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Howard v. State, 137 Nev. Adv. Op. (Sept. 16, 2021)

Kaitlin McCormick-Huhn

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CRIMINAL LAW: DEATH PENALTY ELIGIBILITY WHERE PRIOR CONVICTIONS ARE
VACATED

SUMMARY

If a defendant’s death sentence requires a prior conviction, and all convictions are subsequently vacated, the defendant is ineligible for the death penalty. A death sentence in such a circumstance violates the Eighth Amendment as cruel and unusual punishment. Further, when a defendant promptly seeks relief for the grounds asserted in the petition, he or she exercises reasonable diligence.

BACKGROUND

Appellant, Samuel Howard, was convicted of first-degree murder and sentenced to death in 1983.² The jury’s conviction was based on two aggravating circumstances. The Nevada Supreme Court invalidated one of the aggravating circumstances.³ Ultimately, the only aggravating circumstance Howard’s sentence was based on was a 1979 conviction in New York for robbery—a felony offense that involved the use or threat of violence to another person.

In 2018, a New York court vacated Howard’s robbery conviction. Howard subsequently filed a postconviction petition for a writ of habeas corpus. Howard argued his sentence now violated the Eighth Amendment because his death sentence became invalid once his conviction was vacated. The district court denied Howard’s petition, holding the petition was procedurally barred and was barred by statutory laches. Howard appealed.

DISCUSSION

Howard’s petition was procedurally barred for three reasons. First, his petition was untimely under NRS 34.726(1)⁴ because he filed it more than a year after remittitur was issued on his direct appeal. Second, Howard’s petition was untimely under NRS 34.726⁵ because it was filed more than 25 years after the effectiveness date of the statute, January 1, 1993. Third, under NRS 34.810(1)(b)(2)⁶ and NRS 34.810(2)⁷, Howard’s petition was deemed successive because he had litigated five postconviction habeas petitions in the past.

Despite these procedural bars, Howard’s petition could still be considered if he raised an “actual innocence gateway” claim. To do so, a defendant must demonstrate that failing to consider the constitutional claims in the petition would be a “fundamental miscarriage of justice” because

¹ By Kaitlin McCormick-Huhn.

² *Howard v. State*, 106 Nev. 713, 716, 800 P.2d 175, 177 (1990), *abrogated on other grounds by* *Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

³ *Howard v. State*, Docket No. 57469 (Order of Affirmance, July 30, 2014).

⁴ NEV. REV. STAT. § 34.726(1) (2021).

⁵ NEV. REV. STAT. § 34.726 (1991); *see* 1991 NEV. STAT., ch. 44, § 33, at 92.

⁶ NEV. REV. STAT. § 34.810(1)(b)(2) (2021).

⁷ NEV. REV. STAT. § 34.810(2) (2021).

he or she is innocent. Howard raised a gateway claim and argued he was innocent. When a claim of actual innocence is before the Court, the Court analyzes objective factors of the elements of the capital offense and of the statutory aggravating circumstances. At issue here was Howard’s now-vacated aggravating circumstance.

During the relevant time period, first-degree murder under NRS 200.033(2)⁸ was aggravated if “[t]he murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.”⁹ Because Howard’s New York conviction was vacated, the Court held that there is now no conviction to satisfy NRS 200.033(2).¹⁰ The State argued the evidence of Howard’s now-vacated felony that was presented in his penalty hearing showed that he did in fact commit a felony involving use or threat of violence to another. However, the Court rejected the State’s argument finding a conviction—not simply a commission of a crime—is required under the plain language of NRS 200.033(2).¹¹ The Court held “[b]ecause the only aggravating circumstance supporting Howard’s death sentence is no longer valid, he is ineligible for the death penalty.” Therefore, the district court erred when it dismissed the petition as procedurally barred.

In the alternative, the State argued the district court properly dismissed Howard’s petition because Howard did not exercise reasonable diligence. Under NRS 34.800¹², the State argued dismissal is appropriate if a delay in filing a petition prejudices the State’s ability to retry the defendant or to respond to the petition. Under NRS 34.800(2), filing a petition more than five years after a decision on direct appeal creates a rebuttable presumption that the State is prejudiced.¹³ Because Howard filed his petition more than five years after a decision on direct appeal, under NRS 34.800(1)(a), he needed to show his petition was based on grounds that he could not have knowledge of through exercising reasonable diligence.¹⁴ The State argues, by delaying to seek relief from his New York conviction, Howard failed to exercise reasonable diligence.

The Court held that the State’s reasonable diligence argument was flawed. The Court was unconvinced that NRS 34.800¹⁵ required Howard to show that he exercised reasonable diligence to obtain relief from his New York conviction. Howard obtained relief from this conviction due to the New York prosecutor’s unreasonable delay. Thus, requiring Howard to obtain speculative, earlier relief would create a “catch-22 situation.” The Court concluded that NRS 34.800(1)(a) pertains to reasonable diligence as to the relief sought in the petition.¹⁶ Therefore, “the substantive ground for relief asserted in the petition (an Eighth Amendment violation) depends on the New York court’s order vacating the New York conviction. The same is true of the actual-innocence-gateway claim, assuming that it also is subject to the reasonable diligence showing.” Because Howard promptly filed his petition in Nevada after his New York conviction was

⁸ NEV. REV. STAT. § 200.033(2) (1981).

⁹ 1981 NEV. STAT., ch. 771, § 19, at 2011.

¹⁰ NEV. REV. STAT. § 200.033(2) (1981).

¹¹ *Id.*

¹² NEV. REV. STAT. § 34.800 (2021).

¹³ NEV. REV. STAT. § 34.800(2) (2021).

¹⁴ NEV. REV. STAT. § 34.800(1)(a) (2021).

¹⁵ NEV. REV. STAT. § 34.800 (2021).

¹⁶ NEV. REV. STAT. § 34.800(1)(a) (2021).

vacated, the Court held “the district court abused its discretion to the extent it dismissed the petition under NRS 34.800.”¹⁷

The Court also held Howard’s substantive Eighth Amendment claim had merit. Howard claimed that his death sentence now violates the Eighth Amendment because he is ineligible for the death penalty in light of his conviction, and thus his only aggravating circumstance, being vacated. The Court found that Howard’s Eighth Amendment claim had merit because it “depend[ed] on the same underlying premise as the actual-innocence gateway claim, which [the Court] determined had merit.” Because no aggravating circumstances remained once Howard’s conviction was vacated, his death sentence “constitute[d] cruel and unusual punishment in violation of the Eighth Amendment.”

CONCLUSION

The Court reversed the district court’s denial of Howard’s petition and remanded “for the district court to grant the petition and conduct a new penalty hearing.” Because Howard’s conviction was his only aggravating circumstance—and his conviction was vacated—he raised an actual-innocence-gateway claim that demonstrated that he was actually innocent of the death penalty. The Court’s holding on the actual-innocence-gateway claim disposed of the Eighth Amendment claim. Thus, the Eighth Amendment claim does not need to be considered on remand. Because Howard promptly sought relief from his death sentence once his New York conviction was vacated, he exercised reasonable diligence.

¹⁷ NEV. REV. STAT. § 34.800 (2021).