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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	PAGE(S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
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.	1
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."	6
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.	8
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

CASES	PAGE(S)
Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)	4
Jennings v. State, 453 So.2d 1109 (Fla. 1984)	9
Kight v. State, 512 So.2d 922 (Fla. 1987)	1
Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)	2
Michigan v. Harvey, 4 FLW Fed S113 (March 5, 1990)	3
Parham v. State, 522 So.2d 991 (Fla. 3rd DCA 1988)	3
Remeta v. State, 522 So.2d 825 (Fla. 1988)	9

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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 State makes much of the fact that Durocher's Sixth Amendment right to counsel had not attached when Bradley questioned him about the latest murder. At least it had not attached according to its analysis of the Sixth Amendment cases it cited. The problem with its explanation is that it has told only half the story. That is understandable because it is the one the courts have almost exclusively focussed upon. It involves the issue of when does a defendant's right to counsel attach and the state's initiation of the adversary process. The state has very ably demonstrated that until the start of that process the defendant's sixth amendment right to counsel does not attach. Kight v. State, 512 So.2d 922 (Fla. 1987). This case does not involve that problem.

Instead, here, before adversary proceedings had started in this case, Durocher had put the state on notice that he would talk with the state only through his attorney. He had, in short, invoked his sixth Amendment right to counsel. What Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) stands for is that at least by the time the state has started the adversary process by filing an indictment, the defendant is entitled as a matter of law to the assistance of counsel. Those cases do not say, as the state perhaps implies, that he cannot invoke that right before then as Durocher did here. The Bill of Rights, after all, was written to protect the citizen against the overwhelming power of the state, so it would be anomalous to the spirit in which those rights were written to deny the defendant counsel if he has put the state on notice that he has it.

The crucial distinction, therefore, is that in this case Durocher had put the State on notice that he had counsel, and he wished to use that counsel to communicate with the State. Not only that, but counsel wrote Detective Bradley only weeks before he had talked with Durocher and told him not to talk with his client. The distinction is important because Durocher had given the State notice that he had invoked his Sixth amendment right to counsel before the state had initiated any proceeding against him in this case.

This flip-side of the usual right to counsel case that this and other courts have faced puts the defendant on equal footing with the State. That is, if the State can delay the

right to counsel until it has filed an indictment (which puts the defendant on notice of the charges filed against him), then the defendant can invoke his right to counsel when he puts the state on notice he has done so. The State should not be able to unilaterally determine when a defendant's rights attach. He should have some say so in the matter. Otherwise, it would be like allowing the coach for the University of Florida football team to coach the Florida State University team during their annual clash.[1]

The State, on page 14, of its brief quotes from the recent case of Michigan v. Harvey, 4 FLW Fed S113 (March 5, 1990) which, upon a superficial reading, seems to hit Durocher with a knockout punch. A closer reading of the case reveals a much less telling blow. In Harvey, the state deliberately elicited from Harvey incriminating statements after counsel had been appointed to represent him. That was a clear violation of his Sixth Amendment right to counsel. At trial Harvey took the stand and testified differently than what he had told the state earlier. The State then used his prior inconsistent statements to impeach him. The United States Supreme Court said this was permissible impeachment because the prophylactic rule against the use of such statements in the State's case in chief did not

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[1]The state cites Parham v. State, 522 So.2d 991 (Fla. 3rd DCA 1988), but the court refused to consider the effect of a notice similar to the one in this case because it was not included in the record on appeal.

apply to impeachment. The court extended the rational it had used to allow statements obtained in violation of the Fifth Amendment for impeachment to Sixth Amendment. See, e.g. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). Thus, what the court had to say regarding waivers of counsel was essentially dicta and not directly relevant to this case. The State in Harvey was not trying to use Harvey's statement in its case in chief, as the State in this case did, and the dissent in Harvey put the court's opinion in perspective:

> Instead of acknowledging that the facts describe a plain violation of respondent's Sixth Amendment right, the Court elides the issue by recharacterizing it as involving nothing more than the violation of a `prophylactic' rule. The purpose of this recharacterization is to enable the Court to draw an analogy to cases like Walder v. United States, 347 U.S. 62, 65, Harris v. New York, 401 U.S. 222 (1971), Oregon v. Hass, 420 U.S. 714 (1975), and United States v. Havens, 446 U.S. 620, 626 (1980), in which the Court held that the interest in deterring violations of Miranda hand the Fourth amendment were adequately served by excluding the illegally obtained evidence from the prosecutor's case in chief. The Court's analysis, however, simply ignores the reasons why evidence that is taken from an indicted defendant outside the presence of counsel is excluded from trial.

Id. 4 FLW Fed at S117.

It is not all clear that the court would transform the dicta of Harvey into its holding if it was faced with the situation here. To do so, it would have to say that after the right to counsel has been invoked, the State could shortcircuit

the adversarial system by confronting the defendant behind counsel's back. That would certainly wrench the meaning of the Sixth Amendment from the court's prior decisions, that uniformly hold (as does Harvey) that the state cannot use in its case in chief statements gathered in violation of a defendant's Sixth Amendment right to counsel. Harvey does not control in this case.

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."

The only question in this issue was the harmlessness of the State's error in telling the jury to notice that Durocher was smiling during closing argument. He argued in his initial brief that the comment was not harmless, and predictably the State said it was. The State tries to minimize the damage by making what can only be described as a "volume" argument. Since the prosecutor said so much, the improper comment did not amount to much. "Appellant would have this Court reverse his conviction based on a single word of that argument." (Appellee's brief at p. 20.). First, there was more than "one word" that was objected to, but notwithstanding that simplification, the thrust of the State's argument misses the power that "one word" can have. From Bartlett's Familiar Quotations are some pithy comments on the power of a single word:

> A powerful agent is the right word. Whenever we come upon one of those intensely right words in a book or a newspaper the resulting effect is physical as well as spiritual, and electrically prompt.
> Mark Twain, Essay on William Dean Howells.
> It is not of so much consequence what you say, as how you say it. Memorable sentence are memorable on account os some single irradiating word.
> Alexander Smith, Dreamthorp, On the Writing of essays.
> There was-and O! how many sorrows crowd into these two brief words!

Sir Walter Scott, The Lord of the Isles.

Finally, an experiment. At oral arguments in this case, if the court will look closely at counsel for the State, it will notice she has dyed her hair. What counsel for Durocher has just written is no longer than what counsel for the State said at closing, but just like the jury in this case, this court will not be able to dismiss it. Referring to Durocher "sitting smiling in the courtroom" was an improper comment the court made no effort to correct. With the error unchecked, this court cannot say to what extent it infected the jury's deliberations. It was therefore reversible error.

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.

The state confuses the time Durocher had to think about the robbery with the time he had to develop the heightened premeditation necessary for the murder to have committed in a cold, calculated, and premeditated manner. What the evidence shows is that Durocher planned to rob the victim, but there is no evidence he planned to shoot him until the victim turned around and sat down. At that point, Durocher stood for a while before shooting him (T 485). The reasonable conclusion is that Durocher decided to shoot the man during that brief interval. Such reflection shows enough premeditation to satisfy the requirements for first degree murder, but the brevity of that conscious decision to kill cannot provide the necessary "heightened premeditation," necessary to aggravate this killing.

Thus, the court erred in its sentencing order when it assumed Durocher planned the robbery and murder at the same time (R 347). There is no evidence of that; instead the equally plausible explanation is that Durocher did not intend to kill the victim until he turned his back on him and sat down. That would explain why he "stood there for a while."

The State faults Durocher for arguing that "some extended period of time is necessary to support this factor." (Appellee's brief at p. 27. Footnote omitted.) The State for

its part is trying to blur the distinction between the premeditation needed to sustain a conviction for first degree murder and that needed to support the cold, calculated, and premeditated aggravating factor. Time is important in determining if this factor applies. Planning takes time. Calculation takes time. For this aggravating factor to apply, the defendant must have done more than simply decided to kill someone. Serial killings such as those Remeta committed show this cold indifference to life. Remeta v. State, 522 So.2d 825 (Fla. 1988). Snap decisions to kill do not make to murder calculated. Prolonged violent criminal activity involving the eventual victim evidences the calculating mind. Jennings v. State, 453 So.2d 1109 (Fla. 1984). While there may be no bright line separating the premeditation necessary for first degree murder from that to make it cold, calculated and premeditated, sufficient time and circumstances should be present that this court can have no doubt of its cold, calculated nature. In short, this aggravating factor should permeate the murder rather than be suggested by an ambiguous comment made by the defendant to the police.

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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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 19th day of June, 1990.

DAVID A. DAVIS