

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.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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The Petitioner, DOLAN DARLING, a/k/a Sean Smith, brought his Petition for

Writ of Habeas Corpus under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V., sec. 3(b)(9), Fla. Const. The Petition presents issues which directly concern the constitutionality of Petitioner'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 context of a capital case in which this Court heard and denied Petitioner's direct appeal. Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969).

Respondent filed their Response to The Petition with argument against Claims I-IV. The Petitioner now Replies to that Response.

ARGUMENT

Introductory Statement

The undersigned relies on the facts and argument 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.

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

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.

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

Mr. Darling relies on the argument and the record cited in his initial Petition for Writ of Habeas Corpus to refute Respondent's Response which alleges that appellate counsel's performance was not so deficient that it compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

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 THE FLORIDA CONSTITUTION**

Respondent relied upon Sims v. State, 754 So.2d 657, 668 (Fla. 2000) for their argument that this claim was without merit. However, the United States Supreme Court granted certiorari on Hill v. Crosby, Case No. 05-8794, (cert. Granted January 25, 2006) since Respondent filed their Response. Petitioner reasserts the argument in the Petition for Habeas Corpus for this claim. Petitioner would additionally argue that the research letter published in April 2005 in The Lancet, a highly respected medical journal, through the analysis of empirical after-the-fact data, concludes that the use of the chemicals prescribed in Florida's execution protocol creates a foreseeable risk of the gratuitous and unnecessary infliction of pain. See Leonidas G. Konaiaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412-14 (2005). This scientific evidence was not available during Darling's direct appeal or during his Rule 3.851 proceeding. The study and its findings constitute new evidence of the effects of execution by lethal injection. This Court did not have the benefit of this or any other scientific study when it concluded that the protocols were constitutional in Sims.

Darling should be granted habeas relief so that he can establish that lethal injection, as administered in Florida, constitutes cruel and unusual punishment. Another trial court in the Fifteenth Judicial Circuit of Florida has ordered that an

evidentiary hearing be conducted on this exact issue in a non-warrant capital case. See Knight v. State, No. 97-05175CFA02 (Fla. Jan. 10, 2006) (granting motion for continuance); Hill v. Florida No. SC06-2 (January 17, 2006). Anstead, J., concurring in part and dissenting in part.

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

Mr. Darling relies on the argument and the record cited in his initial Petition for Writ of Habeas Corpus in support of this claim. 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.

CONCLUSION AND RELIEF SOUGHT

For all reasons discussed herein and in the initial Petition for Habeas Corpus, Mr. Darling respectfully urges this Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Petitioner on March ____, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to 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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