Supreme Court of Florida

Tallahassee, Florida

OMAR BLANCO,	*	**CASE NO.: SC17-330**
	*	
Appellant,	*	L.T. No.: 061982CF000453A88810
	*	
vs.	*	
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
_____ /		

APPELLANT'S REPLY BRIEF

Respectfully submitted,

/s/ Ira W. Still, III

_____

IRA W. STILL, III, ESQUIRE
Attorney for Appellant [Omar Blanco]
148 SW 97th Terrace
Coral Springs, FL 33071
Broward: 954-573-4412
FAX: 954-827-0151
EMAIL: ira@istilldefendliberty.com
Florida Bar No. 169746

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REPLY ARGUMENT

A. INTRODUCTION

In its Answer Brief, the State argues that the summary denial of Mr. Blanco's Rule 3.851 motion was appropriate because he did not raise his claim at the right time. But in making this argument, the State ignores the majority of Mr. Blanco's arguments as to why his motion is procedurally proper.

Nowhere does the State acknowledge Mr. Blanco's argument that *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776 (Fla. Aug. 9, 2016), is inapposite because the defendant in that case had multiple below-70 scores at the time *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided. *See* Initial Brief at 19-20. Nor does the State acknowledge that Florida law included a strict IQ cutoff of 70 since before *Atkins* was decided, and thus Mr. Blanco would not have had a good-faith basis for raising a claim of intellectual disability prior to the issuance of *Hall v. Florida*, 134 S. Ct. 1986 (2014) (finding such cutoff unconstitutional). *See* Initial Brief at 20-22; *see also* Fla. R. Crim. P. 3.203(d)(4)(E) (2004) (requiring capital post-conviction prisoners whose motions for post-conviction relief were pending on appeal on or before October 1, 2004, and who sought to raise mental retardation claims, to file a motion to relinquish jurisdiction in this Court that contained "a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds

to believe that the defendant is mentally retarded"); Answer Brief at 9-10 (noting that Mr. Blanco's post-conviction motion was on appeal to this Court at the time Rule 3.203 was promulgated). The State likewise fails to acknowledge its own prior position that Florida law has included a strict IQ cutoff of 70 since before *Atkins* was decided, and does not respond to Mr. Blanco's argument that it should be collaterally estopped from adopting the opposite position now. *See* Initial Brief at 20-21.

The State instead makes a series of arguments that do not meaningfully counter Mr. Blanco's argument that a remand for an evidentiary hearing is appropriate. Mr. Blanco addresses each in turn.

B. This Court Must Accept Mr. Blanco's Factual Allegations as True.

As Mr. Blanco noted in his Initial Brief, this Court, in reviewing a summary denial of a motion for post-conviction relief, "must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." *Ventura v. State*, 2 So.3d 194, 197-98 (Fla. 2009). The State nonetheless argues that this Court should not follow this well-established standard because Mr. Blanco's post-conviction motion was denied on procedural grounds and thus raises a pure issue of law. Answer Brief at 8.

The State's argument is misplaced. Mr. Blanco readily acknowledges that the issue before this Court presents a pure question of law. *See* Initial Brief at 9 n.7. And he is not asking the Court to declare him intellectually disabled on the existing

record. Rather, he is simply requesting a remand for an evidentiary hearing to prove his claim. *See id.* at 24. The purpose of stating that this Court must accept the truth of Mr. Blanco's factual allegations is simply to note that the Court cannot *deny* the claim on the merits on appeal when Mr. Blanco has pled a *prima facie* case for relief.

C. Mr. Blanco's Proffer Warrants an Evidentiary Hearing.

Although the State declares that it "will not discuss the factual allegations Blanco has set forth in his brief unless this Court directs the State to comment on those untested allegations," it nonetheless does exactly that, observing that two psychologists, Dr. Richard Maulion and Dr. Lee Bukstel, did not find Mr. Blanco to be intellectually disabled during his resentencing proceeding. *See* Answer Brief at 3-4, 8 n.2.

This observation simply highlights the need for an evidentiary hearing, the entire purpose of which is to have a factfinder resolve disputed, material facts. The findings of Dr. Maulion and Dr. Bukstel certainly do not "conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B). After all, the evaluation of Dr. Gerardo Nogueira Rivero revealed that Mr. Blanco suffered from "light mental retardation" as a teenager in Cuba after the administration of a Wechsler intelligence test. *See* SR14[1] (Nogueira Rivero Report at 3). And Mr.

[1] References to the supplemental record filed in this Court along with Mr. Blanco's Initial Brief are cited as SR___.

Blanco twice obtained full-scale IQ scores of 75 on Wechsler tests when Dr. Dorita Marina evaluated him in 1988 and, most recently, when Dr. Antonio Puente evaluated him in 2015. *See* SR 46 (Marina Report at 5); SR166 (Puente Report at 3). Of greatest relevance, Dr. Puente diagnosed Mr. Blanco as suffering from intellectual disability under the relevant legal and clinical definitions while possessing and considering the reports and testimony of Dr. Maulion and Dr. Bukstel. *See* SR165-66 (Puente Report at 2-3).

The State's reference to Dr. Maulion and Dr. Bukstel demonstrates that material facts are in dispute, requiring a hearing.

D. Mr. Blanco's *Hall* Motion Is Procedurally Proper under Rule 3.851.

The State argues that Mr. Blanco's Rule 3.851 motion should be procedurally barred because he failed to raise a claim of intellectual disability after Rule 3.203 was promulgated. In making this argument, the State offers its view that the unpublished order in *Rodriguez* and Justice Pariente's concurrence in *Walls v. State*, 213 So.3d 340, 348 (Fla. 2016), command this result.[2] *See* Answer Brief at 11-14.

[2] Concurrences are not binding authority. "A concurring opinion does not constitute the law of the case nor the basis of the ultimate decision unless concurred in by a majority of the Court." *Greene v. Massey*, 384 So.2d 24, 26 (Fla. 1980). Unpublished orders are likewise not binding authority. *Cf. Ullah v. State*, 679 So.2d 1242, 1243 (Fla. 1st DCA 1996).

But Mr. Blanco discussed at length the reasons why the State's (and the Circuit Court's) reliance on *Rodriguez* and *Walls* is misplaced. *See* Initial Brief at 16-22. The State offers no meaningful engagement with or opposition to Mr. Blanco's arguments in its brief. This Court should reject the State's argument for the reasons already stated in Mr. Blanco's opening brief.

E. The Eighth Amendment Prohibition Against Executing Intellectually Disabled Individuals Cannot Be Waived.

Lastly, the State misconstrues Mr. Blanco's argument that the Eighth Amendment prohibition against executing intellectually disabled individuals cannot be waived. *See* Answer Brief at 14-15. The State contends that the notion that an "Eighth Amendment claim may never be waived is not the law." *Id.* at 15. But this is not what Mr. Blanco has argued. Eighth Amendment claims are of course properly found to be waived all the time. *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 476-77 (2007) (noting that the defendant waived his Eighth Amendment right to present mitigating evidence at trial). Mr. Blanco has instead argued that a specific subset of Eighth Amendment protections—those precluding the execution of certain classes of individuals—cannot be waived. *See* Initial Brief at 23-24. This subset of categorical exemptions includes: 1) juveniles, *see Roper v. Simmons*, 543 U.S. 551, 568 (2005); 2) the insane, *see Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); and 3) the intellectually disabled, *see Atkins*, 536 U.S. at 321.

The State's suggestion that enforcing this constitutional prohibition on executing these categories of people "would allow defendants to sit on their claims," Answer Brief at 15, is misguided and belied by what actually occurred in Mr. Blanco's case. It wasn't until *Hall* was decided that a meritorious claim under Florida law became available to Mr. Blanco. Although he has been intellectually disabled since childhood, Florida law erroneously precluded Mr. Blanco from presenting a viable claim. Moreover, no rational individual (or constitutionally effective attorney) would "sit on" a claim that would remove them from death row. The State offers nothing other than unfounded speculation to suggest that enforcing this constitutional prohibition would have any adverse impact upon the administration of justice.

Finally, the logical extension to the State's argument is that a juvenile should lawfully be executed if she failed to file her claim within a year of *Roper*. Likewise, the State's argument logically commands that an undisputedly intellectually disabled defendant should be executed if her attorney failed to timely file an *Atkins* claim. There is no principled reason to treat intellectually disabled individuals differently from juveniles and the mentally incompetent. As with executing an incompetent person who does not understand the nature of his punishment, "[n]o legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments

on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). And persons "facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 2001.

CONCLUSION

For the foregoing reasons in addition to those stated in his Initial Brief, Mr. Blanco requests that the Court reverse the trial court and remand this case for an evidentiary hearing so that Mr. Blanco can have a fair opportunity to prove his claim of intellectual disability and to establish a record for purposes of review.

Respectfully Submitted,

/s/ Ira W. Still, III

IRA W. STILL, III, ESQUIRE
Attorney for Appellant
148 SW 97th Terrace
Coral Springs, FL 33071
Broward: 954-573-4412
FAX: 954-827-0151
Miami-Dade: 305-303-0853
FAX: 305-675-8330
Email: ira@istilldefendliberty.com
Florida Bar No. 169746

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Reply Brief was E-Filed with the Clerk of the Florida Supreme Court and simultaneously E-Served to the below-listed counsel, this 23rd day of April, 2018:

Steven A. Klinger, Esq.
Assistant State Attorney
Broward County Courthouse
201 SE 6th Street; Suite 660-A
Ft. Lauderdale, FL 33301
SKlinger@sao17.state.fl.us

Carolyn McCann, Esq.
Assistant State Attorney
Broward County Courthouse
201 SE 6th Street; Suite 660-A
Ft. Lauderdale, FL 33301
CMcCann@sao17.state.fl.us

Leslie T. Campbell, Esq.
Assistant Attorney General
1515 North Flagler Drive; 9th Floor
West Palm Beach, FL 33401
Leslie.Campbell@myfloridalegal.com

/s/ Ira W. Still, III

IRA W. STILL, III, ESQUIRE
Attorney for Appellant
148 SW 97th Terrace
Coral Springs, FL 33071
Broward: 954-573-4412
FAX: 954-827-0151
Miami-Dade: 305-303-0853
FAX: 305-675-8330
Email: ira@istilldefendliberty.com
Florida Bar No. 169746

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the font requirements set forth in rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, in that this brief is printed in Times New Roman, 14-point font, and is double spaced.

/s/ Ira W. Still, III

_____

IRA W. STILL, III, ESQUIRE
Attorney for Appellant
148 SW 97th Terrace
Coral Springs, FL 33071
Broward: 954-573-4412
FAX: 954-827-0151
Miami-Dade: 305-303-0853
FAX: 305-675-8330
Email: ira@istilldefendliberty.com
Florida Bar No. 169746