No. 18-7820

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

Supreme Court, U.S.
FILED
JAN 24 2019
OFFICE OF THE CLERK

MERYL MCDONALD,
Petitioner,

v.

JULIE JONES,
as the Secretary of the Florida
Department of Corrections,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Petitioner pro se

CAPITAL CASE

QUESTION(S) PRESENTED

I.

Whether the voir dire examination oath provision of Rules 3.191 and 3.300(a) of the Florida Rules of Criminal Procedure is a *jurisdictional fact,* as such is defined by the U.S. Supreme Court in *Noble v. Union River Logging and Railroad Co.,* 13 S.Ct. 271, 147 U.S. 165 (1893), the existence of which is necessary to the validity of a Florida criminal jury trial proceeding, and without which the action of the court fails for want of jurisdiction over the person or subject-matter, constituting a denial of a defendant's due process right guaranteed by the 14th Amendment to the U.S. Constitution.

II.

Whether Petitioner's habeas challenge to the jurisdictional validity of the trial court's act of issuing its order appointing postconviction counsel as legal representative in Petitioner's case, an act Petitioner challenges as a proceeding jurisdictionally wanting, serve as sufficient basis for pro se filing of his habeas petition; and, if so, whether the Florida Supreme Court's dismissal of Petitioner's habeas petition violate Petitioner's 14th Amendment right to due process.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The caption of this case contains the names of all parties to this proceeding, both here and before the Supreme Court of Florida. No corporations or parent corporations are involved in this matter.

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The judgment of the Supreme Court of Florida that is the subject of this Petition is reported as *McDonald v. State*, case no. SC18-1177 (Fla. Oct. 26, 2018), and is contained in the accompanying Appendix A.

BASIS FOR INVOKING THE COURT'S JURISDICTION

The judgment of the Supreme Court of Florida that is the subject of this Petition was entered on Oct. 26, 2018. A petition for writ of certiorari to review that judgment is timely if filed within 90 days after its entry. Sup. Ct. R. 13.1. As Petitioner filed this Petition within that number of days after the Supreme Court of Florida entered its judgment it is timely, and the Court's jurisdiction to review the question presented exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented involve the 6th Amendment to the United States Constitution, which provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; and the 14th Amendment to the United States Constitution, which provides in pertinent part that: "No State shall ... 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 law."

STATEMENT

Petitioner, a capital defendant, filed a "Petition for Writ of Habeas Corpus Raising a Jurisdictional Question" in the Supreme Court of Florida. Petitioner alleged in his petition that the trial court, by failing to swear the prospective jury panel for voir dire examination—as required under Florida Rules of Criminal Procedure 3.191(a) and 3.300(a)—for his specific trial, constituted a failure to perform a jurisdictional fact necessary to invoke its power to exercise its jurisdiction over the trial of his case. (Appendix B). The Florida Supreme Court, electing not to require the State to respond to Petitioner's habeas petition, dismissed Petitioner's pleading as "an unauthorized impermissible filing." (Appendix C).

The jurisdictional, upon which petitioner's habeas petition was premised, was never addressed on the merit.

A. Legislative and Judicial History of Florida's Rule 3.191/3.300 Voir Dire Examination Oath Prerequisite.

This case involves the construction of rules 3.191 and 3.300 voir dire examination oath provisions of the Florida Rules of Criminal Procedure, as amended in 1980, in light of *The Florida Bar,* 389 So.2d 610 (Fla. 1980), and subsequent cases. Construction of the 1980 amendments to the Florida Rules of Criminal Procedure relevant hereto is aided by an understanding of the background of Florida's rule 3.191/3.300 voir dire examination oath prerequisite.

Under Laws 1939, ch. 19554, the Florida Legislature enacted "An Act Relating to Criminal Procedure," which included among its numerous entries the § 183 "Examination of jurors" provision governing the swearing of jurors prior to commencement of voir dire examination proceedings for the trial of a criminal cause. Section 183 mandated that:

> "The jurors shall be sworn, either individually or collectively, as the Court may decide, to answer truthfully all questions put to them regarding their competence to serve as jurors. The Court shall then examine each juror individually, except that, with the consent of both parties, it may examine the jurors collectively. Counsel for both state and defendant shall be permitted to propound pertinent questions to the jurors after such examination by the Court."

This prerequisite, originally codified under § 913.02, Florida Statutes, was later introduced under Rule 1.290 (presently 3.300) as a procedural constituent of the original compilation of the Florida Rules of Criminal Procedure brought into lawful effect in 1968, providing as follows:

> (a). *OATH.*—The prospective jurors shall be sworn collectively or individually, as the court may decide, to answer truthfully all questions put to them regarding their competency to serve as jurors. The form of oath shall be as follows:
>
> "Do you solemnly swear (or affirm) that you will answer truthfully all questions asked of you about your competency to serve as jurors, so help you God?"
>
> If any prospective juror affirms, the clause "so help you God" shall be omitted.

(b). *EXAMINATION.*—The court shall then examine each prospective juror individually, except that, with the consent of both parties, it may examine the prospective jurors collectively. Counsel for both state and defendant shall be permitted to propound pertinent questions to the prospective juror after such examination by the court.

. . . .

See In re Florida Rules of Criminal Procedure, 196 So.2d 124, 158 (Fla. 1967). Section 913.02 was later repealed by Laws 1971, ch. 70-339, § 180.

Subsequently, Laws 1971, ch. 71-1(B), § 6, amended the "Right to Speedy Trial" provision of F.S. 918.015, designating the then single paragraph subsection (1) and adding Subsection (2) to read:

"(1)—In all criminal prosecutions the state and the defendant shall each have the right to a speedy trial.

"(2)—The Supreme Court shall, by rule of said court, provide procedures through which the right to a speedy trial as guaranteed by subsection (1) and by Section 16 of Article I of the Florida Constitution shall be realized."

Immediately thereafter the Florida Supreme Court amended the Florida Rules of Criminal Procedure by the addition thereto of the rule currently known as Speedy Trial Rule 3.191. The inaugural rule not only provided that a person charged with a crime be brought to trial within a specified period of time, but, under the rule's "Commencement of Trial" provision, even went so far as to define "brought to trial," stating thereunder that a defendant "shall be deemed to have been brought to

trial if the trial commences within the time" therein provided. The term "commences" was then defined more specifically as follows:

> "The trial is deemed to have commenced when the trial jury panel is sworn for voir dire examination, or, upon waiver of a jury trial, when the proceedings begin before the judge." *In re Florida Rules of Criminal Procedure,* 245 So.2d 33, 34 (Fla. 1971).

In the case of *Maines v. Baker,* 254 So.2d 207 (Fla. 1971), the Florida Supreme Court addressed an original proceeding in mandamus involving the constitutionality of Speedy Trial Rule 3.191, where on the Monday morning of September 27, 1971, the last day upon which Maines could be brought to trial under the rule, a panel of prospective jurors was sworn in by the clerk and examined by the court as to their qualification. Neither the prosecuting attorney, defendant, nor defendant's counsel was present during the proceeding. Later that day, jurors from that panel were called for the trial of Maines. No further oath was administered to the jury, but voir dire examination for selection of trial jurors proceeded until 11:15 p.m. that night. The panel was exhausted by peremptory challenges and the case recessed until the following day, when Maines moved for discharge under the speedy trial rule. The trial court denied the motion and held the rule to be constitutional. The Supreme Court upheld the constitutionality of the rule and denied Maines' application for mandamus; holding that where the panel was sworn on the last day for trial under the speedy trial rule, trial was timely commenced even though the panel was exhausted and the case recessed to the following day. Incident thereto, the

Court said: "It is elementary that a trial jury panel is first sworn before any questions (a voir dire examination) are asked the jurors." *Id.* at 208.

Subsequent to the *Maines* holding, various state appellate courts addressing allegations of speedy trial violations likewise referred to the Monday morning swearing of a large body of prospective jurors by the clerk in a designated jury pool assembly area, outside the presence of both the state and the defendant, as satisfactory of the requirement of the Rule 3.300 voir dire examination oath provision and, thusly, as the valid point of trial commencement under the speedy trial rule.

The appropriateness of the jury pool assembly room swearing process was brought into question for the first time in the Fourth District Court of Appeals when the swearing of the jury panel—for speedy trial purposes—became an issue in the case of *Moore v. State,* 358 So.2d 1129 (Fla. 4th DCA 1978), where it was disclosed that on a Monday, the last day of the defendant's speedy trial period, a large body of prospective jurors was sworn by the clerk in readiness as to their qualifications to serve as jurors. None of those jurors were seated for voir dire examination in Moore's case, nor was any other action taken with reference to his particular trial on that day. Upon appeal taken from the denial of the ensuing motion for discharge the 4th DCA held:

> "We affirm, somewhat reluctantly. We are not offended at the thought that the initial swearing should prove sufficient to toll the speedy trial time; however, we find it difficult to accept the premise that this commences a particular trial. Notwithstanding our difficulty,

the end result of this affirmance permits prospective jurors to be sworn on a Monday, in accordance with Fla.R.Crim.P. 3.300, and not actually be examined for the defendant's particular trial until Friday, four days beyond the 180 day limit[.]

". . . .

"Realizing that this opinion creates a conflict and being convinced that this is a matter of great public interest we therefore certify the following question to the Supreme Court.

"FOR THE PURPOSES OF THE 180 DAY RULE, DOES THE TRIAL COMMENCE UNDER RULE 3.191(a)(3) WHEN THE INITIAL OATH IS ADMINISTERED TO A LARGE PROSPECTIVE PANEL UNDER RULE 3.300(a) OR DOES THE TRIAL COMMENCE WHEN THE PANEL IS SEATED FOR VOIR DIRE EXAMINATION."

Id. At 1130, 1131.

The Supreme Court responded to the District Court's certified question as follows:

> The District Court, in the instant case, held that a trial commences under Rule of Criminal Procedure 3.191(a)(3) when the initial oath is administered to the total jury venire without regard to the time when the oath is administered to prospective jurors and the voir dire is commenced in a specific case. This is contrary to our recent holding in *Stuart v. State,* 360 So.2d 406, 409 (Fla. 1978). In accordance with our decision in *Stuart*, we hold that under Rule of Criminal Procedure 3.191(a)(3) a trial commences when a jury panel is sworn for voir dire in a specific trial. *See Hall v. State,* 348 So.2d 932 (Fla. 2d DCA 1977); *State v. May,* 322 So.2d 146 (Fla. 3d DCA 1976), *cert. denied,* 339 So.2d 1172 (Fla. 1976); *State ex rel. Maines v. Baker,* 254 So.2d 207 (Fla. 1971).

> The question having been answered contrary to the District Court's holding, the decision of that court is quashed with directions that the petitioner be discharged.

Moore v. State, 368 So.2d 1291 (1979)

Consequently, the Court's intended application of the Rule 3.300 oath to Speedy Trial Rule 3.191 was reflected in its later amendment to the subdivision (a)(3) commencement provision in 1980 by the "for that specific trial" interpolation as demonstrated below:

> "(a)(3). Commencement of Trial. A person shall be deemed to have been brought to trial if the trial commences within the time herein provided. The trial is deemed to have commenced when the trial jury panel *[for that specific trial]* is sworn for voir dire examination, or, upon waiver of a jury trial, when the trial proceedings begin before the judge." *The Florida Bar,* 389 So.2d 610 (Fla. 1980).

Thus, the Supreme Court's holding in *Moore,* 368 So.2d 1291, along with the aforesaid amendment, established that the Rule 3.300(a) oath was never intended to be utilized as a general qualifying oath to be administered to prospective jurors in readiness as to their qualifications to serve as jurors (on cases for which they should be called and accepted) during that particular week.

In spite of the certified question being answered contrary to the holding of the 4th DCA, however, the Monday morning swearing of the large body of prospective jurors by the clerk in a designated jury assembly room—sans the presence of either the state or the defendant—before they are divided into smaller groups for participation in voir dire proceedings in individual cases, continues as a common practice assumed statewide by numerous trial courts to be appropriately observant of the Rule 3.300(a) oath provision; after which those primarily sworn for voir dire

are then solemnly bound by a secondary, non-critical oath to "well and truly try the issues between the State of Florida and the defendant and render a verdict according to the law and evidence," pursuant to the Rule 3.360 "Oath of Trial Jurors" provision.

It appears that the issue of the failure of the record to evidence the Rule 3.300 swearing of prospective jurors, per se, was for the first time raised on appeal in the case of *Fernandez v. State,* 814 So.2d 459 (Fla. 4th DCA 2001), where it was alleged in a post-conviction motion that counsel was ineffective for not objecting to the trial court's failure to place prospective jurors under oath prior to voir dire. The *Fernandez* court initially required an evidentiary hearing because the record failed to reflect whether another than the trial judge *may* have sworn the prospective jurors. However, the 4th DCA *en banc* receded from *Fernandez* in *Hayes v. State,* 855 So.2d 144 (Fla. 4th DCA 2003), citing *Pena v. State,* 829 So.2d 289 (Fla. 2nd DCA 2002).

The First District Court of Appeals took a different view in *Lott v. State,* 826 So.2d 457 (Fla. 1st DCA 2002), holding that an ineffective assistance of counsel claim based upon counsel's failure "to object when the trial judge failed to place [the] prospective jurors under oath prior to voir dire" is legally insufficient to warrant further proceedings. The 1st DCA reasoned that:

> "By this statement, the defendant has merely alleged that the preliminary oath was not given in the courtroom by the trial judge. He has

> not alleged that the jurors failed to take the oath. In many Florida courts, the preliminary oath is administered to the venire in a jury assembly room, before the jurors are questioned about their qualifications and before they are divided into smaller groups for questioning in individual cases. . . . Rule 3.300(a) does not require that the preliminary oath be given at a particular time or that it be given more than once. If the jurors have taken the oath in the jury assembly room, they need not take it again in the courtroom."

The court concluded that such a claim did not preclude the possibility that counsel failed to object because she knew the venire had already taken the oath earlier in the day in the jury assembly room; further noting that a motion alleging failure to swear a jury is also insufficient where it fails to show prejudice entitling the movant to relief. *See Lott,* 826 So.2d at 458-9. The Second District Court of Appeals specifically declined to follow *Fernandez,* supra, in *Davis v. State,* 848 So.2d 418 (Fla. 2nd DCA 2003), and *Ottesen v. State,* 862 So.2d 30 (Fla. 2nd DCA 2003) (all Rule 3.850 cases relying on *Lott).*

In response to a Rule 3.850 claim that fundamental error was committed when the trial court failed to perform the Rule 3.300(a) oath the State, in *Pena v. State,* 829 So.2d 289 (Fla. 2nd DCA 2002), argued that "it is a common practice for another judge or deputy clerk to swear the potential jurors in another room, when they are part of a general jury pool, prior to the venire's assignment to any particular courtroom." In the same paragraph, the District Court acknowledged its very *own* awareness "that the oath is sometimes given to the venire in another

courtroom in the presence of a different court reporter," following which the court concluded:

> "In this case, there is simply no record as to whether the venire was sworn. As a result, Mr. Pena is unable to demonstrate that the jurors from that venire were not sworn. He does not claim that any member of the venire gave untruthful answers during questioning. In this case, we merely hold that fundamental error is not established by a record that fails to demonstrate, one way or the other, whether the venire received the oath required by rule 3.300(a)."

Pena, 829 So.2d at 293-4. The Florida Supreme Court in *Smith v. State,* 866 So.2d 51, 64 (Fla. 2004), a capital case, later echoed this same reasoning. *See also Bolin v. State,* 869 So.2d 1196 (Fla. 2004).

Although not convinced that a defendant *had* to show prejudice on this issue the Fifth District Court of Appeals, in the subsequential *Martin v. State,* 898 So.2d 1063 (Fla. 5th DCA 2005), contributes the resolve that in light of the common practice of performing the Rule 3.300(a) oath outside the courtroom, an allegation that the venire was never sworn—i.e., that the oath was not taken in the jury assembly room—is acceptable by a trial court as nothing more than "pure speculation" on the part of the alleging party: an allegation "not grounded in fact." *Id.* at 1037. The Florida Supreme Court has consistently denied post-conviction claims based on speculation or conjecture. *See Davis v. State,* 928 So.2d 1089-1118 (Fla. 2005; *Johnson v. State,* 921 So.2d 490, 504 (Fla. 2005); *Gordon v. State,* 863 So.2d 1215, 1223 (Fla. 2003); *Fennie v. State,* 855 So.2d 597 606 (Fla. 2003).

In the case of *Willacy v. State,* 967 So.2d 131, 138-39 (Fla. 2007), the Supreme Court upheld the trial court's denial of an evidentiary hearing on a claim of ineffective assistance of counsel for failing to object to the trial court's failure to swear the jury prior to voir dire, holding that Willacy's claim was legally insufficient and, therefore, required no evidentiary hearing because "Florida's criminal procedure does not mandate that a judge swear the jury after the venire has already been sworn by the clerk."

The foregoing cases suggest a collective misapprehension of the rules of law governing the duties and obligations of a trial judge in regard to the swearing of prospective jurors in a criminal trial proceeding conducted in the State of Florida. The state courts have so far not only failed to demonstrate in their collective reasoning an awareness of the fact that there has never existed in the State of Florida either statutory or procedural rule of law authorizing, at *any* time or place, *any* clerk of court to assume the duty of swearing the venire outside the presence of either party involved in the trial of a specific case, but has failed to demonstrate an awareness of a defendant's mandatory right to be physically present at *any* swearing of the jury relating to the trial of his/her particular case pursuant to Fla.R.Crim.P. 3.180(a)(4), which provides as follows:

"(a) Presence of Defendant. In all prosecutions for crime the defendant shall be present:

". . . .

"(4) at the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury[.]"

Interestingly, the subject of either the purpose or significance of the Rule 3.300(a) oath prerequisite has yet to be addressed by any of this state's appellate courts. Nor does it appear thus far that any of the appellate courts have found cause to report on the issue of the oath prerequisite's jurisdictional effect or potential prejudicial impact on the trial of a specific case.

B. Proceedings Below.

Copy of the Docket Report relating to this particular action is attached as Appendix C.**1**

REASONS FOR GRANTING THE PETITION

I. The Rule 3.300 Oath Prerequisite is a Jurisdictional Fact and Mandatory Requirement of Due Process.

The U.S. Supreme Court has held that "in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; . . . not voidable merely, but void. [And without which] the action of the court . . . fails for want of jurisdiction over the person or subject-matter." *Noble v. Union River Logging and Railroad Co.,* 13 S.Ct. 271, 147 U.S. 165 (1893). The Rule 3.300(a) voir dire examination oath can be classified as such a "jurisdictional fact" for the following reasons:

In 1967 the Florida Legislature repealed the Florida Statutes' § 913.02(1) provision governing the swearing of prospective jurors for voir dire examination. Later that same year the Florida Supreme Court, obviously recognizing an intrinsic value in this process, elected to continue the process—rather than permit its demise—by incorporating it as a procedural constituent of the original compilation of the Florida Rules of Criminal Procedure. *See In re Florida Rules of Criminal Procedure,* 245 So.2d 33, 34 (Fla. 1971). The apparent purpose behind the supreme court's adoption of the voir dire swearing prerequisite was to disallow the trial court's proceeding to seat jurors in a criminal trial proceeding while basing the determination that juror will be impartial on either a mere assumption or the good faith belief of the trial judge. The trial court's failure to perform the requisite oath prior to voir dire examination of jurors for a specific trial allowed the trial of the case at bar to be commenced without the benefit of a panel of jurors bound in conscience to faithfully and truthfully answer the question asked of them as prospective jurors.

The Florida Supreme court has long held that jurors, when examined as to their qualifications, should be sworn on their voir dire, *Ellis v. State,* 6 So. 768 (1889), that on voir dire examination a juror must fully, frankly, truthfully and fairly answer all material questions touching on his or her qualifications as juror, *Story v. State,* 53 So.2d 920 (Fla. 1951), *cert. denied,* 343 U.S. 958 72 S.Ct. 1055,

96 L.Ed. 1357, neither falsely stating any fact, nor concealing any material matter, and that any juror who violates such duty is guilty of misconduct prejudicial to the examining party. *See Loftin v. Wilson,* 67 So.2d 185 (Fla. 1953). This fundamental procedural process stands as an imposing barrier that a trial court must first overcome before it can properly invoke its discretionary powers in the jury trial of a criminal case; a vital prophylactic procedural device which serves the essential function of preventing the court from performing in any judicial capacity in a jury trial proceeding before formally instituting a procedural safeguard beneficial to securing a panel of trial jurors lawfully qualified as constitutionally impartial.

> "A fair and impartial jury denotes jurors who are not only fair and impartial, but also *qualified.*" *Boca Teeca Corp. v. Palm Beach County,* 291 So.2d 110, 111 (Fla. 4th DCA 1974).

The term "qualified" generally applies to one who has taken steps necessary to prepare for an appointment or office, as by giving bond, taking oath, etc. One who has a particular status through some endowment, acquisition, or achievement, or it may describe one who has obtained appropriate legal power or capacity by complying with some routine requirement such as completing a form or taking an oath. *Lehner v. Crane Co.,* 448 F.Supp. 1127, 1135 (D.C. Pa. 1978). The Rule 3.191(c)/3.300(a) oath provision is of mandatory construction, and can or should be properly characterized as a "qualification " oath legally necessary to predicate, or affirm, a juror's state and federal constitutionally required impartiality status

and render him or her eligible to perform their appointed public duty or function. In other words, this swearing process operates as a qualifying device preclusive of the ability of a person summoned for jury duty to enter into the "office" of a criminal trial juror, and essential to the legitimacy of the trial of a specific case.

The Florida Supreme Court has long determined the jury to be an arm or instrumentality of the court, which court speaks through the presiding judge. *Ellis v. State,* 129 So. 106 (Fla. 1930). It is only reasonable then to assume that the supreme court's adoption of the voir dire oath prerequisite was based on its regard of jurors as no less than "public officers"—specifically selected and appointed to impartially serve the interests of all parties in the trial of a criminal cause, and therefore subject to the same declaration of promise as any other person about to enter upon the duties of a public office, concerning the performance of that office.

The oath in question here must certainly be an "official oath" which by general definition is one taken by an officer when he assumes charge of his office, whereby he will solemnly and faithfully discharge the duties of the same, or whatever may be the required by rule of law or statute in the particular case. Such "oath of office" is required by federal and state constitutions, and by various statutes, to be made by both major and minor officials.

The "office" of a juror should be defined in this instance as a special duty, charge or position conferred upon the juror by exercise of judicial authority and for

a singular public purpose: to well and truly try the issues between the state and the defendant and thereafter render a true verdict in accordance with the law and the evidence. The term "truly," as applies herewith, should be understood to mean without feigning, falsity, or inaccuracy of truth. Rule 3.300(a) mandates that a juror be administered a specific oath purposed upon qualifying a juror's requisite impartiality by binding that juror in conscience to perform the duty of his appointed office faithfully and truthfully before subjecting him to voir dire examination, which sole purpose is to ascertain the qualification of those drawn as jurors, and whether they would be absolutely impartial in their judgment. *And* to obtain a fair and impartial panel of jurors whose minds are free of all interest, bias or prejudice. *See Gibbs v. State,* 193 So.2d 460, 462 (Fla. 2nd DCA 1967).

Such an oath serves to remove from the trial judge the burden of relying on a potentially erroneous assumption that there pre-exists within each potential juror the essential quality of impartiality required by both state and federal constitutions, and therefore must certainly be characterized as nothing less than a qualification oath legally necessary as a prerequisite to certifying a juror's impartiality status prior to the performance of that juror's duty or function as a public servant.

As the official means by which a juror's impartiality qualification is predicated, this essential validation process is clearly a *jurisdictional fact* which must first exist for a Florida criminal trial court to properly exercise its jurisdictional au-

thority over a particular case and/or party—failing which the court acts without jurisdiction; rendering void the trial of the case at bar, because the conditions that alone authorize the trial court's exercise of its general power over a particular case were wanting at the commencement of the trial of Defendant's case, and thus the power of the court was never—and has never *been*—in fact lawfully invoked.

The "due process" clause of the 14th Amendment was intended to guarantee procedural standards adequate and appropriate to protect at all times people charged with or suspected of crime by those holding positions of power and authority. *See Chambers v. State of Florida,* 60 S.Ct. 472, 309 U.S. 227 (1940). The purpose of voir dire proceedings is to secure an impartial jury, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but also freedom from jury bias against the prosecution and for the accused. *See Moody v. State,* 418 So.2d 989 (Fla. 1982), *cert. denied,* 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451. The Rule 3.300(a) voir dire examination oath therefore stands as an *essential* procedural safeguard necessary to the protection of an accused person's state and federal constitutional rights to trial by an impartial, unbiased jury—operating as a critical, indispensable condition precedent to formalizing a juror's constitutionally required impartiality. Thus, the voir dire examination swearing process should—with absolute certainty—be deemed by *every* Florida criminal trial judge as nothing less than a *jurisdictional fact* essential to the validity

of any jury trial proceedings conducted in a criminal case in a Florida court, as well as a key procedural ingredient without which the trial court's jurisdictional power to act in the trial of a specific criminal case is lost.

The record of the trial in this case fails to reflect that the prospective jurors were sworn for voir dire examination for defendant's specific trial, pursuant to the mandatory provisions of Fla.R.Crim.P 3.191(c) in conjunction with 3.300(a) as required before either the State or the defense is allowed to put questions to the prospective panel, and the record is fatally defective in not showing that the panel was sworn in accordance with the mandatory provisions of Rule 3.300—the fact of which should appear of record. *Zapf v. State,* 35 Fla. 210, 17 So. 225 (Fla. 1892), *Brown v. State,* 29 Fla. 543, 10 So. 736 (Fla. 1892). It is the burden of the court or the State to assure the record indicates that requirements of due process have been complied with. *Alexander v State,* 575 So.2d 1370, (Fla. 4th Dist 1991).

The 1994 provisions of Fla.R.Crim.P 3.191(a) require that a defendant be brought to trial within 175 days from the date of arrest when charged with a felony. Fla.R.Crim.P 3.191(c) goes on to define "brought to trial" by setting forth that a defendant "shall be deemed to have been brought to trial if the trial commences within the time" provided under Rule 3.191. The term "commences" is defined more specifically as follows:

> "The trial is considered to have commenced when the trial jury panel for that specific trial is sworn for voir dire examination or, on waiver

> of a jury trial, when the trial proceedings begin before the judge." *In re Amendments to the Florida Rules of Criminal Procedure,* 606 So.2d 227, 270 (Fla. 1992).

Apparently, unless a jury trial is waived a criminal trial proceeding in the State of Florida does not legally commence until the prospective jury panel has been sworn for voir dire examination for a defendant's *specific* case. In addition, Rule 3.300 provides as follows:

> (a) Oath. The prospective jurors shall be sworn collectively or individually, as the court may decide. The form of oath shall be as follows:
>
> "Do you solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?"
>
> If any prospective juror affirms, the clause "So help you God" shall be omitted.
>
> (b) Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both the State and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved

Id. at 313.

Thus, according to Rules 3.191(c) and 3.300(b), it is only upon the *swearing* of the prospective jurors for voir dire examination that the legitimacy of a trial-by-jury, conducted in a specific criminal case, is actually made manifest. Therefore, the trial judge's failure to swear the prospective jurors for voir dire examination for

Defendant's specific trial as required by Rules 3.191(c) and 3.300(a) does in fact constitute a valid failure to perform an essential jurisdictional fact, and thereby provides the basis for legal challenge grounded on the question of whether such failure renders the trial of this case—as well as all proceedings associated therewith—void of legitimacy and, therefore, a nullity. *See Alvarez v. State,* 157 Fla. 254, 25 So. 661 (Fla. 1946); *Zapf* and *Brown,* supras.

The question presented here is whether the voir dire examination oath provision of Rules 3.191 and 3.300(a) of the Florida Rules of Criminal Procedure is a *jurisdictional fact,* as such is defined by the U.S. Supreme Court in *Noble v. Union River Logging and Railroad Co.,* 13 S.Ct. 271, 147 U.S. 165 (1893), the existence of which is necessary to the validity of a Florida criminal jury trial proceeding, and without which the action of the court fails for want of jurisdiction over the person or subject-matter.

II. The Florida Supreme Court's dismissal of Petitioner's pleading as "an unauthorized impermissible filing" was erroneous.

Certainly, the trial court's act of appointing postconviction is one of the forestated proceedings "associated" with the trial process of which legitimacy Petitioner challenges. Since the trial proceeding conducted in Petitioner's case are, at the instant, challenged as to its legitimacy, it stands to reason the the trial court's appointment of postconviction counsel to Petitioner's case is an action undertaken

by a court wanting in jurisdictional authority to do so. Petitioner must therefore view the appointment of postconviction counsel as the equally illegitimate procedural product of a jurisdictionally void antecedent process. Postconviction counsel's legitimacy of standing, in any case, is wholly dependent upon the existence of a valid criminal trial proceeding; a trial proceeding of which legitimacy Petitioner hereby questions.

The question presented here is whether Petitioner's habeas challenge to the jurisdictional validity of the trial court's act of issuing its order appointing postconviction counsel as legal representative in Petitioner's case, an act Petitioner challenges as a proceeding jurisdictionally wanting, serve as sufficient basis for pro se filing of his habeas petition; and, if so, whether the Florida Supreme Court's dismissal of Petitioner's habeas petition violate Petitioner's 14th Amendment right to due process.

CONCLUSION

Every individual who has been accused of a crime is entitled to certain critical constitutional protections. Perhaps the most important of these protections is the Sixth Amendment right to a trial by an impartial jury. Unquestionably, the right to a trial by an impartial jury means that the jury must not be partial, not favoring any one party more than another, unprejudiced, disinterested, equitable and just, and that the merits of the case shall not be prejudged. The term "impartial

jury" refers to a jury that is of an impartial frame of mind at the beginning of the trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting the accused with the commission of the crime charged against him. The 6th Amendment right is guaranteed to the States via the 14th Amendment to the United States Constitution, which provides that no State shall deprive any person of life, liberty, or property, without due process of law. As the Florida Supreme Court has noted in *Scull v. State,* 569 So.2d 1251 (Fla. 1990):

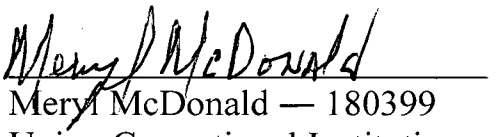
> One of the basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property, must be conducted in accordance to due process. Art. I, § 9, Fla. Const.

In the great majority of our sovereign states, due process, as it relates to the 6th Amendment right to a trial by an impartial jury in a criminal proceeding, requires nothing more in the determination of a juror's impartiality than the trial judge's exercise of a simple, good faith belief that a person serving jury duty will perform the duty with an impartial frame of mind. The State of Florida, however, differs from the majority by being one of the very few states to provide, through rule of law, a greater, more appreciable measure of protection against the potential deprivation of the 6th Amendment right by manner of bringing into lawful effect mandatory rules of law requiring the judge presiding over a jury trial proceeding in a criminal case to swear prospective jurors for voir dire examination for that *spe-*

cific trial; to solemnly bind each prospective juror, by either oath or affirmation, to give truthful answers to any questions put to them touching on their individual impartiality, thus precluding the practice of determining a potential juror's constitutionally required impartiality on the basis of merely the assumption or good faith belief of the presiding judge.

Based on the foregoing, the Petitioner, Meryl McDonald, respectfully request that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,



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Meryl McDonald, pro se, is filing this petition for writ of certiorari in accordance with the "Mail Box" rule stated in *Houston v. Lack,* 108 S.Ct. 2379 (1988).