

IN THE SUPREME COURT OF FLORIDA

MERYL MCDONALD,

Petitioner,

v.

CASE NO. SC04-708

Lower Tribunal No. CRC94-2958 CFANO-

B

JAMES V. CROSBY, JR.,
Secretary,
Department of Corrections,
State of Florida

Respondent.

_____/

REPLY TO CCRC'S RESPONSE TO PETITIONER'S PRO SE MOTION TO
STRIKE CCRC'S PETITION FOR WRIT OF HABEAS CORPUS/DISCHARGE
COUNSEL

COMES NOW the Respondent, James V. Crosby, Jr., Secretary, Department of Corrections, State of Florida, by and through the undersigned counsel, and submits the following Reply to CCRC's Response to Petitioner's *Pro Se* Motion to Strike CCRC's Petition for Writ of Habeas Corpus/Discharge Counsel, and states:

1. Construing the Petitioner's *pro se* motion to strike CCRC's habeas corpus petition as a motion to discharge appointed counsel, CCRC filed a response with this Court on August 6, 2004,¹ urging this Court to strike the Petitioner's *pro se* motion

¹CCRC's response was submitted pursuant to this Court's order of June 21, 2004, which requested CCRC's response on or before July 6, 2004, and also allowed the Respondent to submit any reply on or before July 16, 2004. However, CCRC's response was not filed until August 6, 2004, and the instant reply has been submitted within ten days of CCRC's response.

to discharge counsel. (CCRC Response at page 3, paragraph #9). In addition, CCRC asks this Court to reverse the trial court's order dismissing Petitioner's motion to vacate and allow CCRC "to proceed on the original motion to vacate prepared by prior counsel." (CCRC Response at page 3, paragraph #9).

2. In his *pro se* motion to strike CCRC's habeas petition, Petitioner admitted that he had not seen the petition for writ of habeas corpus submitted by CCRC Attorney Peter Cannon. (See, *pro se* Motion to Strike CCRC's petition at page 10, paragraph #15). Nevertheless, Petitioner asserts that CCRC's habeas petition "is not in his best interest because it cannot raise the claims that were raised in his motion for postconviction relief." (See, *pro se* motion to strike at page 11, paragraph 15). Petitioner, *pro se*, "does not want the State to respond to CCRC's habeas petition." Instead, Petitioner seeks to limit any response to only his *pro se* initial brief in the post-conviction appeal (SC03-648). Id.

3. The State submits that Petitioner is not permitted to represent himself *pro se* in the appellate proceedings before this Court. In fact, on May 21, 2003, this Court issued an Order in the Petitioner's related post-conviction appeal (SC03-648), ruling that Petitioner/Appellant could not proceed without counsel in this proceeding before this Court. Moreover,

Petitioner's *pro se* Motion for Rehearing on the same issue was stricken by this Court on August 26, 2003. As such, the State agrees that the Petitioner's Motion to Strike/Motion to Discharge Counsel in the instant habeas corpus proceeding should be stricken.

4. Alternatively, Petitioner's *pro se* Motion to Strike/Motion to Discharge Counsel should be denied on the merits. Petitioner has failed to allege a sufficient basis to justify discharge of appointed counsel.

ARGUMENT

Reply to CCRC's Response to Pro Se Motion to Strike CCRC's Habeas Petition/Discharge Counsel

Alleging that the unseen habeas corpus petition filed by CCRC could not be in his best interest because it cannot raise any claims previously raised in his motion for post-conviction relief, Petitioner accuses CCRC/Attorney Cannon with "conspiring" to "sabotage his postconviction appeal issues." (Petitioner's *pro se* Motion to Strike at page 11, paragraph 16).

It appears that the Petitioner is under the erroneous impression that any habeas corpus petition filed on his behalf would be considered only in lieu of his post-conviction appeal, rather than in addition to his contemporaneous post-conviction

appeal.² However, a habeas corpus proceeding is not a substitute for a simultaneous post-conviction appeal. Rather, this Court has jurisdiction to review both post-conviction orders denying relief under Florida Rule of Criminal Procedure 3.850 and original petitions for writ of habeas corpus filed simultaneously with the initial post-conviction brief. See, art. V, § 3(b)(1), (9), Fla. Const.; Mann v. Moore, 794 So. 2d 595 (Fla. 2001) (holding that effective January 1, 2002, all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion.) Id., at 598, citing Fla. R. App. P. 9140(b)(6)(E).

Petitioner, *pro se*, recognizes that claims of ineffective assistance of appellate counsel are reviewable in a habeas corpus petition. See, Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). In this case, CCRC's habeas petition does not allege an independent claim of ineffective assistance of appellate counsel. Rather, CCRC's habeas petition asserts a constitutional challenge to Florida's death penalty statute under Ring v. Arizona, 536 U.S. 584 (2002) and also alleges a

²This erroneous impression is further buttressed by the fact that the Petitioner submitted his *pro se* motion to strike CCRC's petition under the post-conviction appeal number (SC03-648), rather than the instant habeas case number (SC04-708).

purportedly "inadequate" inquiry under Faretta v. California, 422 U.S. 806 (1975) during Petitioner's post-conviction proceedings.

The exercise of habeas jurisdiction is very limited³ and habeas corpus proceedings cannot be used as either a second or substitute appeal or to litigate issues that could have been or were raised in a motion for post-conviction relief. See, Baker v. State, 29 Fla. L. Weekly S 105 (Fla. Mar. 11, 2004); Swafford v. State, 828 So. 2d 966 (Fla. 2002); Brooks v. McGlothlin, 819 So. 2d 133 (Fla. 2002) (ruling, in dismissing the petition, that a petition for writ of habeas corpus cannot be used as a second or substitute appeal). The remedy of habeas corpus relief is available only in those limited circumstances where the

³Because the exercise of habeas jurisdiction is very limited, the State submits that it does not encompass CCRC's request for habeas review of his Ring claim or his post-conviction Faretta claim. See, Trepal v. State, 754 So. 2d 702 (Fla. 2000) (recognizing that habeas review is appropriate to review non-final orders regarding discovery issues in postconviction proceedings); See also, Hall v. State, 541 So. 2d 1125 (Fla. 1989) (directing that, in the future, claims under the then recently decided case of Hitchcock v. Dugger, 481 U.S. 393 (1987), would not be cognizable in habeas proceedings, and should be presented in a Rule 3.850 motion); See also, Harvard v. Singletary, 733 So. 2d 1020 (Fla. 1999) (recognizing that expansion of original jurisdiction to alleviate burden on trial courts has been "neither time-saving or efficient."). The right to habeas relief, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." Haag v. State, 591 So. 2d 614, 616 (Fla. 1992).

petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence, or where the original sentencing court would not have jurisdiction to grant the collateral relief requested.

Although the State does not waive any procedural or substantive objections, the State also recognizes that this Court previously has rejected challenges to Florida's death penalty statute under Ring v. Arizona, 536 U.S. 584 (2002) in habeas corpus proceedings. See, Sochor v. State, 2004 Fla. LEXIS 985 (Fla. 2004) (habeas proceeding noting that "Sochor argues that Florida's capital sentencing statute is unconstitutional under Ring . . . We previously have addressed this claim and denied relief.") Id., citing, Jones v. State, 845 So. 2d 55, 74 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002). Additionally, the State recognizes that in Gamble v. State, 2004 Fla. LEXIS 660, 5-6 (Fla. 2004) this Court addressed a hybrid, trial-based Faretta claim asserted in a habeas petition filed in a capital case. In Gamble, the petitioner's four habeas claims included whether the trial court conducted a proper hearing pursuant to Faretta v. California, 422 U.S. 806 (1975) and whether appellate counsel was ineffective for failing to raise

this claim on direct appeal. Although the State does not waive any procedural or substantive objections, it is not surprising that CCRC's habeas petition would assert both a Ring claim and a derivative Faretta-based claim in light of Sochor, Bottoson, and Gamble. If the Petitioner intends to waive CCRC's habeas claims, then his current motion, which was submitted without seeing the petition, is premature.

Petitioner's *pro se* claim does not provide the support necessary to justify striking the habeas petition/discharging CCRC Attorney Cannon. See e.g., Cummings-El v. State, 863 So. 2d 246, 254 (Fla. 2003) (a trial court does not err in failing to conduct a Nelson inquiry where the defendant merely expresses dissatisfaction with his attorney). Moreover, Petitioner has neither the right to select a specific attorney nor the right to discharge competent and conscientious counsel. See, Wilder v. State, 156 So. 2d 395 (Fla. 1st DCA 1963). Neither is Petitioner permitted to represent himself in the current appellate proceedings. The constitutional right to self-representation recognized in Faretta v. California, 422 U.S. 806 (1975), is limited to trial proceedings only. See, Martinez v. Court of Appeal of California, 528 U.S. 152 (2000); Davis v. State, 789 So. 2d 978 (Fla. 2001). Martinez and Davis hold that, because Faretta is premised on the Sixth Amendment right

to counsel, and the federal constitutional right to counsel does not extend beyond the trial, Faretta does not apply to appellate proceedings. These cases also establish that the purported "right" which Petitioner seeks to exercise does not arise from the federal due process clause or the Florida Constitution.

In Davis, this Court acknowledged that the previous practice of permitting capital defendants to file *pro se* pleadings in their appeals resulted in increased filings which, as a matter of policy, needed to be curtailed. 789 So. 2d at 981; see also, Logan v. State, 846 So. 2d 472 (Fla. 2003) (striking *pro se* extraordinary writs filed by noncapital defendants represented by counsel). In fact, in Davis, at 979-980, this Court specifically stated that it would not accept *pro se* filings in capital cases requesting to dismiss appellate counsel. Thus, Petitioner's Motion to Strike Petition/Discharge Counsel should be denied and/or stricken.

Lastly, to the extent CCRC suggests that this case should simply be reversed now, without benefit of appellate briefing or presentation of arguments to the Court, the State strongly objects to CCRC's request and submits that CCRC has not established any credible basis for departing from the well-settled post-conviction and habeas procedures applied to every other death penalty case.

For all of the above-state reasons, the Petitioner's *pro se* motion to strike CCRC's habeas petition should be denied, or stricken.

CONCLUSION

WHEREFORE, Respondent, State of Florida, respectfully requests that this Honorable Court DENY the Petitioner's *pro se* motion to discharge counsel/motion to strike CCRC's habeas petition.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Regular Mail to: Peter J. Cannon, Office of the Capital Collateral Regional Counsel -

Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; and Meryl McDonald, DOC# 180399, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026-4000, this 12th day of August, 2004.

CERTIFICATE OF FONT COMPLIANCE

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

COUNSEL FOR RESPONDENT