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Summary of Brown v. McDaniel. 130 Nev. Adv. Op. 60

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CRIMINAL PROCEDURE: POST-CONVICTION HABEAS RELIEF

Summary

The Court determined whether the ineffective assistance of post-conviction counsel may constitute good cause under NRS 34.726(1) and NRS 34.810 to allow a noncapital petitioner to file an untimely and successive post-conviction petition for a writ of habeas corpus.

Disposition

The Court held that the United States Supreme Court Decision in *Martinez v. Ryan*² does not alter its prior decisions that a petitioner has no constitutional right to post-conviction counsel and such counsel's ineffectiveness does not constitute good cause to overcome the procedural bars under NRS 34.726(1) or NRS 34.810 unless the appointment was mandated by statute.

Factual and Procedural History

Brown was convicted of first-degree murder and was sentenced to prison. The Nevada Supreme Court affirmed the conviction in January 2006 and the remittitur was issued on February 7, 2006. Subsequently, Brown filed a timely post-conviction petition for a writ of habeas corpus. The appeal was denied on its merits and the Nevada Supreme Court affirmed said denial in August 2009.

Brown filed a second post-conviction petition for writ of habeas corpus on June 10, 2010 alleging claims of ineffective assistance of trial and appellate counsel. The district court dismissed the petition, as it was untimely and successive. Brown appealed this decision.

Discussion

Brown's argument relied on the Supreme Court's decision in *Martinez*.

The applicable procedural bars

The court first examined Nevada's statutory post-conviction scheme. NRS 34.726(1) sets the procedural time limits for which a post-conviction petition must be filed.³ NRS 34.810(1)(b) allows for the dismissal of a post-conviction petition when the claims contained therein could have been raised earlier.⁴ NRS 34.810(2) provides for the dismissal of a second or successive petition.⁵

¹ By Allison Vitangeli

² 566 U.S. ___, 132 S. Ct. 1309 (2012).

³ NEV. REV. STAT. § 34.726(1) (2013); *See also* Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

⁴ NEV. REV. STAT. § 34.810(1)(b) (2013).

⁵ NEV. REV. STAT. § 34.810(2) (2013).

In order to overcome these procedural bars, the petitioner must demonstrate “good cause” for the default and actual prejudice.⁶ To show good cause, the petitioner must demonstrate that an “impediment external to the defense” prevented him from complying with the procedural rules.⁷

Next, the Court applied these rules to the present case. First, Brown’s second petition was filed more than four years after the issuance of remittitur from the direct appeal of the judgment of conviction. Second, the claims raised in the second petition were or could have been raised in his first petition. Finally, Brown could not show good cause to overcome the successive and untimely nature of his petition because the Court has consistently held that the ineffective assistance of post-conviction counsel in a noncapital case cannot constitute “good cause.”⁸ This is true because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings.

Martinez v. Ryan does not address state procedural bars

Right off the bat, the Court disagreed that *Martinez* changed the Court’s jurisprudence regarding what can constitute good cause. The Court then went on to discuss the underlying facts of *Martinez*. There, the petitioner argued that he had good cause for the procedural default because counsel in his first state collateral proceeding was ineffective for failing to raise the ineffective-assistance-of-trial-counsel claims in that proceeding.⁹

The Supreme Court in *Martinez* thus considered “whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.”¹⁰ The Supreme Court answered this question in the affirmative where state law provides that ineffective-assistance-of-trial-counsel claims must be raised in a collateral proceeding.¹¹ However, the Supreme Court expressly declined to decide whether a federal constitutional right to counsel exists in post-conviction proceedings and instead emphasized that its ruling was equitable in nature rather than constitutional.¹²

The Court also provided two reasons why *Martinez* does not alter its decisions in *McKague* and *Crump*. First, *Martinez* did not announce a constitutional right to counsel in post-conviction proceedings. Second, the *Martinez* decision is limited to the application of the procedural default doctrine that guides a federal habeas court’s review of the constitutionality of a state prisoner’s conviction and sentence.¹³ Moreover, the *Martinez* decision says nothing about the application of state procedural default rules.¹⁴

⁶ NEV. REV. STAT. §§ 34.726(1), 34.810(3) (2013).

⁷ *Passanisi v. Dir.*, Nev. Dep’t of Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)).

⁸ *See McKague*, 112 Nev. 159, 163–65, 912 P.2d 255, 258.

⁹ *Martinez*, supra note 2, at ___, 132 S. Ct. at 1314–15.

¹⁰ *Id.* at ___, 132 S. Ct. at 1315.

¹¹ *Id.* at ___, 132 S. Ct. at 1320.

¹² *Id.* at ___, 132 S. Ct. at 1315, 1318.

¹³ *See, e.g., id.* at ___, 132 S. Ct. at 1313 (describing the question presented as “whether a federal habeas court may excuse a procedural default”).

¹⁴ The Court noted that because Nevada requires that ineffective-assistance-of-trial-counsel claims be raised in a post-conviction petition rather than on direct appeal, *see, e.g., Pellegrini v. State*, 117 Nev. 860, 882, 34 P.3d 519, 534, the equitable rule from *Martinez* will apply to Nevada state petitioners in federal habeas proceedings.

Despite these reasons, Brown urged the Court to adopt the rationale from *Martinez* even if *Martinez* does not require it to do so. However, the Court declined to accept Brown's invitation to adopt an equitable exception to the general rule in Nevada that the ineffective assistance of post-conviction counsel does not establish good cause to overcome the state procedural bars. The Court's reasoned that the exception pressed by Brown is contrary to the statutory language in NRS Chapter 34 and the clear legislative intent behind those statutes. These statutes only contemplated one post-conviction petition to challenge a conviction or sentence. The legislative history of these statutes also reflect the intent that only one petition may be brought.¹⁵

If the Court were to adapt Brown's rule, it would circumvent the Legislature's "one time through the system" intent because each petitioner could have an opportunity to litigate a second petition based on the petitioner's first post-conviction counsel. The finality of the judgment of conviction would be extremely undermined and the resources of the courts would be stretched even thinner than they already are. Avoiding these issues was precisely the intent of the Legislature when it created NRS Chapter 34.¹⁶

The Court then discussed how it would be difficult for it to follow one part of *Martinez* without the other¹⁷ as both parts of the holding are based on the same idea — that "a prisoner likely needs an effective attorney" in order "[t]o present a claim of ineffective assistance at trial in accordance with the State's procedures."¹⁸ Applying the failure-to-appoint counsel part of *Martinez* would effectively eliminate the mandatory procedural default provisions of NRS Chapter 34 because the only way to maintain the integrity of those provisions would be to appoint counsel in all initial-review post-conviction proceedings.

Furthermore, the Court rejected Brown's suggestion that it adopt an exception similar to that adopted in *Martinez* because the Legislature intended that the state habeas remedy be "coextensive" with the federal habeas remedy and exceptions to federal procedural bars. The Court explained that the federal doctrine of procedural default utilized by federal courts is based in principles of comity. Rather, Nevada's statutory procedural bars are designed to ensure the finality of judgments of conviction and streamline the post-conviction review process. Thus, the state procedural bars "exist to implement policies independent from those animating the [federal doctrine of procedural default]."¹⁹

The Court also explained that while it has looked to the Supreme Court for guidance, it has not followed Supreme Court decisions when they are inconsistent with state law.²⁰ Therefore, the Court is not bound by the Supreme Courts decisions when interpreting "cause exceptions under NRS 34.726 and 34.810. Accordingly, the Court declined to extend the rule from *Martinez* to state post-conviction proceedings. Rather, the Court found that adoption of such a rule lies in the hands of the Legislature.

¹⁵ See *Pellegrini*, 117 Nev. at 870–73, 876–77, 34 P.3d at 526–28, 530 (2001) (setting forth the history of Nevada's post-conviction remedies).

¹⁶ See *id.*; See also *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

¹⁷ The Supreme Court also held in *Martinez* that federal habeas courts can consider the merits of a procedurally defaulted ineffective-assistance-of-trial-counsel claim where the petitioner *did not have counsel* in the initial-review collateral proceeding. 566 U.S. at ____, 132 S. Ct. at 1319–20.

¹⁸ *Id.* at ____, 132 S. Ct. at 1317.

¹⁹ *In re Reno*, 283 P.2d 1181, 1233 & n.30 (Cal. 2012).

²⁰ One example of this was when the Nevada Supreme Court rejected the prison mailbox rule that allowed for tolling the one-year time limit for state post-conviction habeas petitions. See *Gonzalez v. State*, 118 Nev. 590, 594–95, 53 P.3d 901, 903–04 (2002).

Actual innocence

The Court dismissed Brown's argument of actual innocence due to his failure to identify any new evidence of his innocence. Rather, Brown's argument continued to rely on his legal claims that there was insufficient evidence of first-degree murder presented at his trial and that his trial counsel's assistance was ineffective.

Conclusion

The Court found that Brown's petition was untimely and successive and that he failed to demonstrate good cause and prejudice to overcome the procedural bars contained in NRS 34.726 and NRS 34.810. Thus, Brown was not entitled to relief from his appeal.