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APP. 001
IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EDWARD BRANHAM,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 74743

FILED

FEB 26 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *P.B.* DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

Review denied.¹ NRAP 40B.²

It is so ORDERED.

Hardesty, J.

Hardesty

Parraguirre, J.

Parraguirre

Stiglich, J.

Stiglich

Cadish, J.

Cadish

PICKERING, J., dissenting:

I would direct an answer to the petition for review and therefore respectfully dissent.

Pickering, A.C.J.

Pickering

¹The Honorable Mark Gibbons, Chief Justice, did not participate in the decision of this matter.

²The Honorable Abbi Silver, Justice, voluntarily recused herself from participation in the decision of this matter.

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cc: Hon. Elliott A. Sattler, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

APP. 003

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EDWARD BRANHAM,
Appellant,
vs.

ISIDRO BACA, WARDEN,
Respondent.

No. 74743 Electronically Filed
Dec 28 2018 11:12 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR REVIEW

Appellant WILLIAM BRANHAM by and through counsel, Assistant Federal Defender Jonathan M. Kirshbaum, hereby petitions, pursuant to NRAP 40B, for review of the Court of Appeals' published opinion issued on December 13, 2018.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

DATED this 28th day of December, 2018.

Respectfully submitted,

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12908C
702-388-6577

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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION

On December 13, 2018, the Nevada Court of Appeals issued a published opinion, affirming the dismissal of William Branham's second post-conviction petition. The opinion is attached as Exhibit 1. This petition for review has been timely filed within the 18-day period set forth in NRAP 40B(c).

II. QUESTIONS PRESENTED

1. Whether the recent United States Supreme Court decisions in *Montgomery v. Louisiana* and *Welch v. United States* now require state courts to apply narrowing interpretations of a substantive criminal statute retroactively as a matter of federal constitutional law?

2. Whether this Court should reconsider its prior retroactivity decisions in light of *Welch* and the emerging nationwide consensus to grant full retroactive effect to narrowing statutory interpretation decisions?

III. STATEMENT OF FACTS

Branham was charged with open murder. (I.App.1.) He proceeded to a jury trial that took place in March 1993. (I.App. 11.) The State's

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theory at trial was that Branham strangled and/or suffocated his former roommate, Beverly Fetherston, to death sometime between February 6 and February 9, 1992.

However, the State presented little evidence about the events that transpired at the time of Fetherston's death. The State could not definitely prove the cause of death as their own medical experts disagreed about how she died. (I.App.105; V.App.865-67, 892; IV.App.725-27, 741-43.) While Branham was seen with the victim in her apartment on February 6, 1992, the last person to see them together stated they were happy and getting along. (III.App.457, 493.) There was simply no evidence that Branham had any plans to kill Fetherston that day or any other day.

The court provided the jury with what is known as the *Kazalyn* instruction, which provided the definition of the elements of first-degree murder. (VI.App.1149.) The jury convicted Branham of first-degree murder and he was sentenced to life without the possibility of parole. (VI.App. 1156.)

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This Court affirmed Branham's conviction on December 18, 1996 (VII.App.1183), and his conviction became final on March 18, 1997. *See Nika v. State*, 124 Nev. 1272, 1284 n.52, 198 P.3d 839, 848 n.52 (2008).

Almost three years later, on February 28, 2000, this Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, this Court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* at 234-35, 994 P.2d at 713-14. This Court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. *Id.* at 235, 994 P.2d at 714. This Court held this error was not of constitutional magnitude and only applied prospectively. *Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000).

Later, in *Nika*, this Court acknowledged that *Byford* had interpreted the first-degree murder statute by narrowing its terms. *Nika*, 124 Nev. at 1286-87, 1287 n.72-74, 1301, 198 P.3d at 849-50, 850 n.72-74, 859. However, under the Nevada retroactivity rules, this statutory interpretation issue had no retroactive effect to convictions that

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had already become final because it was not a new constitutional rule.

Id. at 1288-89, 198 P.3d at 850-51.

Nonetheless, this Court acknowledged that it had erred when it held *Byford* only applied prospectively. It explained the question for statutory interpretations was limited to whether the interpretation was a “clarification” or a “change” in state law. As a matter of due process, a “clarification” applies to all cases while a “change” applies to only those cases in which the judgment has yet to become final. *Id.* at 1287, 1287 n.72-74, 1301, 198 P.3d at 850, 850 n.72-74, 859. This Court concluded *Byford* was a “change” in state law, *id.*, so petitioners, like Branham, were barred from obtaining the benefit of *Byford*.

On April 19, 2017, Branham filed a post-conviction petition arguing that he was now entitled to the benefit of *Byford* as a result of the United States Supreme Court decisions in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and *Welch v. United States*, 136 S.Ct. 1257 (2016). (VII.App.1190-1219.) He argued that *Montgomery* established a new constitutional rule, namely the *Teague* substantive rule exception was now a federal constitutional rule, and *Welch* clarified that this

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constitutional substantive rule exception included narrowing interpretations of a statute, such as *Byford*. (*Id.*)

After hearing oral argument, the district court dismissed the petition, concluding *Byford* was not substantive. (VII.App.1286-94.) In a published opinion, the Court of Appeals rejected the argument but affirmed on another ground, concluding that *Montgomery* and *Welch* did not alter *Teague*'s threshold requirement that the new rule be a constitutional rule. Exhibit 1 at 6-7.

IV. REASONS REVIEW IS WARRANTED

A. The recent United States Supreme Court decisions in *Montgomery v. Louisiana* and *Welch v. United States* now require state courts to apply narrowing interpretations of a substantive criminal statute retroactively as a matter of federal constitutional law

1. *Montgomery* and *Welch* created a new constitutional rule that changes retroactivity law in Nevada

In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court set forth a framework for retroactivity in cases on collateral review. Under *Teague*, a new rule does not apply, as a general matter, to convictions that were final when the new rule was announced. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016).

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However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.* Second, and the exception at issue in this case, courts must give retroactive effect to new substantive rules. *Id.* “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (quoting *Schrivo v. Summerlin*, 542 U.S. 348, 353 (2004)).

Under the federal retroactivity framework, the substantive rule exception is not just limited to constitutional rules, but also “includes decisions that narrow the scope of a criminal statute by interpreting its terms.” *Id.* (quoting *Schrivo*, 542 U.S. at 351-52).

This Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Clem v. State*, 119 Nev. 615, 621, 628, 81 P.3d 521, 530-31 (2003); *Colwell v. State*, 118 Nev. 807, 819-20, 59 P.3d 463, 471-72 (2002).

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However, there is one significant difference between the Nevada retroactivity rules and those adopted by the United States Supreme Court. In contrast to the United States Supreme Court, the Nevada Supreme Court has held that decisions interpreting a criminal statute fall outside its retroactivity framework and have no retroactivity implications. *Nika v. State*, 124 Nev. 1272, 1288-89, 1301, 198 P.3d 839, 850-51, 859 (2008). It has reasoned that only constitutional rules raise retroactivity concerns. Decisions interpreting a statute are solely matters of state law. *Id.* at 1288-89, 1301, 198 P.3d at 850-51, 859. The only question with respect to who gets the benefit of a narrowing statutory interpretation is whether it represents a “clarification” or a “change” in state law. *Id.* at 1287, 198 P.3d at 850.

The Supreme Court’s recent decisions in *Montgomery* and *Welch* have invalidated this Court’s approach to statutory interpretation cases. As a result of *Montgomery* and *Welch*, state courts are now constitutionally required to retroactively apply a decision narrowing the interpretation of a substantive criminal statute under the “substantive rule” exception to *Teague*.

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In *Montgomery*, the United States Supreme Court, for the first time, constitutionalized the “substantive rule” exception to the *Teague* retroactivity rules. The consequence of this step is that state courts are now required to apply the “substantive rule” exception in the manner in which the United States Supreme Court applies it. *See Montgomery*, 136 U.S. at 727 (“States may not disregard a controlling constitutional command in their own courts.”); *Colwell*, 118 Nev. at 818, 59 P.3d at 471 (state courts must “give federal constitutional rights at least as broad a scope as the United States Supreme Court requires”). Thus, the United States Supreme Court’s interpretation of the substantive rule exception provides the constitutional floor for how this new constitutional rule must be applied in state courts.¹

¹ In a footnote, the Court of Appeals stated that Branham could have raised his retroactivity argument prior to *Montgomery*. Exhibit 1 at 7 n.3. This is clearly wrong. State courts were not constitutionally required to apply the substantive rule exception prior to *Montgomery*. *See Montgomery*, 136 S. Ct. at 729 (Supreme Court had previously “le[ft] open the question whether *Teague*’s two exceptions are binding on the States as a matter of constitutional law.”). Prior to that decision, Branham would have no basis to argue that the state courts were constitutionally required to apply the Supreme Court’s interpretation of the substantive rule exception. And, as discussed below, *Welch* provides the basis to argue that the substantive rule exception includes decisions narrowing the interpretation of a criminal statute.

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In *Welch*, the United States Supreme Court made absolutely clear that the federal constitutional “substantive rule” exception applies to statutory interpretation cases. The *Welch* Court was explicit: the substantive rule *Teague* exception “includes decisions that narrow the scope of a criminal statute by interpreting its terms.” *Welch*, 136 S. Ct. at 1264-65 (emphasis added); *accord id.* at 1267 (“A decision that modifies the elements of an offense is normally substantive rather than procedural.” (quoting *Schrirro*, 542 U.S. at 354)).

In fact, the *Welch* Court not only stated that the exception applies to statutory interpretation cases, it explained how to apply that exception in those cases. “[D]ecisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they ‘alter the range of conduct or the class of persons that the law punishes.’” *Id.* at 1267 (quoting *Schrirro*, 542 U.S. at 353).

This conclusion is also readily apparent in *Welch*’s discussion of its prior decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137

(1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review. As *Welch* put it, “The Court in *Bousley* had no difficulty concluding that *Bailey* was substantive, as it was a decision ‘holding that a substantive federal criminal statute does not reach certain conduct.’” *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*, 523 U.S. at 620).

But *Bailey* did not turn on constitutional principles; like *Byford*, it was a statutory interpretation decision, not a constitutional decision. Nonetheless, the Court in *Welch* classified *Bailey* as substantive. Thus, as *Welch* illustrates, it is irrelevant whether a decision rests on constitutional principles—if the decision is substantive, it is retroactive under the “substantive rule” exception no matter the basis for the decision.

Welch also renders irrelevant the Nevada Supreme Court’s prior reliance upon the clarification/change dichotomy for statutory interpretation cases. What is critically important—and new—about *Welch* is that it explains, for the first time, how the substantive exception applies in statutory interpretation cases. It explained that the *only* test

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for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes.

Welch's broader holdings bolster that conclusion. *Welch* announced a new test for how to determine if a new rule is substantive. The Court held, for the first time, that a new rule is substantive so long as it has “a substantive function.” *Welch*, 136 S.Ct. at 1266. A rule has a “substantive function” when it “alters the range of conduct or class of persons that the law punishes.” *Id.* As the Court indicated in *Welch*, when a decision narrows the scope of a criminal statute, it has such a substantive function, and is therefore retroactive. *Id.* at 1265-67.

In light of *Welch*, the distinction between a “change” and “clarification” is no longer operative for determining who gets the benefit of a narrowing statutory interpretation. *Welch* made clear that the *only* relevant question with respect to the retroactivity of such an interpretation is whether the new interpretation meets the definition of

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a substantive rule. If it meets the definition of a substantive rule, it does not matter whether that narrowing statutory interpretation is labeled a “change” or a “clarification,” because both types of decisions have “a substantive function.” *Welch*, 136 S.Ct. at 1266.

In sum, *Welch* holds that *all* statutory interpretation cases that narrow the scope of a substantive criminal statute—and not just those that are based on a constitutional rule—qualify as “substantive” rules for the purpose of retroactivity analysis. Under the Supremacy Clause, that rule is binding in state courts, just the same as in federal courts. *See* *Montgomery*, 136 S.Ct. at 727. Thus, after *Montgomery* and *Welch*, state courts are now required to give retroactive effect to any of their decisions that narrow the scope of a criminal statute.

2. The Court of Appeals’ published opinion is contrary to the clear language of *Welch*

In a published opinion, the Court of Appeals rejected this argument. *See* Ex. 1, *Branham v. State*, 134 Nev. Adv. Opinion 99 (Dec. 13, 2018). The Court of Appeals concluded that *Montgomery* and *Welch* did not alter *Teague’s* “threshold requirement that the new rule at issue must be a constitutional rule.” *Id.* at 6-7. Mirroring this Court’s prior precedent,

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the lower court reasoned *Byford* was not a constitutional rule, so it did not need to be applied retroactively under *Teague. Id.*

This reasoning is contrary to the express language of *Welch*. As discussed before, *Welch* made explicitly clear the “substantive rule” exception includes narrowing interpretations of criminal statutes:

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. *This includes decisions that narrow the scope of a criminal statute by interpreting its terms*, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.

Welch, 136 S.Ct. at 1264-65 (emphasis added) (internal citations omitted). And this is just one of several explicit statements indicating the same. *E.g. Id.* at 1267 (stating in a parenthetical that “[a] decision that modifies the elements of an offense is normally substantive rather than procedural”). As that case indicates, determining whether a statutory interpretation decision is substantive is a “*Teague* inquiry.” *Id.* at 1267.

The Court of Appeals does not acknowledge the Supreme Court's express language or explain why it doesn't control here. Its failure to

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grapple with these clear statements in *Welch* is not sustainable. This Court should review the lower court's published opinion.

3. **This Court should exercise its discretion and grant review as the issue presents each of the factors for review listed under Rule 40(B)(a)**

The import of *Montgomery* and *Welch* on Nevada's retroactivity scheme presents all of the factors listed in NRAP 40(B)(a). It is a question of first impression on a pure legal issue of general statewide importance. This case is also an appropriate vehicle to decide the question. The petition was timely filed within one year of *Welch*. *Nika* made clear that *Byford* was a decision narrowing the interpretation of the first-degree murder statute. Thus, the new rule from *Montgomery* and *Welch* directly impacts the retroactivity of *Byford*. Branham is within the category of petitioners who would benefit if *Byford* is applied retroactively. There is also no dispute here as to prejudice.

As discussed previously in subsection IV.A.2, the decision of the Court of Appeals conflicts with the clear language of *Welch*. In a similar fashion, the new constitutional rule in *Montgomery* and *Welch* has undercut this Court's prior precedent concerning the retroactive

application of a decision narrowing the interpretation of a substantive criminal statute.

Indeed, the United States Supreme Court’s position on this question is clear. After *Welch*, there can be no debate that the Supreme Court believes the scope of the substantive rule exception includes narrowing statutory interpretations. Indeed, *Welch* was a seven to one decision and the dissenting judge did not take issue with this part of the opinion. *See Welch*, 136 S. Ct. at 1271 (Thomas, J., dissenting) (“The Court has identified two types of substantive rules, and *Johnson*’s rule of decision fits neither description. It is not a new substantive constitutional rule, *nor does it narrow the scope of a criminal statute through statutory construction.*” (emphasis added)). This Court should review this issue to harmonize the Nevada retroactivity rules with this new rule.

Finally, this case involves an issue of fundamental statewide importance. The scope of the new federal constitutional “substantive rule” exception is an issue that will continue to recur. The specific question in this case is whether this new rule requires the retroactive application of this Court’s narrowing interpretation set forth in *Byford*.

That alone is a matter of statewide importance. When viewed in terms of the potential difference in restrictions of personal liberty attendant to each, the difference between first and second degree murder is one of the most consequential distinctions in the Nevada criminal justice system.

See Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

But the question here is not limited to the retroactivity of *Byford*. This new constitutional rule will apply to all future narrowing interpretations of a substantive statute. This Court should provide guidance to the lower courts on this matter.

B. This Court should reconsider its prior retroactivity decisions in light of *Welch* and the emerging nationwide consensus to grant full retroactive effect to narrowing statutory interpretation decisions.

Even if this Court disagrees with Petitioner's position that *Welch* imposes a constitutional requirement that the States give full retroactive effect to narrowing statutory interpretation decisions, *Welch* still provides good cause for this Court to reconsider its prior approach to retroactivity. It is clear from *Welch* in which direction this area of law is moving. That decision is a strong signal from the Supreme Court as to the broad retroactive impact of decisions narrowing the interpretation of

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a substantive criminal statute. In conjunction with *Montgomery*, *Welch* must be viewed, at the very least, as an indication the Court will seek uniform retroactive application of substantive rules amongst the States.

Nevada's complete bar on the retroactive application of a narrowing interpretation is inconsistent with the Supreme Court's approach. It is also an extreme outlier. Indeed, Nevada is the *only* jurisdiction to have adopted such a bar. In addition to the United States Supreme Court, the overwhelming majority of states to consider the issue (twelve of the fifteen) allow for full retroactive application of this type of narrowing interpretation. *See State v. Robertson*, 839 Utah Adv. Rep. 42, 2017 WL 2123459 at *16-17 & *16 n.137 (Utah May 15, 2017) (following federal rule and majority of state jurisdictions that allow for full retroactivity, listing cases). The other two states to have addressed the issue allow for retroactivity for most narrowing interpretations. *See Luuertsema v. Comm'r of Corr.*, 299 Conn. 740, 12 A.3d 817, 832 (2011) (general presumption in favor of full retroactivity); *Policano v. Herbert*, 7 N.Y.3d 588, 825 N.Y.S.2d 678, 859 N.E.2d 484, 495-95 (2006) (new precedent

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applies retroactively based, primarily, upon purpose to be served by new standard).

Thus, there is an emerging nationwide consensus on this issue. The Utah Supreme Court has recently provided a compelling analysis as to why this is so. That court explained that decisions interpreting substantive criminal statutes should be given full retroactive effect—both on appeal and on collateral review—because such decisions demonstrate “a significant risk that a defendant stands convicted of an act that the law does not make criminal.” *Robertson*, 2017 WL 2123459 at *16 (internal citations omitted). The court recognized, like the United States Supreme Court, that “it is only [the legislature], and not the courts, which can make conduct criminal.” *Id.*

This Court should follow this reasoning. A decision that modifies the elements of an offense, one such as *Byford*, strikes at the very core of what makes a new rule substantive. They are precisely the type of rules that alter the range of conduct the statute punishes. The timing or the characterization of the decision should not matter. A court does not legislate, it merely interprets. If a narrowing interpretation excludes a

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defendant, that defendant, no matter when the conviction became final, should receive the benefit of that interpretation.

At bottom, there is no equitable basis for this Court to treat the citizens of Nevada worse than how they would be treated in these other states and in the federal system. *Montgomery* and *Welch* have moved the needle towards a uniform application of the substantive rule exception amongst the States. Almost every other state to decide this issue is fully in line with the Supreme Court's approach. Petitioner urges this Court to review this issue to shift Nevada into that category.

V. CONCLUSION

Based on the foregoing, this Court should grant review.

DATED this 28th day of December, 2018.

Respectfully submitted,

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
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411 E. Bonneville Ave., Suite 250
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font, Century.

2. I further certify that this petition for rehearing complies with the page or type-volume limitations of NRAP 40B because it is proportionately spaced, has a typeface of 14 points, and contains 3,561 words.

DATED this 28th day of December, 2018.

Respectfully submitted,

/s/ *Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
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411 E. Bonneville Ave., Suite 250
Las Vegas, Nevada 89101
702-388-6577

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of December, 2018, electronic service of the foregoing PETITION FOR REVIEW shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy

/s/ Arielle Blanck

An Employee of the Federal Public Defender, District of Nevada

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CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada rules of Civil Procedure, the undersigned hereby certifies that on this December 28, 2018, a true and correct copy of the foregoing was mailed in the United States mail, first-class postage prepaid and addressed to the parties as follows:

Adam Laxalt
Attorney General
100 N. Carson Street
Carson City, NV 89701

William E. Branham
#39519
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

/s/ Arielle Blanck
An Employee of the Federal Public
Defender, District of Nevada

WILLIAM EDWARD BRANHAM,
Appellant,
vs.
ISIDRO BACA, WARDEN,
Respondent.

No. 74743-COA

FILED

DEC 13 2016

ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY *Eliz. L. Brown*
CHIEF DEPUTY CLERK

Appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and Jonathan M. Kirshbaum, Assistant Federal Public Defender, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Christopher J. Hicks, District Attorney, and Terrence P. McCarthy, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

BEFORE SILVER, C.J., TAO and GIBBONS, JJ.

OPINION

PER CURIAM:

In this opinion, we consider whether the United States Supreme Court decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), constitute good cause to overcome the procedural bars to a

postconviction petition for a writ of habeas corpus in which the petitioner contends he is entitled to the retroactive application of a nonconstitutional substantive rule. *Welch* and *Montgomery* do not alter the threshold requirement that, for a new substantive rule to apply retroactively, it must be a constitutional rule. We hold the decisions in those cases do not constitute good cause to raise a procedurally barred claim arguing a nonconstitutional rule should be applied retroactively. Therefore, we conclude the district court did not err by finding Branham failed to demonstrate good cause or a fundamental miscarriage of justice to overcome the procedural bars to his petition. Accordingly, we affirm.

PROCEDURAL HISTORY

William Edward Branham was convicted in 1993 of first-degree murder. The Nevada Supreme Court affirmed Branham's conviction on direct appeal. *See Branham v. State*, Docket Nos. 24478 & 24648 (Order Dismissing Appeals, December 18, 1996). Thereafter, Branham filed a timely postconviction petition for a writ of habeas corpus, which was resolved on its merits, and a subsequent, procedurally barred petition. The district court orders resolving those petitions were affirmed on appeal. *See Branham v. State*, Docket No. 45532 (Order of Affirmance, November 10, 2005); *Branham v. Warden*, Docket Nos. 33830 & 33831 (Order Dismissing Appeals, February 15, 2000).

Branham filed the instant postconviction petition for a writ of habeas corpus on April 7, 2017, more than 20 years after the remittitur was issued from his direct appeal. He claimed he is entitled to the retroactive benefit of the narrowed definition of "willful, deliberate and premeditated" murder announced in *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000), and, accordingly, his convictions should be set aside and he should receive a new trial wherein the jury is properly instructed. Although

acknowledging his petition was subject to procedural bars, Branham asserted the recent United States Supreme Court decisions in *Welch* and *Montgomery* provided good cause to raise this claim. The district court dismissed Branham's petition as procedurally time-barred, finding he failed to demonstrate good cause or a fundamental miscarriage of justice to overcome the procedural bars. This appeal follows.

ANALYSIS

Branham claims the district court erred by dismissing his petition as procedurally barred. Branham acknowledges his petition was subject to procedural bars, *see NRS 34.726(1); NRS 34.810(1)(b), (2)*, but he argues the district court erred by finding he failed to demonstrate good cause or a fundamental miscarriage of justice to overcome the procedural bars.¹

The application of procedural bars is mandatory, *see State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), but a petitioner may overcome the bars in one of two ways: (1) by demonstrating good cause and actual prejudice, *see NRS 34.726(1); NRS 34.810(3)*, or (2) by demonstrating actual innocence, such that a fundamental miscarriage of justice would result were the underlying claims not heard on the merits, *see NRS 34.800(1)(b); Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). As discussed below, we conclude the district court did not err by finding Branham failed to overcome the procedural bars.

¹To the extent Branham also claims the district court erred by finding he failed to demonstrate prejudice, because Branham had to demonstrate both good cause and prejudice to overcome the procedural bars, *see NRS 34.726(1); NRS 34.810(1)(b), (3)*, and because, as explained below, we conclude he did not demonstrate good cause, we need not address this claim.

Branham did not demonstrate good cause

To demonstrate good cause to overcome the procedural bars, a petitioner must offer a legal excuse by showing “that an impediment external to the defense prevented him . . . from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). That is, a petitioner must show “that the factual or legal basis for a claim was not reasonably available . . . or that some interference by officials, made compliance impracticable.” *Id.* (internal quotation marks omitted).

Branham claims he demonstrated good cause to overcome the procedural bars because the recent United States Supreme Court decisions in *Welch* and *Montgomery* expand the reach of federal retroactivity jurisprudence to state collateral proceedings.

In both *Welch* and *Montgomery*, the issue before the Court was whether an earlier decision announced a new, substantive rule of constitutional law that must be applied retroactively to cases that were final when the earlier decision was rendered. *See Welch*, 578 U.S. at __, 136 S. Ct. at 1261; *Montgomery*, 577 U.S. at __, 136 S. Ct. at 732-34. The question in *Welch* was whether the prior decision constituted a new *substantive* constitutional rule. 578 U.S. at __, 136 S. Ct. at 1261. In deciding this question, the Court held that whether a rule is characterized as procedural or substantive depends on the function of the new rule, “not the constitutional guarantee from which the rule derives.” *Id.* at __, 136 S. Ct. at 1266. The question in *Montgomery* was whether “the Constitution requires state collateral review courts to give retroactive effect” to “a new substantive rule of constitutional law [that] controls the outcome of a case.” 577 U.S. at __, 136 S. Ct. at 729. The court held the answer was yes. *Id.*

Branham asserts these decisions establish that the substantive rule exception to the federal retroactivity framework requires states to apply any new substantive rule, including a decision narrowing the interpretation of a criminal statute, retroactively. In particular, Branham claims that *Welch* implies “the clarification/change in law dichotomy [in retroactivity analysis] has become essentially obsolete” and, after *Welch*, the only relevant question is whether the new interpretation represents a new substantive rule. Branham argues that the decision in *Byford* set forth a new substantive rule and, as a result, the decisions in *Welch* and *Montgomery* provide a legal basis that was not previously available to support his underlying claim that he is entitled to the retroactive application of *Byford*. Branham is mistaken as to the implications of the holdings of *Welch* and *Montgomery*.

The United States Supreme Court first set out its modern retroactivity framework in the plurality opinion *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* established that new constitutional rules, i.e., rules of criminal procedure that have an underlying constitutional source, generally do not apply retroactively to convictions that were final when the new constitutional rule was announced. *Id.* at 306-07. However, *Teague* recognized two categories of constitutional rules that are not subject to its retroactivity bar. *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 728. “First, courts must give retroactive effect to new substantive rules of constitutional law.” *Id.* “Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect.” *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264 (internal quotation marks omitted). The threshold requirement for the applicability of *Teague*’s retroactivity framework is that

the new rule at issue must be a constitutional rule.² *See Teague*, 489 U.S. at 306.

In both *Welch* and *Montgomery*, the Court applied the existing *Teague* retroactivity framework to decide the issue before it. *See Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-68; *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 728-36. Nothing in either case alters *Teague*'s threshold requirement that the new rule at issue must be a constitutional rule. *See Welch*, 578 U.S. at ___, 136 S. Ct. at 1264 (reiterating that the *Teague* retroactivity framework applies to new constitutional rules); *Montgomery*, 577 U.S. at ___, 136 S. Ct. at 728 (same). Because the decisions in *Welch* and *Montgomery* do not alter this threshold requirement, we hold those decisions do not constitute good cause for raising a procedurally barred claim arguing a nonconstitutional rule should be applied retroactively.

Here, Branham claimed the decisions in *Welch* and *Montgomery* provided good cause to raise his *Byford* claim. However, the decision in *Byford* "was a matter of interpreting a state statute, not a matter of constitutional law," and "[n]othing in the language of *Byford* suggests that decision was grounded in constitutional concerns." *Nika*, 124 Nev. at 1288, 198 P.3d at 850. Because the decision in *Byford* did not establish a new constitutional rule, the decisions in *Welch* and *Montgomery* do not

²Nevada has adopted a more liberal version of the federal retroactivity framework, but still recognizes this threshold requirement. *See Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008) ("[I]f a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law."); *Colwell v. State*, 118 Nev. 807, 816-17, 59 P.3d 463, 469-70 (2002).

constitute good cause for Branham to raise his procedurally barred claim that *Byford* must be applied retroactively.³

Branham did not demonstrate a fundamental miscarriage of justice

Branham also claims he demonstrated a fundamental miscarriage of justice to overcome the procedural bars. A district court may reach the merits of any claims of constitutional error where a petitioner can demonstrate a fundamental miscarriage of justice has resulted in the conviction of one who is actually innocent. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Branham's argument fails for two reasons.

First, a successful claim of a fundamental miscarriage of justice only allows for consideration on the merits of claims of *constitutional* error. But because the *Byford* decision was not grounded in constitutional concerns, Branham's underlying *Byford* claim was not a claim of constitutional error. Accordingly, Branham would not have been entitled to have his underlying *Byford* claim decided on the merits. Second, Branham could not demonstrate he was actually innocent. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) ("[A]ctual innocence' means factual innocence, not mere legal insufficiency." (alteration in original) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998))). He

³We note that even if the holding in *Byford* could be construed to fall within the *Teague* substantive rule exception, the portions of *Welch* and *Montgomery* on which Branham relies are based on federal law that has long been available for Branham to raise in postconviction proceedings. Further, because Nevada adopted the federal retroactivity framework in 2002, Branham could have raised his retroactivity argument long before the decision in *Montgomery* was issued. Therefore, *Welch* and *Montgomery* still would not provide good cause to excuse the procedural bars. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (holding a good cause claim cannot itself be procedurally barred).

thus failed to demonstrate dismissal of his claim would result in a fundamental miscarriage of justice.

CONCLUSION

We hold that the United States Supreme Court decisions in *Welch* and *Montgomery* do not constitute good cause to raise a procedurally barred claim arguing that a nonconstitutional rule should be applied retroactively. Because the decision in *Byford* did not establish a new constitutional rule, we conclude the district court did not err by finding the decisions in *Welch* and *Montgomery* did not constitute good cause for Branham to raise his procedurally barred claim that *Byford* must be applied retroactively.⁴ Branham also failed to demonstrate that dismissal of his claim would result in a fundamental miscarriage of justice. Accordingly, we affirm the district court's order dismissing Branham's postconviction petition for a writ of habeas corpus as procedurally barred.

Silner, C.J.

Silver

Tao, J.

Tao

Gibbons, J.

Gibbons

⁴We note the district court erred by finding that *Welch* and *Montgomery* did not provide good cause to overcome the procedural bars on the ground that *Byford* did not announce a new substantive rule. Nevertheless, for the reasons stated, we conclude the district court reached the correct result, albeit for the wrong reason. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

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9

10 WILLIAM EDWARD BRANHAM,

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12

Petitioner,

Case No. CR92-1048
Dept. No. 10

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ISIDRO BACA, WARDEN,

Respondent.

15 _____ /

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ORDER

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Presently before the Court is the MOTION TO DISMISS PETITION FOR WRIT OF
HABEAS CORPUS (POST-CONVICTION) ("the Motion") filed by ISIDRO BACA, WARDEN
("the State") on June 1, 2017. The OPPOSITION TO MOTION TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Opposition") was filed by WILLIAM
EDWARD BRANHAM ("the Petitioner") on June 16, 2017. The State filed the REPLY TO
OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION) ("the Reply") on June 26, 2017, and contemporaneously submitted the

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1 matter for the Court's consideration. The Court entered an ORDER TO SET ORAL
2 ARGUMENT on August 17, 2017. The Court heard oral argument on September 20, 2017, at
3 which time the Court took the Motion under advisement.
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5 The Petitioner was convicted of MURDER OF THE FIRST DEGREE in 1993. *See*
6 JUDGMENT OF CONVICTION entered April 14, 1993. He was sentenced to life in the Nevada
7 Department of Corrections without the possibility of parole. The Nevada Supreme Court affirmed
8 the conviction in an ORDER DISMISSING APPEALS entered December 18, 1996. A remittitur
9 was issued on January 6, 1997.
10

11 The Petitioner filed a PETITION FOR WRIT OF HABEAS CORPUS (POST
12 CONVICTION) ("the Petition") on April 7, 2017.¹ The Court entered an ORDER TO RESPOND
13 on May 16, 2017, directing the State to respond to the Petition. Thereafter, the State filed the
14 Motion.
15

16 NRS 34.726 enumerates the procedural requirements for, *inter alia*, filing a writ of habeas
17 corpus. NRS 34.726(1) provides, "a petition that challenges the validity of a judgment or sentence
18 must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken
19 from the judgment, within 1 year after the Supreme Court issues its remittitur." The Petition may
20 be untimely filed if "good cause for delay exists." *Id.* Good cause for delay exists if: 1) the delay
21 is not the petitioner's fault; and 2) dismissing the petition will unduly prejudice the petitioner. NRS
22 34.726(1)(a);(b). The delay is not the fault of the petitioner when an "impediment external to the
23 defense" prevents the petitioner from timely filing. *Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d
24

25
26 ¹ The Petitioner has filed two prior state post-conviction petitions for writ of habeas corpus. The Supreme Court
27 affirmed the order denying the first petition, and thereafter affirmed the order dismissing the second petition. *See*
28 *Branham v. Warden*, Docket No. 33830 and 33831, Order Dismissing Appeals (February 15, 2000); *Branham v. State*,
Docket No. 45532, Order of Affirmance (November 10, 2005).

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1 785, 787 (1998). An impediment is external to the defense when “the factual or legal basis for a
2 claim was not reasonably available to counsel, or that some ‘interference by officials’ made
3 compliance [with procedural requirements] impracticable.” *Hathaway v. State*, 119 Nev. 248, 252,
4 71 P.3d 503, 506 (2003) (internal citation omitted). Undue prejudice to the petitioner exists “not
5 merely [when] the errors [alleged in the petition] created a possibility or prejudice, but that they
6 worked to [the Petitioner’s] actual and substantive disadvantage, in affecting the...proceedings with
7 error of constitutional dimensions.” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716
8 (1993)(internal citation omitted).
9

10 The Nevada Supreme Court explains upholding procedural requirements for petitions for
11 writs of habeas corpus is mandatory. *Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 536
12 (2001). A court may only overlook procedural failures, including a failure to adequately
13 demonstrate good cause for delay, where a refusal to consider a petitioner’s claim would be a
14 “fundamental miscarriage of justice.” *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. A fundamental
15 miscarriage of justice is shown where the petitioner “makes a colorable showing he is actually
16 innocent of the crime,” and “that no reasonable juror would have convicted him absent a
17 constitutional violation.” *Id.* Actual innocence “means factual innocence, not mere legal
18 insufficiency.” *Bousley v. U.S.*, 523 U.S. 614, 615, 118 S. Ct. 1604, 1607 (1998). Factual
19 innocence may be demonstrated by presenting “reliable evidence not presented at trial.” *Calderon*
20 v. *Thompson*, 523 U.S. 538, 541, 118 S. Ct. 1489, 1493 (1998). The presence in the petition of a
21 claim for ineffective assistance of counsel may provide good cause for filing a successive petition,
22 but the claim is still subject to timeliness requirements. *Crump v. Warden*, 113 Nev. 293, 304-05,
23 934 P.2d 247, 254 (1997); *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 235, 112 P.3d 1070,
24 1077 (2005).
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1 The Petition is allegedly based on a previously unavailable constitutional claim. The
2 Petition, 8:14. The Petition alleges the new constitutional claim providing the Petitioner grounds
3 for post-conviction habeas corpus relief was established in two recent United States Supreme Court
4 decisions: *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct.
5 1257 (2016). The Petition, 8:18-20. Specifically, the Petition argues *Welch* and *Montgomery*
6 mandate the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), in all
7 cases where a “*Kazalyn* instruction” was used at trial.² See the Petition, 8:2-6.
8

9 The Motion argues the Petitioner cannot overcome the procedural bars because “*Welch* has
10 no application to the instant case, as the change of the law announced in *Byford* had no
11 constitutional component and did not narrow the ‘conduct’ that was prohibited....” The Motion,
12 5:9-12. The Opposition argues state courts must retroactively apply a substantive narrowing of a
13 criminal statute “regardless of how it is characterized.” The Opposition, 2:23-25.
14

15 *Montgomery* and *Welch* each utilized the “*Teague* framework” to analyze the retroactivity
16 of two different rules of constitutional law set forth in prior United States Supreme Court decisions.
17 While there is generally a bar on retroactive application of new rules of criminal procedure, *Teague*
18 and its progeny mandate the retroactive application of new substantive criminal rules and new
19 “watershed rules of criminal procedure” in federal collateral review proceedings. *Teague v. Lane*,
20 489 U.S. 288, 109 S. Ct. 1060 (1989); *Schrivo v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519,
21 2523 (2004); *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257 (1990). “A rule is substantive rather
22 than procedural if it alters the range of conduct or class of persons that the law punishes.” *Schrivo*,
23 542 U.S. at 353. “This includes decisions that narrow the scope of a criminal statute by interpreting
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27 ² *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992). A “*Kazalyn* instruction” is a jury instruction or set of jury
28 instructions which blurs the distinction between “deliberate” and “premeditated.” *Byford*, 116 Nev. at 235, 994 P.2d at
713.

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1 its terms, as well as constitutional determinations that place particular conduct or persons covered
2 by the statute beyond the State's power to punish." *Id.* at 351-352. "Procedural rules, in contrast
3 are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of*
4 *determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 730 (quoting *Schrivo*, 542
5 U.S. at 353 (italics in original)).
6

7 The *Welch* Court considered the retroactive application of *Johnson v. United States*, 135 S.
8 Ct. 2551 (2015). The *Johnson* Court held a federal statutory clause unconstitutional under the void-
9 for-vagueness doctrine. The *Welch* Court reasoned, "decisions that interpret a statute are
10 substantive if and when they meet the normal criteria for a substantive rule...," and held *Johnson*
11 announced a new substantive rule that is retroactive in cases on collateral review. 136 S. Ct. at
12 1267-68.
13

14 The new law at issue in *Montgomery* was set forth in *Miller v. Alabama*, 567 U.S. 460, 132
15 S. Ct. 2455 (2012). The *Miller* Court held mandatory life without parole sentences for juvenile
16 homicide offenders is a violation of the Eighth Amendment. The *Montgomery* Court considered
17 "whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." 136
18 S. Ct. at 729. The Court held, "when a new *substantive rule of constitutional law* controls the
19 outcome of a case, the Constitution requires state collateral review courts to give retroactive effect
20 to that rule." *Id.* (emphasis added).
21
22

23 In *Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008), the Supreme Court of
24 Nevada held *Byford* does not have retroactive application because it "announced a new rule and
25 that rule was not required as a matter of constitutional law." The *Nika* Court noted the *Byford*
26 Court "indicated that instructions defining these separate words are not required because they are
27 used in the first degree murder statute 'in their ordinary sense'" and "concluded that if a jury is
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1 instructed on the meaning of one of the terms, then it also must be instructed on the meaning of the
2 other two terms.” *Nika*, 124 Nev. at 1284, 198 P.3d at 847. Thus, the practical effect of the new
3 rule announced in *Byford* is one of procedural significance: the terms “willful,” “premeditated,” and
4 “deliberate” need not be separately defined in jury instructions, but if one is defined all must be
5 defined.

7 Even assuming *Montgomery* mandates the application of the *Teague* rule on state collateral
8 review proceedings in all cases where there has been a substantive narrowing of a criminal statute,
9 the Petitioner is not entitled to a retroactive application of *Byford*. This is because the new rule
10 announced in *Byford* is not a substantive rule and is therefore not subject to the rule announced in
11 *Montgomery*.

13 **It is ORDERED** the State’s MOTION TO DISMISS PETITION FOR WRIT OF HABEAS
14 CORPUS (POST-CONVICTION) is hereby **GRANTED**. The PETITION FOR WRIT OF
15 HABEAS CORPUS (POST CONVICTION) is hereby **DISMISSED**.

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17 DATED this 5 day of ^{DECEMBER} November, 2017.



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19 ELLIOTT A. SATTLER
20 District Judge
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of November, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 5 day of ~~November~~^{DECEMBER}, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Terrence P. McCarthy, Esq.

Jonathan M. Kirshbaum, Esq.


Sheila Mansfield
Judicial Assistant

1 2645
2 RENE L. VALLADARES
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8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE
10 STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

11 WILLIAM EDWARD BRANHAM,
12 Petitioner,
13 v.
14 ISIDRO BACA, WARDEN, et al.,
15 Respondents.

Case No. CR92-1048
Dept. No. 10

16 OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS
17 CORPUS (POST-CONVICTION)

18 Petitioner William Edward Branham, by and through his attorney, Assistant
19 Federal Public Defender Jonathan M. Kirshbaum, hereby files this Opposition to
20 Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction). This
21 opposition is based on the attached points and authorities as well as all other
22 pleadings, documents, and exhibits on file.

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1 POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 In his post-conviction habeas petition, Branham argued that, under the recent
4 United States Supreme Court decisions in *Montgomery v. Louisiana*, 136 S.Ct. 718
5 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016), he was entitled to have
6 *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), retroactively applied to his case
7 as it falls under the *Teague* substantive exception.

8 Respondents have moved to dismiss Branham's petition, arguing that the
9 petition is untimely and successive. They argue Branham's claim should be rejected
10 because (1) the *Teague* retroactivity rules only apply to a new constitutional rule; (2)
11 the narrowing interpretation in *Byford* does not fall under the substantive exception
12 to *Teague* because it does not limit the "conduct" that is considered criminal under
13 the statute; and (3) this Court cannot assume that *Welch* overruled *Bunkley v.*
14 *Florida*, 538 U.S. 835 (2003), the case on which the Nevada Supreme Court relied to
15 limit the application of *Byford* only to those cases that had not become final at the
16 time it was decided.

17 Respondents' arguments have no merit and should be rejected. First, the
18 United States Supreme Court made it abundantly clear in *Welch* that the substantive
19 exception in *Teague* applies to narrowing interpretations of criminal statutes.
20 Second, the substantive exception in *Teague* applies when the interpretation alters
21 the range of conduct or the class of persons the law punishes. The narrowing
22 interpretation of *Byford* does both. Finally, the question here is not whether or not
23 *Montgomery* and *Welch* overruled *Bunkley*. Federal law now requires that state
24 courts apply a substantive narrowing of a criminal statute retroactively, regardless
25 of how it is characterized. That is a different question than the one decided in
26 *Bunkley*. The Court in *Bunkley* was not addressing retroactivity concerns, but a
27 different due process question. In fact, the Court was specifically not addressing the

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1 question of whether a change in law had to apply retroactively to convictions that had
2 already become final. That answer is now provided in *Welch*. That decision says
3 that, if there is a substantive change in law, it must be given retroactive effect.

4 For the reasons discussed herein, the motion to dismiss should be denied and
5 the petition should be granted.

6 II. ARGUMENT

7 A. The Substantive Exception to *Teague* Applies to Interpretations of 8 Criminal Statutes That are Substantive

9 Respondents argue that the *Teague* substantive exception only applies to new
10 constitutional rules. Motion to Dismiss (“MTD”) at 2, 3-4. They claim that *Welch*
11 “noted several times” that the exception applies “only with new ‘constitutional’ rules.”
12 *Id.* at 4.

13 This is simply wrong. Not once in *Welch* did the Supreme Court state that the
14 substantive exception to *Teague* “only” applies to new constitutional rules. In fact,
15 the opposite is true. The Court often times simply used the term “new rule.” *Welch*,
16 136 S. Ct. at 1264-65. More important, the Court specifically stated that it has
17 applied the *Teague* substantive exception in statutory interpretation cases. *Welch*,
18 136 S. Ct. at 1267 (discussing its application of the substantive exception in *Bousley*
19 *v. United States*, 523 U.S. 614 (1998)).

20 More specifically, the Court in *Welch* explained precisely how a statutory
21 interpretation decision like *Bousley* fits under *Teague*. First, it confirmed that its
22 application of the substantive exception to *Teague* did include statutory
23 interpretation cases like *Bousley*. It stated that, in *Bousley*, the Court was
24 determining what retroactive effect should be given to its prior decision in *Bailey v.*
25 *United States*, 516 U.S. 137 (1995), which had narrowed the meaning of the term
26 “use” of a firearm in relation to a drug crime under 28 U.S.C. § 924(c). *Bousley*, 523
27 U.S. at 620. The Court stated in *Welch* that it “had no difficulty concluding [in

1 *Bousley*] that *Bailey* was substantive, as it was a decision ‘holding that a substantive
2 federal criminal statute does not reach certain conduct.’” *Welch*, 136 S. Ct. at 1267.

3 The Court made clear in *Welch* that the *Bousley* decision demonstrates how
4 the *Teague* substantive exception should be applied. *Id.* It stated: “*Bousley* thus
5 contradicts the contention that the *Teague* inquiry turns only on whether the decision
6 at issue holds that Congress lacks some substantive power.” *Id.* More important, the
7 Court emphatically concluded that statutory interpretation cases are treated like any
8 other application of the substantive exception to *Teague*:

9 Neither *Bousley* nor any other case from this Court treats
10 statutory interpretation cases as a special class of decisions
11 that are substantive because they implement the intent of
12 Congress. Instead, decisions that interpret a statute are
13 substantive if and when they meet the normal criteria for
a substantive rule: when they “alter the range of conduct
or the class of persons that the law punishes.” *Schriror*[v.
Summerlin], [542 U.S. 348] at 353 [2004].

14
15 *Id.*

16 As can be seen, the United States Supreme Court in *Welch* has left no doubt
17 that the substantive exception to *Teague* applies to statutory interpretation cases.
18 Indeed, the Court in *Welch* used those statutory interpretation cases to define the
19 contours of the substantive exception. *Welch*, 136 U.S. at 1266, 1267. “States may
20 not disregard a controlling constitutional command in their own courts.”
Montgomery, 136 S. Ct. at 727 (quoting *Martin v. Hunter’s Lessee*, 1 Wheat 304, 340-
22 41 (1816)). The Supreme Court has now held that the substantive exception applies
23 to state courts as a matter of constitutional law. The Court has applied that
24 substantive exception to statutory interpretation cases that narrow the definition of
25 a criminal statute. The state courts are now required to apply the substantive
26 exception in the manner that the United States Supreme Court has indicated. *Byford*
27 falls under the substantive exception as it narrowed the interpretation of a criminal

1 statute. That is no different than what the Supreme Court described as occurring in
2 *Bousley*.¹ It is the end of the inquiry here.

3 **B. The Substantive Exception to *Teague* Applies Because *Byford*
4 Alters Both the Range Of Conduct and the Class of Persons the Law
5 Punishes**

6 Respondents argue that the substantive exception to *Teague* does not apply
7 here because *Byford* narrowed the *mens rea* element. MTD at 4-5. As such, *Byford*
8 did not alter the range of “conduct” that the statute made criminal. *Id.* at 5.

9 This argument has no merit. In the first instance, Respondents left out one of
10 the categories of the substantive exception. The substantive exception has two
11 categories and includes rules that alter either “the range of conduct” or the “class of
12 persons” that the law punishes. *Welch*, 136 S. Ct. at 1264-65. The narrowing
13 interpretation of *Byford* applies to both. Intent in a criminal case is proven through
14 conduct, as a jury cannot get inside the mind of the defendant. *See Larsen v. State*,
15 86 Nev. 451, 453, 470 P.2d 417,418 (1970) (“intent need not be proved by positive or
16 direct evidence, but may be inferred from the conduct of the parties and the other
17 facts and circumstances disclosed by the evidence”). *Byford* limits the range of
18 conduct that is criminal to conduct from which it can be inferred that a defendant
19 acted with deliberation as that term is defined in *Byford* when committing a murder.

20 Moreover, *Byford* most certainly limits the “class of persons” who the law
21 punishes. *Byford* limits the class of persons to only those people who act with

22 ¹ To note, the Nevada Supreme Court has suggested in dicta on one occasion
23 that a substantive change in law that narrowed the definition of a statute would have
24 retroactive effect. *Mitchell v. State*, 122 Nev. 1269, 1277, n.25, 149 P.3d 33, 38 n.25
25 (2006). However, the Nevada Supreme Court has otherwise and repeatedly held that
26 a change in the interpretation of a statute does not have retroactive implications.
27 *Nika v. State*, 122 Nev. 1269, 1288, 198 P.3d 839, 850 (2008) (“We affirm our decisions
in *Clem* and *Cowell* and maintain our course respecting retroactivity analysis—if a
rule is new but not a constitutional rule, it has no retroactive application to
convictions that are final at the time of the change in law. . . . [T]he interpretation
and definition of the elements of a state criminal statute are purely a matter of state
law. . . .”).

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premeditation *and* deliberation as defined in *Byford* when committing a murder. It falls squarely within the substantive exception.

C. *Montgomery and Welch* Created a New Rule that Must Be Applied in State Court that Goes Beyond What Was Decided in *Bunkley*

Respondents argue that Branham cannot obtain relief here because this Court would need to conclude that *Montgomery* and *Welch* overruled *Bunkley*. MTD at 3. According to Respondents, only the Supreme Court can overrule its own prior precedent. *Id.*

This argument has no merit. Branham is not contending that *Welch* and *Montgomery* overruled *Bunkley*. Rather, the argument here is that the Nevada Supreme Court's interpretation and application of *Bunkley* is no longer valid in light of these new cases. Essentially, *Welch* answers the retroactivity question that was left open in *Bunkley* and demonstrates that the clarification/change dichotomy the Nevada Supreme Court used does not answer the relevant retroactivity question here.

In the first instance, *Bunkley* did not address the retroactivity question at issue here. *Bunkley* actually concerned whether or not the state courts had properly applied *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Court had originally granted certiorari to determine “when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.” *Id.* at 226. However, in the process of litigation before the Court, the Pennsylvania Supreme Court indicated that it had clarified, not changed, the law. As a result, the Supreme Court held that this clarification “presents no issue of retroactivity,” *Id.* at 228, meaning that the original retroactivity question “disappeared,” *Bunkley*, 538 U.S. at 840. Rather, the question was purely one of due process, whether the State had presented enough evidence to convict the defendant of all elements of the crime beyond a reasonable doubt. *Id.* at 228-29.

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1 *Bunkley* was an extension of *Fiore*. *Bunkley* concerned a change, rather than
2 a clarification, in law. *Bunkley*, 538 U.S. at 840-41. Once again, the Court indicated
3 that it was not addressing a retroactivity issue. *Id.* at 840. Rather, the Court
4 concluded that a change in law would also establish the same due process violation
5 that occurred in *Fiore* if the change occurred prior to the conviction becoming final.
6 *Id.* at 840-42. The problem in *Bunkley* was that the Florida Supreme Court had not
7 indicated precisely when that change occurred. *Id.* at 841-42. As a result, the Court
8 remanded the case to the state court for that court to determine whether or not a
9 *Fiore* error occurred. *Id.*

10 As can be seen, the retroactivity question at issue here was not addressed in
11 *Bunkley*. The Court did not determine that a change in law does not apply
12 retroactively. Rather, in *Bunkley*, the Court was answering an antecedent question
13 that needed to be determined before retroactivity became relevant. Certainly, if the
14 Florida Supreme Court had later found that the change occurred after *Bunkley*'s
15 conviction became final, the analysis would have had to turn to whether that change
16 should apply retroactively to him. As the original question on which certiorari was
17 granted in *Fiore* shows, the United States Supreme Court does believe that a change
18 in the definition of a statute could raise retroactivity concerns. But in the *Bunkley*
19 decision itself, the Court was not addressing that subsequent retroactivity question.
20 More important, the Court in *Bunkley* did not hold that a change in law does not, or
21 could not, apply retroactively. The Court was simply stating, in an affirmative way,
22 that a change in law had to be applied, as a matter of due process, to convictions that
23 had not yet become final.

24 It is now *Montgomery* and *Welch* that answer the retroactivity question with
25 respect to a change in law. In that situation, the substantive exception to *Teague*
26 now applies to state courts as a matter of due process. That substantive exception
27 requires that a new rule, including a narrowing interpretation of a criminal statute,

1 apply retroactivity so long as it meets the definition of substantive. *Byford* meets
2 that definition so it must be applied retroactively to Branham's case.

3 What is important here is that the Nevada Supreme Court refused to consider
4 whether a change in law applied retroactively at all in *Nika v. State*, 122 Nev. 1269,
5 1288, 198 P.3d 839, 850 (2008). It was only willing to go so far as to acknowledge the
6 clarification/change in law dichotomy, essentially making that the end of the
7 retroactivity analysis with respect to statutory interpretation cases. It flat out
8 refused to address any potential retroactivity concerns with the change in law in
9 *Byford*, stating that retroactivity only applied to constitutional rules. However,
10 *Welch* shows that the clarification/change dichotomy is not where the retroactivity
11 analysis ends for statutory interpretation issues. Rather, the substantive exception
12 now applies to statutory interpretation issues in state court and that exception, and
13 that exception alone, determines whether a change in the interpretation of a statute
14 applies retroactively.

15 To be sure, the implications of *Welch* is that the clarification/change in law
16 dichotomy has become essentially obsolete. Now, it is irrelevant whether there has
17 been a clarification or change in law that narrows the definition of a criminal statute.
18 Either one will apply retroactively. But that step does not necessitate an overruling
19 of *Bunkley*. It is simply a consequence of the Supreme Court deciding in *Welch* the
20 next step in the analysis, namely when an interpretation of a criminal statute must
21 apply retroactively.

22 D. The Petition Is Not Barred By Laches

23 In the final sentence of their motion, Respondents argue, for the first time, that
24 the petition is "barred by laches." MTD at 5.

25 This throwaway language is insufficient to plead a laches defense. Under
26 N.R.S. 34.800(2), "In a motion to dismiss the petition based on . . . prejudice, the
27 respondent or the State of Nevada must specifically plead laches. The petitioner must

1 be given an opportunity to respond to the allegations in the pleading before a ruling
2 on the motion is made.”

3 Under the statute, laches must be specifically pled and the prejudice on which
4 the motion to dismiss is based must be indicated. There were no allegations to
5 support such a laches defense based on prejudice in the motion. It was simply a three-
6 word comment thrown in as the last three words of the motion. There are no
7 allegations to which Petitioner can respond. That cannot be considered an
8 affirmative assertion of the laches defense.

9 In any event, as a constitutional matter and as a matter of equity, laches
10 cannot, and should not, bar the petition. The state courts are now constitutionally
11 required to apply a substantive change retroactively. That is the import of
12 *Montgomery*. And the facts of *Montgomery* demonstrate the breadth and far-
13 reaching application of this new constitutional rule. Put simply, there is no temporal
14 limit on how far back a new substantive change must be applied.

15 The question in *Montgomery* was whether the Supreme Court’s prior decision
16 in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in which the Supreme Court held that
17 a juvenile cannot be sentenced to life without parole absent consideration of the
18 defendant’s special circumstance as a juvenile, applied retroactively. *Montgomery*,
19 136 S.Ct. at 725. The petitioner in *Montgomery* received a life without parole
20 sentence as a juvenile almost 50 years prior to the decision in *Miller*. *Id.* at 726. After
21 determining that *Miller* did apply retroactively, the Court held that “prisoners like
22 *Montgomery* *must* be given the opportunity to show their crime did not reflect
23 irreparable corruption; and, if it did not, their hope for some years of life outside
24 prison walls must be restored.” *Id.* at 736-37 (emphasis added).

25 As can be seen, the new rule from *Montgomery* has exceedingly broad
26 implications. If a change in law is retroactive, a petitioner whose conviction has
27 already become final, even if it has been final for 50 years, must be given the benefit

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1 of that new rule. That overcomes any allegation of lack of diligence or prejudice.
2 These are simply not relevant factors in the retroactivity determination. The federal
3 Constitution requires that the rule must apply to a petitioner in Branham's position.

4 Further, as a matter of equity, this Court should not impose the discretionary
5 laches bar. The length of time that has passed in this case is not attributable to a
6 delay from Branham. In fact, Branham was unable to obtain relief on this issue prior
7 to *Montgomery* and *Welch*. The Nevada Supreme Court definitively held in *Nika* that
8 petitioners whose convictions became final prior to *Byford* were not entitled to relief.
9 The United States Supreme Court has now issued a new constitutional rule with
10 direct application to Branham's case that was not previously available to him. The
11 state courts are constitutionally required to apply this new rule to his case. The
12 record indicates that Branham has not inappropriately delayed this case. The
13 discretionary laches bar should not be imposed. *See State v. Powell*, 122 Nev. 751,
14 758-59, 138 P.3d 453, 458 (2006) (State was not entitled to relief under N.R.S. 34.800
15 because petitioner had not inappropriately delayed case).

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1 III. CONCLUSION

2 Accordingly, for the reasons stated in the petition and as supplemented herein,
3 the motion to dismiss should be denied. Branham has demonstrated sufficient
4 grounds to overcome any purported procedural bars and respectfully requests that
5 this Court:

- 6 1. Issue a writ of habeas corpus to have Branham brought before
7 the Court so that he may be discharged from his unconstitutional
8 confinement and sentence;
- 9 2. To the extent any pertinent facts are in dispute, conduct an
10 evidentiary hearing at which proof may be offered concerning such
11 matters; and
- 12 3. Grant such other and further relief as, in the interest of justice,
13 may be appropriate.

14 DATED this 16th day of June, 2017.

15 Respectfully submitted,
16 RENE L. VALLADARES
17 Federal Public Defender

18 */s/Jonathan M. Kirshbaum*
19 JONATHAN M. KIRSHBAUM
20 Assistant Federal Public Defender

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1 AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

2 The undersigned does hereby affirm that the preceding OPPOSITION TO
3 MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-
4 CONVICTION) filed in the District Court Case No. CR92-1048.

5 Does not contain the social security number of any person.

6 - OR -

7 Contains the social security number of a person as required by:

8 A: A specific state or federal law

9 B: For the administration of a public program or for an application
10 for a federal or state grant.

12 DATED this 16th day of June, 2017.

14 */s/ Jonathan M. Kirshbaum* _____

15 JONATHAN M. KIRSHBAUM
16 Assistant Federal Public Defender
17 411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

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1 CERTIFICATE OF SERVICE

2 In accordance with the Rules of Civil Procedure, the undersigned hereby
3 certifies that on this 16th day of June, 2017, a true and correct copy of the foregoing
4 was filed electronically with the Second Judicial District Court. Electronic service of
5 the foregoing document shall be made in accordance with the master service list as
6 follows:

7 Christopher J. Hicks
P.O. Box 11130
8 Reno, NV 89520

9 Adam P. Laxalt
Nevada Attorney General
10 100 North Carson Street
Carson City, NV 89701
11

12 /s/Adam Dunn
13 An Employee of the Federal Public
Defender, District of Nevada
14
15
16
17
18
19
20
21
22
23
24
25
26
27

1 CODE No. 2300
2 CHRISTOPHER J. HICKS
#7747
3 P. O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
4 Attorney for Respondent

5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

7 IN AND FOR THE COUNTY OF WASHOE
8 * * *

9 WILLIAM EDWARD BRANHAM,

10 Petitioner,

11 v.

Case No. CR92-1048

12 ISIDRO BACA, WARDEN,

Dept. No. 10

13 Respondent.
14 /

15 MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

16 COMES NOW, Respondent and moves this Honorable Court to dismiss the
17 petition for writ of habeas corpus (post-conviction). This motion is based upon the
18 records of this court and of the Supreme Court, and the following points and authorities.
19

20 POINTS AND AUTHORITIES

21 Petitioner Branham was convicted of murder on April 14, 1993. He appealed but
22 the judgment was affirmed. *Branham v. State*, Docket Number 24648, Order
23 Dismissing Appeals (December 18, 1996). Branham then filed a post-conviction habeas
24 corpus petition in this court on December 12, 1997. That petition was denied after a

1 hearing on February 23, 1999. He again appealed but the order denying the petition was
2 affirmed. *Branham v. Warden*, Docket No. 33830 and 33831, Order Dismissing
3 Appeals (February 15, 2000).

4 Branham filed a federal habeas corpus petition in 2000. That was dismissed and
5 he appealed to the Ninth Circuit. That Court affirmed and then the U.S. Supreme Court
6 denied Certiorari.

7 In 2005 he filed another state petition, this time alleging that post-conviction
8 counsel was negligent. That petition was dismissed on June 17, 2005. Branham
9 appealed but the order dismissing was affirmed. *Branham v. State*, Docket No. 45532,
10 Order of Affirmance (November 10, 2005). Among other things, the Supreme Court
11 noted that the petition was untimely, abusive and successive.

12 Branham filed his most recent petition on April 7, 2017. This court has ordered a
13 response.

14 The instant petition is untimely, abusive and successive, just as was the last one.
15 Those procedural bars can sometimes be overcome where the claim was not legally
16 available but only recently became available due to an intervening change in the law.
17 “However, . . . proper respect for the finality of convictions demands that this ground for
18 good cause be limited to previously unavailable *constitutional* claims.” *Clem v. State*,
19 119 Nev. 615, 621, 81 P.3d 521, 525–26 (2003)(emphasis added). Branham seems to
20 now contend that a couple decisions of the U.S. Supreme Court changed that model and
21 now there can never be a final judgment because all changes in the law, from any source,
22 must be retroactive to all convicted persons. He is incorrect.

23 At issue is what has come to be known as the *Kazylan* instruction concerning the
24 *mens rea* for murder. The instruction was commonly given until 2000 when the Court

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1 ruled in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), that the various terms of
2 intent to kill, premeditation and deliberation are each different in some ways and that
3 future juries should be instructed on the proper definitions of each. There next came
4 the question of whether *Byford* would be retroactively applied. The Nevada Supreme
5 Court finally addressed that in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). The
6 Court ruled that the *Byford* definitions were not to be applied retroactively.

7 The *Nika* decision, in part, boiled down to the question of whether the Court in
8 *Byford* had discovered the law as it had always existed, or if it had changed the law. The
9 ruling in *Nika*, after a fairly extensive discussion, was that the Court has changed the
10 law. The Court went on to rule that the change in the law announced in *Byford* would
11 not be applied retroactively to those whose convictions were final before *Byford* was
12 announced. That would include Branham.

13 Among other things, the *Nika* Court mentioned that *Byford* had not invoked any
14 constitutional mandate, but instead was a regular exercise of appellate jurisdiction,
15 interpreting state statutes.

16 The argument in the petition has several faults. First, it depends on the notion
17 that the Supreme Court in *Welch v. United States*, 136 S.Ct. 1257 (2016) has implicitly
18 overruled an earlier decision of the Supreme Court, *Bunkley v. Florida*, 538 U.S. 835,
19 123 S.Ct. 2020 (2003). The Supreme Court has recently reminded state courts, in
20 somewhat curt language, that the Supreme Court alone is empowered to overrule its
21 own precedents and that if the Court intends to overrule a prior decision, it will do so
22 explicitly. *Bosse v. Oklahoma*, ___, U.S. ___, 137 S.Ct. 1 (2016). In *Nika, supra*, the
23 prior decision at issue was *Bunkley v. Florida, supra*. There, the Court held that where
24 a state court interpretation of a statute is a change in the interpretation of a state statute

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1 (not constitutionally required) then state law determines the effective date of that new
2 interpretation.¹ In Nevada, in *Nika*, the Court clearly and explicitly ruled that the state
3 law announced in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000)(concerning the
4 mental states involved in a murder prosecution), represented a change in the law, not a
5 mere discovery of the law as it always existed. Nothing in *Welch v. United States*
6 changed that. *Welch* dealt with the retroactive application of a ruling that a certain
7 clause of the Armed Career Criminal Act was unconstitutionally vague. The Court made
8 several comments that reveal that this case has nothing to do with that analysis. Among
9 them, issues of retroactivity are determined by federal law only where the new rule of
10 law is based on a “constitutional rule.” *See e.g.*, 136 S.Ct. at 1264. As this court noted in
11 the Order of April 1, 2017, dismissing the last petition, the *Byford* decision was purely a
12 matter of state law and there were no constitutional issues involved in the relevant part
13 of the decision.

14 The *Welch* decision noted several times that the question of the retroactivity
15 applies only with new “constitutional” rules. There was no constitutional component to
16 the decisions in *Byford* and *Nika*. The state court was simply exercising its appellate
17 authority to determine the meaning of statutes, which it does with great frequency, even
18 when the Constitution does not demand that the court do so.

19 Finally, the court might note that the *Welch* Court noted several times that the
20 general rules regarding retroactivity apply when the new constitutional rule narrows the

21
22 ¹ In *Bunkley*, the statute at issue referred to a “common pocket knife.” The
23 Florida Supreme Court had changed its interpretation of that term, but not on any
24 constitutional grounds, and the U.S. Supreme Court ruled that the Florida Supreme
Court must determine when that change was effective. That is, the Florida Court would
have to determine if it had discovered the law as it always existed, or if it had changed
the law.

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1 “conduct” regulated by the criminal statute. *See e.g.*, 136 S.Ct. at 1265, In *Nika*, the
2 Court noted that distinction and pointed out that the *Byford* decision, concerning the
3 elements of willfulness, premeditation, malice and intent to kill, concerned only the
4 *mens rea* of the crime of murder, not the *actus reus*. Thus, the elements of the crime of
5 murder that concern the conduct, have not been expanded or narrowed by *Byford*. It
6 seems clear enough that *Welch*, if it applied at all, would apply only if the *Byford* Court
7 had narrowed the “conduct” that was at issue. The Supreme Court used that term,
8 “conduct,” quite a few times and it appears to be deliberate.

9 Because *Welch* has no application to the instant case, as the change of the law
10 announced in *Byford* had no constitutional component and did not narrow the
11 “conduct” that was prohibited, there is nothing that overcomes the procedural bars and
12 the instant petition is untimely, abusive, successive and barred by laches and should be
13 dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

15 The undersigned does hereby affirm that the preceding document does not
16 contain the social security number of any person.

17 DATED: June 1, 2017.

19 CHRISTOPHER J. HICKS
20 District Attorney

21 By /s/ TERRENCE P. McCARTHY
22 TERRENCE P. McCARTHY
23 Chief Appellate Deputy

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Second Judicial District Court on June 1, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jonathan M. Kirshbaum
Assistant Federal Public Defender

/s/ DESTINEE ALLEN
DESTINEE ALLEN

3585
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Attorney for Petitioner William Branham

IN THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

WILLIAM EDWARD BRANHAM,

Case No. CR92-1048
Dept. No.

Petitioner,

V.

ISIDRO BACA, WARDEN, etc.

Respondents.

**PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)**

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

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(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

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PETITION

1
2 1. Name of institution and county in which you are presently imprisoned
3 or where and how you are presently restrained of your liberty: Northern Nevada
4 Correctional Center, Carson City, Nevada

5 2. Name and location of court which entered the judgment of conviction
6 under attack: 2nd Judicial District, Washoe County

7 3. Date of judgment of conviction: April 14, 1993

8 4. Case Number: CR-92-1048

9 5. (a) Length of Sentence: Life without the possibility of parole

10 (b) If sentence is death, state any date upon which execution is
11 scheduled: N/A

12 6. Are you presently serving a sentence for a conviction other than the
13 conviction under attack in this motion? Yes [] No [X]

14 If "yes", list crime, case number and sentence being served at this time:
15 Nature of offense involved in conviction being challenged:

16 7. Nature of offense involved in conviction being challenged: First Degree
17 Murder

18 8. What was your plea?

19 (a) Not guilty XX (c) Guilty but mentally ill _____

20 (b) Guilty _____ (d) Nolo contendere _____

21 9. If you entered a plea of guilty or guilty but mentally ill to one count of
22 an indictment or information, and a plea of not guilty to another count of an
23 indictment or information, or if a plea of guilty or guilty but mentally ill was
24 negotiated, give details:

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1 10. If you were found guilty after a plea of not guilty, was the finding made
2 by: (a) Jury XX (b) Judge without a jury _____

3 11. Did you testify at the trial? Yes _____ No XX

4 12. Did you appeal from the judgment of conviction? Yes XX No _____

5 13. If you did appeal, answer the following:
6 (a) Name of Court: Nevada Supreme Court
7 (b) Case number or citation: 24648
8 (c) Result: Conviction Affirmed on 12/18/96; Remittitur issued on
9 1/6/97.

10 14. If you did not appeal, explain briefly why you did not: N/A

11 15. Other than a direct appeal from the judgment of conviction and
12 sentence, have you previously filed any petitions, applications or motions with respect
13 to this judgment in any court, state or federal? Yes XX No _____

14 16. If your answer to No. 15 was "yes," give the following information:
15 (a) (1) Name of Court: 2nd Judicial District
16 (2) Nature of proceeding: Post-conviction Petition for a Writ of
17 Habeas Corpus.
18 (3) Ground raised:
19 Ground One: Whether ineffective assistance of counsel for failure to object to
20 NRS 175.211, reasonable doubt instruction.
21 Ground Two: Ineffective assistance of counsel, for failure to object to malice
22 instruction.
23 Ground Three: Ineffective assistance of counsel, for failure to advise defendant of
24 his right to be sentenced by jury.
25 Ground Four: Trial counsel failed to fully investigate by forensic autopsy and
26 failure to hold inquest.

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Ground Five: Whether the petitioner was provided with his constitutional right to notice of charges against him, because the information was insufficient.

Ground Six: Whether the petitioner was denied his federal constitutional to effective assistance of counsel both prior to and during trial.

Ground Seven: Whether counsel was ineffective on first direct appeal.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes No

(5) Result: Petition Denied.

(6) Date of Result: 2/23/1999

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Order dated 2/15/2000.

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: United States District Court for the District of Nevada

(2) Nature of proceeding: Petition for Writ of Habeas Corpus
Pursuant to 28 U.S.C. § 2254

(2) Grounds raised:

Ground One: Branham's conviction and resulting sentence are invalid under constitutional guarantees of due process and a fair trial due to the absence of evidence sufficient to support, beyond a reasonable doubt, a factual basis for the necessary element of criminal agency for culpability for the offense. U.S. Const. Amends. V, XIV.

Ground Two: The jury instruction on malice was improper as it allowed the jury to presume malice without proof beyond a reasonable doubt in violation of NRS 47.230, thus violating Branham's Fifth, Sixth, and Fourteenth Amendment rights to due process.

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1 Ground Three: Branham's constitutional right to due process was violated
2 because the jury instruction on reasonable doubt was improper.

3 Ground Four: Branham's right to be sentenced by his jury was denied in
4 violation of right to due process.

5 Ground Five: Branham's right to due process was violated when no coroner's
6 inquest was held pursuant to NRS 259.050.

7 Ground Six: Branham was denied effective assistance of counsel prior to and
8 during trial in violation of the Sixth Amendment to the United
9 States Constitution.

10 a) Trial counsel's failure to object to the jury instruction on implied
11 malice was improper and violated NRS 47.2340.

12 b) Trial counsel's failure to object to the jury instruction on
13 reasonable doubt was improper.

14 c) Trial counsel's failure to assert Branham's right to be sentenced
15 by the jury was improper.

16 d) Trial counsel's failure to assert Branham's right to a coroner's
17 inquest.

18 Ground Seven: Branham was denied effective assistance of counsel on direct
19 appeal in violation of the United States Constitution.

20 a) Appellate counsel's failure to challenge the jury instruction on
21 implied malice was improper and violated NRS 47.2340.

22 b) Appellate counsel's failure to challenge the jury instruction on
23 reasonable doubt was improper.

24 c) Appellate counsel's failure to challenge Branham's right to be
25 sentenced by the jury was improper.

26 d) Appellate counsel's failure to challenge Branham's right to a
27 coroner's inquest.

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1 (4) Did you receive an evidentiary hearing on your petition,
2 application or motion? Yes _____ No XX

3 (5) Result: Petition Dismissed.

4 (6) Date of result: 9/26/2002.

5 (7) If known, citations of any written opinion or date of orders
6 entered pursuant to such result: Judgment entered 9/26/2002.

7 (c) As to any third petition, application or motion, give the same
8 information: N/A

9 (1) Name of court:

10 (2) Nature of proceeding:

11 (3) Grounds raised:

12 I.

13 II.

14 (4) Did you receive an evidentiary hearing on your petition,
15 application or motion? Yes _____ No _____

16 (5) Result:

17 (6) Date of result:

18 (7) If known, citations of any written opinion or date of orders
19 entered pursuant to such result:

20 (d) Did you appeal to the highest state or federal court having
21 jurisdiction, the result or action taken on any petition, application or motion?

22 (1) First petition, application or motion?

23 Yes X No _____

24 (2) Second petition, application or motion?

25 Yes X No _____

26 (3) Third petition, application or motion? N/A

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1 Yes No

2 (e) If you did not appeal from the adverse action on any petition,
3 application or motion, explain briefly why you did not. N/A.

4 17. Has any ground being raised in this petition been previously presented
5 to this or any other court by way of petition for habeas corpus, motion, application or
6 any other post-conviction proceeding? No If so, identify:

7 a. Which of the grounds is the same:
8 b. The proceedings in which these grounds were raised:
9 c. Briefly explain why you are again raising these grounds.

10 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any
11 additional pages you have attached, were not previously presented in any other court,
12 state or federal, list briefly what grounds were not so presented, and give your reasons
13 for not presenting them.

14 Ground One is based upon a previously unavailable constitutional claim. *Clem*
15 *v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to
16 file a petition from the date that the claim has become available. *Rippo v. State*, 132
17 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*,
18 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court
19 decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United*
20 *States*, 136 S. Ct. 1257 (2016). *Montgomery* established a new rule of constitutional
21 law, namely that the “substantive rule” exception to the *Teague* rule applies in state
22 courts as a matter of due process. Furthermore, *Welch* clarified that this
23 constitutional rule includes the Supreme Court’s prior statutory interpretation
24 decisions. Moreover, *Welch* established that the only requirement for an
25 interpretation of a statute to apply retroactively under the “substantive rule”

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1 exception to *Teague* is whether the interpretation narrowed the class of individuals
2 who could be convicted under the statute.

3 **19.** Are you filing this petition more than 1 year following the filing of the
4 judgment of conviction or the filing of a decision on direct appeal? No.

5 Ground One is based upon a previously unavailable constitutional claim. *Clem*
6 *v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to
7 file a petition from the date that the claim has become available. *Rippo v. State*, 132
8 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*,
9 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court
10 decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United*
11 *States*, 136 S. Ct. 1257 (2016), which established a new constitutional rule applicable
12 to this case. This petition was filed within one year of *Welch*, which was decided on
13 April 18, 2016.

14 **20.** Do you have any petition or appeal now pending in any court, either
15 state or federal, as to the judgment under attack? Yes No XX

16 If yes, state what court and the case number:

17 **21.** Give the name of each attorney who represented you in the proceeding
18 resulting in your conviction and on direct appeal: Mary Lou Wilson (trial); Jane
19 McKenna (direct appeal).

20 **22.** Do you have any future sentences to serve after you complete the
21 sentence imposed by the judgment under attack: Yes No XX

22 **23.** State concisely every ground on which you claim that you are being held
23 unlawfully. Summarize briefly the facts supporting each ground. If necessary you
24 may attach pages stating additional grounds and facts supporting same.

1 GROUND ONE

2 UNDER RECENTLY DECIDED SUPREME COURT
3 CASES, PETITIONER MUST BE GIVEN THE BENEFIT
4 OF *BYFORD V. STATE*, AS A MATTER OF DUE
5 PROCESS BECAUSE *BYFORD* WAS A SUBSTANTIVE
6 CHANGE IN LAW THAT NOW MUST BE APPLIED
7 RETROACTIVELY TO ALL CASES, INCLUDING
8 THOSE THAT BECAME FINAL PRIOR TO *BYFORD*.

9
10 In *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme
11 Court concluded that the jury instruction defining premeditation and deliberation
12 improperly blurred the line between these two elements. The court interpreted the
13 first-degree murder statute to require that the jury find deliberation as a separate
14 element. However, the Nevada Supreme Court stated that this error was not of
15 constitutional magnitude and that it only applied prospectively.

16 In *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), the Nevada Supreme
17 Court acknowledged that *Byford* interpreted the first-degree murder statute by
18 narrowing its terms. As a result, the court was wrong to only apply *Byford*
19 prospectively. However, relying upon its interpretation of the current state of United
20 States Supreme Court retroactivity rules, it held that, because *Byford* represented
21 only a “change” in state law, not a “clarification,” then *Byford* only applied to those
22 convictions that had yet to become final at the time it was decided. The court
23 concluded, as a result, that *Byford* did not apply retroactively to those convictions
24 that had already become final.

25 However, in 2016, the United States Supreme Court drastically changed these
26 retroactivity rules. First, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the
27 Supreme Court held that the question of whether a new constitutional rule falls
under the “substantive exception” to the *Teague* retroactivity rules is a matter of due
process. Second, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme

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1 Court clarified that the “substantive exception” of the *Teague* rules includes
2 “interpretations” of criminal statutes. It further indicated that the *only* requirement
3 for determining whether an interpretation of a criminal statute applies retroactively
4 is whether the interpretation narrows the class of individuals who can be convicted
5 of the crime.

6 *Montgomery* and *Welch* represent a change in law that allows petitioner to
7 obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has
8 acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that
9 means that it must be applied retroactively to convictions that had already become
10 final at the time *Byford* was decided. The Nevada Supreme Court’s distinction
11 between “change” and “clarification” is no longer valid in determining retroactivity.
12 And the state courts are required to apply the rules set forth in *Welch* because those
13 retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional
14 principle. Petitioner is entitled to relief because there is a reasonable likelihood that
15 the jury applied the *Kazalyn* instruction in an unconstitutional manner. Further, the
16 instruction had a prejudicial impact at trial as the State’s evidence of deliberation
17 was nearly non-existent and the only evidence that was provided was more consistent
18 with a second-degree murder. Further, the prosecutor’s comments in closing
19 exacerbated the harm from the improper instruction.

20 Petitioner can also establish good cause to overcome the procedural bars. The
21 new constitutional arguments based upon *Montgomery* and *Welch* were not
22 previously available. Petitioner has filed the petition within one year of *Welch*.
23 Petitioner can also show actual prejudice.

24 Accordingly, the petition should be granted.

1 **I. BACKGROUND**

2 **A. *Kazalyn* First-Degree Murder Instruction**

3 Branham was charged with first-degree murder based on allegations that he
4 killed his former roommate, Beverly Fetherston, by asphyxiation, strangulation, or
5 suffocation. (Information.) The court provided the jury with the following instruction
6 on premeditation and deliberation, known as the *Kazalyn*¹ instruction:

7 Premeditation is a design, a determination to kill,
8 distinctly formed in the mind at any moment before or at
9 the time of the killing.

10 Premeditation need not be for a day, an hour or even
11 a minute. It may be as instantaneous as successive
12 thoughts of the mind. For if the jury believes from the
13 evidence that the act constituting the killing has been
14 preceded by and has been the result of premeditation, no
15 matter how rapidly the premeditation is followed by the act
16 constituting the killing, it is willful, deliberate and
17 premeditated murder.

18 (Jury Instructions, Instruction No. 23.)

19 **B. Conviction and Direct Appeal**

20 The jury convicted Branham of first-degree murder. (Verdict.) He was
21 sentenced to life without the possibility of parole. (Judgment.)

22 Branham appealed the judgment of conviction. The Nevada Supreme Court
23 issued an order dismissing the appeal on December 18, 1996. The conviction became
24 final on March, 18 1997. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 n.52
25 (Nev. 2008) (conviction becomes final when judgment of conviction is entered and 90-
26 day time period for filing petition for certiorari to Supreme Court has expired).

27 ¹ *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

C. *Byford v. State*

On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* Its prior cases, including *Kazalyn*, had “underemphasized the element of deliberation.” *Id.* Cases such as *Kazalyn* and *Powell v. State*, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), had reduced “premeditation” and “deliberation” to synonyms and that, because they were “redundant,” no instruction separately defining deliberation was required. *Id.* It pointed out that, in *Greene v. State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997), the court went so far as to state that “the terms premeditated, deliberate, and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as a result of the act.”

The *Byford* court specifically “abandoned” this line of authority. *Byford*, 994 P.2d at 713. It held:

By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder. *Greene's* further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. The court emphasized that deliberation remains a “critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighting process and consideration of consequences before acting.” *Id.* at 714. It is an element that “must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.” *Id.* at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

1 The court held that, “[b]ecause deliberation is a distinct element of *mens rea*
2 for first-degree murder, we direct the district courts to cease instructing juries that a
3 killing resulting from premeditation is “willful, deliberate, and premeditated
4 murder.” *Byford*, 994 P.2d at 714. The court directed the state district courts in the
5 future to separately define deliberation in jury instructions and provided model
6 instructions for the lower courts to use. *Id.* The court did not grant relief in *Byford*’s
7 case because the evidence was “sufficient for the jurors to reasonably find that before
8 acting to kill the victim *Byford* weighed the reasons for and against his action,
9 considered its consequences, distinctly formed a design to kill, and did not act simply
10 from a rash, unconsidered impulse.” *Id.* at 712-13.

11 On August 23, 2000, the NSC decided *Garner v. State*, 116 Nev. 770, 6 P.3d
12 1013, 1025 (2000). In *Garner*, the NSC held that the use of the *Kazalyn* instruction
13 at trial was neither constitutional nor plain error. *Id.* at 1025. The NSC rejected the
14 argument that, under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford* had to apply
15 retroactively to *Garner*’s case as his conviction had not yet become final. *Id.*
16 According to the court, *Griffith* only concerned constitutional rules and *Byford* did
17 not concern a constitutional error. *Id.* The jury instructions approved in *Byford* did
18 not have any retroactive effect as they were “a new requirement with prospective
19 force only.” *Id.*

20 The NSC explained that the decision in *Byford* was a clarification of the law as
21 it existed prior to *Byford* because the case law prior to *Byford* was “divided on the
22 issue”:

23 This does not mean, however, that the reasoning of
24 *Byford* is unprecedented. Although *Byford* expressly
25 abandons some recent decisions of this court, it also relies
26 on the longstanding statutory language and other prior
decisions of this court in doing so. Basically, *Byford*
interprets and clarifies the meaning of a preexisting

1 statute by resolving conflict in lines in prior case law.
2 Therefore, its reasoning is not altogether new.

3 Because the rationale in *Byford* is not new and could
4 have been – and in many cases was – argued in the district
5 courts before *Byford* was decided, it is fair to say that the
failure to object at trial means that the issue is not
preserved for appeal.

6 *Id.* at 1025 n.9 (emphasis added).

7 **D. *Fiore v. White* and *Bunkley v. Florida***

8 In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S.
9 225 (2001). In *Fiore*, the Supreme Court held that due process requires that a
10 clarification of the law apply to all convictions, even a final conviction that has been
11 affirmed on appeal, where the clarification reveals that a defendant was convicted
12 “for conduct that [the State’s] criminal statute, as properly interpreted, does not
13 prohibit.” *Id.* at 228.

14 In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S.
15 835 (2003). In *Bunkley*, the Court held that, as a matter of due process, a change in
16 state law that narrows the category of conduct that can be considered criminal, had
17 to be applied to convictions that had yet to become final. *Id.* at 840-42.

18 **E. *Nika v. State***

19 In 2007, the Ninth Circuit decided *Polk v. Sandoval*, 503 F.3d 903 (9th Cir.
20 2007). In *Polk*, that court concluded that the *Kazalyn* instruction violated due process
21 under *In Re Winship*, 397 U.S. 358 (1970), because it relieved the State of its burden
22 of proof as to the element of deliberation. *Polk*, 503 F.3d at 910-12.

23 In response to *Polk*, the NSC in 2008 issued *Nika v. State*, 124 Nev. 1272, 198
24 P.3d 839, 849 (Nev. 2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk*’s
25 conclusion that a *Winship* violation occurred. The court stated that, rather than
26 implicate *Winship* concerns, the only due process issue was the retroactivity of
27

Byford. It reasoned that it was within the court’s power to determine whether *Byford* represented a clarification of the interpretation of a statute, which would apply to everybody, or a change in the interpretation of a statute, which would only apply to those convictions that had yet to become final. *Id.* at 849-50. The court held that *Byford* represented a change in the law as to the interpretation of the first-degree murder statute. *Id.* at 849-50. The court specifically “disavow[ed]” any language in *Garner* indicating that *Byford* was anything other than a change in the law, stating that language in *Garner* indicating that *Byford* was a clarification was dicta. *Id.* at 849-50.

The court acknowledged that because *Byford* had changed the meaning of the first-degree murder statute by narrowing its scope, due process required that *Byford* had to be applied to those convictions that had not yet become final at the time it was decided, citing *Bunkley* and *Fiore*. *Id.* at 850, 850 n.7, 859. In this regard, the court also overruled *Garner* to the extent that it had held that *Byford* relief could only be prospective. *Id.* at 859.

The court emphasized that *Byford* was a matter of statutory interpretation and not a matter of constitutional law. *Id.* at 850. That decision was solely addressing what the court considered to be a state law issue, namely “the interpretation and definition of the elements of a state criminal statute.” *Id.*

F. *Montgomery v. Louisiana* and *Welch v. United States*

On January 25, 2016, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, the Court addressed the question of whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited under the Eighth Amendment mandatory life sentences for juvenile offenders, applied retroactively to cases that had already become final by the time of *Miller*. *Montgomery*, 136 S. Ct. at 725.

1 To answer this question, the Court applied the retroactivity rules set forth in
2 *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a new constitutional rule of
3 criminal procedure does not apply, as a general matter, to convictions that were final
4 when the rule was announced. *Montgomery*, 136 S. Ct. at 728. However, *Teague*
5 recognized two categories of rules that are not subject to its general retroactivity bar.
6 *Id.* First, courts must give retroactive effect to new substantive rules of constitutional
7 law. *Id.* Substantive rules include “rules forbidding criminal punishment of certain
8 primary conduct, as well as rules prohibiting a certain category of punishment for a
9 class of defendants because of their status or offense.” *Id.* (internal quotations
10 omitted). Second, courts must give retroactive effect to new “watershed rules of
11 criminal procedure implicating the fundamental fairness and accuracy of the criminal
12 proceeding.” *Id.* (internal quotations omitted).

13 The primary question the Court addressed in *Montgomery* was whether it had
14 jurisdiction to review the question. The Court stated that it did, holding “when a new
15 substantive rule of constitutional law controls the outcome of a case, the Constitution
16 requires state collateral review courts to give retroactive effect to that rule.”
17 *Montgomery*, 136 S. Ct. at 729. “*Teague*’s conclusion establishing the retroactivity of
18 new substantive rules is best understood as resting upon constitutional premises.”
19 *Id.* “States may not disregard a controlling constitutional command in their own
20 courts.” *Id.* at 727 (citing *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 340-41, 344
21 (1816)).

22 The Court concluded that *Miller* was a new substantive rule; the states,
23 therefore, had to apply it retroactively on collateral review. *Montgomery*, 136 S. Ct.
24 at 732.

25 On April 18, 2016, the United States Supreme Court decided *Welch v. United*
26 *States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether

1 *Johnson v. United States*, which held that the residual clause in the Armed Career
2 Criminal Act was void for vagueness under the Due Process Clause, applied
3 retroactively to convictions that had already become final at the time of *Johnson*.
4 *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether
5 *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a
6 substantive rule as one that “alters the range of conduct or the class of persons that
7 the law punishes.” *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).
8 “*This includes decisions that narrow the scope of a criminal statute by interpreting*
9 *its terms*, as well as constitutional determinations that place particular conduct or
10 persons covered by the statute beyond the State’s power to punish.” *Id.* at 1265
11 (quoting *Schriro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the
12 Court concluded that *Johnson* was substantive. *Id.*

13 The Court then turned to the *amicus* arguments, which asked the court to
14 adopt a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265.
15 Among the arguments that *amicus* advanced was that a rule is only substantive when
16 it limits Congress’s power to act. *Id.* at 1267.

17 The Court rejected this argument, pointing out that some of the Court’s
18 “substantive decisions do not impose such restrictions.” *Id.* The “clearest example”
19 was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was
20 whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*,
21 the Court had “held as a matter of statutory interpretation that the ‘use’ prong [of 18
22 U.S.C. § 924(c)(1)] punishes only ‘active employment of the firearm’ and not mere
23 possession.” *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). The Court in *Bousley* had
24 “no difficulty concluding that *Bailey* was substantive, as it was a decision ‘holding
25 that a substantive federal criminal statute does not reach certain conduct.’” *Id.*
26 (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following
27

1 parenthetical as further support: “A decision that modifies the elements of an offense
2 is normally substantive rather than procedural.” The Court pointed out that *Bousley*
3 did not fit under the *amicus*’s *Teague* framework as Congress amended § 924(c)(1) in
4 response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

5 Recognizing that *Bousley* did not fit, *amicus* argued that *Bousley* was simply
6 an exception to the proposed framework because, according to *amicus*, “*Bousley*
7 ‘recognized a separate subcategory of substantive rules for decisions that interpret
8 statutes (but not those, like *Johnson*, that invalidate statutes).’” *Welch*, 136 S. Ct. at
9 1267 (quoting *Amicus* brief). *Amicus* argued that statutory construction cases are
10 substantive because they define what Congress always intended the law to mean. *Id.*

11 The Court rejected this argument. It stated that statutory interpretation cases
12 are substantive solely because they meet the criteria for a substantive rule:

13 Neither *Bousley* nor any other case from this Court treats
14 statutory interpretation cases as a special class of decisions
15 that are substantive because they implement the intent of
16 Congress. Instead, decisions that interpret a statute are
substantive if and when they meet the normal criteria for
a substantive rule: when they “alte[r] the range of conduct
or the class of persons that the law punishes.”

17
18 *Welch*, 136 S. Ct. at 1267 (emphasis added).

19 II. ANALYSIS

20 A. *Welch* And *Montgomery* Establish That the Narrowing 21 Interpretation Of The First-Degree Murder Statute In *Byford* 22 Must Be Applied Retroactively in State Court To Convictions That Were Final At The Time *Byford* Was Decided

23 In *Montgomery*, the United States Supreme Court, for the first time,
24 constitutionalized the “substantive rule” exception to the *Teague* retroactivity rules.
25 The consequence of this step is that state courts are now required to apply the
26 “substantive rule” exception in the manner in which the United States Supreme

1 Court applies it. *See Montgomery*, 136 U.S. at 727 (“States may not disregard a
2 controlling constitutional command in their own courts.”).

3 In *Welch*, the Supreme Court made clear that the “substantive rule” exception
4 includes “*decisions that narrow the scope of a criminal statute by interpreting its*
5 *terms.*” What is critically important, and new, about *Welch* is that it explains, for the
6 very first time, that the *only* test for determining whether a decision that interprets
7 the meaning of a statute is substantive, and must apply retroactively to all cases, is
8 whether the new interpretation meets the criteria for a substantive rule, namely
9 whether it alters the range of conduct or the class of persons that the law punishes.
10 Because this aspect of *Teague* is now a matter of constitutional law, state courts are
11 required to apply this rule from *Welch*.

12 This new rule from *Welch* has a direct and immediate impact on the retroactive
13 effect of *Byford*. In *Nika*, the Nevada Supreme Court concluded that *Byford* was
14 substantive. The court held specifically that *Byford* represented an interpretation of
15 a criminal statute that narrowed its meaning. This was correct as *Byford*s
16 interpretation of the first-degree murder statute, in which the court stated that a jury
17 is required to separately find the element of deliberation, narrowed the range of
18 individuals who could be convicted of first-degree murder.

19 Nevertheless, the court concluded that, because *Byford* was a change in law,
20 as opposed to a clarification, it did not need to apply retroactively. In light of *Welch*,
21 this distinction between a “change” and “clarification” no longer matters. The *only*
22 relevant question is whether the new interpretation represents a new substantive
23 rule. In fact, a “change in law” fits far more clearly under the *Teague* substantive
24 rule framework than a clarification because it is a “new” rule. The Supreme Court
25 has suggested as much previously. *See Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9
26 (2005) (“A *change* in the interpretation of a *substantive* statute may have

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1 consequences for cases that have already reached final judgment, particularly in the
2 criminal context.” (emphasis added); citing *Bousley v. United States*, 523 U.S. 614
3 (1998); and *Fiore*).² Critically, in *Welch*, the Supreme Court never used the word
4 “clarification” once when it analyzed how the statutory interpretation decisions fit
5 under *Teague*. Rather, it only used the term “interpretation” without qualification.
6 The analysis in *Welch* shows that the Nevada Supreme Court’s distinction between
7 “change” and “clarification” is no longer a relevant factor in determining the
8 retroactive effect of a decision that interprets a criminal statute by narrowing its
9 meaning.

10 Accordingly, under *Welch* and *Montgomery*, petitioner is entitled to the benefit
11 of having *Byford* apply retroactively to his case, which became final prior to *Byford*.
12 The *Kazalyn* instruction defining premeditation and deliberation given in his case
13 was improper.

14 It is reasonably likely that the jury applied the challenged instruction in a way
15 that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004).
16 As the Nevada Supreme Court explained in *Byford*, the instruction blurred the
17 distinction between first and second degree murder. It reduced premeditation and
18 deliberation down to intent to kill. The State was relieved of its obligation to prove
19 essential elements of the crime, including deliberation. In turn, the jury was not
20 required to find deliberation as defined in *Byford*. The jury was never required to
21 find whether there was “coolness and reflection” as required under *Byford*. *Byford*,
22 994 P.2d at 714. The jury was never required to find whether the murder was the
23 result of a “process of determining upon a course of action to kill as a result of thought,

26

27 ² In contrast, the United States Supreme Court has never cited *Bunkley* in any
subsequent case.

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1 including weighing the reasons for and against the action and considering the
2 consequences of the action.” *Id.*

3 This error had a prejudicial impact on this case. The prosecution’s theory at
4 trial was that Branham strangled or suffocated his former roommate, Beverly
5 Fetherston, to death sometime between February 6 and February 9, 1992. The State
6 provided no direct forensic evidence linking Branham to Fetherston’s death. The
7 State did not provide any evidence that Branham had the intent to kill Fetherston or
8 that, before acting to kill the victim, Branham “weighed the reasons for and against
9 his action, considered its consequences, distinctly formed a design to kill, and did not
10 act simply from a rash, unconsidered impulse.” *See Byford*, 944 P.2d at 712-13. There
11 was simply no evidence presented that would disprove the theory that, if Branham
12 did kill Fetherston, that the killing arose as an impulsive act borne out of passion.
13 The evidence against Branham was not so great that it precluded a verdict of second-
14 degree murder.

15 The State presented little evidence about the events that transpired before
16 February 6, the last time anyone reported seeing Branham and Fetherston together.
17 The State presented testimony through Fetherston’s good friend, Dudley Poorman.
18 (3/3/93 Trial Transcript (“TT”) at 111-114.) That day, Fetherston and Branham were
19 at her house when Poorman got there. (3/3/93 TT at 123.) Both of them had been
20 drinking. (3/3/93 TT at 124-125.) Fetherston appeared intoxicated; her words were
21 slurred. Poorman and Branham were also intoxicated. (3/3/93 TT at 180-181.)
22 Fetherston gave Poorman some money to go buy beer. (3/3/93 TT at 120-121.)
23 Poorman later fell asleep on the sofa. (3/3/93 TT at 129-130.) When he woke up,
24 Fetherston was sitting on Branham’s lap in a chair in the corner of the room. (3/3/93
25 TT at 136.) They appeared friendly, not romantic. (3/3/93 TT at 172.) He left her
26 house around 4:00 p.m. (3/3/93 TT at 131, 136.) On Friday morning, around 8:30 or
27

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1 9:00 a.m., he went to Fetherston's house, but her car was not there, nor was it there
2 when he walked by on Saturday. (3/3/93 TT at 132-133.)

3 To establish that Branham murdered Fetherston with premeditation and
4 deliberation, the State relied primarily on Dr. James Neal O'Donnell, the pathologist
5 who performed the autopsy. However, Dr. O'Donnell's testimony was inconsistent
6 and cannot be considered reliable. In the first instance, Dr. O'Donnell, stated the
7 cause of death was undetermined, but consistent with asphyxia. (3/1/93 TT at 94.)
8 He testified that he could not tell if Fetherston simply passed away or was killed.
9 (3/1/93 TT at 104-106.) There was a bruise-like injury of the low anterior neck,
10 hemorrhage in the soft tissue in the front of the low trachea in the neck, and a
11 separate area of hemorrhage in the pharynx area. (3/1/93 TT at 95-96.) He could not
12 say that the areas he believed to be hemorrhages were caused at the same time.
13 (3/2/93 TT at 32.) There can be a small amount of hemorrhaging after death, and
14 mishandling of the body can cause bruising after death. (3/2/93 TT at 34.) With
15 regard to the "bruise-like area" on her neck, there was no hemorrhage on the
16 underside soft tissue when he opened her up. (3/2/93 TT at 12-13.) The hemorrhage
17 in the trachea area he attributed to blunt force trauma. (3/1/93 TT at 98-100.)
18 Although a majority of strangulations show evidence of a fight, there was no skin or
19 blood under the fingernails, no contusions, split lip or black eye. (3/2/93 TT at 33.)
20 He could think of no other reason for Fetherston's death than asphyxia. (3/1/93 TT
21 at 107.)

22 Dr. O'Donnell's testimony on critical issues changed between his testimony at
23 the preliminary hearing and at trial. At the preliminary hearing, he testified that he
24 was unaware of any way to determine whether a hand was responsible for the bruise-
25 like injury he saw. (3/2/93 TT at 18-19.) At the autopsy he classified the mark at the
26 exterior source of the anterior neck as bruise-like, at the preliminary hearing he

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1 characterized it as an apparent bruise, and at trial the same mark became a clear-
2 cut bruise. (3/2/93 TT at 62.)

3 Dr. Ellen Clark of Sierra Pathology Associates, a co-worker of Dr. O'Donnell,
4 testified that the body was in a moderate degree of decomposition. (3/5/93 TT at 9-
5 11.) In her opinion, this was a homicide with the cause of death being blunt trauma
6 to the neck. (3/5/93 TT at 29-31.) She could not say how the trauma occurred. (3/5/93
7 TT at 45-47.)

8 Dr. Joseph H. Masters, a pathologist, had previously testified for the State
9 about 98 percent of the time. (3/8/93 TT at 3-6.) He formed the opinion that he could
10 not identify Fetherston's cause of death. (3/8/93 TT at 6-8.) The bruise two inches
11 below the larynx, about at the jugular notch, was probably a bruise caused by blunt
12 force. (3/8/93 TT at 21-24.) A bruise by definition is blunt force trauma. (3/8/93 TT
13 at 48-52.) However, he stated that the bruise was not consistent with strangulation.
14 (3/8/93 TT at 48.) Further, he did not believe it could have caused her death. (3/8/93
15 TT at 56-64.) It takes about 33 pounds of pressure to block off the airway to the
16 trachea. Significant bruising would indicate a lot of pressure, but this bruise, only
17 present in the fat tissue, is the size of a dime and gave no indication of damage.
18 (3/8/93 TT at 64-66.) Other than congestion of the lungs, none of the other classical
19 signs were present. (3/8/93 TT at 27-28.) He believed the cause of death was
20 undetermined, without equivocation. (3/8/93 TT at 33.)

21 The State simply failed to present any direct or circumstantial evidence to
22 support a conclusion that Branham had any plans to harm Fetherston. Although
23 Marilyn MacKay, a former co-worker testified she once saw Fetherston with a black
24 eye and split lip which Branham had given her (3/3/93 TT at 81-83), no one else was
25 able to testify to Fetherston ever having a black eye or split lip. Furthermore,
26 testimony that Fetherston was afraid of Branham at some point in time (3/3/93 TT at
27

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1 80-81) is not evidence of the premeditation and deliberation necessary to convict
2 Branham of First Degree Murder.

3 Beyond the weaknesses in the evidence, the prosecutor's comments in closing
4 exacerbated the harm from the improper instruction. In rebuttal, the prosecutor
5 emphasized the improper *Kazalyn* instruction, arguing:

6 In order to establish murder, the State must show that the
7 unlawful killing must be accompanied with deliberate and
8 clear intent to take the life in order to constitute Murder of
9 the First Degree. The intent to kill must be the result of
10 deliberate premeditation. *If you recall, premeditation can*
11 *be successive thoughts in the mind.* Doesn't have to plan
12 it for a week, for a month, for a year, When he put his hand
13 around her neck, thumb over her throat, pillow over her
14 face as the facts suggest, the intent was there. That was
15 deliberate premeditation. There's no other reason for him
16 to take those actions. Clearly when you put your hand over
somebody's neck and choke them out, death is a likely
result. Deliberate premeditation has been met. Obviously
that's a determination to kill. And again, I get back to it
doesn't have to be for a day, an hour, or even a minute. *As*
instantaneous as successive thoughts of the mind. You
want to keep that in mind, ladies and gentlemen, during
your deliberation.

17 (3/9/93 TT at 83-84 (emphasis added).)

18 Even assuming the jury believed the prosecutor's version of the events leading
19 up to Fetherston's death, this evidence does not necessarily establish that the attack
20 occurred with deliberation, *i.e.* that there was a dispassionate weighing process and
21 consideration of consequences before acting. The State presented testimony that
22 Branham and Fetherston got into an argument over car keys and he allegedly stated
23 she was a "dead bitch." (3/3/93 TT at 56-57.) This was, however, days before the last
24 time they were seen together and, Branham was very drunk. (3/3/93 TT at 55-57.)
25 The last person to see Branham and Fetherston together stated they were happy and
26 getting along (3/3/93 TT at 172) and there was simply no evidence that Branham had

1 any plans to harm Fetherston that day. Furthermore, the State presented nothing
2 to disprove the theory that something occurred to spark a heated argument between
3 Branham and Fetherston, who were both intoxicated, leading to a killing done in the
4 heat of passion. The improper *Kazalyn* instruction left no room for a finding of
5 deliberation or “coolness and reflection” and permitted the jury to convict Branham
6 even if the determination to kill was a “mere unconsidered and rash impulse” or
7 “formed in passion.” *Byford*, 994 P.2d at 714.

8 Accordingly, there can be no doubt that the jury applied the instruction in an
9 unconstitutional manner. This error clearly prejudiced Branham.

10 **B. Petitioner Has Good Cause to Raise this Claim in a Second
11 or Successive Petition**

12 To overcome the procedural bars of NRS 34.726 and NRS 34.810, a petitioner
13 has the burden to show “good cause” for delay in bringing his claim or for presenting
14 the same claims again. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537
15 (2001). One manner in which a petitioner can establish good cause is to show that
16 the legal basis for the claim was not reasonably available at the time of the default.
17 *Id.* A claim based on newly available legal basis must rest on a previously unavailable
18 constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A
19 petitioner has one-year to file a petition from the date that the claim has become
20 available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev’d on
21 other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017).

22 The decisions in *Montgomery* and *Welch* provide good cause for overcoming the
23 procedural bars. *Montgomery* established a new rule of constitutional law, namely
24 that the “substantive rule” exception to the *Teague* rule applies in state courts as a
25 matter of due process. Furthermore, *Welch* clarified that this constitutional rule
26 includes the Supreme Court’s prior statutory interpretation decisions. Moreover,

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1 *Welch* established that the only requirement for an interpretation of a statute to
2 apply retroactively under the “substantive rule” exception to *Teague* is whether the
3 interpretation narrowed the class of individuals who could be convicted under the
4 statute. These rules were not previously available to petitioner. Finally, petitioner
5 submitted this petition within one year of *Welch*, which was decided on April 18,
6 2016.

7 Alternatively, petitioner can overcome the procedural bars based upon a
8 fundamental miscarriage of justice. A fundamental miscarriage of justice occurs
9 when a court fails to review a constitutional claim of a petitioner who can
10 demonstrate that he is actually innocent. *See Bousley v. United States*, 523 U.S. 614,
11 623 (1998). Actual innocence is shown when “in light of all evidence, it is more likely
12 than not that no reasonable juror would have convicted him.” *Schlup v. Delo*, 513
13 U.S. 298, 327-328 (1995). One way a petitioner can demonstrate actual innocence is
14 to show in light of subsequent case law that narrows the definition of a crime, he
15 could not have been convicted of the crime. *See Bousley*, 523 U.S. at 620, 623-24;
16 *Mitchell v. State*, 122 Nev. 1269, 1276-77, 149 P.3d 33, 37-38 (2006).

17 As discussed before, the Nevada Supreme Court has previously indicated that
18 *Byford* represented a narrowing of the definition of first-degree murder. Under *Welch*
19 and *Montgomery*, that decision is substantive. In other words, there is a significant
20 risk that petitioner stands convicted of an act that the law does not make criminal.
21 For the reasons discussed before, the facts in this case established that petitioner
22 only committed a second-degree murder. As such, in light of the entire evidentiary
23 record in this case, it is more likely than not no reasonable juror would convict him
24 of first-degree murder.

25 Finally, petitioner can establish actual prejudice for the same reasons
26 discussed on pages 22 to 26. It is reasonably likely that the jury applied the
27

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1 challenged instruction in a way that violates the Constitution. That error cannot be
2 considered harmless.

3 **II. PRAYER FOR RELIEF**

4 Based on the grounds presented in this petition, Petitioner, William Edward
5 Branham, respectfully requests that this honorable Court:

6 1. Issue a writ of habeas corpus to have Mr. Branhan brought before the
7 Court so that he may be discharged from his unconstitutional confinement and
8 sentence;

9 2. Conduct an evidentiary hearing at which proof may be offered
10 concerning the allegations in this Petition and any defenses that may be raised by
11 Respondents and;

12 3. Grant such other and further relief as, in the interests of justice, may be
13 appropriate.

14 WHEREFORE, petitioner prays that the court grant petitioner relief to which
15 he may be entitled in this proceeding.

16
17 DATED this 7th day of April, 2017.

18
19 /s/Jonathan M. Kirshbaum
20 JONATHAN M. KIRSHBAUM
21 Assistant Federal Public Defender
22 411 E. Bonneville Ave., Suite 250
23 Las Vegas, NV 89101
24 Attorney for Respondent
25
26
27

APP. 088

1 VERIFICATION

2 Under penalty of perjury, the undersigned declares that she is counsel for the
3 petitioner named in the foregoing petition and knows the contents thereof; that the
4 pleading is true of her own knowledge except as to those matters stated on
5 information and belief and as to such matters she believes them to be true. Petitioner
6 personally authorized undersigned counsel to commence this action.

7 DATED this 7th day of April, 2017.

8
9 /s/Jonathan M. Kirshbaum
10 JONATHAN M. KIRSHBAUM
11 Assistant Federal Public Defender
12 411 E. Bonneville Ave., Suite 250
13 Las Vegas, NV 89101
14 Attorney for Respondent

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1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that he is an employee in the office of the
3 Federal Public Defender for the District of Nevada and is a person of such age and
4 discretion as to be competent to serve papers.

5 That on April 7, 2017, he served a true and accurate copy of the foregoing by
6 placing it in the United States mail, first-class postage paid, addressed to:

7 Washoe County District Attorney
8 Mills B. Lane Justice Center
9 1 South Sierra Street
South Tower, 4th Floor, Reno, NV, 89501

10 Adam P. Laxalt
11 Nevada Attorney General
12 100 North Carson Street
Carson City, NV 89701

13 /s/ Adam Dunn
14 An Employee of the
15 Federal Public Defender
16 District of Nevada

APP. 090

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EDWARD BRANHAM,) No. 24478

Appellant,)

vs.)

THE STATE OF NEVADA,)

Respondent.)

WILLIAM EDWARD BRANHAM,) No. 24648

Appellant,)

vs.)

THE STATE OF NEVADA,)

Respondent.)

FILED

DEC 18 1996

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEALS

These are consolidated appeals from judgments of conviction, pursuant to jury verdicts, of one count of first degree murder and seven counts of forgery. The district court sentenced appellant to serve in the Nevada State Prison a term of life without the possibility of parole for the murder and a term of one year for each of the seven counts of forgery, and to pay restitution in the amount of \$2,455.96. The seven one-year terms run concurrently with each other and consecutive to the term of life imprisonment.

Appellant contends that insufficient evidence was presented at his trial to prove the corpus delicti of the crime of murder. To establish the corpus delicti of murder, the state must show (1) the fact of death, and (2) that the criminal agency of another is responsible for that death. *Frutiger v. State*, 111 Nev. 1385, 1389, 907 P.2d 158, 160 (1995). The fact of death is uncontested, but appellant contends that insufficient evidence was presented to prove that a criminal agency was responsible for that death. Specifically, appellant points out that pathologists could not determine a cause of death.

To sustain a homicide conviction, "the proper standard is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded beyond a reasonable doubt that [the] death was caused by a criminal agency." Frutiger, 111 Nev. at 1391, 907 P.2d at 161 (citing Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) and Jackson v. Virginia, 443 U.S. 307, 319 (1979)). After reviewing the record on appeal, we conclude that sufficient evidence was presented for the jury to reasonably find that the victim's death was caused by a criminal agency. Specifically, the victim's body was found on a couch in her home, nude and on her back, partially covered by an afghan, with a pillow over her face. An empty beer can was in the victim's right hand, with the opening on the side away from her head, opposite the normal drinking position. There was evidence of trauma to her neck. Although pathologists could not rule out natural causes of death, the death was termed "consistent with asphyxia." The victim was not known to have any medical problem likely to cause sudden death. Cf. Frutiger, 111 Nev. at 1391, 907 P.2d at 162 (medical expert testified that the most likely cause of death was chronic and acute alcoholism). Sufficient evidence was presented for a reasonable jury to find that the victim died from a criminal agency.

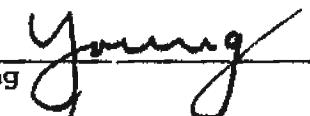
Appellant further contends that his conviction of forgery is not supported by sufficient evidence. Appellant points to evidence that he and the victim had enjoyed a close personal relationship, that the victim had lent him her car and her ATM card, that he knew the PIN number for her ATM card, and that he had cashed checks on her account before her death. Appellant further points out that he offered the victim's telephone number to a bank official when the bank questioned him regarding a check drawn on the victim's account, and that he did not flee when the

police came to arrest him. Appellant contends that this indicates that he had permission to withdraw money from the victim's checking account and negates the "intent to defraud" element of the crime of forgery. See NRS 205.090. Although appellant and the victim were roommates, testimony presented at trial indicated that the victim had never allowed appellant to draw checks on her account. The victim was dead when appellant was apprehended cashing a check on her account. The jury could reasonably infer from appellant's lack of fear when the bank challenged the check drawn on the victim's account that appellant knew the victim was dead and could not respond to the bank's inquiries. Further, appellant had tracings of the victim's signature in his possession when he was apprehended. Under these facts and circumstances, the jury could reasonably find that appellant had the intent to defraud when he signed the victim's name to her checks. The jury's verdict will not be disturbed where, as here, it is supported by sufficient evidence. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981). Accordingly, appellant's contentions lacking merit, we dismiss these appeals.

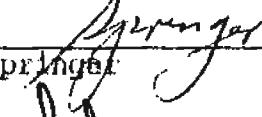
It is so ORDERED.



Steffen, C.J.



Young, J.



Springer, J.



Shearing, J.



Rose, J.

APP. 093 D
FILED

No. CR92-1048

Dept. No. 5

April 14, 1993

AUDI BAILEY, Clerk

By B. Walker
Deputy Clerk

CR92-1048 DC-990005189-008
STATE VS WILLIAM EDWARD BRANHAM 1 Page
District Court 04/14/1993 08:44 AM
Washoe County 1850
CLERK

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,) Reporter: R. Molezzo
Plaintiff,)
vs.) JUDGMENT
WILLIAM EDWARD BRANHAM,)
Defendant.)

No sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That William Edward Branham is guilty of the crime of Murder Of The First Degree as charged in the Information and that he be punished by imprisonment in the Nevada State Prison for the term of Life Without The Possibility Of Parole. The Defendant is ordered to pay restitution in the amount of Two Thousand Four Hundred Fifty-Five Dollars and Ninety-Six Cents (\$2,455.96). It is further ordered that the Defendant pay the statutory Twenty-Five Dollar (\$25.00) administrative assessment fee.

Dated this 14th day of April, 1993.


DISTRICT JUDGE

214

1 The unlawful killing must be accompanied with a
2 deliberate and clear intent to take life in order to
3 constitute Murder of the First Degree. The intent to kill
4 must be the result of deliberate premeditation.

5 Premeditation is a design, a determination to kill,
6 distinctly formed in the mind at any moment before or at the
7 time of the killing.

8 Premeditation need not be for a day, an hour or even
9 a minute. It may be as instantaneous as successive thoughts
10 of the mind. For if the jury believes from the evidence that
11 the act constituting the killing has been preceded by and has
12 been the result of premeditation, no matter how rapidly the
13 premeditation is followed by the act constituting the killing,
14 it is willful, deliberate and premeditated murder.

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26 Instruction No. 23