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Leavitt v. State, 132 Nev. Adv. Op. 83 (Dec. 29, 2016) (per curiam)

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Leavitt v. State, 132 Nev. Adv. Op. 83 (Dec. 29, 2016) (per curiam)¹

CRIMINAL LAW: HABEAS PETITIONS AND KAZALYN INSTRUCTIONS

Summary

The Court expressly repudiated the Ninth Circuit’s interpretation of Nevada law in *Riley v. McDaniel*² and therefore found that *Riley* cannot serve as the basis for an argument that good cause exists to overcome a procedural default in filing a petition for a writ of habeas corpus.

Background

A jury convicted appellant Todd Leavitt of one count of first-degree murder with use of a deadly weapon in 1998. He filed his post-conviction petition for a writ of habeas corpus in the Eighth Judicial District Court of Nevada on October 20, 2015. Because his petition was successive³ and untimely⁴, Leavitt was barred from relief absent a demonstration of good cause and prejudice.⁵ The district court concluded that Leavitt failed to demonstrate good cause and prejudice. Leavitt appealed, arguing that the district court erred by failing to consider his argument based on *Riley*.⁶

Discussion

The use of the *Kazalyn*⁷ instruction in any trial predating *Byford*⁸ does not constitute reversible error and therefore is not grounds for a showing of good cause to overcome a procedural default in filing a habeas petition.⁹ Because Leavitt was convicted in 1998—before *Byford* had been decided—the *Kazalyn* instruction used in his trial was a correct statement of then-existing Nevada law.¹⁰ Thus, the Court affirmed the district court’s denial of Leavitt’s petition.

Conclusion

Repudiating the Ninth Circuit’s recent decision in *Riley*, the Court held that the use of a *Kazalyn* instruction at any time prior to *Byford* (2000), including the time prior to *Powell* (1992), does not constitute reversible error and therefore cannot be used as the basis for a demonstration

¹ By Brent Resh.

² *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1450 (2016).

³ NEV. REV. STAT. 34.810(1)(b)(2) (2015).

⁴ NEV. REV. STAT. 34.726(1) (2015).

⁵ *Id.*; NEV. REV. STAT. 34.810(3).

⁶ *See Riley*, 786 F.3d at 721 (holding that the *Kazalyn* instruction given in a trial before *Powell* or after *Byford* constitutes a violation of due process), *cert. denied*, 136 S. Ct. 1450 (2016).

⁷ *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

⁸ *Byford v. State*, 116 Nev. 215, 234–237, 994 P.2d 700, 713–715 (2000) (overruling *Powell v. State*, 108 Nev. 67, 825 P.2d 578 (1992)).

⁹ *Leavitt v. State*, 132 Nev. Adv. Op. 83 (Dec. 29, 2016) (per curiam).

¹⁰ *See Nika v. State*, 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2008).

of good cause pursuant to NRS 34.810 or NRS 34.726. The Court affirmed the district court's denial of Leavitt's petition for a writ of habeas corpus.