
Brent Resh
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**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 successive\(^3\) and untimely\(^4\), 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

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1. By Brent Resh.
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).
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.