

**IN THE SUPREME COURT
STATE OF FLORIDA**

**Case No.: SC17-2062
Collier Case No.: 2009-CF-002298**

MESAC DAMAS,

Mr. Damas,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Ninth Judicial Circuit,
In and For Collier County, Florida

REPLY BRIEF

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ARGUMENT

I. FARETTA HEARING: Under the Sixth Amendment, the trial court deprived Mr. Damas of his constitutional right to self-representation when it denied his request to represent himself on the basis that he “failed to adequately articulate his answers to the Court’s Faretta colloquy and failed to demonstrate sufficient understanding of the legal process in order to represent himself.”

In the *Answer Brief*, Appellee, STATE OF FLORIDA, argues that the Faretta¹ claim raised by Appellant, MESAC DAMAS, is: (A) barred by an appeal waiver contained in the plea agreement; (B) unpreserved for appeal because Mr. Damas did not object to the sufficiency of the trial court’s order; and (C) the trial court’s order denying Mr. Damas’s request to represent himself is supported by competent, substantial evidence. (AB.48-60)

First, the State claims that Mr. Damas’s Faretta claim is barred by an appeal waiver contained in the plea agreement. See AB.48-50. However, it is well-settled that cases resulting in a sentence of death are constitutionally and legislatively subject to *mandatory* direct appeal review. See Fla. Const. Art. V, § 3(b)(1); Fla. Stat. § 921.141(4) (2018); Robertson v. State, 143 So. 3d 907 (2014). This mandatory review applies even if the defendant requests a sentence of death. See Robertson, 143 So. 3d at 909 (citing Goode v. State, 365 So. 2d 381, 384 (Fla. 1978)). Given that a human life is at stake, and given the Constitutional duties of all

¹ Faretta v. California, 422 U.S. 806 (1975).

parties involved to ensure that a human life is not arbitrarily or capriciously taken, it is shocking to see that the State of Florida would seek to enforce such a waiver on direct appeal, much less include an appeal waiver in the plea agreement in the first place. See e.g., Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976). Because of the magnitude of what is at stake in this case, Mr. Damas’s claim is not – and can never be – barred by the appeal waiver contained in the plea agreement.

The State goes on to argue that Mr. Damas waived his right to self-representation a second time when he informed the trial court during the change of plea hearing that “he was satisfied with trial counsel’s representation in his case” and that such representation “constituted a valid waiver of the challenge to the sufficiency of the August 18, 2017 order denying his request for self-representation.” See AB.49. But such a waiver never happened. At change of plea hearing conducted on September 5, 2017, the trial court asked Mr. Damas if he was satisfied with the advice given by counsel in connection to pleading guilty to capital murder – not whether he wished to continue to retain his counsel or wished to abandon his prior Faretta request. See R.2865. After having the State recite the factual basis for the charges, the trial court conducted the standard change of plea colloquy as follows:

COURT: Mr. Shirley, Mr. Ermacora and Mr. Damas, do you stipulate for the purposes of this plea that the State can

establish a prima facie case as to each count pertaining to Mr. Damas?

SHIRLEY: We would so stipulate.

COURT: And do you acknowledge that as well, Mr. Damas?

DAMAS: Yes.

COURT: Mr. Shirley, Mr. Ermacora, have you counseled Mr. Damas as to the ramifications of entering these pleas?

SHIRLEY: Um, we have.

COURT: Is there anything else that you would like to add at this phase of the colloquy relating to the plea of guilty as to the offenses?

SHIRLEY: I don't believe so. Thank you for the opportunity, though.

COURT: You are present with your attorneys, Mr. Damas – Mr. Ermacora and Mr. Shirley. **As it relates to your desired intent today, are you satisfied with their advice and counsel?**

DAMAS: **Yes.**

...

COURT: ...But, again, I want to ask you specifically, and I do need you to answer this question. Regarding their representation of you as it relates to this case; their preparation for trial, **their counseling you as it relates to your decision to enter a plea of guilty, are you satisfied with their advice and counsel?**

DAMAS: This case.

COURT: Is that a yes?

DAMAS: Yes.

(R.2864-2867. Emphasis added.) By answering the trial court's questions about the advice of counsel given **in connection to the guilty plea**, Mr. Damas did not waive or abandon his prior request for self-representation. See Bland v. State, 241 So. 3d

975 (Fla. 5th DCA 2018) (holding that the defendant affirmatively abandoned his request for self-representation when he informed the court at a subsequent hearing that he was satisfied with being represented by counsel).

Second, the State argues that any deficiencies in the trial court's Faretta findings are unpreserved for appellate review because Mr. Damas did not contemporaneously object to the trial court's written order. See AB.49-51. Despite the State's argument, the statutory and decisional law of this State do not require a capital defendant making a pro se motion for self-representation to object following the issuance of a written order. See Thompson v. State, 37 So. 3d 939 (Fla. 2d DCA 2010); Smith v. State, 956 So. 2d 1288, 1289 (Fla. 4th DCA 2007). Rather, all that was required of Mr. Damas was that he unequivocally assert his Sixth Amendment right to represent himself. Tennis v. State, 997 So. 2d 375, 377-78 (Fla. 2008).

Third, the State argues that, on the merits, the trial court did not abuse its discretion by denying the Faretta request because Mr. Damas was "uncooperative and argumentative" while "refus[ing] to answer questions appropriately." See AB.58. While these were *factual findings* cited by the court in its order, these were not the trial court's *legal grounds* for denying the request. The legal grounds for denying the request were that Mr. Damas "failed to adequately articulate his answers to the Court's *Faretta* colloquy and failed to demonstrate sufficient understanding of the legal process in order to represent himself." See R.1356. The trial court

impermissibly focused on Mr. Damas's ability to understand "the plea process and related matters involved in a death penalty..." rather than on whether Mr. Damas invocation of his Sixth Amendment right to self-representation was knowing and intelligent. See Faretta, 422 U.S. at 834-836.

In sum, the trial court abused its discretion by denying Mr. Damas' attempt to exercise his constitutional right to represent himself by focusing on Mr. Damas' ability to represent himself rather than on whether his election to do so was knowing and intelligent. See Thompson, 37 So. 3d at 940; see also Smith, 956 So. 2d at 1289. Accordingly, Mr. Damas must be afforded a new penalty phase proceeding where he is afforded his Sixth Amendment right to self-representation.

II. DOUBLING OF AGGRAVATORS: The trial court fundamentally erred by finding the existence of two aggravating circumstances where both aggravators were based upon the tender ages of the child victims.

In sentencing Mr. Damas to death, the circuit court found the existence of five aggravators, two of which pertained to the tender age of the child victims. Specifically, the circuit court found that the victims of the capital felony were less than twelve years of age (Fla. Stat. § 921.141(6)(l)) and that Mr. Damas stood in a position of familial or custodial authority over the child victims (Fla. Stat. § 921.141(6)(m)). (R.31-32) In the *Initial Brief*, Mr. Damas argued that the circuit court fundamentally erred by imposing both aggravators because Subsection (l) and Subsection (m) both rely on the tender age of the victims as aggravating circumstances. (IB.13-14)

In the *Answer Brief*, the State attempts to distinguish between the two statutory aggravators on the basis that Subsection (l) is “based on numerical age” of the child victims rather than their vulnerability and Subsection (m) is based on “the age of the children” rather than “the vulnerability of the victims based on the parent’s role in his children’s lives.” See AB.62-63.

But such a distinction is simply a specious play on words. Under this Court’s precedent, both Subsection (l) and Subsection (m) rely upon the victim’s status as a child – encompassing both the numerical age of childhood and the vulnerability associated with that tender age. See Lukehart v. State, 776 So. 2d 906, 925 (Fla.

2000). Allowing both aggravators to operate separately constitutes the sentencing error of improper doubling. See *id.*

To the extent that the State argues the error is harmless, see AB.65, Mr. Damas asks the Court to be mindful that the weighing of aggravating factors and mitigating evidence is the unique function of the trial judge where a jury determination of such has been waived. As the State cites (see AB.48), the trial judge had a superior vantage point where she was able to: view the witnesses and evaluate credibility; observe the defendant, his demeanor, and his remorse; and assess the visible impact of the crimes upon the surviving family members present in the courtroom. Because this Court is unable to do the same, Mr. Damas requests that this Court find the error was not harmless beyond a reasonable doubt, and remand so that the Honorable Christine Greider may re-weight the evidence without the additional aggravating factor to determine whether a sentence of death or a sentence of life imprisonment is appropriate.

III. EIGHTH AMENDMENT: Under the Eighth Amendment, the trial court violated Mr. Damas' constitutional rights by sentencing him to death because capital punishment is inherently cruel and unusual punishment.

In the *Answer Brief*, the State argues that the issue of whether Mr. Damas' sentence of death violates the Eighth Amendment is unpreserved for appellate review and thus subject to the fundamental error analysis only. See AB.67. The State also argues that such an argument constitutes invited error: "The State argues that this issue was waived on the basis that, during trial proceedings, Damas had repeatedly sought to receive death sentences. He should not be able to complain that the death penalty is per se unconstitutional on appeal." See AB.67-68.

However, all death sentences in Florida are subject to mandatory appellate review, requiring this Court to examine the sentence upon Eighth Amendment grounds in every case. See Fla. Const. Art. V, § 3(b)(1) (2018); Fla. Stat. § 921.141(4) (2018); Robertson, *supra*. Even where a defendant expresses a desire to be executed, "this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all the standards set by the Constitution, the Legislature, and the courts." Goode, 365 So. 2d at 384. Whether Mr. Damas will be subjected to cruel and unusual punishment undoubtedly falls under this mandatory appellate review without regard to whatever wishes he expressed regarding his sentence. See id. The standards set forth in the Eighth Amendment include that Mesac Damas shall not be subjected to cruel, unusual, or

disproportionate punishment. See U.S. Const. amend. VIII.

As the State points out, it is true that neither this Court nor the U.S. Supreme Court has receded from its existing positions on capital punishment despite the high rate at which humans innocent humans have been sentenced to death, despite the lengthy delays before exoneration, despite the recent instances of prolonged and painful death, and in light of its arbitrary and capricious administration. See IB.15-21. Nonetheless, the undersigned counsel urges this Court to re-examine the practice in light of the aforementioned developments² and under the evolving standards of decency test. See Glossip v. Gross, 135 S.Ct. 2726, 2755-2777 (2015) (Breyer, J., dissenting).

Mr. Damas' sentence of death constitutes the cruelest of all punishments and the "evolving standards of decency" dictate that such punishment is now "unusual". See id. Accordingly, Mr. Damas requests that this Court vacate his death sentence and hold that Section 921.141 violates the Eighth Amendment of the United States Constitution.

² Since the submission of the *Initial Brief* in this case, the execution of Carey Dean Moore in Nebraska took 24 minutes between injection and death. During those 24 minutes, witnesses reported that Moore visibly took gasping breaths while his skin turned red and purple, his chest heaving several times before he died. See Associated Press, "Nebraska carries out its first execution since 1997", August 15, 2018, available at <https://www.cbsnews.com/news/nebraska-carries-out-first-execution-since-1997-today-2018-08-14/>

CONCLUSION

For the foregoing reasons, Mr. Damas requests that this Court vacate his death sentence and award him any and all further relief to which he is entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, Capital Appeals Division, via electronic mail delivery on this 17th of August 2018 to capapp@myfloridalegal.com.

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point Font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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