

IN THE CIRCUIT COURT, FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1994-CF-012188-AXXX

DIVISION: CR-A

STATE OF FLORIDA

v.

**DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
THURSDAY, AUGUST 22, 2019**

GARY RAY BOWLES,
Defendant.

_____ /

**ORDER DENYING DEFENDANT'S SUCCESSIVE
MOTION FOR POSTCONVICTION RELIEF**

This matter came before the Court on Defendant's "Amended Rule 3.851 Motion for Postconviction Relief in Light of Moore v. Texas, Hall v. Florida, and Atkins v. Virginia" ("Motion"), pursuant to Florida Rule of Criminal Procedure 3.851, filed on July 1, 2019. The State filed its answer to Defendant's Motion on July 3, 2019. On July 8, 2019, a Case Management Conference was held on Defendant's Motion.

PROCEDURAL HISTORY

Defendant entered a plea of guilty on May 17, 1996, to one count of First-Degree Murder. After a penalty proceeding, a jury recommended a sentence of death by a vote of ten-two and the Court sentenced Defendant to death on September 6, 1996. On appeal, the Florida Supreme Court affirmed Defendant's conviction, but reversed his sentence and remanded for a new penalty phase. Bowles v. State, 716 So. 2d 769 (Fla. 1998). Following a second penalty

proceeding, a jury unanimously recommended a sentence of death. The Mandate affirming Defendant's conviction and sentence was issued by the Florida Supreme Court on June 14, 2002.

Defendant filed his initial motion for postconviction relief on December 9, 2002, which was amended on June 25, 2003. A hearing on Defendant's initial motion for postconviction relief was held on February 8, 2005, and the Court denied the motion on August 12, 2005. On February 14, 2008, the Florida Supreme Court affirmed the order denying the initial motion for postconviction relief. Bowles v. State, 979 So. 2d 182 (Fla. 2008).

On March 19, 2013, Defendant filed a successive motion for postconviction relief, which was denied by the Court on July 17, 2013. Defendant did not appeal the denial of this successive motion for postconviction relief. On June 14, 2017, Defendant filed his third motion for postconviction relief in light of Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). The Court denied this motion on August 22, 2017, and the Florida Supreme Court affirmed the denial on January 29, 2018. Bowles v. State, 235 So. 3d 292 (Fla. 2018).

On October 19, 2017, Defendant filed his fourth motion for postconviction relief. Defendant amended this motion on March 13, 2019. On June 11, 2019, Governor DeSantis signed the death warrant in this case. Following the signing of the death warrant, the Florida Supreme Court ordered this Court to complete all postconviction proceedings by July 17, 2019.

On July 2, 2019, Defendant filed the final version of his fourth motion for postconviction relief in which he claimed the State was barred from executing him based on his intellectual disability. On July 8, 2019, a Case Management Conference was held to determine whether an evidentiary hearing was necessary to address Defendant's claim of intellectual disability.

RULE 3.203 TIME LIMITATION

In response to the passing of Section 921.137, Florida Statutes, barring the imposition of death sentences on intellectually disabled persons, and the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304 (2002), holding the execution of the intellectually disabled constitutes excessive punishment under the Eighth Amendment, the Florida Supreme Court promulgated Florida Rule of Criminal Procedure 3.203 to establish the methods for determining which offenders are intellectually disabled. In Re Amends. To Fla. R. Crim. P. & Fla. R. App. P., 875 So. 2d 563 (Fla. 2004). The Florida Supreme Court set forth specific time limitations in Rule 3.203 for filing a motion for determination of intellectual disability as a bar to execution. Relevant to the instant case, Florida Rule of Criminal Procedure 3.203(d) states in part:

(4) Cases in which the direct appeal is final; contents of motion; conformity with Florida Rule of Criminal Procedure 3.851

...

(C) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(C) (2004). A claim of intellectual disability is waived if not filed by the deadlines set forth in subsection (d)(4). Fla. R. Crim. P. 3.203(f) (2004).

Defendant filed his initial motion for postconviction relief on December 9, 2002, and the Court did not rule on the motion until August 12, 2005. Thus, the time limit in Rule 3.203(d)(4)(C) is applicable to Defendant and beginning October 1, 2004, Defendant had sixty days to amend his pending Rule 3.851 motion to include a claim of intellectual disability. Defendant failed to amend and, instead, raised his claim of intellectual disability for the first time

on October 19, 2017. Thus, Defendant's claim of intellectual disability is untimely and is waived.

RULE 3.203(f) GOOD CAUSE EXCEPTION

Defendant alleges his waiver should be excused because he had good cause for failing to previously file a claim of intellectual disability. Defendant's alleged good causes are: (1) Defendant and postconviction counsel could not have known Defendant's IQ score of 74 did not bar Defendant from raising a claim of intellectual disability prior to Hall v. Florida, 572 U.S. 701 (2014) being found retroactive; and (2) postconviction counsel was grossly negligent in failing to investigate, discover, and file an Atkins claim.

Retroactivity of Hall

Defendant argues there is good cause for failing to timely file his claim of intellectual disability because he believed he was prohibited from bringing a claim with an IQ score above 70. Defendant contends that he was not on notice he could bring an intellectual disability claim based on his IQ score of 74 until the Florida Supreme Court in Walls v. State, 213 So. 3d 340 (Fla. 2016) found the Hall decision, overturning the bright-line cut off IQ score of 70 established in Cherry v. State, 959 So. 2d 702 (Fla. 2007), applied retroactively.

In Rodriguez v. State, 250 So. 3d 616 (Fla. 2016), the defendant made a similar argument as the basis for good cause to excuse his waiver under Rule 3.203. Rodriguez argued he could not raise his intellectual disability claim earlier because his claim was procedurally barred until the decision in Hall. Id. The trial court rejected this argument because by failing to timely raise an Atkins claim there is no way he could have relied on the ruling in Cherry. Id.; See Harvey v. State, 260 So. 3d 906-07 (Fla. 2018). This Court agrees with the reasoning stated in Rodriguez

and rejects Defendant's argument that Hall being held retroactive is a basis for good cause because Defendant failed to previously raise an Atkins claim.

Postconviction Counsel's Negligence

Defendant claims postconviction counsel was grossly negligent for failing to investigate and file an Atkins claim prior to the deadline set forth in Rule 3.203. Defendant argues it was clear that attorneys representing defendants sentenced to death should investigate intellectual disability claims following the Atkins decision. Defendant contends this was especially true in cases like his where there were multiple pieces of evidence indicating limited intellectual functioning.

While Defendant has framed postconviction counsel as grossly negligent, he is effectively arguing good cause exists because postconviction counsel was *ineffective* for failing to file an Atkins claim. The Florida Supreme Court has repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable. See Kokal v. State, 901 So. 2d 766, 777 (Fla. 2005); Foster v. State, 810 So. 2d 910, 917 (Fla. 2002); King v. State, 808 So. 2d 1237, 1245 (Fla. 2002); Waterhouse v. State, 792 So. 2d 1176, 1193 (Fla. 2001); Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996). Instead, the Florida Supreme Court has held that a capital defendant is only entitled to meaningful access to judicial process during postconviction proceedings. Kokal, 901 So. 2d at 777. Considering this is Defendant's *fourth* Rule 3.851 motion adjudicated by the Court, it is clear that Defendant has had ample meaningful access to judicial process during the postconviction stage of his case.

Additionally, it is not the intent of the Rule 3.203 good cause exception to serve as a backdoor for claims of ineffective assistance of postconviction counsel. To interpret otherwise would nullify the procedural bar in its entirety because any defendant, at any time, could claim

counsel was ineffective for failing to file the claim. Without the procedural bar, defendants sentenced to death would be encouraged to bring claims of intellectual disability at the eleventh hour, such as when a death warrant is signed, in order to create delay. Therefore, Defendant's claim that postconviction counsel was ineffective for failing to timely investigate and file his claim of intellectual disability is not a basis for good cause under Rule 3.203.

DISPOSITION OF WAIVED INTELLECTUAL DISABILITY CLAIM

The Florida Supreme Court first affirmed the summary denial of a defendant's post-Hall Atkins claim as time barred in Rodriguez, 250 So. 3d at 616. In Blanco v. State, 249 So. 3d 536 (Fla. 2018), the Florida Supreme Court applied its reasoning in Rodriguez when it affirmed the denial of Blanco's Atkins claim as untimely under the time-bar contained within Rule 3.203. Most recently in Harvey, the Florida Supreme Court again affirmed the summary denial of a defendant who failed to raise a claim of intellectual disability by the deadline imposed by Rule 3.203. Harvey, 260 So. 3d at 906-07. When Rule 3.203 went into effect on October 1, 2004, Harvey's initial postconviction motion was on appeal and, thus, he had sixty days to file a motion with the Florida Supreme Court to relinquish jurisdiction for a determination of his intellectual disability. Fla. R. Crim. P. 3.203(d)(4)(E) (2004); See Harvey v. State, 946 So. 2d 937 (Fla. 2006). Harvey failed to meet this deadline, instead, waiting until 2016 to raise his claim of intellectual disability for the first time. Harvey, 260 So. 3d at 906-07. The court held the record conclusively showed Harvey's claim was untimely and he was not entitled to relief. Id.

Similar to the defendants in those cases, Defendant waived his claim of intellectual disability by failing to file by the Rule 3.203 deadline and has not sufficiently alleged good cause to excuse this waiver. "Where an issue has been decided in the Supreme Court of the state, the

lower courts are bound to adhere to the Court's ruling when considering similar issues." State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1970). Lower courts are similarly bound to the rules of criminal procedure promulgated by the Florida Supreme Court. State v. Lott, 286 So. 2d 565, 566-67 (Fla. 1973). When there is controlling Florida Supreme Court precedent disposing of a claim, the trial court should summarily deny the postconviction claim. Mann v. State, 112 So. 3d 1158, 1162-63 (Fla. 2013).

For this Court to rule differently, effectively ignoring the plain language of Rule 3.203(f) and failing to follow Florida Supreme Court precedents in Rodriguez, Blanco, and Harvey, would violate the obligation lower courts have to adhere to the higher court's authority. Therefore, an evidentiary hearing is not necessary and Defendant's untimely intellectual disability claim is summarily denied.

RULE 3.851(d)(2)(B) TIME LIMIT EXCEPTION

As an alternative to the time bar in Rule 3.203, Defendant argues his intellectual disability claim is timely filed pursuant to Rule 3.851 and the timeliness exception found in subsection (d)(2)(B). When a claim for postconviction relief is filed beyond the time limitation provided for in Florida Rule of Criminal Procedure 3.851(d)(1), the claim must rely upon one of the following enumerated exceptions:

- (A) The facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
- (B) The fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
- (C) Postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). Specifically, Defendant claims his Motion was timely filed within the one year time limit when calculated from the date the Walls court found the Hall decision applied retroactively. Defendant's argument is without merit because he never filed an Atkins claim, and Hall is not applicable to defendants who did not previously file a claim of intellectual disability under Atkins. Harvey, 260 So. 3d at 907. Therefore, Defendant cannot rely upon Rule 3.851(d)(2)(B) because he was not part of a class of defendants who had a fundamental constitutional right to file a retroactive intellectual disability claim. Accordingly, it is:

ORDERED AND ADJUDGED that Defendant's "Amended Rule 3.851 Motion for Postconviction Relief in Light of Moore v. Texas, Hall v. Florida, and Atkins v. Virginia," pursuant to Florida Rule of Criminal Procedure 3.851, filed on July 1, 2019, is **DENIED**. In accordance with the Florida Supreme Court's June 12, 2019 scheduling order, Defendant shall have until 3:00 p.m. Thursday, July 18, 2019, to file his Notice of Appeal with the Clerk of Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 11th day of July, 2019.



BRUCE ANDERSON
Circuit Judge

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to all legal counsel for both parties via address listed above and/or Defendant by U.S. Mail this _____ day of _____, 2019.

_____,
Deputy Clerk

Case No.: 16-1994-CF-012188-AXXX-MA

Division: CR-A

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