IN THE SUPREME COURT OF FLORIDA

MERYL S. McDONALD,

Appellant,

v. **Case No. SC03-648**
L.T. No. CRC94-02958-CFANO-B

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS[1]

Trial Proceedings

The Circuit Court's final order denying post-conviction relief sets forth the following summary of the case and facts:

> Dr. Louis A. Davidson (ADavidson@ or Avictim@) was murdered on January 25, 1994. Five persons, including Meryl S. McDonald (AMcDonald@), were indicted for the crime of murder in the first degree by a grand jury on April 27, 1994. The state=s theory of the case was that Dr. Davidson=s estranged wife, Denise A. Davidson, (ADenise Davidson@) and her boyfriend, Leonardo A. Cisneros, (ACisneros@), both of whom were indicted, hired McDonald and Robert R. Gordon (AGordon@) to kill Davidson. The fifth person indicted, Susan C. Shore, (AShore@) was hired by McDonald and Gordon to drive them to Tampa the day before the murder, and to drive them to the victim=s apartment, Thunderbay Apartments, on the day of the murder, where McDonald and Gordon murdered the victim inside his apartment, while Shore remained outside in her car. Shore says she did not know the defendants were going to kill the victim before they did so, and she did not learn the victim had been killed until some time after the incident. After the murder, Shore drove Gordon and McDonald to a Days Inn motel where they changed clothes and eventually met with Denise Davidson and Cisneros, whom they had also met the day before the murder at Dooly Groves, Denise Davidson=s place of business. After Gordon

[1] The State cannot accept CCRC's facts, which are replete with impermissible argument and unsupported allegations. For example, CCRC blatantly claims that false evidence was presented at trial, although nothing in the record credibly supports CCRC's accusations. CCRC also asserts that there were no hair fibers or other physical evidence from McDonald at the crime scene. This is a misleading statement because Susan Shore's testimony not only placed McDonald at the victim's apartment on the day of the murder (V31/T1562-1564); but, in addition to the shoeprint impression at the crime scene, the sweatshirt recovered from the Days Inn had the victim's blood on it, fibers from the victim's carpet and the cashmere belt which bound the victim, as well as hairs that matched McDonald's hair. (V38/T1166; V39/T1227-1231).

> and McDonald conferred with Denise Davidson and Cisneros, out of Shore=s hearing, Shore drove Gordon and McDonald back to Miami. Davidson=s body was found by his girl friend the same day he was murdered. The police were called to process the crime scene. Denise Davidson became an immediate suspect. Eventually, the police developed evidence that lead to the arrests of McDonald, Gordon, Shore, and Denise Davidson for the murder of Dr. Davidson. Although Cisneros was indicted by the grand jury, and an arrest warrant for him is outstanding, he is still at large. The facts and evidence against McDonald are more fully set out in Gordon v. State, 704 So. 2d 107, 108-110 (Fla. 1997).
>
> McDonald and Gordon were tried together from June 6 to June 15, 1995. Both were found guilty as charged. At a joint penalty phase, on June 16, 1995, the jury recommended, by identical votes of 9-3, that each should be sentenced to death. After two Spencer hearings, McDonald and Gordon were both sentenced to death on November 16, 1995. McDonald filed an appeal of his judgment and sentence, and the Florida Supreme Court affirmed his judgment and sentence. McDonald v. State, 743 So. 2d 501 (Fla. 1999). Gordon=s death sentence was likewise affirmed. Gordon v. State, 704 So. 2d 107 (Fla. 1997). Denise Davidson was tried and convicted of first degree murder in a separate trial. Her jury recommended a life sentence, and the trial court sentenced her to life imprisonment. Her judgment and sentence was affirmed. Davidson v. State, 706 So 2d 298 (Fla. 2d DCA 1997). Shore eventually pled nolo contendere to the lesser charge of accessory after the fact. She also testified against all of the other defendants, except Cisneros, who is still at large. If Cisneros is ever arrested, Shore will be expected to testify against him as well.
>
> (PCR V13/2293-2294).

In imposing the death penalty, the trial court found four aggravating factors: (1) the murder was committed during the commission of a burglary/robbery; (2) the murder was committed for pecuniary gain (based on a contract killing); (3) the murder was heinous, atrocious, or cruel (HAC); and (4) the murder was

cold, calculated and premeditated (CCP). The trial court found no statutory mitigating factors and three nonstatutory mitigators: (1) McDonald's good prison behavior; (2) McDonald's advanced age at the time he will be eligible for release; and (3) co-defendant Denise Davidson's receipt of a life sentence. McDonald v. State, 743 So. 2d 501, 502 (Fla. 1999).

Post-Conviction Proceedings

The Circuit Court granted an evidentiary hearing on post-conviction Issues VI (IAC/admission of blood stain evidence), XI (IAC/severance and joint trial), XII (IAC/alibi), and on XIV, speedy trial, although a legal issue, either side was permitted to inquire of defense counsel. An evidentiary hearing[2] was conducted on November 29 and 30, 2001.

McDonald was represented at trial by attorneys Richard Watts and Michael Schwartzberg, experienced counsel from the Pinellas County list of those approved for appointment as conflict counsel. Schwartzberg was primarily responsible for the guilt phase and Watts was primarily concerned with the penalty phase. (PCR V21/3445). McDonald specifically declined to call attorney Watts as a witness, even though the State made him available for the evidentiary hearing. (PCR V20/3270; V21/3450)

[2] At the Huff hearing held on July 25, 2001, McDonald confirmed his intention to rely on the post-conviction testimony of Dr. Herrera, the DNA expert presented by co-defendant Gordon. (PCR. Supp. Vol., 3602-3606)

Schwartzberg had been on the list approved for felony cases since 1986 and for capital cases since 1989. By the time of McDonald's trial on June 6, 1995, he had tried approximately seventy felony cases, ten of which were capital cases, and had been counsel of record on over ten other capital cases. (PCR V20/3441-3446). Schwartzberg's theory of the case, which he had discussed with McDonald, was that McDonald had been at the apartment only to retrieve a document, and the small blood stain on the sweatshirt, identified as consistent with the victim's blood, was an insufficient amount to show that it was present when the victim was killed, and that someone else killed the victim. (PCR V20/3322-3323; 3333-3334; 3339; V21/3374-3375; 3378) Trial counsel considered this a reasonable defense based on what his client told him and the evidence which the State had against McDonald, and that the physical evidence was not inconsistent with that defense. (PCR V20/3334; V21/3380) McDonald had agreed it was a reasonable theory of defense. (PCR V21/3323) McDonald never told counsel that he was somewhere else, and McDonald's statements to him were consistent with the defense pursued. (PCR V21/3380)

After discussions with McDonald, co-defendant Gordon and co-defendant's counsel, Schwartzberg decided to use the small amount of blood found on the sweatshirt at the motel as part of

the defense that someone else committed the murder and framed the defendant. Schwartzberg had discussed with McDonald that they would not be challenging the DNA as not harmful to their planned defense and McDonald agreed with that strategy. (PCR V20/3319-3323; 3333-3334; 3339-3340; PCR V21/3367-3369; 3380)

At the evidentiary hearing, Schwartzberg explained that the severance was not needed after co-defendant Gordon withdrew his notice of alibi, (PCR V21/3376), and that McDonald agreed to withdrawing the motion to sever. (PCR V21/3381) McDonald and co-defendant Gordon wanted to be tried together. (PCR V3382)

Schwartzberg acknowledged that trial commenced after the 175th day, and that speedy trial had not been waived prior to the defense moving for continuance on April 28, 1995, a date after the 175 days had already run. (PCR V/3435-3436). The other co-defendants had waived speedy trial prior to Defendant's arrest, and defense counsel had moved to continue because they were not ready for trial. (PCR V21/3438) Schwartzberg testified that it was his belief that it would not have been in McDonald's best interest to have demanded a speedy trial because the defense would not have been ready for trial. (PCR V21/3440-3441) Schwartzberg did not recall that McDonald ever asked for a speedy trial, and it would have been his practice to have such

a request set for hearing when he was not prepared for a speedy trial. (PCR V21/3377-3384; 3447)

Schwartzberg testified that he was prepared for trial on June 6, 1995, and had discussed with McDonald both asking for a continuance and going to trial. (PCR V20/3310; V21/3374; 3377) Schwartzberg believed the defense would have received a speedy trial if requested. (PCR V20/3354-3355) McDonald admitted that trial counsel had told him "sometime in April" that he was going to try to get a continuance and that he would depose Susan Shore on May 19th. (PCR V21/3394) Schwartzberg recalled co-counsel Watts was present with McDonald and co-defendant Gordon when he and McDonald discussed the possibility of Gordon filing a notice of alibi, but McDonald elected not to call Mr. Watts. (PCR V21/3375; V21/3450) Schwartzberg denied that McDonald had given him any names for alibi witnesses and testified that if McDonald had done so, he would have talked to the persons provided and pursued any alibi defense supported by them. (PCR V20/3284; 3286; 3288-3290; V21/3380) After reviewing his affidavit filed in support of his motion for attorney fees, Schwartzberg stated that he had met with or had telephone conversation with McDonald twelve times before trial, but this was the first time he'd heard any alibi names. (PCR V20/3299; 3290) Schwartzberg spoke with the FBI witnesses before they

testified and believed he had all the FBI reports at the time of trial; Schwartzberg denied destroying any notes. (PCR V20/3290; 3296).

On February 10, 2003, the Circuit Court entered a detailed written order denying post-conviction relief. (PCR V13/2292-2341). For ease of reference in addressing McDonald's Faretta claim, the facts relevant to McDonald's self-representation are set forth in Issue I of the instant brief.

PRELIMINARY STATEMENT

An ineffective assistance claim has two components:

> A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness."

Wiggins v. Smith, 539 U.S. 510, 521, (2003) (quoting Strickland v. Washington, 466 U.S. 668, 668 (1984). An IAC claim is a mixed question of law and fact, subject to plenary review based on Strickland. See, Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999). This Court conducts an independent review of the trial court's legal conclusions, while giving deference to the factual findings. See Id. at 1032-33.

SUMMARY OF THE ARGUMENT

Issue I – The Faretta Claim

The Circuit Court commendably conducted an extensive Faretta inquiry before granting McDonald's request for self-representation at the post-conviction proceedings below. The record establishes that McDonald's choice to proceed *pro se* was "made with his eyes open." Under Faretta, a defendant who elects to represent himself cannot later complain about the quality of his own representation.

Issue II – The IAC/Jury Selection Claim

CCRC's current IAC/jury selection claim was not raised in the Circuit Court and, therefore, is procedurally barred. McDonald's *pro se* three-part IAC/jury selection claim has not been asserted in this appeal and, therefore, is abandoned. Even if McDonald had relied upon the *pro forma* claim of co-defendant Gordon, summary denial of this identical claim would have been appropriate, as in Gordon II, *infra*.

Issue III – The IAC/Prosecutor Comment Claim

CCRC's current IAC/prosecutor comment claim was not raised below and is procedurally barred. McDonald's *pro se* IAC/prosecutor comment claim is deemed abandoned. Furthermore, no prosecutorial misconduct supported a claim of ineffective assistance and summary denial was proper.

Issues IV – X Summary Denial of IAC Claims (Failure to Exclude Hair Evidence, Fibers, Bloodstain DNA evidence, Sweatshirt & Tennis Shoes, Shoe Imprint Match, and Testimony of Susan Shore)

The Circuit Court painstakingly evaluated the record below and correctly summarily denied post-conviction relief on those remaining claims which were conclusively refuted by the record or legally insufficient.

Issue XI – The IAC/Severance & Speedy Trial Claim

Trial counsel's decision not to move to sever was the result of a strategic decision, severance would not have been proper, and no prejudice was demonstrated inasmuch as the same evidence presented at the joint trial would have been presented in a severed trial. McDonald did not establish any deficiency of counsel and resulting prejudice arising from counsel's requested continuance and failure to demand speedy trial.

Issue XII – The IAC/Alibi Claim

McDonald did not show that he had any legitimate alibi, nor that the alleged witnesses could be located, even if he had provided their names to counsel, which trial counsel denied.

Issue XIII – The Renewed Faretta Claim

The Circuit Court conducted a textbook-model Faretta inquiry before allowing McDonald to represent himself. CCRC's disagreement with the defendant's choice below does not constitute any credible basis for post-conviction relief.

ARGUMENT

ISSUE I

THE CIRCUIT COURT CONDUCTED A PROPER FARETTA INQUIRY BEFORE ALLOWING THE DEFENDANT TO PROCEED *PRO SE.* (As restated by Appellee, State)

In appellant's first post-conviction issue, CCRC argues that the Circuit Judge, the Honorable Susan Schaeffer, purportedly violated both the Florida and Federal Constitutions by allegedly conducting an inadequate inquiry under Faretta v. California, 422 U.S. 806 (1975)[3] and allowing Mr. McDonald to proceed *pro se* at his post-conviction proceedings below. (See, Amended Initial Brief of Appellant at 18).

Although a defendant need not have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and that his choice is made with his eyes open." Hernandez-Alberto v. State, 889 So. 2d 721, 728-729 (Fla. 2004), citing Faretta, 422 U.S. 806, 835.

[3] However, the *constitutional* right to self-representation recognized in Faretta v. California, 422 U.S. 806 (1975), is limited to trial proceedings. See, Martinez v. Court of Appeal of California, 528 U.S. 152 (2000); Davis v. State, 789 So. 2d 978 (Fla. 2001). In Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993), this Court concluded, "[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." (e.s.)

Burden of Proof and Standard of Review

In Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993), this Court established that the relevant test in Florida for competency in the context of waiving collateral counsel and collateral proceedings is whether the person seeking waiver has the capacity to "understand the consequences of waiving collateral counsel and proceedings."[4] The party challenging the defendant's waiver of collateral counsel and post-conviction proceedings bears the burden of proving that the defendant is incompetent. Id.

An abuse of discretion standard applies when reviewing a trial court's determination regarding a capital defendant's competency to waive post-conviction counsel and post-conviction proceedings altogether. See, Alston v. State, 894 So. 2d 46, 57 (Fla. 2004), citing Slawson v. State, 796 So. 2d 491, 502 (Fla. 2001); Castro v. State, 744 So. 2d 986, 989 (Fla. 1999).

[4] If a capital defendant seeks to waive his collateral counsel and his post-conviction proceedings, the trial court must conduct a Faretta-type hearing in accordance with Durocher, in order to determine if the defendant understands the consequences of waiving his collateral counsel and postconviction proceedings. Alston v. State, 894 So. 2d 46, 49 (Fla. 2004), citing Sanchez-Velasco v. State, 702 So. 2d 224, 228 (Fla. 1997). In Alston, the Circuit Court conducted a Durocher hearing, and informed Alston that his three options were to (1) allow CCRC-M counsel to proceed in his post-conviction proceedings, (2) discharge CCRC-M counsel and proceed pro se, or (3) both discharge CCRC-M counsel and waive his right to post-conviction relief.

Procedural Bar

On April 18, 2001, after McDonald verified his unequivocal request to represent himself in the post-conviction proceedings below, the Circuit Court conducted a meticulous and detailed Faretta inquiry. (PCR Supp. Vol. 3503-3540) Following an exemplary on-the-record colloquy, the Circuit Court specifically requested any additional input from CCRC, and the Circuit Court pointedly asked CCRC, "Do you know of any reason why I shouldn't appoint him to represent himself?" (PCR Supp. Vol. 3537) In response to the Circuit Court's explicit inquiry, CCRC's "only concern" was the issue of "conflict-free counsel." (PCR Supp. Vol. 3537-3538) However, CCRC also conceded that no new grounds existed to arguably support the alleged "conflict-free counsel" claim, an issue which the Circuit Court previously addressed and denied. (PCR. Supp. Vol. 3536; 3539-3540) Now, CCRC asserts that the Circuit Court's Faretta inquiry was inadequate. However, despite the Circuit Court's specific request for CCRC's input at the Faretta hearing, no challenge was ever raised concerning the adequacy of the Faretta inquiry. This claim was never raised below and, therefore, is procedurally barred. See, Gordon v. State, 863 So. 2d 1215, 1219 (Fla. 2003) (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982), "[e]xcept

in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.")

Assuming, *arguendo*, that CCRC's current challenge to the adequacy of the Circuit Court's Faretta inquiry is properly before this Court, which the State specifically denies and strongly disputes, CCRC's current claim is patently without merit for the following reasons.

Procedural Background

Defendant McDonald was originally represented by Capital Collateral Regional Counsel-Middle for his post-conviction proceedings. CCRC-M prepared a 3.850 Motion for McDonald; however, McDonald would not swear to CCRC's motion. On December 11, 2000, CCRC filed an unsworn motion, and McDonald then filed his own *pro se* motion on December 15, 2000. CCRC then filed a "Certification of Conflict and Motion to Withdraw and for Appointment of Conflict-Free Counsel" because McDonald would not verify the motion that CCRC had prepared.

On January 30, 2001, the Circuit Court conducted a Nelson inquiry[5] and determined that no legal conflict existed in this

[5] In Hardwick v. State, 521 So. 2d 1071, 1075 (Fla. 1988), this Court adopted the procedure announced in Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973) for handling a defendant's complaint that his appointed counsel is rendering ineffective assistance. See, Weaver v. State, 894 So. 2d 178, 191 (Fla. 2004). "[I]n order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant

case. Ultimately, both post-conviction motions, the one filed by CCRC and the one filed by McDonald, were stricken. On December 31, 2000, McDonald agreed to swear to the motion prepared by CCRC, which was amended to present some of McDonald's *pro se* claims as individual claims and filed February 2, 2001, *nunc pro tunc* to December 11, 2000, and the Circuit Court agreed to hear this motion. However, on March 2, 2001, McDonald, *pro se*, filed "Defendant's Motion to Remove Conflict Counsel, and to Strike Counsel 3.850 Motion, and Motion for Reconsideration, and for Self-Representation."

On April 18, 2001, the Circuit Court conducted a hearing on McDonald's motion for self-representation, again concluding that there was no legal conflict, and thus, no reason for CCRC not to represent the defendant.[6] Before proceeding with the Faretta

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must "establish that an actual conflict of interest adversely affected his lawyer's performance." Gamble v. State, 877 So. 2d 706, 717-718 (Fla. 2004), citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). "A lawyer suffers from an actual conflict of interest when he or she "actively represents conflicting interests." Cuyler, 446 U.S. at 350. The defendant must therefore identify specific evidence in the record showing that his or her interests were compromised in order to demonstrate actual conflict. See Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998).

[6] In Gamble, 877 So. 2d at 717-718, this Court emphasized that the combined effect of Nelson and Faretta is to ensure that a defendant who chooses to proceed without counsel after waiving court-appointed counsel has done so knowingly and intelligently. In Gamble, the defendant's only allegation was that there might be a conflict, and Gamble was unable to identify any manner in which that suspected conflict affected his counsel's competency

inquiry on April 18, 2001, the Circuit Court confirmed with McDonald and with CCRC that the only two issues to be decided by the Court were McDonald's request to (1) represent himself and (2) substitute his *pro se* 3.850 motion for the one filed by CCRC. Because McDonald still insisted that he wanted to represent himself, rather than have CCRC represent him, the Circuit Court conducted an on-the-record inquiry in accordance with Faretta v. California, 422 U.S. 806 (1975). As the Circuit Court explained,

> This court determined that she had no legal alternative but to let McDonald represent himself. The defendant was quite clear that he did not want to go forward on CCRC-M's motion, but wanted to go forward on his own pro se motion that was filed December 15, 2000. This court permitted the defendant to proceed to represent himself, relying on his own pro se motion. See April 18, 2001 hearing transcript.
>
> (PCR V13/2296)

A written order reflecting the court's oral pronouncements was entered on May 16, 2001. CCRC-M was appointed as stand-by counsel, and appeared as stand-by counsel throughout the remainder of the post-conviction proceedings. The Circuit Court allowed McDonald to withdraw CCRC's post-conviction motion and substitute his *pro se* motion for post-conviction relief.

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to represent him; therefore, the need for a Nelson inquiry was never triggered. Additionally, a Faretta inquiry was not required because Gamble never asked to represent himself. Id. at 718.

Waiver of Post-Conviction Counsel and Proceedings

This Court previously has addressed the issue of capital defendants' post-conviction waivers of counsel and collateral proceedings altogether. See, Durocher, *supra*; Sanchez-Velasco v. State, 702 So. 2d 224, 228 (Fla. 1997). This Court has ruled that "competent defendants have the constitutional right to refuse professional counsel and to represent themselves, or not, if they so choose." Castro v. State, 744 So. 2d 986, 989 (Fla. 1999), quoting Durocher, 623 So. 2d at 483. In addition, the State recognizes the "obligation to assure that the waiver of collateral counsel is knowing, intelligent, and voluntary." Castro, 744 So. 2d at 989, citing Durocher, 623 So. 2d at 483. To ensure that this obligation was fulfilled in this case, the Circuit Court conducted an in-depth examination which went well beyond an otherwise "typical" Faretta inquiry at trial.

The Faretta Inquiry in this Case

CCRC asserts that "this Court has no record of the Faretta inquiry and whether the correct colloquy was given." (Amended Initial Brief at 31). This is incorrect. The supplemental record, filed approximately four months before the Amended Initial Brief of Appellant was filed with this Court, includes the transcript of the Faretta hearing held in the Circuit Court on April 18, 2001. (See, PCR Supp. Vol. 3494-3547).

Contrary to CCRC's allegations, the Circuit Court below meticulously addressed the issue of self-representation and conducted a thorough and comprehensive Faretta inquiry. McDonald was made well aware of the "dangers and disadvantages of self-representation" and he clearly made his choice to waive post-conviction counsel "with his eyes open." Because the crux of CCRC's current post-conviction claim involves the adequacy of the Faretta inquiry below, the State necessarily directs this Court's attention to the following record excerpt of the Circuit Court's scrupulous and extensive colloquy in this case:

> [THE COURT]: . . .
> You do understand, do you not, Mr. McDonald, that you are entitled to a lawyer to represent you?
> THE DEFENDANT: Yes, your Honor.
> THE COURT: And you understand that pursuant to that right, Florida has said you're entitled to counsel at the post-conviction stage? In some states you're not entitled to a lawyer there, but Florida says you are.
> Do you understand that?
> THE DEFENDANT: Yes, your Honor.
> THE COURT: Pursuant to that right, certain things have come into being, such as the Capital Collateral Regional Office, one in the south, one in the north and one in the middle, and they handle cases dealing with prisoners on death row from those various regions. Did you know that?
> THE DEFENDANT: Yes, your Honor.
> THE COURT: Counsel, you are from the Middle Region?
> MR. ABATECOLA: Yes, your Honor.
> THE COURT: And this is the Middle Region.
> So pursuant to that, and since Mr. Gordon actually has private counsel at this stage, CCRC was appointed or the process occurred and they were appointed to represent you on your motions for post-conviction relief. You understand that?
> THE DEFENDANT: Yes, your Honor.

THE COURT: All right. And pursuant to that appointment, they filed timely a Motion for Post-Conviction Relief, putting all the things in there that they felt should be raised, and at least it's their belief they filed those things that you wanted them to raise. You and they may disagree on this, but that's presumably what they think they did, right?

THE DEFENDANT: I assume -- I agree, your Honor, yes, ma'am.

THE COURT: You disagreed with that, you did not like their motion; you filed your own, right?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Do you understand that when a person has been sentenced to death row there are certain things that they have almost sort of a right to, or at least I'm going to assume they have a right to, and then there are certain things that get harder and harder as the case progresses? One of the things that I would say any prisoner on death row has a right to is a first motion for post-conviction relief.

THE DEFENDANT: Yes, your Honor.

THE COURT: And that's what -- that's the stage we're in.

THE DEFENDANT: Right.

THE COURT: Okay. The law says that after that is filed, that I am required to, if I want, ask the State to respond. And they have, of course, asked me to postpone that, because they don't know what they're responding to. They want to see what happens today, and whatever motion I let stand they're going to respond to it. You understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And after that I'm going to hold a hearing, which is required in death cases, it's called a Huff hearing, we call it a Huff hearing, where I will hear argument on what claims that are raised should go forward in an evidentiary hearing and what claims should I either grant or deny as a matter of law. That's kind of what a Huff hearing is.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. As I go through this, I'm going to talk to you a little bit about some of the advantages and disadvantages of representing yourself.

You obviously have put in your motion that you're aware of that, and you're quite aware of all the

discussions of the disadvantage of representing yourself, right?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. In your motion, I don't have it in front of me, but I remember when I read it you have adopted a lot of what CCRC filed on your behalf, and then you put some other stuff with it, right? That's my recollection. I may be wrong on that.

THE DEFENDANT: No, your Honor.

THE COURT: You did not?

THE DEFENDANT: No. What CCRC claims and my claims are different, in conflict. Two motion, but we all different grounds, different arguments.

THE COURT: Okay. If in your motion there are any, what we will call legal claims – not factual claims; I am innocent, this should have been done, the hair isn't mine, factual things. If there are any legal issues raised, constitutionality of the death penalty, Caldwell issues, all those things CCRC may tend to raise in the State court hoping to obtain perhaps relief in a Federal court, those claims oftentimes have to be raised in the State court to get relief in the Federal court.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. And do you understand that if you are not successful in the State court, you may have a right to have a hearing on certain things in the Federal courts?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. You may find that if certain things weren't done or raised in the State court, that you can't raise them in the Federal court and, therefore, they're gone.

THE DEFENDANT: I understand that.

THE COURT: You understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you understand one of the problems with representing yourself at this stage, in a complex case like this, where the death penalty has been imposed, is that CCRC is usually up on things; they go to seminars, talk about those issues. We call them hot topics sometimes in seminars, things that it is believed that perhaps the Federal courts are going to take a look at and things that are probably dead issues and things that may be coming up on the horizon, is my terminology.

But they will raise things that are pretty well settled in the State of Florida that they know they're going to lose here, because they're trying to preserve them for Federal review, hoping that they can get relief either in a District Court, Federal District Court, Eleventh Circuit Court of Appeals or the United States Supreme Court.

THE DEFENDANT: Yes, ma'am, I'm aware of that, your Honor.

THE COURT: Do you understand you may be at a disadvantage there because you would not have any way of having been to those seminars and know what those topics are?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you understand that the Federal court, just like I can't give you any special privileges if you elect to represent yourself, neither will they? So if you had to raise something here to raise it in Federal court and you don't, and I let you represent yourself, they're going to say, just like as if you were represented by a lawyer, it's waived.

Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Can't be raised. Might be valid, but it can't be raised because Mr. McDonald chose to represent himself in State court and he didn't raise it.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. That's one of the disadvantages.

Do you agree with that? Right?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. As I was reading through the petition that you had filed in the Supreme Court -- and I have not read your motion for post-conviction relief in some time, but I did receive what you filed in the Supreme Court – it appears to me as if you're challenging or saying you want to challenge some things like DNA, Motions to Suppress, expert witnesses, hair analysis, this type of thing.

Is that true? Is that some of the stuff you want to challenge?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Do you realize that you, as kind of a person with training, but not as much training as your lawyer, are at a certain disadvantage in kind of

going toe to toe with an expert who supposedly is an expert in his or her field?

THE DEFENDANT: Repeat the question, your Honor.

THE COURT: Okay. Do you understand you may be at a disadvantage if in fact I grant you a hearing and you or the State calls an expert witness in the field of DNA, which is pretty technical, and you are representing yourself as your own lawyer, that you may be at a disadvantage in being able to challenge him on cross examination because you simply will not be as up on DNA expertise as a lawyer would be?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Do you understand that you would not be as knowledgeable as a trained lawyer would be on the rules of evidence?

THE DEFENDANT: Yes, ma'am.

THE COURT: And, therefore, the State may ask a question or a series of questions or go into a certain area that they may not be entitled to, but you wouldn't know necessarily to object; you might, but you wouldn't be as trained in those areas as a lawyer would be. You understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Okay. Now I'm going to read you some of the stuff they want me to read to you, okay? So listen carefully.

It is almost always unwise to represent yourself in court. I'm telling you that. Let me tell you a few of the disadvantages of representing yourself in court.

Do you understand that you will not get any special treatment from this court or any other court just because you are representing yourself?

THE DEFENDANT: Yes, your Honor, I understand that.

THE COURT: Okay. Do you understand that if we are going to schedule a hearing and because you're representing yourself you're not ready, do you understand you would not be entitled to a continuance simply because you are representing yourself and were unable to get ready?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you will be limited to legal resources that are available to you while you are in custody? You will not be entitled to additional library privileges just because you are representing yourself. A lawyer has fewer restrictions in

researching your case and your defenses. They have no limitations, you will.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: I should tell you, you are not required to possess the legal knowledge or skills of an attorney in order to represent yourself. However, you will be required to abide by the rules of criminal law and the rules of courtroom procedure. These laws took lawyers years to learn and abide by. If you demonstrate an unwillingness to abide by these rules, I may have the right to terminate your self-representation if I give you that right.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that if you are disruptive in the courtroom, that I can terminate your self-representation and remove you from the courtroom? That would be kind of tough, wouldn't it, if you were representing yourself?

Probably I would forget that, that would be in a case of jury review, okay?

THE DEFENDANT: Yes, your Honor.

THE COURT: But I will tell you, if you're disruptive, I'm not going to put up with it. You understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand your access to a State Attorney, who in essence is prosecuting, is limited as compared to a lawyer, who could easily contact the State? In other words, they could pick up the telephone and call and say, will you agree to this, will you agree to that. You, from where you are, probably won't have the same access to a telephone that they will.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. This is -- I think this would apply here. If in fact I allow you to represent yourself, and we have a hearing or we don't have a hearing, but you are unsuccessful, in other words, if I deny your claim for post-conviction relief, you understand you can't claim on appeal that your own lack of legal knowledge or skill constitutes a basis for a new hearing?

THE DEFENDANT: Yes, your Honor, I understand that too.

THE COURT: In other words, you can't claim you were ineffective, right?
THE DEFENDANT: Right. Yes, your Honor.

* * *

THE COURT: Okay. I'm going to have to ask you some questions now that go to your competency to waive a lawyer.
Do you understand that?
THE DEFENDANT: Yes, your Honor.
THE COURT: Okay. How old are you?
THE DEFENDANT: 47, your Honor.
THE COURT: Okay. As I recall, you are originally from, is it Jamaica?
THE DEFENDANT: Yes, your Honor.
THE COURT: You are obviously -- you have lived in this country for -- or lived in Miami, as I recall, for a long time?
THE DEFENDANT: Miami and New York, yes, your Honor.
THE COURT: Okay. Do you feel comfortable with English?
THE DEFENDANT: Yes, your Honor.
THE COURT: And you can read English?
THE DEFENDANT: Yes, your Honor. Pretty good, your Honor.
THE COURT: And you can write English?
THE DEFENDANT: Pretty good, your Honor.
THE COURT: When you say pretty good, these legal documents that you see that the State prepares, can you read them?
THE DEFENDANT: Yes, ma'am.
THE COURT: Do you feel like you can understand them –
THE DEFENDANT: Yes, your Honor.
THE COURT: -- in order to respond to them or talk to me about them?
THE DEFENDANT: Yes, your Honor.
THE COURT: You don't look at them and say, gee, I don't even know what the words mean or anything like that?
THE DEFENDANT: I can understand them.
THE COURT: How many years of school have you completed?
THE DEFENDANT: I went high school and I did two years in college.

THE COURT: Okay. Did you have any particular course of study?

THE DEFENDANT: I do engineering for two -- two to three years.

THE COURT: Okay. What line of work did you pursue after you got out of college or after you finished your two years?

THE DEFENDANT: I work at a bank for two and a half years in Jamaica.

THE COURT: What did you do there?

THE DEFENDANT: Clerk.

THE COURT: Clerk, like I would think of a bank teller?

THE DEFENDANT: Bank teller, that's right.

THE COURT: Okay.

THE DEFENDANT: I work at Stanley Mott Limited almost 16 years, salesman/representative.

THE COURT: Stanley Moten Limited, M-o-t-e-n?

THE DEFENDANT: M-o-t-t, Mott.

THE COURT: What is that?

THE DEFENDANT: I work at other company almost seven years-

THE COURT: What do they do?

THE DEFENDANT: -- as a sales representative, electronic appliances.

THE COURT: Are we talking electronics, like computers, or are we talking –

THE DEFENDANT: Yes, your Honor.

THE COURT: -- refrigerators?

THE DEFENDANT: Yes, your Honor.

THE COURT: Computers?

THE DEFENDANT: Yes.

THE COURT: You actually sold the products?

THE DEFENDANT: Yes, your Honor.

THE COURT: For seven years?

THE DEFENDANT: Yes.

I work at John Crook Limited for seven years.

THE COURT: Cook, C-o-o-k.

THE DEFENDANT: C-r-o-o-k.

THE COURT: Any other kind of work?

THE DEFENDANT: Marketing in Miami for couple years.

THE COURT: What were you marketing?

THE DEFENDANT: Different products, T-shirts.

THE COURT: Shirts?

THE DEFENDANT: Pins, key chains.

THE COURT: Okay.

THE DEFENDANT: Computer, et cetera, et cetera.

THE COURT: And then, as I recall from your trial, at the time that it is alleged that this happened, I don't believe you were employed at that time?

THE DEFENDANT: Yes, your Honor, I was.

THE COURT: You were? What were you doing then?

THE DEFENDANT: Same thing, marketing.

THE COURT: Marketing?

THE DEFENDANT: Yes.

THE COURT: You and Mr. Gordon were marketing together?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. I shouldn't assume this, so I'm going to ask it, you may think it's kind of foolish, but are you today under the influence of any drugs or alcohol?

THE DEFENDANT: No, your Honor. Don't use drugs, never did.

THE COURT: Have you ever been diagnosed or treated for any type of a mental illness?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. Have you ever thought that you needed to go see a psychiatrist, that something was bothering you in your head or anything like that?

THE DEFENDANT: No, your Honor.

THE COURT: I'm going to stop here and ask the State: I do not recall in my sitting through this trial ever thinking, or at any time, during any pretrial proceeding or otherwise, ever thinking in my dealings with Mr. McDonald that he was not perfectly competent in front of me. Does the State have any information to the contrary?

MR. ABATECOLA [sic]: No, your Honor. And as a matter of fact, during the penalty phase it wasn't even an issue to be brought up, about his mental -- any type of mental problem at all in the past.

THE COURT: Right, okay.

MR. ABATECOLA: So no, he was always –

THE COURT: Did you ever -- really, once these things are filed a lawyer's discussion is waived, but just in thinking back, can you think of any conversation or otherwise that you've had that would have lead you to believe that Mr. McDonald suffered from any type of mental infirmity?

MR. ABATECOLA: No, your Honor.

THE COURT: Okay. And I'm going to ask you, since you still represent him, Counselor, in your dealings with Mr. McDonald, have you come into any thoughts, materials,

documents or otherwise that Mr. McDonald suffers from any type of a mental or emotional disease or illness?

MR. ABATECOLA: No, your Honor.

THE COURT: All right.

MS. KING: Judge, if I could be heard on that for a second.

My Paragraph 10 of the pleading I filed –

THE COURT: Yes.

MS. KING: -- did indicate that there was an issue raised in the 3.850 that was prepared by CCRC, that the defendant signed, that is the one pending before the Court at this time, does indicate that there is an issue of mental health assistance on the 3.850; that counsel was ineffective for not doing certain things pursuant to the Ake, A-k-e, case from the U.S. Supreme Court.

And that type of an issue would be consistent with the request for self-representation pursuant to a case from the Florida Supreme Court named Holland at 25 Florida Law Weekly S-796. And I did feel that perhaps that issue would need to be specifically waived by the defendant on the record in order to show that he was competent to represent himself and did not intend to revive or continue with the issue about Ake and mental health assistance.

THE COURT: Okay. I am aware oftentimes due to the time constraints of the motions for 3.850 that CCRC occasionally will raise an issue and later withdraw it, because they're wanting to be sure that they don't leave something out they can't amend later and the time's up and it's the year and they need to file it.

So I'm going to ask you, Counsel, specifically, do you have any evidence in your file or otherwise to suggest to you at this time that Mr. McDonald has any mental illness?

MR. ABATECOLA: No, your Honor.

THE COURT: So was this one of those issues that was just raised in case, as the case progressed, you learned of anything?

MR. ABATECOLA: Partial, your Honor. But it was also as to, there could be other areas of mental health mitigation in terms of just mitigation of his previous -- his life and stuff like that that might not impinge on his capacity to -- you know, it's just a broader area, you know. But no, I'm not aware of any –

THE COURT: It is indeed a broad area, but I want to be sure we don't get down the road somewhere and you tell me you have a psychiatrist report, psychologist report

from a doctor of any sort or any indication from Mr. McDonald that he at any time suffered from any type of mental or emotional illness.

MR. ABATECOLA: No, I don't, your Honor.

THE COURT: And now, Mr. McDonald, let me ask you, you've indicated you don't, but have you ever seen a psychiatrist for a mental illness?

THE DEFENDANT: I think I spoke with one one time, I have when I first went there.

THE COURT: This was after you were in –

THE DEFENDANT: Custody, yeah, first time.

THE COURT: And this was part of the process?

THE DEFENDANT: Yes.

THE COURT: The entering process?

THE DEFENDANT: Yes, your Honor.

THE COURT: They sat down with you –

THE DEFENDANT: Yes.

THE COURT: -- to see whether or not – do you know, did he ever follow-up and suggest that you had a problem that you needed medication for or anything like that?

THE DEFENDANT: No. No, your Honor.

Everything was fine.

THE COURT: Okay. Have you ever sought any type of psychotropic drug –

THE DEFENDANT: No, your Honor.

THE COURT: -- to deal with a mental illness?

THE DEFENDANT: No, your Honor.

THE COURT: Have you ever had one prescribed for you?

THE DEFENDANT: No, your Honor.

THE COURT: And you've never done drugs?

THE DEFENDANT: Never.

THE COURT: Have you ever had an alcohol problem?

THE DEFENDANT: Never.

THE COURT: Okay. Let's talk about your physical problems, if any.

Do you have any physical problem which would hinder your representation of yourself, such as a hearing problem, a speech impediment or poor eyesight?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. You and I sometimes can't understand each other, but oftentimes it's because you have a little bit of a -- is it a Jamaican accent that you have or New York accent?

THE DEFENDANT: Both.

THE COURT: Both, okay.

But I think the difficulty is that accent and I'm trying to get used to it, right?

THE DEFENDANT: Yes, your Honor.

THE COURT: That's not a speech impediment, that's just a matter of geography, right?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Has anybody told you not to use a lawyer in this case?

THE DEFENDANT: No, your Honor.

THE COURT: In other words, has anybody threatened you or in any way suggested that if you accept a lawyer, that this will be harmful to you?

THE DEFENDANT: No, your Honor.

THE COURT: Are you in any way frightened about having a lawyer?

THE DEFENDANT: No, your Honor.

THE COURT: Is there anything that you and I need to talk about that you feel is affecting you negatively, where you don't want a lawyer because of this or you don't want a lawyer because of that, other than what you have stated on paper?

THE DEFENDANT: What I state on paper.

THE COURT: Right. Anything else we need to talk about?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. This apparently is the ultimate question here, and I'm going to once again read it just the way they've got it: Having been advised of your right to counsel, do you understand you have the right to counsel?

THE DEFENDANT: Yes, ma'am.

THE COURT: You understand I have told you as much as I can the advantages of having counsel?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the disadvantages of representing yourself?

THE DEFENDANT: Yes, your Honor.

THE COURT: The dangers of proceeding without counsel?

THE DEFENDANT: Yes, your Honor.

THE COURT: You know the nature and possible consequences if you do? In other words, you are on death row and you're fighting for your life.

You understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you certain that you want to represent yourself and not have a lawyer represent you?

THE DEFENDANT: Yes, your Honor.

THE COURT: You do understand -- I mean, as I said, you and I have been together in court many times over the course of many days, so it just seems kind of silly to ask it: You do understand that you have received a death sentence and in the event that you are not successful at one of these stages, that you will have a death sentence carried out? You understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: You know what's at stake here, quite clearly, right?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Does the State have any questions?

MS. KING: No, your Honor.

THE COURT: Correct me if I'm wrong, Miss King, but my recollection of the last time I read the law or was in a seminar where this was discussed, no matter how -- I mean, I'm going to tell you in the strongest terms possible, Mr. McDonald, I really wish you wouldn't do this, because I think it's dangerous. I think you would receive better representation from a lawyer. I think you have a better chance of succeeding if you had a lawyer.

And I -- I don't want to just keep pounding on this, but I'm not saying this because I'd just as soon deal with a lawyer as deal with you, I mean it.

Do you understand that?

THE DEFENDANT: Your Honor, counsel here, I respect his -- his action. However, the motion that counsel prepared is motion that he prepared for post-conviction relief. I disagree with the claim as argument. Now, if he can work with me, work with me with my claims, it be good. But his claim is what bother me. He try to demonstrate to this court on my behalf, which I object to.

THE COURT: That -- that we kind of went through last time.

THE DEFENDANT: Yes, your Honor.

THE COURT: In other words, you had a conflict, you and he. You and I talked about it, I ruled there wasn't a conflict.

THE DEFENDANT: Yes.

THE COURT: You're appealing that ruling, so we're kind of past that.

THE DEFENDANT: Okay, your Honor.

THE COURT: So I guess what I'm suggesting to you is, do you understand I am telling you in the strongest possible terms, I've got nothing -- I've got nothing against you personally, I'm dealing within a legal system here, but I'm telling you as judge to another human being in this courtroom, I think it is a huge mistake for you to represent yourself in a case that carries the death sentence.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. And you still wish to do that?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Now, Miss King, my understanding of the law is, even though this is a death case and there's been a sentence and it's post-conviction relief, that he still has that right. Is that your understanding of the law?

MS. KING: Yes, your Honor.

THE COURT: And I can think of nothing that he has answered me that surprised me today. As I say, this is not my first time meeting Mr. McDonald. We went through a long trial together, we had motions before trial. I don't know the man very well, but I've certainly been in court with him.

He's not been a disruptive person, he's not been a problem to me in court, he's never given me any indication he has a mental problem. I think probably as far as defendants charged with death penalty crimes are concerned, I think he's probably one of the brighter ones I've had in front of me. He seems to have always been fairly intelligent, dressed appropriately, acted appropriately, and I can't think of any reason why I can deny him his right to represent himself. Can the State?

MS. KING: No, your Honor.

THE COURT: No, okay.

I'll ask CCRC the same question. Again, I'm just about ready to let him represent himself, and I think it's a mistake, but I have always found him to be a decent human being as far as in my courtroom and as far as handling himself and as far as speaking to me in a respectful manner, as far as attempting to follow law and cite law. And I've gone through all the inquiries and he's not answered in any way other than what I kind of expected him to answer.

I can't think of any reason why I shouldn't grant his request, can you?

MR. ABATECOLA: Your Honor, I only have one concern, if I may be heard.

THE COURT: Okay.

MR. ABATECOLA: My only concern is that one of the prerequisites is that his request needs to be unequivocal. And, your Honor, I don't know if you saw his -- his motion to the FSC, he's asking for conflict-free counsel. So while at the same time he's asking for -- to go for self-representation in this court, he's simultaneously asking for counsel in the Florida Supreme Court.

THE COURT: Do you have any other grounds other than the grounds you told me last time that you should be removed from this case?

MR. ABATECOLA: No, your Honor.

THE COURT: Well, then I have ruled that you do not have grounds to remove yourself from the case, that you are indeed conflict-free counsel, and he's appealing that.

MR. ABATECOLA: I understand, your Honor.

THE COURT: So that's past. I understand what you're saying, but if you don't have any other ground, I've made a ruling on that.

MR. ABATECOLA: I have nothing additional, your Honor.

THE COURT: So other than that, he's not equivocating. What he's saying, if you're the conflict counsel he can have, he'd rather represent himself.

That is what you're saying, aren't you, Mr. McDonald?

THE DEFENDANT: Yes, your Honor.

MR. ABATECOLA: Thank you, your Honor.

THE COURT: Do you know of any reason why I shouldn't appoint him to represent himself?

MR. ABATECOLA: I have nothing else, your Honor.

THE COURT: What is the status of your office handling stand-by counsel? Somebody's got -- this is a death case, somebody's got to do that, represent him as stand-by counsel.

MR. ABATECOLA: Your Honor, my understanding would be that Mr. McDonald would only be the second person ever to go pro se in post-conviction.[7] So I'm not -- it's an

[7] The "second" person referred to by CCRC-M Attorney Abatecola may have been capital defendant Michael Bell, who was allowed to represent himself during his post-conviction proceedings before the Circuit Court in Jacksonville [Duval County].

unusual situation. I mean, anyone prior to him that's gone pro se has elected to waive everything. So it's an unusual situation. I'm not really sure, your Honor.

THE COURT: I might know that I would be just the person that would get to handle this unusual situation.

Do you know of any reason why -- I mean, I am of the view -- I know the law says if a client elects to represent themselves at the penalty phase, for example, you must appoint stand-by counsel. We're at a more crucial stage as far as legal knowledge is concerned here than we would be as far as the penalty stage of a trial.

So I'm going to take the position he is entitled to stand-by counsel and I have to appoint him stand-by counsel. And I'm going to appoint your office as stand-by counsel. And if you have any reason to think that that should not happen, then you're going to have to bring me some motion or something to tell me why that can't be, because I think he's entitled to stand-by counsel.

MR. ABATECOLA: Okay, your Honor.

THE COURT: All right. So I'm going to find that he is capable of representing himself.

You will be representing yourself. However, I'm appointing CCRC as stand-by counsel for you to -- I'm not even sure what the purpose of stand-by counsel is, to tell you the truth. I guess they're there if you want to confer with them, you can. But they're not here to represent you. They're not going to be standing up and you say to them, you do this. This is not co-counsel.

Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. So your request to represent yourself is granted. Your request for another lawyer is still denied, although I've already ruled on that and that's up on appeal. I don't believe I should be getting into that.

But counsel says he has no further grounds today, so, Miss King, if you'll help me with this order, drafting it and send it by Mr. McDonald, if you will.

I think that we need to give credit to counsel raising once again that he did ask for conflict-free counsel; however, he had nothing to add to the previous statement, which I found to be insufficient, and that's on appeal. Therefore, there is no basis again today upon which I would appoint another counsel. And then it became Mr. McDonald's desire to represent himself rather than

have CCRC represent him. And then I appointed them as stand-by counsel.

Now, that leaves us with which motion we're going to hear. Now, I suspect that Mr. McDonald's motion may well be attacked as somehow or another untimely or whatever, but I'll be honest with you, if we're going to hear one, and this is all about hearing his motion, the one he filed, then I think I ought to just allow it to be -- it has been filed, right? I struck it. Then I think upon your motion, Mr. McDonald, to reinstate it –

THE DEFENDANT: Yes, your Honor.

THE COURT: -- that this would be an appropriate motion: Defendant then moved to reinstate his motion.

And his motion would have been timely filed, as I recall, if I had not stricken it. Is that right, Miss King?

MS. KING: Yes, your Honor.

THE COURT: Do you have any objection to that motion?

MS. KING: No, your Honor.

THE COURT: Then Mr. McDonald's motion to reinstate his motion and withdraw CCRC's motion is granted.

(PCR Supp. Vol. 3508-3541)

Merits

Essentially, CCRC concludes that their post-conviction motion was preferable to McDonald's *pro se* motion and McDonald would have been better represented by CCRC. However, contrary to CCRC's conclusion, this is not the dispositive issue. Rather, Godinez v. Moran, 509 U.S. 389 (1993) governs on the issue of the level of competence required to allow a defendant to proceed *pro se*. In Godinez, 509 U.S. 389, 399, the U. S. Supreme Court stated that the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. Based on Godinez, this Court has held:

> that once a court determines that a competent defendant of his or her own free will has "knowingly and intelligently" waived the right to counsel, the dictates of *Faretta* are satisfied, the inquiry is over, and the defendant may proceed unrepresented. . .

Hernandez-Alberto v. State, 889 So. 2d 721, 729 (Fla. 2004), citing State v. Bowen, 698 So. 2d 248, 251 (Fla. 1997). See also, Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986) (emphasizing that in determining whether a defendant has knowingly and intelligently waived his right to counsel, a trial court should inquire into, among other things, the defendant's age, mental status, and lack of knowledge and experience in criminal proceedings).

In this case, the Circuit Court conducted a careful inquiry of the defendant to be sure that his decision was free, voluntary and knowing. McDonald's responses were coherent and logical and, "after Faretta inquiry and on the court's prior observation of the Defendant in court and knowledge of his pro se pleadings," the Circuit Court found that McDonald was competent to represent himself and granted McDonald's motion for self-representation. The record before this Court confirms that McDonald's decision was knowing, intelligent and voluntary.

The transcript of the hearing below shows that the Circuit Court conducted a detailed Faretta-type evaluation of the defendant, eliciting information that McDonald was 47 years old

at the time of the hearing, had completed high school, two years of college, reads and speaks the English language, was not under any medication, and understood the purpose of the hearing. Additionally, the transcript reflects that McDonald repeatedly exhibited an understanding of the consequences of waiving his rights to post-conviction counsel. The transcript verifies that the Circuit Court conducted an extensive hearing at which the trial judge explored the defendant's age, education, and capacity to understand the consequences of waiver, complied with the standards applicable to waiver of one's rights to collateral counsel. Here, as in Alston, *supra*, the record shows that the Circuit Court did not abuse its discretion in finding the defendant competent to waive post-conviction counsel and discharge CCRC-M. See, Alston, 894 So. 2d at 59.

The Circuit Court below extensively questioned the defendant regarding his knowledge of his pending proceedings, the right to post-conviction counsel that he would be waiving, and the consequences of such a waiver. McDonald's responses to the questions posed by the Circuit Court demonstrated that he understood his legal options and the consequences. In this case, as in Slawson, although it was clear that McDonald was disenchanted with CCRC-M, that fact alone did not negate his ability to waive collateral counsel and, if he so desired,

collateral proceedings as well. See also, Sanchez-Velasco, 702 So. 2d at 228 (noting that defendant's seemingly contradictory positions did not cause this Court to doubt his competency to waive his rights to both collateral counsel and post-conviction proceedings). In Faretta, 422 U.S. at 834 the United States Supreme Court stated:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

The ultimate test is not the trial court's express advice, but rather the defendant's understanding. In Rogers v. Singletary, 698 So. 2d 1178, 1180-1181 (Fla. 1996), this Court found that the Faretta standards were met because the record established that Rogers knew what he was doing and his choice was made with eyes open. In this case, the Circuit Court expressly addressed the disadvantages of self-representation and the record establishes that McDonald "knew what he was doing and his choice was made with eyes open." Thus, the Circuit Court's decision to allow McDonald to represent himself should be upheld.

ISSUE II

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION AND CCRC'S IAC/JURY SELECTION CLAIM IS PROCEDURALLY BARRED. (As restated by Appellee, State)

Standard of Review

"To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or the record must conclusively refute them." Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000). Further, as this Court explained in LeCroy v. Dugger, 727 So. 2d 236 (Fla. 1998):

> A motion for postconviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief. A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.
>
> LeCroy, 727 So. 2d at 239 (quoting Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989)).

Procedural Bar

McDonald's IAC/jury selection claim in the Circuit Court was based on three grounds: (1) trial counsel allegedly failed to protect the defendant from biased jurors, (2) trial counsel failed to object to the alleged failure to place the juror's

under oath before *voir dire*, and (3) the juror questionnaires allegedly were not available to trial counsel. The Circuit Court summarily denied post-conviction relief on McDonald's three-part IAC/jury selection claim, addressing McDonald's identified jury selection complaints in a detailed written order. (PCR V13/2297-2301).

Now, CCRC asserts another IAC/jury selection claim: trial counsel allegedly failed to adequately challenge the racial composition of the jury venire. (Amended Initial Brief of Appellant at 33). CCRC's current claim, that trial counsel was ineffective for allegedly failing to adequately challenge the racial composition of the jury venire, was not raised by McDonald in the Circuit Court; therefore, this issue is procedurally barred. See, Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Furthermore, the three-part IAC/jury selection claim which McDonald presented to the Circuit Court has not been raised by CCRC in this appeal. Accordingly, the IAC/jury selection claim which was raised below, but not asserted here is abandoned. See Sireci v. State, 773 So. 2d 34, 41 (Fla. 2000), citing Shere v. State, 742 So. 2d 215, 218 n. 6 (Fla. 1999).

IAC/racial composition of the jury venire

CCRC's current IAC/jury selection claim, that trial counsel allegedly failed to adequately challenge the racial composition

of the jury venire, is procedurally barred. Steinhorst. Even if CCRC's claim is properly before this Court, which the State strongly disputes, McDonald still is not entitled to any relief.

On direct appeal, this Court held that both McDonald and his co-defendant, Gordon, "failed to refute the trial court's finding that jury members were randomly selected by computer and there was no evidence that blacks had been systematically excluded from the jury selection process." McDonald v. State, 743 So. 2d 501, 503 (Fla. 1999), citing Gordon v. State, 704 So. 2d 107, 111-12 (Fla. 1997).

In co-defendant Gordon's post-conviction appeal, Gordon v. State, 863 So. 2d 1215 (Fla. 2003) [Gordon II], this Court rejected a claim which is virtually identical to the claim now asserted by CCRC, *i.e.,* that trial counsel did not effectively challenge the racial composition of the jury venire. In Gordon II, this Court stated, in pertinent part:

> Gordon argues that the trial court erred in summarily denying his claim that trial counsel was ineffective in not effectively challenging the all-white venire from which his jury was selected. The standard for establishing a prima facie violation of the Sixth Amendment's fair cross-section requirement is set forth in Duren v. Missouri, 439 U.S. 357, 58 L. Ed. 2d 579, 99 S. Ct. 664 (1979):
>
> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this

> underrepresentation is due to systematic exclusion of the group in the jury-selection process.
>
> Id. at 364. Because Gordon has not initially established a prima facie showing in his motion that black people were systematically excluded from the jury selection process, his claim was properly summarily denied by the trial court. In other words, Gordon has not set out in his motion a proper claim on the merits on this issue that counsel could have advanced. See Robinson v. State, 707 So. 2d 688, 699 (Fla. 1998) (holding that trial court did not err in summarily denying claim where the petitioner "made no showing at trial or in his postconviction motion that blacks are systematically excluded from venires in St. Johns County"). Accordingly, we deny Gordon relief on this claim.
>
> Gordon, 863 So. 2d at 1218

The IAC/jury selection claim now relied upon by CCRC was not presented to the trial court below and, therefore, is procedurally barred. Moreover, as evidenced by the above-quoted ruling by this Court in Gordon II, even if McDonald had relied upon the *pro forma* claim like that of co-defendant Gordon, summary denial of this identical claim would have been appropriate, once again. See, Robinson v. State, 707 So. 2d 688, 699 (Fla. 1998).

ISSUE III

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S IAC/PROSECUTOR COMMENT CLAIM AND CCRC'S IAC/PROSECUTOR COMMENT CLAIM IS PROCEDURALLY BARRED. (As restated by Appellee, State)

Procedural Bar

In the Circuit Court, McDonald alleged that trial counsel was ineffective for failing to object to a purportedly improper closing argument by the prosecutor, specifically that (1) McDonald knew where the murder weapon was and (2) McDonald came out of the victim's apartment by himself. Now, CCRC asserts a different ground: that trial counsel was ineffective in failing to object to the prosecutor's closing argument concerning the pain and suffering felt by the victim.[8] (Amended Initial Brief of Appellant at 39-42).

CCRC admits that the current IAC/prosecutor comment claim now asserted on appeal was not raised in the Circuit Court below. (Amended Initial Brief of Appellant at 42). Accordingly, this issue is procedurally barred. See, Gordon, II (holding that "[B]ecause the aforementioned guilt phase prosecutorial comment is the only one raised in Gordon's postconviction motion, it is the only one properly before this Court.")

[8] On direct appeal, this Court determined that the prosecutor's closing argument, although perilously close to a "golden rule" violation, did not constitute fundamental error. See, McDonald, 743 So. 2d at 505 and n. 9.

Additionally, the IAC/prosecutor comment claim which was raised by McDonald in the Circuit Court has not been asserted in this post-conviction appeal and, therefore, is deemed abandoned. See, Sireci, *supra*.

Summary Denial of IAC/prosecutor comment claim

Assuming, *arguendo*, that either CCRC's IAC/prosecutor comment claim or McDonald's *pro se* IAC/prosecutor claims are properly before this Court, which the State specifically denies and strenuously disputes, summary denial of post-conviction relief is appropriate in each case.

First, the comments concerning the victim's suffering which are now relied upon by CCRC were addressed by this Court on direct appeal in McDonald v. State, 743 So. 2d 501, 505 n.9 (Fla. 1999). There, this Court determined that the prosecutor's comments, taken both individually and collectively, neither rose to the level of fundamental error nor so tainted the jury's verdict so as to warrant a new penalty phase. See, McDonald, 743 So. 2d at 505. Post-conviction proceedings cannot be used as means to obtain a second appeal of issues raised on direct appeal. Rodriguez v. State, 2005 Fla. LEXIS 1169 (Fla. 2005). Additionally, this Court does not consider procedurally barred claims under the guise of ineffective assistance of counsel. Id.

Second, in ruling on the two-part IAC/prosecutor comment claim which was raised below (that McDonald knew where the murder weapon was and that McDonald came out from the victim's apartment by himself), the Circuit Court found that McDonald's counsel was not deficient for failing to object to the prosecutor's closing argument, which the defense had invited. Additionally, McDonald could not demonstrate any prejudice under Strickland v. Washington, 466 U.S. 668 (1984) inasmuch as "the outcome of McDonald's trial would have been the same, with or without the remarks from the state in its closing argument." As the Circuit Court soundly explained:

> ISSUE XIII
> PROSECUTOR COMMENT
>
> Mr. McDonald says his counsel was ineffective for failing to object to an improper closing argument by the state that McDonald knew where the murder weapon was and that he came out of the victim's apartment by himself. Susan Shore testified at trial that Gordon came back to the car first and that McDonald followed about 5 to 10 minutes later. There was a lake behind the doctor's apartment.
>
> It was the state's theory that McDonald and Gordon had killed the doctor when they were in his apartment on the morning of January 25th, 1994. The medical examiner opined that although the cause of death was drowning, the victim had also been hit on the head by a blunt instrument. That blunt instrument was never found. In the defendants' closing arguments, their counsel argued that neither of them had returned to the car with anything that looked like a murder weapon, and that no murder weapon had been found matching the description of the mark on the victim's head. V 34, T 2070-2071. The state argued in their closing argument that based on the evidence, a reasonable hypothesis was that since McDonald had been the last to come back to the car, and he had come

> from behind the apartment, that he had disposed of the murder weapon in the lake. The state also pointed out that the murder weapon might have been a large camera that was found to be missing from the victim's apartment but was never found. V 34, T 2114-2116. Lawyers, including state attorneys, are allowed to draw reasonable inferences from the evidence. And lawyers, including state attorneys, are entitled to respond to a defendant's argument, which is called invited response.
>
> The Florida Supreme Court has already determined on direct appeal that there was no fundamental error in the prosecutor's closing argument. McDonald v. State, 743 So. 2d 501, 505 and n. 9. Neither was McDonald's counsel deficient for failing to object to this closing argument, which he had invited. Even if McDonald's counsel should have objected, the defendant cannot meet the prejudice prong of Strickland. The outcome of McDonald's trial would have been the same, with or without the remarks from the state in its closing argument. Issue XIII is denied.

(PCR V13/2333-2335)

At trial, the State's closing argument was responsive to co-defendant Gordon's prior closing arguments that neither Gordon nor McDonald was observed with a weapon when they returned to the car driven by Susan Shore, and that no weapon was found matching the description of the mark on the victim's head. See, V34/T2070-2071. Following the defense closing, the prosecutor then fairly responded, based on the evidence presented at trial, that Shore had testified that McDonald returned to the car after Gordon and from the area behind the victim's apartment. Thus, he might have thrown the weapon into the lake behind the victim's apartment. The State also pointed out the reasonable inference that the murder weapon œuld have

been a large camera that was missing from the victim's apartment. (V34/T2114-2116) The State's argument in closing was invited response and a proper comment from the evidence. See, Caballero v. State, 851 So. 2d 655, 660 (Fla. 2003). As in co-defendant Gordon's case, McDonald's trial counsel was not ineffective for failure to make a futile objection. See, Gordon II, 863 So. 2d at 1219 (holding that "Since counsel cannot be deemed ineffective for pursuing futile motions, trial counsel cannot be deemed to have performed deficiently") McDonald's post-conviction IAC/prosecutor comment claim was correctly denied below. CCRC's IAC/prosecutor comment claim is procedurally barred and, alternatively, without merit.

ISSUE IV

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIMS CONCERNING FBI AGENT VICK AND BLOODSTAIN "DNA" EVIDENCE. (As restated by Appellee, State)

In this post-conviction issue, CCRC asserts a hybrid Brady/Giglio legal claim.[9] However, McDonald did not assert a specified legal claim under Brady or Giglio in his *pro se* post-conviction motion. Accordingly, CCRC's current legal claim is procedurally barred. However, CCRC does include some factual allegations which were alleged in McDonald's *pro se* supplemental motion before the Circuit Court on the underlying "bloodstain" evidence claim. (Amended Initial Brief of Appellant at 45). Specifically, McDonald asserted below: "(A) That Agent Michael Vick never conducted the DNA tests. (B) That Agent Michael Vick had no training in DNA tests. (C) That Agent Michael Vick was not a DNA expert. (D) That no DNA match of the victim's blood were [sic] found on the gray sweatshirt." (PCR V9/1482-1483) The Circuit Court denied these claims in post-conviction issue VI (bloodstain evidence), which is now CCRC's appellate issue VII. Accordingly, the State will address CCRC's claims regarding the DNA testing and Agent Vick in issue VII of the instant brief.

[9] Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

ISSUE V

THE CIRCUIT COURT PROPERLY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO SEEK SUPPRESSION OF THE DEFENDANT'S HAIR EVIDENCE. (As restated by Appellee, State)

In this case, records presented at trial established that Gordon and McDonald stayed at the Days Inn in Tampa several times before the murder and finally on the day of the murder. (V28/T1054-65, 1071-77, 1110-13, 1129-36) When they checked out on January 26, 1995, they left behind a sweatshirt and a pair of tennis shoes. These clothes were analyzed for blood, hair and fiber matches. (V23/T468-69; V26/T840-43; V29/T1223-27, 1256-77) McDonald's sweatshirt contained fibers from Dr. Davidson's carpet and Deninno's cashmere belt as well as hairs that matched McDonald's hair. The victim's blood sample matched the DNA found in stains on the sweatshirt. (V29/T1166, 1227-31)

McDonald's *pro se* post-conviction motion alleged three sub-claims of ineffective assistance of counsel concerning his hair sample obtained by police and submitted to the FBI for comparison with the hair found on the sweatshirt seized from the Days Inn. First, McDonald alleged that his hair samples were illegally seized by fraud, without court order, and that trial counsel was ineffective for failing to move to suppress. Second, McDonald alleged that the testimony of Detective Celona and FBI Agent Allen was false concerning the dates of submission

of McDonald's hair samples and the result of the FBI's comparison, that the State knew it was false and that trial counsel was ineffective for failing to move to suppress. Third, McDonald alleged fundamental error and ineffective assistance for failure to require adherence to Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). CCRC again asserts that trial counsel was ineffective in failing to adequately challenge the testimony of FBI Agent Allen and "investigate the State's DNA evidence." (Amended Initial Brief of Appellant at 48; 53-54).

In denying post-conviction relief, the Circuit Court ruled, in part, that trial "counsel cannot be deficient for not moving to suppress McDonald's hairs that could have been legally obtained and tested again." In addition, the Circuit Court concluded that "no Frye hearing is required before the opinion testimony of a hair analyst can be admitted in a trial." In denying the "hair evidence" claim, the Circuit Court ruled:

> ISSUE III
> HAIR EVIDENCE
>
> This issue is again broken into sub-issues to try to cover all of the areas that the defendant has argued in his Supplemental Motion. The defendant's first sub-issue argues that his lawyer was ineffective for not suppressing hair samples that were taken from him without a warrant. He says the seizure was involuntary, as it was fraudulently obtained. He says the detectives told him at the Dade County Jail that they needed the hair samples for a South Carolina warrant. He acknowledges that the detectives had testified that they asked him for his hair samples to eliminate him as a suspect in the homicide. There are two reasons why this claim fails. If his lawyer

had filed a motion to suppress, it would have been the defendant's word verses the word of the two detectives as to what had been said. Even if the defendant had been believed over the two detectives, that the hairs had been obtained through a ruse, this may not have been sufficient to suppress the hair sample. Some deception is permitted to obtain a Fourth Amendment waiver, and stating that the hairs were needed for some other case would probably not cause the hairs to be suppressed.

But none of this matters, which is why this court did not cite to case law for the above proposition regarding some deception being permitted to obtain a Fourth Amendment waiver to obtain evidence. The reason that none of this matters is that if the Defendant's counsel had moved to suppress the hairs, and had the defendant been believed over the two detectives, and had the ruse violated the defendant's Fourth Amendment rights, and the hairs been suppressed, the state would have had sufficient probable cause to obtain a warrant as they did with the co-defendant Gordon. They then would have obtained McDonald's hair samples all over again, and had McDonald's newly acquired hairs compared to the unknown hairs on the gray sweatshirt. There is no reason to believe that the result would have been any different. What this means, in a nutshell, is that the defendant cannot prove either prong of Strickland. Counsel cannot be deficient for not moving to suppress McDonald's hairs that could have been legally obtained and tested again. Not only is the lawyer not deficient, but also the defendant is unable to prove any prejudice from his attorney's alleged deficient conduct.

The next sub-issue regarding the hairs is that the testimony of Detective Celona and Agent Allen was false regarding the dates the hairs were submitted for comparison, and that the analysis was false. McDonald suggests his counsel was ineffective for not moving to suppress this false testimony, or the results of the comparisons. The defendant does not make out a case in his Supplemental Motion that the testimony was false. The state, in its Response to Order to Show Cause, carefully shows the chain of custody of the hairs of this defendant as well as the hairs of the other suspects. The State's Response then carefully analyzes the testimony regarding the hairs. State's Response, 17-20. There was nothing defendant's counsel could do except cross-examine regarding these hairs, which he did. There was nothing

defendant's counsel could suppress. Counsel cannot be faulted for failing to file a frivolous motion that would not have been granted.

The last sub-issue regarding the hairs is that the defendant's counsel did not request a Frye hearing regarding the hairs. Hair evidence has been around longer than this court. It is not a means of positive identification. The best that can be said is that a certain questioned hair is either similar or dissimilar to a known hair. A suspect can be excluded from belonging to a questioned hair, but no hair expert can say a hair definitely came from a certain person. A hair examiner merely gives his opinion based on his education, training and experience. Hair analysis has been around for many years. It is not a novel science. No Frye hearing is required before the opinion testimony of a hair analyst can be admitted in a trial, and no Frye hearing would have been granted had it been requested by McDonald's attorneys. Counsel cannot be ineffective for failing to do a useless act.

This court has now analyzed all of the defendant's claims regarding the hairs that were found on the gray sweatshirt that were consistent with the defendant's known head and beard hairs. Because the defendant's hairs were found on the gray sweatshirt, and because of other testimony and evidence in the trial, the gray sweatshirt was connected to McDonald, and to having been worn by him while inside the victim's apartment. Although this testimony and evidence was incriminating, defendant has not shown what his counsel could have done to keep this testimony and evidence from coming before the jury. In other words, McDonald has not shown his lawyer's performance was legally deficient. In some of his sub-issues, he cannot show prejudice. For all of the above reasons, Issue III is denied.

(PCR V13, 2301-2304)

The Circuit Court's meticulous post-conviction analysis should be affirmed. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must "prove that his Fourth

Amendment claim is meritorious." Zakrzewski v. State, 866 So. 2d 688, 694 (Fla. 2003), citing Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). And, in order to demonstrate actual prejudice, the defendant must show that there is a reasonable probability that the verdict would have been different absent the excludable evidence. See, Strickland; Kimmelman.

Even if McDonald had testified at a pre-trial hearing contrary to the police officers on the issue of consent, his testimony, even if credited, would not have automatically resulted in suppression since the use of some deception, which is short of illegal activity, to obtain a Fourth Amendment waiver does not require suppression. See, Griffin v. State, 419 So. 2d 320 (Fla. 1982). Moreover, knowledge of the right to refuse consent is only one factor of the totality of the circumstances. In this case, the totality of the circumstances included that McDonald signed Miranda waiver forms in the presence of Detectives Noodwang and Taranto on February 23 and 24, 1994, in Miami, once as Rudolph Bowens and once as Meryl McDonald. Moreover, as the Circuit Court found, McDonald's hair samples would have been inevitably obtained. McDonald's claim that the police lacked probable cause to obtain his hair sample was refuted by his admission that police obtained a warrant just 2½ weeks later to obtain hair samples of co-defendant Gordon.

The hair samples would have been inevitably discovered. See, Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005), citing Nix v. Williams, 467 U.S. 431, 448 (1984).

In denying McDonald's second sub-issue, the Circuit Court correctly found that there was "nothing defendant's counsel could suppress." Detective Celona testified that he received Defendant's hair sample from Detective Noodwang on March 1, 1994, placed it in evidence, and later sent it to the FBI on March 17, 1994, the same date that co-defendant Gordon's hair samples were sent. He identified State's trial exhibit 8 as the hair samples he had received from Det. Noodwang. (V28/T1170-1173) The FBI report dated June 9, 1994 and testimony of Agent Allen (V29/T1248-1249) similarly reflect that the hair samples of Defendant (K7 and K8 under name of Bowens) and of co-defendant Gordon (K9 and K10) were received on March 18, 1994.

On direct examination, Agent Allen identified State's exhibit 8, as bearing his initials and designations of K7 and K8, and as the known hair samples of McDonald which he found to match with trace evidence hair which he'd collected from the sweatshirt. The FBI lab report classified these hairs as Negroid. He explained that hair comparison is not a positive identification, as is fingerprints, but did identify the hairs as included for a possible match. He described the unusual dyed

characteristics of Defendant's known hair samples and those of the 1 facial and 2 head hairs he had found on the sweatshirt. (V29/T1248-1249, 1252-1263) McDonald's girlfriend, Carol Cason, testified at trial that McDonald had dyed his hair and beard but that it had gotten lighter by the time of trial. (V26/T902-903) Thus, as the Circuit Court correctly found below, McDonald failed to show that trial counsel had any motion to exclude Agent Allen that was of any merit.

Finally, Agent Allen conducted only a microscopic and visual comparison of hair and fiber evidence. The hair he had for identification did not lend itself to DNA testing and that none had been done on the hair. (V29/T1290) Comparison-type evidence has been distinguished from scientific testing evidence for Frye requirements. Visual and microscopic hair comparison is not based on new or novel scientific principles and, therefore, does not require a Frye analysis. See Ramirez v. State, 651 So. 2d 1164, 1168 (Fla. 1995); Flanagan v. State, 625 So. 2d 827, 828 (Fla. 1993). McDonald failed to demonstrate any deficiency of trial counsel and resulting prejudice under Strickland based on the failure to assert any of McDonald's meritless challenges to the hair evidence.

ISSUE VI

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE FIBER TESTIMONY OF AGENT CHRIS ALLEN. (As restated by Appellee, State)

In his *pro se* motion, McDonald alleged ineffective assistance of counsel for failure to suppress evidence of carpet fibers from the victim's apartment, which were matched by the FBI with a fiber collected from the sweatshirt. McDonald alleged that there were no carpet fibers sent to the FBI lab from Dr. Davidson's apartment, but only carpet fibers taken from the Days Inn Motel.[10]

McDonald also raised two sub-claims concerning the cashmere fibers found on the sweatshirt and matched with the coat and belt from the victim's apartment. (The cashmere belt was among the bindings found on the victim. V23/R465-467) First, McDonald alleged that Agent Allen's testimony was inaccurate, misleading or fabricated, and counsel was ineffective for failing to suppress it; and second, that Frye was not adhered to in admission of the fibers comparison.

Now, CCRC's 1½-page argument summarily asserts that (1) "Mr. McDonald claims that these [carpet] fiber were removed

[10] The trial record confirmed that this evidence was personally hand carried to the FBI on February 26, 1994, by St. Petersburg Police Department technician Ronald Anderson, who flew with the evidence from the police department to the FBI laboratory. (V26/T841, V28 T1161-1168)

from the Days Inn because there is no report of any technician removing carpet fibers from the victim's apartment," (2) an analysis of the cashmere belt had not been done by March 1, and (3) "counsel was ineffective for not requesting a *Frye* hearing regarding the admissibility of the fiber testimony." (Amended Initial Brief of Appellant at 56).

CCRC's *pro forma* complaint is insufficient to preserve this issue for appeal. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Assuming, *arguendo*, that the IAC/fibers claim has been fairly presented on this post-conviction appeal, which the State specifically denies and strongly disputes, the Circuit Court properly denied post-conviction relief on McDonald's IAC/carpet and cashmere fibers claims.

As to the carpet fibers, the Circuit Court found that the State presented the chain of custody of the carpet samples that were taken from the victim's apartment and hand carried to the FBI lab. The witnesses who took the samples, who transported the samples and who examined the samples and made the comparisons testified at the trial. (V29/T1276-1277, 1283)

There was no showing that "the carpet comparison testimony was false, or that the prosecutor knew it was false, there was no testimony or evidence for McDonald's attorney to suppress." (PCR V13/2305) In denying relief on the "cashmere fibers" claim, the Circuit Court rejected McDonald's unsupported accusations against Agent Allen, finding that "the defendant has done nothing but merely assert inaccurate, misleading, and false testimony. He offers nothing to back it up. His bare allegation is insufficient for any relief." (PCR V13/2307) In addressing McDonald's allegation that his attorney was ineffective for failing to request a Frye hearing, the Circuit Court explained why she would not have given him a Frye hearing, even if he had requested it. (PCR V13/2307-2308) Thus, trial counsel could not be found ineffective "for not requesting a Frye hearing he would not have gotten, or for not filing motions to suppress that would not have been granted." (PCR V13/2308)

Other than simply resurrecting McDonald's unfounded allegations which were soundly rejected below, CCRC has offered nothing to undermine the Circuit Court's commendable analysis and proper rejection of this claim. Accordingly, the Circuit Court's order denying post-conviction relief should be affirmed. See, LeCroy, *supra*.

ISSUE VII

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE BLOODSTAIN EVIDENCE. (As restated by Appellee, State)

In his *pro se* motion for post-conviction relief, McDonald alleged a three-part claim of ineffective assistance of counsel regarding the DNA/bloodstain evidence. McDonald first alleged that trial counsel was ineffective in failing to suppress evidence of a bloodstain on the sweatshirt "as lost or destroyed." Second, McDonald alleged that his trial attorney was ineffective for failing to obtain a DNA expert. Third, McDonald alleged ineffective assistance of counsel in failing to request a Frye hearing. In this post-conviction appeal, CCRC renews McDonald's three *pro se* claims, albeit in reverse order. (Amended Initial Brief of Appellant at 57-58).

The Circuit Court's order denying McDonald's "bloodstain evidence" claims, also addressed McDonald's supplemental motion and criticisms against Agent Vick. (See Issue IV, *supra*). The Circuit Court ultimately found that all of McDonald's criticisms against Agent Vick and "assertions are refuted by the trial testimony of Agent Vick. V 29, T 1211 - 1238 Vick's testimony and the DNA evidence was in no way refuted at the evidentiary hearing."

Both defense attorneys for co-defendant Gordon and McDonald testified at the evidentiary hearing that they made a strategic, informed decision not to challenge the DNA evidence which showed the victim's blood on McDonald's shirt. Their defense theory was that Gordon and McDonald went to the victim's apartment to retrieve a document from the victim. After they left the apartment, Leo Cisneros killed the victim and later planted the DNA evidence on McDonald's shirt. Given this defense theory, the DNA evidence was not an issue. In fact, the additional presence of unknown DNA on McDonald's shirt served to bolster their claim that they were framed.

In denying post-conviction relief after an evidentiary hearing, the Circuit Court ruled, in pertinent part, that even if the bloodstain itself may have been consumed in the testing, the DNA materials, such as photographs of the DNA test results, autoradiographs, x-rays, and perhaps more, are still available for comparison, should anyone want to verify that the DNA is Dr. Davidson's. At the evidentiary hearing the defense DNA expert, Dr. Herrera, agreed with Agent Vick that the identification of the bloodstain from the sweatshirt was consistent with the known victim's blood sample. Furthermore, had the defense attorneys sought a Frye hearing, the trial court would have ruled against them. As the Circuit Court explained,

ISSUE VI
BLOODSTAIN EVIDENCE

At the Huff hearing, the bloodstain evidence was discussed at some length. HH, 16-22, 48-62. This was after the court had permitted the defendant to substitute his Supplemental Motion with the additional 16 pages at the beginning of the motion that was not in his original motion. HH, 6-10, 13-16. Almost all of the additional matters raised by the defendant in the Supplemental Motion regard the bloodstain evidence, particularly the DNA sub-issue. HH, 15. Accordingly, all of the defendant's assertions regarding the bloodstain evidence, contained anywhere in his Supplemental Motion, including all of his allegations regarding the DNA evidence, will be discussed under Issue VI.

The court granted the defendant an evidentiary hearing on most, if not all of this issue. One of the opportunities offered to the defendant at the Huff hearing was to have the transcript of DNA expert, Dr. Herrera, who had been called by co-defendant Gordon at his evidentiary hearing where he was represented by private counsel, introduced at McDonald's evidentiary hearing. The state would then be allowed to use the transcript of the expert they had called at the Gordon evidentiary hearing, Dr. Tracey. This court agreed she would consider both Dr. Herrera's testimony, and Dr Tracey's testimony from the Gordon evidentiary hearing just as if they had been present testifying at McDonald's evidentiary hearing. The defendant indicated at the Huff hearing that he wished to avail himself of the court's offer. HH 53-61, 77. At the evidentiary hearing, the transcripts were introduced, and both sides have referred to them in their submissions. EH, 201-204, 210-212.

The first sub-issue, identified in the State's Response on page 30 and their Closing Argument, on page 5 is "ineffective assistance in failing to suppress evidence of a blood stain on the sweatshirt as lost or destroyed by the state's misconduct." This court is not sure exactly what the defendant is complaining about. Perhaps he is complaining that the small bloodstain on the tennis shoe, connected to the defendant, was totally consumed in the testing. If so, this claim has no merit. The bloodstain on the shoe was so small that the agent could only say it was human blood. It was too small to do any further testing. V 29, T 1223. It was too small to even do a blood typing. V 29, T 1230.

Perhaps the defendant is complaining, as he does in his Supplemental Motion, that Agent Vick testified at trial that certain evidence had been lost. However, he says, this alleged testimony "is not found in the trial transcripts....The Defendant further specifically alleges that the tape of the trial testimony will specifically show that this testimony of Agent Vick will appear as stated in this paragraph and as such the Defendant is entitled to a new trial." Supplemental Motion, 100-101. Agent Vick was the person who did the blood, and DNA testing, and is the FBI expert who testified about same at the defendant's trial. This court sat through the trial and does not remember any such testimony, but this statement by this court is probably as irrelevant as is the defendant's statement. The trial transcript, and not some "tape" if there was such a "tape", is the official record. A tape of a proceeding made by a court reporter to assist in a transcript is not even a judicial record. Holt v. Allen, 677 So 2d 81 (Fla. 2d DCA 1996).

Perhaps the defendant is complaining about the bloodstain evidence that was taken from the gray sweatshirt, connected to McDonald that was used for DNA analysis. From the defendant's closing argument, it appears that this is his real complaint. Defendant's Closing Argument, 48-51. While the bloodstain itself may have been consumed in the testing, the DNA "materials", such as photographs of the DNA test results, autoradiographs, x-rays, and perhaps more, is still available for comparison, should anyone want to verify that the DNA is Dr. Davidson's. In fact, the defendant's DNA expert at the evidentiary hearing, Dr. Herrera, acknowledged at the evidentiary hearing that he agreed with Agent Vick that the identification of the bloodstain from the sweatshirt was consistent with the known victim's blood sample. Gordon's Evidentiary Hearing, 84, 126. Thus, not only was Agent Vick correct in his analysis of the DNA test results, but whatever DNA "materials" that remain must be sufficient for another DNA expert to view, compare, and render opinions.

As to a second stain that was identified as belonging to Dr. Davidson and another unidentified individual, those DNA "materials" are also still available. The defendant says at pages 99-100 of his Supplemental Motion that the unknown blood was clearly not his blood, but that is not necessarily true. Neither McDonald's blood, nor that of any of the other co-defendants, was sent to the FBI or

analyzed by the FBI. The only blood sample the FBI had was that of Dr. Davidson. V 29, T 1221, 1231. The DNA photographs, x-rays, autoradiographs, and whatever else has been preserved from the DNA testing can be compared to the Defendant's DNA profile should such a procedure be requested by him, and if he provides his blood for DNA comparison. Surely the defendant knows that DNA testing can be requested under Fla. R. Crim. P. 3.853, and Fla. Stat. § 925.11. Interestingly, the defendant has not requested any such testing. If such a test is ever requested and the unidentified blood, mixed with the victim's blood, is that of the McDonald, that would only strengthen the state's evidence against him. If such a test is ever requested, and the unidentified blood, mixed with the victim's blood, is not that of McDonald, that may or may not afford him any relief. However, that discussion is for another day if additional DNA testing is ever requested. In conclusion, while the bloodstain may have been unavoidably consumed in the DNA testing, the DNA "materials" from the test are not lost or destroyed. Comparisons from those "materials" can still be made. Note that I underline "may" because the state suggests in their closing argument that the stains may somehow still be available for additional testing. State's Closing Argument, 8-9.

If the bloodstains were totally consumed and if no DNA "materials" were available, that would still afford the defendant no basis for a motion to suppress. Unavoidable consumption of evidence during testing does not give rise to a motion to suppress. It is not a violation of due process when evidence is unavoidably used up during a testing procedure. King v. State, 808 So 2d 1237 (Fla. 2002), State v. T.L.W., 457 So 2d 566 (Fla. 2d DCA 1984). If evidence is lost or totally consumed during testing, the burden is on the defendant to show bad faith by the state in failing to preserve evidence. Arizona v. Youngblood, 488 U.S. 51 (1988); King v. State, supra. The FBI agent's consumption of the small amount of blood on the tennis shoe during testing shows no bad faith on the part of the state. The same would be true of the consumption of the bloodstain from the gray sweatshirt that was used for DNA analysis, if in fact the bloodstain was totally consumed. State v. T.L.W., supra; King, supra.

In short, the defendant's counsel cannot be ineffective for failing to file a motion to suppress based

on the fact that blood was consumed in the various testing processes. Such a motion would have no legal basis. Counsel cannot be faulted for not filing a motion that will not succeed.

The second sub-issue of the defendant is that his attorney was ineffective for failing to get his own expert to attack the state's forensic serologist and DNA experts. At the Huff hearing, the defendant says he is talking about a DNA expert and not a serology expert. HH, 52-53. The third sub-issue was ineffective assistance of counsel in failing to require a Frye hearing for admission of the DNA testimony and evidence. An evidentiary hearing was afforded on both of these issues. Since they are related, they will be discussed together.

Dr. Renee Herrera, defendant's DNA expert, testified at the evidentiary hearing through a transcript of his testimony taken from an evidentiary hearing held in conjunction with co-defendant Gordon's Motion for Post-conviction Relief. Dr. Martin Tracey, Sr. testified for the state. I have already analyzed that testimony and how it would relate to a Frye hearing, had one been requested, in my order denying post-conviction relief to Robert Gordon. That order is dated April 20, 2002. My analysis in that order will be repeated here in this order. Please note that the record references are to the evidentiary hearing transcript pages from Gordon's evidentiary hearing, and not McDonald's evidentiary hearing. This applies to the following two paragraphs that are in quotation marks as they are taken directly from my order in Gordon's case.

"At the evidentiary hearing, two experts were called to discuss the Frye issue as it pertained to the DNA evidence introduced at defendant's trial. Dr. Renee Herrera testified for the defendant. Dr. Martin Tracey, Sr. testified for the state. They were the first two witnesses called at the evidentiary hearing and their testimony comprises the entire first volume of the evidentiary hearing transcript. EH, 21-84, 124-127-Herrera; 85-124- Tracey. They were both qualified as experts in the field of population genetics. EH, 27-28-Herrera; 86-87-Tracey.

Based on the totality of the experts' testimony, had they been called as experts in a Frye hearing, I would have found that the problem of ethnic substructure affecting the population frequency calculations, which had caused the Vargus court, Vargus v. State, 640 So.2d 1139

(Fla. 1st DCA 1994), to conclude that Frye could not be met in 1990 in a case involving a Puerto Rican defendant, had been sufficiently cleared up before Gordon's 1995 trial to admit Agent Vick's testimony. In other words, had Mr. Love requested a Frye hearing, and had the testimony before this court been what it was at the evidentiary hearing, I would have found that there was, in 1995, the time of Gordon's trial, general acceptance in the scientific community (forensic population genetics), to permit Agent Vick's DNA testimony, including his population frequency testimony. EH, 21-126. Accordingly, Gordon's counsel cannot be deemed ineffective for not pursuing a motion which would have been denied."

This same analysis is true for defendant McDonald. Had his lawyers, Mr. Michael Schwartzberg, ("Schwartzberg") or Richard Watts, ("Watts") requested a Frye hearing on behalf of defendant McDonald, and had the testimony at the Frye hearing been as it was in Gordon's evidentiary hearing, I would have found that at the time of McDonald's 1995 trial, general acceptance in the scientific community (forensic population genetics) would have permitted Agent Vick's testimony, including his population frequency testimony. Accordingly, as I have previously stated about Mr. Gordon's attorney, McDonald's counsel cannot be deemed ineffective for not pursuing a motion that would not have helped his client.

However, this Frye analysis is not the main thing regarding this sub-issue that causes this court to resolve it against the defendant. It is clear from the testimony of Schwartzberg at the evidentiary hearing, that he, along with Watts and McDonald, made a strategic choice that the small amount of blood on the gray sweatshirt that may have been worn by Mr. McDonald, or as also contended by the defense, may have been planted at the motel room by co-defendant Cisneros, whom the defense told the jury may have been the actual killer, was more helpful to McDonald's case than harmful. The reasons for this strategic choice were several, and all come from the trial transcript of McDonald's trial, although specific references to that trial transcript are not given in this order.

1. Susan Shore placed McDonald and Gordon on the grounds of the victim's apartment at or near the time of the murder. She testified that McDonald directed her to the Thunderbay Apartments, where the victim lived, and that McDonald had gone off "jogging" when they first

arrived in the parking lot. She later saw a black figure under the stair steps leading to the victim's apartment, but could not positively identify the black figure as McDonald.

Gordon and Shore were additionally placed on the grounds by a neighbor, Ms. Springer, who saw Shore and Gordon together on the grounds before the doctor came home. Others saw a white, blond woman, and a black man playing catch with a small ball, but did not get a good enough look to make a positive identification. Shore says she and Gordon played catch with either a baseball or a cricket ball while waiting for Gordon and McDonald's "friend". Another neighbor of the victim saw Shore seated in the parked vehicle, as she stated she was, when Gordon and McDonald were elsewhere, presumably inside the doctor's apartment. Shore testified that when the victim came home, Gordon said something like, "There is my friend" and Gordon went to talk to Davidson, eventually going with the victim toward his apartment. Gordon was not seen again by Shore for approximately 20 minutes. McDonald came back to the car 5 to 10 minutes after Gordon. It was the state's theory, corroborated by the medical examiner's estimated time of death, that the doctor was killed at the time Shore says she, Gordon and McDonald were at the Thunderbay Apartments. Shore's testimony that she, Gordon, and McDonald were at the victim's apartment, at least on the grounds of the apartment, would have been very difficult to deny since her testimony was corroborated on several fronts.

2. The circumstances leading up to the homicide showed that the defendants, Gordon and McDonald, came to the Tampa/St. Petersburg area several times, sometimes meeting with co-defendants Cisneros and Davidson on several occasions. The last time they came to Tampa and met with Denise Davidson and Cisneros was when this homicide occurred and was testified to by Susan Shore. However that was not the only time Gordon and McDonald came to Tampa, which could be connected to this homicide. On one occasion, a girlfriend of McDonald's was told to dress like a nurse, so "Dr." Gordon, and "Dr." McDonald could case out the hospital where the victim worked. On another occasion, Gordon, McDonald, and state's witness, Clyde Bethyl, went to the Thunderbay Apartments to see an apartment exactly like the doctors, and passed themselves off to the leasing agent as father, son, and cousin who expected to purchase a similar unit. Not only did Bethyl

testify to this at trial, but Lisa Gubov, the leasing agent of Thunderbay Apartments, confirmed this and identified Gordon and McDonald at trial. A maintenance man also identified Gordon and McDonald as being in the clubhouse. This ruse gave them an opportunity to see the actual layout of the victim's apartment grounds, and actual apartment layout. They left with a sight plan of the apartment grounds, and a floor plan of a unit like the doctor's. Gubov's testimony, and identification, corroborated Clyde Bethyl's, who was a friend of the defendants, and who testified at the trial regarding his trips to Tampa, including the above. He also testified to other incriminating events, such as Gordon and McDonald meeting with Denise Davidson and Cisneros. It would have been difficult to deny or attempt to explain this testimony, except not to challenge it, and to argue that a reasonable inference from that evidence was that the McDonald and Gordon needed this information to get the document or paper they were hired by Denise Davidson and Cisneros to retrieve from the doctor's apartment, which they did retrieve from the apartment, and then left with the doctor still alive, only to be murdered by someone else. This is exactly what the defense contended.

3. Co-defendant, Susan Shore, testified that when Gordon and McDonald returned to the car, presumably from the doctor's apartment, they were not out of breath, were not wet and had no blood on them that she could see, giving rise to the defense contention that they went to the apartment to get a document or paper regarding the divorce/custody battle of the Davidson's. Furthermore, Shore testified that McDonald actually patted his stomach when he returned to the car, said "I've got it", or "I've got the piece of paper" and she heard a paper crinkle under his shirt where he rubbed it. This testimony fit quite nicely with the defense theory that McDonald and Gordon had gone to the victim's apartment to retrieve a piece of paper or a document that Mrs. Davidson wanted, and that they left the apartment after they got the piece of paper, and someone else came in after them, presumably Cisneros, and killed the doctor. McDonald's lawyer was able to effectively argue that if McDonald and Gordon had been involved in the murder, where signs of quite a struggle were apparent, that McDonald and Gordon would have been wet, had blood on them, and showed signs of a struggle, such as being out of breath, etc.

4. A friend and co-worker of Mrs. Davidson, Pam Willis, went to stay with her the night of the murder. She smelled smoke and asked what it was. At first she was told it was Cisneros smoking. However, later, she went to the bathroom and found ashes from paper on the floor, with a match nearby, and cleaning fluid. She asked Davidson the next day about this, and was told the ash was from burned old letters from the doctor that she didn't want anyone to read. This also fit in with the defense theory that the burnt paper was the paper that Ms. Davidson had wanted, and that the paper is what the defendants were hired to get, and what McDonald did get.

5. Gordon was seen at the Days Inn motel in Tampa on the day of the murder, January 25, 1994. He was identified at trial by Claire Dodd, manager of the Days Inn, who said a blond white woman, Susan Shore, had come in to rent a room on the day of the murder. Her records indicated that Shore (not the name she used) had checked in at 11:02 a.m. There were no rooms cleaned at 11:00 a.m., but Shore said she would take a dirty one, as all she needed it for was to take a shower. About an hour after Shore checked in, Ms. Dodd saw a man she identified as Gordon in the lobby, who had signed into her motel on January 18th as R. Gordon. On January 25, 1994, she saw Gordon with a man she had seen him with the week before at the motel. The reason she knew it was the same man she had seen Gordon with the week before was because the week before, the man had been wearing a purple striped jacket. The jacket was quite distinctive, and was identified and introduced into evidence at trial as a jacket belonging to McDonald. The police had taken the jacket into evidence, and Ms. Dodd identified the jacket at trial, although she could not positively identify McDonald.

The room rented to and identified by Susan Shore was the room where the tennis shoes and gray sweatshirt, purportedly purchased by Ms. Davidson the night before the murder, and worn by McDonald the day of the murder, were left behind, recovered by the police and ultimately checked for blood, hairs, and fibers. Ms. Shore had testified that McDonald and Gordon each wore a jogging suit and tennis shoes to the Thunderbay Apartments on January 25th, although she couldn't say positively which one had on the gray sweatshirt, and which one had on a black sweatshirt. However, she testified that they both changed out of those sweatshirts and tennis shoes at the motel after they had returned there from the Thunderbay

Apartments. A tennis shoe, size 10, which matched the foot size of McDonald, and which matched a shoe print found at the victim's apartment, had specks of human blood on it. The gray sweatshirt had the victim's DNA on it. The gray sweatshirt also had a head and beard hair that matched McDonald's head and beard hair on it. It also had fibers on it that matched the carpet fibers at Davidson's apartment. Finally, the gray sweatshirt also had six green fibers that matched fibers from a green coat and sash found at the Davidson murder sight. The sash had been used to bind the victim.

All of this testimony and evidence was documented by guest registrations, eyewitness testimony, and expert testimony. Although McDonald said all of this was untrue at the evidentiary hearing, it would have been next to impossible to sell that to a jury. With all of this evidence, McDonald's counsel fit all of it into the agreed upon strategy that McDonald and Gordon were at the victim's apartment to retrieve a document, or paper, and someone else, perhaps Cisneros, had committed the murder, and tried to frame McDonald and Gordon.

6. Finally, as McDonald's attorney opined at the evidentiary hearing, there was another small amount of blood on the sweatshirt that could not be identified by DNA testing as being the victim's blood, and thus, with this unidentified blood, he could tell the jury it might be Cisneros' blood, whom he suggested in his closing argument was the actual killer and who planted the specks of blood on the sweatshirt, or planted the sweatshirt itself at the hotel when he came with Ms. Davidson to visit with Gordon and McDonald after the murder. This evidence of the unidentified bloodstain mixed in with the victim's bloodstain, allowed McDonald and his lawyers to bolster their agreed upon strategy.

With all of the incriminating evidence, and much more not mentioned specifically here, including cell phone and beeper records that verified what was said by Shore and others, regarding McDonald's and Gordon's whereabouts, defense counsel Schwartzberg and Watts did not think they could contend McDonald was not at the doctor's apartment, or at the Days Inn motel, but that the best strategy, and the strategy that was approved by McDonald was that McDonald and Gordon went to the doctor's apartment for the purpose of getting a document or some piece of paper, which they did, and that another or others, perhaps Cisneros, actually killed the doctor. They then delivered

the piece of paper to Davidson and Cisneros when they came to the Days Inn motel. The sweatshirt, with a few unnoticed specks of blood, and not wet (according to Shore) when the murder scene was very wet from water, and very bloody, actually helped, rather than hurt, this theory of defense, according to Schwartzberg. Thus, Schwartzberg did not want a Frye hearing to exclude what he thought helped McDonald's case. Swartzberg [sic] says he discussed this with his client who agreed with this defense. EH, 101-106, 111-112, 116-119, 122-123, 150-155, 161, 163-164. Mr. McDonald denies that he ever agreed to this defense, saying he wanted to pursue an alibi defense, and says his lawyer "sit here and fabricate a story against this defendant." Of course, he says the same about all of the other testimony against him. It is all false. EH, 175-182, 184-191, 193-199.

When determining credibility of witnesses, this court uses the same criteria as jurors do when they have to weigh credibility, including such things as a witness's interest in the outcome of the case. In this case, to believe Mr. McDonald, everyone would have to be lying, including most of the witnesses who testified against him at trial, some of whom had been friends, acquaintances, and even girlfriends. These people, except for possibly Shore, had no interest in the outcome of McDonald's case, except that it was obvious that some of them would have liked to help McDonald and Gordon if they could have. This court isn't prepared to say that everyone who testified at the trial was involved in a giant conspiracy against Mr. McDonald. As to the credibility of his lawyer verses Mr. McDonald, this court finds that Mr. Schwartzberg is telling the truth about the strategy developed and participated in by Mr. McDonald. Schwartzberg has no interest in the outcome of this case, except that no lawyer likes to be called ineffective. But that would not cause a member of the Florida Bar to lie and jeopardize his license to practice law. Frankly, the strategy developed was probably the only strategy available in light of the overwhelming amount of testimony and other evidence that was available at the trial to tie Mr. McDonald to the Tampa Bay area and to this murder. Even if the DNA evidence had been suppressed, which I have determined it wouldn't have been, there were still McDonald's hairs on the sweatshirt, as well as carpet and coat fibers from the victim's apartment. That alone would have tied McDonald to the victim's apartment. But that

> wasn't all there was. There was much more, including the devastating testimony of Susan Shore. The strategy developed by Schwartzberg and Watts, McDonald's co-counsel, and approved by McDonald, was not ineffective assistance of counsel, but once again, a lawyer having to play the hand he was dealt. Unfortunately, for Mr. McDonald, it was he and his co-defendants who dealt the hand.
>
> Finally, I will address the defendant's bloodstain issues that he raises in the first 16 pages of his Supplemental Motion. The defendant summarized his contentions on pages 12-13 of his Supplemental Motion as follows: "(A) That Agent Michael Vick never conducted the DNA tests. (B) That Agent Michael Vick had no training in DNA tests. (C) That Agent Michael Vick was not a DNA expert. (D) That no DNA match of the victim's blood were (sic) found on the gray sweatshirt. All of these assertions are refuted by the trial testimony of Agent Vick. V 29, T 1211 - 1238. Vick's testimony and the DNA evidence was in no way refuted at the evidentiary hearing.
>
> This court has now addressed all of the sub-parts of Issue VI in the defendant's Supplemental Motion. They are all either conclusively refuted by the record, or were refuted at the evidentiary hearing. Issue VI is denied.

(PCR V13/2308-2322)

In Gordon II, this Court denied the co-defendant's virtually identical post-conviction ineffective assistance/DNA claims, finding that the co-defendant was not entitled to relief on either his IAC/lost evidence or DNA/Frye claim:

> DNA TESTING
>
> Next, Gordon asserts that the trial court erred in summarily denying his claim that trial counsel was ineffective for failing to seek to exclude the results of scientific tests where, through no fault of the State, the material tested was destroyed. Even if trial counsel's performance was deficient, Gordon has not shown how the innocent consumption of the DNA prejudiced him. In order to prevail on a claim involving destruction of DNA samples, a defendant must prove that the State acted in bad faith. See Arizona v. Youngblood, 488 U.S. 51, 102 L.

> Ed. 2d 281, 109 S. Ct. 333 (1988). Additionally, Florida courts have held that the unavoidable consumption of testing material does not trigger a constitutional violation. See State v. T.L.W., 457 So. 2d 566 (Fla. 2d DCA 1984); State v. Herrera, 365 So. 2d 399 (Fla. 3d DCA 1978). Therefore, as Gordon has neither asserted a claim of bad faith nor explained any prejudice in this instance, he is not entitled to relief here.
>
> * * *
>
> DNA
>
> Next, Gordon argues that trial counsel was ineffective for failing to challenge the admissibility of DNA evidence and failing to request a Frye hearing. At the evidentiary hearing, trial counsel and codefendant McDonald's counsel expressly indicated that as a part of the defense strategy, it was actually desirable to present to the jury the unidentified DNA evidence that did not implicate either Gordon or McDonald, in order to corroborate the defense theory of what happened the day of the murder. It was also a part of the strategy to get before the jury the small amount of DNA that implicated McDonald because it supported the defense theory that the defendants merely went in to get a piece of paper and that another man, Leonardo Cisneros, was the real killer. In its order, the trial court discussed the lack of a challenge to the DNA evidence at length, identifying a variety of reasons that this claim does not merit relief. We agree with the sound reasoning of the trial court, which was primarily based on the fact that counsel's decision was an intended strategic one, and the courts will not second-guess such a decision. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000).
>
> Gordon, 863 So. at 1221, 1222

Trial counsel decided, after discussions with McDonald, co-defendant Gordon and co-defendant Gordon’s counsel, to use the small amount of blood found on the sweatshirt at the motel to support the defense that someone else committed the murder and framed the Defendant. Trial counsel testified that he discussed

this strategy with McDonald, *i.e.*, that they would not challenge the DNA as not harmful to their planned defense, and McDonald agreed with that strategy.

Lastly, with respect to the post-conviction DNA expert, the State strongly disputes CCRC's representation that the Circuit Court "forced" McDonald to rely on co-defendant Gordon's DNA expert. To the contrary, as the Circuit Court reminded the defendant at the commencement of the evidentiary hearing, McDonald, against CCRC's recommendation at the Huff hearing, "jumped right up and said that's what he wanted to do." (PCR V20/3254).

In this case, as in Gordon II, trial counsel's tactical decision may not be not second-guessed. See Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2000). As in Gordon II, the Circuit Court's well-reasoned order denying post-conviction relief on McDonald's ineffective assistance/DNA claims should be affirmed.

ISSUE VIII

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE SWEATSHIRT AND TENNIS SHOES. (As restated by Appellee, State)

In his *pro se* motion below, McDonald alleged that trial counsel was ineffective in failing to suppress the sweatshirt and tennis shoes recovered from the Days Inn Motel. McDonald alleged that these items might have been contaminated.

Now, CCRC also asserts that "due to the position that Mr. McDonald was put in at the evidentiary hearing, the State's case was not properly challenged," and "this Court should remand this case back for a full and fair evidentiary hearing." (Amended Initial Brief of Appellant at 63). CCRC's adequacy-of-the-Faretta-hearing" complaint is procedurally barred. (See, Issue I). Assuming, *arguendo*, that McDonald's remaining IAC claims regarding the tennis shoes and sweatshirt are properly before this Court, the Circuit Court correctly found that the defendant's claims were refuted on the record.

In denying post-conviction relief on McDonald's IAC/sweatshirt/tennis shoe contamination claim, the Circuit Court carefully analyzed the trial record and explained:

> ISSUE VII
> SWEATSHIRT CONTAMINATION
>
> The court did not order an evidentiary hearing on this issue. The testimony at trial was that on January 25, 1994, the day of the murder, the cleaning lady found

the gray sweatshirt and the tennis shoes in question when cleaning room 121 at the Days Inn which Susan Shore identified as the room she, McDonald and Gordon had checked into soon after the murder had occurred. She stated one of the men had been wearing a gray sweatshirt and one a black sweatshirt, and both had been wearing tennis shoes at the Thunderbay Apartments where the victim lived. Although there was no room clean, the men didn't care, and told her to rent the room anyway so that they could clean up and change clothes. They did change out of the sweats and tennis shoes that both had been wearing and changed into other clothes. She never saw the sweats or shoes again, although she couldn't say they had been left behind either. V 30, T 1561-1562, 1573-1579, 1631-1634, 1638-1641, 1661.

Ms. Asbury, the cleaning lady stated that she found the sweatshirt and tennis shoes on January 25th in the same room that the defendants rented and had changed clothes in, Room 121. She showed them to her supervisor, Ms. Fulkerson, who told her to return them to the room in case the folks renting the room for the day (Shore, McDonald and Gordon) returned for them. The next day, when the sweatshirt and shoes were still there, Ms. Fulkerson placed them in a plastic bag and placed them in lost and found. She gave them to the police on February 24, 1994, when they came to the hotel making inquiry. V 28, T 1115-1120, 1126, 1129-1131, 1133-1134, 1138-1139.

Detective Deasaro obtained the sweatshirt and tennis shoes on February 24, 1994 from Ms. Fulkerson. They were still in the same package she had placed them in. He did not open it. He observed a small hole in the bag about the size of a coin slot, which he kept folded over until Detective Celona taped the hole shut. V 28, T 1144-1149. Detective Anderson hand carried the sweatshirt and tennis shoes to the FBI, on or about February 26, 1994, still in the same plastic packaging. V 28, T 1161-1165.

The FBI took over from there and processed the sweatshirt and tennis shoes, where the blood, hair and fiber evidence was obtained, which has been discussed in this order previously. Before an attorney can seek to exclude evidence on the basis of tampering, he or she must show a "likelihood or probability" of tampering with the evidence. Taplis v. State, 703 So 2d 453 (Fla. 1997). The state of the record in this case was such that the evidence could not have been suppressed, as there was no "likelihood or probability" of tampering with the tennis

> shoes and gray sweatshirt. As the lawyer indicated at the evidentiary hearing, he did try to show the jury that there was a possibility that the evidence was planted, or tampered with, EH, 100-102, but he could not have made the required legal showing to have the evidence suppressed. A lawyer cannot be ineffective for not filing a motion to suppress that would not have been granted. Additionally, as indicated above, it was part of the attorneys' strategy, agreed to by Mr. McDonald, not to challenge this testimony as it fit in with the rest of the strategy that Mr. McDonald had gone to the apartment to retrieve a piece of paper, but that he had not killed the victim. See discussion under Issue VI. For all of the above reasons, Issue VII is denied.
>
> (PCR V13/2322-2324)

Based on the foregoing extensive citations to the trial record in this case, the Circuit Court correctly found that the evidence could not have been suppressed inasmuch as "there was no "likelihood or probability" of tampering with the tennis shoes and gray sweatshirt." Trial counsel cannot be deemed ineffective for not filing a motion to suppress that would not have been granted. See, Gordon, II. A motion for post-conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrate that the movant is entitled to no relief, as in this case. See, LeCroy, *supra*.

ISSUE IX

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE SHOE IMPRINT TESTIMONY OF AGENT WILLIAM BODZIAK. (As restated by Appellee, State)

In his *pro se* post-conviction motion, McDonald raised three claims of ineffective assistance concerning the tennis shoes recovered at the Days Inn and their match with prints lifted at the victim's apartment. First, McDonald claimed that his trial record did not show that shoe print lifts were taken from the crime scene and that the lifts allegedly were "invented" by St. Petersburg Police Technician Kidd. Second, McDonald alleged that no men's tennis shoes were recovered from the Days Inn, but only a small size woman's shoe. Third, McDonald alleged a violation of Frye in the admission of the shoe print comparison.

In this post-conviction claim, CCRC asserts an abbreviated one-page argument, seeking remand for an evidentiary hearing. (Amended Initial Brief of Appellant at 64). CCRC again alleges that "due to the position that Mr. McDonald was put in at the evidentiary hearing, as stated in Argument I, the State's case was not properly challenged." Id. CCRC's adequacy-of-the-Faretta-hearing claim is procedurally barred. See, Issue I.

Furthermore, CCRC's conclusory one-page argument is woefully inadequate to fairly preserve this issue for appeal.

See, Cooper v. State, 856 So. 2d 969, 977, n. 7 (Fla. 2003); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Assuming, *arguendo*, that this issue is fairly presented, which the State specifically denies, summary denial was appropriate because the defendant's claims are conclusively refuted by the record in this case. The Circuit Court entered the following fact-specific order denying relief on McDonald's IAC/shoe print claims:

> ISSUE VIII
> SHOE PRINT AND TENNIS SHOES
>
> The defendant raises three sub-issues regarding the tennis shoes. The first is that shoe print lifts taken from the crime scene were "invented." by St. Petersburg technician Kidd. Technician Kidd testified at the trial that Detective Moland, in charge of crime scene processing, instructed him to lay brown paper in the foyer of the victim's apartment for later print processing, which he did. He told other officers and technicians not to step there. He photographed the visible shoe prints and took lifts of those same shoe prints on January 25, 1994, the day of the murder. V 23, T 484-487, 491-493, 495. He identified state's exhibits 3 and 7 as the lifts and photographs he had taken, which were admitted into evidence. V 23, T 493-495. Later, FBI Agent Bodziak testified that one of these lifts matched one of the size 10 shoes that came from the Days Inn. V 28, T 1174, 1177-1202. The testimony was not "invented" and there was nothing the defendant's counsel could have done about either this testimony or the admissibility of the evidence.
>
> The second sub-issue is that no men's tennis shoes were recovered from the Days Inn, but only a small size woman's shoe. The state, in its Response to Order to Show Cause, goes through an in-depth, detailed analysis of the tennis shoes, size 10 Voit athletic running shoes, recovered from the Days Inn and examined and compared by the FBI. State's Response, 41-44. I am not going to repeat their detailed analysis here, except to say that

> the assertion that the tennis shoe recovered was a small size woman's shoe is a figment of Mr. McDonald's imagination, unless he considers a size 10 shoe to be "small size woman's shoe." A size 10 shoe would be a very large size for a woman. This sub-issue deserves no further response except the detailed response provided by the State.
>
> The third sub-issue is that McDonald's attorney should have moved the court for a Frye hearing regarding the shoe comparison evidence. As this court stated at the Huff hearing, a Frye hearing is not necessary, nor would it be granted on sheer opinion testimony, which is what Agent Bodziak's testimony was. He makes a visual comparison, based on his education, training, and experience. There is no novel scientific principle involved. There was nothing Mr. Schwartzberg could have done to get a Frye hearing.
>
> Since all three sub-issues of Issue VIII have been explained as refuted conclusively by the record, Issue VIII is denied.
>
> (PCR V13/2324-2325)

Inasmuch as the record conclusively demonstrated that McDonald was not entitled to any relief, this claim was properly denied without an evidentiary hearing. At trial, St. Petersburg Police Technician Kidd testified that he first covered the foyer with brown wrapping paper and instructed others not to step there. He photographed the visible shoe prints and took lifts on Jan. 25, 1994, of the shoe prints. (V23/T484-487, 491-493, 495) He identified State's trial exhibits 3 and 7 as the lifts and photographs he had taken. These exhibits were admitted into evidence without objection. (V23/T493-495)

Kriste Astbury testified that she found sneakers and the sweatshirt when she entered the second time to clean Room 121 on

Jan. 25, 1994. She identified State's trial exhibit 65 as the sweatshirt that she found. When she looked at the sneakers, State's trial exhibit 66, she said they had been white. The State established that the FBI processing had turned the white tennis shoes blue. She did not say that she had found only a small woman's shoe, rather than the size 10 men's tennis shoes, which were exhibit 66. (V28/T1128-1136, V33 T1846-1847)

Detective Anderson testified that he hand carried the sweatshirt and tennis shoes, trial exhibits 63 and 66, in their sealed package, to the FBI on Feb. 26, 1994, among the twenty-five items he took that date. He identified State's trial exhibit 66 as the tennis shoes he had observed through their plastic bag packaging. (V28 T1161-1165)

FBI Agent Bodziak testified that he received the five footwear impression lifts, a piece of paper with a potential footwear impression, and the pair of size 10 Voit athletic shoes. Agent Bodziak identified State's trial exhibit 66 as the shoes he'd received for tread-print comparison. They were light blue when he received them because they had been chemically tested for blood with a protein stain. (V28/T1174, 1177, 1202) He described the condition of the shoes after other testing in the lab, the processes he did, his visual observations, and conclusions of similarity of one lift as consistent with the

design, lack of wear pattern, and size of the shoes, including appearance of the VOIT brand name and words “oil resistant.” (V28/T1174, 1177-1202)

In short, McDonald failed to establish any deficiency of counsel and resulting prejudice under Strickland. Inasmuch as the defendant’s post-conviction IAC claim was conclusively refuted by the record below, the Circuit Court’s summary denial of post-conviction relief should be affirmed.

ISSUE X

THE CIRCUIT COURT PROPERLY SUMMARILY DENIED THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE TESTIMONY OF SUSAN SHORE. (As restated by Appellee, State)

McDonald's *pro se* motion for post-conviction relief alleged that trial counsel was ineffective in failing to preclude Susan Shore from testifying at trial based on alleged inducements from the State. Now, CCRC again summarily asserts only a single-page argument, seeking remand for an evidentiary hearing. (Amended Initial Brief at 65). CCRC's "due-to-the-position-that-Mr. McDonald-was-put-in-at-the-evidentiary-hearing" Faretta claim is procedurally barred. See, Issue I.

Furthermore, CCRC's conclusory complaint is insufficient to fairly present McDonald's IAC/Susan Shore claim on appeal. Cooper v. State, 856 So. 2d 969, 977, n.7 (Fla. 2003) (noting that "Cooper has chosen to contest the trial court's summary denial of various claims, by contending, without specific reference or supportive argument, that the "lower court erred in its summary denial of these claims. We find speculative, unsupported argument of this type to be improper, and deny relief based thereon."), citing Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); See also, Floyd v. State, 2005 Fla. LEXIS 2042 (Fla. 2005).

Assuming, *arguendo*, that this issue is fairly presented on appeal, which the State specifically disputes, the Circuit Court properly denied post-conviction relief on this IAC claim as follows:

> ISSUE IX
> SUSAN SHORE
>
> Mr. McDonald, as did Mr. Gordon in his 3.850 Motion, argues ineffectiveness of counsel for Schwartzberg's failing to keep Ms. Shore from testifying based on inducements from the state for her testimony. This court has already addressed this identical issue in her order of April 20, 2002, and that portion of the Gordon order will be repeated here.
>
> "In his Motion, 6-8, the defendant suggests that trial counsel was ineffective for his failure to file and argue a Motion to Exclude and/or Suppress the testimony of state's witness, and indicted co-defendant, Susan Shore. Collateral counsel suggests that the prosecutor violated Federal bribery laws and Rule 4-3.4 of the Rules Regulating the Florida Bar by making an agreement with witness Susan Shore to reduce her charges in exchange for her truthful testimony. For his proposition, he cited in the defendant's motion two Federal cases that were not in existence at the time of the defendant's trial. U.S. v. Singleton, 144 F. 3d 1343 (10th Cir. 1998), and U.S. v. Lowery, Case No. 97-368-CR-ZLOCH (USDC So. D. Fla. August, 1998). Both of these cases had been reversed by the time of the Huff hearing. U. S. v. Singleton, 165 F. 3d 1297 (10th Cir. 1999); U. S. v. Lowery 166 F. 3d 1119 (11th Cir. 1999). Even if these cases had not been reversed, they were certainly not the law at the time of the defendant's trial, and trial counsel cannot be found ineffective for failure to anticipate an appellate decision not in existence. Bottoson v. Singletary, 685 So. 2d 1302, 1304 (Fla. 1997).
>
> This court rejects any suggestion that Mr. Fred Schaub, or Rebecca Graham, Assistant State Attorneys, and the prosecutors in Gordon's case, violated any state or federal law, or any provision of the Rules Regulating the Florida Bar. The state simply chose the least culpable defendant and entered into a plea bargain with her in exchange for her cooperation by testifying truthfully

against other co-defendants. The Florida Supreme Court recognizes both the right and necessity of this common practice. Hunt v. State, 613 So.2d 893 (Fla. 1992); State v. Benitez, 395 So.2d 514 (Fla. 1981).

As this court said at the Huff hearing, it is doubtful the state could have prosecuted Ms. Shore for the crime of murder in the first degree. HH. 25-26. Frankly, I think they were fortunate to get her to agree to plead to any criminal charge arising out of her involvement in this case. However, that is not at issue here. Simply put, the state needed Ms. Shore's testimony to assist them in successfully prosecuting the other co-defendants. There is no prohibition to the state's doing exactly what they did in this case to assure her testimony. There was no basis at the time of the trial, and there is none now, that would have sustained trial counsel's motion to suppress/exclude Susan Shore's testimony in Mr. Gordon's trial. Trial counsel is not required to file futile motions. This issue is summarily denied."

This previous discussion in Mr. Gordon's order is the same as I would recite here. There is no reason to duplicate it, except to say that Mr. Schwartzberg was not required to file a futile motion to exclude testimony he could not have legally excluded. Issue IX is denied.

(PCR V13/2326-2327)

McDonald presented nothing to show that trial counsel could have excluded or suppressed the testimony of Susan Shore, and trial counsel was not ineffective for failure to raise a futile objection. See, Gordon II, *supra*. The fact that prosecutors may plea bargain with criminals to obtain their cooperation in testifying against co-perpetrators is certainly a necessary and permitted practice. See, Hunt v. State, 613 So. 2d 893 (Fla. 1992). A co-defendant's decision to enter a plea agreement does not support any claim of ineffective assistance of counsel.

On direct examination at trial, Susan Shore revealed she had also been charged with first degree murder along with the other co-defendants. (V31/T1617-1618). At the time of her trial testimony, the State had offered to allow Shore to plea to the lesser included offense of accessory to murder, but she had not decided whether to accept the plea because she continued to maintain her innocence. (V31/T1618). She had been incarcerated for ten months and was on house arrest at the time of Gordon's trial. (V31/T1616-1617). She also explained that she understood that a conviction would lead to her deportation from the United States. (V31/T1619).

On cross-examination, Shore admitted that she knew she had been charged with first degree murder prior to fleeing to Jamaica. (V31/T1623). She also understood the penalty for first degree murder in Florida would be either 25 years in prison or the electric chair. (V31/T1623-1624). Shore further testified that she was offered a plea deal to the lesser of accessory and was released from prison to house arrest. However, she claimed not to know whether her cooperation with authorities led to her release, but she admitted to cooperating and agreeing to testify in court. (V31/T1626-1627). Shore's relationship with the State was fully explored during her testimony. Counsel cannot be deemed ineffective for not

adequately impeaching Shore where the jury was properly informed on the topic. Moreover, in affirming the denial of post-conviction relief in co-defendant Gordon's appeal, this Court addressed and rejected this claim:

> TESTIMONY OF SUSAN SHORE
>
> Next, Gordon argues that the trial court erred in summarily denying his claim that trial counsel was ineffective for failing to move to exclude the testimony of an alleged accomplice, Susan Shore. However, as noted by the trial court, there would not have been a valid basis on which to exclude Shore's testimony, as the State has the right to call witnesses, in particular an accomplice, to testify against a defendant. See Hunt v. State, 613 So. 2d 893 (Fla. 1992). Further, the record reflects that Shore was cross-examined regarding the circumstances of her plea agreement, and trial counsel emphasized her obvious self-interest in avoiding more serious punishment. We find no error in the summary denial of this claim.
>
> We also find Gordon's argument on appeal that the State engaged in continued and "malicious prosecution" of Susan Shore as procedurally barred. "Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). As noted by the State, this claim was not raised in Gordon's motion for postconviction relief.

Gordon II, 863 So. 2d at 1219

In this case, as in Gordon II, the Circuit Court's order denying post-conviction relief on McDonald's claim of ineffective assistance of counsel for failing to exclude the testimony of Susan Shore should be affirmed.

ISSUE XI

THE CIRCUIT COURT PROPERLY RULED THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FILE A MOTION TO SEVER. (As restated by Appellee, State)

The Circuit Court's preliminary order granted an evidentiary hearing on McDonald's *pro se* Issue XI concerning severance and joint trial. Once again, CCRC summarily asserts only a one-page conclusory argument on this claim, seeking remand for an evidentiary hearing. (Amended Initial Brief at 66). CCRC's allegedly inadequate Faretta hearing and due-to-the-position-that-McDonald-was-put-in-at-the-evidentiary-hearing claims are procedurally barred. See, Issue I.

Furthermore, CCRC's one-page, conclusory complaints are insufficient to fairly preserve this issue for appeal. Duest, Cooper. Assuming, *arguendo*, that CCRC's one-page argument is sufficient to fairly preserve and present this claim on appeal, which the State specifically denies and strongly disputes, appellant's claim still must fail.

In denying post-conviction relief on McDonald's IAC/severance claim, the Circuit Court stated:

> ISSUE XI
> JOINT TRIAL/SEVERANCE
>
> At the Huff hearing, this court granted an evidentiary hearing on this issue as to the guilt phase only. HH, 72-73. My order of August 9, 2001 says as to the "penalty phase only", but that is clearly erroneous, and both the defendant and state realized it, as the state filed a Motion to Correct Scrivener's Error and the

defendant at the evidentiary hearing elicited testimony and testified himself as to this issue only as it related to the guilt phase of his trial.

As to the penalty phase, both McDonald and Gordon raised the issue of no separate penalty phase on direct appeal. In both opinions, the Court rejected the issue as without merit and as procedurally barred. Since the issue was found not to have merit, I will not address it again in this order. Gordon v. State, 704 So. 2d 107, 113-114 (Fla. 1998); McDonald v. State, 743 So. 2d 501, n.8 (Fla. 1999).

The severance of the guilt phase of the trial was addressed at the evidentiary hearing. Mr. Schwartzberg indicated that although McDonald and Gordon had wished to be tried together, he had to file a Motion to Sever very close to the trial date when it appeared that Mr. Gordon was going to pursue an alibi defense, which was so contrary to Mr. McDonald's defense that he and Mr. McDonald felt that Mr. McDonald would be unable to get a fair trial if Gordon had pursued an alibi defense. EH, 158-159, 164-165. This is consistent with a transcript of the Motion to Sever hearing that was held on the morning of trial, right before the trial began, where Mr. Gordon withdrew his alibi defense and Mr. McDonald, through his attorney, Mr. Schwartzberg, withdrew McDonald's Motion to Sever. Both defendants were present for this hearing on McDonald's Motion to Sever.

Mr. McDonald suggests in his Supplemental Motion and at the evidentiary hearing that he didn't know anything about this. He even suggested to this court at the hearing that he was not present at the hearing on the Motion to Sever. EH, 57, 178-182. However, the record suggests he was indeed there for this hearing. In fact, while the defendants might not have been there for the very beginning of the motion, when Mr. Love, counsel for Gordon said, "Judge, before you hear the motion, it may in the vein, the motion itself may become moot." V 21, T p. 3, 1 said, "Let's bring the defendants in and we will hear what's going on." Id. p. 4. After the defendants were brought into court, I said, "It's been noted that you have a motion to sever. It was filed on behalf of Mr. Meryl McDonald and decided we should have the defendant here before we heard it. The defendants are present and I am ready to hear from you, Mr. Schwartzberg." Id. p. 4. Then Mr. Schwartzberg began to say why McDonald couldn't go to trial with Mr. Gordon if Gordon were going to pursue

> an alibi defense, and that if Gordon withdrew the alibi, he would withdraw McDonald's Motion to Sever. That is exactly what happened. I never spoke directly to Mr. McDonald, but did to Mr. Gordon. However, not only does the transcript say I waited until both defendants were there, but that is what I would have required, since I would not have wanted the alibi or the severance withdrawn without the defendants hearing this. V 21, T 4-6.
>
> In light of the record and Mr. Schwartzberg's testimony at the evidentiary hearing, as well as the hearing on the Motion to Sever, I find that the defendant cannot now complain of not having a severed trial, since the motion his lawyer filed on his behalf was withdrawn, and the defendant concurred in this. This issue was waived by the defendant and his counsel. Additionally, there is no ineffectiveness of counsel here, since both defendants were now pursuing the same defense that Mr. McDonald and his lawyers agreed to present, which, as I have discussed previously, was the only defense that fit the testimony and evidence. In fact, since a joint defense was being pursued, I would have denied McDonald's motion to sever if McDonald had insisted that it be heard. Thus, there is no prejudice either. Issue XI is denied.

(PCR V13/2328-2330)

Attorney Schwartzberg explained that severance was not needed after co-defendant Gordon withdrew his notice of alibi (PCR V21/3376), and that McDonald agreed to withdrawing the motion to sever. (PCR V21/3381) McDonald and co-defendant Gordon wanted to be tried together. (PCR V21/3382)

In affirming the denial of post-conviction relief in co-defendant Gordon's appeal, this Court concluded, *inter alia*, that (1) counsel's decision not to move to sever was the result of a strategic decision, (2) severance would not have been proper, (3) no prejudice was demonstrated inasmuch as the co-

defendant failed to demonstrate that the same evidence presented at the joint trial would not have also been presented in a severed trial, and (4) the allegation that other defense strategies might have been employed if separate trials had occurred was entirely speculative. Gordon II, 863 So. 2d at 1220. Here, as in Gordon II, the Circuit Court correctly denied the post-conviction severance claim.

With respect to McDonald's subsidiary speedy trial complaint, trial co-counsel moved for a continuance on May 1, 1995. Defense counsel acknowledged that trial commenced after the 175th day, and that speedy trial had not been waived prior to the defense moving for continuance on April 28, 1995, a date after the 175 days had already run. (PCR V21/3435-3437) Defense counsel moved to continue because they were not ready for trial. (PCR V21/V3438) Counsel testified that it was his belief that it would not have been in his client's best interest to have demanded a speedy trial because the defense would not have been ready for trial. (PCR V21/3440-3441)

The motion for continuance, held on May 5, 1995, reflects argument by Schwartzberg's co-counsel, Richard Watts. Watts represented to the trial court that they were not ready for trial. Mr. Schwartzberg testified at the evidentiary hearing that he was prepared for trial on June 6, 1995, and had

discussed with McDonald both asking for a continuance and going to trial. (PCR V21/3377) McDonald admitted that counsel had told him "sometime in April" that he was going to try to get a continuance and that he would depose Shore on May 19th. (PCR V21/3394)

McDonald was aware of trial counsel's request for a continuance and trial counsel's tactical decision was not among the four categories which necessarily required the defendant's consent. See, Florida v. Nixon, 543 U.S. 175 (2004)[11] As with every other claim asserted below, the Circuit Court set forth a detailed analysis addressing McDonald's speedy trial claim. (See, Order denying post-conviction issue XIV, at PCR V13/2335-2339). McDonald did not establish any deficiency of counsel and resulting prejudice under Strickland arising from trial counsel's failure to assert an irresponsible and unethical demand for speedy trial.

[11] In Nixon, the U. S. Supreme Court noted that a defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Id., citing Jones v. Barnes, 463 U.S. 745, 751 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). In those four categories, "an attorney must both consult with the defendant and obtain consent to the recommended course of action." Id.

ISSUE XII

THE CIRCUIT COURT PROPERLY RULED THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT AN ALIBI DEFENSE. (As restated by Appellee, State)

In his *pro se* motion, McDonald alleged that trial counsel was ineffective for failing to investigate and present an alibi defense.[12] McDonald alleged that he gave trial counsel the names of three people who could help establish an alibi: "Tina" (an exotic dancer, last name unknown) and Everton Miller and Ely Ellison, friends from Miami who saw him about 8:30-9:00 on Monday evening, which McDonald claimed was January 25th.

CCRC now reasserts the names of these three "alibi" witnesses and also alleges that the Faretta inquiry was purportedly inadequate and urges this Court to "remand this case back to the trial court so it may conduct a *proper* evidentiary hearing with CCRC-M as counsel." (Amended Initial Brief at 69) Once again, CCRC's claim that the trial court's Faretta inquiry was inadequate is procedurally barred. See, Issue I.

McDonald's IAC/alibi claim was denied after an evidentiary hearing, and the Circuit Court ruled, in pertinent part:

> ISSUE XII
> ALIBI
> An evidentiary hearing was granted on this issue, although it probably could have been refuted on the basis

[12] In Gordon II, this Court noted that co-defendant Gordon's counsel made a strategic decision not to present an alibi defense. Gordon II, 863 So. 2d at 1222.

of the record, due to the defendant's Motion to Sever that was filed by his counsel. See ISSUE XI above. At the hearing on the Motion to Sever, which McDonald said would be required if Gordon pursued an alibi defense in a joint trial, the defendant's counsel said, in the presence of the defendant, "[I]n light of obvious review of all of the evidence and length of work that has been placed into this case by McDonald's attorneys and in fact conversation with Mr. McDonald, it has become apparent to us that such an alibi might in fact subject Mr. McDonald to an improper determination by a jury of the guilt or innocence of Mr. McDonald in such that the alibi defense may be so conflicting with the evidence and testimony that the state is going to put forward here that it may cause some confusion in the minds of the jury." V 21, T 4, emphasis mine. The state, in its Response, also showed how the record refuted that the defendant could have had an alibi defense. State's Response, 59-63. Nonetheless, in an abundance of caution, I granted an evidentiary hearing to further hear about the defendant's alibi defense.

The defendant alleges ineffective assistance of counsel for failing to investigate and to present for the jury's consideration an alibi defense. The defendant states that he gave his counsel three names who could help establish an alibi for him, one whose name he remembers only as "Tina" who was an exotic dancer, and Everton Miller and Ely Ellison, friends of his from Miami who saw him about 8:30-9:00 that Monday evening which he says was January 25. The state, in its response says Monday evening was January 24. The murder occurred on the 25th. The defendant was back in Miami the night of the 25th, so an "alibi" for the night of January 25th is no alibi at all.

The defendant says he told Mr. Schwartzberg the first time he saw him about his alibi. He also says he talked to Mr. Schwartzberg's investigator, Mr. Troy Hitchcox, in December, and told him the same thing. Finally, he says he told the same thing to co-counsel, Richard Watts. He says all of three of these people assured him that the investigator would go to Miami and check this out and find these people. Mr. McDonald says that defense counsel told him months later that Mr. Hitchcox had gone to Miami, but he was unable to locate these people. EH, 175-177, 186, 198. McDonald admits that neither he nor CCRC-M, acting as stand-by counsel and trying to help McDonald locate these witnesses, has been able to locate these people as

of the date of the evidentiary hearing. Therefore, no alibi witnesses, except for the defendant, testified at the evidentiary hearing. EH, 189-191. Without any witnesses, there was no possibility for this court to analyze any prejudice to the defendant for not having these alibi witnesses available for his defense. Even the defendant never told us at the evidentiary [hearing] exactly what his alibi was. Since the defendant cannot show prejudice, he cannot prevail on this claim.

Mr. Schwartzberg said at the evidentiary hearing that McDonald never told him about any alibi witnesses, and that he had not heard about them until the day of the evidentiary hearing when Mr. McDonald, acting as his own counsel, asked him about this alibi defense. Mr. Schwartzberg says he met with the defendant 12 times, and that if the defendant had told him he was in Miami when this crime was committed, he would have attempted to talk to any persons whose names McDonald had provided to determine if an alibi defense would be possible. EH, 67-69, 71-73, 80, 82-85, 163. Mr. Schwartzberg says Mr. Gordon's alibi defense was discussed at a meeting in the jail attended by Gordon, Rob Love, Gordon's counsel, Watts and Schwartzberg, McDonald's co-counsel, and McDonald. It was after Mr. McDonald talked to Mr. Gordon that Gordon decided not to attempt to pursue his alibi defense, and it was then agreed by all that the motion to sever would be withdrawn, which it was. EH, 158-159. While Mr. McDonald denies this meeting ever occurred, he declined to call Mr. Watts who was available to testify and either corroborate McDonald's version or Schwartzberg's. EH, 232-233.

Mr. Schwartzberg stated at the evidentiary hearing that his strategy was based, to some extent, on his conversations with McDonald, who indicated he was present in Tampa, and at the victim's apartment, but that he had only taken a piece of paper, and had not killed Dr. Davidson. EH, 116- 117, 163. In light of the evidence, including that the defendant was in fact present in the area, and at the victim's apartment, and the sweatshirt with only a small amount of blood of the victim's, plus a stain that could not be linked to the defendant and the victim, but only to the victim and an unidentified person, he believed this to be a reasonable defense. He says the defendant agreed with this defense. EH, 105-106, 116-117, 122, I57-158, 161, 163-164. While the defendant denies that he told his lawyer he was in Tampa, or at the victim's parking lot or apartment, or at the Days Inn

> motel, and says all of the witnesses who placed him in Tampa at any time are lying, this court resolves the conflicts in the testimony against the defendant.
>
> As this court has said before in this order, a defense lawyer has to play the hand he or she is dealt. Mr. Schwartzberg and Mr. Watts played the hand the defendant and the state dealt them, and played it about as well as could have been expected with all of the evidence that tied Mr. McDonald to this homicide. A lawyer cannot put on a perjured defense without violating the Code of Professional Responsibility. An alibi defense was never an option once Mr. McDonald told Mr. Schwartzberg he was in Tampa and St. Petersburg the day before and the day of the homicide. See DeHaven v. State, 618 So. 2d 337 (Fla. 2d DCA 1993) which says at 339, "[A] defendant's constitutional right to the effective assistance of counsel does not include the right to require his lawyer to perpetrate a fraud on the court." Issue XII is denied.

(PCR V13/2330-2333)

Trial counsel's theory of the case, which he had discussed with McDonald, was that the defendant had been at the victim's apartment only to retrieve a document, and the small blood stain on the sweatshirt, identified as consistent with the victim's blood, was an insufficient amount to show that the sweatshirt was present when the victim was killed, and that someone else killed the victim. (PCR V20/3322-3323, 3333-3334, 3339; V22/3374-3375; 3378) Trial counsel considered this a reasonable defense based on what Defendant told him and the evidence which the State had against Defendant, and that the physical evidence was not inconsistent with that defense. (PCR V20/3334; 3380) McDonald agreed it was a reasonable theory of defense. (PCR V20/3323) McDonald never told Schwartzberg that was somewhere

else, and Defendant's statements to him were consistent with the defense. (PCR V21/3380)

Mr. Schwartzberg denied that McDonald had given him any names for alibi witnesses and testified that if he had, he would have talked to the persons provided and pursued any alibi defense supported by them. (PCR V20/3284, 3286, 3288, 3380) After reviewing his affidavit in support of attorney fees, Schwartzberg stated that he met with or had telephone conversations with McDonald 12 times before trial, but post-conviction was the first time he had heard any alibi names. (PCR V20/3297, 3299-3302) Schwartzberg denied destroying any notes. (PCR V20/3290)

In post-conviction, McDonald did not provide any address, job occupation or phone number for his purported alibi witnesses. McDonald did not call Mr. Hitchcox or Mr. Watts as witnesses to support his alleged claim of having told them the names of alibi witnesses. McDonald admitted that CCRC was unable to locate an exotic dancer known as Tina, and he was still attempting to locate her himself. (PCR V21/3406-3408) Although McDonald claimed that a CCRC investigator had located the address of one of the witnesses, McDonald admitted that the witness was not present for the hearing. Id.

McDonald did not demonstrate any ineffective assistance of counsel in the investigation and presentation of an alibi because McDonald did not show that he had any legitimate alibi, nor that the alleged witnesses could be located, even if he had provided their names to counsel, which trial counsel denied. See also, Nix v. Whiteside, 475 U.S. 157 (1986) (Sixth Amendment right to effective assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial.)

ISSUE XIII

THE CIRCUIT COURT CONDUCTED A PROPER FARETTA INQUIRY BEFORE ALLOWING DEFENDANT MCDONALD TO PROCEED *PRO SE*.
(As restated by Appellee, State)

In this final claim, CCRC asserts that the Circuit Court's Faretta inquiry allegedly was inadequate and, therefore, according to CCRC, McDonald "did not make a knowing waiver" of his penalty phase claims. (Amended Initial Brief of Appellant at 69-70). Again, the Circuit Court specifically requested any input and objections from CCRC and no challenge to the adequacy of the trial court's Faretta inquiry was ever raised below. Accordingly, this complaint is procedurally barred. Moreover, the Circuit Court painstakingly conducted a meticulous Faretta inquiry. See Issue I, *supra*. The fact that CCRC vigorously disagrees with McDonald's decision to waive CCRC's representation does not credibly form any basis for relief. See, Sanchez-Velasco v. Sec'y of the Dep't of Corr., 287 F.3d 1015, 1027 (11th Cir. 2002).

CONCLUSION

Based on the foregoing arguments and authorities, the Circuit Court's well-reasoned order denying post-conviction relief should be affirmed.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Honorable Susan F. Schaeffer, c/o Pinellas County Circuit Court, Judicial Building, 545 First Avenue North, Room 417, St. Petersburg, Florida 33701; to Peter J. Cannon, Assistant CCRC-Middle Region, 3801 Corporex Park Drive, Suite 200, Tampa, Florida 33619-1136; and to C. Marie King, Assistant State Attorney, P.O. Box 5028, Clearwater, Florida 33758-5028, this 24th day of October, 2005.

_____

COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE