No. 18-7822

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

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

PETITIONER'S REPLY MEMORANDUM

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Petitioner pro se

PRELIMINARY MATTERS

The Petitioner, Meryl McDonald, asserts that his arguments in the original petition and appendices to this Court are correct and true. While he will not reply to every argument raised by Respondent, he expressly does not abandon the issues and arguments not especially replied to herein.

ARGUMENT(S)

First, Petitioner feels it necessary to bring to this Honorable Court's Notice an erroneous treatment of facts presented to the Court by Respondent regarding state postconviction proceedings filed by postconviction counsel and ruled on by the Florida Supreme court in 200 6.

On page 7 of the opposition brief, Respondent submits a statement asserting that Petitioner's "Motion for Postconviction relief included a claim challenging counsel's effectiveness regarding [counsel's] alleged failure to object when voir commenced before an allegedly unsworn venire" and that "the Florida Supreme Court affirmed the trial court's determination that the claim was procedurally barred. *McDonald v. State,* 952 So.2d 484, 489 (Fla 2006)." The only claim barred in that case was levied on a reasserted argument that trial court conducted an inadequate *Faretta* inquiry. *Id.* at 50.

Reply to contention that there is no constitutional dimension to Petitioner's claim (page 9)

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 sovereignty 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 selecting of jurors—than the trial judge's exercise of a simple, good faith determination 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 *specific* 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.

In this instance, there are present the three distinct factors relevant to this Court's determination of whether Florida's process of swearing jurors for voir dire is a process constitutionally due: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest. *Mathews v Eldridge,* 424 U.S. 319, 47 L Ed 2d 18, 96 S Ct 893 (1976).

Petitioner's 2002 presentation of claim to trial court

In the first paragraph of Respondent's "Reasons for Denying the Writ" Respondent contends that denial is warranted on the grounds that: 1) this Court lacks jurisdiction to address Petitioner's claim because it was not fairly presented to the lower court, and 2) that the Florida Supreme Court never reached the merits of the claim because Petitioner is represented by counsel and Florida does not permit substantive pro se filings by a counseled defendant.

Respondent lacks familiarity with the chain of procedural events in the matter that brings this cause to this Honorable Court: on February 26, 2002, Petitioner filed in the trial court a "Notice of Expiration of Time for Speedy Trial and/or Motion for Discharge" wherein he alleged that he was taken into custody by arrest on warrant on October 13, 1994, and arrived by extradition in Pinellas County, Florida, on October 27, 1994. Trial was set for June 6, 1995, a period of 236 days his arrest (56 days beyond the speedy trial period) and 222 days after his return to Pinellas County (42 days beyond the speedy trial period). On March 24, 2002, Petitioner filed an "Amended Notice of Expiration of Time for Speedy Trial and/or Motion for Discharge" wherein he first presented his voir dire examination oath and attendant jurisdictional question to the trial court.[1] On June 6, 2002, Petitioner's Notice was denied and Petitioner's Notice was denied and Petitioner filed his appeal to the Florida Supreme Court. On August 2, 2002, the State filed for

[1] Copy of Amended Notice Expiration of Time for Speedy Trial and/or Motion for Discharge attached at Appendix A.

dismissal and on August 13, 2002, Petitioner filed a response to the State's dismissal motion.

On August 20, 2002, Petitioner received an "Acknowledgement of New Case" from the Florida Supreme Court, which informed a Petitioner that his notice had been "treated as a petition under Florida Rule of Appellate Procedure 9.100."[2] (Copy of Acknowledgement attached at Appendix B). On September 13, 2002, Petitioner filed an "Amended Petition for Writ of Habeas Corpus." On November 13, 2002, the Supreme Court granted the State's Motion to Dismiss "without prejudice." *See McDonald v. State of Florida,* 2002 Fla. LEXIS 2520 (Fla., Nov. 13, 2002).

This Court's review of these events will support Petitioner's assertion that he has indeed presented the issues now before this Court in the lower court. What is true, however, is the fact that none of the courts involved in the process of addressing Petitioner's claims have bothered to address the merits of the jurisdictional question presented in most if not all of Petitioner's efforts.

Reply to argument that petitioner failed to establish that his jury was unsworn

Florida Rule of Criminal Procedure 3.180(a)(4) provides in pertinent part as follows:

3.180. PRESENCE OF DEFENDANT

[2] Copy of Acknowledgement attached at Appendix B.

(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[.]

Respondent, on page 10 of the opposing brief, demonstrates an obvious misapprehension of the purpose or function of a trial transcript, which is to provide a true and correct account of the exchange of dialogue between participants engaged in a legal dispute contested in a courtroom setting. Such a proceeding requires the attendance of an official court reporter authorized to report in stenotype every word spoken by the judge, prosecuting attorney, defense attorney, juror, witness, bailiff or clerk.

While words spoken in open court by either the prosecution or defense are by nature words of persuasion, those spoken by the judge are words of authority; expected to be taken as either command or direction by all in attendance in the courtroom. If the judge voices a command, the reporter records in stenotype a true and correct transcription of that command. If the judge directs a participant in the dispute to perform a particular act that is within the court's authority to direct. The court reporter is obligated to provide an accurate transcription of that direction.

Florida Rule of Criminal Procedure 3.180(a)(4) mandatorily provides for the presence of the defendant at the swearing of jurors. If the jurors examined on voir dire in Petitioner's case were sworn elsewhere other than a location where Peti-

tioner was in attendance they, by rule of law, were not made available in the courtroom so that Petitioner be absolutely certain of the undertaking of a procedural rule that could, arguably, have the potential to be essential to the protection rather than for him to be unfairly put in the position of proving that the performance of this fact did not indeed occur.

It is quite the curiosity that the performance of this mandatorily constructed rule of criminal procedure is allowed to be covertly undertaken, to require neither transcription nor recording of its occurrence, and then require the *Petitioner* to perform the unquestionably impossible task of proving that the undertaking of this activity *never* occurred.

From Petitioner's point of view, this is nothing less than subversion of a legal principle; a subterfuge to undermine Petitioner's right to a process constitutionally due.

Reply to Question II of Respondent's Questions Presented for Review

Petitioner has always contended that the because the trial court failed to perform the act necessary to invoke its jurisdictional authority over the trial of his case every act performed beyond the point where the jurisdictional fact should have been performed, including the appointment of postconviction counsel, was an act

void of legitimacy. Petitioner has been consistent in his assertion that the trial court's appointment of postconviction counsel was an act performed in excess or want of jurisdiction, and for that reason postconviction counsel has no legitimate standing to represent Petitioner in this particular action until properly appointed by a court jurisdictionally qualified to validly issue the order to appoint counsel. The question now put before this Court is whether Petitioner has a right to pro se file if his pleading raises an issue premised on such circumstance as this.

On page 16 of the opposing brief Respondent attacks Petitioner's claim as an effort to "undermine the trial court's subject matter jurisdiction," and would put it that Petitioner "directs our attention to *Noble v Union River Logging R. Co.,* 13 S Ct 271 (1893), where this Court examined the nature of jurisdiction and the types of proof necessary to establishing the court's authority to try certain cases. *Noble* does not support McDonald's position."

Quoting *Noble,* Respondent asserts that "the Court held that where the necessary jurisdictional allegations are made and accepted by the trial court, 'such finding is conclusive is binding in every collateral proceeding.'" Respondent fails to recognize this particular *Noble* quoting as a class distinction between proceedings of a "judicial" nature, such as relates to the instant cause, and proceedings of a "quasi-judicial" nature. *Noble*'s distinction in regard to "quasi-judicial" matters reads in pertinent part as follows:

> "There is, however, another class of facts which are termed quasi jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally.[...] In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive in every collateral proceeding." *Noble,* at 147 U.S.173-174.

Respondent goes on to posit that although the failure to swear prospective jurors might constitute trial error, it has nothing to do with the court's subject matter jurisdiction. Petitioner counters this assertion by pointing out that at no point in this action has Petitioner suggested that the trial court's subject matter jurisdiction was in doubt. In fact, *Noble* itself does not specifically address itself but actually subscribes to "*want of person or subject matter jurisdiction.*" *Noble,* at 147 U.S. 173.

In light of the factors submitted herein for this Honorable Court's consideration, Petitioner prays this Court will grant certiorari review of this matter.

Respectfully submitted,

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Pro se Petitioner