No.

October Term, 2018

In the

Supreme Court of the United States

Rome Richard Chacon, *et al.*,
Petitioners,

v.

The State of Nevada,
Respondents.

On Petition for Writ of Certiorari to the
Nevada Court of Appeals

Petition for Writ of Certiorari

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QUESTION PRESENTED

In 2001, this Court left open the question of whether due process requires the states to retroactively apply a decision narrowing the interpretation of a substantive criminal statute. *Fiore v. White*, 531 U.S. 225, 228 (2001). A deep and intractable split then emerged in the state courts, with a majority granting full retroactivity while a small number imposing a retroactivity bar.

In 2016, this Court issued two opinions that resolve this split. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 727-29, 731-32 (2016), this Court constitutionalized the "substantive rule" exception to *Teague*. "A rule is substantive [and, hence, retroactive] if it alters the range of conduct . . . that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). In *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), this Court made clear the "substantive rule" exception includes decisions narrowing the interpretation of a substantive criminal statute. This new constitutional rule sets the constitutional floor for how the "substantive rule" exception must be applied in the state courts. Those states that do not allow for full retroactivity are wrong.

This includes Nevada. After the petitioners' first-degree murder convictions became final, the Nevada Supreme Court narrowed the definition of the first-degree murder statute. However, even in light of *Montgomery* and *Welch*, Nevada continues to hold that a narrowing statutory interpretation has no retroactive effect. *See Branham v. State*, 434 P.3d 313, 316-17 (Nev. Ct. App. 2018). To ensure uniformity and to correct clear error, this Court should grant certiorari on the following question:

1. Under the new constitutional rule of retroactivity established in *Montgomery v. Louisiana* and clarified in *Welch v. United States*, is a state court required under the federal constitution to retroactively apply interpretations of a substantive criminal statute that narrow its scope?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. Pursuant to Supreme Court Rule 12.4, the petitioners listed below file a single petition for writ of certiorari to the Nevada Court of Appeals to cover multiple judgments below raising the same issue.

Petitioners:

Chacon, Rome Richard

Chavez, Charles

Cooper, Rickey

Mercado, Ruel

Respondent:

State of Nevada

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PETITION FOR WRIT OF CERTIORARI

Rome Richard Chacon, et al., petition for a writ of certiorari to review the judgments and orders of the Nevada Court of Appeals in their cases. *See* Appendix 003, 066, 127, 192.

OPINIONS BELOW

The decisions below were all unpublished, and are contained in the attached appendix. A table has been included below. They are joined in a single petition pursuant to Rule 12.4 in that they "involve identical or closely related questions," namely whether a state court's narrowing interpretation of a substantive criminal statute must apply retroactively under the federal constitution.

Petitioner	Case No.	Nev. COA Order Date	App. Pg. (Order)	NSC Denial Date	App. Pg. (NSC)
Chacon, Rome Richard	74552	3/20/2019	003	6/13/2019	001
Chavez, Charles Kelly	74554	3/20/2019	066	6/13/2019	064
Cooper, Rickey Dennis	74159	3/20/2019	127	6/13/2019	125
Mercado, Ruel	74513	3/20/2019	192	6/13/2019	191

JURISDICTION

The Nevada Court of Appeals' orders of affirmance in all of the petitioners' cases were issued on March 20, 2019. App. 003, 066, 127, 192. The Nevada Supreme Court denied the petitions for discretionary review on June 13, 2019. App. 001, 064, 125, 191. This Court has statutory jurisdiction under 28 U.S.C. § 1257(a). This petition presents a federal constitutional question for this Court's review as the Nevada Court of Appeals' decisions did not invoke any state-law grounds

"independent of the merits" of the petitioners' federal constitutional challenge. *See Rippo v. Baker*, 137 S. Ct. 905, 907 n.1 (2017); *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016). The Nevada Court of Appeals' procedural default ruling in each case analyzed whether, under this Court's recent precedent, the petitioner had presented a new constitutional rule to overcome the procedural default. App. 004, 067, 128, 193.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI, Clause 2, provides, in pertinent part:

> This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Nevada Revised Statute § 200.30, Degrees of Murder, provides, in pertinent part:

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing.

STATEMENT OF THE CASE

A. Petitioners are convicted of first-degree murder without a finding of deliberation.

Nevada Revised Statutes § 200.030(1) enumerates the different ways in which a person can commit first-degree murder in Nevada. One of these methods is through a "willful, deliberate and premeditated killing." Nev. Rev. Stat. § 200.030(1)(a)

(2018). Second-degree murder consists of "all other kinds of murder." Nev. Rev. Stat. § 200.30(2) (2018). For anyone charged with murder, the jury must decide between first or second-degree murder. Nev. Rev. Stat. § 200.030(3) (2018).

The difference in degree of murder carries tremendous significance with respect to punishment. A first-degree conviction can result in a sentence of death or life without parole. Nev. Rev. Stat. § 200.30(4)(a)-(b) (2018). The current maximum sentence for a second-degree murder conviction is 10 to life. *See* Nev. Rev. Stat. § 200.30(5) (2018). Prior to a 1995 amendment changing the range of punishment, the maximum sentence for second-degree murder was 5 to life. Nev. Rev. Stat. § 200.30(5) (1994).

Each of the petitioners were convicted of first-degree murder on the theory they committed the willful, deliberate and premeditated killing of the victims. At each of their trials, the jury was given the following problematic instruction defining first-degree murder, known as the *Kazalyn* instruction,[1] which did not define deliberation as a separate element:

> 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.

[1] *See Kazalyn v. State*, 825 P.2d 578, 583–84 (Nev. 1992).

In 1992, the Nevada Supreme Court had upheld this instruction as an accurate definition of the intent element of first-degree murder. *Powell v. State*, 838 P.2d 921, 926-27 (Nev. 1992), *vacated on other grounds*, 511 U.S. 79 (1994); *Kazalyn v. State*, 825 P.2d 578, 583-84 (Nev. 1992).

Based upon their convictions for first-degree murder, each of the petitioners were sentenced to life in prison, with three of the petitioners sentenced to life without parole. App. 062-63, 123-24, 189-90, 269-71. Based on the date on which either the Nevada Supreme Court affirmed the conviction on direct appeal or the time for bringing an appeal expired (*see* App. 057-61, 123-24, 186-88, 260-68), all of the convictions became final prior to February 28, 2000, the date on which the Nevada Supreme Court narrowed the interpretation of the first degree murder statute. *See Nika v. State*, 198 P.3d 839, 848 n.52 (Nev. 2008) (defining when convictions become final under state law).

B. The Nevada Supreme Court narrows the definition of first-degree murder, but applies it only prospectively.

On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 994 P.2d 700 (Nev. 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 713–14. It reasoned:

> 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. [Our] further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. at 713.

The court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. *Id.* at 714.

The court emphasized that deliberation is a "critical element of the *mens rea* necessary for first-degree murder," which requires the jurors to find, "before acting to kill the victim, [the defendant] 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 713–14.

A few months later, the Nevada Supreme Court held any error with respect to the *Kazalyn* instruction was not of constitutional magnitude and only applied prospectively. *Garner v. State*, 6 P.3d 1013, 1025 (Nev. 2000).

C. This Court agrees to decide whether the federal constitution requires a new statutory interpretation to apply retroactively, but then leaves the question open.

Right before the decision in *Byford*, this Court granted certiorari in *Fiore v. White* to determine "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore v. White*, 531 U.S. 225, 226 (2001). However, while the case was being litigated in this Court, the Pennsylvania Supreme Court indicated that it had clarified, not changed, the meaning of the criminal statute. This "clarification" made the retroactivity question "disappear[ ]." *Bunkley v. Florida*, 538 U.S. 835, 840 (2003). This Court explained a clarification is available to any defendant as it merely clarified the law that was in existence at the time of the defendant's conviction. *Fiore*, 531 U.S. at 228. As a result, a clarification "presents no issue of retroactivity." *Id.* Instead, *Fiore* concerned a different due process violation, namely whether the State had presented enough evidence to prove all elements of the crime beyond a reasonable doubt. *Fiore*, 531 U.S. at 228–29 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); and *In re Winship*, 397 U.S. 358, 363 (1970)).

Two years later, in *Bunkley v. Florida*, this Court considered the implications of a new, or changed, interpretation of a criminal statute narrowing its scope. Once again, this Court did not reach the question of retroactivity. *Bunkley*, 538 U.S. at 841. Rather, it concluded that such a change in law would establish the same due process violation at issue in *Fiore* if the change occurred prior to the conviction becoming final. *Id.* at 840–42. The problem in *Bunkley* was the Florida Supreme Court had not indicated precisely when that change occurred. *Id.* at 841–42. This Court remanded the case to the state court to determine whether a *Fiore* error occurred. *Id.*

D. Nevada limits the retroactivity of statutory interpretation decisions to "clarifications" of the law and not "changes."

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court established a retroactivity framework for cases on collateral review in federal court. This framework replaced the retroactivity standard established in *Linkletter v. Walker*, 381 U.S. 618 (1965), which analyzed the retroactivity of a new rule on a case by case basis by examining the purpose of the new rule, the reliance of the states on prior law, and the effect on the administration of justice of a retroactive application. *Id.* at 636–40. This standard did not lead to consistent results. *Teague*, 489 U.S. at 302.

Teague established a uniform approach for retroactivity on collateral review. Under *Teague*, a new rule does not, as a general matter, apply 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 here, 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." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Under the federal retroactivity framework, the substantive rule exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro*, 542 U.S. at 351–52 (citing *Bousley v. United States*, 523 U.S. 614, 620–21 (1998)). "New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." *Id.* at 354. When a decision narrows an interpretation, it "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620–21 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). This Court has emphasized, "it is only Congress, and not the courts, which can make conduct criminal." *Id.* at 621.

The Nevada Supreme Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Clem v. State*, 81 P.3d 521, 530–31 (Nev. 2003); *Colwell v. State*, 59 P.3d 463, 471–72 (Nev. 2002).

However, there is one significant difference between the Nevada retroactivity rules and those adopted by this Court. In contrast to the federal rule, the Nevada Supreme Court has imposed a complete bar on the retroactive application of new, narrowing interpretations of a substantive criminal statute. *Nika v. State*, 198 P.3d 839, 850–51, 859 (Nev. 2008); *Clem*, 81 P.3d at 52-29. It has reasoned that only constitutional rules raise retroactivity concerns while decisions interpreting a criminal statute are matters of state law without retroactivity implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531. According to the court, the only question with respect to who gets the benefit of a narrowing statutory interpretation is whether it represents a "clarification" or a "change" in state law. *Nika*, 198 P.3d

at 850; *Clem*, 81 P.3d at 529, 531. Relying upon *Fiore* and *Bunkley*, it has held, 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 Nevada Supreme Court eventually applied these concepts to *Byford*'s narrowing interpretation of the first-degree murder statute. It characterized the *Byford* decision as a change, as opposed to a clarification, of the statute. *Nika*, 198 P.3d at 849–50. The court emphasized *Byford* involved a matter of statutory interpretation and not a matter of constitutional law. *Nika*, 198 P.3d at 850. The court reaffirmed its retroactivity rules—"if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in law." *Id.*

Acknowledging the new interpretation narrowed the scope of the crime, the court concluded, as a matter of due process, those defendants whose convictions had yet to become final at the time of *Byford* should have been allowed to obtain the benefit of *Byford*. *Id.* at 850, 859 (overruling its prior decision in *Garner* that *Byford* applied only prospectively). But it held, as a matter of state law, the new, narrowing interpretation had no retroactive effect. *Id.* As a result, petitioners like Cox, whose convictions became final prior to *Byford*, were not entitled to *Byford*'s benefit.

E. This Court creates the new constitutional rule of retroactivity in *Montgomery v. Louisiana* and clarifies its scope and application in *Welch v. United States*.

On January 25, 2016, this Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The issue in *Montgomery* was whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited mandatory life sentences for juvenile offenders under the Eighth Amendment, applied retroactively. *Montgomery*, 136 S. Ct. at 725.

The initial question this Court addressed was whether it had jurisdiction to review the retroactivity question. It concluded it did. This Court had previously

"le[ft] open the question whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." *Montgomery*, 136 S. Ct. at 729. It now held that the Constitution required state collateral review courts to give retroactive effect to new substantive constitutional rules. *Id.* It stated, "*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)).

This Court concluded *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, this Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). The primary issue in *Welch* was whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause in the ACCA as unconstitutionally vague, applied retroactively. *Welch*, 136 S. Ct. at 1260–61, 1264. More specifically, this Court considered whether *Johnson* fell under the substantive rule exception to *Teague*. *Id.* at 1264–65.

This 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*, 542 U.S. at 353). "'**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)); *see also Welch,* 136 S.Ct. at 1267 (stating, in a parenthetical, "A decision that modifies the elements of an offense is normally substantive rather than procedural') (quoting *Schriro*, 542 U.S. at 354).

This Court concluded that *Johnson* was substantive. *Id.* In reaching this conclusion, this Court adopted the new "substantive function" test for determining

whether a new rule is substantive, as opposed to procedural. *Id.* at 1266. It explained the *Teague* balance did not depend on the characterization of the underlying constitutional guarantee 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." *Id.*

This Court also rejected an argument to adopt a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265-67. Relevant to statutory interpretation cases, this Court disagreed with the claim that a rule is only substantive when it limits Congress' power to act. It pointed out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* at 1267.

The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Welch*, 136 S. Ct. at 1267. The question in *Bousley* was whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, this 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*). This 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 *Welch* Court stated that *Bousley* did not fit under the proposed *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267. It concluded, "*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.*

Rejecting the suggestion that statutory construction cases are substantive because they define what Congress always intended the law to mean, this Court stated that statutory interpretation cases are substantive solely because they meet the criteria of the substantive rule exception to *Teague*:

> 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. Petitioners files a second state petition arguing that the new constitutional rule of retroactivity requires the state courts to apply *Byford* to his case.

Within one year of *Welch*, each of the petitioners filed a second state post-conviction petition arguing that he was now entitled to the benefit of *Byford* as a result of *Montgomery* and *Welch*. App. 031, 095, 149, 221.

They each argued *Montgomery* established a new constitutional rule, namely the *Teague* substantive rule exception was now a federal constitutional rule the states must apply. *Id.* They further argued *Welch* clarified that this substantive exception included narrowing interpretations of a statute, which would include the Nevada Supreme Court's decision in *Byford* (holding deliberation was a separate and distinct element of first-degree murder). *Id.* The State moved to dismiss the petitions arguing they were procedurally barred and *Montgomery* and *Welch* do not establish good cause to overcome the procedural default. The petitioners all opposed, repeating his argument that the procedural bars could be overcome by a showing of good cause based on a new constitutional rule.

The state district court dismissed the petitions. App. 006-30, 068-94, 130-48, 194-220. The court concluded the petitioners could not overcome the procedural bars (untimely and successive) through a showing of good cause based on a new constitutional rule. *Id.*

The petitioners appealed, raising the same constitutional argument he raised in the state district court. In its unpublished orders, the Nevada Court of Appeals rejected the argument relying exclusively on its prior decision in *Branham v. State*, 434 P.3d 313, 316 (Nev. Ct. App. 2018)).[2] App. 004, 067, 128, 193. In *Branham*, the court rejected the argument that this Court's recent cases require state courts to retroactively apply narrowing interpretations. *Branham*, 434 P.3d at 316–17. It explained that, in *Montgomery* and *Welch*, this Court was solely applying the established *Teague* framework to new constitutional rules. *Id.* It concluded *Montgomery* and *Welch* did not alter *Teague*'s "threshold requirement that the new rule at issue must be a constitutional rule." *Id.* It reasoned *Byford* was a matter of interpreting a statute and not a constitutional rule, so it did not need to be applied retroactively under *Teague*. *Id.*

The petitioners filed petitions for review with the Nevada Supreme Court, arguing that the new constitutional rule of retroactivity established good cause to raise a claim relying on *Byford*. The Nevada Supreme Court denied the petitions. App. 001, 064, 125, 191.

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[2] The petitioner in *Branham* has filed a separate certiorari petition. *Branham v. Baca*, No. 18-9436.

REASONS FOR GRANTING THE PETITION

A. Certiorari is warranted to resolve the intractable split that developed in the state courts on the retroactivity of a narrowing interpretation of a substantive criminal statute after this Court left the question open in *Fiore*.

1. The states have implemented different and opposing retroactivity approaches.

There is a clear split in the state courts as to the retroactive effect of narrowing interpretations of substantive criminal statutes. After this Court left open the question of whether the federal constitution requires the retroactive application of a new interpretation, the state courts veered off on divergent paths. The majority of state courts have concluded, as this Court has, that these decisions deserve full retroactive effect as they are substantive. A group of states have adopted standards that allow, but do not require, the retroactive application of these decisions. At the other end of the spectrum, there are at least three states that do not allow for retroactive application, including, as shown above, Nevada. There are also a handful of states that have adopted standards that severely limit the retroactive effect of these decisions. Overall, the states have adopted divergent and opposing approaches.

a. Seventeen states follow the federal rule and grant full retroactivity because the new interpretation is substantive.

The most common approach among the state courts is to grant full retroactivity to new, narrowing interpretations of substantive criminal statutes because they represent new substantive rules.[3] *See State v. Towery*, 64 P.3d 828, 832 (Ariz. 2003)

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[3] At one point, Nevada appeared to have adopted this rule, indicating a decision that "address[ed] the elements of an offense" was retroactive because it was substantive under *Schriro*. *Mitchell v. State*, 149 P.3d 33, 38 n.25 (Nev. 2006). However, the Nevada Supreme Court later "disavow[ed] any language in *Mitchell v. State* suggesting that a new nonconstitutional rule of criminal procedure applies retroactively." *Nika*, 198 P.3d at 850 n.78.

("Substantive rules determine the meaning of a criminal statute." (citing *Bousley*)); *Chao v. State*, 931 A.2d 1000, 1002 (Del. 2007) (new substantive decisions, including narrowing interpretations, apply retroactively "when a defendant has been convicted for acts that are not criminal"); *Luke v. Battle*, 565 S.E.2d 816, 819 (Ga. 2002) ("an appellate decision holding that a criminal statute no longer reaches certain conduct is a ruling of substantive law" and must apply retroactively); *State v. Young*, 406 P.3d 868, 871 (Id. 2017) (new statutory interpretation will apply retroactively if it "substantively alters punishable conduct"); *People v. Edgeston*, 920 N.E.2d 467, 471 (Ill. App. Ct. 2009) ("Illinois follows the federal rule that a decision that narrows a substantive criminal statute must have full retroactive effect in collateral attacks." (internal citation omitted)); *Jacobs v. State*, 835 N.E.2d 485, 489-91 (Ind. 2005) (narrowing statutory interpretation was substantive and applied retroactively because new rule concerned itself with "'what conduct is criminal and [what is] the punishment to be imposed for such conduct,'" citing 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.2 (2d ed. 2003)); *Allen v. State*, 42 A.3d 708, 720 (Md. Ct. App. 2012) (new statutory decision is fully retroactive "when the change affected the integrity of the fact finding process or the change involved the ability to try a defendant or impose punishment"); *Chambers v. State*, 831 N.W.2d 311, 326 (Minn. 2013) ("a new rule is 'substantive' if the rule '*narrow[s]* the scope of a criminal statute by interpreting its terms'" (quoting *Schriro*)), *overruled on other grounds*, *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016); *Jones v. State*, 122 So.3d 698, 702 (Miss. 2013) ("[S]ubstantive rules . . . include[ ] decisions that narrow the scope of a criminal statute by interpreting its terms."(quoting *Schriro*)); *State v. Cook*, 272 P.3d 50, 55-56 (Mont. 2002) (new statutory interpretation applies retroactively if substantive); *Morel v. State*, 912 N.W.2d 299, 304 (N.D. 2018) ("substantive rules include decisions that narrow the scope of a criminal statute"); *Commonwealth v. Cunningham*, 81 A.3d 1, 19 (Pa. 2013)

(substantive rules include "'decisions that narrow the scope of a criminal statute by interpreting its terms'" (quoting *Schriro*)); *State v. Robertson*, 438 P.3d 491, 511-13 (Utah May 15, 2017) (new interpretation of substantive criminal statute is fully retroactive because it is substantive); *State v. White*, 944 A.2d 203, 207-08 (Vt. 2007) ("New substantive rules include those that 'narrow the scope of a criminal statute by interpreting its terms . . .'" (quoting *Schriro*)); *State v. Lagundoye*, 674 N.W.2d 526, 531 (Wisc. 2004); *see also In re Miller*, 14 Cal.App.5th 960, 978–79, 222 Cal. Rptr.3d 960, 979 (2017) (new interpretation given retroactive effect because "a court acts in excess of its jurisdiction by imposing a punishment for conduct not prohibited by the relevant panel statute").

Notably, similar to petitioner's argument here, one state has used the combination of *Montgomery* and *Welch* to apply the federal substantive rule exception to the states. *State v. Parker*, 96 N.E.3d 1183, 1188 (Ohio App. 2017), *appeal allowed*, 93 N.E.3d 1002 (Ohio 2018).

b. Twelve states apply a case-by-case approach to determine retroactivity using public policy factors.

Six state courts use a *Linkletter*-like case-by-case public policy analysis to determine whether to provide a new statutory interpretation retroactive effect. While these courts look to similar public policy factors, they utilize several different tests.

For example, three of these states have created a presumption in favor of retroactivity and use the *Linkletter* or other public policy factors to determine whether retroactivity should be precluded for the new interpretation on equitable grounds. *See Luurtsema v. Comm'r of Corr.*, 12 A.3d 817, 832 (Conn. 2011) (general presumption in favor of retroactivity, but no relief where continued incarceration would not represent gross miscarriage of justice); *Policano v. Herbert*, 859 N.E.2d 484, 495 (N.Y. 2006) (weighing three *Linkletter* factors to determine retroactivity of

new narrowing interpretation with emphasis on purpose of rule and avoiding miscarriage of justice); *State v. Harwood*, 746 S.E.2d 445, 450–51 (N.C. App. 2013) (new statutory interpretation is retroactive unless *Linkletter* factors dictate otherwise).

Although these tests would appear to favor retroactivity for narrowing interpretations, it is far from automatic. For example, the New York Court of Appeals refused to retroactively apply a narrowing interpretation of its second-degree murder statute because such a bar "pose[d] no danger of a miscarriage of justice." *Policano*, 859 N.E.2d at 495–96.

Three other states use *Linkletter* or a similar public policy analysis on a case-by-case basis to determine the retroactivity of a new interpretation of a criminal statute, but do not utilize a presumption in favor of retroactivity. *See State v. Jess*, 184 P.3d 133, 401–02 (Hawaii 2008) (*Linkletter* test used to determine retroactivity of judicial decisions announcing new rule); *Salinas v. State*, 523 S.W.3d 103, 111–12 (Tex. Crim. App. 2017) (utilizing *Linkletter* test for new statutory interpretations); *see also Rivers v. State*, 889 P.2d 288, 291–92 (Okla. Crim. App. 1994) (using *Linkletter* test to determine retroactivity of statutory interpretation decision).

Six states utilize *Linkletter* or other public policy standards to determine retroactivity in general in their state post-conviction proceedings, but have not specifically indicated these retroactivity standards apply to new interpretations of a statute (although *Linkletter* is a broad enough standard that it probably does). *See generally State v. Smart*, 202 P.3d 1130, 1136 (Alaska 2009) (establishing *Linkletter* as retroactivity standard); *Kelley v. Gordon*, 465 S.W.3d 842, 845–46 (Ark. 2015) (public policy concerns, including fundamental fairness, evenhanded justice, and finality, dictate whether new rule applies retroactively); *People v. Maxson*, 759 N.W.2d 817, 820–22 (Mich. 2008) (utilizing *Linkletter* approach for retroactivity);

State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003) (establishing *Linkletter* as retroactivity standard); *State v. Feal*, 944 A.2d 599, 607–09 (N.J. 2008) (retroactivity of new rule determined using *Linkletter* test); *State v. Mares*, 335 P.3d 487, 501 (Wy. 2014) (retroactivity of new rule determined using *Linkletter* test).

While *Linkletter* is generally viewed as a more flexible standard than *Teague*, *see*, *e.g.*, *Whitfield*, 107 S.W.3d at 267, the *Linkletter* factors do not automatically require retroactive application of any particular new rule, including narrowing interpretations. Retroactivity is determined on a case-by-case basis. As this Court identified in *Teague*, such a test leads to inconsistent results. It can potentially work as a narrower retroactivity test than the federal substantive rule exception.

c. Fourteen states have adopted the *Teague* standard but have not yet indicated whether it applies to narrowing statutory interpretations.

In addition to the seventeen states that have fully embraced the federal rule, an additional fourteen states have explicitly adopted *Teague* as their retroactivity standard for their state collateral proceedings. These states, however, have not yet indicated whether their "substantive rule" exception would include new, narrowing statutory interpretations. *Ex parte Harris*, 947 So.2d 1139, 1143–47 (Ala. 2005); *Edwards v. People*, 129 P.3d 977, 981–83 (Co. 2006); *Leonard v. Commonwealth*, 279 S.W.3d 151, 160–61 (Ky. 2009); *State v. Tate*, 130 So.3d 829, 834 (La. 2013); *Carmichael v. State*, 927 A.2d 1172, 1179 (Maine 2007); *Commonwealth v. Sullivan*, 681 N.E.2d 1184, 1188 (Mass. 1997); *State v. Glass*, 905 N.W.2d 265, 274–75 (Neb. 2018); *Petition of State*, 103 A.3d 227, 232 (N.H. 2014); *Kersey v. Hatch*, 237 P.3d 683, 691 (N.M. 2010); *Page v. Palmateer*, 84 P.3d 133, 138 (Ore. 2004); *Pierce v. Wall*, 941 A.2d 189, 195-96 (R.I. 2008); *Aiken v. Byars*, 765 S.E.2d 572, 575 (S.C. 2014); *Siers v. Weber*, 851 N.W.2d 731, 742–43 (S.D. 2014); *see also Kelson v.*

Commonwealth, 604 S.E.2d 98, 101 (Va. Ct. App. 2004) (new substantive rules apply retroactively, citing *Schriro*).

d. Six states have limited or barred retroactivity for new substantive statutory interpretations.

At the other end of the spectrum, there are six states that greatly limit or completely bar retroactive application of new interpretations of a substantive criminal statute. As stated above, Nevada has imposed a complete retroactivity bar for new interpretations of a substantive criminal statute. In Nevada, only new constitutional rules can apply retroactively. Non-constitutional rules, such as a new interpretation of a criminal statute, has no retroactivity implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531. In Nevada, a narrowing interpretation is available to all defendants if the Nevada courts classify it as a "clarification." If the Nevada courts classify the interpretation as a "change," it is only available to those petitioners whose convictions have yet to become final. *Id.*

Iowa has directly followed Nevada's lead. The Iowa Supreme Court has held that, even though new narrowing interpretations of a criminal statute are substantive, they only apply retroactively if they are deemed to be a "clarification." If there has been a "change" in substantive law, it does not apply retroactively. *Goosman v. State*, 764 N.W.2d 539, 542–45 (Iowa 2009) (discussing *Clem*); *accord Nguyen v. State*, 878 N.W.2d 744, 754-55 (Iowa 2016).

Kansas has also utilized the clarification/change dichotomy for narrowing interpretations. *Easterwood v. State*, 44 P.3d 1209, 1216–23 (Kan. 2002). In *Easterwood*, the Kansas Supreme Court held that a new statutory interpretation did not need to apply retroactively because it was a "new decision" and not a clarification like the one at issue in *Fiore*. *Id.* at 1223.

Washington suggested a similar approach in a recent case. The law in Washington has been that a first interpretation of a statute is retroactive. *Matter of Colbert*, 380 P.3d 504, 507–08 (Wash. 2016). However, the Washington Supreme Court stated that the reason supporting retroactivity for a first interpretation—"the court's construction is deemed to be what the statute has meant since its enactment"—"does not logically appear to apply" for a "reinterpretation" of a statute. *Id.* at 508 n.5. Nevertheless, it left the question open.

Soon after *Fiore*, Florida also adopted the clarification/change dichotomy to determine the retroactivity of a decision narrowing the interpretation of a statute. *State v. Klayman*, 835 So.2d 248, 252–53 (Fla. 2002). However, Florida retreated from this approach and instead adopted a rule that essentially bars retroactive application of new interpretations of a substantive criminal statute. *See State v. Barnum*, 921 S.2d 513, 524 (Fla. 2005) (for new interpretation to be applied retroactively, interpretation must be "constitutional in nature" and "must constitute a development of fundamental significance").

Tennessee also has a bar on the retroactive application of new statutory interpretations. Unlike the other states with a bar, Tennessee's bar is statutory. A petitioner in Tennessee can only obtain retroactive application of a new constitutional rule. T.C.A. §§ 40-30-102(b)(1), 40-30-117(a)(1). Under these statutes, the Tennessee Supreme Court has refused to retroactively apply a decision interpreting a provision of its capital sentencing statute because it was not a constitutional rule, only an interpretation of a statute. *Keen v. State*, 398 S.W.3d 594, 609 (Tenn. 2012).

Finally, West Virginia has established a presumption against retroactivity for new interpretations narrowing the meaning of a statute. *State v. Kennedy*, 735 S.E.2d 905, 924 n.16 (W. Va. 2012). The West Virginia Supreme Court has listed several public policy factors it would consider in determining whether to apply a new

interpretation retroactively. *Id.* However, it has indicated that where "substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored." *Id.*

2. This Court should establish uniformity and require all states to follow the federal rule.

As can be seen, there is an incredible amount of inconsistency on this issue throughout the state courts. It ranges from full retroactivity, to a presumption in favor of retroactivity, to a public policy approach on a case-by-case basis, to a presumption against retroactivity, all the way down to a complete retroactivity bar. Despite the clarity of the federal rule requiring full retroactivity for narrowing interpretations of a substantive criminal statute, the diverging approaches in the states result in similarly situated defendants throughout the country being treated vastly different depending on where the crime occurred. In fact, because the federal retroactivity rule is broader than those in several states, there could be inconsistent results *in the same case*.[4]

[4] For example, in Nevada, a petitioner could raise a substantive claim relying on a new narrowing interpretation in a post-conviction proceeding. Because there is no retroactivity, the Nevada courts would find the claim procedurally barred. *Pellegrini v. State*, 34 P.3d 519, 536 (Nev. 2001) (procedural bars are mandatory). However, in a federal habeas proceeding this petitioner would potentially be able to raise the same substantive claim and overcome any procedural hurdle by establishing a miscarriage of justice on the basis of the narrowing interpretation. *Bousley*, 523 U.S. at 623-24 (new substantive narrowing interpretation provides basis for arguing miscarriage of justice). Because there was no merits determination in state court, he would receive *de novo* review of the claim in federal court, *Cone v. Bell*, 556 U.S. 449, 472 (2009), in which he would be able to obtain the retroactive benefit of the new narrowing interpretation under the federal retroactivity rule. *Welch,* 136 S. Ct. at 1264–65; *Schriro*, 542 U.S. at 351–52.

The new constitutional rule of retroactivity established in *Montgomery* and clarified in *Welch* provides the necessary vehicle in which to establish uniformity in the state courts. Sup. Ct. Rule 10(b). As discussed in more detail below, read together, these two cases require the state courts to apply the "substantive rule" exception as has been defined by this Court. This federal "substantive rule" exception clearly applies to decisions narrowing the interpretation of a criminal statute. Further, this rule looks to the effect of the narrowing interpretation, not its characterization as a change or clarification, to determine retroactivity.

The issue here is of exceptional importance. New narrowing interpretations of substantive criminal statutes are the essence of what makes a new rule substantive. Substantive law is the law that "declares what conduct is criminal and prescribes the punishment to be imposed for such conduct." Wayne R. LaFave, Substantive Criminal Law § 1.2 (3d ed. 2017). When a decision narrows an interpretation of a statute, it "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620–21 (internal quotations omitted). No matter in which jurisdiction it occurs, a narrowing interpretation of the elements of a crime is substantive and creates the risk that the defendant was convicted, and suffering punishment for, a crime he did not commit.

For the narrowing change at issue here, a jury's verdict as to the appropriate degree of murder represents one of the most consequential decisions a jury can make. *See Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). In Nevada, it can mean the difference between death or life without parole for a first-degree murder versus a chance for parole after as little as five or ten years for a second-degree murder. *See* Nev. Rev. Stat. § 200.30(4)(a)-(b) & (5) (2018); Nev. Rev. Stat. § 200.30(5) (1994) (second-degree murders committed before 1995 had minimum term of 5 years).

This Court should grant certiorari and declare that the state courts must follow the constitutional command of this Court and follow the federal "substantive rule" exception. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 100 (1993) ("Supremacy Clause does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law"). Without this Court's intervention, the disparate and opposing approaches in the state courts on this critically important issue would be "contrary to the Supremacy Clause and the Framer's decision to vest in 'one Supreme Court' the responsibility and authority to ensure the uniformity of federal law." *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting).

B. Certiorari review is warranted because the Nevada Supreme Court's refusal to follow the new constitutional rule of retroactivity is clearly erroneous.

This Court will review a decision on state post-conviction review when the lower courts have misapplied settled law. *Rippo*, 137 S. Ct. at 907; *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). Here, the Nevada courts clearly misapplied this Court's recent precedents in *Montgomery* and *Welch*. Those cases require the state courts to apply the federal substantive rule exception as a matter of the federal constitution and in the manner that this Court has defined it. The federal substantive rule exception includes decisions narrowing the interpretation of a substantive criminal statute. The Nevada courts' failure to follow this rule was clearly erroneous.

1. The new constitutional rule of retroactivity requires the state courts to grant full retroactive effect to decisions narrowing the interpretation of a substantive criminal statute.

In *Montgomery*, this Court, for the first time, constitutionalized the "substantive rule" exception to the *Teague* retroactivity rules. *Montgomery*, 136 S.

Ct. at 729 ("*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises."). As a federal constitutional rule, the state courts must give the "substantive rule" exception "at least as broad a scope as [this Court] requires. *Colwell*, 59 P.3d at 471; *accord Montgomery*, 136 U.S. at 727 ("States may not disregard a controlling constitutional command in their own courts.").

Thus, this Court's interpretation of the federal "substantive rule" exception provides the constitutional floor for how this rule must be applied in state courts. *Danforth*, 552 U.S. at 287 (state court decision must "satisfy[y] the minimum federal requirements" the Supreme Court has outlined, quoting *Harper*, 509 U.S. at 100); *see also Harper*, 509 U.S. at 102 ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy" (citation omitted)); *Yates v. Aikens*, 484 U.S. 211, 218 (1988) ("Since it has considered the merits of the federal claim, [state court] has a duty to grant the relief that federal law requires"); *see also*, Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of Danforth v. Minnesota and the Unmet Obligation of state Courts to Vindicate Federal Constitutional Rights*, 44 Fla. St. U. L. Rev. 53, 69 (Fall 2016) ("[F]ederal retroactivity rules now establish a floor, not a ceiling: states may be more generous than federal courts in providing retroactive relief, but they may not be stingier").

In *Welch*, this Court made absolutely clear that the federal constitutional "substantive rule" exception to *Teague* applies to statutory interpretation cases. The *Welch* Court was explicit: the substantive rule *Teague* exception "**includes decisions that narrow the scope of a criminal statute by interpreting its terms**." *Welch*, 136 S. Ct. at 1264–65 (emphasis added); *accord id.* at 1267 ("A decision that modifies the

elements of an offense is normally substantive rather than procedural" (quoting *Schriro*, 542 U.S. at 354)).

In fact, the *Welch* Court not only repeated what it had stated in *Schriro,* the exception applies to statutory interpretation cases, it went much further. It explained, for the first time, how to apply the exception in those cases. "[D]ecisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alter the range of conduct or the class of persons that the law punishes.'" *Id.* at 1267 (quoting *Schriro*, 542 U.S. at 353). It explained that this was the *only* criteria for determining whether a decision that interprets the meaning of a statute is substantive. *Id.* This Court had never articulated this principle so clearly in a prior case.

The broad scope of the substantive rule exception is also readily apparent in *Welch*'s discussion of its prior decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137 (1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review. As *Welch* put it, "[t]he 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; it was a statutory interpretation decision, not a constitutional decision. Nonetheless, this Court in *Welch* classified *Bailey* as substantive under a *Teague* analysis. Thus, as *Welch* illustrates, it is irrelevant whether a decision rests on constitutional principles—if the decision interpreting a statute is substantive, it is retroactive under the "substantive rule" exception to *Teague*.

Welch also introduced a new test for determining whether a new rule is substantive. This Court held, for the first time, that a new rule is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. A rule has a "substantive function" when it "alters the range of conduct or class of persons that the law punishes." *Id.* 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 sum, *Welch* held 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. After *Montgomery* and *Welch*, those States that have not applied full retroactivity to new interpretations are now wrong.

This includes Nevada. Contrary to the new constitutional rule, the Nevada courts have consistently held that a new narrowing interpretation of a substantive criminal statute has no retroactive implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531; *Branham*, 434 P.3d at 316–17. This retroactivity bar remains the rule in Nevada.

Here, the Nevada Court of Appeals relied exclusively on its prior published opinion in *Branham*.[5] In that opinion, the court rejected the argument that this Court's recent cases require state courts to retroactively apply narrowing interpretations of criminal statutes. *Branham*, 434 P.3d at 316–17. It explained that, in *Montgomery* and *Welch*, this Court solely applied the established *Teague* framework to new constitutional rules. *Id.* It concluded *Montgomery* and *Welch* did

[5] The petitioner in *Branham* has filed a separate petition seeking certiorari from the Nevada Court of Appeals' published opinion. *Branham v. Baca*, No. 18-9436.

not alter *Teague*'s "threshold requirement that the new rule at issue must be a constitutional rule." *Id.* Mirroring the Nevada Supreme Court's prior precedent, the court reasoned *Byford* was not a constitutional rule, so it did not need to be applied retroactively under *Teague*. *Id.*

This reasoning is contrary to the express language of *Welch*. As discussed before, *Welch* held the "substantive rule" exception includes narrowing interpretations of criminal statutes:

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

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

The Court of Appeals also failed to acknowledge the full scope of the substantive rule exception. As shown above, the new constitutional rule of retroactivity requires the state courts to apply the substantive rule exception in the same manner that this Court applies it. That exception includes decisions interpreting a statute by narrowing its terms. *Welch* made that abundantly clear throughout its discussion on how the substantive rule operates. *Welch*, 136 S. Ct. at 1264–65, 1267. The lower court was not free to disregard an essential part of this Court's decision. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996)

("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [lower courts] are bound").

Byford is a substantive rule and the federal constitution requires its retroactive application. *Byford* narrowed the scope of the first-degree murder statute by requiring deliberation to be found as a separately defined element. This new interpretation of the elements of the crime is obviously substantive as it altered the range of conduct the statute defines to be criminal. *Welch*, 136 S. Ct. at 1264–65 (substantive rule exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms"); *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)). Indeed, the Nevada Supreme Court has already acknowledged that *Byford* is substantive. *Nika*, 198 P.3d at 850, 859. That is all that matters in the retroactivity analysis. The lower court was clearly wrong in refusing to grant *Byford* full retroactivity.

Further, contrary to the lower court's reasoning, the new interpretation does not need a constitutional basis for it to fall under the substantive rule. *Welch*'s discussion of *Bousley* establishes this. If the decision interpreting a statute is substantive, it is retroactive under the "substantive rule" exception to *Teague*. The substantive function test requires it. In all respects, the Nevada Court of Appeals' analysis was wrong.[6] *Byford* modified the elements of first-degree murder, narrowing

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[6] In any event, there is every reason to believe a change in the interpretation of the elements of a criminal statute implicates due process concerns. Under *Montgomery*, because such a narrowing interpretation is substantive, its retroactivity has a constitutional premise. *Montgomery*, 136 S. Ct. at 729 ("*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises"). In fact, the rationale underlying the substantive rule exception finds common footing with fundamental due process notions. *Compare Welch*, 136 S. Ct. at 1266 (substantive change will "necessarily carry a significant risk that a defendant stands convicted of an act that the law does

the scope of the statute. It is substantive. The Nevada courts are required to apply it retroactively.

2. In light of *Welch*'s substantive function test, the change versus clarification dichotomy does not guide the retroactivity analysis.

Welch also undermines those courts that have used the change versus clarification dichotomy as the measuring stick for who gets the benefit of a narrowing interpretation. In light of *Welch*, the distinction between a "change" and a "clarification" plays no role in controlling the retroactivity for narrowing interpretations.

To the contrary, *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 fact, the change/clarification dichotomy was never meant to control the retroactivity question for narrowing interpretations. *Fiore* and *Bunkley* themselves specifically say the issue is not about retroactivity. Those cases focus instead on the due process requirement that every element of a crime be proven beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). The question of whether the constitution requires a state court to retroactively apply a narrowing interpretation of a statute was left open in those cases. The combination of *Montgomery* and *Welch* now provides an answer to that question.

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not make criminal" (internal quotations omitted)); *with Fiore,* 531 U.S. at 228–29 (due process violation for State to convict defendant without proving all of the elements beyond a reasonable doubt).

Welch also undermines the Nevada Supreme Court's original rejection of the federal retroactivity rule in *Clem*. In *Clem* the petitioner had argued that *Bousley* required the state courts to retroactively apply a state court's decisions interpreting substantive provisions of Nevada's criminal statutes. *Clem*, 81 P.3d at 531. The Nevada Supreme Court rejected this argument, concluding *Bousley* was just "correlative to the rule reiterated in *Fiore* for state court decisions clarifying state statutes." *Id.* According to that court, "in *Bousley*, the Supreme Court implicitly indicates that its decisions which interpret the substantive provisions of federal statutes are to be regarded as clarifications of the law." *Id.*

That reasoning is no longer valid after *Welch*. The Nevada Supreme Court believed that a narrowing interpretation from this Court is always retroactive because it is a clarification. Like in *Fiore,* this Court would simply be declaring what the law always was. *See Fiore*, 531 U.S. at 228 (clarification indicates what law was at time of conviction). The *Welch* Court specifically rejected an argument that "statutory construction cases are substantive because they define what Congress always intended the law to mean. . . . ." *Welch*, 136 S. Ct. at 1267. This Court emphasized that statutory interpretation cases are not 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 alter the range of conduct or the class of persons that the law punishes." *Id.* (citations omitted).

A court's characterization of an interpretation of a statute has no impact on who gets its benefit. A statutory interpretation decision is not retroactive because it implements the original intent of the legislature or articulates what the law has always meant. As this Court stated in *Welch*, all that matters in determining

retroactivity is whether the new interpretation is substantive. The state courts that have rejected this approach, like the lower courts here, are clearly wrong.

* * * *

Petitioners believe *Montgomery* and *Welch* provide a basis for summary reversal. However, to the extent the legal principle at issue here has not been clearly established, this Court should grant certiorari on the question presented as it is a crucial retroactivity question left open after *Montgomery*. *See Carlos M. Vasquez* and *Stephen I. Vladeck*, The Constitutional Right to Collateral Post-Conviction Review, 103 Va. L. Rev. 905, 948 (2017) (stating *Montgomery* raised the question previously left open in *Fiore*, "Does the federal Constitution also require the retroactive application of new substantive rules of state law, or is the retroactivity of such rules purely a matter of state law?"). A decision requiring the state courts to follow the federal rule will have a wide-ranging impact as it will alter the law in all but the seventeen states that have already adopted it.

Whether it is through summary reversal or plenary review, this Court should take the opportunity to impose a uniform application of the federal "substantive rule" exception to ensure defendants whose convictions were final at the time of a narrowing interpretation of a substantive criminal statute are not suffering punishment for a crime they may not have committed.

CONCLUSION

For the foregoing reasons, Rome Richard Chacon, et al., respectfully request that this Court grant their petition for writ of certiorari and reverse the judgment of the Nevada Court of Appeals. In the alternative, petitioners request this Court grant certiorari, vacate the decision of the Nevada Court of Appeals, and remand for further proceedings.

Dated this 5th day of September, 2019.

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