

IN THE SUPREME COURT OF FLORIDA

MERYL S. MCDONALD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC19-635
L.T. No(s). 94-CF-2958
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

BRIEF OF APPELLEE
ADDRESSING WHETHER MCDONALD HAS A
CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF

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RECEIVED, 01/08/2020 01:07:30 PM, Clerk, Supreme Court

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STATEMENT OF THE CASE AND FACTS

Meryl McDonald is a Florida prisoner under sentence of death. This Court affirmed McDonald's conviction and death sentence. 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-M) as standby collateral counsel. This Court affirmed the denial of relief, although it 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 this Court seeking a belated, successive post-conviction appeal to raise additional claims which were not presented on his original post-conviction appeal, which this Court denied. McDonald v. McNeil, 991 So. 2d 387 (Fla. 2008)[Table].

McDonald is presently seeking review of the lower court's denial of his successive Rule 3.851 motion to vacate. Briefing of the issues was completed August 13, 2019. Although represented by competent counsel, McDonald has repeatedly sought to discharge him and advance his own arguments. Most recently McDonald filed a motion challenging the constitutionality of Fla. R. of Crim. P. 3.851(b)(6), which forbids death-sentenced defendants from self-representation in post-conviction proceedings. This Court has asked the parties to brief the question of whether it should

reconsider Gordon v. State, 75 So. 3d 200 (Fla. 2011), which held that death-sentenced inmates may not appear *pro se* in any post-conviction appeals.

SUMMARY OF THE ARGUMENT

Since Florida law confers a statutory right to post-conviction counsel for capital defendants, McDonald should have the ability to make a knowing and intelligent waiver of that right.

ARGUMENT

ISSUE: WHETHER MCDONALD HAS A CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF, IN POST-CONVICTION, SUCH THAT THIS COURT SHOULD RECONSIDER GORDON V. STATE, 75 SO. 3D 200 (FLA. 2011).

The issue before the Court is whether McDonald has a constitutional right to represent himself in post-conviction proceedings. This Court should reconsider and overrule Gordon v. State, 75 So. 3d 200, 202 (Fla. 2011) to the extent it prohibits a competent capital defendant from representing himself in post-conviction proceedings. This Court reviews constitutional questions *de novo*.

A competent capital defendant has a right to represent himself during trial proceedings. Faretta v. California, 422 U.S. 806 (1975). However, a defendant sentenced to death does not have a

right to self-representation on direct appeal under either federal or state law. See Davis v. State, 789 So. 2d 978, 980-81 (Fla. 2001); see also Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000).

Capital defendants have a statutory right to post-conviction counsel. § 27.7001, Fla. Stat. In Durocher v. Singletary, 623 So. 2d 482, 483 (Fla. 1993), this Court held that “[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.” The Court further held that the right to post-conviction counsel may be waived after the post-conviction court conducts an inquiry of the defendant “to determine if he understands the consequences of waiving collateral counsel and proceedings.”

Nearly twenty years later, this Court in Gordon v. State, 75 So. 3d 200, 202 (Fla. 2011), held that capital defendants may not represent themselves in post-conviction appeals. Following Gordon, in 2014, Florida Rule of Criminal Procedure 3.851 was amended to provide that capital defendants are no longer permitted to represent themselves in post-conviction proceedings initiated on or after January 1, 2015. See In re Amendments to the Florida Rules of Judicial Administration; Florida Rules of Criminal Procedure; and the Florida Rules of Appellate Procedure--Capital Postconviction Rules, 148 So. 3d 1171, 1180-81 (Fla. 2014).

In the State's view, this Court's analysis of this question in Durocher is more persuasive than Gordon. This Court has recognized "a trend has developed toward permitting the waiver of constitutional rights, especially rights given to criminal defendants." Chames v. DeMayo, 972 So. 2d 850, 860 (Fla. 2007). It has long been recognized that constitutional rights may be waived. See United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (noting a "criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution" citing cases and noting a criminal defendant may also waive rule-based rights); Peretz v. United States, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are similarly subject to waiver") (citations omitted). If a defendant has the right to waive a constitutional right, he or she should certainly have the right to waive a non-constitutional, statutory right.¹ C.f. McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018) (finding trial counsel violated Defendant's Sixth Amendment right to "autonomy" at the time of trial).

¹ States are not even constitutionally required to provide for post-conviction relief, much less counsel for this avenue of challenge to their convictions. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

When this Court decided Gordon, it adopted the reasoning in Davis.² Gordon, 75 So. 3d at 202. (“For the same reasons expressed in Davis, and based on the same authorities, we conclude that death-sentenced appellants do not have a federal or state constitutional right to proceed *pro se* in appeals from postconviction proceedings.”). However, while the Davis court considered in its analysis the ability of capital defendants to redress injury from ineffective assistance of appellate counsel, through a habeas petition, there is no such cognizable action in post-conviction proceedings relating to the performance of collateral counsel. Id. at 981. Therefore, this Court should reconsider its holding in Gordon. A competent defendant may waive post-conviction representation and collateral counsel “has no duty

² In Davis v. State, 789 So. 2d 978, 980-81 (Fla. 2001), this Court, relying on Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000), found no Sixth Amendment constitutional right to represent oneself on direct appeal. In Martinez, the United States Supreme Court held that a defendant did not have a constitutional right to represent himself on direct appeal. The Court distinguished the right to represent oneself at trial, based on Faretta, from a right to represent oneself on appeal because (1) unlike self-representation at trial, there is no historical right to represent oneself on appeal, (2) the Sixth Amendment does not provide a basis for relief because it pertains only to trial proceedings, and (3) once convicted the defendant’s autonomy interests become less compelling. The presumption of innocence no longer applies and the defendant is, instead, seeking reversal of a presumptively just verdict entered by a jury of the defendant’s peers. Id. at 156-163.

or right to represent a death row inmate without that inmate's permission." Durocher, 623 So. 2d at 484-85.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court reconsider its holding in Gordon v. State, 75 So. 3d 200 (Fla. 2011).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 2020, I electronically filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Jonathan E. Hackworth, Esquire, Hackworth Law, P.A., Post Office Box 4347, Tampa, Florida

33677, jhack@bhtampa.com.

This notice is also being served this date via United States mail on Appellant, Meryl McDonald, DC#180399, Union Correctional Institution, Post Office Box 1000, Raiford, Florida 32083.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Timothy A. Freeland
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