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IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN MICHAEL COX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75922

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed the instant petition in 2017, more than 19 years after the remittitur issued on direct appeal. *Cox v. State*, Docket No. 26457 (Order Dismissing Appeal, April 24, 1997). Thus, the petition was untimely filed. *See* NRS 34.726(1). The petition was also successive because appellant had previously litigated a postconviction petition for a writ of habeas corpus.[1] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). To the extent appellant raised new claims for relief, those claims constituted an abuse of the writ. *See* NRS 34.810(2). Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). To demonstrate good cause, appellant "must show 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

[1]*Cox v. State*, Docket No. 55109 (Order of Affirmance, June 9, 2010); *Cox v. State*, Docket No. 27045 (Order Dismissing Appeal, April 10, 1998).

503, 506 (2003). Appellant could meet this burden by showing that the "legal basis for a claim was not reasonably available" at the time of the first petition. *Id.* (internal quotation marks omitted). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Appellant claims the district court erred by denying his petition as procedurally barred because recent decisions by the United States Supreme Court provide good cause to excuse the procedural bars. Specifically, he alleges that *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), changed the framework under which retroactivity is analyzed and that he is now entitled to retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000).

In both *Welch* and *Montgomery*, the Court retroactively applied substantive rules of constitutional law. *Welch*, 136 S. Ct. at 1265 (retroactively applying a substantive rule that found the residual clause of the Armed Career Criminal Act of 1984 unconstitutional because it was void for vagueness); *Montgomery*, 136 S. Ct. at 736 (retroactively applying a substantive rule that found a mandatory sentence of life without parole for juvenile homicide offenders unconstitutional because it constituted cruel and unusual punishment). Conversely, in *Byford*, this court merely interpreted a statute unrelated to any constitutional issue. *See Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008); *see also Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000) (holding that this court does not consider retroactive application of new rules unless they involve a constitutional dimension), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002). Contrary to appellant's assertion,

we agree with the Court of Appeals that "[n]othing in [*Welch* or *Montgomery*] alters *Teague*'s threshold requirement that the new rule at issue must be a constitutional rule." *Branham v. Warden*, 134 Nev., Adv. Op. 99, 434 P.3d 313, 316 (2018). And because *Byford* did not establish a new constitutional rule, neither *Welch* nor *Montgomery* undermine *Nika* or provide good cause to raise the *Byford* claim in the instant petition.

Based on the above, we conclude the district court did not err by denying appellant's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: Chief Judge, The Eighth Judicial District Court
Eighth Judicial District Court, Dept. 6
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

No. 75922

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN MICHAEL COX,

Appellant,

v.

THE STATE OF NEVADA, et al.

Respondents-Appellees.

On Appeal from the Order Denying Petition
For Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County, Case No. C97303
Honorable Elissa Cadish, District Court Judge

Appellant's Opening Brief

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NEV. RULE. APP. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. D. Eugene Martin
2. Robert D. Caruso
3. Paul G. Turner

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
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JURISDICTIONAL STATEMENT

This is an appeal from an Order filed on May 3, 2018, with notice of entry of order filed on May 10, 2018. The notice of appeal was timely filed on May 17, 2018. This Court has jurisdiction under N.R.A.P. 4(b) & 4(c), N.R.S. 34.575(1), 34.710, 34.815, 177.015(2).

ROUTING STATEMENT

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus that involves a conviction for a category A felony, first-degree murder, where the petitioner was sentenced to life in prison without the possibility of parole. This case is not presumptively assigned to the Court of Appeals.

The primary issue concerns a new constitutional rule, namely that the "substantive rule" exception to the *Teague* retroactivity principle applies in state post-conviction proceedings as a matter of federal constitutional law. Recent United States Supreme Court opinions make clear that a narrowing interpretation of a criminal statute must apply retroactively under the constitutional substantive rule exception. This new constitutional rule undermines several of the Nevada Supreme Court's prior decisions.

This constitutional issue presents a matter of statewide importance because it affects numerous petitioners throughout the State. This issue is being litigated in several other appeals currently before this Court (*see* Case Nos. 74457, 74459, 74513, 74552, 74554, 74159, 74743, 75706, 75739, 76716). More important, the issue will certainly affect future cases. There will inevitably be cases in which the Nevada Supreme Court interprets the meaning of a criminal statute and limits its scope. A decision in the instant case will have a direct impact on the retroactive effect of those types of decisions.

STATEMENT OF THE ISSUES

Under recently decided United States Supreme Court cases, Cox must be given the benefit of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), as a matter of federal constitutional law, because *Byford* was a substantive change in law that now must be applied retroactively to all cases, including those that became final prior to *Byford*.

STATEMENT OF THE CASE

This appeal concerns the denial of a successive state post-conviction petition arguing that a new constitutional rule allowed Cox to overcome the procedural defaults and obtain relief on the merits. (IV.App.663-97.)

Cox was charged in an information with open murder. (I.App.1-2.) He proceeded to a jury trial that took place in May 1993. (I.App.3.) The jury convicted him of first-degree murder. (IV.App.635.) He was sentenced to life without the possibility of parole. (IV.App.661-62.) On July 8, 1994, the Nevada Supreme Court affirmed the conviction, but vacated the sentence and remanded for resentencing. (IV.App.683.) Following a resentencing hearing, Cox was again sentenced to life without the possibility of parole. (*Id.*) Judgment of conviction was filed on October 7, 1994. (*Id.*) On April 24, 1997, the Nevada Supreme Court dismissed the appeal from the judgment. (IV.App.683-84.)

In April 1998, the Nevada Supreme Court affirmed the denial of Cox's first state post-conviction petition. (IV.App.666.)

On April 18, 2017, Cox filed a second state post-conviction petition raising the issue presented in this appeal. (IV.App.663.) On May 26, 2017, the State filed a response. (IV.App.698.) On July 24, 2017, Cox filed an opposition to the State's response. (IV.App.726.)

On September 7, 2017, the district court held oral argument. (IV.App.745.) On May 3, 2018, the district court issued an order dismissing the petition. (V.App.777.) Notice of entry was filed on May

10, 2018. (V.App.803) Cox filed a timely notice of appeal on May 17, 2018. (V.App.830.)

STATEMENT OF FACTS

Cox was charged with open murder based on allegations that with malice aforethought he killed Carita Antoinette Wilson by tying her hands up with a television cord and then using a pillow case to strangle her. (I.App.1-2.)

The evidence at trial showed that, in March 1990, Cox left Northern California with approximately $16,000.00 cash, ten dogs, stereo equipment, furniture, personal records, and a 30-year old truck with a hole in the windshield the size of a football and otherwise in very poor condition en route to his original home (Tennessee), to evaluate opportunities to move his wife and young son there permanently. (III.App.303-05.) With his truck breaking down almost hourly, Cox made it to Las Vegas, Nevada, where he intended to repair his truck and continue on his way. (III.App.305-15.)

While in Las Vegas, he became involved with a prostitute named Carita "Coco" Wilson, and her pimp, Dennis Fikes. (III.App.317-22.) On March 21, 1990, Coco was found dead in a Las Vegas motel room rented

to Cox. (I.App.39; I.App.116.) The State's theory was that she had been strangled with a rolled up pillow case. (I.App.32.)

Cox was arrested on March 22, 1990, with his truck and dogs on Interstate 40 near Flagstaff, Arizona, en route to Tennessee. (II.App.199.) After being advised of his Miranda rights, Cox was questioned by Arizona Highway Patrolman Scott Tyman if he had killed anyone. (II.App.202-03.) Cox said he was framed and it was self-defense. He said, "[T]he girl turned into a demon, attacking him, coming at him with fangs and fingernails." He also stated, "Hey! That girl still had a strong pulse when I left her. I choked her around the neck only long enough to subdue her." (II.App.204; II.App.214.)

As Cox was being driven back to Las Vegas from Arizona, North Las Vegas Police Dept. Det. Bruce Scoggins stated that Cox talked for about seven hours "non-stop." Cox made several admissions harmful to his case. Cox told Det. Scroggins that the victim Coco had been using cocaine in the motel room. She came out of the bathroom with her hair dripping wet and that he had to take a towel to dry it. Coco began to act bizarre and devilish, and flipped out. He had to take the towel to restrain her to the point of her passing out. She woke up after the first incident

and attacked him again. This happened two more times. After the third time of her passing out, she never woke up. (II.App.163-66.) Cox left the motel room hoping that someone would find her and take care of her. (II.App.166.)

Cox testified on his own behalf in a lengthy, rambling, narrative (lasting for over a two hour period of time) (III.App.296; III.App.327-446), that was stopped only by an objection from the prosecutor (II.App.447). Cox's theory of defense was self-defense. Cox testified that he met Coco and went to a motel room when she overdosed on crack cocaine and became demonically possessed. (*See e.g.* III.App.413-31.) Cox testified that he had to restrain her to protect himself and Coco at the same time as she was holding on to a scissors. She had attacked him on three separate occasions. Each time she attacked him he acted to subdue her. He further testified that she was alive when he left the motel room. (*Id.*)

During trial, three separate jurors wrote notes inquiring about the presence and effects of drug usage on Cox and the victim. During trial, three separate jurors wrote notes inquiring about the effects of drug usage on Cox and the victim.

> Juror Note #1 dated May 24, 1993 - "Can we know what the behavior of the defendant and woman was like? Were they appropriate in action. Any signs of being under the effect of drugs?" Signed [C.] Drury (I.App.154.)
>
> Juror Note #2 dated May 25, 1993 - "Were any tests done (blood tests??) To determine cocaine use? If so - what was found? What behavior would use of cocaine cause? Signed M. Sciorio (II.App.293)
>
> Juror Note #3 dated May 26, 1993 - "Was a drug test ever done on Mr. Cox after his arrest? Signed [L.] Lang. (III.App.537.)

The court provided the jury with the following instruction on premeditation and deliberation, known as the *Kazalyn*[1] instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(III.App.543.)

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

During closing argument, the prosecutor strongly implied that Cox came to Las Vegas to spend his money on drugs. (IV.App.581-83.) The prosecutor also told the jury that it did not need to decide whether Cox was acting out of some type of delusion, or whether "there was some misplaced paranoia on his part that was exacerbated or focused in intensity by the use of cocaine." (IV.App. at 583.) The prosecutor then engaged in a discussion of the Kazalyn instruction:

> [Y]ou must find that the defendant acted in premeditation and deliberation. Those are the two words, one phrase. That's important, premediation and deliberation. Your instructions, Instructions 6, 7, and 8 talk about premeditation and deliberation. It's not a lofty concept. And, by no means, should you consider this a lofty, legal concept. Because this is down in the dirt, criminal law. This is murder.
>
> Premeditation, under definition of law, says that all we need show is the defendant acting had successive thoughts of the mind. He acted with a belief, premeditation, that he wanted to kill Carita. His first thought being, "I want to kill Carita." And that he choked her out. He choked her to death. It can happen that fast. It can happen in an instant. It can happen with the snap of a fingers, or as it happened in this case, three to four minutes with this pillow case around her throat, holding her down.

(IV.App.584.)

In response defense counsel pointed out that Cox "may seem a little bizarre to you. Perhaps he doesn't think the way you and I think."

(IV.App.596.) He emphasized, "Another important thing for you to understand is for someone to premeditate and deliberate, they must be rational. They must be thinking as clearly as anyone can. Because they have, to be found guilty of First Degree Murder, have planned to do it and deliberately take the life of another." (*Id.*) He also pointed out that there was no motive here. (IV.App.619.)

In rebuttal, the prosecutor described Cox's story as "bizarre." (IV.App.625.)

The jury convicted Cox of first-degree murder. (IV.App.635.) He was sentenced by the jury to life without parole. (IV.App.634.)

On July 8, 1994, the Nevada Supreme Court issued an order affirming the conviction but vacating the jury-imposed sentence. (IV.App.683.) Cox was resentenced by the judge to life without the possibility of parole. (IV.App.661-62.) On April 24, 1997, the Nevada Supreme Court dismissed the appeal from this judgment. (IV.App.683-84). The conviction became final on July 23, 1997. *See Nika v. State*, 124 Nev. 1272, 1284 n.52, 198 P.3d 839, 848 n.52 (2008) (conviction becomes final when 90-day time period for filing petition for certiorari to Supreme Court has expired).

A. *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.* at 234-35, 994 P.2d at 713-14. Its prior cases, including *Kazalyn*, had "underemphasized the element of deliberation." *Id.* at 234, 994 P.2d at 713. These cases had reduced "premeditation" and "deliberation" to synonyms and that, because they were "redundant," no instruction separately defining deliberation was required. *Id.* at 235, 994 P.2d at 714. It pointed out that 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." *Id.*

The *Byford* court specifically "abandon[ed]" this line of authority. *Byford*, 116 Nev. at 234, 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. [This Court's] further reduction of

> premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. at 235, 994 P.2d at 713. The court emphasized that deliberation remains a "critical element of the mens rea necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting." *Id.*, 994 P.2d at 714. It is an element that "'must be proven beyond a reasonable doubt before an accused can be convicted or first degree murder.'" *Id.* at 235, 994 P.2d at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

The court directed the state district courts in the future to separately define deliberation in jury instructions as set forth in the opinion. *Byford*, 116 Nev. at 235-37, 994 P.2d at 714-15.

In *Garner v. State*, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), the Nevada Supreme Court held that the use of the *Kazalyn* instruction was not constitutional error. *Id.* at 788-89, 6 P.3d at 1025. It concluded *Byford* had no retroactive effect and only applied prospectively." *Id.*

B. *Fiore v. White* and *Bunkley v. Florida*

In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Court held that due process requires

that a clarification of a criminal statute apply to all convictions, even a conviction that had become final, where the clarification reveals that a defendant was convicted "for conduct that [the State's] criminal statute, as properly interpreted, does not prohibit." *Id.* at 228.

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

C. *Colwell v. State* and *Clem v. State*

In *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002), the Nevada Supreme Court adopted the *Teague* retroactivity rules in Nevada state courts. Under *Teague v. Lane*, 489 U.S. 288 (1989), new rules do not apply retroactively unless they fall within two exceptions: (1) they are substantive; or (2) they establish a watershed procedural rule. The Nevada Supreme Court held that these retroactivity rules, with some liberalizations, would apply only to new constitutional rules of criminal law. *Colwell*, 118 Nev. at 819-20, 59 P.3d at 470-72.

One year later, in *Clem v. State*, 119 Nev. 615, 628, 81 P.3d 521, 531 (2003), the Nevada Supreme Court reaffirmed the retroactivity rules in *Colwell*, emphasizing that they only apply to new constitutional rules and not to a decision that narrows the reach of a substantive criminal statute. *Id.* at 626, 628, 81 P.3d at 529, 531. It explained that the clarification/change dichotomy from *Fiore* and *Bunkley* dictated when a statutory interpretation decision needs to be applied to convictions that had become final. *Id.* at 625-26, 81 P.3d at 528-29.

D. *Nika v. State*

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

In response to *Polk*, the Nevada Supreme Court in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). In *Nika*, the court disagreed with *Polk*'s conclusion that a *Winship* violation could occur with respect to the *Kazalyn* instruction. *Id.* at 1286, 198 P.3d at 1286. The court stated, rather than implicate *Winship* concerns, the only due process issue was whether *Byford*'s interpretation of the first-degree murder

statute was a clarification or a change in the law. *Id.* at 1286-87, 198 P.3d 849-50. The court held that *Byford* was a change in state law. *Id.*

The court acknowledged, because *Byford* had changed the law to "narrow the scope of a criminal statute," due process required *Byford* be applied to those convictions that had not yet become final at the time it was decided, citing *Bunkley* and *Fiore*. *Id.* at 1287, 1287 n.72-74, 1301, 198 P.3d at 850, 850 n.72-74, 859.

The court emphasized that *Byford* was a matter of statutory interpretation and not a matter of constitutional law. *Id.* at 1288, 198 P.3d at 850. The court stated, "[T]he interpretation and definition of a state criminal statute are merely a matter of state law." *Id.* The court reaffirmed the principle set forth in *Clem* and *Colwell*—"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 the law." *Id.* It concluded, "Because *Byford* announced a new rule and that rule was not required as a matter of constitutional law, it has no retroactive application to convictions, like Nika's, that became final before the new rule was announced." *Id.* at 1289, 198 P.3d at 851.

E. *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 mandatory life sentences for juvenile offenders under the Eighth Amendment, applied retroactively to cases that had already become final by the time of Miller. *Montgomery*, 136 S. Ct. at 725.

The initial question the Court addressed in *Montgomery* was whether it had jurisdiction to review the question. The Court stated that it did, holding "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S. Ct. at 729. "Teague's conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional command in their own courts." *Id.* at 727 (citing *Martin v. Hunter's Lessess*, 1 Wheat. 304, 340-41, 344 (1816)). "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their

confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." *Id.* at 731-32.

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

On April 18, 2016, the United States Supreme Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause in the Armed Career Criminal Act was void for vagueness under the Due Process Clause, applied retroactively to convictions that had already become final at the time of *Johnson*. *Welch*, 136 S. Ct. at 1260-61, 1264.

More specifically, the Court determined whether Johnson represented a new substantive rule. *Id.* at 1264-65. The Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). "'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.'" *Id.* at 1265 (quoting *Schriro*, 542 U.S. at 351-52) (emphasis added).

The Court explained determining retroactivity under *Teague* "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive. It depends instead on whether the new rule itself has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction or alters instead the range of conduct or class of persons that the law punishes." *Welch*, 136 U.S. at 1266 (emphasis added).

Under that framework, the Court concluded that *Johnson* was substantive. *Id.* at 1265-66.

Because both parties agreed that the lower court had been wrong on this issue, the Supreme Court appointed *amicus* counsel to argue that the lower court decision should be upheld. Amicus argued that the Court's prior cases set forth a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265. Among the arguments that amicus advanced was that a rule is only substantive when it limits Congress's power to act. *Id.* at 1267.

The Court rejected this argument, pointing out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* It confirmed that its application of the substantive rule exception to *Teague* did include statutory interpretation cases like *Bousley*. *Id.*

The Court then explained how a statutory interpretation decision like *Bousley* fits under the substantive rule exception. In *Bousley*, the Court was determining what retroactive effect should be given to its prior decision in *Bailey v. United States*, 516 U.S. 137 (1995), which had narrowed the meaning of the term "use" of a firearm in relation to a drug crime under 28 U.S.C. § 924(c). *Bousley*, 523 U.S. at 620. The Court explained in *Welch* that it "had no difficulty concluding [in *Bousley*] 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. The Court also cited *Schriro*, 542 U.S. at 354, using the following parenthetical as further support: "A decision that modifies the elements of an offense is normally substantive rather than procedural."

The Court made clear in *Welch* that the *Bousley* decision demonstrates <u>how</u> the Teague substantive exception should be applied.

Id. It stated: "*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power." *Id.* The Court explained that statutory interpretation cases are treated like any other application of the substantive rule exception:

> Neither *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of 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."

Welch, 136 S. Ct. at 1267 (emphasis added; quoting *Schriro*).

F. Second State Petition

On April 18, 2017, exactly one year after *Welch* was decided, Cox filed a second state petition arguing that he was now entitled to the benefit of *Byford* as a result of *Montgomery* and *Welch*. (IV.App.663.) He argued that *Montgomery* established a new constitutional rule, namely the *Teague* substantive exception was now a federal constitutional rule, and *Welch* established that this substantive exception included narrowing interpretations of a statute, such as *Byford*. (*Id.*) The district

court dismissed the petition as procedurally barred and barred by laches. (V.App.777-802.)

SUMMARY OF ARGUMENT

In *Byford*, the Nevada Supreme Court concluded that the jury instruction defining premeditation and deliberation improperly blurred the line between these two elements. The court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. However, the Nevada Supreme Court stated that this error was not of constitutional magnitude and did not need to apply retroactively.

In *Nika*, the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by narrowing its terms. However, under the Nevada retroactivity rules, the statutory interpretation issue in *Byford* had no retroactive effect because it was not a new constitutional rule. Rather as a "change" in state law, it only had to be applied to those convictions that had yet to become final at the time it was decided.

However, in 2016, the United States Supreme Court issued two opinions that have a direct impact on the retroactivity of *Byford*. First,

in *Montgomery*, the Supreme Court held that the question of whether a new rule falls under the "substantive rule" exception to the *Teague* retroactivity framework is now a federal constitutional rule.

Second, in *Welch* the Supreme Court clarified that the "substantive rule" exception is not limited to just new constitutional rules, but also includes narrowing interpretations of criminal statutes. It further indicated in *Welch* that the only requirement for determining whether an interpretation of a criminal statute applies retroactively is whether the interpretation meets the definition of a "substantive rule," namely it alters the range of conduct or the class of persons that the law punishes. *Welch* also announced a broad new rule for how to determine if a new rule is substantive. It held that a new rule is substantive so long as it has "a substantive function." In light of this new rule, whether a statutory interpretation is designated a "clarification" or a "change" is irrelevant. It only matters whether the interpretation serves a "substantive function."

Montgomery and *Welch* represent a new constitutional rule that allows petitioner to obtain the benefit of *Byford* on collateral review in a second petition. The substantive exception to *Teague* is now a federal

constitutional rule. The state courts are required to apply that constitutional rule in the manner that the United States Supreme Court has indicated. In *Welch* the Supreme Court made abundantly clear that the substantive rule exception applies to statutory interpretation decisions. Those decisions are substantive, and apply retroactively, so long as the interpretation alters the range of conduct or the class of persons that the law punishes.

The Nevada Supreme Court has already acknowledged in *Nika* that *Byford* represented such a substantive change. Under *Montgomery* and *Welch*, *Byford* must be applied retroactively to convictions that had already become final at the time *Byford* was decided. Branham falls into that category of petitioners.

Cox can also establish good cause and actual prejudice to overcome the procedural bars. The new constitutional arguments based upon *Montgomery* and *Welch* were not previously available. Cox timely filed the petition within one year of *Welch*, the key decision here. Cox can also show actual prejudice. Under *Byford*, there is a reasonable likelihood that the jury applied the *Kazalyn* instruction in an unconstitutional manner. Further, the instruction had a prejudicial impact at trial as the

State's evidence of deliberation was not strong and was not inconsistent with a second-degree murder, particularly in light of Cox's drug abuse and bizarre behavior. Further, the prosecutor's comments in closing exacerbated the harm from the improper instruction.

ARGUMENT

I. MONTGOMERY AND WELCH ESTABLISH THAT THE NARROWING INTERPRETATION OF THE FIRST-DEGREE MURDER STATUTE IN BYFORD MUST BE APPLIED RETROACTIVELY TO CONVICTIONS THAT WERE FINAL AT THE TIME BYFORD WAS DECIDED

A. *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). 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 *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Under the federal retroactivity framework, the substantive exception "'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.'" *Id.* (quoting *Schriro*, 542 U.S. at 351-52).

The Nevada Supreme Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Colwell v. State*, 118 Nev. 807, 819-20, 59 P.3d 463, 471-72 (2002). While the court adopted the basic framework, it liberalized some of the rules: it more strictly construed the meaning of what constituted a "new rule" and more broadly defined the two exceptions. *Id.*; *see Clem v. State*, 119 Nev. 615, 621, 628, 81 P.3d 521, 530-31 (2003)

Despite the liberalization of the exceptions, the Nevada Supreme Court has clearly indicated that these retroactivity rules apply only to new constitutional rules. *Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008). The court has maintained that decisions that interpret a criminal statute to narrow its scope have no retroactive effect as they are not constitutional rules, but solely matters of state law. *Id.* at 1288-89, 1301, 198 P.3d at 850-51, 859. Rather, according to the court, the application of a narrowing statutory interpretation to cases that have become final depends solely on whether the interpretation represents a "clarification" versus a "change" in the law. *Id.* at 1287, 198 P.3d at 850. 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.*

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

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 v. State*, 118 Nev. 807, 818, 59 P.3d 463, 471 (2002) (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.

In *Welch*, the United States Supreme Court made absolutely clear that the federal constitutional "substantive rule" exception applies to statutory interpretation cases. *Welch* stated this explicitly. It stated that 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 *Schriro*, 542 U.S. at 354)).

In fact, the Court in *Welch* not only stated that the exception applies to statutory interpretation cases, it explained how to apply that exception in those cases. It stated, "decisions 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 *Schriro*, 542 U.S. at 353).

This conclusion is also readily apparent in *Welch*'s discussion of its previous 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 as defined by the Supreme Court, 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 very first time, how the substantive exception applies in statutory interpretation cases. It explained that the only test 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. It explained 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 retroactivity concerns. *Welch* made clear that the *only* relevant question with respect to the retroactivity of a statutory interpretation decision is whether the new interpretation meets the definition of 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 criminal statute—and not just those that are based on a constitutional rule—qualify as "substantive" rules for the purpose of retroactivity analysis. That rule is binding in state courts, just the same

as in federal courts. *See Montgomery*, 136 S.Ct. at 727; *Colwell*, 118 Nev. at 818, 59 P.3d at 471. 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. The Nevada Supreme Court's prior refusal to give full retroactive effect to narrowing statutory interpretations is no longer valid.

B. The Changes to the Retroactivity Rules Require *Byford* to be Applied Retroactively to Cox's case

As a result of *Montgomery* and *Welch*, the Nevada Supreme Court's decision in *Byford* applies retroactively. The analysis here is straightforward as the Nevada Supreme Court has already concluded that *Byford* is substantive.

In *Byford*, the Nevada Supreme Court interpreted the terms of the first-degree murder statute and disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Byford*, 116 Nev. at 234-35, 994 P.2d at 713-14. The court in *Byford* set forth the appropriate jury instructions providing the new definitions of these two separate elements. *Id.* at 235-37, 994 P.2d at 714-15.

Later, in *Nika*, the Nevada Supreme Court held that *Byford* represented an interpretation of a criminal statute that narrowed its scope. *Nika*, 124 Nev. at 1287, 1301, 198 P.3d at 850, 859. This was the basis for the Court concluding that *Byford* was a "change" in law that had to be applied to all conviction that had not yet become final as a matter of due process. *Id.*

Because *Byford* represents a narrowing interpretation of the terms of the first-degree murder statute, *Byford* falls squarely under *Welch*'s definition for a substantive rule. *See Welch*, 136 S. Ct. at 1265 (substantive rule "includes decisions that narrow the scope of a criminal statute by interpreting its terms"); *Id* at 1267 ("A decision that modifies the elements of an offense is normally substantive rather than procedural." (quoting *Schriro*, 542 U.S. at 354)). *Byford* had a "substantive function" because it altered the range of conduct or the class of persons that the law punishes. *Id.* at 1266, 1267. It placed "particular conduct or persons covered by the statue beyond the State's power to punish." *Id.* at 1265.

Accordingly, under *Welch* and *Montgomery*, Cox, whose conviction became final prior to *Byford*, is entitled to the retroactive application of *Byford* to his case.

C. Under *Byford*, There Was Constitutional Error in Cox's Case

The jury instruction on first-degree murder in Cox's case did not comport with *Byford*. The *Kazalyn* instruction defining premeditation and deliberation did not define deliberation as a separate element. As a result, it is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

As the Nevada Supreme Court explained in *Byford*, the *Kazalyn* instruction blurred the distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The jury instruction violated due process as it relieved the State of its obligation to prove essential elements of the crime, including deliberation. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). In turn, the jury was not required to find deliberation as defined in *Byford*. The jury was never required to find whether there was "coolness and

reflection." *Byford*, 116 Nev. at 235, 994 P.2d at 714. The jury was never required to find whether the murder was the result of a "process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action." *Id.*

This error had a prejudicial impact on this case. The evidence against Cox was not so great that it precluded a verdict of second-degree murder. The evidence of deliberation, namely that Cox engaged in a dispassionate weighing process and acted with "coolness and reflection" was far from strong. Indeed, there were reasons to believe that Cox was both under the influence of cocaine and not thinking rationally at the time of the incident. That has an impact on his specific intent. *See generally Riley v. McDaniel*, 786 F.3d 719, 725 (9th Cir. 2015) (Riley's emotional state and his drug use "could easily have led the jury to have a reasonable doubt whether Riley acted with 'coolness and reflection or undertaken a 'dispassionate weighing process.'").

Critically, the defense, the State, and the jury raised issues about Cox's mental health and his drug use. Three jurors submitted notes asking about these two issues. It clearly was an important issue in their

minds. It was a central tenet of the defense that someone who was not thinking rationally could not "deliberately" take a life. Thus, the defense centered on deliberation. However, the jury was not instructed on the appropriate definition of deliberation.

Just as important, the prosecutor's closing exacerbated the harm here as he specifically relied upon the jury instruction. The prosecutor told the jury that the concepts here were not "lofty," rather this was just "murder." And he attempted to convince them that murder was just murder by pointing to the *Kazalyn* instruction. He stated that "premeditation and deliberation" was simply one phrase. He emphasized that "all we need show is the defendant acting had successive thoughts of the mind." The prosecutor specifically asked the jury to find Cox guilty without separately finding deliberation, as allowed under the *Kazalyn* instruction.

Accordingly, the improper *Kazalyn* instruction left no room for a finding of deliberation or "coolness and reflection" and permitted the jury to convict Cox even if the determination to kill was a "mere unconsidered and rash impulse" or "formed in passion." *Byford*, 994 P.2d at 714. The jurors clearly had questions about Cox's mental state at the time of the

incident. There can be no doubt that the jury applied the instruction in an unconstitutional manner. This error caused actual prejudice to Cox.

D. The Petition Is Not Barred By Laches

As a constitutional matter and as a matter of equity, laches cannot, and should not, bar the petition under N.R.S. 34.800. The state courts are now constitutionally required to apply a substantive change retroactively. That is the import of *Montgomery*. And the facts of *Montgomery* demonstrate the breadth and far-reaching application of this new constitutional rule. Put simply, there is no temporal limit on how far back a new substantive change must be applied.

The question in *Montgomery* was whether the Supreme Court's prior decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in which the Supreme Court held that a juvenile cannot be sentenced to life without parole absent consideration of the defendant's special circumstance as a juvenile, applied retroactively. *Montgomery*, 136 S.Ct. at 725. The petitioner in Montgomery received a life without parole sentence as a juvenile almost 50 years prior to the decision in Miller. *Id.* at 726. After determining that *Miller* did apply retroactively, the Court held that "prisoners like *Montgomery* must be given the opportunity to show their

crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-37 (emphasis added).

As can be seen, the new rule from *Montgomery* has exceedingly broad implications. If a change in law is retroactive, a petitioner whose conviction has already become final, even if it has been final for 50 years, must be give the benefit of that new rule. That overcomes any allegation of lack of diligence or prejudice. These are simply not relevant factors in the retroactivity determination. The federal Constitution requires that the rule must apply to a petitioner in Cox's position.

Further, as a matter of equity, this Court should not impose the discretionary laches bar.[2] The length of time that has passed in this case is not attributable to a delay from Cox. Cox previously attempted to raise

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[2] There can be no doubt that the laches bar is discretionary. N.R.S. 34.800 uses permissive, as opposed to mandatory, language. *See* N.R.S. 34.800(1) ("[a] petition *may* be dismissed (emphasis added)); *see also* Hearing on A.B. 517 Before the Assembly Comm. On Judiciary, 63d Leg. Ex. D (Nev. May 7, 1985) ("[T]he language of the subdivision, 'a petition may be dismissed," is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation," (internal parenthetical omitted) (quoting Rule 9 of the Rules Governing § 2254 Petitions (1982)); *Robins v. State*, 385 P.3d 57 (Nev. 2016) (unpublished).

this claim, but he was denied relief. In fact, Cox was unable to obtain relief on this issue prior to *Montgomery* and *Welch*. The Nevada Supreme Court definitively held in *Nika* that petitioners whose convictions became final prior to *Byford* were not entitled to relief. The United States Supreme Court has now issued a new constitutional rule with direct application to Cox's case that was not previously available to him. The state courts are constitutionally required to apply this new rule to his case. The record indicates that Cox has not inappropriately delayed this case. The discretionary laches bar should not be imposed. *See State v. Powell*, 122 Nev. 751, 758-59, 138 P.3d 453, 458 (2006) (State was not entitled to relief under N.R.S. 34.800 because petitioner had not inappropriately delayed case).

CONCLUSION

Cox has established that, under new constitutional principles, the decision in *Byford* must apply retroactively to his case pursuant to the new constitutional rule set forth in *Montgomery* and *Welch*. Under *Byford*, it is clear that the jury instruction on first-degree murder was improper. As a result, this Court should find that he has established both cause and prejudice to overcome the procedural defaults. For similar

reasons, laches does not bar the petition. This Court should grant the petition for a writ of habeas corpus and remand this case to the district court with directions to vacate Cox's judgment of conviction and to provide Cox with a new trial.

Dated October 17, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

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[ ] Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion

in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated October 17, 2018.

Respectfully submitted,

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/s/ Jonathan M. Kirshbaum
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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2018, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Ryan MacDonald.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

STEVEN MICHAEL COX,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 90C097303
Dept. No. VI

Date of Hearing: 09/06/2017
Time of Hearing: 8:30 a.m.
(Not a Death Penalty Case)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE having come on for hearing before the Honorable Judge Elissa Cadish, District Judge, on the 7th of September, 2017, the Petitioner not being present, represented by Jonathan M. Kirshbaum the Respondent being represented by Steven B. Wolfson, Clark County District Attorney, by and through Charles Thoman, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

Procedural History

On November 21, 1990, the State charged Steven Michael Cox ("Petitioner") with Murder with Use of a Deadly Weapon (Felony -NRS 200.010, 200.030, 193.165). Petitioner's jury trial commenced on May 24, 1993, and on May 28, 1993, the jury returned a verdict finding Petitioner guilty of First Degree Murder. The jury also returned a special verdict imposing a sentence of life without the possibility of parole in the Nevada State Prison. On July 20, 1993, Petitioner was adjudged guilty of First Degree Murder and sentenced to life without the possibility of parole in the Nevada State Prison. The Judgment of Conviction was filed on July 28, 1993.

But, on July 8, 1994, the Nevada Supreme Court issued an Order remanding the matter to the district court. On appeal, Petitioner argued that the district court erred in refusing to accept a proposed stipulation entered into between the State and Petitioner. The district court had refused to accept this proposed stipulation based on an incorrect interpretation of the Nevada Supreme Court's decision in *McCabe v. State,* 98 Nev. 604, 655 P.2d 536 (1982). Accordingly, the Nevada Supreme Court vacated the jury-imposed sentence of life without the possibility of parole and remanded the case for the district court to determine the appropriate sentence in accordance with NRS 176.015 and NRS 176.033. Remittitur issued on July 27, 1994.

On September 29, 1994, Petitioner was again adjudged guilty of First Degree Murder and sentenced to life without the possibility of parole in the Nevada State Prison. The Judgment of Conviction was entered on October 7, 1994. On April 24, 1997, the Nevada Supreme Court issued an Order dismissing Petitioner's appeal and affirming the judgment. Remittitur issued on May 13, 1997.

During the pendency of his direct appeal, Petitioner filed his first habeas petition on February 8, 1995. On February 23, 1995, the Court denied the petition and entered an Order to that effect on March 9, 1995. On April 10, 1998, the Nevada Supreme Court issued an Order dismissing Petitioner's appeal and affirmed the denial of his first habeas petition. Remittitur issued on April 29, 1998.

On July 7, 2009, Petitioner filed his second habeas petition. On September 16, 2009, the Court denied the petition and entered an Order to that effect on December 2, 2009. On June 9, 2010, the Nevada Supreme Court issued an Order affirming the denial of Petitioner's second habeas petition. Remittitur issued on August 16, 2010.

On April 18, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post Conviction), which now constitutes his third habeas petition. The State ~~responds as follows:~~ Filed its Response on May 26, 2017.

ANALYSIS

This Court will deny the Petition on the basis that it is procedurally barred under both NRS 34.726(1) and NRS 34.810(2), The Court also finds that laches under NRS 34.800(2) applies here and that prejudice to the State should be presumed given that more than 19 years have elapsed between the Nevada Supreme Court issuing it's remittitur and the filing of the instant Petition.

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A. The Procedural Bars are Mandatory

The Nevada Supreme Court has held that application of the statutory procedural default rules to post-conviction habeas petitions is *mandatory,"* noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

State v. Dist. Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005) (emphasis added). Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State," Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied. For the reasons discussed below, Petitioner's motion is be denied.

B. Petitioner's Petition is Time Barred

The mandatory provision of NRS 34,726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed ***within 1 year after entry of the judgment of conviction*** or, if an appeal has been taken from the judgment, ***within 1 year after the Supreme Court issues its remittitur.*** For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(emphasis added). "[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." Riker, 121 Nev. at 233, 112 P.3d at 1075.

Accordingly, the one-year time bar prescribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its plain meaning).

In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme Court affirmed the rejection of a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1), Gonzales reiterated the importance of filing the petition with the District Court within the one-year mandate, absent a showing of "good cause" for the delay in filing. Gonzales, 590 P.3d at 902. The one-year time bar is therefore strictly construed. In contrast with

the short amount of time to file a notice of appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

Here, Petitioner filed a direct appeal from his Judgment of Conviction. Remittitur issued on ~~May 5, 1998~~ May 13, 1997 al. Accordingly, Petitioner had until approximately May ~~5, 1999~~ 13, 1998 al to file a post-conviction petition. The instant petition was not filed until April ~~18~~ 18 al, 2017. Therefore, absent a showing of good cause, Petitioner's motion must be denied as time-barred pursuant to NRS 34.726(1). NRS 34.726 can only be overcome upon a showing of good cause and prejudice, which Petitioner failed to demonstrate. Accordingly, this Court denies Petitioner's Petition as time-barred.

C. Petitioner's Petition is Barred by Laches

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The statute also requires that the State plead laches in its motion to dismiss the petition. NRS 34.800. The State plead laches in the instant case.

Here, Petitioner filed a direct appeal from his Judgment of Conviction. Remittitur issued on May ~~5~~ 13, 1998. Petitioner filed the instant petition on April ~~18~~ 18, 2017, more than ~~19~~ 18 al years from the issuance of Remittitur. Since more than 19 years have elapsed between the Petitioner's Judgment of Conviction and the filing of the instant Petition, NRS 34.800 directly applies in this case, and a presumption of prejudice to the State arises. Moreover, Petitioner ailed to address the presumption, nor did he offer anything to rebut it. Pursuant to NRS 34.800, Petitioner's instant Petition is statutorily barred and is dismissed.

D. Petitioner's Petition is Successive

Petitioner's Petition is procedurally barred because it is successive. NRS 34.810(2) reads:

> A second or successive petition *must* be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added). Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

The Nevada Supreme Court has stated that "[w]ithout [] limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-498 (1991).

Here, Petitioner filed a previous Petition for Writ of Habeas Corpus on ~~March 25, 1999~~ July 7, 2009, which was denied ~~and affirmed, after a limited remand, on September 29, 2006~~. Consequently, the instant petition filed on April 18, 2017, is a successive petition. To avoid the procedural default under NRS 34.810, Petitioner had the burden of pleading

and proving specific facts that demonstrate both good cause for his failure to present his claim in earlier proceedings and actual prejudice. NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). As Petitioner failed to do so, his *third* Petition for Writ of Habeas Corpus is denied.

E. Petitioner Cannot Establish Good Cause

To meet NRS 34.726(1)'s first requirement, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules," Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.' "Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986)).

Petitioner attempts to meet this first requirement by arguing new case law. Specifically, he argues that Montgomery and Welch "represent a change in law that allows petitioner to obtain the benefit of Byford' on collateral review." Petition at 22. In essence, Petitioner avered that Montgomery and Welch establish a legal basis for a claim that was not previously available. Petitioner's reliance on Montgomery and Welch is misguided.

As noted by Petitioner, he received the Kazalyn[2] jury instructions on premeditation and deliberation:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

The Nevada Supreme Court held in Byford that this Kazalyn instruction did "not do full justice to the [statutory] phrase 'willful, deliberate and premeditated.' " 116 Nev. at 235, 994 P.2d at 713, As explained by the Court in Byford, the Kazalyn instruction "underemphasized the element of deliberation," and "[b]y defining only premeditation and failing to provide deliberation with any independent definition, the Kazalyn instruction blur[red] the distinction between first- and second-degree murder." 116 Nev. at 234-35, 994 P.2d at 713. Therefore, in order to make it clear to the jury that "deliberation is a distinct element of *mens rea* for first-degree murder," the Court directed "the district courts to cease instructing juries that a killing resulting from premeditation is 'willful, deliberate, and premeditated murder.' " Id. at 235, 994 P.2d at 713. The Court then went on to provide a set of instructions to be used by the district courts "in cases where Petitioners are charged with first-degree murder based on willful, deliberate, and premeditated killing." Id. at 236-37, 994 P.2d at 713-15.

Seven years later, in Polk v. Sandoval, the United States Court of Appeals for the Ninth Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held that the use of the Kazalyn instruction violated the Due Process Clause of the United States Constitution because the instruction "relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated." Id. at 909. In Polk, the Ninth Circuit took issue with the Nevada Supreme Court's conclusion in cases decided in the wake of *Byford* that "giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error."[3] *Id.* at 911. According to the Ninth Circuit, "the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state insofar as it "failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin Winship and thus ignored the law the Supreme Court clearly established in those decisions—that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution." Id.

A little more than a year after Polk was decided, the Nevada Supreme Court addressed that decision in Nika v. State, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008). In commenting on the Ninth Circuit's decision in Polk, the Court in Nika pointed out that "[t]he fundamental flaw . . . in Polk's analysis is the underlying assumption that Byford merely reaffirmed a distinction between `willfulness,' deliberation' and 'premeditation.' " *Id.* Rather than being simply a clarification of existing law, the Nevada Supreme Court in Nika took the "opportunity to reiterate that Byford announced *a change in state law.". Id.* (emphasis added). In rejecting the Ninth Circuit's reasoning in Polk, the Nevada Supreme Court noted that "[u]ntil Byford, we had not required separate definitions for `willfulness,' premeditation' and 'deliberation' when the jury was instructed on any one of those terms." Id. Indeed, Nika explicitly held that "the Kazalyn instruction correctly reflected Nevada law before Byford." Id. at 1287, 198 P.3d at 850.

The Court in Nika then went on to affirm its previous holding that Byford is not retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing Rippo v. State, 122 Nev. 1086, 1097, 146 P,3d 279, 286 (2006)). For purposes here, Nika's discussion on retroactivity merits close analysis. The Court in Nika commenced its retroactivity analysis with Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002). In Colwell, the Nevada Supreme Court "detailed the rules of retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if those rules fell within one of two narrow exceptions." Nika, 124 Nev. at 1288, 198 P.3d at 850 (citing Colwell, 118 Nev, at 820, 59 P.3d at 531). Colwell, in turn, was premised on the United States Supreme Court's decision in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). In Teague, the United States Supreme Court did away with its previous retroactivity analysis in Linkletter,[4] replacing it with "a general requirement of nonretroactivity of new rules n federal collateral review." Colwell, 118 Nev. at 816, 59 P.3d at 469-70 (citing *Teague,* 489 U.S. at 299-310, 109 S. Ct, at 1069-76). In short, the Court in Teague held that "new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added). This

holding, however, was subject to two exceptions: first, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " Id. at 311, 109 S. Ct. at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new constitutional rule of criminal procedure should be applied retroactively if it is a "watershed rule[of criminal procedure." Id. at 311, 109 S. Ct. at 1076 (citing Mackey, 401 U.S. at 69394, 91 S. Ct. at 1165).

That Teague was concerned exclusively with new *constitutional* rules of criminal procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the Court in Teague. See Mackey, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan's opinion in Mackey starts off acknowledging the nature of the issue facing the Court. See id. at 675, 91 S. Ct. at 1165 ("These three cases have one question in common: the extent to which new *constitutional* rules prescribed by this Court for the conduct of criminal cases are applicable to other such cases which were litigated under different but then-prevailing *constitutional* rules." (emphasis added)). And when outlining the two exceptions that were ultimately adopted by the Court in Teague, Justice Harlan explicitly acknowledged the constitutional nature of these exceptions. See id. at 692, 91 S. Ct. at 1165 ("New 'substantive due process' rules, that is, those that place, *as a matter of constitutional interpretation,* certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing." (emphasis added)); id. at 693, 91 S. Ct, at 1165 ("Typically, it should be the case that any conviction free from federal *constitutional* error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a ull hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." (emphasis added)).

The Nevada Supreme Court's decision in Colwell further reinforces the notion that Teague's exceptions were concerned exclusively with new *constitutional* rules. *See* 118 Nev. at 817, 59 1[3].3d at 470. In Colwell, the Court provided examples of "new rules" that fall into either exception. As to the first exception, the Nevada Supreme Court explained that "the Supreme Court's holding that the *Fourteenth Amendment* prohibits states from criminalizing marriages between persons of different races" is an example of a new substantive rule of law that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 692 n.7, 91 S. Ct at 1165 n.7) (emphasis added). Noting that this first exception "also covers 'rules prohibiting a certain category of punishment for a class of Petitioners because of their status,' " id. (quoting Penry v. Lynaugh, 492 U.S. 302, 329-30, 109 S. Ct. 2934, 2952-53.(1989), overruled on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002)), the Nevada Supreme Court cited "the Supreme Court's [holding that the *Eighth Amendment* prohibits the execution of mentally retarded criminals" as another example of a new substantive rule of law that should be applied retroactively on collateral review. Id. (citing Penry, 492 U.S. at 329-30, 109 S. Ct. at 2952-53) (emphasis added). As to the second exception, the Nevada Supreme Court cited "the right to counsel at trial"[5] as an example of a watershed rule of criminal procedure that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 694, 91 S. Ct. at 1165).

The Court in Colwell, however, found Teague's retroactivity analysis too restrictive and, therefore, while adopting its general framework, chose "to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require." Id. at 818, 59 P.3d at 470; See also id. at 818, 59 P.3d at 471 ("Though we consider the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review.").[6] First, the Court in Colwell narrowed Teague's definition of a "new rule," which it had found too expansive.? Id. at 819-20, 59 P.3d. at 472 ("We consider too sweeping the proposition, noted above, that a rule is new whenever any other reasonable

interpretation or prior law was possible. However, a rule is new, for example, when the decision announcing it overrules precedent, or 'disapproves a practice this Court had arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had uniformly approved.' " (quoting Griffith v. Kentucky, 479 U.S. 314, 325, 107 S. Ct. 708, 714 (1987)). And second, the Court in Colwell expanded on Teague's two exceptions, which it had found too "narrowly drawn":

> When a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain Petitioners because of their status r offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. These are basically the exceptions defined by the Supreme Court. But we do not limit the first exception to `primary, private individual' conduct, allowing the possibility that other conduct may be constitutionally protected from criminalization and warrant retroactive relief. And with the second exception, we do not distinguish a separate requirement of 'bedrock' or 'watershed' significance; if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.

Id. at 820, 59 P.3d at 472. Notwithstanding this expansion of the protections afforded in Teague, the Court in Colwell never lost sight of the fact that the Court's determination of retroactivity focuses on new rules of *constitutional* concern. If the new rule of criminal procedure is not constitutional in nature, Teague's retroactivity analysis has no bearing.

One year later in Clem v. State, the Nevada Supreme Court reaffirmed the modified Teague retroactivity analysis set out in Colwell. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32 (2008). Notably, the Clem Court explained that it is "not required to make retroactive its new rules of state law that do not implicate constitutional rights." Id. at 626, 81 P.3d at 529. The Court further noted that "[t]his is true even where [its] decisions overrule or reverse prior decisions to narrow the reach of a

substantive criminal statute." Id. The Court then provided the following concise overview of the modified Teague retroactivity analysis set out in Colwell:

> Therefore, on collateral review under Colwell, if a rule is not new, it applies retroactively; if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of Colwell's delineated exceptions.

Id. at 628, 81 P.3d at 531. Thus, Clem reiterated that if the new rule of criminal procedure is not constitutional in nature, Teague's retroactivity analysis has no relevance. Id. at 628-629, 81 P.3d at 531 ("Both Teague and Colwell require limited retroactivity on collateral review t neither upset the usual rule of nonretroactivity for rules that carry no constitutional significance.").[8]

It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous holding[9] that Byford is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 ("We reaffirm our decisions in Clem and Colwell 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 the law."). The Court in Nika then explained how the change in the law made by Byford "was a matter of interpreting a state statute, not a matter of constitutional law." Id. Accordingly, because it was not a new *constitutional* rule of criminal procedure of the type contemplated by Teague and Colwell, the change wrought in Byford was not to have retroactive effect on collateral review to convictions that were final before the change in the law.

Neither Montgomery nor Welch alter Teague's—and, by extension, Colwell' s—underlying premise that the two exceptions to the general rule of nonretroactivity must implicate constitutional concerns before coming into play. In Montgomery, the United States Supreme Court had to consider whether Miller v. Alabama, 567 U.S. 132 S. Ct. 2455 (2012), which held that a mandatory sentence of life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on "cruel and unusual punishment," ad to be applied retroactively to juvenile offenders

whose convictions and sentences were final at the time when Miller was decided. U.S. at 136 S. Ct. at 725. To answer this question, the Court in Montgomery employed the retroactivity analysis set out in *Teague.* Id. at , 136 S. Ct. at 728-36. As to whether Miller announced a new "substantive rule of constitutional law," id at , 136 S. Ct. at 734, such that it fell within the first of the two exceptions announced in Teague, the Montgomery Court commenced its analysis by noting that "the 'foundation stone' for Miller's analysis was [the] Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Id. at, 136 S. Ct. at 732.

This "line of precedent" included the Court's previous decision in Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010), and Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005), the holdings of which were premised on constitutional concerns—namely, the Eighth Amendment. U.S. at —, 136 S. Ct. at 723 (explaining how Graham "held that the Eighth Amendment bars life without parole for juvenile nonhomicide offenders" and how Roper "held that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the time of their crimes"). After elaborating further on the considerations discussed in Roper and Graham that underlay the Court's holding in Miller, id. at136 S. Ct. at 733-34, the Court went on to conclude the following:

> Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, [it rendered life without parole *an unconstitutional penalty* for a class of Petitioners because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, *Miller* announced a substantive rule of *constitutional* law. Like other substantive rules, *Miller* is retroactive because it necessarily carr[ies] a significant risk that a Petitioner—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon him.

Id. at _____, 136 S. Ct. at 734 (internal citations omitted) (quotation marks omitted) (alteration in original) (emphasis added).

Petitioner, however, gets caught up in Montgomery's preceding jurisdictional analysis in which it had to decide, as a preliminary matter, whether a State is under an "obligation to give a new rule of constitutional law retroactive effect in its own collateral review proceedings." W. at136 S. Ct. at 727; see Petition at 21-22, 29, 36. Petitioner made much ado about Montgomery's discussion on this front, arguing that the Court in Montgomery "established a new rule of constitutional law, namely that the 'substantive' exception to the Teague rule applies in state courts as a matter of due process." Petition at 37. This assertion, while true, shortchanged the Court's jurisdictional analysis. In addressing the jurisdictional question and discussing Teague's first exception to the general rule of nonretroactivity in collateral review proceedings, Montgomery actually reinforces the notion that Teague's retroactivity analysis is relevant only when considering a new constitutional rule. See, e.g., id. At 136 S. Ct. at 727 ("States may not disregard a controlling, *constitutional* command in their own courts." (emphasis added)); id. at , 136 S. Ct. at 728 (explaining that under the first exception to the general rule of nonretroactivity discussed in Teague, "courts must give retroactive effect to new substantive rules of *constitutional* law" (emphasis added)); id. at , 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of *constitutional* law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (emphasis added)); id. At 136 S. Ct. at 729-30 ("Substantive rules, then, set forth categorical *constitutional* guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred *by the Constitution,* the resulting conviction or sentence is, by definition, unlawful." (emphasis added)); id. At 136 S. Ct. at 730 ("By holding that new substantive rules are, indeed, retroactive, Teague continued a long tradition of giving retroactive effect to *constitutional* rights that go beyond procedural

guarantees." (emphasis added)); id. at T, 136 S. Ct. at 731 ("A penalty imposed pursuant to an *unconstitutional* law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the *Constitution* forbids." (emphasis added)); id. at _____, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional* right that determines the outcome of that challenge." (emphasis added)). Montgomery's holding that State courts are to give retroactive effect to new substantive rules of constitutional law simply makes universal what has already been accepted as common practice in Nevada for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in State collateral review proceedings. See Colwell, 118 Nev. at 818-21, 59 P.3d at 471-72; Clem, 119 Nev. at 628-29, 81 P.3d at 530-31.

Petitioner, however, really just used Montgomery as a bridge to explain why he believed that the United States Supreme Court's more recent decision in Welch mandates that Byford is retroactive even as to those convictions that were final at the time that it was decided. Thus, the focal point was not so much Montgomery—which, again, made constitutional (i.e., that State courts must give retroactive effect to new substantive rules of constitutional law) what the Nevada Supreme Court has already accepted in practice—but rather Welch, which according to Petitioner, "indicated that the *only* requirement for determining whether an interpretation of a criminal statute applies retroactivity is whether the interpretation narrows the class of individuals who can be convicted of the crime." Petition at 37 (emphasis in original). Once again Petitioner shortchanged the Supreme Court's analysis by making such an unqualified assertion—this time to the point of misrepresenting the Court's holding in Welch.

In Welch, the Court had to consider whether Johnson v. United States, 576 U.S. , 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA") of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness, is retroactive in cases on collateral review. U.S. at 136 S. Ct. at 1260-61.

Not surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in Teague. Id. at 136 S. Ct. at 1264-65. The Court commenced its application of the Teague retroactivity analysis by recognizing that "{uinder Teague, as a general matter, 'new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,' " id. at , 136 S. Ct. at 1264 (quoting Teague, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was subject to the two exceptions that have already been discussed at great length above. Finding it "undisputed that Johnson announced a new rule," the Court explained that the specific question at issue was whether this new rule was "substantive," Id.° Then, upon concluding that "Johnson changed the substantive reach of the [ACCA]" by "'altering the range of conduct or the class of persons that the [Act] punishes,' " the Court held that "the mile announced in Johnson is substantive." *Id.* at , 136 S. Ct. at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)).

Salient in the Court's analysis was the principle announced in Schriro, that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." 542 U.S. at 353, 124 S. Ct. at 2523; see Welch, ____ U.S. at 136 S. Ct. at 1264-65 (citing Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the Court in Shriro relied upon Bousley v. United States, which, in turn, relied upon Teague in explaining the "distinction between substance and procedure" as far as new rules of constitutional law are concerned. See 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998) (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle relied on by the Court in Welch in holding that Johnson was a new substantive rule is ultimately rooted in Teague, which, as

discussed above, is concerned exclusively with new rules of *constitutional* import. That is to say, if the rule is new, but not constitutional in nature, there is no need to resort to either of the Teague exceptions.

Juxtaposing the invalidation of the residual clause of the ACCA by Johnson with the change in Nevada law on first-degree murder" effected by Byford will help drive home the point that the former was premised on constitutional concerns not present in the latter, This, in turn, will help illustrate why Teague's retroactivity analysis has relevance only to the former. In Johnson, the United States Supreme Court considered whether the residual clause of the ACCA violated "the Constitution's prohibition of vague criminal laws." 576 U.S. at 135 . Ct. at 2555. The "residual clause" is part of the ACCA's definition of the term "violent felony":

> the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another;*

18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of § 924(e)(2)(B) that came to be known as the "residual clause." Johnson, 576 U.S. at

135 S. Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more convictions for a "violent felony" (defined above) is subject to a minimum term of imprisonment of 15 years to a maximum term of life. § 924(e)(1); Johnson, 576 U.S. at , 135 S. Ct. at 2556. Thus, a conviction for a felony that "involves conduct that presents a serious potential risk of physical injury"—i.e., a felony that fell under the residual clause—could very well have made the difference between serving a maximum of 10 years in prison versus a maximum of life in prison. See Johnson, 576 U.S, at ____, 135 S. Ct. at 2555 ("In general, the law punishes violation of this ban by up to 10 years' imprisonment. H But if the violator has three or more earlier convictions for . . . a

'violent felony,' the [ACCA] increases his prison term to a minimum of 15 years and a maximum of life." (internal citation omitted)).

To understand the issue that arose with the residual clause, it helps to understand the context in which it was applied. See Welch, U.S. at 136 S. Ct. at 1262 ("The vagueness of the residual clause rests in large part on its operation under the categorical approach."). The United States Supreme Court employs what is known as the categorical approach in deciding whether an offense qualifies as a violent felony under § 924(e)(2)(B). Id. at _,136 S. Ct. at 1262 (citing Johnson, 576 U.S. at , 135 S. Ct. at 2557). Under the categorical approach, "a court assesses whether a crime qualifies as a violent felony In terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a articular occasion.' " Johnson, 576 U.S. at _____, 135 S. Ct. at 2557 (quoting Begay v. United States, 553 U.S. 137, 141, 128 S. Ct. 1581, 1584 (2008)). The issue with the residual clause was that it required "a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." Id. (quoting James v. United States, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597 (2007)).

The Court in Johnson found that "[L]ly() features of the residual clause conspire[d] to make it unconstitutionally vague." Id. First, that the residual clause left "grave uncertainty about how to estimate the risk posed by a crime"; and second, that it left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Id. at T, 135 S. Ct. at 255758. Because of these uncertainties, the Court in *Johnson* explained that "[Unyoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." Id. at , 135 S. Ct. at 2560. Accordingly, "[t]he Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine, a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect to the Federal Government) and the *Fourteenth Amendment* (with respect to the States)." Welch, ^ U.S. 136 S. Ct, at 1261-62 (emphasis added).

Unlike the invalidation of the residual clause of the ACCA on constitutional grounds, the change in the law on first-degree murder effected by Byford implicated no constitutional concerns. The Nevada Supreme Court in Nika explained in very clear terms that its "decision in Byford to change Nevada law and distinguish between `willfulness,' premeditation,' and `deliberation' was a matter of interpreting a state statute, *not a matter of constitutional law."* 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in Nika noted how other jurisdictions "differ in their treatment of the terms 'willful,' 'premeditated,' and 'deliberate' for first-degree murder." Id.; see id. at 1288-89, 198 P.3d at 850-51 ("As explained earlier, several jurisdictions treat these terms as synonymous while others, for xample California and Tennessee, ascribe distinct meanings to these words. These different decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional law.").

Conflating the change effected by Johnson with that effected by Byford ignores a fundamental legal distinction between the two. Because the residual clause was found unconstitutionally void for vagueness, Petitioners whose sentences were increased on the basis of this clause were sentenced on the basis of an unconstitutional provision and, thus, were unconstitutionally sentenced. Such as sentence is, as the Court in Montgomery would put it, "not just erroneous but contrary to law and, as a result, void." See U.S. at ___, 136 S. Ct. at 731 (citing Ex parte Siebold, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the change effected by Byford. At no point has Nevada's law on first-degree murder been found unconstitutional. Petitioners who were convicted of first-degree murder under NRS 200.030(1)(a) prior to Byford were nonetheless convicted under a constitutionally valid statute and, thus, were lawfully convicted. See Nika, 124 Nev. at 1287, 198 P.3d at 850 (explaining that "the Kazalyn instruction correctly reflected Nevada law before *Byford").*

It was the constitutional rights that underlay Johnson's invalidation of the residual clause that made it a "substantive rule of constitutional law," See Montgomery, U.S. at , 136 S. Ct. at 729. And as a "new" substantive rule of constitutional law, it fell within the

first of the two exceptions to Teague's general rule of nonretroactivity. Because *no* constitutional rights underlay the Nevada Supreme Court's change in Nevada's law on first-degree murder, the new rule announced in Byford does not fall within Teague's "substantive rule" exception. The constitutional underpinnings of Johnson's invalidation of the residual clause and the legal ramifications stemming from this (i.e., that those whose sentences were increased pursuant to an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to Welch's holding that the change effected by Johnson is retroactive under the Teague framework.

Petitioner's reliance on Welch, however, went beyond the Court's holding and *ratio decidendi.* In his exposition of Welch, Petitioner went on to describe the Court's treatment of the arguments raised by *Amicus.* See Petition at 30-31; Welch, U.S. at 136 S. Ct. at 1265-68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a different understanding of the Teague framework, "apply[ing] that framework by asking whether the constitutional right underlying the new rule is substantive or procedural"; (2) that a rule is only substantive if it limits Congress' power to legislate; and (3) that only "statutory construction cases are substantive because they define what Congress always intended the law to mean" as opposed to cases invalidating statutes (or parts thereof). Welch, U.S. at ____, 136 S. Ct, at 1265-68. It was in addressing this third argument that the Court set out the "test" for determining when a rule is substantive that Petitioner's argument hinges on:

> Her argument is that statutory construction cases are substantive because they define what Congress always intended the law to mean—unlike Johnson, which struck down the residual clause regardless of Congress' intent.
>
> That argument is not persuasive. Neither Bousley nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of 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.'

Id. at , 136 S. CLat 1267 (quoting Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). On the basis of this language, Petitioner came to the following conclusion:

> What is critically important, and new, about Welch is that it explains, for the very first time, that the *only* test 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. Because this aspect of Teague is now a matter of constitutional law, state courts are required to apply this rule from *Welch.*

Petition at 32 (emphasis in original).

Petitioner, however, failed to grasp that that this "test" he relies so heaVily on is nothing more than judicial dictum. *Judicial Dictum,* Black's Law Dictionary 519 (9th Ed. 2009) (defining "judicial dictum" as "[a] opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision"). This "test" set out by the Court was in response to an argument made by *Amicus* and was not essential to Welch's holding regarding Johnson's retroactivity. As judicial dictum; this "test" is not binding on Nevada courts as Petitioner argues. See Black v. Colvin, 142 F. Supp. 3d 390, 395 (ED. Pa. 2015) ("Lower courts are not bound by dicta." (citing United States v. Warren, 338 F.3d 258, 265 (3d Cir. 2003)))

Interestingly, though, in setting out this test, the Court quoted verbatim from the very portion of its decision in Schriro that has been cited above, see *supra,* for the proposition that the key principle relied on by the Welch Court—in holding that *Johnson* was a new substantive rule—is ultimately rooted in Teague, which, again, is concerned exclusively with new rules of constitutional import. Thus, to the extent the "test" relied on by Petitioner is grounded on this text from Schriro, Petitioner took it out of context by ignoring the fact that this statement in Schriro was based on Bousley's discussion of the substance/procedure distinction respecting new rules of constitutional law, which was, in

turn, premised largely on Teague. See Bousley, 523 U.S, at 620-621, 118 S. Ct. at 1610 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). But, to the extent that this "test" is unmoored from the constitutional underpinnings of Teague's retroactivity analysis, it is, after all, nothing more than dictum. Either way, Petitioner's reliance on this language from Welch was misguided.

Because neither Montgomery nor Welch alter Teague's retroactivity analysis, the Nevada Supreme Court's decision in Colwell, which adopted Teague's framework, remains valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in Nika, Byford has no retroactive application on collateral review to convictions that became final before the new rule was announced. 124 Nev. at 1287-89, 198 P.3d at 850-51. Petitioner's conviction was final on May 5, 1998. Byford was decided on February 28, 2000.

F. Petitioner Cannot Establish Actual Prejudice

To meet NRS 34.726(1)(b)'s criterion, "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev., 275 P.3d 91, 95 (2012) (citing Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993)).

First, Petitioner has failed to provide any cogent argument in support of his allegation that he was actually prejudiced by use of the Kazalyn instruction. The very last sentence of the Petition states that "petitioner can establish actual prejudice for the reasons discussed on pages 16-32." Petition at 33. A review of pages 16-32, however, reveals that Petitioner makes only the following conclusory statement in support of his allegation that he was actually prejudiced by use of the Kazalyn instruction: "It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution." Petition at 30.

But, in any event, Petitioner cannot show that he was unduly prejudiced by the use of the Kazalyn instruction because there was overwhelming

evidence of premeditation, deliberation, and willfulness. The evidence reflected that Petitioner checked into a hotel room with the victim, Carita Wilson, in the early afternoon of March 21, 1990. See Transcript of Jury Trial, May 24, 1993, at 112; Transcript of Jury Trial, May 25, 1993, at 157. In this hotel room, Petitioner tied Ms. Wilson to the television set with the television's electrical cord and strangled her to death by wrapping a pillow case around her neck. See Transcript of Jury Trial, May 24, 1993, at 55-56, 133-34; Transcript of Jury Trial, May 25, 1993, at 157-60, 173, 207¬08, 228-31.

Based on the foregoing, this Court finds that the instant Petition is untimely pursuant to NRS 34.726(1) and that Petitioner has failed to establish "good cause for delay." The United States Supreme Court's decisions in Montgomery and Welch do not provide a new legal basis to satisfy NRS 34.726(1)(a)'s criterion that the delay not be the fault of the petitioner. And Petitioner has also failed to establish NRS 34.726(1)(b)'s criterion inasmuch as he has failed to establish that he was unduly prejudiced by the use of the Kazalyn instruction. This Court denies the Petition on the basis that it is procedurally barred under NRS 34.726(1).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby dismissed.

DATED this 10 of April, 2018.

DISTRICT JUDGE

JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12901C
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, I hand delivered the foregoing to the honorable Elissa F. Cadish's chambers.

I hereby certify that on April 3, 2018, I electronically mailed the foregoing to the Clark County District Attorney's Office at the addresses noted below.

Ryan.Macdonald@clarkcountyda.com

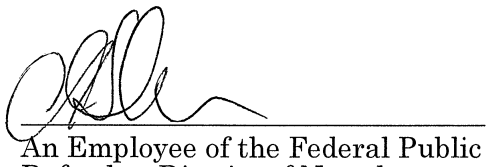
Stephanie.Johnson@clarkcountyda.com

Eileen.davis@calrkcountyda.com

motions@clarkcountyda.com

I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Steve M. Cox
No. 40295
Northern Nevada Correctional Center
PO Box 7000
Carson City, NV 89702



An Employee of the Federal Public Defender, District of Nevada

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CLERK OF THE COURT

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Attorney for Petitioner STEVEN MICHAEL COX

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

STEVEN MICHAEL COX, Petitioner, v. ISIDRO BACA, et al., Respondents.	Case No. C97303 Dept No. ~~V~~ VI (Not a Death Penalty Case) Hearing: 6-5-17 Time: 8:30AM

PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

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

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District Court in Las Vegas, Nevada.

3. Date of judgment of conviction: October 7, 1994.

4. Case Number: C97303.

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

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

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

If "yes", list crime, case number and sentence being served at this time: N/A.

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

8. What was your plea?

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

(b) Guilty _____ (d) Nolo contendere _____

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

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

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

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

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court.

(b) Case number or citation: Case No. 25007.

(c) Result: Cox filed a timely Notice of Appeal on August 18, 1993. The record on appeal was docketed in the Nevada Supreme Court as Case No. 25007.

On July 8, 1994, the Nevada Supreme Court entered an order of remand vacating the jury-imposed sentence of life without the possibility of parole for the district court to determine Cox's sentence. The judgment was filed on August 17, 1994, and remittitur issued on August 16, 1994. Following a resentencing hearing, a judgment of conviction was filed on October 7, 1994, wherein Cox was again sentenced to life without the possibility of parole by the district court.

13.1. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court.

(b) Case number or citation: Case No. 26457.

(d) Result: Cox filed a timely Notice of Appeal on October 28, 1994. The record on appeal was docketed in the Nevada Supreme Court as Case No. 26457. On February 2, 1995, Cox also filed, in proper person, a Petition for Writ of Mandamus in the Nevada Supreme Court regarding Case No. 26457. The appeal was dismissed on April 24, 1997. The judgment was filed on May 13, 1997, and remittitur was issued on May 29, 1997.

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

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

16. If your answer to No. 15 was "yes," give the following information:

(a) **As to any first petition, application or motion, give the same information:**

(1) Name of Court: 8th Judicial District Court

(2) Nature of proceeding: Motion for Acquittal/New Trial, or in the alternative, Petition for Writ of Habeas Corpus (post-conviction).

(3) Grounds raised:

I. Defendant incorporates the facts, information, analysis, and applicable law within the motion for acquittal, or in the alternative motion for new trial attached hereto;

II. Abuse of Discretion:

A. EDCR Rules and Faretta Issue;

B. Sentencing; and

III. Ineffective Assistance of Counsel.

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

(5) Result: The district court rejected Cox's claims of ineffective assistance of counsel at trial and at sentencing, and held that he waived his other claims by failing to raise them on direct appeal. The Supreme Court of Nevada affirmed this final state appeal on April 10, 1998.

(6) Date of Result: April 10, 1998.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Order dismissing appeal dated April 10, 1998.

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

(1) Name of court: Nevada Supreme Court (Case No. 26457).

(2) Nature of proceeding: Motion to File Proper Person Brief and Appellant's Supplemental Brief.

(3) Grounds raised:

I. Insufficient evidence to sustain accusation of First Degree Murder Beyond a Reasonable Doubt by a rational trier of fact and requires entry of judgment of acquittal.

A. Prosecution violated Brady v. Maryland by failure to disclose exculpatory evidence of the preliminary "on-site" investigation of Deputy Coroner Holt.

1. Preliminary on-site investigation and Corner's Inquest Negate proximate cause require to prove first degree murder beyond a reasonable doubt, and supports defense theories of self-defense and heat of passion, as well as potential second suspect and inter or supervening cause of death

a. Body temperature

b. Lividity

c. Rigor Mortis

d. Putrefaction

e. Other Factors

B. Court erred as statements obtained as a result of involuntary responses to questioning while Cox was in mentally debilitated condition and suggestive state of mind required suppression.

1. Jenkins Issue and Cox's Statements.

a. Cox's first statements.

b. Cox's second statement.

2. Harmless Error Analysis.

C. Court erred in refusing to allow evidence of violent character and criminal record of the deceased –said evidence negates the credibility of prosecution case and supports claims of self-defense and heat of passion as well as potential second suspect and inter or supervening cause of death.

D. Question of competency and heat of passion negate elements necessary to prove first degree murder beyond a reasonable doubt.

E. Failure to Disclose offer of leniency to jury denied fair proceeding.

II. Cox incorporates the issues of appellant's opening brief, case No. 25007 and 26457, and all subsequent briefs, and makes part by reference with addendum addressing abuse of discretion.

A. District Court abused discretion and Violated standard of Dawson v. Delaware in sentencing Cox.

B. District Court Erred in denial of Cox's motion for acquittal. Or in the alternative, motion for a new trial.

C. District Court erred in denial of Cox's motion for advisory opinion, or in the alternative, petition for writ of habeas corpus, without an evidentiary hearing or appointment of counsel.

III. State cannot oppose claim of ineffective assistance of counsel.

A. Representation of office of the Clark County Public defender fell below objective standards of reasonableness.

B. Clark County Public Defender sustained conflict of interest sufficient to merit reversal and new proceeding.

IV. 'Grave Doubt' and fundamental miscarriage of justice standard mandates reversal.

V. Cox reserves the right to allege additional issues and grounds for relief.

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

(5) Result: Appeal dismissed.

(6) Date of result: April 24, 1997.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Order dismissing appeal dated April 24, 1997.

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: 8th Judicial District Court

(2) Nature of proceeding: On February 2, 1995, Cox filed a Motion For Advisory Opinion on Defendant's Motion For Acquittal/New Trial, or in the alternative, Petition for Writ of Habeas Corpus (post-conviction).

(3) Grounds raised:

I. Defendant incorporates the facts, information, analysis, and applicable law within the motion for acquittal, or in the alternative motion for new trial attached hereto;

II. Abuse of Discretion:

A. EDCR Rules and Faretta Issue;

B. Sentencing; and

III. Ineffective Assistance of Counsel.

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

(5) Result: On March 9, 1995, the district court filed an Order Denying Motion for Acquittal/New Trial, or in the Alternative Petition For Writ of Habeas Corpus (post-conviction). Petitioner filed a timely pro se Notice of Appeal on April 3, 1995, and the record on appeal was docketed in the Nevada Supreme Court as Case No. 27045. On April 24, 1997, the Nevada Supreme Court filed an Order Dismissing Appeal, Case No. 26457. On April 10, 1998, the Nevada Supreme Court

entered an order dismissing Petitioner's appeal from the denial of his motions for acquittal and an advisory opinion (motions construed as a petition for writ of habeas corpus), Case No. 27045.

(6) Date of result: April 10, 1998.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Order dismissing appeal dated April 10, 1998.

(d) As to any fourth 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. On August 24, 1998, Cox mailed a proper person Petition for Writ of Habeas Corpus to the federal district court in Las Vegas, Nevada, which was filed by the court on November 3, 1998. Following the appointment of the Federal Public Defender to represent Cox, an Amended Petition for Writ of Habeas Corpus was filed on Cox's behalf on April 20, 1999.

(3) Grounds raised:

Ground One: The trial court denied Cox his privilege against self-incrimination and his rights to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution by not sua sponte, ordering (1) an evaluation of his competency to waive knowingly and intelligently his rights

under Miranda v. Arizona, 384 U.S. 436 (1966) and (2) hold a hearing as to whether Cox's statements were voluntary.

Ground Two: Cox's Fifth and Fourteenth Amendment rights to due process of law were violated when he was resentenced by the same judge who had refused to sentence him and affirmed the jury verdict of life without the possibility of parole.

Ground Three: The State's failure to comply with standard procedures in collecting and evaluating crime scene evidence denied Cox access to potentially exculpatory evidence and violated his Fifth and Fourteenth Amendment rights to due process.

Ground Four: The trial court denied Cox his right to a fair trial and due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by refusing to admit into evidence the victim's bad character.

Ground Five: Cox was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel at trial because errors of his trial counsel fell below the constitutionally required level of representation:

(a) failed to challenge Cox's competency to waive his Miranda rights;

(b) failed to advance the defense of voluntary intoxication;

(c) inappropriately allowed Cox to testify in narrative;

(d) failed to support Cox's self-defense claim by introducing evidence of the victim's criminal history;

(e) failed to present any mitigating evidence at resentencing;

(f) failed to challenge Cox's competency to be resentenced.

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

(5) Result: The district court found that Grounds Two and Five(a)-(d) and (f) were unexhausted and allowed Cox the opportunity to abandon such grounds. Cox filed a Formal Declaration of Abandonment of Grounds Two and Five (a)-(d) and (f). Following the Respondents' Answer counsel for Cox filed an emergency motion to allow psychological evaluation of Cox, which was granted by the district court.

Following the filing of Cox's Traverse, the district court entered an Order to Show Cause and Prejudice finding procedural default as to Grounds Three and Four. Cox filed Points and Authorities addressing the issue of cause and prejudice, to which Respondents filed a Reply to Cox's Points and Authorities Re: Procedural Default. On October 1, 2001, the district court filed a Memorandum Decision and Order and Judgment in a Civil Case, denying Cox's Amended Petition for Writ of Habeas Corpus.

(6) Date of result. October 1, 2001.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: October 1, 2001 Memorandum Decision and Order and Judgment in a Civil Case.

(e) As to any fifth petition, application or motion, give the same information:

(1) Name of Court: 8th Judicial District Court

(2) Nature of proceeding: Notice of Appeal and Application for a Certificate of Appealability. On October 31, 2001, Cox filed a Notice of Appeal and an Application for a Certificate of Appealability.

(3) Grounds raised:

1. Whether the district court erred in dismissing Ground One of the amended petition on the merits;

2. Whether the district court erred in dismissing Grounds Three and Four as procedurally defaulted; and

3. Whether the district court erred in dismissing Ground Five(e) of the amended petition on the merits.

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

(5) Result: On June 20, 2002, the district court entered an Order granting in part Cox's Application for Certificate of Appealability as to the following issue: "Whether the United States District Court erred in relying on the Nevada Supreme Court's dismissal of Petitioner's post-conviction appeal on procedural grounds when it dismissed Grounds Three and Four of the amended federal petition as being procedurally barred from federal review?".

(6) Date of Result: June 20, 2002

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

(f) As to any sixth petition, application or motion, give the same information:

(1) Name of Court: Ninth Circuit Court of Appeal

(2) Nature of proceeding: Notice of Appeal and Application for a Certificate of Appealability. On July 26, 2002, Cox filed Appellant's Motion for Broader Certification with the Ninth Circuit seeking certification to include as assignments of error whether the district court erred in dismissing Ground One and Ground Five(e) on the merits.

(3) Grounds raised: N/A.

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

(5) Result: On October 16, 2002, a motions panel of the Ninth Circuit denied Cox a certificate of appealability of those two issues.

(6) Date of Result: October 16, 2002.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: October 16, 2002 order denying Certificate of Appealability.

(g) As to any seventh petition, application or motion, give the same information:

(1) Name of Court: Ninth Circuit Court of Appeal

(2) Nature of proceeding: Cox filed with the merits panel a motion seeking broader certification pursuant to the Advisory Committee Note To Ninth Circuit Rule 22-1.

(3) Grounds raised:

1. Whether the district court erred in dismissing Ground One of the Amended Petition on the merits; and,

2. Whether the district court erred in dismissing Ground Five(e) of the Amended Petition on the merits.

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

(5) Result: On August 1, 2003, the Ninth Circuit found that the district court erred in finding Grounds Three and Four procedurally defaulted and remanded the case for further proceedings on the merits. The Ninth Circuit also granted Cox's motion to broaden the certificate of appealability to include review on the merits of Grounds One and Five(e). On September 6, 2005, the district court filed an Order and Judgment in a Civil Case denying Grounds Three and Four on the merits.

(6) Date of Result: September 6, 2005.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: September 6, 2005 Order and Judgment in a Civil Case.

(h) As to any eighth petition, application or motion, give the same information:

(1) Name of court: 8th Judicial District Court

(2) Nature of proceeding: Cox filed a Notice of Appeal and an Application For Certificate of Appealability as to Grounds Three and Four.

(3) Grounds raised: N/A.

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

(5) Result: On December 14, 2005, the district court filed an Order denying in full Cox's motion for issuance of a certificate of appealability.

(6) Date of result: December 14, 2005.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: December 14, 2005 Order Denying Certificate of Appealability.

(i) As to any ninth petition, application or motion, give the same information:

(1) Name of court: Ninth Circuit Court of Appeal

(2) Nature of proceeding: On January 23, 2006, Cox filed Appellant's Application for Certificate of Appealability with this Court as to Grounds Three and Four.

(3) Grounds raised: N/A.

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

(5) Result: On October 4, 2006, a motions panel of the Ninth Circuit issued an Order noting that (in Case No. 02-16313) it had previously granted a certificate of appealability as to Ground One (Miranda waiver) and Ground Five(e) (ineffective assistance of counsel) and set a briefing schedule. The motions panel denied Cox's request for a certificate of appealability as to Ground Three (faulty crime scene collection and evaluation procedures) and Ground Four (error in refusing to admit at trial evidence of the victim's bad character).

(6) Date of result: October 4, 2006.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: October 4, 2006 Order Denting Certificate of Appealability.

(j) As to any tenth petition, application or motion, give the same information:

(1) Name of court: Ninth Circuit Court of Appeal

(2) Nature of proceeding: Appeal of denial of federal habeas petition.

(3) Grounds raised:

1. Whether the United States District Court erred in denying appellant's habeas corpus petition with respect to his claim that he did not knowingly and voluntarily waive his Miranda rights?

2. Whether the United States District Court erred in denying appellant's habeas corpus petition with respect to his claim that his attorney was ineffective at his bench sentencing proceeding?

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

(5) Result: Affirmed district court's denial of federal habeas relief.

(6) Date of result: September 4, 2008.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Written opinion filed September 4, 2008.

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

(1) First petition, application or motion?

Yes __X__ No _____

(2) Second petition, application or motion?

Yes __X__ No _____

(3) Third petition, application or motion?

Yes __X__ No _____

(4) Fourth petition, application or motion?

Yes __X__ No _____

(5) Fifth petition, application or motion?

Yes __X__ No _____

(6) Sixth petition, application or motion?

Yes __X__ No _____

(7) Seventh petition, application or motion?

Yes __X__ No _____

(8) Eighth petition, application or motion?

Yes X No _____

(9) Ninth petition, application or motion?

Yes X No _____

(10) Tenth petition, application or motion?

Yes X No _____

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

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes If so, identify:

a. Which of the grounds is the same: Ground One

b. The proceedings in which these grounds were raised: First State Petition.

c. Briefly explain why you are again raising these grounds.

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

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

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.). N/A.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? No. If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

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

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

If yes, state what court and the case number: N/A.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: D. Eugene Martin, Deputy Public Defender (trial counsel); Robert D. Caruso (appellate counsel).

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes _____ No __XX___

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

GROUND ONE

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

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

In *Nika v. State*, the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by narrowing its terms. As a result, the court was wrong to only apply *Byford* prospectively. However, relying upon its interpretation of the current state of United States Supreme Court retroactivity rules, it held that, because *Byford* represented only a "change" in state law, not a

"clarification," then *Byford* only applied to those convictions that had yet to become final at the time it was decided. The court concluded, as a result, that *Byford* did not apply retroactively to those convictions that had already become final.

However, in 2016, the United States Supreme Court drastically changed these retroactivity rules. First, in *Montgomery v. Louisiana*, the 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*, the Supreme Court clarified that the "substantive exception" of the *Teague* rules includes "interpretations" of criminal statutes. It further indicated that the *only* requirement for determining whether an interpretation of a criminal statute applies retroactively is whether the interpretation narrows the class of individuals who can be convicted of the crime.

Montgomery and *Welch* represent a change in law that allows petitioner to obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that means that it must be applied retroactively to convictions that had already become final at the time *Byford* was decided. The Nevada Supreme Court's distinction between "change" and "clarification" is no longer valid in determining retroactivity. And the state courts are required to apply the rules set forth in *Welch* because those retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional principle. Petitioner is entitled to relief because there is a reasonable likelihood that the jury applied the *Kazalyn* instruction in an unconstitutional manner.

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

Accordingly, the petition should be granted.

I. BACKGROUND

A. *Kazalyn* First-Degree Murder Instruction

Cox was charged with firs-degree murder based on allegations that he strangled a prostitute to death. The court provided the jury with the following instruction on premeditation and deliberation, known as the *Kazalyn*[1] instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

(5/27/93 Jury Instructions, Instruction No. 6.)

B. Appeal and Date Conviction Became Final

A verdict of guilty of first degree murder and a special verdict of imposition of a sentence of life without the possibility of parole was returned against Cox on May 28, 1993. Cox filed a timely Notice of Appeal on August 18, 1993 (Case No. 25007). On July 8, 1994, the Nevada Supreme Court entered an order of remand vacating the jury-imposed sentence of life without the possibility of parole for the state district court to determine Cox's sentence. Following a resentencing hearing, a judgment of conviction was filed on October 7, 1994, wherein Cox was again sentenced to life without the possibility of parole. Cox filed a timely Notice of Appeal on October 28,

---

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

1994 (Case No. 26457). On April 24, 1997, the Nevada Supreme Court filed an Order Dismissing Appeal, Case No. 26457.

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 or

first degree murder.'" *Id.*at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

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

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

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

> This does not mean, however, that the reasoning of *Byford* is unprecedented. Although *Byford* expressly abandons some recent decisions of this court, it also relies

> 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 statute by resolving conflict in lines in prior case law. Therefore, its reasoning is not altogether new.
>
> Because the rationale in *Byford* is not new and could have been – and in many cases was – argued in the district 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.

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

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

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

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

E. *Nika v. State*

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

In response to *Polk*, the NSC in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (Nev. 2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk*'s

conclusion that a *Winship* violation occurred. The court stated that, rather than implicate *Winship* concerns, the only due process issue was the retroactivity of *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.

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

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

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

On April 18, 2016, the United States Supreme Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether *Johnson v. United States*, which held that the residual clause in the Armed Career Criminal Act was void for vagueness under the Due Process Clause, applied retroactively to convictions that had already become final at the time of *Johnson*. *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)). "'*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.'" *Id.* at 1265 (quoting *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the Court concluded that *Johnson* was substantive. *Id.*

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

The Court rejected this argument, pointing out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, the Court had "held as a matter of statutory interpretation that the 'use' prong [of 18 U.S.C. § 924(c)(1)] punishes only 'active employment of the firearm' and not mere possession." *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). 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.'" *Id.* (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following parenthetical as further support: "A decision that modifies the elements of an offense is normally substantive rather than procedural." The Court pointed out that *Bousley* did not fit under the *amicus*'s *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

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

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

> Neither *Bousley* nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of 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."

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

II. ANALYSIS

A. *Welch* And *Montgomery* Establish That the Narrowing Interpretation of the First-Degree Murder Statute in *Byford* Must Be Applied Retroactively in State Court to Convictions That Were Final at the Time *Byford* Was Decided

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.").

In *Welch*, the Supreme Court made clear that the "substantive rule" exception includes "*decisions that narrow the scope of a criminal statute by interpreting its terms*." What is critically important, and new, about *Welch* is that it explains, for the very first time, that the *only* test 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. Because this aspect of *Teague* is now a matter of constitutional law, state courts are required to apply this rule from *Welch*.

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

Nevertheless, the court concluded that, because *Byford* was a change in law, as opposed to a clarification, it did not need to apply retroactively. In light of *Welch*, this distinction between a "change" and "clarification" no longer matters. The *only* relevant question is whether the new interpretation represents a new substantive rule. In fact, a "change in law" fits far more clearly under the *Teague* substantive rule framework than a clarification because it is a "new" rule. The Supreme Court

has suggested as much previously. *See Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9 (2005) ("A *change* in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context." (emphasis added); citing *Bousley v. United States*, 523 U.S. 614 (1998); and *Fiore*).[2] Critically, in *Welch*, the Supreme Court never used the word "clarification" once when it analyzed how the statutory interpretation decisions fit under *Teague*. Rather, it only used the term "interpretation" without qualification. The analysis in *Welch* shows that the Nevada Supreme Court's distinction between "change" and "clarification" is no longer a relevant factor in determining the retroactive effect of a decision that interprets a criminal statute by narrowing its meaning.

Accordingly, under *Welch* and *Montgomery*, petitioner is entitled to the benefit of having *Byford* apply to his case. The *Kazalyn* instruction defining premeditation and deliberation given in his case was improper.

It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

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

To overcome the procedural bars of NRS 34.726 and NRS 34.810, a petitioner has the burden to show "good cause" for delay in bringing his claim or for presenting the same claims again. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537 (2001). One manner in which a petitioner can establish good cause is to show that the legal basis for the claim was not reasonably available at the time of the default. *Id.* A claim based on newly available legal basis must rest on a previously unavailable

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

constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to file a petition from the date that the claim has become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017).

The decisions in *Montgomery* and *Welch* provide good cause for overcoming the procedural bars. *Montgomery* established a new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of due process. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover, *Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute. These rules were not previously available to petitioner. Finally, petitioner submitted this petition within one year of *Welch*, which was decided on April 18, 2016.

Alternatively, petitioner can overcome the procedural bars based upon a fundamental miscarriage of justice. A fundamental miscarriage of justice occurs when a court fails to review a constitutional claim of a petitioner who can demonstrate that he is actually innocent. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). Actual innocence is shown when "in light of all evidence, it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995). One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that narrows the definition of a crime, he

could not have been convicted of the crime. *See Bousley*, 523 U.S. at 620, 623-24; *Mitchell v. State*, 122 Nev. 1269, 1276-77, 149 P.3d 33, 37-38 (2006).

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

Law of the case also does not bar this Court from addressing this claim due to the intervening change in law. Under the law of the case doctrine, "the law or ruling of a first appeal must be followed in all subsequent proceedings." *Hsu v. County of Clark*, 123 Nev. 625, 173 P.3d 724, 728 (2007). However, the Nevada Supreme Court has recognized that equitable considerations justify a departure from this doctrine. *Id.* at 726. That court has noted three exceptions to the doctrine: (1) subsequent proceedings produce substantially new or different evidence; (2) there has been an intervening change in controlling law; or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced. *Id.* at 729.

Here, *Welch* and *Montgomery* represent an intervening change in controlling law. These cases establish new rules that control the control both the state courts as well as the outcome here. Thus, law of the case does not bar consideration of the issue here.

Finally, petitioner can establish actual prejudice for the reasons discussed on pages 16 to 32.

DATED this 18th April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Megan C. Hoffman
MEGAN C. HOFFMAN
Assistant Federal Public Defender

VERIFICATION

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

DATED this 18th April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Megan C. Hoffman
MEGAN C. HOFFMAN
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

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

That on April 18, 2017, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Steve Wolfson
Clark County District Attorney
301 E. Clark Ave #100
Las Vegas, NV 89101

Attorney General Adam P. Laxalt
Office of the Attorney General
555 E. Washington Ave #3900
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Steve M. Cox
No. 40295
Northern Nevada Correctional Center
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/s/Jessica Pillsbury
An Employee of the
Federal Public Defender
District of Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN MICHAEL COX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 26457

FILED

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CLERK OF SUPREME COURT
BY

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict. Appellant was convicted of first degree murder and sentenced to life in the Nevada State Prison without the possibility of parole.

Appellant argues that the district judge who sentenced him was biased and appellant's sentence must be vacated and this case remanded for sentencing by another district judge. Appellant's argument is based on comments made by the district judge during sentencing. Specifically, the district judge stated that appellant's use of crack cocaine made him a dangerous person. Appellant has failed to show how the district judge's comments demonstrate bias. A sentencing court is privileged to consider facts it deems relevant, as long as those facts are not "supported only by impalpable or highly suspect evidence . . . ." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). The district judge's statement was merely a comment on the fact that appellant had used cocaine; a fact previously admitted by appellant. We

therefore conclude that the district judge's comments were not inappropriate and did not demonstrate bias. Accordingly, we

ORDER this appeal dismissed.[1]

Shearing, C.J.

Springer, J.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Jeffrey D. Sobel, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

[1]Although appellant has not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered appellant's proper person documents. We conclude that none of the relief requested therein is warranted.

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CLERK

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THE STATE OF NEVADA

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- STEVEN MICHAEL COX, #0938174 Defendant.	CASE NO. C97303 DEPT. NO. V DOCKET NO. H

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 27th day of November, 1990, the Defendant STEVEN MICHAEL COX, entered a plea of not guilty to the crime of MURDER (Felony) committed on the 21st day of August, 1990, in violation of NRS 200.010, 200.030, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime of FIRST DEGREE MURDER (Felony); and

WHEREAS, thereafter, on the 29th day of September, 1994, the Defendant being present in Court with his counsel D. EUGENE MARTIN, Deputy Public Defender, and RONALD C. BLOXHAM, Chief Deputy District Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and

SEP 30 1994

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verdict and, in addition to a $25.00 Administrative Assessment Fee, sentenced Defendant to Life in the Nevada Department of Prisons without the possibility of parole, and pay $777.50 in restitution. Defendant granted four (4) years and one hundred and twenty (128) days credit for time served.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 1st day of ~~September~~ October, 1994, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#90-97303X/da
NLVPD DR#90-3170
1ST DEG MURDER - F