IN THE SUPREME COURT OF FLORIDA

MERYL S. MCDONALD,

Petitioner,

v. **CASE NO. SC04-708**
L. T. No. CRC94-2958 CFANO-B

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

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, James V. Crosby, Jr., Secretary, Department of Corrections, State of Florida, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case, and states:

STATEMENT OF THE CASE AND FACTS

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 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) codefendant Denise Davidson's receipt of a life sentence. McDonald v. State, 743 So. 2d 501, 502 (Fla. 1999).

Direct Appeal

On direct appeal, numerous briefs were filed on behalf of McDonald. Appellant's Initial Brief, filed November 21, 1996, by attorney Richard J. Sanders was later stricken by Order of this Court dated May 21, 1997. It raised the following issue:

> ISSUE: THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT A NEW SENTENCING HEARING. THE FACT THAT DENISE DAVIDSON HAD RECEIVED A LIFE SENTENCE WAS A MITIGATING CIRCUMSTANCE THAT DEFENDANT'S PENALTY PHASE JURY SHOULD HAVE HEARD.

Subsequently, an Initial Brief was filed April 13, 1998 by

attorney Richard N. Watts. Attorney Watts adopted the claims raised in codefendant Robert Gordon's direct appeal as follows:

> STATEMENT OF ADOPTION:
>
> This appeal and the various issues raised by the Appellant McDonald and Co-Appellant Robert Gordon (Appeal Case No. 87,059) arise from one prosecution, one indictment and one jury trial.
>
> In the interest of brevity and judicial economy, Appellant McDonald hereby adopts by reference, as though set forth in their entirety herein, all portions of the briefs of Co-defendant Robert Gordon which are applicable to Appellant McDonald and are not adverse to his position on appeal.

McDonald's Initial Brief also argued the following claims:

> ISSUE I: JURY COMPOSITION.
>
> ISSUE II: THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL.
>
> ISSUE III: THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A SEPARATE PENALTY PHASE JURY.
>
> ISSUE IV: THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH AND NOT FOLLOWING THE DOCTRINE OF PROPORTIONALITY.
>
> ISSUE V: THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.
>
> ISSUE VI: THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANT ACTED IN A MANNER THAT WAS HEINOUS, ATROCIOUS AND CRUEL.
>
> ISSUE VII: THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION FOR A NEW PENALTY PHASE BASED ON CERTAIN INAPPROPRIATE STATEMENTS MADE BY THE PROSECUTION DURING THE CLOSING.
>
> ISSUE VIII: THE TRIAL COURT'S FAILURE TO CONDUCT THE

REQUIRED STEP BY STEP INQUIRY TO DETERMINE WHETHER EXPERTS DNA TEST RESULTS AND BASIS OF STATISTICAL CONCLUSIONS COULD BE ADMITTED DOES NOT CONSTITUTE HARMLESS ERROR AND A NEW TRIAL IS REQUIRED.

Finally, a Supplemental Answer [sic] Brief of the Appellant was filed November 18, 1998, by Attorney Watts addressing the following issues:

ISSUE VI: THE TRIAL COURT ERRED IN FINDING THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR.

ISSUE VII: THE APPELLANT IS ENTITLED TO A NEW PENALTY PHASE DUE TO THE PROSECUTOR'S CLOSING ARGUMENT.

ISSUE VIII: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE ADMISSION OF DNA TEST RESULTS.

This Court affirmed McDonald's first-degree murder conviction and death sentence on July 1, 1999. McDonald v. State, 743 So. 2d 501 (Fla. 1999). McDonald did not file a petition for writ of certiorari to the United States Supreme Court.

Post-Conviction Proceedings

McDonald was originally represented by Capital Collateral Regional Counsel-Middle for postconviction purposes and CCRC-M prepared a 3.850 motion for McDonald. However, McDonald would not swear to this motion. On December 11, 2000, CCRC-M filed an unsworn motion, and McDonald filed his own motion on December 15, 2000. CCRC-M filed a Certification of Conflict and Motion to Withdraw and for Appointment of Conflict-Free Counsel because

McDonald would not verify their motion. At a hearing on January 30, 2001, the Circuit Court determined that there was no legal conflict. Both motions, the one filed by CCRC-M and the one filed by McDonald, were stricken.

On December 31, 2000, McDonald agreed to swear to the motion prepared by CCRC-M, which was amended and filed February 2, 2001, *nunc pro tunc* to December 11, 2000. The Circuit Court agreed to hear this motion. However, on March 2, 2001, McDonald filed "Defendant:s Motion to Remove Conflict Counsel, and to Strike Counsel 3.850 Motion, and Motion for Reconsideration, and for Self-Representation." At a hearing held on April 18, 2001, the Circuit Court concluded that there still was no conflict, and, thus, no reason for CCRC-M not to represent McDonald. McDonald insisted that he wanted to represent himself, rather than have CCRC-M represent him, and the Circuit Court conducted a Faretta inquiry. Faretta v. California, 422 U.S. 806 (1975). The Circuit Court determined that she had no legal alternative but to let McDonald represent himself. As the Circuit Court found, McDonald "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." (PCR V13/2296). The Circuit Court permitted McDonald to represent himself, relying on his own *pro se* motion. (PCR Supp. Vol., 3494-3547).

An order reflecting the court=s oral pronouncements was entered on May 16, 2001. CCRC-M was appointed as stand-by counsel, (PCR Supp. Vol., 3538) and appeared as stand-by counsel for Mr. McDonald throughout the remainder of the post-conviction proceedings below. The Circuit Court allowed McDonald to withdraw the motion filed by CCRC-M, and substitute his own post-conviction motion that had been filed December 15, 2000. (PCR Supp. Vol., 3541). McDonald's post-conviction motion requested the court to vacate his judgment, conviction and sentence, and order a new trial. (See, V13/2296).

On July 10, 2001, McDonald filed Defendant's Supplemental 3.850 Post-Conviction Relief Motion. This Supplemental Motion was identical to defendant's original 3.850 Motion for Post Conviction Relief, filed December 15, 2000, except that it included additional information regarding one issue, added at the first 16 pages of the defendant's Supplemental Motion.

On July 25, 2001, the Circuit Court held a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). Without objection from the State, the Circuit Court allowed McDonald to supplement his original motion and proceed on his *pro se* Supplemental 3.850 Post-Conviction Relief Motion. The Circuit Court's entered a preliminary order which granted some issues for evidentiary hearing and denied others as legal matters to be ruled on later

or as waived by McDonald during the Huff hearing on July 25, 2001. Specifically, the Circuit Court denied, for evidentiary hearing, Issues I on jury selection (PCR Supp. Vol., 3570-3578), III on hair samples (PCR Supp. Vol., 3580-3588), IV on carpet fibers (PCR Supp. Vol., 3588-3592), V on cashmere fibers (PCR Supp. Vol., 3588-3592), VII on chain of custody of the sweatshirt (PCR Supp. Vol., 3609-3612), VIII on shoe print and tennis shoes (PCR Supp. Vol., 3612-3618), IX on Susan Shore (PCR Supp. Vol., 3618), XIII on prosecutor comment (PCR Supp. Vol., 3621), XV on the autopsy (PCR Supp. Vol., 3622), and XVI on collective error (PCR Supp. Vol., 3622). The Circuit Court found Issue II, concerning Miranda, and Issue X, concerning witness identification being alleged lies, to have been waived. 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 was conducted on November 29 and 30, 2001. On February 10, 2003, the Circuit Court entered a comprehensive written order denying post-conviction relief. (PCR V13/2292-2341).

STATEMENT REGARDING PROCEDURAL BARS

This Court has consistently stated that a state habeas proceeding cannot be used as a second appeal. Issues that were or could have been raised on direct appeal or in prior collateral proceedings may not be litigated anew, even if couched in ineffective assistance of counsel language. See Teffeteller v. Dugger, 734 So. 2d 1009, 1025 (Fla. 1999) (holding that habeas claims were procedurally barred because the claims were raised on direct appeal and rejected by this Court or could have been raised on direct appeal). Habeas may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000); Thompson v. State, 759 So. 2d 650, 660 n.6 (Fla. 2000).

ARGUMENT IN OPPOSITION TO HABEAS CLAIMS

CLAIMS I – IV [Consolidated]

WHETHER FLORIDA'S CAPITAL SENTENCING SCHEME IS CONSTITUTIONAL IN LIGHT OF APPRENDI V. NEW JERSEY AND RING V. ARIZONA? (As restated by Respondent).

Petitioner's first four habeas claims present customary defense-based challenges predicated on Ring v. Arizona, 536 U.S. 584 (2002). Therefore, these frequent habeas claims are addressed in a single consolidated response.

Procedural Bars

McDonald's Ring claim is procedurally barred. This Court has already held that Ring is not retroactive to cases that were final when Ring was decided. McDonald's case became final several years before Ring was decided. Thus, Ring provides no basis for vacating the death sentence in this case. Parker v. State, 908 So. 2d 1058 (Fla. 2005) (Because the defendant's conviction was already final when Ring was rendered, Ring does not apply retroactively to him); Puiatti v. State, 906 So. 2d 1059 (Fla. 2005) (Ring is not retroactive to cases that were final when Ring was decided); See also, Schriro v. Summerlin, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) (holding that Ring announced a new "procedural rule" and is not retroactive to cases on collateral review); Turner v. Crosby, 339 F.3d 1247, 1283 (11th Cir. 2003) (holding that Ring is not retroactive to death sentences imposed before it was handed down).

This claim is also procedurally barred for failure to raise it at trial and on direct appeal. See, Finney v. State, 831 So. 2d 651, 657 (Fla. 2002) (ruling that because Finney could have raised a claim that Florida's capital sentencing statute was unconstitutional on direct appeal his claim was procedurally barred on post-conviction motion); Floyd v. State, 808 So. 2d 175 (Fla. 2002) (claim that Florida's death penalty statute is

unconstitutional is procedurally barred because it should have been raised on direct appeal); Arbelaez v. State, 775 So. 2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal).

Accordingly, as Ring is not retroactive and the claim was not properly presented to the trial court and this Court on direct appeal, McDonald is not entitled to any relief based on Ring.

Merits

This Court has repeatedly rejected petitioner's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator (HAC) case). In Zack v. State, 2005 Fla. LEXIS 1456, 22-23 (Fla. July 2, 2005), this Court again reiterated:

> Zack argues that Florida's capital sentencing statute and his death sentence violate his constitutional rights under Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002). In

> Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), this Court denied relief under Ring. Subsequently, this Court has rejected postconviction challenges to section 921.141 that rely on Ring. See, e.g., Gamble v. State, 877 So. 2d 706, 719 (Fla. 2004) (rejecting appellant's similar claim that Florida's death penalty scheme is unconstitutional under Ring); Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003); Wright v. State, 857 So. 2d 861, 877-78 (Fla. 2003); Jones v. State, 855 So. 2d 611, 619 (Fla. 2003); Chandler v. State, 848 So. 2d 1031, 1034 n.4 (Fla. 2003); Banks v. State, 842 So. 2d 788, 793 (Fla. 2003).
>
> This Court has also rejected claims that Ring requires aggravating circumstances be individually found by a unanimous jury verdict. See Hodges v. State, 885 So. 2d 338, 359 n.9 (Fla. 2004); Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003).
>
> Zack, 2005 Fla. LEXIS 1456

Although this Court in State v. Steele, 2005 Fla. LEXIS 2043 (October 12, 2005), recently noted that, "[s]ince Ring, this Court has not yet forged a majority view about whether Ring applies in Florida," the Steele Court also declined to approve "ad hoc innovations" to "a capital sentencing scheme that both the United States Supreme Court and this Court repeatedly have held constitutional." Accordingly, the petitioner's Ring claim can also be denied as meritless.

CLAIM V

INQUIRY UNDER FARETTA v. CALIFORNIA

(As restated by Respondent)

In this habeas claim, CCRC reasserts the first issue presented in McDonald's contemporaneous post-conviction appeal, again alleging that the Circuit Court purportedly conducted an inadequate Faretta inquiry and abused its discretion in granting McDonald's request for self-representation.

McDonald's renewed habeas claim is procedurally barred. As this Court emphasized in Baker v. State, 878 So. 2d 1236, 1241 (Fla. 2004), habeas corpus cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a post-conviction motion. Id., citing Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) ("Habeas corpus is not to be used 'for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have . . . or have been, raised in' prior postconviction filings.").

Assuming, *arguendo*, that CCRC's duplicate post-conviction Faretta claim is simultaneously cognizable in the instant habeas proceeding, which the State specifically denies and strenuously disputes, CCRC's Faretta claim is still without merit.

McDonald's path to self-representation at his postconviction

evidentiary hearing began with CCRC Attorney John Abatecola filing a Motion to Withdraw and Appointment of Conflict-free Counsel in the circuit court on December 11, 2000. The Motion alleged that McDonald refused to verify the postconviction motion drafted by Attorney Abatecola and wanted to file his own pro se 3.851 Motion. As a result, Attorney Abatecola requested to withdraw from representation and asked that the court appoint a new attorney for McDonald. (PCR V1, 5-7). McDonald then filed his pro se 3.851 Motion. (PCR V2, 186-379).

Following a hearing held in the circuit court, Attorney Abatecola filed a Motion for Reconsideration on February 2, 2001. (PCR V3, 396-398). The Motion noted that after a hearing held January 30, 2001, the trial court denied the request for certification of conflict and the motion to withdraw. The court also struck both the unverified 3.851 motion filed by Attorney Abatecola and the pro se motion filed by McDonald. (PCR V4, 604-605). Then, at a hearing on January 31, 2001, McDonald verified the 3.851 motion prepared by counsel. Thus, the Motion for Reconsideration sought to resubmit the verified 3.851 motion prepared by counsel, noting no objection from the State. (PCR V3, 396-398). On February 6, 2001, the trial court issued an Order accepting the 3.851 Motion prepared by counsel nunc pro tunc. (PCR V4, 578-579).

Subsequently, on March 2, 2001, McDonald filed a pro se Motion to Remove Conflict Counsel, and to Strike Counsel 3.850 Motion, & Motion for Reconsideration, & for Self-representation. (PCR V4, 582-593). While the State objected to McDonald's pro se motion, the State also stipulated to the court conducting a Faretta inquiry. (PCR V4, 594-599).

On May 18, 2001, the trial court, having found, after a Faretta inquiry and on the court's observation of McDonald in court and with knowledge of his pro se pleadings, McDonald competent to represent himself, granted McDonald's motion for self representation and reinstated the pro se 3.851 motion. (PCR V4, 650-651).

On July 16, 2001, McDonald filed a Motion to Amend and File Supplemental 3.850 Post Conviction Motion. (PCR V9, 1467-1581). McDonald then proceeded to file a number of motions prior to the evidentiary hearing, (PCR V11, 1817-1839), and his written closing argument following the hearing. (PCR V11, 1911-1949).

Despite the Circuit Court's specific request for CCRC's input at the Faretta hearing, no challenge was ever raised below concerning the purported inadequacy of the Faretta inquiry. Therefore, CCRC's current challenge to the adequacy of the Faretta inquiry 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.")

"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. 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 postconviction counsel "with his eyes open." In this case, the Circuit Court commendably conducted the following exemplary inquiry:

> [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. These are some of the dangers. And I think that I would even have to go a little further here.

In a -- in a case where a person is on death row, if a warrant is signed, I have been involved to some extent in some of those cases, there are fast and furious hearings that are held, going from State court into the Federal court, back into State court, Florida Supreme Court. It can be a fast and furious process because there are -- there's a warrant outstanding, everybody is trying to either get relief granted or deny relief before the warrant expires.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: You will be severely limited in what you can do in going to all those various courts. You may lose out on some of the rights to go to some of the courts that you might otherwise be able to go to because you're representing yourself and don't have a lawyer.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Do you feel that like you understand the dangers and the disadvantages of representing yourself?

THE DEFENDANT: I believe I do, your Honor.

THE COURT: Okay. Do you have any questions about any of these disadvantages that you and I have talked about? We're going to have some more, but I'm talking about just these disadvantages that you and I have been talking about, do you have any questions about

that?

THE DEFENDANT: No, 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. So I'm not -- it's an 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).

The foregoing transcript excerpt confirms that the Circuit Court conducted a detailed Faretta 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 verifies that McDonald repeatedly exhibited an understanding of the consequences of waiving his right to post-conviction counsel. The Circuit Court painstakingly conducted an extensive hearing at which the trial judge explored the defendant's age, education, and capacity to understand the consequences of waiver, and clearly complied with the standards applicable to waiver of one's rights to collateral counsel. See e.g., Alston v. State, 894 So. 2d 46, 57 (Fla. 2004); Castro v. State, 744 So. 2d 986, 989 (Fla. 1999).

In Potts v. State, 718 So. 2d 757, 759 (Fla. 1998), this Court held that the defendant validly waived his right to [trial] counsel, stating, in part:

> [a] defendant's demand for self-representation places the trial court in a quandary, for the court must balance seemingly conflicting fundamental rights-

> i.e., the court must weigh the right of self-representation against the rights to counsel and to a fair trial. Because the court's ruling turns primarily on an assessment of demeanor and credibility, its decision is entitled to great weight and will be affirmed on review if supported by competent substantial evidence in the record.

Potts reiterated the requirement that a decision of self-representation must be made "knowingly and intelligently, i.e., 'with eyes open.'" Id. However, in determining the validity of a waiver of counsel, an appellate court should not focus on the specific advice given by the trial court, "but rather on the defendant's general understanding of his or her rights" because "there are no 'magic words' under Faretta." Id. at 760.

In this case, the Circuit Court conducted a textbook-model inquiry, and McDonald clearly understood the nature and effect of his decision to represent himself below. This habeas claim is procedurally barred and without merit.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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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, 545 First Avenue North, Room 417, St. Petersburg, Florida 33701; to Peter Cannon, CCRC-M, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136; and to Marie King, Assistant State Attorney, P. O. Box 5028, Clearwater, Florida 33758-5028, this ___ day of October, 2005.

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