

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
KELLY ROBERT BLACK,
Respondent.

No. 41180

FILED

MAY 18 2005

[Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal by the State from an order of the district court granting Kelly Robert Black's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On March 21, 2001, the district court convicted Black, pursuant to a guilty plea, of one count of possession of a majority of the ingredients to manufacture a controlled substance, a violation of NRS 453.322(1)(b). The district court sentenced Black to serve a term of 36 to 120 months in the Nevada State Prison. Black did not file a direct appeal.

On January 8, 2002, Black filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, Black contended, among other things, that his guilty plea was invalid because the statute under which he was convicted was unconstitutionally vague. The State opposed the petition. The district court appointed counsel to represent Black and counsel filed a supplement.

While Black's petition was pending in the district court, this court issued its decision in Sheriff v. Burdg.¹ This court held in Burdg that NRS 453.322(1)(b) was unconstitutionally vague on its face because it lacked an intent element and was ambiguous regarding the ingredients required to manufacture a controlled substance. We did not address the applicability of Burdg to convictions finalized before the decision.

The district court subsequently ordered the parties to brief the issue of whether the holding in Burdg applied to cases on collateral review. After hearing arguments from counsel, the district court granted Black's petition, concluding that the decision must be applied retroactively. The State appeals.

The State argues that our opinion in Burdg should not apply retroactively to cases on collateral review. Specifically, the State asserts that when a court declares a statute unconstitutionally vague on its face, the decision should not apply to cases on collateral review "where the legislation at issue governs a subject that is properly the business of the legislature, but the legislative attempt at regulation is unconstitutional because of the manner in which the legislature sought to regulate behavior" We disagree with the State's contention.

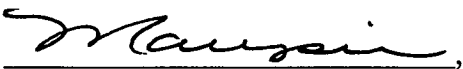
When a decision merely clarifies a statute, the issue of retroactivity is not implicated.² "If a rule is not new, then it applies, even

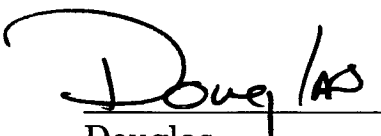
¹118 Nev. 853, 59 P.3d 484 (2002).

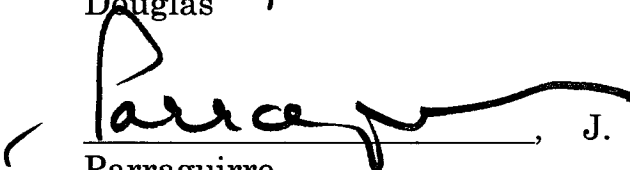
²Fiore v. White, 531 U.S. 225, 228 (2001); see also Bunkley v. Florida, 538 U.S. 835 (2003); Clem v. State, 119 Nev. 615, 81 P.3d 521 (2003).

on collateral review of final cases."³ Here, this court's decision in Burdg was a clarification of the law at the time Black's conviction was final; it was not a new construction of the law.⁴ Because the statute under which Black was convicted was unconstitutionally vague at the time he pleaded guilty, he established that his plea was not validly entered.⁵ We therefore conclude that Black must be afforded the opportunity to withdraw his guilty plea. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Nathalie Huynh
Washoe District Court Clerk

³Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002).

⁴Cf. Wainwright v. Stone, 414 U.S. 21 (1973).

⁵See generally Bousley v. United States, 523 U.S. 614 (1998).