03-8260

IN THE UNITED STATES SUPREME COURT
OCTOBER 2003 TERM

Supreme Court, U.S.
FILED
JAN - 9 2004
CLERK

TYRONE PETER DARKS,	)	
	)	
Petitioner,	)	
	)	
Vs.	)	Case No. _____
	)	
BRAD HENRY, Governor State of Oklahoma,	)	CAPITAL CASE:
	)	EXECUTION PENDING:
RON WARD, Executive Director Oklahoma Department of Corrections,	)	JANUARY 13, 2004 6:00 P.M.
MIKE MULLIN, Warden Oklahoma state Penitentiary,	)	
	)	
Respondents.	)	

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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BASIS OF MR. DARKS' CONFINEMENT

Mr. Darks is presently confined at the Oklahoma State Penitentiary in McAlester, Oklahoma, by Warden Mike Mullin.

Mr. Darks' confinement is pursuant to the judgment and sentence of death by the District Court of Cleveland County, Oklahoma.

Mike Mullin, in his capacity as Warden of the Oklahoma State Penitentiary at McAlester, is charged under Title 22 O.S. § 1001 with the duty of executing Mr. Darks' sentence of death and is presently holding Mr. Darks pending execution of the sentence.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2241 and 2242 and Rule 20 of the Rules of the Supreme Court. Mr. Darks has no other avenue of relief available to him. The State of Oklahoma has failed to appoint counsel for state court proceedings. Therefore he is unable to challenge the denial of counsel and the ruling on the merits of his claim by a petition for a writ of certiorari. A petition for an original writ of habeas corpus is the only avenue of redress available to Mr. Darks.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Article I, Section 9, Clause 2:

The privilege of the Writ of Habeas Corpus shall not be suspended,

unless when in cases of rebellion or invasion the public safety may require it.

U.S. Const. amend. V (excerpt):

> No person shall be ... deprived of life, liberty, or property without due process of law....

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV (excerpt):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

August 11, 1994, Tyrone Peter Darks was charged in the District Court of Cleveland County, Oklahoma, with the First Degree Murder of his ex-wife (O.R. 1-4) The case was numbered as CF-94-1024 and the Bill of Particulars was filed on February 10, 1995 alleging the murder was committed for the purpose of avoiding lawful arrest or prosecution, and the existence of a probability defendant would commit criminal acts of violence constituting a continuing threat to society. (O.R. 57-58)

From October 23-31, 1995, Mr. Darks was tried by jury with the Honorable William C. Hetherington, Jr., District Judge, presiding. Mr. Darks was convicted of Frist Degree Malice Aforethought Murder and the penalty was fixed at death after the jury found one aggravating circumstance: continuing threat. Formal sentence occurred on November 20, 1995.

Mr. Darks appealed to the Oklahoma Court of Criminal Appeals but on February 12, 1998, his appeal was denied. *Darks v. State* 954 P.2d 152 (Okl.Cr.App. 1998). In March of 1998, Mr. Darks' application for state post conviction relief (PC-97-01077, October 13, 1998) was denied. *Darks v. State,* 954 P.2d 169 (Okl.Cr.App. 1998)

November 30, 1998, Mr. Darks' petition for federal habeas relief was filed and the State's response was filed on March 30, 1999. Mr. Darks' reply was on April 12, 1999 and on September 22, 2000, the District Court ordered a limited evidentiary to consider the following pertinent question:

> 1. Whether the failure to request jury instructions on the lesser included offense of first degree manslaughter (heat of passion manslaughter and/or manslaughter by means of a dangerous weapon) was a strategic decision on the part of Petitioner's trial counsel.

The District Court's Order and Memorandum Opinion granting habeas

relief on grounds seven, seventeen and nineteen, dismissing ground twenty (in part) and twenty-one as not being ripe and denying relief on all other grounds was entered on July 13, 2001.

The State appealed the decision and filed its brief on January 26, 2002. Mr. Darks' answer brief was filed on February 22, 2002. Oral argument was held by the Tenth Circuit Court of Appeals in September of 2002 and the order reversing the lower Court's decision was entered on April 11, 2003. *Darks v. Mullin*, ___F.3d___(10th Cir. 2003)(Case No. 01-6308)

Mr. Darks' filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on April 23, 2003 and was denied May 14, 2003. Petition for Writ of Certiorari was filed August 8, 2003, and denied October 20, 2003.

The State has now scheduled an execution by lethal injection to be conducted at 6:00 p.m. on January 13, 2004. Mr. Darks filed a 42 U.S.C.§ 1983 action challenging the constitutionality of the lethal injection protocol used by Oklahoma. The Federal District Court transmitted the matter to the Tenth Circuit Court of Appeals urging that Court to find the issue was one properly submitted in a successor habeas petition. As of this writing, the Tenth Circuit has ordered the State to respond but has issued no other order. This is precisely the issue presently before this Court in the case of ***Nelson v. Campbell*, 347 F.3d 910 (11th Cir. 2003) cert.**

granted. ____S. Ct. ___, 2003 WL 22327593 (2003).

CLAIM ONE

WHEN THE DISTRICT COURT HAS CORRECTLY FOLLOWED THIS COURT'S PRECEDENCE AND HAS CAREFULLY REVIEWED THE FACTS, IS THE CIRCUIT COURT FREE TO DISREGARD THE DISTRICT COURT'S DECISION?

1. In violation of *Beck v. Alabama* , 447 U.S. 624 (1980), the Tenth Circuit has given the jury no option but to convict on the capital charge, even though evidence of the on going domestic dispute was found sufficient by the District Court to instruct on the lesser included offense.

Pertinent Facts:

Mr. Darks was convicted of murdering his ex-wife, Sherry Goodlow. Ms. Goodlow's body was found just before 4:00 p.m. on August 7, 1994, inside her vehicle which was near the intersection of Westminster Road and East Stanley Draper Drive in Cleveland County, Oklahoma. The State alleged at trial the homicide occurred between 3:40 and 3:45 p.m. (Tr. 1275). The spot where the body was found is a relatively unpopulated area about a twenty-five minute drive one way from Mr. Darks' home at 2545 SW 48th, Oklahoma City, Oklahoma. (Tr. 773) According to testimony at trial, Mr. Darks was unaccounted for only between 3:25: p.m. and 3:45 p.m. (Tr. 1152), leaving only a twenty minute window of opportunity in which Mr. Darks could have

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Petitioner,

v.

BRAD HENRY, Governor, State of Oklahoma;
RON WARD, Executive Director,
Oklahoma Department of Corrections;
MIKE MULLIN, Warden,
Oklahoma State Penitentiary,

Respondents.

RESPONSE TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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I.

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II.

THE CLAIMS PRESENTED BY THE PETITIONER IN THE INSTANT APPLICATION MUST BE DISMISSED AS THEY DO NOT MEET THE EXCEPTIONS SET FORTH IN § 2244(b). 8

III.

THE PETITIONER HAS NOT SHOWN EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THIS COURT'S DISCRETIONARY POWERS WHEN HE PRESENTS ONE CLAIM THAT IS *RES JUDICATA* AND IN THE SECOND CLAIM HE PRESENTS HIS ATTACK ON OKLAHOMA'S LETHAL INJECTION PROTOCOL FOR THE FIRST TIME ON THE EVE OF HIS EXECUTION. 11

STATEMENT OF THE CASE

The Petitioner, Tyrone Peter Darks, is incarcerated pursuant to a Judgment and Sentence entered in the District Court of Cleveland County, State of Oklahoma, Case No. CRF-94-1024, for murder in the first degree (malice-aforethought), on November 20, 1995.

Petitioner was tried by a jury of his peers before the Honorable William C. Hetherington, District Judge. The jury found one aggravating circumstance beyond a reasonable doubt: the existence of a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. The jury failed to find the existence of another alleged aggravating circumstance: that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution. Having found the existence of an aggravating circumstance beyond a reasonable doubt, necessary under Okla. Stat. tit. 21, § 701.12, before a penalty of death can be imposed, the jury then assessed the death penalty.

The Court of Criminal Appeals affirmed the Petitioner's convictions and sentences on February 12, 1998, and rehearing denied on March 17, 1998. *Darks v. State*, 954 P.2d 152 (Okla. Crim. App. 1998).

The Petitioner did not file a petition for writ of certiorari in the United States Supreme Court.

The Court of Criminal Appeals denied the Petitioner's application for post-conviction relief on March 19, 1998, *Darks v. State*, 954 P.2d 169 (Okla. Crim. App. 1998).

The Petitioner filed a Petition for Writ of Habeas Corpus in the District Court for the Western District of Oklahoma on November 30, 1998, and an amended petition on January 11, 1999.

The district court granted a conditional writ of habeas relief as to three grounds, dismissed two grounds without prejudice, and denied relief as to all other grounds in the petition on July 13, 2001.

The grant of habeas relief was appealed to the Tenth Circuit Court of Appeals, which reversed the district court on April 11, 2003. *Darks v. Mullin*, 327 F.3d 1001 (10th Cir. 2003). Rehearing *en banc* were denied on May 14, 2003.

Petitioner filed for a petition for writ of certiorari to the Tenth Circuit in this Court, Case No. 03-5873. The sole question presented by Petitioner in his petition, as formulated by him, was:

> Whether Petitioner was deprived of his Fifth, Sixth, Eighth and Fourteenth Amendment rights under *Beck v. Alabama*, to have a jury consider lesser included offenses at his first degree murder trial when the trial judge refused to instruct the jury on the lesser included offense of first degree manslaughter even though the defense had presented evidence of longstanding provocation as circumstantial evidence of adequate provocation which negated the element (absence of adequate provocation) that separates first degree murder from the lesser included first degree manslaughter under Oklahoma law?

This Court denied the certiorari on October 20, 2003. *Darks v. Mullin*, 124 S.Ct. 433 (2003).

Petitioner having exhausted his state and federal remedies, the Oklahoma Court of Criminal Appeals set the execution date of January 13, 2004.

Six days before the date of his execution, on January 7, 2004, Petitioner filed a complaint in the Western District of Oklahoma challenging the use of lethal injection. The next day, January 8, 2004, the District Court transferred the case to the Tenth Circuit Court of Appeals for authorization to file a successor habeas petition. Attachment A.

The Tenth Circuit has not ruled on whether Petitioner has satisfied the requirements of 28 U.S.C. § 2244(b) to file a second or successive habeas petition, granting Petitioner's motion for a stay of execution instead. Attachment

B. This grant of a stay is the subject of an *Emergency Application to Vacate Stay of Execution* pending in this Court in Case No. 03A584.

REASONS FOR DENYING THE WRIT

I.

THE RESTRICTIONS OF 28 U.S.C. § 2244(b) ON FILING SECOND AND SUCCESSIVE APPLICATIONS FOR HABEAS RELIEF APPLY TO ORIGINAL HABEAS PETITIONS PRESENTED IN THIS COURT.

In *Felker v. Turpin*, 518 U.S. 651 (1996), this Court considered, among other issues, the extent to which Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (the "Act") applied to petitions for writ of habeas corpus filed as original matters in this Court. The provisions of Title I pertinent to the instant case are those provisions governing second or successive applications for habeas corpus by state prisoners. Section 2244 (b)(1) and (b)(2) state:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to