

**APPELLANT'S BRIEF ADDRESSING WHETHER MCDONALD HAS A
CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF**

CASE NO. SC19-635

**THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

MERYL McDONALD

Appellant,

v.

STATE OF FLORIDA

Appellee.

**On Appeal From:
CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT COURT CASE NO. CRC94-02958CFANO**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	3
STATEMENT REGARDING ORAL ARGUMENT	4
STATEMENT OF THE ISSUES.....	5
STATEMENT OF THE CASE AND FACTS	6
SUMMARY OF THE ARGUMENTS	9
ARGUMENTS AND CITATIONS OF AUTHORITY	10
I. Florida Rule of Criminal Procedure 3.851(b)(6) & (i) is Unconstitutional.....	11
II. Appellant has a Constitutional Right to represent himself.....	12
CONCLUSION	16
CERTIFICATE OF SERVICE	18
CERTIFICATE OF TYPEFACE COMPLIANCE	18

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Barnes v. Sec’y, Dep’t of Corr.</u> , 833 F.3d 1148 (11th Cir. 2018).....	13
<u>Barnes v. Jones</u> , 139 S. Ct. 945 (2019).....	13
<u>Durocher v. Singletary</u> , 623 So. 2d 482 (Fla. 1993).....	12
<u>Faretta v. California</u> , 95 S. Ct. 2525 (1975).....	12
<u>Florida Dept. of Revenue v. City of Gainesville</u> , 918 So. 2d 250 (Fla. 2005).....	9
<u>Gaskin v. Florida</u> , SC19-1097 (Fla. October 31, 2019).....	16
<u>Gordon v. State</u> , 2016 WL 6462391 (Fla. 2016).....	8
<u>Gordon v. State</u> , 75 So. 3d 200 (Fla. 2011).....	11, 13
<u>Hamblen v. State</u> , 527 So. 2d 800 (Fla. 1988).....	12
<u>McDonald v. State</u> , 743 So. 2d 501 (Fla. 1999).....	6
<u>McDonald v. State</u> , 952 So. 2d 484 (Fla. 2006).....	7
<u>McDonald v. State</u> , 117 So. 3d 412 (Fla. 2013).....	7
<u>McDonald v. Florida</u> , 138 S. Ct. 746 (Fla. 2018).....	7
<u>Ricketts v. Adamson</u> , 107 S. Ct. 2680 (1987).....	11
<u>Tucker v State</u> , 559 So. 2d 218 (Fla. 1990).....	11
<u>United States v. Mezzanatto</u> , 115 S. Ct. 797 (1995).....	11
<u>Zingale v. Powell</u> , 885 So.2d 277 (Fla. 2004).....	9

TABLE OF CITATIONS (cont.)

Pleadings

Petitioner’s Brief in Gaskin v. Florida, SC19-1097 *18 (Fla. October 31, 2019).....16

Statutes and Rules

Florida Rule of Criminal Procedure Rule 3.851.....7

Florida Rule of Criminal Procedure, Rule 3.851(f)(5)(B).....8

Florida Rules of Professional Responsibility

Florida Rules of Professional Responsibility, Rule 4-3.1.....15

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Mr. McDonald, respectfully requests oral argument on this appeal. Mr. McDonald believes oral argument will be beneficial to this Court in its resolution of the case.

STATEMENT OF THE ISSUES

- I. Whether Florida Rule of Criminal Procedure 3.851(b)(6) & (i) is Unconstitutional?
2. Whether Appellant has a constitutional right to represent himself?

STATEMENT OF THE CASE AND FACTS

A. Facts, Course of Proceedings, and Disposition in the Lower Tribunal

The Trial and Direct Appeal

On or about April 27, 1994, Appellant, Meryl McDonald (hereinafter referred to as “Appellant”) along with co-Defendant, Robert Gordon (hereinafter referred to as “Gordon”), and Denise Davidson were indicted for first degree murder. On or about June 6, 1995, before the Honorable Susan Schaeffer, Circuit Judge, Appellant and his co-Defendant Gordon began their joint jury trial. (R, P520) On June 15, 1995, both Appellant and Gordon were found guilty of murder in the first degree for the killing of Dr. Louis A. Davidson on January 25, 1994. (R, P520) The following day on June 16, 1995, the jury recommended death for both Appellant and Gordon by a vote of nine to three. (R, P520) The Sentencing Court followed the recommendation of the jury on November 16, 1995, and sentenced Appellant to death. (R, P520) The Florida Supreme Court upheld both Appellant’s conviction and death sentence on direct appeal in McDonald. McDonald v. State, 743 So. 2d 501 (Fla. 1999). The mandate was issued on October 18, 1999. (R, P520)

The Prior Post-Conviction Proceedings and Other Evidence Presented in Earlier Collateral Proceedings

McDonald timely filed his first Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure, Rule 3.851 on December 15, 2000. (R, P520) An evidentiary hearing was conducted on November 29, 2001 and November 30,

2001. (R, P520) On February 10, 2003, the Trial Court entered an Order denying Appellant's first Motion for Postconviction Relief. The Florida Supreme Court affirmed that decision on November 2, 2006. McDonald v. State, 952 So. 2d 484 (Fla. 2006).

On March 12, 2002, McDonald filed another Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure Rule 3.851. (R, P521) On June 12, 2002, Appellant's Motion for Postconviction Relief was summarily denied. (R, P521) Again, the Florida Supreme Court affirmed this Trial Court's decision on May 28, 2013. McDonald v. State, 117 So. 3d 412 (Fla. 2013).

Appellant filed his second successive Postconviction Motion, which again was summarily denied by the Trial Court by way of order on February 27, 2014. (R, P521) The Florida Supreme Court affirmed the summary denial of the second successive Postconviction Motion filed by Appellant on June 23, 2017. McDonald v. State, SC14-973, 2017 WL 2709773 (Fla. June 23, 2017), reh'g denied, SC14-973, 2017 WL 3764370 (Fla. Aug. 31, 2017) and cert. denied sub nom. McDonald v. Florida, 138 S. Ct. 746 (Fla. 2018). (R, P521)

On September 4, 2015, during the pendency of the appeal of the second successive Postconviction Motion, Appellant's Counsel filed the Fourth Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend pursuant to Florida Rule of Criminal Procedure Rule 3.851. (R,

521) The State filed its response on September 24, 2015. (R, 521) The Trial Court held a case management conference on October 16, 2015 subject to the requirements of Florida Rule of Criminal Procedure Rule 3.851(f)(5)(B). Ultimately, the Trial Court on October 26, 2015 entered an order abating the Motion until jurisdiction returned to the Trial Court from the Florida Supreme Court. (R, P541)

As noted by the Court in its Order Denying Appellant's Fourth Successive Motion to Vacate Judgments of Conviction and Sentence, Appellant filed pro se amendments and additional pro se filings throughout the proceedings in this matter. (R, P541) Ultimately, these were all stricken. (R, P541)

Pursuant to Florida Rule of Criminal Procedure, Rule 3.851(f)(5)(B), a case management conference was conducted on March 4, 2019. (R, P493) During the case management conference, counsel for Appellant adopted Appellant's most recent pro se filing by reading relevant portions of his pro se filing into the record during the hearing. (R, P500 - 502) Appellant requested the Trial Court grant Appellant an evidentiary hearing. (R, P503) During the case management conference, Appellee cited to Appellant's co-defendant Gordon's raising of the same issue concerning forensic hair analysis and the Florida Supreme Court's affirming of the trial court's denial of post-conviction in Gordon.¹ (R. 504, L11-15)

¹ Gordon v. State, 2016 WL 6462391 (Fla. 2016)

Throughout Appellant's Appellate proceedings, he has filed numerous pro se pleadings, both before the Trial Court, the Second District Court of Appeals and the Florida Supreme Court. As Appellant was represented by Counsel throughout the proceeding, the pro se pleadings and motions were summarily denied or stricken.

On May 10th and May 15th, 2019, the Appellant, pro se, filed directly with the Florida Supreme Court his 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. The Appellant's pro se filings through the course of his pending post-conviction matter and the Motions filed on May 10th and May 15th, 2019, respectively has prompted this Court to request the Appellant's and Appellee's counsel to each file their respective briefs on the issue of having a defendant represent himself in postconviction death penalty cases.

B. Standards of Review

This Court reviews questions of constitutionality on a de novo basis. "The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo by this Court." Florida Dept. of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005) citing See Zingale v. Powell, 885 So.2d 277, 280 (Fla. 2004).

SUMMARY OF THE ARGUMENTS

Mr. McDonald is entitled to represent himself throughout these proceedings pro se – the right to self-representation is one of the most basic tenants of the American Judicial System and American Jurisprudence. Florida Rule of Criminal Procedure 3.851(b)(6) & (i) is unconstitutional as it bars Mr. McDonald’s right to represent himself.

ARGUMENTS AND CITATIONS TO AUTHORITY

I. Florida Rule of Criminal Procedure 3.851(b)(6) & (i) is Unconstitutional

Florida Courts have long held that criminal defendants do not have a statutory right to counsel for post-conviction relief, primarily with the exception of Florida Rule of Criminal Procedure Rule 3.851(b). Florida Rule of Criminal Procedure Rule 3.851(b) provides a statutory right to those sentenced to death after a mandate affirming their “judgment and sentence of death on direct appeal.” Fla. R. Crim. Pro. R. 3.851(b)(1) Specifically subsection (b) provides the procedure and process for the appointment of counsel and their statutory obligations, including the process for a defendant to dismiss his post-conviction counsel. It provides the two (2) basis for discharge – an actual conflict or within subdivision (i) of the Rule, which provides a basis for a defendant to both “dismiss pending postconviction proceedings and to discharge collateral counsel.” Fla. R. Crim. Pro. R. 3.851(i)(1) The Rule provides that a defendant may do so upon a finding that the defendant is

competent and a requirement that the court conduct “a complete (Durocher/Faretta) inquiry to determine whether the defendant knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and dismiss collateral counsel.” Fla. R. Crim. Pro. R. 3.851(i)(6)

Here, following the logic of subsection (i), if a defendant can waive all postconviction proceedings and their postconviction counsel with a waiver found to be “knowingly, freely and voluntarily”, then it would only logically follow that a defendant should be able to waive their postconviction counsel with the same – knowingly, freely and voluntarily given waiver. To hold otherwise would grant this waiver of statutory right *only* to a defendant stipulating to their death sentence being carried out, but not their decision to represent themselves pro se.

II. Appellant has a Constitutional Right to represent himself.

In Gordon, this Honorable Court previously found that death-sentenced appellants may not appear pro se in postconviction appeals. Gordon v. State, 75 So. 3d 200 (Fla. 2011) After this Court’s holding in Gordon, Florida Rule of Criminal Procedure 3.851 was amended to include a provision that capital defendants, such as Gordon and McDonald, are no longer able to represent themselves in postconviction proceedings on or after January 1, 2015. See In re. Amendments to Fla. Rules of Jud. Admin.; Fla. Rules of Crim. P.; and Fla. Rules of App. P. – Capital Postconviction Rules, 148 So. 3d 1171, 1180-81 (Fla. 2014).

Both Federal and State Courts have recognized that constitutional rights may be waived. See United States v. Mezzanatto, 115 S. Ct. 797 (1995) (noting that the provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) were able to be waived by a criminal defendant); see Ricketts v. Adamson, 107 S. Ct. 2680 (1987) (holding a defendant's plea agreement removing double jeopardy principles was enforceable against a criminal defendant); see Johnson v. Zerbst, 58 S. Ct. 1019 (2000) (1938) (denying a Petitioner's habeas corpus petition challenging the validity of his waiver of counsel); see Tucker v State, 559 So. 2d 218 (Fla. 1990) (holding that even an oral waiver of a defendant's right to a jury trial was valid). Both Federal and Florida Jurisprudence is full of examples of defendants waiving their rights to various Constitutional Rights as identified above.

In this Court's recession from the holding in Gordon, it should consider and rely on its reasoning in Durocher. Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993) This Honorable Court held in Durocher that "[c]ompetent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." Id. at 484 citing Faretta v. California, 95 S. Ct. 2525 (1975); Hamblen v. State, 527 So. 2d 800 (Fla. 1988) The holding continued "[i]f the right to representation can be waived at trial, we see no reason why the statutory right to collateral counsel cannot also be waived." Id. at 484. As such, if a defendant may

waive constitutional rights, then a defendant must be able to waive statutory rights, such as those bestowed in Fla. Rules of Crim. Pro. Rule 3.851(b).

Further argument to reverse the ruling Gordon v. State is asserted in the dissent of such case drafted by Justice C.J. Canady and concurred by Justice J. Polston which states:

It is true that appellants in direct criminal appeals do not have the right to proceed pro se. But there is one very important difference between direct appeals and postconviction appeals: a remedy is available for the ineffective assistance of appellate counsel in direct appeals, but no such remedy is available with respect to postconviction appellate counsel. Even if there is no constitutional right for a prisoner under sentence of death to proceed pro se in a postconviction appellate proceeding, I conclude that it is an unwise and unfair policy to saddle such a litigant with counsel against his wishes—particularly when the litigant is without any meaningful remedy for the ineffective assistance of counsel. Gordon v. State, 75 So. 3d 200, P. 203 (Fla. 2011)

The Appellant in this case agrees with the dissent in Gordon in that a Defendant should not be forced to have counsel if such right is properly waived.

Federal Courts, most notably the United States Court of Appeals for the Eleventh Circuit and the United States Supreme Court permit pro se litigants to file pleadings, while still represented by Counsel. See Barnes v. Sec’y, Dep’t of Corr., 833 F.3d 1148, 1155 (11th Cir. 2018) cert. denied sub nom. Barnes v. Jones, 139 S. Ct. 945 (2019) Nothing in the Federal Rules of Appellate Procedure and/or the Eleventh Circuit’s Rules prohibit pro se representation. The overwhelming majority

of Federal Post-Conviction actions are filed pro se. Undersigned Counsel is unaware of any prohibitions against pro se filings by the United States Supreme Court.

Lastly, a portion of the conflict between appointed counsel and criminal defendants, which wish to proceed pro se raises ethical conflicts for their appointed counsel. Florida Rules of Professional Responsibility, Rule 4-3.1 titled “Meritorious Claims and Contentions” states the following:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Unfortunately, the current state of Florida Law puts appointed counsel in the difficult situation of weighing their ethical obligations with their client’s desires to raise every potential issue. Appointed counsel is put in the precarious situation, where they must protect attorney-client privilege, while still explaining why they are unable to raise said issue, if challenged by their criminal defendant client. If a criminal defendant with appointed counsel believes they have a good faith basis to argue or raise an issue to attempt to save their life, they should have that basic Human Right.

CONCLUSION

Based on the foregoing, Mr. McDonald respectfully requests that this Honorable Court reconsider its holding in Gordon and determine Florida Rule of Criminal Procedure 3.851(b)(6) & (i) is unconstitutional.

As highlighted by James Driscoll, Jr. of the Capital Collateral Regional Counsel – Middle Region in Petitioner’s Brief in Gaskin: There is a better way to resolve the issue, while still achieving this Court’s concerns as highlighted in Gordon. Gaskin v. Florida, SC19-1097 *18 (Fla. October 31, 2019) This Court should permit defendants to submit pro se filings, while monitoring to ensure defendant to do not abuse the process. Defendants’ appointed counsel can assist in the electronic filing of the pro se filings, without being forced to assert their position regarding the merits of the pro se claim and/or face the ethical conundrum highlighted above. Defendants, in a pro se capacity, can present their arguments with the assistance of standby counsel at the trial court level. If oral argument and/or appellate issues arise, the Court can appoint counsel and/or rely on the defendants’ appointed counsel. This system would protect criminal defendants sentenced to death basic right of self-representation, while still ensuring the goals this Court identified in Gordon continue to be met.

As such, Mr. McDonald should have the opportunity to represent himself proceeding forward, if he so chooses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at capapp@myfloridalegal.com, on this 8th day of January, 2020.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief is formatted in compliance with Florida Rule of Appellate Procedure 9.210.

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