No: 20-5954

IN THE
SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD, Petitioner
—V.—
STATE OF FLORIDA, Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION(S) PRESENTED

The question presented in this case is whether rule 3.851(b)(6)&(i) found in the Florida Rules of Criminal Procedure is unconstitutional and violates both the Equal Protection and Due Process clauses of the Fourteenth Amendment where it prohibits death sentenced inmates from submitting any filings pro se without waiving postconviction counsel and waiving all postconviction proceedings?

LIST OF 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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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

[ ] For cases from **Federal Courts: Not applicable**

[ ] For cases from **State Courts:**

The opinion of the Florida Supreme Court, which is the highest state court to review the merits of this case appears at Appendix "A" to the petition and is unreported.

BASIS FOR INVOKING JURISDICTION

The judgment of the Florida Supreme Court which is the subject of this petition was entered on May 20th 2020. A petition for writ of certiorari to review that judgment is timely filed within 90 days after its entry. Supreme Court Rule 13.1, however, pursuant to the Supreme Court's order dated March 19th 2020; the time to file any petition for a writ of certiorari was extended to 150 days from the date of the lower court judgment. Therefore, the Court's jurisdiction to review the question presented exists and is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution which provides in relevant part: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Rule of Criminal Procedure, Rule 3.851(b)(6) which states in relevant part: "A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only basis for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule."

Florida Rule of Criminal Procedure, Rule 3.851(i) Dismissal of Postconviction Proceedings which states in relevant part: "This subdivision applies only when a defendant seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel."

These subdivisions, 3.851(b)(6)&(i), read together constitute an unconstitutional infringement upon the rights of a Florida criminal defendant who has been sentenced to death.

STATEMENT OF THE CASE

Meryl McDonald is a Florida prisoner under sentence of death. The Florida Supreme Court affirmed McDonald's conviction and sentence of death. *McDonald v. State*, 743 So.2d 501 (Fla. 1999). In his initial post-conviction challenge, the lower court permitted McDonald to act pro se with Capital Collateral Regional Counsel-Middle (CCRC-Middle) as standby counsel. The Florida Supreme Court affirmed the denial of relief, and the Supreme Court also denied McDonald's request to represent himself on appeal. *McDonald v. State*, 952 So.2d 484 (Fla. 2006).

In 2008, McDonald filed a pro se Habeas/All Writs petition in the Florida Supreme Court seeking a belated, successive post-conviction appeal to raise additional claims which were not presented on his original post-conviction appeal, which the Supreme Court denied. *McDonald v. McNeil*, 991 So.2d 387 (Fla. 2008) [Table].

In 2015, McDonald, thru Capital Collateral Regional Counsel–South (CCRC–South) filed a pro se Amended Fourth Successive Motion for Postconviction Relief pursuant to Rule 3.851 to supply additional facts and argument based on the 2014 and 2015 letter issued by the United States Department of Justice that criticized the testimony of the alleged expert from the FBI's hair and comparison analysis section/unit. The pro se motion asserts that the

Newly Discovered Evidence was not limited to only the June 9th 1994 report and the FBI's trial testimony, but extends to the FBI's hair analysis the State presented in a sworn arrest affidavit; and submitted to the Grand Jury to secure a capital murder indictment against McDonald–which maintained that McDonald was denied due process due to violations of *Brady* and *Giglio*[1] based on the knowing use of falsified hair and fiber analysis and of suppressing material facts.

The trial court denied the pro se motion based on the unconstitutional provisions found in rule 3.851(b)(6), which disallows a criminal defendant sentenced to death from representing himself/herself in any postconviction proceeding.

It should also be noted that court appointed counsel, Jonathan Hackworth, on April 14th 2020, who submitted in the lower court a Motion to Compel Grand Jury Testimony. (See Appendix–H) McDonald had previously urged counsel to file said motion months **prior to** the lower court denying the fourth successive motion for postconviction relief.

McDonald has also previously attempted to raise the same viable claims thru his court appointed counsel, Jonathan Hackworth, who steadfastly refused to raise any claims that could have and should have been raised.

[1] *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)
Giglio v. United States, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)

McDonald then moved the court to discharge counsel which the court denied. It should also be noted that after the lower court denied the fourth successive motion for post-conviction relief, McDonald submitted with the Florida Supreme Court a Motion to Discharge Post-conviction counsel because of an irreconcilable conflict and counsels failure to assist McDonald and act as his legal agent and a Motion to Appoint Conflict-Free Counsel. McDonald also filed a Motion to Strike Counsel's Initial Brief. The Florida Supreme Court again ultimately denied all pro se filings.

During the pendency of the fourth successive 3.851 appeal, McDonald, on November 25th 2019, submitted in the Florida Supreme Court a Motion to Declare Rule 3.851(b)(6)&(i) of the Florida Rules of Criminal Procedure unconstitutional. (See Appendix–B)

On December 19th 2019, the Florida Supreme Court issued an order directing the State of Florida and Counsel for the Appellant, Jonathan Hackworth, to file Briefs with the Court, addressing the Constitutionality of rule 3.851(b)(6)&(i) and whether McDonald had a Constitutional right to represent himself in a postconviction proceeding, such that the Court should reconsider *Gordon v. State*, 75 So.3d 200 (Fla. 2011)(Death sentenced defendants pro se filings stricken as unauthorized impermissible pro se filings and dismissed). The

Supreme Court further authorized that McDonald submit an Supplemental Brief. (See Appendix–C)

On January 8th 2020, counsel for the appellant, Jonathan Hackworth, filed his brief, in which counsel acknowledged that rule 3.851(b)(6)&(i) was unconstitutional and indicated that the defendant had a constitutional right to represent himself and that the Court should reconsider its holding in *Gordon v. State*. Counsel further stated that this right should come with the stipulation that there be standby counsel appointed in such circumstances where a death sentenced wishes to represent himself. (See Appendix–D)

On the same day, the State filed their brief. Although the State remained silent in regards to the Constitutionality issue of the rule itself, the State urged the Court to reconsider the holding in *Gordon*. The State argued that a competent defendant may waive postconviction representation and collateral counsel which "has no duty or right to represent a death row inmate without that inmate's permission." (See Appendix–E)

On January 17th 2020, McDonald filed his Supplemental Brief and on January 30th 2020, McDonald submitted a "Request for Leave" to submit an "Addendum to Appellants Supplemental Brief" See Appendix "F." On February 6th 2020, the Court granted McDonald's Motion Requesting Leave to submit the Addendum. (See Appendix-)

On May 20th 2020, the Florida Supreme Court dismissed McDonalds motion to declare rule 3.851(b)(6)&(i) unconstitutional. In so doing, the Court stated that McDonald in his Supplemental Briefing advocated for impermissible "Hybrid Representation" (See Appendix–A). However, this was a misrepresentation of the facts; the one advocating for the "Hybrid Representation" was Jonathan Hackworth in his brief, not McDonald. A casual reading of McDonalds Motion, Supplemental Brief and the Addendum filed by McDonald makes no mention of "Hybrid Representation." In fact, McDonald had requested that a *Nelson/Faretta*[1] type procedure be incorporated into the rule in order to protect a death sentenced defendants rights.

Petitioner filed a Motion for Rehearing and on June 25th 2020, the Florida Supreme Court struck McDonalds Motion for Rehearing as an "Impermissible pro se filing" (See Appendix–G)

The Florida Supreme Court denied McDonalds appeal to the fourth successive motion to vacate on June 4th 2020, and the mandate issued on June 25th 2020. See *McDonald v. State*, 45 FLW S173 (Fla. June 4, 2020)

McDonald at present is filing a pro se Motion in the trial court pursuant to *Farreta v. California*, 422 U.S 806 (1975). That motion is premised upon abuse of

[1] *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA1973); *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)

Grand Jury process in the instant case such as perjury or government misconduct.

REASONS FOR GRANTING THE PETITION

Florida Rule of Criminal Procedure Rule 3.851(b)(6)&(i) is unconstitutional on its face where it forces a Florida death sentenced defendant to choose between appointed counsel or discharging counsel and waiving all postconviction proceedings.

The question presented in this Petition is a Federal question of substance which involves a death sentenced defendant in Florida being forced to choose between pursuing his/her postconviction claims or waiving all postconviction proceedings.

Crucial to the exercise of this Court's certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question is found in the case doesn't mean, standing alone, that a state decision will be reviewed. First, the federal question must be a substantial question. Second, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. Third, even then this court may not take the case if the state court's judgment can be sustained on an independent ground of state law.

In this petition, it is clear that the issue presented is a substantial issue of federal law that arises under the United States Constitution. The issue has properly been raised in the highest state court and could not and cannot be sustained on any independent ground of state law. Therefore, the issue here meets all the criteria necessary for consideration by the Court under its certiorari jurisdiction.

Certiorari has also been granted to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation. See e.g., *Bullington v. Missouri*, 451 U.S. 430, 432 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to different kind of sentencing procedure); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read Miranda too broadly"); *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977) (certiorari granted on issue whether state court correctly declined to give retroactive effect to prior Supreme Court decision).

As an initial matter, capital defendants do not have a federal constitutional right to self-representation in their postconviction collateral proceedings, but states are not precluded from recognizing such a right under their own constitutions. See *Martinez v. Court of Appeal of California*, 528 U.S. 152, 163 (2000).

In this case, Certiorari should be granted to determine whether the state court has properly interpreted, applied, and/or extended the Supreme Court decision in

Martinez, which was a case dealing with a criminal defendant having *no constitutional right to self-representation on a direct appeal* (emphasis added)

In *Gordon v. State*, 75 So.3d 200 (Fla. 2011) the Florida Supreme Court, citing to *Martinez*, interpreted, applied and erroneously extended the holding in *Martinez* concluding that death sentenced defendants in Florida **do not** have a state constitutional right to proceed pro se in their postconviction collateral appeals. Based on this decision, rule 3.851 was subsequently amended on January 1st 2015, to include (b)(6) which states: "[A] defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only basis for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or *subdivision (i) of this rule*" (emphasis added).

Subdivision (i) of Rule 3.851 states in pertinent part that: "[T]his subdivision applies only when a defendant seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel." Therefore, read together, Rule 3.851(b)(6)&(i) allow a capital defendant to dismiss his current capital counsel for only two reasons (1) when a actual conflict exists, and (2) when the death sentenced defendant also *waives all postconviction proceedings in their entirety.* (emphasis added).

Petitioner asseverates that Florida's Rule 3.851(b)(6)&(i) pro se prohibition violates the right to access to the courts, equal protection and due process under both the United States and Florida Constitutions. Fla. Const. Art. 1§2 states, "[A]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability." Fla. Const. Art 1§9 states in part, "[n]o person shall be deprived of life, liberty or property without due process of law." Fla. Const. Art. 1§21 states that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Likewise, the United States Constitution in the Fourteenth Amendment states; "[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

Under the Fourteenth Amendment, "due process" emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection," on the other hand, emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. See *Ross v. Moffitt*, 417 US 600, 41 L Ed 2d 341, 94 SCT 2437 (1974)

The Fourteenth Amendment is violated by a state procedure which substantially denies indigent defendants the benefits of an existing system of appellate review, whether a direct appeal from a criminal conviction or an appeal from denial of relief in state collateral proceedings; this is so even though the state has already provided one review on the merits. *Lane v. Brown*, 372 US 477, 9 L Ed 2d 892, 83 SCT 768 (1963)

Furthermore, The equal protection clause of the Fourteenth Amendment requires that a state's criminal appellate system be free of unreasoned distinctions, and that indigents have an adequate opportunity to present their claims fairly within the adversary system; the state cannot adopt procedures which leave an indigent entirely cut off from any appeal at all by virtue of his indigence, or extend to such indigent merely a meaningless ritual while others in better economic circumstances have a meaningful appeal-the question being one of degrees, not of absolutes.

With these constitutional provisions in mind, it is clear that a defendant sentenced to death in the State of Florida has no choice but to concede to court appointed attorneys being assigned to represent them regardless of appointed counsel's skill, knowledge, qualifications or overall effectiveness, or in the alternative, the death sentenced defendant must waive all postconviction proceedings and basically agree to be executed without any appellate review whatsoever.

In Florida, the unreasoned distinction found in the facially unconstitutional rule is that a criminal defendant sentenced to death *does not* have the same opportunity to have all his claims addressed on their merits as non-capital defendants who are allowed to proceed pro se, in fact, non-capital defendants *are required* to proceed pro se until such time that he requests appointment of counsel and the trial court finds that the defendant meets the requirements under *Graham v. State*, 372 So. 2d 1363 (Fla. 1979). (There is no absolute right to the appointment of counsel in postconviction proceedings.) However, the capital defendant is **forced** to except appointed postconviction counsel or waive all postconviction proceedings.

It is also easy to see that Equal Protection, Due Process and Access to the Courts all take a back seat to Florida's desire to streamline the capital defendants case, regardless of the shortcomings of appointed counsel, and regardless of the

fact that serious trial errors are never presented to the court's for review because the death sentenced defendant has no chance whatsoever to present any viable claims pro se because of Florida's prohibition against pro se filings by death sentenced defendants. See *Gordon v. State*, at 203

Florida's blanket prohibition against *pro se* motions in capital cases is catastrophic and as U.S. Supreme Court Justice Alito states in *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010);

> "Petitioner appears to allege that he made reasonable efforts to terminate counsel due to his inadequate representation and that such efforts were successfully opposed by the State on the Perverse grounds that petitioner failed to act through appointed Counsel ... common sense dictates that a litigant cannot be held Constructively responsible for the conduct of an attorney who is not Operating as his agent in any meaningful sense of the word, that is particularly so if the litigants reasonable efforts to terminate the attorney's representation have been thwarted by forces wholly beyond petitioner's control." Id.

It's recognized that a Petitioner is not entitled an absolute right to post-conviction counsel. But this Court recognized in *Martel v. Clair*, 565 US 648, 132 S.Ct. 1276, 182 L Ed 135 (2012) that due to the unique nature of capital cases counsel assigned to death penalty case are not a discretionary practice but a right. id at 1284-85. Being that such effective representation is expected at a minimum and if that is not the case, Petitioner must be afforded the opportunity to address the courts *pro se* with any concerns pertaining to that ineffectiveness.

It is not unreasonable to perceive appointed counsel as being blameworthy or negligent at times. Numerous precedent rulings have come from those very same scenarios of negligence, misconduct, misadvice and ineffectiveness. *Holland v. Florida; Martel v. Clair; Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); *Downs v. McNeil*, 520 F.3d 1311 (11th cir. 2008).

It should also be noted that a criminal defendant sentenced to death in Florida has no avenue available to him for a claim of ineffective assistance of postconviction counsel. Florida has repeatedly rejected such claims. *See Gore v. State*, 24 So. 3d 1, 16 (Fla. 2009) ("Moreover, we find that [Appellant's] claim is in effect a claim of ineffective assistance of postconviction counsel, and thus is also without merit."); *Gonzalez v. State*, 990 So. 2d 1017, 1034 (Fla. 2008) ("To the extent that [Appellant] is making an ineffective assistance of postconviction counsel claim, this Court has repeatedly rejected such a claim."); *Tompkins v. State*, 994 So. 2d 1072, 1088 (Fla. 2008) (recognizing that ineffective assistance of postconviction counsel claims are not cognizable); *Kokal v. State*, 901 So. 2d 766, 777 (Fla. 2005) ("We have repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable."); *Waterhouse v. State*, 792 So. 2d 1176, 1193 (Fla. 2001) ("[T]his Court has repeatedly held that ineffective assistance of postconviction counsel is not a cognizable claim.").

With these principles in mind, it is clear that rules 3.851(b)(6) & (i) are unconstitutional on their face and deny a death sentenced defendant access to the courts and any opportunity to have his claims addressed where he has been forced to accept post-conviction counsel who is either incompetent, does not have his clients best interests at heart or is not being adequately compensated for his time and chooses to do the bare minimum. These circumstances cannot stand up to any kind of scrutiny whether it is the rational basis test, strict scrutiny or any other standard of review utilized in determining the constitutionality of a rule or statute.

Petitioner understands that a State's procedural rules are of vital importance to the orderly administration of its criminal courts, However, this watershed rule of criminal procedure implicates the fundamental fairness and accuracy of the criminal proceeding where a death sentenced defendant in Florida must rely solely on the decisions made by court appointed counsel who does not or who will not raise all the errors necessary in order for the defendant to have a full and fair appellate review of all his claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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