IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN DUROCHER,

Appellant,

v. CASE NO. 74,442

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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aff'd w/out op 560/1174

TABLE OF CITATIONS

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Michael Durocher is the appellant in this capital case. In this brief, he refers to Defense Exhibit #1 and State Exhibit #1. Those exhibits were introduced at the hearing on Durocher's Motion to Suppress and do not refer to the trial exhibits.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Duval County on February 16, 1989 charged Michael Durocher with one count of first degree murder and one count of armed robbery (R 12). Durocher filed several pretrial motions, which are not relevant to this appeal. He did file a motion to suppress statements he made to the police and a motion to suppress evidence discovered because of what he told the police (R 186-190, 246-248). The court denied both motions (R 250-251).

Durocher proceeded to trial before Judge Wiggins, and the jury found him guilty as charged on both counts (R 301-302). He then proceeded to the penalty phase of the trial, and the jury recommended death by a vote of 7 to 5 (R 307).

The court followed that recommendation, and in its sentencing order it found the following aggravating factors:

1. Durocher had been convicted of another capital offense.
2. He committed the murder during an armed robbery.
3. He committed the murder to avoid or prevent his lawful arrest.
4. The murder was committed for pecuniary gain.
5. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (R 344-349).

In mitigation the court found that Durocher had a loving relationship with his mother and retarded brother (R 349). It found nothing else.

The court also denied Durocher's motions for a new trial and a new penalty phase hearing (R 315-328, 335).

This timely appeal follows.

STATEMENT OF THE FACTS

In January 1989, Michael Durocher was awaiting sentencing for a first degree murder he had committed (T 79-80). He had just been found guilty of that murder, and his public defender told him he probably would be sentenced to life in prison without the possibility of parole for twenty-five years (T 80). Durocher did not like that future, and in the first part of January he asked a mental health counselor in the Duval County Jail to call a detective Bradley and tell him that he wanted to talk with Bradley about another murder (T 61). Bradley was the policeman who had investigated the murder Durocher had just been convicted of committing.

In August 1988, Durocher had signed a form provided by the Public Defender's office in which he said that he did not want to talk to any policeman without his attorney being present (See Defense Exhibit #1). This "Edwards Notice"[1] was prepared in four copies with one copy going to the jail file, one to the State Attorney's office, and one to the sheriff's office (T 41).

Bradley talked with an Assistant State Attorney about whether he should question Durocher (T 45). The attorney said he could (T 45). So without notifying Durocher's attorney, who had specifically told Bradley not to talk with Durocher for any

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[1]So called because it was derived from Edwards v. Arizona, 451 US 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

reason (State's exhibit #1), Bradley went to the jail to question Durocher (T 46-47).

Before he did so, he had Durocher write on the bottom of the letter his lawyer had written that he had requested Bradley not to speak with him, that he was aware of the Edwards Notice, but that he still wanted to speak with Bradley. He also said Bradley had not made any promises to him (T 461). Bradley then read him his "Miranda" rights, which he waived (T 463).

Durocher told Bradley that he wanted to confess to another murder but only if Bradley could guarantee him he would be executed (T 464). Bradley said he could not make that promise, and when Durocher asked him to ask the State Attorney for such a deal, Bradley told him the State Attorney could not give him that gurantee either (T 464). Durocher then asked Bradley if he would do everything in his power to get him the death penalty, and Bradley said he would (T 464).

Durocher was undecided about what to do because Bradley could not guarantee him death, and he requested some time to think about it (T 465). Bradley told him he would be back Monday, four days later, if Durocher did not contact him before then (T 465). Durocher did not and Bradley showed up Monday (T 465). Durocher waived his rights again (T 465), and Bradley then took him to an office in the sheriff's department, where he confessed to a murder that had occurred about four years earlier (T 469).

On 12 January 1986, Durocher walked past a store in Jacksonville known as the Window Decor (T 482), which sold

ready made and custom made curtains (T 321). Durocher saw that the back door was open, so he decided it would be a good place to get the money he needed so he could go see his father in Louisiana (T 482). He went home, which was only a few blocks away (T 424), packed his clothes, and got the shotgun he had bought recently (T 482-483).

He returned to the store and demanded money from the clerk (T 485). He said the store dealt only by credit card, and there was no cash on the premises (T 485). He turned his back to Durocher and sat down (T 485). Durocher stood for a moment then fired the shotgun (T 485). It caught the clerk in the back of the head (T 378).

Durocher took about thirty dollars from the victim's pockets; he then went through the rest of the store looking for money (T 486). Finding none, he wiped the areas he had touched, took the victim's car keys, and left the store (T 486). He got in the victim's car and drove to Louisiana to see his father who was dying of cancer (T 486). Durocher told his father what he had done, and his father told him to take the car back to Jacksonville, get rid of it, then return to Louisiana (T 489). Durocher drove back to Jacksonville, arriving about 1 a.m. He drove the car to a wooded area near his home, poured two gallons of gas on the car, and set it on fire (T 489). He then went to his mother's mobile home and hid underneath it (T 494). Later, he sold the shotgun at a pawnshop (T 489) then returned to his father where he stayed for three or four weeks (T 494).

SUMMARY OF THE ARGUMENTS

This capital case presents three guilt phase issues and three sentencing phase issues. The first guilt issue deals with the trial court excusing for cause a prospective juror. The state challenged her because it said her views on the death penalty would substantially interfere with her ability to sit as a juror. Not so, what this prospective juror was concerned about was her ability to be fair, to render a just verdict. She was concerned that her vote might unfairly send a man to the electric chair. She was unopposed to the imposition of the death penalty; she simply wanted to make sure she did the right thing.

The major issue presented by this case focuses upon statements Durocher made to the police while he was awaiting sentencing for another murder. Detective Bradley violated Durocher's Fifth and Sixth Amendment rights to counsel by responding to Durocher's invitation to talk with him. Once a defendant has invoked his right to counsel, as Durocher had done, the police must go through counsel whenever they want to talk with the defendant. This is especially true where the defendant has initiated the contact with the police after he has invoked his Sixth Amendment right to the assistance of counsel.

Before Bradley talked with Durocher, he discussed Durocher's request with an Assistant State Attorney. That prosecutor said "it would be fine" if Bradley talked with

Durocher. That was unethical for the Assistant State Attorney to do.

During the state's closing argument, the prosecutor told the jury that as Durocher "sits smiling in the courtroom today [he] used this shotgun to shoot Thomas Underwood in the head." That was an improper comment upon evidence not produced at trial. It also was a comment upon Durocher's character, which he had not placed in issue. Such a comment prejudicially infected this trial because there was abundant evidence that Durocher had significant mental problems. Such a comment invited the jury to forget the evidence, but convict simply because Durocher did not take his trial seriously.

In sentencing Durocher to death, the court used Durocher's prior conviction for murder to justify the death sentence. That conviction is pending appeal, and if it is reversed, the trial court will have improperly used it in aggravation of that sentence.

The court also said Durocher committed this murder during a robbery and for pecuniary gain. That was an improper doubling of aggravating factors.

Finally, the court said Durocher committed this murder in a cold, calculated and premeditated manner. There is very little evidence Durocher did much planning or committed the murder with any heightened premeditation. What happened evidence more the congealing of several fortuitous events that led to this tragedy. The court, therefore erred in finding

Durocher had the necessary premeditation to justify this aggravating factor.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING DUROCHER'S MOTIONS TO SUPPRESS BECAUSE THE STATEMENTS THE POLICE TOOK FROM HIM WERE MADE IN VIOLATION OF DUROCHER'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL.

The facts relevant to this issue are not controverted; their application to the law is. While waiting to be sentenced for committing a first degree murder, Durocher asked a mental health counselor to call Detective Bradley (the lead investigator in the murder for which Durocher was now being sentenced) about another murder (T 59-60, 61, 79). After talking with the mental health counselor, Bradley went to an Assistant State Attorney about the propriety of talking with Durocher, knowing that he was represented by counsel (T 61). The prosecutor said Bradley could talk with him (T 61).

Apparently the Public Defender for the Fourth Judicial Circuit has a practice that whenever a defendant they represent is jailed, they have him sign what is called an "Edwards' Notice." (See Defense Exhibit #1). This form tells the state that the defendant 1. has asserted his right not to talk to the police without counsel being present and 2. that any future waiver of the right to counsel can only be made after the defendant has had "an opportunity provided for the Defendant and his attorney to discuss the waiver of his right." A copy of this notice is put in the defendant's jail file, and copies are sent to the sheriff's and State Attorney's offices (T 41). In this case, Durocher signed the notice on August 25, 1988

(T 41). Additionally, Durocher's lawyer wrote Bradley a letter on January 6, 1989 requesting that he not talk with Durocher under any circumstance. (State Exhibit #1). When Bradley talked with Durocher on January 18, 1989, he was aware of that letter because he had Durocher sign on the bottom of it that he was waiving counsel (T 51, 64). Bradley also had him waive his Miranda rights (T 64, 70).

The issue presented here raises the question of what effect Durocher's request to see Bradley had on his Fifth and Sixth Amendment rights to the assistance of counsel. His argument is that it should have made no difference. Once Durocher had invoked his right to counsel, as he obviously had done, the police or other state agent cannot interrogate him without counsel's knowledge.

THE SIXTH AMENDMENT ANALYSIS

While the Fifth and Sixth Amendments guarantee the assistance of counsel, the Fifth Amendment focuses upon providing lawyers at custodial interrogations. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). It ensures that a defendant can talk with a lawyer before the police question him. In Edwards, the court said the police could not question Edwards because he had invoked his right to counsel but had not talked with his lawyer when they wanted to question him. This was true even though he said he no longer wanted counsel. Id. at 484. Once a defendant has said he wants a lawyer, he must at least talk with him before he decides he no longer wants his help.

The Sixth Amendment's counsel provision has a different concern. It protects "the unaided layman at critical confrontations with his adversary." United States v. Gouveia, 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). That right arises at the start of the prosecution or once the indictment has been returned. Id, at 187. When the defendant invokes this right to counsel, he is telling the state that he wants to "rely on counsel as a `medium' between him and the state." Maine v. Moulton, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). At that point, the presumption arises that the accused considers himself unable to face the State except through his lawyer. C.f. Arizona v. Roberson, 486 U.S.-- 108 S.Ct.---, 100 L.Ed.2d 704, 713,714 (1988). If the State wants to question a defendant after he has asserted that right it can do so only after counsel has talked with him.

In the early Sixth Amendment right to counsel cases, the U.S. Supreme Court disapproved the police tactic of using informants to surreptitiously question the defendant. Massiah v. United States 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). Once the defendant has invoked his right to an attorney, the state can talk to him only through his lawyer. Maine v. Moulton, supra, at 176. Interrogation, without the defendant's or counsel's knowledge, is unconstitutional.

More relevant to this appeal are cases like Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986),

where the police questioned Jackson after he had invoked his Sixth Amendment right to counsel.[2] At that interrogation, Jackson, like Edwards, waived his right to counsel as explained in the Miranda warnings. The Supreme Court, as it had done in the Fifth Amendment context in Edwards, said that was not enough for Patterson to have waived his Sixth Amendment right to counsel. Id. at 635. Interrogation with the defendant's knowledge and approval but without the assistance of counsel is unconstitutional. Fifth And Sixth Amendment rights to counsel are so vital that once the defendant has invoked either one, he must talk with counsel before he can waive it. Edwards, supra, at 484.[3]

Thus, when the Edwards Fifth Amendment rationale is combined with Jackson and other cases involving the Sixth Amendment right to counsel, the conclusion is that when a defendant has invoked his right to counsel, the police cannot

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[2]Patterson v. Illinois, 487 U.S.--, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) is distinguishable from Jackson and this case because the police interrogated Patterson after he had been arraigned but before he had requested counsel. Here, Durocher had invoked his right to counsel at least by August 1988 (T 41).

[3]Massiah and Jackson represent an evolving development of when a defendant can talk with the police after the right to counsel has been invoked. In Massiah, the court said that a valid waiver of counsel could not be inferred from the defendant's response to overt or subtle questioning. Edwards, supra, at 484. f.n. 8. Jackson extended that rationale to overt questioning after the defendant had waived his right to counsel. This case represents the logical development of these cases. The police cannot question a defendant who wants to talk to them without first letting his attorney know that.

penetrate that shield without counsel's knowledge. The question posed by this case is whether that shield remains intact when a defendant, such as Durocher, asks to talk with the police. Does it remain an absolute barrier?

Obviously not. A defendant's rights cannot trap him. But if not, how can the defendant waive his right to the assistance of counsel? Applied specifically to this case, could Detective Bradley, knowing Durocher had counsel, talk with Durocher without him first talking with his lawyer.

Repeatedly, the U.S. Supreme Court has said that counsel is the "medium" through which a defendant talks with the state. Maine v. Moulton; Michigan v. Patterson; Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (Stevens, concurring.) After counsel has begun representing a defendant, he must use that medium to let the state know he now wants to waive his right to a lawyer's assistance. He has no right to represent himself on some matters and have counsel represent him on others. He either represents himself or he has counsel represent him. Goode v. State, 365 So.2d 381 (Fla. 1979); State v. Tait, 386 So.2d 338 (Fla. 1980).[4] Although his lawyer

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[4]One of the frustrating type of client appellate counsel has represented is the defendant who insists upon filing his own motions with the court, usually without counsel's knowledge. Appellate courts must also experience this frustration because they often reject these pro se motions and pleadings by citing Rule 2.060(d) Rules of Judicial Administration, which requires all pleadings of defendants represented by counsel to be signed by counsel.

cannot, in certain instances, tell the police they must stop talking with the defendant, Haliburton v. State, 476 So.2d 192 (Fla. 1985), one corollary derived from the above cited Sixth Amendment cases is that he can tell them when they can start talking with the defendant.

The defendant also cannot put the state in the ethical dilemma of talking with the defendant when it knows counsel represents him. See, Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[5] The accused can let the state know he wants to talk with it, but it cannot honor that request until counsel has had the opportunity to consult with the defendant.[6] The state cannot unilaterally resolve the inherent conflict such a request presents. Instead, it must assume the defendant has not waived his right to counsel. It should "indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

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[5]"The government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland, at 686.

[6]In Haliburton v. State, 476 So.2d 192 (Fla. 1985), this court said a defendant can exercise his prerogative and reject the assistance of counsel because it is his, not counsel's, choice to make. Haliburton is not controlling here because at the time the police question Haliburton, his right to counsel had not attached. In this case it had, and Durocher had told the state he wished the advice of counsel before he talked with them.

This is especially true when the absence of any re-invocation of those rights is the only evidence of their waiver.

In this case, the state had to show Durocher met with his lawyer and waived his right to counsel before Bradley met with him. That task rivals those of Hercules because the state had only Durocher's bare request to see the detective. The state never proved that counsel and Durocher had met and talked about his initiating contacts with the police. The burden becomes even harder to carry because Bradley knew Durocher had signed the "Edwards Notice" months earlier (Defense Exhibit #1). More significantly, Durocher's counsel had sent Bradley a letter two weeks before he talked with Durocher requesting that Bradley not interrogate the defendant on any subject. (States Exhibit #1 Motion to Suppress).[7] Therefore, with overwhelming evidence that Durocher had counsel and wanted to talk with Bradley only through that "medium," he should not have questioned Durocher without counsel first talking with his client. Even though the state produced evidence of a waiver of counsel after Bradley had talked with Durocher, the court erred in denying his motion to suppress.

THE FIFTH AMENDMENT ANALYSIS

Analysis of this case under the Fifth Amendment compels a similar result as that under the Sixth Amendment. When a

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[7]The court dismissed the Edwards Notice by saying "Well, I think we out to get something straight. There is no such thing as an Edward's Notice." (T 133).

defendant has invoked his Fifth Amendment right to counsel he is telling the police that he is incapable of handling the pressures of custodial interrogation without the assistance of counsel Arizona v. Roberson, 486 U.S.-- 108 S.Ct.---, 100 L.Ed.2d 704 (1988). In Roberson, Roberson was arrested and jailed for committing a burglary. The police tried to question him, but before they could, Roberson said he wanted counsel before he answered any questions. Three days later, another policeman (ignorant of Roberson's earlier assertion of his right to counsel) questioned him about another burglary. Although the officer advised Roberson of his Miranda rights, the defendant did not want counsel, and he made some incriminating statements. The United States Supreme Court said the Arizona appellate court had properly affirmed the suppression of what Roberson had said. When a suspect invokes his right to counsel, any further questioning must stop.

> Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney.

100 L.Ed.2d at 715.

The court also said that the police can question the suspect if he initiates the interrogation Id. at 100 L.Ed.2d 717. That dicta raises the question this case presents: how does a defendant, like Durocher who has invoked his Sixth Amendment right to counsel, initiate further contact with the police? Can he do it personally, or must he use counsel?

In Edwards, and apparently also in Roberson, the defendants' Sixth Amendment right to counsel had not yet attached or the defendants had not invoked that right. See, Patterson v. Illinois, 487--, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988)(The Sixth Amendment right to counsel is not self-executing. It has to be invoked.) Edwards and Roberson had asserted only their Fifth Amendment right to counsel because they did not feel comfortable facing custodial interrogations without the advice of a lawyer. Thus, they could initiate contact with the police without that aid because they believed they could face the rigors of police custodial interrogation alone. An attorney, in the Fifth Amendment context, serves only to aid or assist the defendant when facing police interrogation; he does not represent him as completely when he has invoked his Sixth Amendment right to counsel.[8] That representation is broader than the corresponding Fifth Amendment right because its scope is so much more extensive.[9]

Thus, the question raised here in the Fifth Amendment context was not before the Supreme Court. When Durocher invoked his Sixth Amendment right to counsel could he initiate further contacts with the police and thereby waive his Fifth

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[8]The Supreme Court in Patterson recognized the different purposes counsel served in the various stages of the criminal process, 100 L.Ed.2d at 276.

[9]This is not saying that it takes more to waive that right than it does the Fifth Amendment right to counsel. Patterson v. Illinois, supra, 101 L.Ed.2d at 275.

Amendment right to counsel? The answer is yes, but he could make such contact only through the "medium" of his counsel. He could not personally do so. A defendant may not need counsel's advice to know if he should invoke his Sixth Amendment rights, but before he can waive the right invoked he must have the advice of counsel. Edwards, Jackson, supra. For the reasons argued above, once a defendant has invoked his Sixth Amendment right to counsel, the state can talk with him, even if it is to determine if he still wants counsel, but only through counsel.

THE ETHICAL IMPLICATIONS

The trial court should also have suppressed Durocher's statements because the Assistant State Attorney violated the ethical prohibition against talking with opposing parties. Rule 4-4.2 Rules of Professional Conduct. Before Bradley talked with Durocher, he told an Assistant State Attorney that Durocher had contacted him, and he intended to talk with him (T 61). After talking with the detective, the attorney said "it would be fine" if he talked with Durocher (T 45). Such approval violated the ethical rules of the Florida Bar.

This court has, in a somewhat similar scenario to this case, said that an assistant State Attorney violated Disciplinary Rule (DR) 7-104(A)(1) when he talked with a defendant at his request.[10] Suarez v. State, 481 So.2d 1201

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[10] DR 7-104(A)(1) reads:

(Footnote Continued)

(Fla. 1985). When Suarez asked to see the prosecutor, he was in jail awaiting trial and had counsel. This court said the Assistant State Attorney had violated the disciplinary rule by talking to Suarez.

> We next address the question whether it is a violation of the rule for a prosecuting attorney to interview a defendant represented by counsel without notice to defense counsel when the defendant requests or acquiesces to the interview. Again we have no problem in finding that a violation does occur under these circumstances.

Id. at 1206.

Despite this lapse in ethical behavior, suppressing Suarez's statements was unnecessary because the Florida Bar's disciplinary procedures adequately deterred errant prosecutors.

> However, we have another effective way to deter violation of an ethical rule. Bar discipline can be initiated by the Florida Bar, and also may be initiated by a circuit court or a district court 09judge pursuant to Florida Bar Integration Rule, article XI, Rule 11.14. The goal of deterrence is therefore achieved without the "overkill" of suppression and reversal.

Id. at 1207.

(Footnote Continued)
(A) during the course of his representation of a client, a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
Rule 4-4.2, Communication with person represented by counsel, Rules of Professional Conduct, has replaced DR 7-104(A)(1).

But the threat of Bar sanctions has not deterred prosecutors from violating the Rules of Professional Conduct.

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985) this court said the prosecutor had violated ethical propriety by inflaming the jury during his closing argument, thereby subjecting himself to the possibility of Bar discipline.

Undeterred, the state in Suarez, supra, violated the Disciplinary Rules when it talked with Suarez, knowing he had counsel. Again no reversal was required because Bar discipline adequately check such misconduct.

Undeterred, the state in Garron v. State, 528 So.2d 353 (Fla. 1988) inflamed the jury during closing argument, and this court again "expressed its displeasure" with the state's violation of its ethical duty. But unlike earlier cases Garron's judgment and sentence were reversed because

> [W]e believe a mistrial is the appropriate remedy here in addition to the possible penalties that disciplinary proceedings could impose upon the prosecutor.

Id. at 360.

Thus, the threat of Bar disciplinary proceedings does not deter errant prosecutors. Only suppression of statements or new trials will do that. This court, in short, has abandoned the rationale of Suarez and adopted the more sure method of deterrence.

Here the prosecutor simply ignored the state's ethical obligation not to talk with Durocher. Therefore, the trial

court's judgment and sentence should be reversed and this case remanded for a new trial.

ISSUE II

THE COURT ERRED IN DENYING DUROCHER'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT BECAUSE THE STATE REFERRED TO DUROCHER "SIT[TING] SMILING IN THE COURTROOM TODAY USED THIS SHOTGUN."

During the state's closing argument, the prosecutor made a summing up argument that included the following:

> ...ladies and gentlemen, you can only reach one conclusion and one conclusion only and that is that Michael Durocher as he sits smiling in the courtroom today used this shotgun to shoot Thomas Underwood in the head, and I am asking you to find him guilty.

(T 580).

Durocher objected to the comment that Durocher was smiling, but the court denied it by saying, "and you seen (sic) him smile throughout this closing argument. Let's move on." (T 582). The court erred in not granting Durocher's motion for mistrial.

The law in this area is simple, and its application straight forward. The sole purpose of closing argument is to assist the jury in analyzing and applying the evidence adduced at trial. United States v. Dorr, 636 F.2d 117, 120 (5th Cir. 1981). The State, therefore commits error whenever it tries to go beyond the evidence presented. Evidence of the defendant's behavior during trial is not evidence subject to comment because it was not presented to the jury. United States v. Pearson, 746 F.2d 787 (11th Cir 1984); United States v. Wright, 489 F.2d 1181 (DC Cir. 1973). While the jury may see the defendant's behavior, the state with the court's approval

cannot comment on it. Doing so introduces the defendant's character as an issue at the trial. Until the defendant places it in issue, the state cannot infer that from his courtroom demeanor he is a bad person likely to commit crime. Wright, supra, at 1186.

In Wright, the state in closing argument said:

> Mr. Anthony Wright has been present throughout this trial, has found a good part of it humorous, other parts he couldn't stand. And you may definitely consider his demeanor in your deliberations.

The DC Circuit court of Appeals found that statement error.

In Pearson, the prosecutor said:

> You saw him sitting there in the trial. Did you see his leg going up and down? He is nervous. You saw how nervous he was sitting there. Do you think he is afraid? That was error.

This court has also disapproved the prosecutor commenting about the defendant's in court behavior. In Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1986), the prosecutor said:

> I don't know if you saw it; but I saw it, [Pope] was grinning from ear-to-ear. This is supposed to be a wrongful accused man, grinning from ear-to-ear? I don't know why he grins from ear-to-ear.

Had that comment been properly objected to, it would have been error.

Finally, in Williams v. State, Case no. 88-1965 (Fla. 3rd DCA August 8, 1989) the Third District said it was improper for the State to have told the jury that Williams had laughed and snickered during the trial.

Thus, the prosecutor's comment in this case (which was objected to) was improper. Durocher never took the stand and placed his character in issue. While the jury may have seen him smiling, and they could make whatever inferences they wanted from that observation, the prosecutor could not call it to their attention. Wright, supra.

With the prosecutor's error patent, the only question is its harmlessness. Throughout this trial, and even before, Durocher had shown bizarre behavior. When arrested for the first murder, the police had to talk him out of committing suicide (T 52). Apparently they had cornered Durocher, and he was going to kill himself (T 52). Then as he sat in the Duval County jail awaiting sentencing for committing murder, he called Detective Bradley so he could confess to another murder. He did that because he was not going to be sentenced to death for the murder he had been convicted of committing. The only condition he placed on Bradley was that he guaranteed him that he would get death if he confessed (T 66). Bradley said he could not make that sort of promise, but he would do his best to see that he was executed (T 68). Durocher then confessed to the Underwood murder. These scenarios would make more sense if they appeared as Far Side cartoons. They do not reflect the workings of a man with a rational mind. But there is more. The meager evidence and Durocher's knowledge of the murder also suggest he may have confessed to a murder he did not commit.

The Underwood murder had remained unsolved for several years (T 73). The police found no fingerprints at the store or

on Underwood's car (T 535), and the gun could not be traced. Also, Durocher lived only a few blocks from where the murder occurred, and the killing was naturally a popular subject of discussion in his neighborhood (T 515-516). Durocher, with his twisted desires, may simply have told Bradley the local, common gossip. Because there was so little he could confirm, what Durocher told was believed. In short, Durocher may have confessed to a crime he did not commit so he could be assured of a death sentence.

Then during trial, Durocher wore old jeans and a T shirt (T 249). His hair was in a pony tail, and he had tattoos on his arm (T 249). Clearly upset at this, Durocher's counsel questioned the prospective jurors about how they felt about his casual, indifferent, or disrespectful appearance (T 249-250). They initially said it did not bother them, but upon further probing, several admitted that, yes, it did upset them to see him so slovenly dressed (T 249).

Thus, in this context, the State's closing improper comment about Durocher smiling recalled very powerfully how bizarre Durocher is. The confession has some nagging problems, but the prosecutor minimized those by neatly pointing out that Durocher was smiling. If he had so little concern for what happened that he could come to trial dressed like a bum and smile throughout the proceeding, then convict him.

The State's comment was not harmless beyond all reasonable doubt. State v. DiGuillo, 491 So.2d 1129 (Fla. 1986).

ISSUE III

THE COURT ERRED IN CONSIDERING AS AN AGGRAVATING FACTOR THAT DUROCHER HAS A PRIOR CONVICTION FOR MURDER BECAUSE HE IS APPEALING THAT CONVICTION.

The court sentenced Durocher to death, and in justifying that sentence, it said that he had a prior conviction for first degree murder (R 344-345). Durocher objected to this because he had appealed the judgment in that case. He argued that the prior murder conviction could not be found as an aggravating factor because it was on appeal (T 770). The court rejected that argument.

Whether the court was right has not yet been determined. Durocher's appeal of the prior of the first degree murder, as of the date he filed his initial brief, is still pending before the First District Court of Appeal. If that court reverses the trial court's judgment and sentence, then the court will have erred in using the prior murder conviction as an aggravating factor. Long v. State, 529 So.2d 286 (Fla. 1988). "We have expressly held that a conviction used as an aggravating circumstance, which is valid at the time of the sentence but later reversed and vacated by an appellate court, results in an error in the penalty phase proceeding. The reversal eliminates the proper use of the conviction as an aggravating factor. See Oats v. State, 446 So.2d 90 (Fla. 1984)" Id.

If the appellate court does not reverse, this issue is without merit. Therefore, this court should not render a

decision in this case until the First District has ruled on Durocher's case pending before it.

ISSUE IV

THE COURT ERRED IN FINDING THAT THE MURDER HAD BEEN COMMITTED FOR PECUNIARY GAIN AND DURING THE COURSE OF A ROBBERY.

In sentencing Durocher to death, the court found that he had committed the murder during the course of a robbery, and he had killed Underwood for pecuniary gain (R 346). That was an improper doubling of aggravating factors, which this court has prohibited. Rogers v. State, 511 So.2d 526 (Fla. 1987); Riley v. State, 366 So.2d 19 (Fla. 1978).[11]

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[11]The indictment charged Durocher with committing only a robbery and a murder (R 12). In Bates v. State, 465 So.2d 490 (Fla. 1985) this court approved the trial court's findings that Bates had committed the murder during the course of a robbery and for pecuniary gain. Bates had also been convicted of other crimes (i.e. kidnapping and attempted sexual battery), which the court could have properly used to aggravate his sentence. Bates has no applicability to this case.

ISSUE V

THE COURT ERRED IN FINDING DUROCHER COMMITTED THE MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In sentencing Durocher to death, the court said he committed the murder in a cold, calculated and premeditated manner without any moral or legal justification. To justify this finding, the court relied only upon:

> The time between the decision to murder Thomas J. Underwood, III and his actual murder included enough time for Michael Alan Durocher to return home, pack his clothes, get his gun, and return to the place of business which was a walk of approximately two and one-half(2 1/2) blocks each way.

(R 347). Time, without more evidence of planning, the court appeared to say, made this murder cold, calculated, and premeditated. This court has rejected this; instead this factor looks to the heightened premeditation as evidenced by the careful planning and prearranged design in committing the murder. Rogers v. State, 511 So.2d 526 (Fla. 1987); Amoros v. State, 531 So.2d 1256 (Fla. 1988). Here there is no evidence of any careful planning. All this crime shows is that Durocher took advantage of a fortuitous set of circumstances. He happened to walk by a store on a Sunday afternoon which happened to be open. Impulsively, he decided to rob the clerk because he needed money to visit his father (T 482-483). After killing the clerk, Durocher took the clerk's car because it just happened to be there and he found the keys laying on a counter (T 486). The time that elapsed from conceiving the

idea to driving away could not have been very long, and as the court noted, most of the time involved was simply walking two and from his house.

In Jackson v. State, 522 So.2d 802 (Fla. 1988), Jackson spent a lot of time killing his two victims, removing traces of the crime, and dumping the bodies:

> After having shot and killed the first victim, Roger McKay, the Defendant stuffed McKay's body into the trunk of the Defendant's automobile and then made a well-reasoned and calculated attempt to remove traces of the crime by taking his automobile through a car was and be attempting to conceal the bullet holes in the right front seat of the Defendant's automobile...Thereafter, in an obviously premeditated manner, the Defendant, with his accomplice Lucas, picked up the second victim, Terrence Wayne Milton, in the Defendant's automobile. The Defendant had Milton sit in the right front seat, where the Defendant had previously shot Roger McKay. After driving this victim around for a period of tie, the Defendant shot Terrence Wayne Milton in the back and after more driving and having reached a point on U.S. Highway 301, appropriate for disposing of the bodies, the Defendant dragged the victim Milton, for the back floor of his automobile, him through the head and dumped both bodies in the Hillsborough River.

Id. at 810.

Unlike the murders in Jackson, the killing here was quickly conceived and as quickly done. There is no evidence Durocher brooded or thought about what he was doing for any length of time. Middleton v. State, 426 So.2d 548 (Fla. 1982). It was done during daylight hours when the store was open for business. That shows little planning. See, Lightbourne v. State, 438 So.2d 380 (Fla. 1983). The victim was not bound or

taken to some remote location. Routly v. State, 440 So.2d 1257 (Fla. 1983). There was also only one shot, not several, which in other cases has justified this aggravating factor. Squires v. State, 450 So.2d 208 (Fla. 1984).

The killing, in short, was nearly spontaneous and luck rather than planning explains why Durocher was never caught. The court erred in finding that the time it took for him to walk from the store and back made this murder cold, calculated, and premeditated.

ISSUE VI

THE COURT ERRED IN EXCUSING PROSPECTIVE JUROR DORSEY FOR CAUSE BECAUSE "SHE MADE IT REAL PLAIN SHE DIDN'T FEEL GOOD SITTING."

During voir dire, a Mrs. Dorsey responded to questions of the State and Durocher as follows:

> MR. PHILLIPS: (ASSISTANT STATE ATTORNEY): Thank you, ma'am. Ms. Dorsey, how are you doing?
>
> THE VENIREMAN: Fine.
>
> MR. PHILLIPS: Okay. How long have you worked at a Hospice, ma'am?
>
> THE VENIREMAN: About eight years, eight-and-a-half years.
>
> MR. PHILLIPS: And is your work actually involved with taking physical care of the people who are terminally ill?
>
> THE VENIREMAN: Yes.
>
> MR. PHILLIPS: Well, let me just say that's admirable work.
>
> THE VENIREMAN: Yes, it is.
>
> MR. PHILLIPS: Do you think that the fact that you work in a situation like that may affect your ability to be fair in this case?
>
> THE VENIREMAN: Well, it really would bother me anyway. I just -- I would be afraid that I would -- I wouldn't make the right decision. I couldn't, you know -- it would just bother me if I would cause someone to pay for something that, you know -- I don't know. I am just -- I was brought up like that.
>
> I guess I was raised like that, and all my life I heard these things I shall not steal and all these things and I guess I am a religion freak I guess. It's against my religion and it's against my will that I just don't think I could do it, and I am telling you the truth.

MR. PHILLIPS: I appreciate that.

THE VENIREMAN: I don't really think I could make a decision like that. I wouldn't be of any service to anybody on the jury I don't think because I wouldn't -- it would always bother me did I make the right decision.

MR. PHILLIPS: Yes, ma'am. I take it from what you are saying that you have a moral or religious conviction about not sitting in judgment of your fellow men?

THE VENIREMAN: I don't like judging nobody.

MR. PHILLIPS: Do you think that -- and I think I know the answer to this, but let me make it clear for the record. Would your beliefs interfere with or substantially impair your ability to vote to convict the defendant in this case?

THE VENIREMAN: Yes, it would.

MR. CHIPPERFIELD: (COUNSEL FOR DUROCHER) Okay. Ms. Dorsey, you suggested that you thought your beliefs might interfere with you ability to vote for a death penalty. Do you understand that you don't go into it blind, that if we have a second phase Judge Wiggins will give you rules to apply about how to weigh evidence, what to consider in aggravation and mitigation? Understanding that do you think you could apply those rules fairly and impartially to the facts and make a decision on your recommendation?

THE VENIREMAN: I don't know -- it's just -- don't feel that I would have the right to say kill somebody. I mean that's what it would be if you put somebody in the electric chair. I don't know whether I could do it. I just really don't because could I really say something like a little -- like if the law says if you kill go to jail or to the electric chair then if you put them in the electric chair you still kill them. That's what you said not to do, so I just -- I just don't know what -- I just really don't know if I could do it or not.

I know I am supposed to. I am a citizen and I would abide by the rules and

regulations, but I really want to be honest because a lot of times you don't agree with the people on the jury. Then just for me to go right on and say, yes, you know, then they are looking at our part and I would be trying to look on the inward part and what -- so I couldn't really -- I don't feel that I really could because it's just something about killing that does to me.

MR. CHIPPERFIELD: Well, it's a situation you have never been put in before, and you don't know how you are going to react once you are in the jury room.

THE VENIREMAN: Right.

MR. CHIPPERFIELD: Till you --

THE VENIREMAN: But I would be fair. I know I would try to be fair to the best of my mind.

MR. CHIPPERFIELD: That's really what this is all about. If you think you can be fair and if you would -- if you think you can follow the rules that Judge Wiggins gives you in solving this problem then you are qualified.

THE VENIREMAN: I could do that, but I -- I would have to be fair. I couldn't be no other way but fair.

MR. CHIPPERFIELD: Okay. And when you say you could be fair that means you will do your best to follow the rules that the Judge gives you?

THE VENIREMAN: Yes.

The State challenged her for cause, and the court granted it:

I am going to grant it for cause on her. She made it real plain she didn't feel good sitting and --okay. I will grant that for cause.

(T 303).

The question, thus presented, is whether the court properly excused juror Dorsey because she was reluctant to sit as a juror. In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Supreme Court articulated the test to determine if a prospective juror should be excused because he holds some opposition to imposition of the death penalty:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

Id. at 424. Accord, Lambrix v. State, 494 So.2d 1143 (Fla. 1986). Measured by this standard Mrs. Dorsey's views did not justify the court's excusing her for cause.

Mrs. Dorsey initially said that her views would interfere with her ability to render a verdict (T 208). Later, she clarified what she had meant. Her scruples were focused more upon the importance of reaching the correct decision than having to reach a verdict in which a death sentence might be imposed. "I would be afraid that I would--I wouldn't make the right decision." (T 207). When questioned by defense counsel, she said she would abide by the "rules and regulations," she would "try to be fair to the best of my mind" (T 280), "I would have to be fair. I couldn't be no other way but fair." (T 280).

Mrs. Dorsey had a tender conscience, and rather than excusing her, the court should have welcomed her gladly. When a man's life is at stake, a juror should be uneasy about

passing judgment. Death is different, and Mrs. Dorsey recognized the sublime agony she was asked to suffer. She probably had never done anything like this before, but when defense counsel explained that the court would give her instructions, her fears seemed allayed. Afterward she repeatedly said she would be fair and follow the court's instructions (T 280). Mrs. Dorsey recognized her duty, and she accepted it only if she could be fair. What she believed about the death penalty would not have substantially affected her ability to follow the court's instructions or to obey her oath as a juror.

The trial court could have had no reasonable doubt that Mrs. Dorsey would have rendered a just verdict and recommended the appropriate sentence. Robinson v. State, 487 So.2d 1040 (Fla. 1986).

CONCLUSION

Based upon the arguments presented in this brief, Durocher respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial or reverse the trial court's sentence and remand for resentencing.

Respectfully submitted,

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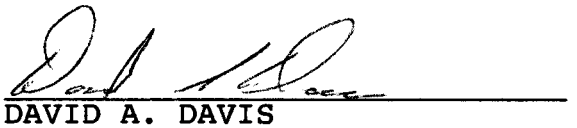
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Laura Rush, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant MICHAEL ALAN DUROCHER, #A809844, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 15th day of February, 1990.

DAVID A. DAVIS