

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia ex rel.
Irvin V. Cowgill, Petitioner Below,
Petitioner**

FILED

June 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 101600** (Hampshire County 07-C-17)

**Teresa Waid, Warden
Huttonsville Correctional Center,
Respondent Below, Respondent**

MEMORANDUM DECISION

Petitioner Irwin V. Cowgill appeals from the circuit court's "Order Denying Motion to Renew Previously Filed Amended Second Habeas Corpus Petition."¹ Petitioner sought to have the circuit court apply retroactively the law announced in syllabus point 4 of *State v. Harden*, 223 W.Va. 796, 679 S.E.2d 628 (2009). A timely response has been filed by the State of West Virginia.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on March 3, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On or about August 22, 2002, petitioner was convicted of second degree murder following a jury trial. The trial court sentenced petitioner to a definite term of forty years in prison. His direct criminal appeal was refused by this Court on November 19, 2003.

¹ Petitioner also filed a *pro se* "Writ of Error," which the Court has treated as a supplemental brief in support of his Petition for Appeal.

Subsequently, petitioner instituted a post-conviction habeas proceeding in the circuit court. An omnibus hearing was held after which the circuit court entered an order denying habeas relief. Petitioner's appeal of the circuit court's decision was refused by this Court on January 10, 2007.

On February 8, 2007, petitioner filed a *pro se* habeas petition in the circuit court. The circuit court appointed counsel to prepare a new habeas petition and directed counsel to consider that petitioner had already received an omnibus habeas hearing in his first habeas action and that the new petition should only raise issues which would be colorable under *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). On November 19, 2007, petitioner's counsel filed an amended second petition for a writ of habeas corpus, which was denied by the circuit court on February 10, 2009.

On February 26, 2010, petitioner moved the circuit court to allow him to renew his amended second habeas corpus petition to raise the issue of whether syllabus point 4 of *Harden*, 223 W.Va. 796, 679 S.E.2d 628, is retroactive. Syllabus point 4 states that “[w]here it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.” *Id.*

On May 3, 2010, the circuit court held a hearing on the retroactivity issue and directed the parties to submit briefs. On August 3, 2010, the circuit court entered an order denying the motion to renew. The circuit court noted that the *Harden* Court did not indicate that syllabus point 4 could be applied retroactively and that the law in syllabus point 4 appeared to be “an integration of prior precedent.” The circuit court concluded that petitioner could not use syllabus point 4 of *Harden* to collaterally attack his final judgment.

“The issue of ‘full retroactivity,’ in the sense of allowing collateral attack on final judgments which are unappealable, is rarely discussed as a distinct or separate concept of retroactivity. Ordinarily, a basic predicate to a collateral attack by way of habeas corpus is that the claimed error be of a constitutional dimension. (citation omitted). Consequently, where, as here, we are involved with a rule that is of a nonconstitutional nature, we are not concerned with ‘full retroactivity.’” *State v. Gangwer*, 168 W.Va. 190, 194 n.2, in part, 283 S.E.2d 839, 841 n.2, in part (1981) “[W]here a new rule of criminal law is made of a nonconstitutional nature, it will be applied retroactively only to those cases in litigation or on appeal where the same legal point has been preserved.” Syl. Pt. 1, in part, *State v. Reed*, 218 W.Va. 586, 625 S.E.2d 348 (2005) (quoting Syl. Pt. 3, *Gangwer*, 168 W.Va. 190, 283 S.E.2d 839 (1981)).

Petitioner, whose case was neither in litigation nor on appeal when *Harden* was issued, argues that syllabus point 4 of *Harden* is of a constitutional nature as it appears to be based, at least in part, on Article III, Section 22 of the West Virginia Constitution, which allows individuals to keep and bear arms for certain enumerated purposes, including self-defense, which would mean that it can be retroactively applied. The Court has previously recognized, however, that the rule regarding the burden of proof for self-defense is “a judicially created procedural shift not resting on constitutional grounds.” *Gangwer*, 168 W.Va. at 196, 283 S.E.2d at 843 (citing *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978)).

Notwithstanding petitioner’s arguments to the contrary, syllabus point 4 of *Harden* was not based on constitutional grounds. Syllabus point 4 represents, borrowing the words of the circuit court, “an integration of prior precedent” regarding relevant evidence in cases of self-defense. Consequently, petitioner may not collaterally attack his conviction by way of a writ of habeas corpus based upon *Harden*.

Having considered the parties' briefs and the relevant law, we are of the opinion that the circuit court did not commit reversible error and affirm the decision below.

Affirmed.

ISSUED: June 15, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh