No: 20-5954

October Term, 2020

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

REPLY BRIEF OF PETITIONER

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Petitioner pro se

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REPLY

REASONS FOR GRANTING THE WRIT

Petitioner McDonald would first point out to this Honorable Court that the Respondent in their Brief in Opposition claims that "McDonald once again challenges Florida's rule mandating appointment of counsel to all death-sentenced defendants" which is totally incorrect. (Brief in Opposition, page 6, footnote 4).

In 2017, McDonalds certiorari petition raised two separate and distinct claims, neither of which were ones addressing the constitutionality of the Florida's postconviction rule. The claims that were presented in 2017 were:

1. Whether the State violated due process when the lead police detective and a FBI crime lab analyst knowingly falsified hair and fiber analysis against petitioner, and the State's failure to disclose this information to the court and defense prior to jury trial, and whether the falsity of the pretrial and trial testimony extend to the State for purpose of establishing a violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972)? and,

2. Whether the State violated due process where the State record shows prior to jury trial the State suppressed two crucial DNA lab reports including the Supervisor and reviewing agent report, and then submitted a false FBI report on the DNA testing?

The respondents brief in opposition also posits that all of McDonalds attempts to file pro se motions and/or claims have been stricken by the Florida Supreme Court as unauthorized is correct to the extent that Florida's high court relies on the decision in *Gordon v State*, 75 So.3d 200 (Fla. 2011) which held that "death sentenced appellants may not appear pro se in postconviction appeals." The decision in *Gordon* was incorrectly decided as will be shown below.

The Florida Supreme Court, when rendering its decision in *Gordon* relied on this Courts decision in *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (holding that defendant did not have federal constitutional right to represent himself on *direct appeal* from his conviction).(emphasis added).

These two cases are clearly distinguishable and present two totally different procedural postures. *Martinez* was a case on direct appeal, whereas *Gordon* was a postconviction case. To extend the holding in *Martinez*, that there is no Sixth Amendment right to self-representation on *direct appeal*, to cases in the postconviction process then the question is raised that "If there is no constitutional right to self-representation on direct appeal or in a postconviction proceeding, then how can the State of Florida force this constitutional right on a death sentenced defendant against his wishes?

Furthermore, and more importantly, the State of Florida took the position in the proceedings below that the decision in *Gordon* should be revisited and in so doing stated that "This Court should reconsider and overrule *Gordon* to the extent it prohibits a competent capital defendant from representing himself in postconviction proceedings"[1] (see Certiorari Appendix, Exhibit-"E", page 2).

The State further pointed out to Florida's high court that courts own decision in *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993) which held that "if the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived." (see Certiorari Appendix, Exhibit-"E", page 3).

Then 20 years later the Florida Supreme Court decided *Gordon*, which in turn prompted the amendment of Florida Rule of Criminal Procedure 3.851 to include the provisions that capital defendants were no longer permitted to represent themselves in postconviction appeals, and the only way to discharge postconviction counsel was to also waive all postconviction appeals. See rule 3.851(b)(6) & (i).

The State has now changed its position; the State now relies on the decision in *Gordon* as being good law and mentions nothing about that case being wrongly

[1] postconviction counsel Jonathan Hackworth also submitted to the Florida Supreme Court that not only should be Gordon be revisited and overruled but also that the rule was in fact unconstitutional. ." (see Certiorari Appendix, Exhibit-"D")

decided or whether the case should be revisited and reconsidered as they did in the proceedings in the Florida Supreme Court. This brings up the issue of Judicial Estoppel. See *Zedner v. United States*, 547 US 489, 126 S Ct 1976, 164 L Ed 2d 749 (2006) (Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, the party may not thereafter, simply because the party's interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken. This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase).

In this present certiorari petition, McDonald would be prejudiced by the State's changing its position, this is especially so because McDonald and the State **both agreed** in the Florida Supreme Court that the decision in *Gordon* should be revisited and overruled. Now the State, by taking a contrary position because their interest has changed, are now asserting that the reasons provided for in *Gordon* are valid reasons for this Court to decline to exercise its certiorari jurisdiction. This Honorable Court should decline this invitation.

The respondent in their brief in opposition also states that McDonald erroneously asserts that Florida's rule forbidding pro se filings by death sentenced defendants violates this Court's jurisprudence, (brief in opposition, page 9), and in

example, cites to McDonalds use of *Martel v. Clair*, 565 US 648, 132 S.Ct. 1276, 182 L Ed 135 (2012). However, a casual reading of the certiorari petition will show that McDonalds use of *Martel* and other cases such as *Holland v. Florida,* 560 U.S. 631,658 130 S.Ct. 2549,2568 177 L.Ed.2d 130 (2010); *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); and *Downs v. McNeil*, 520 F.3d 1311 (11th cir. 2008) was not for the purpose of showing this Court how the rule forbidding pro se filings violates this Court's jurisprudence, but rather to show examples of ineffective assistance of postconviction counsel and the effect they have on death sentenced defendants.

In other words as stated in the certiorari petition, "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." (See certiorari petition, page 15)

Lastly, the respondent in their brief in opposition goes on a detailed history of McDonald's previous filings since 1995, and attempts to equate those filings with what is before this Court now. McDonald's previous case history is immaterial to the issue presented to this Court because the issue before this Court affects a whole class of people, and that is all death sentenced defendants in Florida and McDonald's previous case history has no bearing whatsoever on the issue or this Courts ultimate certiorari jurisdiction.

In closing, McDonald would respectfully asseverate to this Court that the constitutionality of rule 3.851 is before this Court because a death sentenced defendant in Florida is being forced to choose between pursuing his/her postconviction appeals or *waiving all postconviction proceedings* which, does in fact, raise the unsettled question of federal law which is;

"If there is no constitutional right to postconviction counsel then how can a death sentenced defendant be *forced* to choose between appointed counsel or *waiving all postconviction appeals*?

Therefore, this Honorable Court should grant certiorari review to this class of death sentenced defendants and resolve the constitutionality of Florida's rule 3.851(b)(6) & (i) in the "Interests of Justice"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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