IN THE SUPREME COURT OF FLORIDA

DOLAN DARLING a/k/a SEAN SMITH Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NUMBER SC94-691

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

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ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS COMPLETELY CIRCUMSTANTIAL AND DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.

The state's reliance on Kimbrough v. State, 700 So.2d 634 (Fla. 1997) is misplaced. In Kimbrough, there were obvious signs of a forcible burglary that was accomplished using a ladder to an outside balcony. Appellant's case is clearly

distinguishable where there were no signs of a forcible entry or struggle. The circumstances as well as the physical evidence are consistent with a consensual sexual encounter between Darling and Grace. Although the medical examiner opined that Grace was sexually battered, Dr. Anderson conceded that the vaginal **abrasions** [not lacerations (T III 468)] could have occurred during consensual "rough sex." (T III 464-65) Dr. Anderson also conceded that the abrasions were consistent with Grace scratching herself to relieve vaginal itching. (T III 468-74) The small rectal tear could have been the result of consensual anal intercourse. (T III 458-59, 467)

While the state characterizes the abrasion injuries as "fresh", the medical examiner actually testified at trial that the abrasions were "recent". Neither the doctor nor the state clarified how "recent" the abrasions were. Defense counsel pointed this out in his motion for judgment of acquittal when he argued that Grace "could have had sex Sunday, Monday or Tuesday." (T IV 696)

The state contends on appeal that the sexual activity occurred in conjunction with the murder based on the allegation that, "semen was found **on**, and inside her. (T 458, 480-81)". (AB pp.44, 45) Closer scrutiny of the record reveals that there is no basis in fact for the state's allegation. Specifically, Dr. Anderson testified as follows:

> ...This is the vaginal area. You see the pubic hair here. Some seminal purulent **or some material here**.

(T III 458) Emphasis added. Subsequently, the doctor identified a slide of the vaginal area and testified:

> ...There is some what looks like, you know, something consistent with seminal fluid on the hairs themselves of the labia. That's the picture of the labia that we showed with the hair and fluid material on it.

(T III 481) The state never offered any evidence that the "fluid material" was tested. In fact, the jury interrupted their deliberations with the question about this very issue. The trial court read the question into the record.

> ...Some jurors remember the white substance on the pubic hair as being identified as semen. We do not remember if it was identified as to whose semen it was, it would have been. May we have an answer as to who it was? ...

(T IV 774) The prosecutor remembered that the medical examiner testified that it "appeared to be semen or some words to that effect ... I don't think it was ever identified, but I don't think it was ever specified one way or the other." (T IV 774) The prosecutor was absolutely correct in his recollection of the evidence and testimony. **The liquid sample was never tested**. The only physical evidence of that type introduced were the Q-tip swabs/smears from the victim's vagina, rectum,

and mouth. (T III 508-10) Since the "material" was never identified as semen (appellant's or someone else's), the state cannot now use this allegation on appeal to support the conviction below.

Additionally, Dr. Anderson conceded that Grace's cervical inflamation, for which she was scheduled to see her gynecologist that day, could have resulted in a vaginal discharge. (T III 472) The fluid certainly could have been the result of this type of discharge. Furthermore, the paramedics who arrived first at the scene had tainted the crime scene by placing a nearby towel over Grace's vaginal region.[1] (T III 376-84) Dr. Anderson agreed that from a forensic point of view, this was a bad idea. (T III 452) Certainly the towel could have been contaminated with "material" that could have been transferred to the victim's pubic hair.

The state takes great issue in appellant's failure to argue to the trial court below that his fingerprint could have been placed on the lotion bottle found in the victim's bathroom while it was still for sale in a nearby public store. This is not fatal to Appellant's claim. The presence of fingerprints is **inherently** circumstantial. Specifically, the state's own witness admitted that it was impossible to determine when fingerprints are left on an object. (T III 437) For

[1] In fact, Jesse, Grace's boyfriend, was the first to arrive at the scene and the first to contaminate it by moving the body.

this reason, the state must first establish that the fingerprints "could only have been placed on the items at the time the [crime] was committed." Jaramillo v. State, 417 So. 2d 257 (Fla. 1982). See also Tirko v. State, 138 So.2d 388 (Fla. 4th DCA 1962). It is therefore the state's burden, not the defendant's to prove that the print could only have been placed on the relationship item at the time of the crime. At any rate, appellant's fingerprint on the bottle could also be easily explained where appellant and Grace had a consensual sexual encounter, perhaps a long-term relationship.

Finally, appellant must take issue with some of the "facts" included in the state's answer brief on this point. The state alleges that Grace's "killer had apparently washed blood from himself." (AB p.44) The assistant attorney general provides no record cite for this allegation. The record in fact refutes the conclusion where there was very little if any blood found at the scene. There certainly is no evidence that the killer washed blood from himself. As mentioned earlier there was absolutely no evidence that semen was found **on** the nude body of the murdered victim. Additionally, contrary to the state's assertion in footnote 12 on page 45 of the answer brief, appellant does not concede that Jesse, the victim's boyfriend was out of town all day. Rather, appellant was merely arguing the issue and viewing the evidence in the light most favorable to the state as he must do on

appeal. Similarly, appellant does not concede that Grace's husband was "in Poland" at the time of her murder. (AB p.46 n. 14) Also, the government asserts, again with no record cite nor basis in fact, that appellant brought the gun into the apartment. (AB pp.47-48) This conclusion can only be based on wild speculation. The fact is that the murder weapon has not been recovered to this day. Indeed, the handgun in appellant's possession at the time of his arrest was **excluded** as the murder weapon.

POINT II

> IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ADMITTING THE DNA EVIDENCE WITHOUT CONDUCTING A FRYE HEARING, THE EXPERT WITNESS WAS NOT QUALIFIED IN THE AREA OF STATISTICS, AND THE CORRECT DATA BASE WAS NOT USED, RENDERING THE RESULTS MEANINGLESS.

The state claims that this issue should be barred from review by this Court because defense counsel did not object until the state offered this evidence at trial. The state contends that appellant engaged in "trial by ambush" and therefore cannot prevail. The state never objected on these grounds below and cannot now argue these grounds for the first time on direct appeal.

Additionally, undersigned counsel is concerned and confused by the assistant attorney general's final paragraph on this point in her answer brief. She writes:

> Finally, to the extent that Darling claims that his trial counsel rendered him ineffective assistance in this regard, that issue is not properly before this Court.

(AB p.63) Undersigned has pored over his initial brief vainly searching for an allegation that trial counsel was ineffective. Finding no hint of such a claim, he remains baffled and confused.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, AND A FAIR TRIAL WHERE THE JUDGE RULED THAT DEFENSE COUNSEL COULD NOT COMMENT ON THE FAILURE OF THE STATE TO EXCLUDE OTHER SUSPECTS.

The assistant attorney general appear to have fallen into the same trap as the trial prosecutor and the trial judge. As such, the cases that the state cites are inapplicable to the set of facts at issue. Specifically, **defense counsel did not comment on the failure of the state to call a witness**. Rather, defense counsel was simply **arguing the lack of evidence** to convict his client.

At trial and on appeal appellant questions the reliability of the DNA evidence and statistical calculations used by the state to convict him. The state's DNA expert Baer mentioned in his testimony that he compared known samples from "a Mr. Powell" and from "a Mr. Marcus." (T III 581-82) When Baer used demonstrative evidence to demonstrate his opinion that the DNA matched appellant's, he also testified that it did not match samples from Powell and Marcus. (T III 581-85)

All defense counsel was attempting to do was to point out that there were

other viable suspects at least partially investigated by police. Specifically, Powell's and Marcus' DNA was excluded as a match. However, the state offered no testimony regarding the comparison of these men's fingerprints with the more than 80 latent prints of value from the crime scene that were not matched to either Jesse, Grace, or the appellant. (T III 531-36) Did the state compare their fingerprints with the more than 80 latents found in Grace's apartment? Who were Marcus and Powell? Why were they originally suspects? Were they the maintenance men at the apartment complex? These were all legitimate questions that defense counsel should have been able to point out to the jury as far as the lack of evidence presented by the state.

The state contends on appeal as it did below that defense counsel could have excluded Marcus and Powell as suspects in the jury's mind by asking the state's latent fingerprint examiner about this issue on cross-examination. This argument must fail for the very obvious reason that it is the prosecutor's duty to convict (although in a perfect world his duty is to seek justice). Defense counsel does not share that duty with the prosecutor, nor should he. Rather his duty is to point out the failure of the state to prove their case beyond a reasonable doubt. The trial

court's ruling unfairly prevented defense counsel from fulfilling his duty.[2]

[2] Once again, undersigned counsel is baffled and confused by the assistant attorney general's erroneous belief that appellant claims that his trial counsel rendered him ineffective assistance. (AB p. 67) Appellant makes no allegation of that sort. However, appellant does not want the government to construe this as a concession that his trial counsel was effective.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION DURING JURY SELECTION, RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

The relevance and necessity of the two areas of inquiry was an attempt by defense counsel to impart to the prospective jurors the extreme weight of their duty. The first question was an attempt to convey to the prospective jurors that juries sometimes do make mistakes which are only revealed after many years. Undoubtedly, defense counsel was attempting to warn against a rush to judgment at the trial level as well as on appeal.

The second question disallowed by the court (life imprisonment without parole vs. execution) was an attempt to convince the jurors that these really were the only two possible results. Defense counsel was attempting to hammer that point home because many jurors simply do not believe that a life sentence really is a life sentence without possibility of release. Additionally, defense counsel was attempting to ascertain if life imprisonment was a viable punishment for first degree murder in the prospective jurors' minds. This was a valid area of inquiry and should have been allowed.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION REGARDING CIRCUMSTANTIAL EVIDENCE, A VIOLATION OF DARLING'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The state contends that this issue has not been preserved for appeal where defense counsel failed to "renew" his objection after the judge instructed the jury. More specifically, after much legal argument at the charge conference on appellant's requested instruction, defense counsel answered affirmatively when the trial court asked both lawyers whether the instructions were "acceptable as read." (T IV 767)

Contrary to the state's assertion, no further objection was required at that point. See, e.g., Perez v. State, 709 So.2d 158 (Fla. 5th DCA 1998). It was sufficient to request the instruction. The issue was dismissed and the court's position clearly stated. See also, Hettick v. State, 637 So.2d 964 (Fla. 2nd DCA 1994).

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE UNDER THE PARTICULAR FACTS IN THIS CASE, THE TRIAL COURT ERRED IN PRECLUDING DEFENSE COUNSEL'S REBUTTAL CLOSING ARGUMENT.

Once again the state erroneously perceives a concession by counsel that is simply not present in his initial brief. The state writes:

> ...Moreover, Darling's attorney made an **informed** strategic decision to present his initial closing argument as he did, as Darling concedes on appeal, "defense counsel was gambling by 'holding back' in his initial summation." (IB p.72)

(AB p.75.) Bolded word in original; emphasis added by underlining. The state omitted the preceding word in its quote from appellant's initial brief. Undersigned counsel wrote:

> ...Appellant concedes that **perhaps** defense counsel was gambling by "holding back" in his initial summation.

(IB p.72) Emphasis added. The state's omission of the word "perhaps" is critical to the meaning of the sentence. The entire sentence certainly cannot be read as a real concession on any substantive issue.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO ARGUE RESIDUAL DOUBT AS TO HIS GUILT IN THE PENALTY PHASE AS A LEGITIMATE REASON FOR THE JURY TO RECOMMEND LIFE.

Appellant writes only to contest the state's allegation that this issue is not preserved for review. Not only did the trial court sustain the state's objections thus precluding the line of inquiry relating to appellant's "unwavering declaration of innocence" (R II 67-69), the trial court subsequently granted the state's motion in limine which prevented defense counsel from arguing this particular proposed nonstatutory mitigating factor. (R II 210-12; R III 249-51).

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE ABSENCE OF A COMPLETE RECORD ON APPEAL DEPRIVES DARLING ADEQUATE APPELLATE REVIEW RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO EQUAL PROTECTION UNDER THE LAW.

Opposing counsel accuses appellant of keeping secrets from them as well as this Court. As the assistant attorney general notes in her brief, "he claims that there was 'at least one major hearing...on appellant's death penalty motions,' and later characterizes this hearing as 'critical.' (IB pp. 83, 85)." Counsel then states that, despite claiming to have discussed it with trial counsel and court personnel, appellant does not even hint at any basis for the "critical hearing" label. (AB p.81)

Appellant thought he made this issue clear when he referred to the hearing on "death penalty motions." Prior to trial, defense counsel filed fifteen separate motions attacking various aspects of Florida's death penalty scheme. (R VI 468-610) It is undersigned counsel's experience that, in capital cases, one of the *de rigueur* pretrial hearings is the one disposing of the plethora of motions attacking the constitutionality of Florida's death penalty. Additionally, counsel's efforts to find the missing hearings as well as the purported nature of those hearings is fully explained in the initial brief.

Next, counsel for the state takes undersigned counsel to task for failing to move to relinquish jurisdiction in an attempt to reconstruct the missing hearings. Undersigned counsel truly believed that the hearings were going to show up eventually. Undersigned counsel was wrong. At that point, in an attempt to avoid further delay, counsel filed his initial brief. Although appellant failed to file a **separate** motion to relinquish jurisdiction for reconstruction of the record, appellant does request that specific relief in his initial brief. (IB p. 85) If this Court agrees with opposing counsel, appellant can certainly file a separate motion requesting that particular relief.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE APPLICABLE LAW AT THE PENALTY PHASE BY DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS.

Once again, the state contends that this issue has not been preserved for appeal where defense counsel replied affirmatively when the trial judge asked the lawyers if the jury instructions were "acceptable as read." (T IV 767) Contrary to the state's assertion, no further objection was required at that point. See, e.g., Perez v. State, 709 So.2d 158 (Fla. 5th DCA 1998) It was sufficient to request the instructions. The issues were dismissed and the court's position clearly stated. See also Hettick v. State, 637 So.2d 964 (Fla. 2d DCA 1994)

The state claims that appellant's proposed jury instruction on victim impact evidence is not an accurate statement of the law. Specifically, the state contends that victim impact evidence may be considered in making a decision on the proper sentence. The state cites Austin v. State, 723 So.2d 148, 160 (Fla. 1998) in support of this contention. Appellant's proposed jury instruction did not instruct the jury that they could not consider the victim impact evidence in making their decision. Rather, the proposed instruction explained to the jury that they could not consider

the evidence in aggravation nor could they consider the evidence in weighing the aggravating circumstances and mitigating circumstances. Appellant maintains that this is a correct statement of the law. The jury can consider victim impact evidence but not in the context of aggravating and mitigating circumstances. The seminal case in this state is that of Windom v. State, 656 So.2d 432, 438 (Fla. 1995), wherein this Court specifically held that the procedure for addressing victim impact evidence, as set forth in the statute, does not impermissibly affect the weighing of the aggravators and mitigators. This Court continued by stating that the evidence is not admitted as an aggravator but, instead, allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Id. This language clearly prevents the jury's consideration of victim impact evidence in aggravation, mitigation, or the weighing of those factors.

When the trial court rejected appellant's proposed jury instruction on victim impact evidence, appellant asked the trial court if it would consider any other type of limiting instruction on the victim impact evidence. The state contends that the court was under no obligation to fashion a jury instruction for the defense. The assistant attorney general writes, "Darling has not, and can not (sic), show (sic) any error in this regard." (AB p. 86) Trial counsel was simply exploring the trial

court's amenability to any further requested instructions. Appellant mentions this exchange only to demonstrate defense counsel's extreme concern about the jury's treatment of this type of devastating evidence.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEATH PENALTY IS NOT WARRANTED IN THIS CASE WHERE THE SEQUENCE OF EVENTS LEADING TO THE VICTIM'S DEATH ARE STILL UNKNOWN AND WHERE ONLY TWO "GARDEN VARIETY" AGGRAVATORS EXIST AND THE MITIGATION IS SUBSTANTIAL.

Appellant relies on the argument set forth in his initial brief.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT DOLAN DARLING'S DEATH SENTENCE VIOLATES AN INTERNATIONAL TREATY.

Opposing counsel contends that the pretrial motion raising this issue was factually insufficient because it failed to state that Darling is a foreign national. "It also failed to State (sic) whether the Bahamas is a signatory to that treaty." (AB p. 93) As far as the record on appeal indicates, the state never argued either one of these grounds below. Perhaps this issue was discussed in one of the missing hearings. Additionally, there is absolutely little doubt that Dolan Darling is a foreign national who was born and reared in the Bahamas.

Additionally, appellant contends that it is irrelevant whether or not the Bahamas is a signatory to the treaty. The most important factor is whether or not the United States is a signatory to the treaty, which it clearly is. The treaty sets out rights and **obligations** of signatory countries. Murphy v. Netherlands, 116 F. 3rd 97, 99 (4th Cir. 1997). As a signatory country, United States authorities had an **obligation** to Dolan Darling to inform him of his rights as a foreign national.

The cases cited by the state are clearly distinguishable from the instant case. Murphy v. Netherlands, 116 F. 3rd 97 (4th Cir 1997), held that the defendant had procedurally defaulted because he had pled guilty and not raised the issue in state

court. Similarly, the defendant failed to raise the issue in state court and Breard v. Pruett, 134 F. 3rd 615 (4th Cir. 1998) The Breard court failed to reach the merits of the claim which was never raised in state court. The state also cites United States vs. Lombera-Camorlinga, 2000 WL 245374 (9th Cir. March 6, 2000), which held that a foreign national's post-date arrest statement should not be excluded solely because he made them before being told of his right to consular notification. There were no post arrest statements made by appellant in this case. The remedy sought was and is preclusion of the ultimate sanction.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments cited herein and in the Initial Brief Appellant respectfully requests this Honorable Court to vacate his convictions and sentences and remand for discharge as to Points I and II. As for Points II, IV, V, VI and VIII, appellant asks this Court to reverse and remand for a new trial. As for Points VII and IX, appellant asks this Court to vacate his death sentence and remand for a new penalty phase trial. As to Points X and XI, appellant asks this Court to vacate his death sentence and remand for the imposition of a sentence of life in prison without possibility of parole.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Dolan Darling, #X06883, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 3rd day of August, 2000.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER