IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2020

DOLAN DARLING, A/K/A SEAN SMITH

Petitioner,

v.

JAMES V. CROSBY, et al.,

Respondent.

_____/

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTIONAL STATEMENT

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Darling's conviction and sentence of death.

Jurisdiction in this action lies in the Court, see, e.g., *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Darling's direct appeal. *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969).

ARGUMENT

CLAIM I

MR. DARLING WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND ACCESS TO THE COURTS IN A PRIOR VIOLENT FELONY CASE WHICH WAS USED AS AN AGGRAVATING CIRCUMSTANCE TO SUPPORT HIS DEATH SENTENCE

The Petitioner, DOLAN DARLING, a/k/a Sean Smith, has been sentenced to death for the murder and armed sexual battery of Grace Mlynarczyk ("Grace") at her apartment in Orlando on October 29, 1996. This Court's affirmance on direct appeal of the judgment and sentence is reported at *Darling v. State*, 808 So.2d 145 (Fla. 2002), *cert. den. Darling v. Florida*, 537 U.S. 848, 123 S.Ct. 190, 154 L.Ed.2d 78

(U.S. Fla. Oct 07, 2002).

About a week after the murder, on November 7, 1996, Darling was arrested for the carjacking and non-fatal shooting of a taxi cab driver earlier that day. On April 3, 1997, he pled no contest to 1) armed carjacking, 2) robbery, and 3) aggravated battery in CASE NO. CR96-13626, Ninth Judicial Circuit for Orange County. The same day he was sentenced to 126.5 months DOC concurrent all counts with a minimum mandatory three years. He did not appeal.

Darling filed a timely pro-se 3.850 motion in the taxicab case claiming ineffective assistance of counsel.[1] Darling=s request for the appointment of counsel in the postconviction proceedings was denied. PC-R Vol. I, 14. On October 8, 1997,[2] the court conducted an evidentiary hearing on three issues: ineffective assistance because defense counsel (1) failed to investigate and prepare a voluntary intoxication defense after promising to do so, (2) badgered Darling into accepting a plea, and (3) failed to investigate the facts of the crime. With regard to the third claim, Darling alleged that an adequate investigation would have revealed that the victim was unable

[1] Apparently, the motion was filed on August 22, 1997, the same date as his motion for appointment of postconviction counsel.

[2] The Public Defender was allowed to withdraw and Mr. LeBlanc was appointed to represent the defendant on September 16, 1997. R-Vol. IV 431. Mr. Iennaco was not appointed until after the postconviction hearing in the taxicab case. R-Vol. IV 434.

to identify Darling as the perpetrator. *Id.* The court asked Darling a few preliminary questions about his allegations and then turned him over to the prosecutor. Darling admitted committing the crime, although he said that he was on drugs at the time,[3] and maintained that he Adidn=t intend to do what happened@ and was unable to distinguish Aright from wrong.@ *Id*. 20-21.

Darling=s attorney in the carjacking case, Christopher Smith, testified at some length and denied that his representation fell short in any way. Darling asked that the court be lenient. The court found that Darling=s motion for postconviction relief was, in reality, a motion to mitigate sentence, and denied it. PC-R Vol. I, 68-72. That denial was appealed pro-se to the 5th District Court of Appeal, but the appeal was dismissed or abandoned.

Christopher Smith[4] did not know about the murder investigation. PC-R Vol. V 788. He would have handled this case differently had he known about the possibility of a murder indictment. He said that he would have contacted the attorney who was handling the murder case. He would have put it on the record that he had discussed the fact this was a possible aggravating factor in his homicide case. He also Awould not

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[3] The original arrest charges included one for possession of cannabis.

[4] At the evidentiary hearing conducted in the murder case, collateral counsel offered the testimony of Christopher Smith. The court declined to accept his testimony in evidence, but allowed a testimonial proffer anyway. PC-R Vol. V 902.

have been so amenable to recommending a plea, knowing that this could possibly be used against [Darling] in a penalty phase later on.@ PC-R Vol. V 910-11. He had not completed discovery at the time this plea was entered. He had scheduled some depositions, but had not taken them yet.

Christopher Smith conceded that he Adidn't do much work@ on the case. *Id*. 921-22. He had met his client only two times prior to the entry of a plea and sentence. PC-R Vol. V 922. He would not have resolved the case with a plea at that time, although he did not rule out the possibility of a plea later on. *Id.* 912. He would have pursued a motion to suppress evidence. PC-R Vol. V 910-11. He understood that Darling was under the influence of drugs at the time of the offense, but did not investigate a voluntary intoxication defense. *Id*. 914; 919.

Ineffective assistance of counsel is supported by counsel=s failure to take depositions, failure to investigate voluntary intoxication, failure to file a motion to suppress the confession, the entry of a plea after less than two months, and failure 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.

The postconviction court in the taxicab case erred by failing to appoint counsel when requested to do so. 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). Christopher Smith said that he did not think Darling was sophisticated enough to represent himself in his postconviction proceedings. PC-R Vol. V, 916-17. An evidentiary hearing in itself implies the presence of three of the four *Graham* factors. *William v. State*, 471 So.2d 738 (Fla. 1985).[5] In particular, one of the *Graham* factors is the Aadversary nature of the proceeding.@ This proceeding was non-adversarial throughout. Competent counsel would also have been mindful of the right to appeal. Although it is true of any indigent prisoner, as such Darling=s ability to conduct any sort of investigation was virtually nil. Any doubts about the necessity of counsel must be resolved in favor of the defendant. *Graham*, *id.* Once the right to counsel has attached, its denial is a denial of due process. *Graham*, *id.*, citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Where there is an outright denial of counsel prejudice may be presumed. *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984); *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

The court then erred by redefining Darling=s motion. There was no authority for

[5] Without conceding the ultimate issue, the State did concede that inefectiveness was adequately pled and that Darling was entitled to an evidentiary hearing.

the court to do so. While courts do restyle pleadings under certain circumstances, the court=s ruling here denied minimal due process in that it evaded Darling=s Sixth Amendment claim and foreclosed any meaningful review. The judgment of conviction and sentence was dated April 14, 1997. Because no direct appeal was taken, Darling had a sixty day period in which to file a motion for reduction or modification of sentence under Fla. R. 3.800 (c), which expired June 13, 1997. The court lost jurisdiction to entertain a motion to mitigate by the time of the hearing on October 8. *Grosse v. State*, 511 So.2d 688 (Fla. 4th DCA 1987); *State v. Woodard*, 866 So.2d 120 (Fla. 4th DCA 2004). Such a motion would have been untimely. However, the court did not deny the motion, now considered as a motion to mitigate, as untimely; the court denied it on the merits. Because of that, and because the court=s disposition was a denial rather than a grant of relief, the disposition was not reviewable by way of certiorari either. *Staveley v. State*, 866 So.2d 1239 (Fla. 5th DCA 2004); *State v. Sotto*, 348 So.2d 1222 (Fla. 3d DCA 1977). Cf. *Jolly v. State*, 803 So.2d 846 (Fla. 1st DCA 2001) (AAlthough a trial court's order denying a Florida Rule of Criminal Procedure 3.800(c) motion to mitigate sentence on the merits is not appealable, an appellate court may exercise its certiorari jurisdiction to review a case where the motion was denied for lack of jurisdiction based on the motion's untimeliness.@). In the alternative, Darling would have had a right to appeal a denial of his 3.850; whereas certiorari is discretionary only. The result is that Darling=s claim of ineffective

assistance in the taxicab case has never been adjudicated or reviewed.

This Court can and should exercise its broad jurisdiction to grant habeas relief and direct the circuit court to actually address Darling=s postconviction claims, including that of ineffective assistance of counsel, in the taxicab case. AArticle I, section 21 of the Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay. . . . This Court has a responsibility under this provision to ensure every citizen's access to the courts.@ *Chandler v. Crosby*, --- So.2d ----, 2005 WL 2456006 (Fla. 2005) (Anstead, J., concurring specially)(citations omitted).

CLAIM II

MR. DARLING RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHEN COUNSEL ABANDONED CLAIMS WHICH HAD BEEN RAISED AND PRESERVED IN THE TRIAL COURT

Trial counsel filed an number of motions challenging the death penalty on July 23, 1998. R Vol. V468 through Vol. VI 610. The State filed a response. Vol. VI 614-22. Evidently the motions were heard and denied, but the record contains neither a transcript of the hearing nor an order disposing of the claims. Darling=s appellate

counsel claimed that the incomplete record violated due process and equal protection because the case could not be adequately reviewed. Initial Brief, Point VIII, at page 83. What appellate counsel did not do was argue the substance any of the motions.

In its response, the State argued that Darling had failed to meet his burden of showing prejudice due to the incomplete record. This Court likewise found that Darling had Afailed to demonstrate what specific prejudice . . . [had] been incurred because of the missing transcripts.@ *Darling v. State*, 808 So.2d 145 (Fla. 2002) at 163. The Court therefore denied relief on the merits. *Id.* Although the Court found that the missing portions of the record had Anot been shown to be necessary for a complete review of this appeal@, the Court did not address the substance of the death penalty motions.

Appellate counsel was ineffective in two respects. First, by failing to argue the substance of the motions, counsel failed even to attempt to meet his burden to demonstrate the prejudice component of his incomplete record claim.

The rule applied here, that there must be a showing of prejudice and that the defendant has the burden of showing it, is itself problematic. In *Vargas v. State*, 902 So.2d 166 (Fla. 3rd DCA Dec 29, 2004), a portion of the record had been destroyed in a fire. The court reversed and granted a new trial, despite the fact that the appellant had been unable, Aeither at the hearing below or on appeal, to identify even a potential source of reversible error in the conduct of the voir dire and instead relies only on the

fact that the possibility that one occurred cannot be totally eliminated in the absence of an appropriate record@. *Id.* A dissenting opinion cited *Darling*. The court certified conflict with *Jones v. State*, 870 So.2d 904 (Fla. 4th DCA 2004). The case is pending before this Court. SC04-1217. Here, Darling asserts that the rule applied here was erroneous, and that this Court=s resolution of this issue on direct appeal was fundamentally flawed.

Second, (alternatively), counsel simply abandoned claims which, as this Court=s disposition necessarily implied, had been adequately raised and preserved for review in the trial court. Some of these claims are reasserted here as instances of ineffective assistance of appellate counsel:

1. The aggravating circumstance of murder during the commission of an enumerated felony (sexual battery) is unconstitutional. This aggravating circumstance is an inherent element of the conviction and constitutes, therefore, an "automatic" aggravating circumstance.

2. Section 921.141, Florida Statutes is unconstitutional because only a bare majority of jurors is sufficient to recommend a death sentence.

3. The jury in penalty phase should have been required to furnish findings of fact. This means that the jury would have been required to reach some form of agreement as to the aggravating or mitigating circumstances which were found.

4. Section 921.141, Florida Statutes is unconstitutional for failure to provide jury

adequate guidance in the finding of sentencing circumstances.

5. The State should be compelled, by way of a statement of particulars, to notify the defendant what aggravating circumstances the State intended to prove at penalty phase.

Claims two through five implicate *Ring v. Arizona* and *Apprendi v. New Jersey*. *Jones v. United States*, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones, at 243, n. 6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. 530 U.S. at 475-476. *Ring v. Arizona*, 122 S.Ct. 2428 (2002), held that a death penalty statute's aggravating factors operate as 'the functional equivalent of an element of a greater offense.' " Ring, at 2441 (quoting Apprendi, 530 U.S. at 494, n. 19).

Apprendi was decided on June 26, 2000. *Ring* was argued April 22, 2002, and decided June 24, 2002. Darling=s reply brief was filed August 3, 2000, however, this Court=s opinion in Darling was issued January 3, 2002; rehearing was denied February 12, 2002. The substance of these issues were or should have been known to appellate counsel. The mere fact that the motions raising them were in the record is

sufficient to show that.

Non-retroactivity is not an issue here because the case was not final during the time that Darling was represented on appeal. Moreover, this Court, which makes its own decisions on retroactivity, has not held that *Ring* and *Apprendi* do not apply retroactively as a matter of state law. *Windom v. State*, 886 So.2d 915, 936-38 (Fla. 2004) (denying relief on grounds other than non-retroactivity); *Witt v. State*, 465 So.2d 510 (Fla. 1985).

Claim one challenges the use of sexual battery as aggravating circumstances because it is an inherent element of the crime of first degree murder under the circumstances of this case. Use of the same felony to establish guilt of first-degree felony murder as an aggravator fails to meet the U.S. Supreme Court's mandate that aggravating circumstances in a state's death penalty scheme must "genuinely narrow the class of persons eligible for the death penalty" and "reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); *Blanco v. State,* 706 So.2d 7, 13 (Fla. 1997) (Anstead, J., concurring). The use of the underlying felony as a basis for any aggravating factor, rendered those aggravating circumstances "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992), therefore, the sentencing process was unconstitutionally unreliable.

Neglecting to raise such fundamental issues "is far below the range of

acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." *Wilson v. Wainwright,* 474 So.2d 1162, 1164 (Fla. 1985). Had counsel presented these issues, Mr. Darling would have received a new trial, or, at a minimum, a new penalty phase. Individually and "cumulatively," *Barclay v. Wainwright*, 444 So.2d 956, 969 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson*, 474 So.2d at 1165.

CLAIM III
EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER OF THE FLORIDA CONSTITUTION[6]

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments," and bars "infliction of unnecessary pain in the execution of the death sentence," *Louisana ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 91 L.Ed. 422, 67 S.Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death . . ." *In re Kemmler*, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S.Ct. 930 (1890).

Specifically, usage of a Acut down@ procedure, and usage of pancurium bromide

[6] *Contra Sims v. State*, 754 So.2d 657 (Fla. 2000).

(pavulon or also pancuronium) or other paralytic, violate both the state and federal cruel and unusual punishment clauses. Moreover, Florida's lethal injection law lacks necessary safeguards, procedures and protocols rendering the administration of lethal injection cruel and unusual punishment. Florida has no coherent set of procedures and fails to designate adequate equipment or trained personnel for the preparation and administration of the injection.

Despite the perception that lethal injection is a painless and swift death, negligent or intentional errors have caused persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, no evidence clearly demonstrates that they become unconscious to their pain and impending death. Based on eyewitness accounts of such executions, coupled with available scientific evidence regarding the hazards, lethal injection is unreliable as a "humane" method for extinguishing life.

CLAIM IV
MR. DARLING=S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION

A prisoner cannot be executed if Athe person lacks the mental capacity to understand the fact of the impending death and the reason for it.@ This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986). The only time a prisoner can legally raise the issue of his sanity to be executed is after

the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. *Poland v. Stewart*, 41 F.Supp.2d 1037 (D. Ariz. 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); *Martinez-Villareal v. Stewart*, 118 S.Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998) (respondent=s Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time).

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Darling respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on November _____, **2005.**

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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