

CASE NO. 17-6838

IN THE UNITED STATES SUPREME COURT

MERYL S. MCDONALD,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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Denise Davidson decided to kill her husband, St. Petersburg physician Louis A. Davidson. Mrs. Davidson hired two Miami residents, Meryl McDonald and another man, Robert Gordon, to do the job. Over a period of weeks, McDonald and his cohort surveilled their victim. On the morning of January 25, 1994, the two men went to Dr. Davidson's apartment. After talking their way in they tied and beat the victim, then drowned him in his own bathtub.

Police immediately focused on the wife, and after observing her wiring money to someone, they also began focusing on the recipients - McDonald and Gordon. They accumulated evidence that included eyewitness testimony from the girl who drove them to Dr. Davidson's residence as well as trace evidence that placed both McDonald and Gordon inside the victim's apartment. Some of that evidence included a bloody sweatshirt found in the motel where McDonald and Gordon stayed. Dr. Davidson's DNA was on it, as was human hair and other fibers. The prosecution asked the FBI to conduct microscopic examination, and Lab Analyst Allen was assigned to do the work. Allen concluded that fibers on the sweatshirt matched Dr. Davidson's carpet as well as the green cashmere belt that was used to tie his hands, and hair found on the same piece of clothing was indistinguishable from McDonald's dyed facial hair. In short, whoever wore the sweatshirt was

likely inside Dr. Davidson's apartment at the time he was killed. McDonald was convicted of the murder and ultimately sentenced to death.

Nineteen years after McDonald's trial ended, the FBI re-examined Allen's work and concluded that his testimony regarding the hair in McDonald's case was overstated. Based on this, McDonald filed a motion seeking postconviction relief alleging newly discovered evidence. The trial court denied McDonald's motion, and on appeal to the Florida Supreme Court, McDonald stipulated that there was no error with the lower court's denial of relief on the merits; instead, his argument on appeal was only that the trial court improperly refused to stay his case while he obtained additional records from the FBI. The Florida Supreme Court found no abuse of discretion and affirmed.

McDonald now seeks certiorari review of the trial court's postconviction ruling despite the fact that the Florida Supreme Court was never asked to rule on the merits of the specific questions presented here.

McDonald's claim gives rise to the following questions before this Honorable Court:

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

I. WHETHER PETITIONER MCDONALD ADEQUATELY ASSERTED HIS CURRENT CONSTITUTIONAL CLAIMS FOR CONSIDERATION TO THE FLORIDA SUPREME COURT SO AS TO PRESERVE THIS COURT'S JURISDICTION OVER THE QUESTIONS PRESENTED?

II. WHETHER THIS COURT SHOULD EXERCISE ANY CERTIORARI JURISDICTION THAT MIGHT EXIST TO CONSIDER THE CONSTITUTIONAL PARAMETERS OF AN UNPRESERVED CLAIM OF ACTUAL INNOCENCE BY A STATE PRISONER IN A CASE WHERE NO CREDIBLE EVIDENCE OF ACTUAL INNOCENCE HAS BEEN OFFERED AND WHERE THE STATE TRIAL COURT DECISION RESOLVING THE ISSUE DOES NOT CONFLICT WITH ANY RELEVANT FEDERAL DECISION?

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The decision of the Florida Supreme Court is reported at McDonald v. State, ___ So. 3d ___, 2017 WL 2709773 (Fla. June 23, 2017), reh'g denied, ___ So. 3d ___, 2017 WL 3764370 (Fla. Aug. 31, 2017).

In addition to the constitutional provisions cited in the Petitioner's brief, Respondent adds Florida Rule of Criminal Procedure 3.851, which provides in relevant part:

(d) Time Limitation.

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period

provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

Respondent further adds Florida Rule of Appellate Procedure

9.330(a), which provides in relevant part:

A motion for rehearing, clarification, certification, or issuance of a written opinion may be filed within 15 days of an order or within such other time set by the court. A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding.

STATEMENT OF JURISDICTION

Respondent agrees that any jurisdiction this Court may have over the Florida Supreme Court arises out of 28 U.S.C. § 1254(1) as the basis of jurisdiction in this Court. However, this Court's jurisdiction is limited to federal constitutional issues which were presented and considered by the Florida Supreme Court below. Illinois v. Gates, 462 U.S. 213, 217-19 (1983); Webb v. Webb, 451 U.S. 493, 496-97 (1981). As will be addressed more fully in the argument section of this brief, this Court does not have jurisdiction over the questions presented in McDonald's petition because they were affirmatively waived in his appellate brief in the Florida Supreme Court. A copy of that brief is attached hereto as Appendix A.

STATEMENT OF THE CASE AND FACTS

Petitioner, Meryl McDonald, a Florida prisoner under sentence of death for the murder of Dr. Louis Davidson, seeks certiorari review of the Florida Supreme Court's decision affirming McDonald's third successive postconviction challenge pursuant to Fla. R. Crim. Proc. 3.851.

McDonald was tried jointly with his co-defendant, Gordon. The facts adduced at McDonald's trial are set out in the Florida Supreme Court's opinion affirming co-defendant Gordon's conviction and death sentence. In Gordon v. State, 704 So. 2d

107, 108-09 (Fla. 1997), the Florida Supreme Court set forth the following summary of the facts:

Dr. Louis A. Davidson and his wife Denise were in the midst of a bitter custody battle and divorce. Both were engaged to other people at the time of Dr. Davidson's murder; Mrs. Davidson was engaged to another codefendant, Leonardo Cisneros.

Mrs. Davidson and Cisneros arranged for McDonald and Gordon to kill her husband. To that end, they made several trips from Miami to Tampa in late December 1993 and early January 1994, where several witnesses, including Gordon's friend Clyde Bethel, [n2] testified that they met Cisneros, met with a lady about some money they were owed, drove past a hospital to see an emergency room, and went to the Thunder Bay Apartments to see about renting an apartment.

n2 Bethel was one of at least five people who drove Gordon and McDonald from Miami to Tampa in the weeks and months preceding the murder. The other individuals who, along with Bethel, testified to these trips at trial were Patricia Vega, Maurice Dixon, Brenda King, and Claudia Williams.

On January 24, 1994, McDonald and Gordon hired Susan Shore to drive them from Miami to Tampa so that they could visit a friend and "pick up a piece of paper." [n3] Upon arriving in Tampa, they met with a lady Shore later identified as Mrs. Davidson and someone named "Carlos," whom Shore later identified as Cisneros. After McDonald, Gordon, and Shore checked into a Days Inn, Cisneros came by and left with McDonald and Gordon. McDonald and Gordon returned later than night.

n3 The "piece of paper" may have been letters from Mrs. Davidson to Dr. Davidson or vice versa. A fellow employee of Mrs. Davidson's, Pam Willis, spent the night of January 25, 1994, at Mrs. Davidson's home. That was the same day Dr. Davidson was murdered. While at Mrs. Davidson's house, Willis smelled smoke and saw burnt ashes

in the bathroom. The next day, Mrs. Davidson told Willis "that that was old letters that she didn't want anybody to read from the doctor that she had burned."

Early the next morning, January 25, 1994, they drove to Thunderbay Apartments in St. Petersburg to "where their friend lived," presumably Dr. Davidson. While they waited for Dr. Davidson to return from his night shift at Bayfront Hospital, McDonald got out of the car and said he was going jogging. Shore and Gordon played catch with a cricket ball on the apartment grounds. When Dr. Davidson pulled into the parking lot a short time later, Gordon told Shore, "Here is my friend. You can go sit in the car now." While Gordon went over and talked to Dr. Davidson, Shore sat in the car and read a newspaper. Shore testified that Davidson and Gordon then walked toward Davidson's apartment, with Gordon following Davidson. She last saw Davidson and Gordon going underneath the stairwell immediately adjacent to Davidson's apartment door. Gordon came back to the car about twenty to twenty-five minutes later; McDonald returned five to ten minutes after Gordon. McDonald told Gordon that "he had the piece of paper." McDonald patted his stomach and Shore heard something crinkle.

Shore testified that as they drove back to the hotel, McDonald called "Carlos" on his cell phone and said "he had it." "Carlos" came to the hotel, talked with McDonald and Gordon, and then left. "Carlos" later returned with the lady they had met with upon their arrival in Tampa. Shore identified a picture of Mrs. Davidson as the lady she had seen. A short time later, Shore, McDonald, and Gordon drove back to Miami.

Dr. Davidson's body was discovered later that day by his fiancée, Patricia Deninno. She found him blindfolded, bound, gagged, and hogtied, lying face down in a bathtub full of bloody water. He was tied with a vacuum cleaner cord and a cashmere belt. Pieces of towel were wrapped around his head and used as a gag. The toilet bowl had been broken off its foundation and the resulting water leak had partially flooded the apartment. Blood was spattered on the

bathroom walls and the apartment had been ransacked. There was no indication of forced entry. Shoe prints were found on a tiled floor in the apartment. Dr. Davidson's watch, a camera, and a money clip with several hundred dollars were missing. Although the apartment had been ransacked, \$19,300 in cash and some credit cards remained.

The police placed Mrs. Davidson under surveillance shortly after Dr. Davidson's murder. Using the name "Pauline White," Mrs. Davidson subsequently made numerous trips to Western Union. Evidence was later presented that twenty-one money transfers were made, both before [n4] and after the murder, with nineteen going to Gordon. [n5] McDonald's girlfriend, Carol Cason, picked up two of the transfers at his request.

n4 Mrs. Davidson began sending Gordon and McDonald money as early as August 1993.

n5 At oral argument, the State estimated that the amount transferred from Mrs. Davidson to Gordon and McDonald exceeded \$ 15,000. On rebuttal, Gordon's counsel did not challenge that figure. The State further noted that Gordon and McDonald also received an undisclosed amount of money on each of the four trips they made from Miami to Tampa.

The police also obtained phone records which showed numerous contacts among the codefendants both prior to and after the murder. The records showed that on the day of the murder, Mrs. Davidson called McDonald's beeper fifty times during a period of two and a half hours. Mrs. Davidson also bought a cell phone and gave it to McDonald and Gordon, which was then used repeatedly to make hang-up calls to Dr. Davidson's home and place of work. Several Thunder Bay employees testified that McDonald and Gordon were in the management office on January 18, 1994, and received a copy of the floor plan to Dr. Davidson's apartment. Gordon's friend, Clyde Bethel, confirmed that McDonald and Gordon visited Dr. Davidson's apartment complex that day.

Physical evidence was also recovered from the Days Inn where McDonald, Gordon, and Shore spent the nights of January 24-25, 1994. A sweatshirt and a pair of tennis shoes were found in their room. The tennis shoes had the same sole pattern as the shoeprints found in Dr. Davidson's apartment. Flecks of human blood were found on the shoes, but the sample was too small to match. The sweatshirt contained fibers from Dr. Davidson's carpet and Deninno's cashmere belt, as well as hairs that matched McDonald's. Dr. Davidson's blood sample matched the DNA found in stains on the sweatshirt. Receipts confirmed that on the day before the murder, Denise Davidson had purchased a pair of sneakers, a gray sweatshirt, and a purple sweatshirt.

The associate medical examiner, Dr. Marie Hansen, testified that Dr. Davidson had bruises on his face and shoulders, three broken ribs, and multiple lacerations on the back of his scalp, probably caused by a blunt object. The cause of death was drowning. The medical examiner could not determine whether Dr. Davidson was conscious when he died, saying it was possible that he was knocked unconscious by the first blow to his head. Dr. Hansen also testified that from the multiple bindings on his wrists, Dr. Davidson had probably freed one of his wrists during the altercation, only to be re-tied with the belt.

Gordon, 704 So. 2d at 108-110.

Direct Appeal

The Florida Supreme Court affirmed his conviction and death sentence in McDonald v. State, 743 So. 2d 501, 507 (Fla. 1999). McDonald did not file a Petition for Writ of Certiorari.

State Postconviction Proceedings

McDonald's first motion for postconviction relief included claims challenging counsel's effectiveness regarding the hair, fiber, and DNA evidence. The Florida Supreme Court affirmed the

trial court's denial of relief. McDonald v. State, 952 So. 2d 484, 489 (Fla. 2006).

Federal Habeas Corpus Proceedings

McDonald's habeas corpus petition, which included challenges to the State's use of hair, fiber and DNA evidence, was denied by the district court. No Certificate of Appealability was granted.

Successive Postconviction Proceedings in the State Court

McDonald subsequently filed a successive postconviction motion in the state court, in which he reasserted his claims that counsel was ineffective in failing to exclude or effectively challenge hair, fiber, and DNA evidence used at his trial. The Florida Supreme Court affirmed the trial court's denial of relief. McDonald v. State, 117 So. 3d 412 (Fla. 2013). This Court denied certiorari review. McDonald v. Florida, 134 S. Ct. 438 (2013).

McDonald's next successive postconviction motion, which again challenged hair, fiber, and DNA evidence used at his trial, was dismissed because it was procedurally barred under Florida's Rule 3.851. Prior to dismissal, collateral counsel unsuccessfully asked the court to enter a stay because the defense needed time to procure additional documents from the FBI. On appeal, collateral counsel did not challenge the lower

court's ruling on the merits, but instead argued that refusing his request for a stay was an abuse of discretion. The Florida Supreme Court affirmed. McDonald v. State, ___ So. 3d ___, 2017 WL 2709773 (Fla. June 23, 2017), reh'g denied, ___ So. 3d ___, 2017 WL 3764370 (Fla. Aug. 31, 2017). The instant Petition seeking certiorari review followed.

REASONS FOR DENYING THE WRIT

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE QUESTIONS PRESENTED IN THE CERTIORARI PETITION BECAUSE THEY WERE NOT ASSERTED TO THE FLORIDA SUPREME COURT BELOW.

As an initial matter, this Court must first determine the question of jurisdiction. This Court has repeatedly held that it lacks jurisdiction to review constitutional issues which were not fairly presented to and considered by the lower court. Illinois v. Gates, 462 U.S. 213, 217-19 (1983); Webb v. Webb, 451 U.S. 493, 496-97 (1981). A review of the appellate brief filed by McDonald below (attached hereto as Appendix A) reveals that his current claims were affirmatively waived by the defense as lacking merit before the Florida Supreme Court. This Court lacks jurisdiction to consider the questions presented in the Petition because Florida's highest court never considered them; indeed, counsel deliberately chose not to raise them on appeal.

The Petition in this case offers two questions which

essentially pertain to McDonald's unpreserved claim of actual innocence. Both questions are premised on his constitutional right to due process and assert that his conviction was only achieved through improperly adduced evidence- specifically, the allegedly flawed hair and fiber analysis (Question 1) and the allegedly falsified DNA test results (Question 2).

In the trial court, McDonald sought to raise claims pursuant to both Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963); both were deemed procedurally barred because neither claim amounted to "newly discovered evidence" as that term is defined under Florida law. In McDonald's brief to the Florida Supreme Court, McDonald conceded that the trial court correctly denied relief and instead raised a different claim (App. A30, 36). The Florida Supreme Court accepted the defense's concession and never expressly ruled on whether any Giglio or Brady violation occurred. Indeed, the only matter before the state appellate court was whether the trial court had abused its discretion in refusing to enter a stay to afford the defense time to obtain additional records. Accordingly, the questions advanced in his Petition are unexhausted, unpreserved, and beyond the scope of this Court's jurisdiction. This Court must deny the Petition for Writ of Certiorari.

II. CERTIORARI SHOULD BE DENIED BECAUSE, EVEN IF PRESERVED, THE FLORIDA TRIAL COURT'S REJECTION OF MCDONALD'S CLAIM DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR A FEDERAL CIRCUIT COURT OR A STATE COURT OF LAST RESORT.

Even if this Court agreed to consider any aspect of the Questions Presented in McDonald's Petition, this case does not warrant certiorari review. McDonald seeks this Court's review of a Florida trial court opinion affirming the denial of a successive motion for postconviction relief. The Questions Presented and reasons asserted to support certiorari review arise out of McDonald's belief that his conviction was obtained through presentation of flawed evidence that included hair, fibers, and DNA analysis. This case does not compel jurisdiction under this Court's guidelines and, as the trial court properly concluded, there is no credible claim that McDonald is actually innocent of Dr. Davidson's murder.

1. The Florida Trial Court's rejection of McDonald's claims does not conflict with any decision of this Court, a federal circuit court, or a state court of last resort, and does not present any unsettled question of federal law.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling

nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

McDonald does not suggest that any of these considerations are applicable in this case. In fact, he asks this Court to exercise what he refers to as its "supervisory powers" (Petition, p. 36) in a bid to obtain merits review of collateral claims that the Florida Supreme Court rightly deemed waived. Aside from the fact that this Court's supervisory powers over a state trial court decision are markedly limited in scope (if indeed this Court has any because of the limitations imposed by our system of Federalism), McDonald's position is more accurately viewed in terms of his disagreement with collateral counsel's actions. Indeed, when viewed at its most fundamental

level, McDonald is effectively asking this Court to grant relief because, in his view, his postconviction appellate counsel was ineffective.¹

It is significant to note that the arguments McDonald sought to advance were presented to the trial court at a time when McDonald was acting *pro se*; once counsel was appointed and he had an opportunity to review the record, he candidly admitted in his brief to the Florida Supreme Court that there was no good faith argument he could make in support of McDonald's preferred claim that the trial court had erred (see Appendix A pp. 30, 32 at note 15). Instead, on appeal from the trial court's rejection of McDonald's successive postconviction motion, appellate counsel advanced a far more reasonable argument- whether the trial court should have given the defense more time to secure additional documentation that might support McDonald's position.

¹ Respondent notes that there is no constitutional right to the assistance of collateral counsel. Martinez v. Court of Appeal, 528 U.S. 152, 159-60 (2000); Murray v. Giarratano, 492 U.S. 1, 10 (1989). Even if this Court were to consider the effectiveness question implicitly raised by McDonald, the factual underpinnings of such a claim remain undeveloped and certiorari review would be premature at best. Moreover, a decision not to advance a given argument in favor of one that counsel deems stronger is the essence of effective appellate representation. Even if this Court were to consider McDonald's claim in terms of ineffective assistance of appellate counsel, this Court's jurisprudence would mandate affirmance. Davila v. Davis, 137 S. Ct. 2058, 2067, (2017). ("Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed.").

The Florida Supreme Court properly rejected this argument.

Under Florida law, trial courts have broad discretionary powers over scheduling, Walton v. State, 3 So. 3d 1000, 1012 (Fla. 2009), and a decision to deny McDonald's request for a stay so that the defense might have more time to investigate his claim was not an abuse of that discretion, the Florida Supreme Court concluded. McDonald, 2017 WL 2709773 at 1. There is clearly no Federal constitutional violation in either the trial court's actions or the Florida Supreme Court's affirmance; in any event, collateral counsel's reasoned decision to advance a given claim instead of those preferred by his client fails to establish ineffectiveness under Strickland v. Washington, 466 U.S. 668 (1984).

Moreover, this Court has recognized that it does not function in a general supervisory capacity over state courts. McDonald's attempt to secure this Court's interference with state proceedings must be rejected. He has offered no authority for the actions he is requesting this Court to take. This Court has expressed no desire to take jurisdiction merely to re-write state procedural law, or to require that state courts must hear the merits of any particular claim at any particular time. See Michigan v. Long, 463 U.S. 1032, 1039-42 (1983); Wainwright v. Sykes, 433 U.S. 72, 81-85 (1977).

The Florida Supreme Court declined to address McDonald's state law claim because it found that the parties agreed that it lacked merit. McDonald, 2017 WL 2709773 at 1: "In this appeal, McDonald concedes that his third rule 3.851 motion is meritless and does not challenge its denial." This holding does not implicate any of the bases for jurisdiction outlined in Rule 10. To the extent that McDonald suggests that he is actually innocent and that such a claim presents an unsettled question of federal constitutional law which should be decided by this Court, he is mistaken. In fact, this Court considered the implications of a legitimate claim of innocence in several cases.

In District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009), this Court addressed the requirements of due process in the context of a civil rights action filed under 42 U.S.C. § 1983 with regard to a request for DNA testing by a state inmate. In Osborne, this Court specifically considered whether Alaska's procedures for postconviction relief violated Osborne's federal right to due process of law. In reversing the Ninth Circuit Court of Appeals' finding that Osborne's rights had been violated by the state court procedures, this Court outlined the appropriate considerations and analysis:

A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." Herrera v. Collins, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." Dumschat, supra, at 464, 101 S.Ct. 2460² (internal quotation marks and alterations omitted).

The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." Pennsylvania v. Finley, 481 U.S. 551, 559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. Brady is the wrong framework.

Instead, the question is whether consideration of Osborne's claim within the framework of the State's procedures for postconviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." Medina v. California, 505 U.S. 437, 446, 448, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (internal quotation marks omitted); see Herrera, supra, at 407-408 (applying Medina to postconviction relief for actual innocence); Finley, supra, at 556, 107 S.Ct. 1990 (postconviction relief procedures are constitutional if they "compor[t] with fundamental fairness"). Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

² Connecticut Bd. Of Pardons v. Dumschat, 452 U.S. 458 (1981).

Osborne, 557 U.S. at 68-69.

Accordingly, this Court rejected Osborne's plea to "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause." Osborne, 557 U.S. at 55.

In this case, McDonald has not asserted that Florida's procedures governing postconviction review "are fundamentally inadequate to vindicate the substantive rights provided." To the contrary, he was permitted to file a successive motion for postconviction relief -- his third since his 1994 conviction and, indeed, McDonald currently has a pending *fourth* successive postconviction motion addressing the same essential issues still awaiting resolution in Florida. The fact that the state trial court rejected the claim McDonald is attempting to raise here does not offend due process or restrict his entitlement to any limited liberty interest that McDonald has identified. The concerns which McDonald expresses in his petition are not of constitutional dimension and need not be considered; as with Osborne's case, "[t]here is no reason to constitutionalize the issue in this way." Osborne, *id.*

McDonald has not asserted, let alone demonstrated, that

Rule 10 provides any basis for certiorari review in this case. As no compelling reason for review has been offered, certiorari should be denied.

2. Petitioner McDonald has not offered any credible evidence of innocence.

Even if this Court were inclined to consider McDonald's implied claim of actual innocence, this would not be a reasonable case to explore the issue. First of all, McDonald's Petition before this Court is procedurally infirm; he presents his claims as though this Court were nothing more than just another court of review, and his argument is limited entirely to whether the trial court correctly applied Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963). He advances no suggestion of an unsettled federal question, or indeed any conflict whatsoever as a basis for invoking this Court's certiorari jurisdiction. Review by this Court would instead amount to nothing more than an assessment of whether the trial court correctly applied the law, a determination that would invoke no broad constitutional questions and which at bottom matters to no one other than the defendant himself.

Secondly, McDonald advances the same meritless arguments that the Florida Supreme Court rejected four years ago, McDonald

v. State, 117 So. 3d 412 (Fla. 2013), and which this Court declined to consider on certiorari review. McDonald v. Florida, 134 S. Ct. 438 (2013). McDonald's assertion of innocence is founded upon the following:

(A) the allegation that the prosecutor knowingly presented false testimony at trial to demonstrate that hair found on a sweatshirt recovered from McDonald's motel room was microscopically identical to McDonald's facial hair, and that two different groupings of fibers recovered from the same sweatshirt most likely came from carpeting in the victim's apartment as well as from the cashmere belt used to tie the victim prior to his murder;

(B) allegedly false DNA testing showing that blood found on McDonald's sweatshirt came from the victim; McDonald claimed that the testing was never actually completed, and prosecution testimony regarding the results of such analysis was false and deliberately perjured.

McDonald has been arguing the same thing for years- that DNA, hair and fiber evidence linking him to the victim's murder was either faked, flawed, planted, or perjured. For example, McDonald sought relief based upon what he asserted was "newly discovered evidence" in a successive postconviction motion filed in the State trial court in 2012. Under Florida's Rule 3.851, a

successive motion seeking postconviction relief is barred if filed more than one year after the defendant's conviction has become final unless the defendant establishes good grounds for failing to timely file. The Florida trial court rejected McDonald's 2012 motion thusly:

"As previously noted, McDonald contends that the State committed Brady violations "by failing to disclose material FBI scientific files related to prior to trial." However, in his initial motion for postconviction relief, McDonald raised multiple claims addressing the FBI reports concerning the blood, hair, and shoeprint evidence. This court found that McDonald was not entitled to relief on these grounds. [See Exhibit A: February 10, 2003, Order, pp. 10-13, 17-30, 33-34]. Likewise, the District Court also determined that McDonald's contentions did not entitle him to relief. [See Exhibit B: May 6, 2011, Order, pp. 9-12, 42, 45-56]. McDonald neither explains how the FBI reports constitute newly discovered evidence nor does he allege that the existence of the FBI reports was unknown to him or trial counsel at the time of trial or his initial postconviction motion. To the contrary, the record makes clear that McDonald was fully aware of the FBI reports as he addressed them in both his initial motion for postconviction relief and his federal habeas corpus petition. [See Exhibit A: February 10, 2003, Order; Exhibit B: May 6, 2011, Order].

McDonald additionally argues that the State committed a Giglio violation by presenting false testimony during trial. McDonald argues that Agent Vick, Agent Allen, and Detective Celona falsely testified about the testing performed on the evidence used in the State's prosecution; namely the hair samples, shoeprints, and blood samples. However, this court addressed these issues in its order denying McDonald's initial motion for postconviction relief and found them to be without merit. [See Exhibit A: February 10, 2003, Order, pp. 12-13, 19-20]. McDonald also presented these allegations to the District Court

in his federal habeas corpus petition, which the District Court denied. [See Exhibit B: May 6, 2011, Order, pp. 9-12, 42, 45-56]. McDonald has been aware of Agent Vick, Agent Allen, and Detective Celona's testimony since trial and he provides no valid argument as to how their testimony could now qualify as newly discovered evidence.

Based upon the foregoing, the court finds that the allegations McDonald puts forth in his motion do not constitute newly discovered evidence as required by rule 3.851(d)(2)(A). Consequently, McDonald has failed to bring timely, cognizable claims in this motion. Therefore, McDonald's motion for postconviction relief is denied.

Additionally, as the State contends, this court notes that McDonald's motion has not fulfilled the requirements of rules 3.851(e)(2)(C) and 3.851(f)(1). However, despite these deficiencies, the court considered McDonald's motion and such deficiencies had no bearing on this court's findings.

As a corollary to his motion for postconviction relief, McDonald also filed a "Motion for Copy of Agent Chris Allen FBI 1994 Hair Analysis Report" and "Motion to Allow Discovery in the Form of Depositions of FBI Agents Michael Vick, Chris Allen and Audrey G. Lynch." However, as this court has denied McDonald's motion for postconviction relief, these requests are dismissed as moot.

Accordingly, it is ORDERED AND ADJUDGED that McDonald's "Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," is hereby DENIED.

Appendix B, pp. 3-5.

Indeed, McDonald has advanced the same claims multiple times at both State and Federal levels, and every court has rejected his arguments. More recently, the Florida Supreme Court

again denied relief in 2013 because it agreed with the trial court that the claims were procedurally barred; his claims are untimely under the applicable rule. McDonald 117 So. 3d at 412. As noted *supra*, this Court declined certiorari review. McDonald was unable to persuade this Court to consider his claims then, and he has advanced no compelling reason for it to do so now.

McDonald was hired by his victim's wife to kill her husband, apparently because she felt it was a more convenient way to resolve the vigorously contested custody dispute over their six-year-old daughter. Financial records showed the wife paid McDonald and his accomplice over \$15,000 within a few weeks of the murder. McDonald lived nearly 300 miles away, in Miami, and there was no reason for him to target Dr. Davidson, who resided in St. Petersburg, other than that he was hired by the victim's wife. Susan Shore drove McDonald to the victim's apartment, and she testified against McDonald at his trial. Other eyewitnesses placed Shore and McDonald's co-defendant, Gordon, outside the victim's apartment at the approximate time of his murder. DNA testing proved that the victim's blood was on a sweatshirt recovered from McDonald's motel room; the same sweatshirt bore cashmere fibers identical to the green cashmere belt used to tie the victim's hands before he was beaten and then drowned in his own bathtub. Even without the disputed

testimony that McDonald has repeatedly sought to challenge, there remains ample evidence establishing his guilt.³

In short, McDonald has been given multiple opportunities to plead his case but has never presented any credible evidence to support his claim that he is innocent or that he was falsely convicted because of due process or any other constitutional violation. There is no basis for granting certiorari review of this case. There is no conflict between the Florida Supreme Court opinion and any other relevant decision, and no unsettled question of federal law to be resolved. In addition, McDonald does not offer any factual support to compel consideration of the legal issues he presents. Accordingly, this Court should decline to accept certiorari review.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

³ Notably, McDonald erroneously asserts to this Court that newly discovered evidence from the FBI implicated the reliability of both hair *and* fiber comparison testimony by Agent Allen. To the contrary, the FBI has only suggested that Allen's testimony regarding hair comparison analysis exceeded permissible scientific boundaries. Allen also testified that carpet and cashmere fibers found on McDonald's sweatshirt matched similar fibers found in the victim's residence, and there is no statement from the FBI, or any other source, challenging the reliability of that testimony.

Respectfully submitted,
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2017, I electronically filed the foregoing with the Clerk of the Court by using the E-Filing System. I further certify that I forwarded the original and copies to the Clerk of the Court via third party carrier and served a copy by U.S. mail to: Meryl S. McDonald, DC #180399, Union Correctional Institution, Housing P2224, Post Office Box 1000, Raiford, Florida 32083.

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