IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2379

DOLAN DARLING, A/K/A SEAN SMITH

Appellant,

v.

STATE OF FLORIDA

Appellee.

**ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF THE APPELLANT

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ARGUMENT

The undersigned relies on the facts and arguments set out in Appellant's Initial Brief and Petition for Writ of Habeas Corpus with regard to all matters not specifically addressed herein.

References to the record are in the same form as in the Initial Brief. References to Appellant's Initial Brief are of the form, e.g., (IB 123) and references to Respondent's Answer Brief are in the form , e.g., (AB 123).

CLAIM I

TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATING EVIDENCE

Defense counsel introduced the testimony of four witnesses at the penalty phase of trial: Deshane Claer, the mother of Darling's daughter; Veroniki Butler, his sister; Eleanor Bessie Smith, his mother; and Dr. Michael Herkov, a clinical psychologist. While the trial court ruled that the testimony presented by Mr. Darling at the evidentiary hearing was merely cumulative, it ignored the fact that noone except Carlton Darling could have given a representative picture of the horror of Dolan Darling's childhood because noone else was usually with them when he beat Dolan Darling. Darling's sister was ten years older than him. (R Vol. II, 75). She recounted two beatings at trial but she went away to school in the United States at age sixteen (R Vol. II, 75,6,and 9). She testified at trial that most physical abuse of Dolan took place while she was in college. (R Vol. II, 90). Dolan

was alone with his father because Carlton worked at night and Dolan's mother worked during the day. (R Vol. II, 87). Carlton Darling testified at the evidentiary hearing that he beat Dolan approximately six times per week. Even the prosecutor could not claim that a child probably deserved this.

Darling's onset of alcohol and drug abuse began at age nine.(PCR 422). At age sixteen , he started abusing marijuana and the alcohol abuse subsided. (PCR 423). Eventually, he started to abuse cocaine, quaaludes, roofris, rohypnol, hallucinogenic mushrooms, and LSD. This extremely young onset of alcohol abuse and drug abuse was not mentioned by Dr. Herkov at trial. (PCR 348). When asked at trial whether there was any evidence that Darling adopted his father's alcoholism Dr. Herkov replied "No, he's not described as a problem drinker." (R Vol II, 146).This deprived the sentencing jury of a true picture of the Darling's early onset poly-drug dependence. In addition, due to Darling's age at the time of the crime, 20, his brain was not fully mature. Nervous system development and brain development continue until age 25. (PCR 432).

Dr. Herkov did mention in passing that "There was a history of sexual abuse", (R Vol II, 136) but left it at that, allowing the State to capitalize on a statement by Harlan Dean, headmaster of one of the schools Dolan attended in the Bahamas, that characterized Dolan as a bully. (R Vol II, 160). Had Dr. Herkov

been properly prepared by trial counsel and had an adequate mitigation background investigation been performed, this harmful characterization would have been discredited. Dr. Cunningham and Dr. Dee were able to testify at the evidentiary hearing that Harlan Dean treated a rash that Darling had developed on his thighs and genitals by personally applying a salve, which caused Darling to have an erection. (PC-R Vol II, 258). Dr. Dee, in his deposition, said in his interview with Darling that, in fact, Darling had acknowledged that the Dean had masturbated him in the course of these events. (IB, 63). Nor did Dr. Herkov mention the fact that Darling was exposed to rapes occurring in the Foxhill prison. (PC-R Vol. III, 511).

Dr. Herkov's billing records indicated two hours spent reviewing records, an one hour twenty minute interview with Dolan Darling, ninety minutes with Darling's family, and 2.4 hours spent on psychological testing. (PC-R Vol. III, 532-34). This inattention to the development of background mitigation was described by Dr. Cunningham as woefully inadequate. (IB, 35).

The trial court's finding that the mitigation presented at the evidentiary hearing was merely cumulative is completely negated by the facts presented as outlined by that court's own order denying relief.(Order Denying Motion To Vacate Judgment of Conviction And Sentence With Special Request For Leave To Amend, pages 13-24). No testimony concerning the horrendous conditions Darling was exposed to at Foxhill Prison was introduced as mitigation at trial, nor were any

neuropsychological test results indicating Darling's frontal lobe damage which created a substantial impairment in Darling's ability to conform his conduct to the requirements of law . The extent of the abuse by Darling's father was misrepresented at trial. The trial court did not even mention the testimony of Dr. Frank, a psychiatrist employed by the Department of Corrections who testified as a State witness at the evidentiary hearing . Dr. Frank's testimony supported the recognized mitigating circumstance of potential for rehabilitation.

In determining prejudice, a court should examine whether the "entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a 'reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented ***and explained*** the significance of all the available evidence." *Wiggins*, 539 U.S. at 524, 123 S.Ct. at 2543; *Williams v. Taylor*, 529 U.S. at 399, 120 S.Ct. at 1516 (emphasis added). This means that the way mitigating information was presented cannot be excluded from the prejudice analysis, which is what the court did here. The available mitigating evidence, taken as a whole, verified, adequately presented and explained, "might well have influenced the jury's appraisal" of Darling's moral culpability. *Id*., at 398, 120 S.Ct. 1495. *Wiggins*, 539 U.S. at 537. Although "it is possible that a jury could have heard it all and still have decided on

the death penalty, that is not the test." *Rompilla v. Beard*, --- U.S. ----, 125 S.Ct. 2456, --- L.Ed.2d ---- (2005) at 2469. The likelihood of a different result if the available mitigating evidence had been adequately presented and explained is sufficient to undermine confidence in the outcome actually reached at sentencing. *Id*. citing *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

CLAIM II

MR. DARLING RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE DUE TO HIS LAWYERS' FAILURE TO CHALLENGE A PRIOR CONVICTION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

And

CLAIM III

THE POSTCONVICTION COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF THE ATTORNEY WHO REPRESENTED DARLING IN THE PRIOR CONVICTION USED AS AN AGGRAVATING FACTOR

The trial court erred in refusing to consider the proffered testimony by Cris Smith, Esq., which established ineffective assistance of trial counsel in this case during sentencing phase for failure to examine and investigate a prior conviction that had been specifically noticed by the State as a claimed aggravating circumstance in support of the death penalty in this case. The trial court ruled that the claim was not specifically pled. However, the claim was pled in Claim IV which stated in part that "counsel was ineffective for failing to investigate the

defendant's background". This claim was likewise pled in Claim XV which was heard in conjunction with Claim IV. Claim XV sought relief due to ineffective counsel at sentencing by failing "to adequately challenge the State's case" for aggravation. An evidentiary hearing was granted on these claims and testimony was presented which should have been considered by the trial court.

It was likewise pled in Claim XXXVIII that " Mr. Darling's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of a fundamentally fair trial guaranteed under the sixth, eighth, and fourteenth amendments." This claim was erroneously stricken by the trial court.

Regarding the proffer of attorney Christopher Smith, it is the Defendant's position that the Court should consider this evidence in support of his claim of ineffective assistance of counsel at the penalty phase. As a defense attorney in a capital case, one's job is to adequately attack the aggravators that the state intends to use in support of the death penalty. In the case at bar, the state gave notice that they were going to utilize the Defendant's conviction in the taxi cab robbery case as an aggravating circumstance to support the death penalty (Orange County Case CR96-13626). The State did so, even calling the victim in the taxi cab robbery to testify at the penalty phase of the murder trial that Dolan Darling demanded money

from him and shot him in the back of the head. Defense counsel failed to look into case CR96-13626 and take any action to challenge the state's use of that aggravator. Had defense counsel investigated or adequately communicated with Dolan Darling and Christopher Smith, they would have realized that he filed a pro-se 3.850 Motion with very valid claims, including a valid claim for ineffective assistance of counsel on Christopher Smith failing to investigate or pursue a defense of voluntary intoxication when it was available as a defense. See *Duprey v. State*, 870 So.2d 256 (Fla. 2d DCA 2004).

In Duprey, the Court reversed a circuit court decision summarily denying a claim of IAC without an evidentiary hearing regarding failing to inform a defendant of a voluntary intoxication defense. The Court remanded the case back to the circuit court for an evidentiary hearing on the matter. In the case at bar, the testimony at the evidentiary hearing was clear in that Christopher Smith did not investigate this defense. It was available and apparent as many documents supported the fact that Dolan Darling was doing dangerous drugs and suffering blackouts at the time of the taxi cab case. The documents entered at the evidentiary hearing show that Dolan Darling requested and was denied counsel on his 3.850 motion in the taxi cab robbery case. Defense counsel in the murder case failed to request to be appointed in the taxi cab postconviction proceedings. Defense counsel Iennaco and LeBlanc never asked Christopher Smith to file a

Motion to Withdraw Plea on the taxi robbery case. Dolan Darling should have been appointed counsel in the postconviction appeal of the taxi cab robbery case, and trial counsel in the murder case was ineffective for failing to ask to be appointed.

Although the plea form entered in the record as a proffer on the taxi cab case specifically mentions the possibility of deportation back to the Bahamas due to the plea, the plea form fails to mention that Dolan Darling is under investigation for first degree murder, and fails to mention that should he plead out to the charges, they may be used as an aggravator to make him death-eligible on a soon-to-be-filed first degree murder charge. Apparently the State asked for a DNA sample from Dolan Darling in November of 1996 in regards to the unrelated first degree murder case. It appears that the state waited to obtain an automatic aggravator by making an offer in the taxi cab robbery case before indicting him for first degree murder. As such, this was a denial of notice and due process. The State should have warned that an indictment for murder was forthcoming. A motion to withdraw the plea should have been filed, but was not. This constitutes IAC on the part of Mr. Smith, Mr. Iennaco, and/or Mr. LeBlanc.

The issue of denial of the appointment of counsel for the postconviction appeal of case CR96-13626 was appealed pro-se to the 5th District Court of

Appeal, but then abandoned apparently due to the inexperience and incarceration of Dolan Darling. The Defendant, now counseled in the instant case, considers this fundamental error and a Sixth Amendment violation that should be considered and cured by this Court, even if it was not specifically pled in his 3.851 Motion that is pending at this time. Additionally, the Defendant asks that this Court find trial counsel ineffective for failing to become involved in the taxi case appeal. Although Judge Cynthia McKinnon denied the appointment of counsel in the postconviction proceedings, had the court been informed that the case was being used as an aggravator in a death penalty case, she probably would have appointed Ianneco and LeBlanc had they simply asked to be appointed. Instead, no counsel was appointed, and Dolan Darling in his inexperience virtually abandoned his claims, after the court informed him that he was really asking for a motion to mitigate the sentence. The Defendant asks this Court to consider this claim and Christopher Smith's testimony even though it was not specifically pled in the 3.851 Motion. The Defendant asserts that the claim of ineffective assistance of counsel at the penalty phase was generally and sufficiently pled to allow consideration on this issue.

Christopher Smith was appointed to the taxi cab robbery case (Orange County Case CR96-13626) on February 10, 1997. Previously, the Public Defender's Office represented him on the case and had to withdraw due a conflict.

The case was originally set for trial for February 24, 1997. Attorney Smith filed a motion for continuance stating that he had out of town depositions set an another case. The case was continued and on April 3, 2004 Dolan Darling pled no contest to lesser charges under the representation of attorney Smith and was sentenced to 126 months Florida State Prison. Christopher Smith testified that he had no idea that Dolan Darling had an unrelated and pending first degree murder charges.

As shown from the transcript of the October 8, 1997 evidentiary hearing entered as a proffer exhibit, Dolan Darling had viable claims against Christopher Smith for ineffective assistance of counsel on the taxi robbery case. Attorney Smith pled out his client after only having the case for less than two months. He failed to investigate the case and he never even took depositions. Dolan Darling was doing dangerous drugs at the time of the offense and presumably when he made alleged admissions to law enforcement, yet attorney Smith failed to investigate voluntary intoxication to negate specific intent based on drug use, and failed to pursue a motion to suppress admissions based on drug use and the lack of a knowing, intelligent and voluntary waiver of Miranda rights. Ineffective assistance of counsel is supported by Mr. Smith failing to take depositions, failing to investigate the case, failing to investigate voluntary intoxication, failing to file a motion to suppress the confession, and failing to file a motion to withdraw the plea

based on lack of knowledge that the plea would be used as an aggravator in support of an unrelated death penalty case.

Dolan Darling was inexperienced, unsophisticated, from a foreign country, and should have been afforded counsel on his 3.850 Motion and evidentiary hearing. The Defendant asks that this Court consider the proffer of Christopher Smith as substantive evidence in support of the Defendant's ineffective assistance of counsel claims in the penalty phase.

In determining whether counsel should be appointed in a 3.850 proceeding the trial court should consider the adversarial nature of the proceedings, the complexity of the case, the need for an evidentiary hearing and the need for substantial research. *Graham v. State*, 372 So.2d 1363 (Fla. 1979). An evidentiary hearing in itself implies the presence of three of the four Graham factors. *Witherspoon v. State*, 6434 So.2d 208 (4th DCA, 1994); *William v. State*, 471 So.2d 738 (Fla. 1985). Any doubts about the necessity of counsel must be resolved in favor of the defendant. *Witherspoon v. State*, 6434 So.2d 208 (4th DCA, 1994); *William v. State*, 471 So.2d 738 (Fla. 1985).

Trial attorneys Iennaco and LeBlanc should have been more active and should have asked to be appointed in the appeal of the taxi cab robbery case. Had the defense attorneys asked Christopher Smith to withdraw the plea, or had they filed a Motion to Withdraw the plea based on unknowing consequences of the plea,

or asked to be appointed at the 3.850 hearing that was held on October 8, 1997, the claims would not have been pro-se abandoned and the trial attorneys could have successfully vacated the case which was used as an aggravator in the death penalty case. It is clear that Iennaco and LeBlanc failed to examine the court file for the taxicab case even though the State have given formal notice of it's intent to rely on the plea and subsequent conviction in that case in support of a death sentence. Had they done so they could have set aside the guilty plea in that case. The prior conviction file was a public document, readily available at he same courthouse where Darling was tried.

The American Bar Association Standards for Criminal Justice in circulation at the time of Darling's trial describe the obligation of trial counsel in terms no one could misunderstand in the circumstances of a case like this one:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to examine all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)

With regard to the proffer dealing with a postconviction attack on the taxicab case handled by Christopher Smith, Mr. Iennaco apparently had a file

indicating that he knew about the pending postconviction motion, the State's response, and he had his own notes explaining why he did not think that the conviction could be successfully attacked. PC-R VOL VI, 1019 Trial counsel had a duty to attack in whatever way he could the conviction on the taxi case because it was going to be used as an aggravator in the capital case. Iennaco claimed that they "looked into" getting the plea withdrawn, but could not because "Christopher Smith was an excellent lawyer."(PC-R VOL VI, 1012) This explanation fails to meet muster. There is a big difference between filing a Motion to Withdraw and having it denied, and simply and ineffectively "looking into it.". There is a big difference between filing a Notice of Appearance on the postconviction motion, and simply and ineffectively saying that you "looked into it." As shown by the proffer of Christopher Smith, Christopher Smith was ineffective on the taxi case. As shown by the testimony of Christopher Smith and the plea form on the taxi case, Dolan Darling was without knowledge of the dire possible consequences of his plea. He was informed of possible deportation to the Bahamas during the plea colloquy, but he was not informed that it would lead to his death sentence in this country. A simple motion to withdraw the plea based on those facts alone (lack of knowledge of the consequences of the plea) would have been enough to get the plea withdrawn. At that time, after the plea could have been withdrawn, and an adequate investigation could have been made into the taxi cab case. Christopher

Smith, the "excellent attorney" did not even take depositions in the taxi cab case. He did not look into filing a motion to suppress the alleged admissions, even though he had good grounds because Dolan Darling was high on crack cocaine at the time. The "excellent attorney" failed to look into the possibility of a voluntary intoxication defense or even discuss this possible defense with his client.

There is blame on the other side. Christopher Smith was never asked by Iennaco or LeBlanc to file a Motion to Withdraw the Plea. He certainly would have filed the motion based on a lack of knowledge of the consequences of the plea if asked to do so. Christopher Smith said that it was fair to say that he didn't really put much work into the case, and he would have put more work into the case had he known it could be used as an aggravator in a death case. In the alternative, Iennaco or LeBlanc could have stepped in and filed a motion to withdraw the plea. Had Iennaco and LeBlanc spent meaningful time with Dolan Darling, they would have realized that Dolan Darling was asking for counsel to be appointed on his postconviction motion in the taxi case, the very case that was going to be used as an aggravator in the capital case. Iennaco and LeBlanc never intervened in a case where Dolan Darling was pleading over and over to Judge McKinnon that he wanted counsel. His trial attorneys on the capital case were his counsel, but failed to fulfill their role as counsel. As such, it was as if Dolan Darling had no counsel

at all. Regarding whether Iennaco spoke with Christopher Smith, he stated that he "thinks" he did, but that he couldn't swear to it. PC-R Vol VI, 1012. A Motion to Withdraw the Plea on the taxi case would have been timely at any reasonable time after his trial attorneys adequately investigating the situation realized the situation due to the dire consequences of the unknowing enhancement because of the plea and conviction. In the alternative, a motion for postconviction relief would have been timely, as agreed to by defense counsel. PC-R Vol VI, 1014

Mr. Iennaco stated, "I'm sure [Dolan and I] discussed the [Taxi] case, but as far as specifics, I can't say as far as whether we discussed a pending post-conviction motion. If there was one, I can't say." PC-R Vol VI, 1017-1018.

There is no evidence that such a discussion was had because there was no discussion. There is a letter dated January 22, 1998 wherein Mr. LeBlanc writes Dolan, "While I would like to speak with you more frequently, I know you are serving a sentence and I don't want to affect your gain time by having you brought here to Orange County." Obviously vacating the underlying conviction serving the basis of the aggravator should be more important to a defense attorney than adversely affecting a client's gain time when he is facing a death penalty case. No meaningful discussions occurred between Dolan Darling and his counsel regarding the attacking of the underlying conviction. If there had been discussions, in the

record somewhere we would see some evidence of an attempt of his trial counsel to intervene in the taxi cab case in the postconviction posture.

Respondent oversimplifies this claim in characterizing it as a claim that counsel in another case (the taxi cab case) was ineffective. The claim establishes not only ineffectiveness of counsel but a denial of fundamental due process of law. Mr. Darling was denied effective assistance of counsel and access to the courts in that case. The conviction and sentence in that case was used to support the prior violent felony aggravating circumstance in this case.

Respondent claims that Darling filed a Rule 3.850 motion in the taxi cab case, it was denied by the trial judge in that case, and was appealed to the Fifth District Court of Appeal. The State does not address the fact that the Defendant was wrongfully denied appointed counsel to represent him at the hearing on his Rule 3.850 Motion. *Graham v. State*, 372 So. 2d 1363 (Fla. 1979). Darling was not sophisticated enough to represent himself in his postconviction proceedings. PC-R Vol. V, 916-17.

Respondent likewise does not address the fact that the trial court erred in redefining Darling's Motion and treating it as if it were a Motion under Rule 3.800 (c) for mitigation of sentence. That redefining by the trial court denied Mr. Darling minimal due process in that it evaded his Sixth Amendment claim and foreclosed

any meaningful review. The result is that Darling's claim of ineffective assistance of counsel has never been adjudicated or reviewed.

Respondent lastly states that this issue has no merit because the evidence in the taxi cab case was overwhelming**.** That is an overstatement of the strength of the State's case in that the victim in that case could not identify Mr. Darling. More importantly, the weight of the evidence is inconsequential because the 3.850 motion in the taxi cab case sought relief for an involuntary plea and there is no doubt that it was not in Mr. Darling's best interest to enter into the plea in the taxi cab case prior to the resolution of the murder case. The murder investigation was pending at the time that plea was entered and appointed counsel for the plea in the taxi cab case would not have resolved that case with a plea at that time had he known about it. PC-R Vol V 912.

CONCLUSION AND RELIEF SOUGHT

The lower court's order denying relief should be reversed with directions to afford a new trial, penalty phase before a jury, sentencing, or an evidentiary hearing on those claims which were summarily denied, or this Court should afford such other relief as it deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on March ____, 2006.

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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