

DOCKET NO. 20-5954

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX A

Supreme Court of Florida

No. SC19-635

MERYL S. MCDONALD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

June 4, 2020

PER CURIAM.

Meryl S. McDonald, a prisoner under sentence of death, appeals the circuit court's summary denial of his fourth postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction, *see* art. V, § 3(b)(1), Fla. Const., and affirm for the reasons below.

In his motion, McDonald raised newly discovered evidence and *Giglio*¹ claims based on a 2014 letter issued by the United States Department of Justice that criticized portions of the testimony provided by a Federal Bureau of Investigation (FBI) forensic hair analyst during McDonald's joint trial with

1. *Giglio v. United States*, 405 U.S. 150 (1972).

codefendant Robert Gordon in 1995.² We affirm the summary denial of McDonald's *Giglio* claim for the same reason we affirmed the summary denial of a virtually identical claim by Gordon. *See Gordon v. State*, No. SC15-2091, 2016 WL 6462391, at *1 (Fla. Nov. 1, 2016) (holding Gordon's reliance on the 2014 letter to establish a *Giglio* violation was "misplaced" because the prosecutor could not correct testimony alleged to be false based on information in a letter that was written and issued to the State approximately twenty years after the trial) (citing *Wyatt v. State*, 71 So. 3d 86, 102 (Fla. 2011)).

We likewise affirm the summary denial of McDonald's newly discovered evidence claim, agreeing with the circuit court that it is conclusively established on this record that the 2014 letter is not "of such nature that it would probably produce an acquittal on retrial." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998).³

2. Because the circuit court denied McDonald's motion without holding an evidentiary hearing, this Court "will uphold the . . . summary denial 'if the motion is legally insufficient or its allegations are conclusively refuted by the record.'" *Mungin v. State*, 79 So. 3d 726, 733 (Fla. 2011) (quoting *Darling v. State*, 45 So. 3d 444, 447 (Fla. 2010)); *see also* Fla. R. Crim. P. 3.851(f)(5)(B) (providing that a successive postconviction motion may be denied without an evidentiary hearing if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief").

3. In *Gordon*, we treated the 2014 letter as newly discovered. *See Gordon*, No. SC15-2091, 2016 WL 6462391, at *1. We question that conclusion because it is clear from the trial transcript that overstatements in FBI analyst's testimony were clarified at trial, on both direct and cross-examination. Therefore, the substantive concerns about FBI analyst's testimony raised in the 2014 letter are not new. Nevertheless, we need not reconsider *Gordon* to affirm the circuit court's

The criticized portions of the FBI analyst's testimony overstated the certainty of the hair comparison analysis that the State used, in part, to link McDonald to a sweatshirt that contained the victim's blood, fibers from the victim's carpet, and fibers from a cashmere belt used to bind the victim's body. However, McDonald's jury also heard appropriate limiting testimony from the same witness. This included testimony that "hair evidence isn't the same as fingerprint evidence" because "[i]t is not a positive means of personal identification," as well as additional testimony—elicited by McDonald's trial counsel on cross-examination—as to the limits of the expert's opinion, specifically that he could not say that the hair at issue "came from a particular person to the exclusion of everyone else in the world." In a retrial, because the science behind hair comparison analysis has not been discredited, the jury would still hear testimony about characteristics of the hair found on the sweatshirt in comparison to characteristics of McDonald's hair, including that, like McDonald's hair, the hair recovered from the sweatshirt was color treated. The jury would also hear that the hair on the sweatshirt was not consistent with Gordon's hair but was consistent with McDonald's. From this testimony, the jury would still be able to infer a link between McDonald's hair and the hair found on the sweatshirt.

summary denial because McDonald has failed to establish that the 2014 letter, even if newly discovered, is of such a nature that it would probably produce an acquittal on retrial.

But the hair evidence is not the only evidence linking McDonald to the sweatshirt—which was found in a hotel room that McDonald shared with Gordon alongside tennis shoes in McDonald’s shoe size that had the same sole pattern as shoeprints found in the victim’s apartment. *See Gordon v. State*, 704 So. 2d 107, 109 (Fla. 1997). Nor is McDonald’s link to the sweatshirt, whether by the hair evidence or otherwise, the only evidence of his guilt. *See id.* at 108-10. When the 2014 letter is considered together with the evidence that would be admissible on retrial—including McDonald’s procedurally barred, meritless prior postconviction challenges to the bloodstain and DNA analysis performed in his case, *see McDonald v. State*, 117 So. 3d 412, 2013 WL 2420798, at *1 (Fla. May 28, 2013) (table)—the letter is not of such a nature that would probably produce an acquittal. *Cf. Duckett v. State*, 148 So. 3d 1163, 1168 (Fla. 2014) (affirming summary denial of newly discovered evidence claim where expert hair comparison testimony that overstated or exaggerated the accuracy of hair analysis but that, when considered in its full context, was not false did not give rise to a reasonable doubt as to the defendant’s culpability).

Accordingly, we affirm the summary denial of McDonald’s motion.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ.,
concur.
COURIEL, J., did not participate.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Pinellas County,
Chris Thom Helinger, Judge - Case No. 521994CF002958000EPC

Jonathan Hackworth of Hackworth Law, P.A., Tampa, Florida,

for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, and Timothy A. Freeland,
Senior Assistant Attorney General, Tampa, Florida,

for Appellee

DOCKET NO. 20-5954

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX B

Supreme Court of Florida

WEDNESDAY, MAY 20, 2020

CASE NO.: SC19-635
Lower Tribunal No(s).:
521994CF002958000EPC

MERYL S. MCDONALD

vs. STATE OF FLORIDA

Appellant(s)

Appellee(s)

McDonald's Pro Se Motion to Declare Rule 3.851(b)(6) & (i) of the Florida Rules of Criminal Procedure Unconstitutional is hereby dismissed because, in supplemental briefing related to the motion, McDonald advocated for impermissible hybrid representation. *See Logan v. State*, 846 So. 2d 472, 476 (Fla. 2003) ("Only when a pro se criminal defendant is affirmatively seeking to discharge his or her court-appointed attorney have the courts of this state not viewed the pro se pleading in which the request to discharge is made as unauthorized and a 'nullity.'").

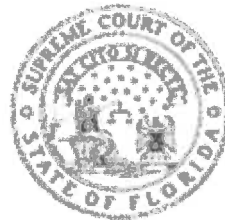
CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



kc

Served:

JONATHAN HACKWORTH
TIMOTHY ARTHUR FREELAND
MERYL S. MCDONALD

DOCKET NO. 20-5954

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX C

Supreme Court of Florida

THURSDAY, JUNE 25, 2020

CASE NO.: SC19-635

Lower Tribunal No(s):
521994CF002958000EPC

MERYL S. MCDONALD

vs. STATE OF FLORIDA

Appellant(s)

Appellee(s)

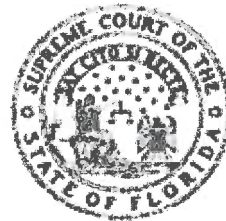
Appellant's pro se Motion for Rehearing is hereby stricken as an impermissible pro se filing. *See Gordon v. State*, 75 So. 3d 200 (Fla. 2011).

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



kc

Served:

JONATHAN HACKWORTH
TIMOTHY ARTHUR FREELAND
MERYL S. MCDONALD

DOCKET NO. 20-5954

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.








BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT








APPENDIX D

Florida Supreme Court Docket
Case Docket

Case Number: SC19-635 - Closed
MERYL S. MCDONALD vs. STATE OF FLORIDA
Lower Tribunal Case(s):521994CF002958000EPC









11/3/2020 5:30:24
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Doc.	Date Docketed	Case Type	Description	Filed by	Notes
	04/18/2019	Death Penalty	NOTICE-APPEAL (3.851 SUCCESSOR)	PS Meryl S. McDonald 180399 BY: AA Jonathan Hackworth 84234	
	04/22/2019	Death Penalty	No Fee Required		3.851 Proceeding
	04/22/2019	Death Penalty	COPY OF THE LOWER TRIBUNAL ORDER/ACTION BEING APPEALED		Final Order Denying Defendant's Fourth Successive Motion to Vacate Judgments of Conviction and Sentence; Directions to Clerk
	04/22/2019	Death Penalty	ACKNOWLEDGMENT LETTER-NEW CASE	Supreme Court Of Florida FSC BY: Supreme Court Of Florida FSC	
	04/22/2019	Death Penalty	ORDER-RECORD FILING (NON-EVIDENTIARY)		TR: 06/11/2019; ROA: 07/01/2019
	05/01/2019	Death Penalty	RECORD/TRANSCRIPT	Ken Burke PINELLA BY: Ken Burke PINELLA	Filed Electronically
	05/01/2019	Death Penalty	RECORD/TRANSCRIPT	Ken Burke PINELLA BY: Ken Burke PINELLA	Addendum to Record - Filed Electronically
	05/06/2019	Death Penalty	ORDER-DEP BRIEF SCHED (40)		The record having been received by the Court, the briefs in the above styled case are to be filed as follows: Appellant's brief is to be filed on or before June 10, 2019; appellee's brief shall be filed twenty days after filing of appellant's brief; and appellant's reply brief shall be filed twenty days after filing of appellee's brief. Motions for extension of time will be granted only due to a medical emergency. The initial and answer briefs shall not exceed seventy-five pages. The reply

					brief shall not exceed twenty-five pages. Motions to file enlarged briefs will not be entertained by the Court.
	05/10/2019	Death Penalty	MOTION-COUNS DISMISSAL	PS Meryl S. Mcdonald 180399 BY: PS Meryl S. Mcdonald 180399	Filed as "Appellant's Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict-Free Counsel" (Amended 5/15/2019)
	05/15/2019	Death Penalty	MOTION-COUNS DISMISSAL	PS Meryl S. Mcdonald 180399 BY: PS Meryl S. Mcdonald 180399	Filed as "Appellant's Amended Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict-Free Counsel"
	05/29/2019	Death Penalty	ORDER- RESPONSE/REPLY REQUESTED		Appellant has filed a pro se "Amended Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict-Free Counsel." Counsel for the parties are hereby requested to file a response to the above-referenced motion on or before June 18, 2019.
	06/05/2019	Death Penalty	RESPONSE	PS Meryl S. Mcdonald 180399 BY: AA Jonathan Hackworth 84234	Appellant's Attorney's Response to Appellant's Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict-Free Counsel
	06/06/2019	Death Penalty	RESPONSE	AE State Of Florida STATE1 BY: AE Timothy Arthur Freeland 539181	State of Florida's Response to Appellant's Motion to Discharge Appointed Counsel
	06/06/2019	Death Penalty	APPENDIX-RESPONSE	AE State Of Florida STATE1 BY: AE Timothy Arthur Freeland 539181	Attachment to State of Florida's Response to Appellant's Motion to Discharge Appointed Counsel
					





	06/06/2019	Death Penalty	NOTICE-FILING	AE State Of Florida STATE1 BY: AE Timothy Arthur Freeland 539181	Notice of Filing
	06/06/2019	Death Penalty	NOTICE-APPENDIX/ATTACHMENT TO NOTICE	AE State Of Florida STATE1 BY: AE Timothy Arthur Freeland 539181	Attachment to Notice of Filing
	06/06/2019	Death Penalty	NOTICE-APPENDIX/ATTACHMENT TO NOTICE	AE State Of Florida STATE1 BY: AE Timothy Arthur Freeland 539181	Attachment to Notice of Filing
	06/07/2019	Death Penalty	MOTION-EXT OF TIME (INITIAL BRIEF-MERITS)	PS Meryl S. Mcdonald 180399 BY: AA Jonathan Hackworth 84234	Appellant's Unopposed Motion for Extension of Time to Serve Initial Brief
	06/10/2019	Death Penalty	MOTION-RECORD SUPPLEMENTATION	PS Meryl S. Mcdonald 180399 BY: AA Jonathan Hackworth 84234	Appellant's Motion to Supplement Record on Appeal
	06/10/2019	Death Penalty	ORDER-RECORD SUPPLEMENTATION GR (CIRC CT)		Appellant's Motion to Supplement Record on Appeal (copy attached) is granted. The trial court clerk is directed, on or before June 20, 2019, to supplement the record with the Fourth Successive Motion to Vacate Judgments of Conviction and Sentence filed below on September 4, 2015. *THE COVERSHEET SHALL REFLECT "SUPPLEMENTAL RECORD" AND PAGE NUMBERING SHOULD RUN CONSECUTIVELY.
	06/10/2019	Death Penalty	ORDER-CIRCUIT COURT		Order Removing Attorney Jenna Finklestein as Co-Counsel
	06/10/2019	Death Penalty	ORDER-CIRCUIT COURT		Order Dismissing Defendant's Motion to Withdraw
	06/11/2019	Death Penalty	ORDER-EXT OF TIME GR (INITIAL BRIEF-MERITS)		Appellant's motion for extension of time is granted, and appellant is allowed to and including July 9, 2019, in which to file the initial brief on the merits. Multiple extensions of time for the

					same filing are discouraged. Absent extenuating circumstances, subsequent requests may be denied. All other times will be extended accordingly.
	06/20/2019	Death Penalty	REPLY TO RESPONSE	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Appellant's Pro Se Reply to Counsel's Response to Pro Se Amended Motion to Discharge Appointed Conflict Counsel
	06/20/2019	Death Penalty	SUPP RECORD/TRANSCRIPT	Ken Burke PINELLA BY: Ken Burke PINELLA	Filed Electronically
	07/08/2019	Death Penalty	ORDER-COUNS DISMISSAL DY		Appellant's Amended Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict-Free Counsel is hereby denied.
	07/08/2019	Death Penalty	LOWER TRIBUNAL DOCUMENTS	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Filed in Circuit Court as "Motion to be Present in Person or by Telephonic Appearance at Notice Motion Hearing"
	07/08/2019	Death Penalty	INITIAL BRIEF-MERITS	PS Meryl S. McDonald 180399 BY: AA Jonathan Hackworth 84234	Appellant's Initial Brief
	07/22/2019	Death Penalty	MOTION-STRIKE	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Appellant's Pro Se Motion to Strike Appointed Counsel's Initial Brief and to Discharge Counsel and/or Request for Permission to Submit this Motion as a Supplement to Appellant's Hair Evidence Giglio Claim (Stricken per 7/24/2019 Order)
	07/24/2019	Death Penalty	ORDER-STRIKE		Appellant's Pro Se Motion to Strike Appointed Counsel's Initial Brief and to Discharge Counsel and/or Request for Permission to Submit this Motion as a Supplement to Appellant's Hair Evidence Giglio Claim is hereby stricken as an impermissible pro se filing. See Gordon v. State, 75 So. 3d 200 (Fla. 2011).

	07/25/2019	Death Penalty	ANSWER BRIEF-MERITS	AE State Of Florida STATE1 BY: AE Timothy Arthur Freeland 539181	Answer Brief of the Appellee
	08/13/2019	Death Penalty	REPLY BRIEF-MERITS	PS Meryl S. McDonald 180399 BY: AA Jonathan Hackworth 84234	Appellant's Reply Brief
	08/13/2019	Death Penalty	ORDER-NO REQ SCHED (MISC)		The above case has been submitted to the Court without oral argument.
	08/26/2019	Death Penalty	MISC. DOCKET ENTRY	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Appellant's Pro Se Summary of Material Evidence and Petition for Relief Based on Trial Counsel's, Trial Judge and Prosecuting Attorney's Violation of McDonald's Fifth, Sixth and Fourteenth Amendment Rights *Stricken per 8/30/2019 Order*
	08/30/2019	Death Penalty	ORDER-STRIKE		Appellant's Pro Se Summary of Material Evidence and Petition for Relief Based on Trial Counsel's, Trial Judge and Prosecuting Attorney's Violation of McDonald's Fifth, Sixth and Fourteenth Amendment Rights is hereby stricken as an impermissible pro se filing. See Gordon v. State, 75 So. 3d 200 (Fla. 2011).
	09/16/2019	Death Penalty	MOTION-COUNS DISMISSAL	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Filed as "Appellant's Second Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict Free Counsel"
	10/08/2019	Death Penalty	LOWER TRIBUNAL DOCUMENTS	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Filed in Circuit Court as "Motion Requesting Court's Order of Transcript of Detective Celona's Grand Jury Scientific Hair and Fiber Testimony"
	10/30/2019	Death Penalty	MOTION-COUNS DISMISSAL	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Filed as "Appellant's Amended Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as

					Appellant's Legal Agent and Motion to Appoint Conflict Free Counsel"
	12/02/2019	Death Penalty	MOTION-OTHER SUBSTANTIVE	PS Meryl S. McDonald 180399 BY: PS Meryl S. McDonald 180399	Filed as "Motion to Declare Rule 3.851(b)(6) & (i) of the Florida Rules of Criminal Procedure Unconstitutional"
	12/19/2019	Death Penalty	ORDER-COUNS DISMISSAL DY		Appellant's Second Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict Free Counsel is hereby denied.
	12/19/2019	Death Penalty	ORDER-COUNS DISMISSAL DY		Appellant's Amended Motion to Discharge Appointed Counsel Because of an Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Motion to Appoint Conflict Free Counsel is hereby denied.
	12/19/2019	Death Penalty	ORDER-DEP BRIEF SCHED (SUPPLEMENTAL)		The State and counsel for the appellant are hereby directed to file briefs with this Court by January 8, 2020, addressing appellant's Motion to Declare Rule 3.851(b)(6) & (i) of the Florida Rules of Criminal Procedure Unconstitutional, including whether McDonald has a constitutional right to represent himself in postconviction, such that this Court should reconsider <i>Gordon v. State</i> , 75 So. 3d 200 (Fla. 2011). The briefs shall be simultaneously filed and limited to twenty pages. Appellant, pro se, is allowed ten days after the service of the State and counsel's briefs to file a supplemental brief limited to five pages.
	01/08/2020	Death Penalty	SUPP INITIAL BRIEF-MERITS	PS Meryl S. McDonald 180399 BY: AA Jonathan Hackworth 84234	Appellant's Brief Addressing Whether McDonald Has a Constitutional Right to Represent Himself
	01/08/2020	Death Penalty	SUPP INITIAL BRIEF-MERITS	AE State Of Florida STATE1 BY: AE Timothy	Brief of Appellee Addressing Whether McDonald Has a Constitutional Right to Represent Himself

				Arthur Freeland 539181	
	01/24/2020	Death Penalty	SUPP ANSWER BRIEF- MERITS	PS Meryl S. Mcdonald 180399 BY: PS Meryl S. Mcdonald 180399	Appellant's Supplemental Brief (Pro Se)
	02/03/2020	Death Penalty	MOTION-BRIEF SUPPLEMENTATION	PS Meryl S. Mcdonald 180399 BY: PS Meryl S. Mcdonald 180399	Motion Requesting Leave to Submit an Addendum to Appellant's Supplemental Brief
	02/03/2020	Death Penalty	APPENDIX- SUPPLEMENTAL-MERIT BRIEF	PS Meryl S. Mcdonald 180399 BY: PS Meryl S. Mcdonald 180399	Addendum To Appellant's Supplemental Brief (Pro Se)
	02/06/2020	Death Penalty	ORDER-BRIEF SUPPLEMENTATION GR		Appellant's Motion Requesting Leave to Submit an Addendum to Appellant's Supplemental Brief is granted and the Addendum to Appellant's Supplemental Brief was filed with this Court on February 3, 2020.
	05/20/2020	Death Penalty	ORDER-OTHER SUBSTANTIVE		McDonald's Pro Se Motion to Declare Rule 3.851(b)(6) & (i) of the Florida Rules of Criminal Procedure Unconstitutional is hereby dismissed because, in supplemental briefing related to the motion, McDonald advocated for impermissible hybrid representation. See Logan v. State, 846 So. 2d 472, 476 (Fla. 2003) ("Only when a pro se criminal defendant is affirmatively seeking to discharge his or her court-appointed attorney have the courts of this state not viewed the pro se pleading in which the request to discharge is made as unauthorized and a 'nullity.' ").
	06/04/2020	Death Penalty	DISP-AFFIRMED		FSC-OPINION: Accordingly, we affirm the summary denial of McDonald's motion. It is so ordered.
	06/09/2020	Death Penalty	MOTION- REHEARING/REINST STRICKEN (UNAUTHORIZED)	PS Meryl S. Mcdonald 180399 BY: PS Meryl S. Mcdonald 180399	(Pro Se) *Stricken, per 6/25/2020 Order.*
	06/25/2020	Death	ORDER-STRIKE		Appellant's pro se Motion for

		Penalty			Rehearing is hereby stricken as an impermissible pro se filing. See <i>Gordon v. State</i> , 75 So. 3d 200 (Fla. 2011).
	06/25/2020	Death Penalty	MANDATE		
	06/25/2020	Death Penalty	ORDER-NOTICE OF DELAY		Article I, section 16(b)(10)b. of the Florida Constitution provides that all state-level appeals and collateral attacks on any judgment must be complete within two years of the date of appeal in non-capital cases and five years from the date of appeal in capital cases unless a court enters an order with specific findings as to why the court was unable to comply and the circumstances causing the delay. Pursuant to the administrative procedures and definitions set forth in Supreme Court of Florida Administrative Order No. AOSC19-76, this case was not completed within the time frame required by Article I, section 16(b)(10)b. because the time frame had already expired by the time this case was filed.
	06/26/2020	Death Penalty	PUBLISH FULL		
	10/19/2020	Death Penalty	USSC Not/Cert Filed in FSC		The petition for a writ of certiorari in the above entitled case was filed on October 1, 2020 and placed on the docket October 8, 2020 as No. 20-5954.

DOCKET NO. 20-5954

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX E

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

**STATE OF FLORIDA,
Plaintiff,**

v.

**CASE NO.: CRC94-02958CFANO
Death Penalty Case**

**MERYL MCDONALD,
Defendant.**

**RESPONSE TO MOTION FOR RECONSIDERATION OF CONDITIONAL
APPOINTMENT BASED ON CERTIFICATION OF CONFLICT OF INTEREST**

COMES NOW, the State of Florida, by and through the undersigned counsel, and requests this Court deny Defendant's motion to reconsider the appointment of counsel and appoint substitute counsel:

1. Capital Collateral Regional Counsel - Middle (CCRC-M) has been appointed to represent McDonald since his conviction became final in 1999. After McDonald's federal habeas petition and appeals were denied in February 2012, there have been occasions when he decided to pursue his own remedies with this Court and CCRC-M has acted as stand-by counsel. Yet, throughout those proceedings, either as stand-by counsel or as counsel of record on appeal, CCRC-M has remained capital collateral counsel for McDonald.

2. On December 26, 2013, McDonald filed another *pro se* successive postconviction motion in this Court. This Court

ordered a case management conference be held on February 3, 2014 and required CCRC-M to attend because CCRC had previously acted as stand-by counsel in McDonald's prior two *pro se* motions. This Court once again appointed CCRC-M as stand-by counsel for the pendency of the postconviction motion in this Court. After denying McDonald's successive postconviction motion, the Court appointed CCRC-M to represent McDonald on appeal on February 28, 2014.

3. In the April 3, 2014 motion filed by CCRC-M, they allege a conflict has recently developed between them and McDonald. At the hearing on April 10, it was further explained that the conflict involves ethical concerns about McDonald's candor with the court. The State requested an opportunity to file a written response, which this Court granted. The hearing on the motion to withdraw was continued until April 24.

4. In a case eerily similar to McDonald's, the Florida Supreme Court was concerned that death penalty defendants were attempting to "game the system" through requests to represent themselves or obtain counsel of their choosing. Lambrix v. State, 124 So. 3d 890 (Fla. 2013). Lambrix alleged his CCRC counsel failed to investigate newly discovered evidence and wanted new counsel appointed. Id. at 898. As Judge Helinger has previously done in McDonald's case, the judge in Lambrix's

case determined that CCRC was not ineffective and would not remove them from the case. Id. Lambrix then filed a civil complaint against his counsel in federal court, which caused his counsel to file a motion to withdraw due to a conflict of interest. Id. at 898-99. In response, Lambrix, as McDonald has done, filed a motion to represent himself. Id. at 899. The state circuit court denied Lambrix's motion to represent himself. Id.

5. The Florida Supreme Court affirmed the ruling denying Lambrix's request for self-representation. Lambrix, 124 So. 3d at 899. The court reviewed the constitutional right to represent oneself at trial and how that right ends when trial is over.¹ Id. The court recognized a right to self-determination for a defendant during postconviction but not to the same degree as at trial. Id. The right to self-representation is not limitless. Id. at 899-900. Courts must ensure that the death penalty is fair and reliable and administered responsibly. Id. Lambrix had already exhausted all of his legal remedies with his current counsel and having new counsel appointed would create unnecessary delays. Id. In addition, Lambrix's excessive, meritless pleadings were disruptive to the judicial system, and

¹ The United States Supreme Court outlined the trial right of self-representation in Faretta v. California, 422 U.S. 806 (1975).

with counsel appointed to represent him, all pleadings would presumably be made in good faith. Id.

6. As recognized in Lambrix, McDonald neither has the constitutional right to newly appointed counsel nor to represent himself. It does not matter if McDonald wants CCRC-M to file certain pleadings or disagrees with how CCRC-M has represented him; through McDonald's abuse of the judicial system and filing of multiple frivolous motions, he has forfeited any choice of self-representation over appointed counsel. Lambrix, 124 So. 3d at 900 ("[A] defendant does not have the right to disrupt the judicial system, frustrate the administration of justice, or prevent his or her case from being litigated.").

7. Under Florida's statutory scheme, McDonald does not receive appointed counsel of his choosing. Instead, he receives qualified counsel that allows the courts to administer justice in a timely manner. CCRC-M should remain counsel of record in this case. The appointment of capital postconviction counsel in this state comes from Florida Statutes, not the Florida or United States constitutions. Darling v. State, 45 So. 3d 444, 455 (Fla. 2010). Thus, the determination of whether CCRC-M may withdraw from this case can only be based on interpreting the statutory scheme for representation of death row inmates in chapter 27. See State v. Kilgore, 976 So. 2d 1066, 1968 (Fla.

2007). Florida Statutes require that CCRC-M remain counsel of record for McDonald unless an actual conflict of interest exists. See § 27.703(1), Fla. Stat. (“[T]he sentencing court shall, upon determining that an **actual conflict** exists, designate another regional counsel. ... A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists.”) (emphasis added).

8. A conflict of interest arises when a lawyer is forced to choose between alternative courses of actions because of competing interests, one of which does not involve his client. Kormondy v. State, 983 So. 2d 418, 434 (Fla. 2007). See also § 27.703, Fla. Stat. (“An actual conflict of interest exists when an attorney actively represents conflicting interests.”). In criminal cases, alleged conflicts of interest most often arise when a defense attorney has represented two defendants or a defendant and a witness. See, e.g., Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976). To show a conflict, a defendant must prove that another attorney, who does not have the same conflict, would have employed a different defense strategy. United States v. Mers, 701 F.2d 1321, 1328-30 (11th Cir. 1983). Conflicts of interest do not arise simply because a defendant and his counsel fail to establish a meaningful relationship.

Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Contention between counsel and client, even rising to the filing of a bar complaint, does not create a conflict of interest. Hutchinson v. State, 17 So. 3d 696, 703-704 (Fla. 2009). Neither does a conflict of interest arise when a defendant requests counsel present false testimony and facts. Sanborn v. State, 474 So. 2d 309, 312 (Fla. 3d DCA 1985) (finding that there is no requirement for attorneys to "withdraw from a case whenever his client insists on presenting false testimony"). The reason for this is because the duty of loyalty to a client and the ethical duty of candor with the court do not create a conflict of interest. Nix v. Whiteside, 475 U.S. 157, 176 (1986).

9. In Whiteside, the Court outlined the duty an attorney has to disclose false evidence a client wants to present to a court. 475 U.S. at 168-70. Florida has the same ethical obligation. Rule 4-3.3(a) of the Rules of Professional Conduct states:

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer [or] (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client[.]

The rule also states that, "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends

to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” R. Regulating Fla. Bar 4-3.3(b).² The comments to the rule tell attorneys that the proper course of conduct is to inform the court of the false information and allow the court to determine the appropriate action. In McDonald’s case, this Court (the Sixth Judicial Circuit) has already denied his motion for postconviction relief and his motion for rehearing. No litigation is currently pending before this Court.

10. McDonald’s counsel has provided general information that an alleged conflict of interest has arisen between CCRC-M and McDonald because McDonald either has or wants to present false information to the court. This does not provide a conflict of interest that permits CCRC-M to withdraw from representing McDonald. First, the tension between properly representing McDonald and the ethical duty to the court does not create a conflict of interest requiring CCRC-M to withdraw. Second, allowing CCRC-M to withdraw, in fact, frustrates the administration of justice by allowing McDonald to continue to act, without discretion. Without ethical counsel, as CCRC-M has

² Other rules that require an attorney to refrain from committing fraud or to report fraud include Rule 4-1.2(d), 4-1.6(b), 4-3.4(b), 4-8.4(b) and 4-8.4(c).

demonstrated, McDonald would be left, unchecked, to disrupt the judicial system. Third, appointing different counsel would not solve the problem before this Court. This Court would still be presented with an ethical disagreement concerning fraud between McDonald and his counsel which does not go away because CCRC-M withdraws from the case. Moreover, without the same knowledge of the case as CCRC-M has, new counsel may fail to recognize the false evidence. Thus, the granting of this motion to withdraw, in the end, results in condoning McDonald's fraud upon the Court. See Sanborn, 474 So. 2d at 314.

WHEREFORE, based on the foregoing, the State respectfully requests this Honorable Court deny Defendant's motion for reconsideration of appointment of CCRC-M for McDonald's appeal.

Respectfully Submitted,

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STATE OF FLORIDA

BERNIE McCABE
STATE ATTORNEY
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service and U.S. mail to The Honorable J. Thomas McGrady, Chief Judge (**hskidmore@jud6.org**), Clearwater Criminal Justice Center, 14250 49th St. North, Clearwater, Florida 33762; and by electronic service to James V. Viggiano, Jr., CCRC, Office of the Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136 (**viggiano@ccmr.state.fl.us** and **support@ccmr.state.fl.us**); and by U.S. mail to Meryl McDonald, DC #180399, Union Correctional Institution, 7819 N.W. 228th St., Raiford, Florida 32026-4450, on this 18th day of April, 2014.

/s/ Sara Elizabeth Macks

SARA ELIZABETH MACKS
CO-COUNSEL, STATE OF FLORIDA

cc: Damien Kraebel, Assistant State Attorney
dkraebel@co.pinellas.fl.us

DOCKET NO. 20-5954

IN THE SUPREME COURT OF THE UNITED STATES

MERYL MCDONALD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX F

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-973

MERYL S. McDONALD,

Appellant,

v.

THE STATE OF FLORIDA

Appellee.

RESPONSE TO DEFENDANT'S MOTION TO DISCHARGE APPELLATE COUNSEL BECAUSE OF IRRECONCILABLE CONFLICT AND FAILURE TO ACT AS APPELLANT'S LEGAL AGENT AND FAILURE TO COMMUNICATE WITH APPELLANT AND MOTION TO APPOINT CONFLICT-FREE COUNSEL

The undersigned files this Response to Appellant McDonald's Motion to Discharge Appellate Counsel Because of Irreconcilable Conflict and Failure to Act as Appellant's Legal Agent and Failure to Communicate with Appellant and Motion to Appoint Conflict-Free Counsel, and states as follows;

1. Appellant McDonald was previously represented by Capital Collateral-Southern Region. The Office of Capital Collateral-Southern Region filed an initial brief, but Appellant McDonald moved this Court to discharge Capital Collateral-Southern Region and strike the initial brief based on almost identical grounds to the present motion. Thereafter, the undersigned was appointed as appellate counsel for Appellant Meryl S. McDonald in this cause and was charged with representing Appellant solely on his appeal from the summary denial of his second successive motion for post-conviction relief.

2. The undersigned proceeded to thoroughly review the record in this case, which consists of thousands of pages of documents and transcripts, and other items, contained in 22 boxes. The undersigned also reviewed the various court decisions involving Appellant's case, including *McDonald v. State*, 743 So.2d 501 (Fla. 1999), *McDonald v. State*, 952 So.2d 484 (Fla. 2006), *McDonald v. State*, 117 So.3d 412 (Fla. 2013) and *McDonald v. Florida*, Case No. 8:07-cv-564-T-26EAJ (Middle District of Florida), as well as previous briefs filed in his appellate cases.

3. Appellant McDonald filed the present motion prior to the filing of the initial brief. Appellant McDonald maintains that the undersigned was required to work as his agent and have him approve any brief filed in this cause. Appellant McDonald also asserts that the undersigned failed to adequately communicate with him and failed to raise specific matters in the initial brief.

4. Contrary to Appellant's claims, the undersigned carefully reviewed Appellant's communications concerning this case. In correspondence, Appellant outlined his view on the history of this case and potential arguments that could be advanced. The undersigned undertook a thorough review of the record in an effort to ascertain whether the record on appeal substantiated an appellate claim that the trial court erred in summarily denying Appellant's second successive motion for post-conviction relief. Appellant maintains that the documentation mentioned in his correspondence was "marginally part" of his circuit court claims. The undersigned exercised his professional opinion in the preparation of the initial brief in the instant appeal. The undersigned was governed by the record on appeal and could not raise nor argue matters which were not substantiated in regard to the trial court's order summarily denying the second successive motion for post-conviction relief. It is instructive to note that Appellant's prior counsel, Capital Collateral-Southern Region, reached the same conclusion as the undersigned when presenting an initial brief in this cause.

5. Appellant's charge that the undersigned failed to "investigate" the DNA, hair and fiber evidence appears to suggest that Appellant believes that the undersigned was appointed for circuit court proceedings, as opposed to an appellate case where the record on appeal had been completed. This misunderstanding is evident where Appellant asserts that the June, 1994 DNA report and the November, 2001, State Attorney letter "requires a full investigation." Appellant McDonald alludes to NACDL's letter concerning hair evidence, which was advanced as "substantive evidence" in the lower court. Appellant also points out that the DOJ/FBI letters "opens this case to full investigation and litigation," and that such litigation should be conducted "in any future proceeding." Appellant McDonald's continually alludes to the DOJ/FBI investigation in support of the instant appeal and notes that the circuit court "ignored" this matter. In reality, as noted in the initial brief, the circuit court pointed out that this information was not advanced as a claim or even as argument and, therefore, there was nothing for the court to adjudicate. The undersigned attempted to implement Appellant's reasonable requests for argument, but, as in the case of prior counsel, found that the record conclusively refuted the claims as alleged. Trial court counsel did not, as the circuit court noted, file any amendments to the second successive motion for post-conviction relief, nor present any pleadings or arguments regarding Agent Wong's July 28, 2014 letter or Agent Wong's November 10, 2015 letter. The record on appeal simply contained a Notice of Filing attaching a copy of the November 10, 2015 letter to co-defendant Gordon.

6. As noted in the initial brief, the matters raised in Agent Wong's letters were raised in the fourth successive motion for post-conviction relief. This motion is being held in abeyance pending the outcome of this appeal. Consequently, the issues are presently before the circuit court and will be ripe for evidentiary development and will allow, at the appropriate time and with an appropriate record, for a full and adequate appellate review on the merits of any issue or argument related thereto should the circuit court rule adversely to Appellant. As such, Appellant's desire to have "a full investigation" and to fully litigate in any "future proceeding," the matters so raised and argued will be realized.

7. Appellant asserts that there exists a conflict of interest because the undersigned has failed to act as his agent in this appeal. However, the presentation of issues on appeal are decisions within an appellate attorney's ambit. As previously noted, the undersigned did conscientiously review Appellant's correspondence and attempted to implement Appellant's reasonable requests for argument, but, as in the case of prior counsel, found that the record conclusively refuted the claims as alleged.

8. Appellant requests that the undersigned be discharged and that attorney Mark E. Olive be appointed to represent him in this cause. The undersigned expresses no opinion as to Mr. Olive, but submits that due to Appellant's belief that a conflict of interest exists with the undersigned, this Court should appoint separate counsel or remand this matter for appointment of separate counsel.

WHEREFORE, the Defendant submits this Response to Appellant McDonald's motion.

Respectfully submitted,

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s/ J. Rafael Rodriguez
J. RAFAEL RODRÍGUEZ, ESQ.
FLA BAR NO. 302007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed on November 9, 2016, and served on opposing counsel and Appellant Meryl S. McDonald, #180399, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

s/ J. Rafael Rodríguez
J. RAFAEL RODRÍGUEZ
FLA BAR NO. 302007