INDEX TO APPENDIX

COOPER, RICKEY DENNIS

MERCADO, RUEL SALVA

APP. 001

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROME RICHARD CHACON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74552

FILED

JUN 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

We conclude that appellant has not demonstrated that the exercise of our discretion in this matter is warranted. *See* NRAP 40B; *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Accordingly we deny the petition for review.

It is so ORDERED.[1]

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J
Silver

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

19-25607

cc: Hon. Douglas Smith, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROME RICHARD CHACON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74552-COA

ORDER OF AFFIRMANCE

Rome Richard Chacon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 18, 2017. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Chacon filed his petition 23 years after issuance of the remittitur on direct appeal on February 8, 1994, *see Chacon v. State*, Docket No. 24085 (Order Dismissing Appeal, January 20, 1994), and 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Chacon's petition was therefore untimely filed. *See* NRS 34.726(1). Chacon's petition was also successive.[1] *See* NRS

[1]*See Chacon v. State*, Docket No. 47444 (Order of Affirmance, September 6, 2007); *Chacon v. State*, Docket No. 39384 (Order of Affirmance, February 27, 2003).

19-12405

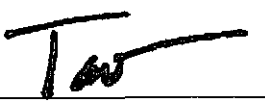
34.810(1)(b)(2); NRS 34.810(2). Chacon's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically pleaded laches, Chacon was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Chacon claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. *See Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Further, Chacon failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2).

Chacon argues for the first time on appeal that he can demonstrate a fundamental miscarriage of justice to overcome the procedural bars. Because Chacon did not raise this claim below, we need not consider it on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). We nevertheless note that Chacon's claim lacks merit. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Chacon argues that "[t]he facts in this case established that [he] should only have been convicted of second-degree murder." This is not actual innocence, and Chacon's argument would thus have failed to

overcome the procedural bars. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

cc: Hon. Douglas Smith, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ROME CHACON,
#1022841

Defendant.

CASE NO: 92C105423

DEPT NO: VIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: September 13, 2017
TIME OF HEARING: 7:45 AM

THIS CAUSE having come on for hearing before the Honorable DOUGLAS E. SMITH, District Judge, on the 13th day of September, 2017, Petitioner not being present, REPRESENTED BY LORI TEICHER, Federal Public Defender, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through KELSEY R. EINHORN, 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:

PROCEDURAL BACKGROUND

On March 24, 1992, the State charged Rome Richard Chacon ("Petitioner") by way of Information with Burglary with Use of a Deadly Weapon and Murder with Use of a Deadly Weapon. Petitioner's jury trial commenced on September 21, 1992, and on September 26,

1992, the jury returned a verdict finding Petitioner guilty of Burglary with Use of a Deadly Weapon and Murder of the First Degree Murder with Use of a Deadly Weapon. On October 27, 1992, Petitioner was adjudged guilty and sentenced to Nevada State Prison as follows: as to Count 1 (Burglary with Use of a Deadly Weapon), five years plus a consecutive term of five years for the use of a deadly weapon; as to Count 2 (First Degree Murder with Use of a Deadly Weapon), life without the possibility of parole plus a consecutive term of life without the possibility of parole for the use of a deadly weapon. The Judgment of Conviction was entered on December 9, 1992. On January 20, 1994, the Nevada Supreme Court dismissed Petitioner's appeal and affirmed the judgment. Remittitur issued on February 8, 1994.

On January 26, 1995, Petitioner filed his first habeas petition. A little more than four years later, while Petitioner's first habeas petition was still pending in the district court, Petitioner filed another habeas petition. The Court denied this latter petition, finding it time-barred. Petitioner both appealed from this decision and filed a petition for writ of mandamus, explaining that the district court had never ruled on the 1995 habeas petition. The Nevada Supreme Court agreed, noting that the district court had, in fact, failed to rule on Petitioner's first habeas petition. Accordingly, the matter was remanded. On October 4, 2000, the district court ultimately denied Petitioner's first habeas petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on January 10, 2001. On February 27, 2003, the Nevada Supreme Court affirmed the denial of Petitioner's first habeas petition. Remittitur issued on March 25, 2003.

On January 3, 2006, Petitioner filed his second habeas petition. On March 1, 2006, the Court dismissed the petition, finding it barred by laches, and entered its Findings of Fact, Conclusions of Law and Order to that effect on July 30, 2007. On September 6, 2007, the Nevada Supreme Court affirmed the dismissal of Petitioner's second habeas petition.[1] Remittitur issued on October 2, 2007.

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[1] Although it formally affirmed the "dismissal" of the petition (which, again, was based on laches), the Nevada Supreme Court actually never reached the issue of laches:

Finally, Chacon argued the district court erred in concluding his petition was barred by laches. Because we conclude the petition is untimely and successive, the issue is moot. But we note that the lapse of "thirteen (13) years" of which the State complained in its motion

On April 18, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction), which now constitutes Petitioner's third habeas petition. The State responded on May 22, 2017. On September 13, 2017, the Court denied Defendant's Petition as follows.

ANALYSIS

I. The Petition Is Procedurally Barred Under Both NRS 34.726(1) And NRS 34.810(2), And The State Specifically Plead Laches Under NRS 34.800(2).

The Court finds that the Petition is procedurally barred under both NRS 34.726(1), NRS 34.810(2), and NRS 34.800(2). The instant Petition has been filed more than 23 years after the Nevada Supreme Court issued its remittitur on Petitioner's direct appeal from the Judgment of Conviction. Accordingly, the Court finds it is untimely under NRS 34.726(1). In an attempt to establish good cause to excuse this untimeliness, Petitioner relied on the United States Supreme Court's decisions in Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718 (2016), and Welch v. United States, __ U.S. __, 136 S. Ct. 1257 (2016). Montgomery and Welch, however, fail to serve as good cause necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the instant Petition constitutes Petitioner's third habeas petition, it is successive under NRS 34.810(2). And for the same reasons that Montgomery and Welch fail to constitute good cause to overcome NRS 34.726(1)'s procedural bar, it likewise fails to constitute good cause sufficient to overcome NRS 34.810(2)'s procedural bar. Lastly, because more than 23 years have elapsed between the Nevada Supreme Court's decision on Petitioner's direct appeal of the Judgment of Conviction and the filing of the instant Petition, the State plead laches pursuant to NRS 34.800(2) and properly availed itself of that statute's rebuttable presumption of prejudice.

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to dismiss is not entirely attributable to Chacon, as Chacon's timely first postconviction petition for writ of habeas corpus was not properly resolved by the district court for almost six years.

Chacon v. State, Docket No. 47444 at *4 (Order of Affirmance, filed September 6, 2007) (footnotes omitted).

A. The Petition Is Untimely Under NRS 34.726(1), And Petitioner Has Failed To Establish Good Cause For Delay.

This Court finds that the Petition is untimely under NRS 34.726(1) and Petitioner has failed to establish good cause for delay. Under NRS 34.726(1), "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 appellate court of competent jurisdiction . . . issues its remittitur," absent a showing of good cause for delay. In State v. Eighth Judicial Dist. Court (Riker), the Nevada Supreme Court noted that "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

Here, the Judgment of Conviction in Petitioner's case was filed on December 9, 1992. Petitioner filed a Notice of Appeal, and on January 20, 1994, the Nevada Supreme Court issued an Order dismissing Petitioner's appeal. Remittitur issued on February 8, 1994. Accordingly, Petitioner had until February 8, 1995, to file a timely Petition. The instant Petition, however, was filed on April 18, 2017, more than 22 years after the one-year deadline had expired. Such untimeliness can be excused if Petitioner can establish good cause for the delay. This, however, he has failed to do.

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. The Court finds that Petitioner failed to meet the requirements of NRS 34.726(1).

1. Petitioner Failed To Establish That The Delay Is Not His Fault.

The Court finds that Petitioner failed to establish that the delay is not his fault. 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 attempted to meet this first requirement by arguing new case law. Specifically, he alleged that Montgomery and Welch "represent a change in law that allows petitioner to obtain the benefit of Byford[2] on collateral review." Petition at 9. In essence, Petitioner avers 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 following jury instruction 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.

Instructions to the Jury, filed September 26, 1992, Instruction No. 9. This instruction is known as the Kazalyn[3] instruction.

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

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[2] Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), cert. denied, Byford v. Nevada, 531 U.S. 1016, 121 S. Ct. 576 (2000).

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

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 defendants 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."[4] *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 law" insofar as it "failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and 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,

[4] See, e.g., Garner v. State, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), overruled on other ground by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

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,[5] replacing it with "a general requirement of nonretroactivity of new rules in 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 693-94, 91 S. Ct. at 1165).

[5] Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

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 full 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 P.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 defendants 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"[6] 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.").[7] First, the Court in Colwell narrowed Teague's definition of a "new rule," which it had found too expansive.[8] 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

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[6] As per Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

[7] As the Nevada Supreme Court explained in Colwell, it was free to deviate from the standard laid out in Teague so long as it observed the minimum protections afforded by Teague. See 118 Nev. at 817-18, 59 P.3d at 470-71; see also Johnson v. New Jersey, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

[8] This has the effect of affording greater protection than Teague insofar as defendants seeking collateral review here in Nevada will be able to avail themselves more frequently of the principle that "[i]f a rule is not new, then it applies even on collateral review of final cases." Colwell, 118 Nev. at 820, 59 P.3d at 472. Under *Teague*'s expansive definition for "new rule," most rules would be considered new by Teague's standards and, thus, "given only prospective effect, absent an exception." Id. at 819, 59 P.3d at 471.

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 defendants because of their status or 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 Teague's retroactivity analysis 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 Court in Clem 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, but neither upset the usual rule of nonretroactivity for rules that carry no constitutional significance.").[9]

It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous holding[10] 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," had to be applied retroactively to juvenile offenders whose convictions and sentences were

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[9] Petitioner omits any mention of Colwell or Clem, which were central to Nika's retroactivity analysis regarding convictions that were final at the time of the change in the law. Instead, Petitioner cites Nika's preceding analysis of why "the change effected by Byford properly applied to [the defendant in Polk, 503 F.3d at 910] as a matter of due process." Nika, 124 Nev. at 1287, 198 P.3d at 850; see Petition at 8. To be sure, the Court in Nika, in conducting this analysis, did rely on the retroactivity rules set out in Bunkley v. Florida, 538 U.S. 835, 123 S. Ct. 2020 (2003), and Fiore v. White, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to Petitioner were "drastically changed," Petition at 8, by the United States Supreme Court's decisions in Montgomery and Welch. Whether or not this is true is of no moment. The analysis in Nika regarding retroactivity in Polk had absolutely no bearing on Nika's later analysis of the rules of retroactivity respecting convictions that were final at the time of the change in the law.

[10] See Rippo, 122 Nev. at 1097, 146 P.3d at 286.

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 Court in Montgomery 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. at __, 136 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 defendants 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 defendant—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, was 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." Id. at __, 136 S. Ct. at 727; see Petition at 15, 17, 22-23. Petitioner makes much

ado about Montgomery's discussion on this front, when he argued 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 22-23. This assertion, while true, shortchanges 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 __, 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, used Montgomery as a bridge to explain why he believes 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 is 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 9 (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 "[u]nder 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

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question at issue was whether this new rule was "substantive." *Id.*[11] 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 rule 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[12] 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 S. Ct. at 2555. The "residual clause" is part of the ACCA's definition of the term "violent felony":

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[11] The parties agreed that the second Teague exception was not applicable. Welch, __ U.S. at __, 136 S. Ct. at 1264.

[12] Specially, where the first-degree murder is premised on a theory of willfulness, deliberation, and premeditation. NRS 200.030(1)(a).

> 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. [ ] 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 particular 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 "[t]wo 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 __, 135 S. Ct. at 2557-58. Because of these uncertainties, the Court in Johnson explained that "[i]nvoking 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 example 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 made by Byford ignores a fundamental legal distinction between the two. Because the residual clause was found

unconstitutionally void for vagueness, defendants 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 a 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. Defendants who were convicted of first-degree murder under NRS 200.030(1)(a) prior to Byford were 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, goes beyond the Court's holding and *ratio decidendi*. In his exposition of Welch, Petitioner goes on to describe the Court's treatment of the arguments raised by *Amicus*. See Petition at 16-17; 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. Ct. at 1267 (quoting Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). On the basis of this language, Petitioner comes 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 18 (emphasis in original).

Petitioner, however, failed to grasp that this "test" he relies so heavily on is nothing more than judicial dictum. Judicial dictum is an "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." Black's Law Dictionary 519 (9th Ed. 2009). 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 (E.D. 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 at 15, 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 takes 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 is 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, like Petitioner's, that became final before the new rule was announced. 124 Nev. at 1287-89, 198 P.3d at 850-51. Consequently, Petitioner's reliance on Montgomery and Welch to meet NRS 34.726(1)(a)'s criterion fails.

2. Petitioner Has Failed To Establish That Dismissal Of The Petition As Untimely Will Unduly Prejudice Him.

Turning now to NRS 34.726(1)'s second prong—i.e., undue prejudice—necessary to establish good cause, this Court finds that Petitioner has failed to establish that he was unduly prejudiced by the use of the Kazalyn instruction. 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)).

Petitioner did not show that he was unduly prejudiced by the use of the Kazalyn instruction because there was overwhelming evidence of premeditation, deliberation, and willfulness. A recitation of the facts surrounding the murder as described by the Nevada Supreme Court in its Order dismissing Petitioner's appeal from the Judgment of Conviction helps show just how overwhelming the evidence of premeditation *and deliberation* was in this case:

> Moreover, the jury could have also inferred from Chacon's actions that he committed the crime of first degree murder. On the night in question, but prior to the murder, Chacon and the victim engaged in a minor altercation at the 7-11 Store. After the minor altercation, Chacon and his friend returned to Chacon's apartment where his three other friends were visiting. While at the apartment, Chacon told his friends what had happened and asked them to return to the 7-11 Store to fight the victim. Approximately ten minutes later, Chacon and his four friends returned to the 7-11 Store looking for the victim. Upon their arrival, Chacon and his friend Ken approached the victim, and Chacon said, "What's up now punk?" and then said, "You're dead." The victim and the victim's friend ran, and Chacon chased them into the 7-11 Store. Once Chacon gained entrance into the store, he chased the victim and stabbed him four times.

Chacon v. State, Docket No. 24085 at *3-4 (Order Dismissing Appeal, filed on January 20, 1994). Particularly significant for purposes of "deliberation" (the element underemphasized by the Kazalyn instruction) is the fact that Petitioner returned to his apartment after the altercation—reflecting that Petitioner had "time for the passion to subside and deliberation to occur," see Byford v. State, 994 P.2d at 714, 116 Nev. at 236—before returning to the 7-11 in order to seek out the victim and carry out his design.

Petitioner's argument fails because he cannot establish prejudice on the basis of the Kazalyn instruction due to the fact that the evidence clearly established first-degree murder on a theory of felony murder. See Moore v. State, 2017 Nev. Unpub. LEXIS 224, *2, 2017 WL 1397380 (Nev. Apr. 14, 2017) (explaining that appellant could not establish that he was prejudiced by the Kazalyn instruction "because he did not demonstrate that the result of trial would have been different considering that the evidence clearly establish[ed] first-degree

murder based on felony murder"). Petitioner was charged with and ultimately convicted of Burglary with Use of a Deadly Weapon—which is among the enumerated felonies that can serve as a predicate to a theory of felony murder. See NRS 200.030(1)(b) (defining first-degree murder as murder "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099" (emphasis added)). Accordingly, because the evidence established that Petitioner was guilty of first-degree murder under a felony-murder theory, he cannot establish that the error in giving the Kazalyn instruction worked to his "*actual* and substantial disadvantage." See Huebler, 128 Nev. at __, 275 P.3d at 95 (emphasis added).

Based on the foregoing, the 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. That being the case, this Court denies the Petition on the basis that it is procedurally barred under NRS 34.726(1).

B. The Petition Is Successive Under NRS 34.810(2), And Petitioner Has Failed To Establish Good Cause And Actual Prejudice.

The Court finds that the Petition is successive under NRS 34.810(2), and Petitioner has failed to establish good cause and actual prejudice. NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition 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." And as with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. See Evans

v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001) ("[A] court *must dismiss* a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." (emphasis added)).

As noted above, the instant Petition constitutes the third habeas petition that Petitioner has filed. Petitioner filed his first habeas petition on January 26, 1995. The Court ultimately denied this petition on the merits on October 4, 2000, and entered its Findings of Fact, Conclusions of Law and Order to that effect on January 10, 2001. Petitioner then proceeding to file his second habeas petition on January 3, 2006. The Court dismissed this petition on March 1, 2006, upon finding that it was barred by laches; the Court further explained, however, how the petition was successive in addition to being untimely.[13] This Court treats the instant petition no differently.

While Petitioner's claim attacking the Kazalyn instruction has been raised twice before,[14] this is the first time that he has attacked it on the basis of the United States Supreme Court's decisions in Montgomery and Welch. To the extent that this claim constitutes a "new and different" ground for relief, Court finds that Petitioner's failure to raise it in a prior petition and the disingenuous nature of the argument constitutes an abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar described in subsection (2), Petitioner failed to establish either good cause or actual prejudice for the very same reasons that he failed to establish good cause for delay under NRS 34.726(1). See supra at 4-22. That being the case, this Court denies the Petition on the basis that it is procedurally barred under NRS 34.810(2).

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[13] The Court entered its Findings of Fact, Conclusions of Law and Order to that effect on July 30, 2007.

[14] Petitioner attacked the Kazalyn instruction both in his direct appeal and in his second habeas petition.

C. Laches Applies Under NRS 34.800(2) Because More Than 23 Years Have Elapsed Between The Nevada Supreme Court's Decision On Petitioner's Direct Appeal Of The Judgment Of Conviction And The Filing Of The Instant Petition.

This Court finds since more than 23 years have elapsed between the Nevada Supreme Court's decision on Petitioner's direct appeal of the judgement of conviction and the filing of the instant petition laches applies. NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] 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 Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State affirmatively plead laches in this case. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court, Petitioner has failed to meet that burden. That being the case, this Court dismisses the Petition pursuant to NRS 34.800(2).

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ORDER

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

DATED this 17 day of October, 2017.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I certify that on the 16th day of October, 2017, I emailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

LORI C. TEICHER
First Assistant Federal Public Defender
Email: Lori_Teicher@fd.org

BY
M. HERNANDEZ
Secretary for the District Attorney's Office

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Attorney for Petitioner Rome Chacon

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

ROME RICHARD CHACON, Petitioner, v. THE STATE OF NEVADA, et al., Respondents.	Case No. C105423 Dept. No. 11 Date of Hearing: Time of Hearing: (Not a Death Penalty Case)

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: Transferred by NDOC to Massachusetts Correctional Institution - Concord in Concord, MA.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District, Department 6, 200 S. Third Street, Las Vegas, NV, 89101

3. Date of judgment of conviction: December 9, 1992

4. Case Number: C105423

5. (a) Length of Sentence: 5 years for Burglary, plus a consecutive 5 years for the Use of a Deadly Weapon (Count I), and life without the possibility of parole for Murder of the First Degree, plus an equal and consecutive life without the possibility of parole for the Use of a Deadly Weapon (Count II). Count II is to run concurrent to Count I.

(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:

Nature of offense involved in conviction being challenged:

7. Nature of offense involved in conviction being challenged: Burglary with use of a deadly weapon, Murder with use of a deadly weapon

8. What was your plea?

(a) Not guilty X (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 X (b) Judge without a jury _____

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

12. Did you appeal from the judgment of conviction? Yes X No ___

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: 24085

(c) Result: Order Dismissing Appeal; January 20, 1994.

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 X No _____

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

(a) (1) Name of Court: Eighth Judicial District

(2) Nature of proceeding: Pro Se Petition for Writ of Habeas Corpus

(3) Ground raised:

I. APPELLANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED WITH A SIX MONTH DELAY PRIOR TO TRIAL.

II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

A. TRIAL COUNSEL MADE MISTAKES OF OMISSION AND COMMISSION.

B. TRIAL COUNSEL FAILED TO PREPARE FOR THE PRESENTATION OF DEFENSE WITNESSES.

C. TRIAL COUNSEL FAILED TO INVESTIGATE AND CALL NECESSARY DEFENSE WITNESSES FOR TRIAL.

D. TRIAL COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE 7-11 SURVEILLANCE VIDEOTAPE.

E. INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE MR. CHACON'S CASE WAS REASSIGNED TO A DEPUTY PUBLIC DEFENDER UNFAMILIAR WITH THIS CASE.

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

(5) Result: Affirmed

(6) Date of Result: Case No. 39149, February 14, 2002; Case No. 39384, February 27, 2003.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Chacon's original petition was never ruled upon. Chacon filed another petition, which the district court found to be procedurally barred on March 5, 1999. Chacon filed a timely Notice of Appeal in proper person in the Nevada Supreme Court, Case No. 33939, on March 18, 1999. On May 22, 2000, Chacon filed a pro se Writ of Mandamus as the court never ruled upon his timely petition. The Nevada Supreme Court remanded, finding that Chacon's petition had been pending in the district court since 1995 and should be ruled upon. The district court did not appoint counsel, held no argument and denied the petition on October 4, 2000. Chacon again filed a timely appeal and a proper person brief to the Nevada Supreme Court, which was affirmed.

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

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Second Post-Conviction Petition

(3) Grounds raised:

GROUND ONE: The trial court erred in admitting gruesome autopsy photographs when the photographs had no relevance to any contested issue and were highly inflammatory. As a result, Mr. Chacon's Fifth and Fourteenth Amendment Constitutional Right to due process was violated.

GROUND TWO: The trial court erred by denying defendant's motion in limine to prevent impeachment of the defendant by a prior felony conviction for possession of a stolen vehicle. As a result, Mr. Chacon's Rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated.

GROUND THREE: The instruction on premeditation given during trial improperly minimized the state's burden of proof. As a result of the erroneous instruction, Mr. Chacon's conviction and sentence are invalid under the federal constitutional guarantees of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

GROUND FOUR: Mr. Chacon's conviction and sentence are invalid under the federal constitutional guarantee of a Right to a Speedy Trial under the Sixth and Fourteenth Amendments to the United States Constitution.

GROUND FIVE: Mr. Chacon was denied his right to effective assistance of trial counsel under the Sixth and Fourteenth Amendment to the United States Constitution.

GROUND SIX: Mr. Chacon was denied his right to effective assistance of appellate counsel under the Sixth and Fourteenth Amendment to the United States Constitution.

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

(5) Result: Order Dismissing Petition for Writ of Habeas Corpus

(6) Date of result: September 26, 2007

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Order Dismissing Petition for Writ of Habeas Corpus, filed on July 31, 2007; Nevada Supreme Court, Case No. 47444, order affirming the district court filed on September 26, 2007.

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

(1) Name of court: Federal District Court, District of Nevada

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

(3) Grounds raised:

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

(5) Result: United States District Court denied relief, Case No. 3:03-cv-00214-ECR-RAM

(6) Date of result: August 20, 2010

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Above; Ninth Circuit Court of Appeals, Case No. 10-17053, order denying certificate of appealability, September 12, 2011; United States Supreme Court, certiorari denied February 21, 2012.

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: Chacon's direct appeal; it was also raised in the second state post-conviction petition and in federal district court.

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. 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? Yes If so, state briefly the reasons for the delay.

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 X

If yes, state what court and the case number:

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

22. 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*, 124 Nev. 1272, 198 P.3d 839 (2008), 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*, 136 S. Ct. 718 (2016), 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*, 136 S. Ct. 1257 (2016), 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. Further, the instruction had a prejudicial impact at trial.

The evidence presented to the jury in this case was not sufficient to establish that Chacon had the requisite intent to kill Andrew Warianaka. Premeditation or deliberation did not exist in this case, and there was no conclusive evidence that Chacon stabbed Mr. Warianaka. The prosecution presented only vague, contradictory, biased, and unreliable testimonial evidence to establish that Chacon murdered Mr. Warianaka, and did so willfully, deliberately, and with premeditation.

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

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.
>
> Premeditation is a question of fact for the jury and may be determined from the facts and circumstances of the killing, such as the use of an instrument calculated to produce death, the maker of the use, and the circumstances surrounding the act.

(Jury Instructions, Instruction No. 9.)

B. Appeal and Date Conviction Became Final

According to the verdict form, the jury found Chacon guilty of Burglary With Use of a Deadly Weapon (Count I), and First Degree Murder With the Use of a Deadly Weapon (Count II) (Verdict.) Chacon was sentenced to life without the possibility of parole on the murder consecutive to a life without parole on the enhancement, and

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

concurrent five years for Burglary and a consecutive five years for the Use of a Deadly weapon. (Judgment.)

Chacon appealed from the judgment of conviction. The Nevada Supreme Court affirmed the conviction on January 20, 1994. (Case No. #24085.) The conviction became final on April 20, 1994, once the time for seeking *certiorari* expired. *See See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 n.52 (Nev. 2008).

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 (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*, Chacon is entitled to the benefit of having *Byford* apply to his case, which became final prior to *Byford*. 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). 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 State was relieved of its obligation to prove essential elements of the crime, including deliberation. 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" as required under *Byford*. *Byford*, 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. As discussed previously, the evidence presented to the jury was not sufficient to establish that Chacon was even

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

the killer on the night of the homicide. Eyewitness testimony was inaccurate and testimonial evidence taken from Chacon's acquaintances was equally flawed – indeed this testimony was biased due to their own potential criminal liability.

Insufficient evidence was produced at trial to support a finding that Chacon murdered Mr. Warianaka. However, even if Chacon did murder Mr. Warianaka, which Chacon does not admit or concede, he has still been unconstitutionally convicted of first degree murder. The one central fact that permeates the proffered evidence is that the killing of Mr. Warianaka was performed impulsively, in the heat of passion, and aroused by a confrontation that occurred in the minutes prior to the slaying. As such, the death of Mr. Warianaka was not performed willfully, deliberately, and with premeditation.

No direct or physical evidence existed that could be used by the State to establish that Chacon acted willfully, deliberately, or with premeditation in carrying out the murder of Mr. Warianaka. The State again relied on testimonial evidence to establish this essential element and obtain a first degree murder conviction. The State relied on Tammy Manley's account of the evening of the homicide.

Tammy Manley testified that she heard the man she believed to have stabbed Mr. Warianaka scream, "I am going to kill you" upon his entrance into the store. (Trial Testimony at 96.) Ms. Manley claimed that an African-American male then pursued Mr. Warianaka into the store, wielding a knife. (*Id.* at 96, 145.) Other witnesses, however, remember a different version of events. Ms. McGregor, a customer who claimed to have witnessed the actual slaying of Mr. Warianaka, claimed that Mr. Warianaka was the individual screaming as he entered the store.

(*Id.* at 218.) John Stevenson, a clerk that was also present inside the 7-11, also testified that Mr. Warianaka was screaming when he entered the store. (*Id.* at 205.) Neither Ms. McGregor or Mr. Stevenson claimed that anyone threatened Mr. Warianaka at any time.

Not only does the evidence offered by the State insufficiently establish that the murder of Mr. Warianaka was performed willfully, deliberately, and with premeditation, other evidence directly contradicts this assertion. Chacon has consistently maintained that he was in a prior altercation with Mr. Warianaka. (Trial Testimony at 592.) According to testimony taken from Thaddeus Hashley, Chacon asked his friends to return with him to the convenience store parking lot "in case he were to get into a fight." (*Id.* at 397). Mr. Hasley testified that Chacon had claimed he had been in a verbal confrontation with another individual, and that he wanted his friends with him because he was afraid Mr. Warianaka and his friends might "beat him up or something." (*Id.* at 675.) Mr. Hasley further testified that he never heard anyone saying anything about killing anyone, and that he did not believe Chacon intended to kill anyone that night. (*Id.* at 419.)

Upon Chacon's return to the 7-11 with his friends, a physical confrontation broke out between Chacon and Mr. Warianaka. (*Id.* at 592.) Eyewitness testimony from Ms. Manley (*Id.* at 124), Mr. Stephenson (*Id.* at 203), and Mr. Hashley (*Id.* at 402) describe the confrontation while testifying at Chacon's trial. All of the participants at the scene were also intoxicated. Mr. Hashley, who was present during the altercation, claimed to have drank approximately ten beers that night. (*Id.* at

418.) When asked if the other individuals had drank as much alcohol as he did, he responded, "At least." (*Id.*) This evidence, coupled with the fact that Chacon "never intended to kill" Mr. Warianaka, demonstrates that the killing of Mr. Warianaka was an impulsive killing, done during the heat of passion. This was not a cool, calculated, deliberate type of killing, but rather a rash and impulsive act which was at the most second degree murder.

The minimal evidence provided by the State to prove Chacon's intent on the night of the homicide does not do so beyond a reasonable doubt. As such, the evidence does not sufficiently support a finding of first degree murder. Accordingly, it is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. This error prejudiced Chacon. He is entitled to relief on this claim.

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 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.

Finally, petitioner can establish actual prejudice for the same reasons discussed on pages 19 to 22. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. That error cannot be considered harmless.

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 20 to 21.

III. PRAYER FOR RELIEF

Based on the grounds presented in this petition, Petitioner, Rome Chacon, respectfully requests that this honorable Court:

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

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

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

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

DATED this 18th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Lori C. Teicher
LORI C. TEICHER
First Assistant Federal Public Defender

VERIFICATION

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

DATED this 18th day of April, 2017.

/s/ Lori C. Teicher
LORI C. TEICHER
First Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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, she served a true and accurate copy of the foregoing NOTICE OF APPEARANCE by placing it in the United States mail, first-class postage paid, addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89101

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

Rome Chacon
T94526
MCI Concord
P.O. Box 9106
Concord, MA 01742-9016

/s/ Leianna Jeske
An Employee of the Federal Public Defender, District of Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROME RICHARD CHACON, AKA RICHARD CHACON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 24085

FILED

JAN 20 1994

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon and one count of burglary with the use of a deadly weapon. The district court sentenced Chacon to five years for burglary plus a consecutive five years for the use of a deadly weapon and to life without the possibility of parole for murder plus a consecutive life term without the possibility of parole for the use of a deadly weapon.

On appeal, Chacon argues the following[1]: (1) the district court abused its discretion in admitting autopsy photos of the victim; (2) the district court abused its discretion in denying Chacon's motion in limine to exclude evidence of a prior felony conviction; (3) the district court erred in giving Jury Instruction Nos. 6 and 9; and (4) the State presented insufficient evidence to support Chacon's burglary with the use of a deadly weapon and first degree murder convictions.

First, Chacon contends that the district court committed reversible error in admitting four color autopsy photos depicting the four stab wounds on the victim's body. We

[1]Chacon filed a proper person supplemental opening brief which argues that (1) the definition of malice contained in Jury Instruction No. 6 improperly denied him his due process right of presumptive innocence and that (2) the State presented insufficient evidence to support a jury verdict convicting him of burglary with the use of a deadly weapon.

conclude that the district court properly determined that the State's use of the photographs was "to illustrate and explain the circumstances of the crime and the nature of the victim's wounds, both of which are relevant to the determination of the degree of the crime committed." Dearman v. State, 93 Nev. 364, 370, 566 P.2d 407, 410 (1977); see also Allen v. State, 91 Nev. 78, 82, 530 P.2d 1195, 1197 (1975). Further, a review of the autopsy photographs does not reveal anything so gruesome or inflammatory as to inflame or excite the passions of the jury. See Allen, 91 Nev. 78, 530 P.2d 1195 (1975). We, therefore, conclude that the district court did not abuse its discretion in admitting the four autopsy photographs.

Next, Chacon contends that the district court committed reversible error in giving Jury Instruction Nos. 6 and 9. With respect to Jury Instruction No. 6, Chacon contends that the instruction improperly defined malice, and as a result, denied him his due process right of presumptive innocence. This contention is without merit.[2] In the instant case, Jury Instruction No. 6 uses the exact language of NRS 200.020, defining malice. We, therefore, conclude that the district court did not err in giving Jury Instruction No. 6. See State v. Lewis, 59 Nev. 262, 271, 91 P.2d 820 (1939).

With respect to Jury Instruction No. 9,[3] Chacon

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[2]Chacon's failure to object to this instruction could have precluded review by this court. Cutler v. State, 93 Nev. 329, 566 P.2d 809 (1977).

[3]Jury Instruction No. 9:

> 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

(continued...)

contends that the instruction inadequately defined premeditation and deliberation. We conclude that this contention lacks merit and that Jury Instruction No. 9 properly defines premeditation and deliberation as defined by Nevada case law. See Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992); see also Payne v. State, 81 Nev. 503, 509, 406 P.2d 922, 926 (1965).

Lastly, Chacon contends that there was insufficient evidence to support his convictions of burglary with the use of a deadly weapon and first degree murder. Our review of the record reveals that sufficient evidence exists to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). In particular, we note that a jury could have reasonably inferred from the evidence presented that Chacon's actions -- chasing the victim into the store, wielding a knife and screaming, "I'm going to kill you," at the victim -- presented sufficient evidence that Chacon committed the crime of burglary with the use of a deadly weapon and that the district court properly enhanced his sentence under NRS 193.165. See Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980); see also Culverson v. State, 95 Nev. 433, 596 P.2d 220 (1979).

Moreover, the jury could have also inferred from Chacon's actions that he committed the crime of first degree murder. On the night in question, but prior to the murder, Chacon and the victim engaged in a minor altercation at the 7-11 Store. After the minor altercation, Chacon and his friend returned to Chacon's apartment where his three other friends were visiting. While at the apartment, Chacon told his friends

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[3](...continued)
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.

what had happened and asked them to return to the 7-11 Store to fight the victim. Approximately ten minutes later, Chacon and his four friends returned to the 7-11 Store looking for the victim. Upon their arrival, Chacon and his friend Ken approached the victim, and Chacon said, "What's up now punk?" and then said, "You're dead." The victim and the victim's friend ran, and Chacon chased them into the 7-11 Store. Once Chacon gained entrance into the store, he chased the victim and stabbed him four times. We conclude that the jury could have reasonably inferred from the evidence presented that Chacon, without the authority of the law and with malice aforethought, willfully and feloniously stabbed and killed the victim with a knife.

We have considered Chacon's other contentions and conclude that they lack merit. Accordingly, we

ORDER this appeal dismissed.

_____, C.J.
Rose

_____, J.
Steffen

_____, J.
Young

_____, J.
Springer

_____, J.
Shearing

cc: Hon. Addeliar D. Guy, Judge
Hon. Frankie Sue Del Papa, Attorney General
Morgan D. Harris, Public Defender, Clark County
Rex Bell, District Attorney, Clark County
Loretta Bowman, Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

REMITTITUR

DATE: February 8, 1994

TO: Honorable Loretta Bowman, Clerk

RE: ROME RICHARD CHACON, AKA RICHARD CHACON vs. THE STATE OF NEVADA

NO. 24085 DIST. CT. NO. C105423

Pursuant to NRAP Rule 41, enclosed is (are) the following:

X Certified copy of Judgment and copy of Order.

..... Certified copy of Judgment and copy of Opinion.

..... Certified copy of Judgment and Opinion.

X Receipt for Remittitur. (County Clerk please sign below and return. Retain the attached copy for your records.)

..... Record on Appeal. Volumes.....

X Exhibits State's 3, 4, 5 and 6.

.....

.....

..... Deposition(s) of.....

..... Memorandum of Costs and Disbursements.

..... Other.....

cc: Morgan D. Harris, Public Defender
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney

Issued by: Joanne C. Richards
Chief Deputy Supreme Court Clerk

sp

RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on (date) FEB 1[illegible]

[illegible]
County Clerk

(Rev. 9-92) (O1-3976)

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

FILED
DEC 9 10 55 AM '92
Loretta Bowman
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff,	CASE NO. C105423
-vs-	DEPT. NO. XI
ROME RICHARD CHACON, aka Richard Chacon #1022841 Defendant,	DOCKET NO. S

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 31st day of March, 1992, the Defendant ROME RICHARD CHACON aka Richard Chacon, entered a plea of not guilty to the crimes of COUNT I - BURGLARY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - MURDER WITH USE OF A DEADLY WEAPON (Felony) committed on the 20th day of September, 1991, in violation of NRS 205.060, 193.165, 200.010, 200.030, 193.165, and the matter having been tried before a jury, and the defendant being represented by counsel and having been found guilty of the crimes of **COUNT I - BURGLARY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony)**; and

WHEREAS, thereafter, on the 27th day of October, 1992, the

DEC 0 2 1992

CEDS

ENT 12-9-92

defendant being present in Court with his counsel, TERRY JACKSON, Deputy Public Defender, and KARL M. LEDEBOHM, Deputy District Attorney also being present; the above entitled Court did adjudge defendant guilty thereof by reason of said trial and verdict and sentenced defendant to the Nevada State Prison on Count I - FIVE (5) years for BURGLARY plus a consecutive FIVE (5) years for USE OF A DEADLY WEAPON and on Count II - LIFE WITHOUT THE POSSIBILITY OF PAROLE for MURDER OF THE FIRST DEGREE plus a consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE for USE OF A DEADLY WEAPON. Count II to run concurrent to Count I. Pay $518.71 restitution and $25.00 Assessment Fee. Credit for time served 271 days.

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 8th day of ~~November~~ December, 1992, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

92-105423X/kjh
LVMPD DR#9109200023
BURG W/WPN & 1° MURDER
W/WPN - F

APP. 064

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES KELLY CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74554

FILED

JUN 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

We conclude that appellant has not demonstrated that the exercise of our discretion in this matter is warranted. *See* NRAP 40B; *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Accordingly we deny the petition for review.

It is so ORDERED.[1]

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Silver, J.
Silver

[1]The Honorable Mark Gibbons, Chief Justice, and Elissa F. Cadish, Justice, did not participate in the decision of this matter.

19-25606

cc: Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES KELLY CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74554-COA

ORDER OF AFFIRMANCE

Charles Kelly Chavez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 18, 2017. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Chavez filed his petition 19 years after entry of the judgment of conviction on April 14, 1998.[1] Chavez' petition was therefore untimely filed. *See* NRS 34.726(1). Chavez' petition was also successive.[2] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Chavez' petition was therefore 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). Further, because the State specifically pleaded laches, Chavez was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

[1]Chavez did not appeal his conviction.

[2]*See Chavez v. State*, Docket No. 60741 (Order of Affirmance, December 12, 2012); *Chavez v. State*, Docket No. 44023 (Order of Affirmance, June 29, 2005); *Chavez v. State*, Docket No. 37759 (Order of Affirmance, February 4, 2003). Chavez does not appear to have appealed from the denial of a postconviction petition for a writ of habeas corpus filed on August 24, 2015.

Chavez claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. *See Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Further, Chavez failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

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

Electronically Filed
10/20/2017 11:55 AM
Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

CHARLES CHAVEZ,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 97C146562

Dept No: VI

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on October 16, 2017, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on October 20, 2017.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 20 day of October 2017, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Charles Chavez # 57418
P.O. Box 7007
Carson City, NV 89702
Las Known Address

Rene L. Valladares
Federal Public Defender
411 E. Bonneville, Ste 250
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

Electronically Filed
10/16/2017 10:50 AM
Steven D. Grierson
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CHARLES KELLY CHAVEZ,
#1156097

Defendant.

CASE NO: 97C146562

DEPT NO: VI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: September 7, 2017
TIME OF HEARING: 9:00 AM

THIS CAUSE having come on for hearing before the Honorable Elissa Cadish, District Judge, on the 7th September, 2017, the Petitioner not being present, represented by Lori Teicher, 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:

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///

///

///

FINDINGS OF FACT, CONCLUSIONS OF LAW

Procedural History

On November 5, 1997, the State charged Charles Kelly Chavez by way of Information with Murder (Open Murder) (Felony – NRS 200.010, 200.030), Robbery (Felony – NRS 200.380), and Unlawful Use of Card for Withdrawal of Money (NRS 205.237). Petitioner's jury trial commenced on February 2, 1998, and on February 6, 1998, the jury returned a verdict finding Petitioner guilty of First Degree Murder, Robbery, and Unlawful Use of Card for Withdrawal of Money. On February 19, 1998, the parties filed a Stipulation and Order Waiving Separate Penalty Hearing and Waiving Appeal, stipulating to the imposition of a sentence of 20 years to life imprisonment. On April 2, 1998, Petitioner was adjudged guilty of all three counts and sentenced to the Nevada Department of Prisons as follows: as to Count 1 (First Degree Murder), 20 years to life; as to Count 2 (Robbery), 6 to 15 years, to run concurrent with Count 1; and as to Count 3 (Unlawful Use of Card for Withdrawal of Money), 4 to 10 years, to run concurrent with Count 2. The Judgment of Conviction was filed on April 14, 1998. As per the Stipulation and Order Waiving Separate Penalty Hearing and Waiving Appeal, Petitioner did not file a direct appeal.

On September 25, 1998, Petitioner filed his first habeas petition. On October 18, 1999, Petitioner, through counsel, filed a Supplemental Points and Authorities in support of his first habeas petition. On March 3, 2001, the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on March 29, 2001. On February 4, 2003, the Nevada Supreme Court issued an Order affirming the denial of Petitioner's first habeas petition. Remittitur issued on March 4, 2003.

On December 19, 2003, Petitioner filed his second habeas petition. On April 20, 2004, Petitioner filed an Amended Petition. On September 8, 2004, the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on September 29, 2004. On June 29, 2005, the Nevada Supreme Court issued an Order affirming the denial of Petitioner's second habeas petition. Remittitur issued on July 26, 2005.

On December 23, 2011, Petitioner filed his third habeas petition. On March 19, 2012, the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on April 4, 2012. On December 12, 2012, the Nevada Supreme Court issued an Order affirming the denial of Petitioner's third habeas petition. Remittitur issued on January 8, 2013.

On August 24, 2015, Petitioner filed his fourth habeas petition. On November 18, 2015, the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order to that effect on December 23, 2015. Petitioner did not appeal from this Order.

Most recently, on April 18, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction), which now constitutes Petitioner's fifth habeas petition. The State filed its response on May 25, 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 its remittitur and the filing of the instant Petition.

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED.

The instant Petition WAS filed more than 19 years after the Judgment of Conviction was entered. Accordingly, it is untimely under NRS 34.726(1). In an attempt to establish good cause to excuse this untimeliness, Petitioner relies on the United States Supreme Court's decisions in Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718 (2016), and Welch v. United States, __ U.S. __, 136 S. Ct. 1257 (2016). Montgomery and Welch, however, fail to serve as good cause necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the instant Petition constitutes Petitioner's fifth habeas petition, it is successive under NRS 34.810(2). And for the same reasons that Montgomery and Welch fail to constitute good cause

to overcome NRS 34.726(1)'s procedural bar, it likewise fails to constitute good cause sufficient to overcome NRS 34.810(2)'s procedural bar. Lastly, because more than 19 years have elapsed between the filing of the Judgment of Conviction and the filing of the instant Petition, the State plead laches pursuant to NRS 34.800(2) and sought to avail itself of that statute's rebuttable presumption of prejudice.

A. The Petition Is Untimely Under NRS 34.726(1), And Petitioner Has Failed To Establish Good Cause For Delay.

Under NRS 34.726(1), "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 appellate court of competent jurisdiction . . . issues its remittitur," absent a showing of good cause for delay. In State v. Eighth Judicial Dist. Court (Riker), the Nevada Supreme Court noted that "the statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005)

Here, the Judgment of Conviction in Petitioner's case was filed on April 14, 1998. Petitioner did not file a direct appeal. Accordingly, Petitioner had until April 14, 1999, to file a timely Petition. The instant Petition, however, was filed on April 18, 2017—more than 18 years after the one-year deadline had expired. Such untimeliness can be excused if Petitioner can establish good cause for the delay. This, however, he has failed to do.

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely.

1. Petitioner Has Failed To Establish That The Delay Is Not His Fault.

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 attempted to meet this first requirement by arguing new case law. Specifically, he argued that Montgomery and Welch "represent a change in law that allows petitioner to obtain the benefit of Byford[1] on collateral review." Petition at 12. 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 was misguided.

As noted by Petitioner, he received the following jury instruction 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.

Instructions to the Jury, filed February 6, 1998, Instruction No. 10. This instruction is known as the Kazalyn[2] instruction.

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

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[1] Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), *cert. denied*, Byford v. Nevada, 531 U.S. 1016, 121 S. Ct. 576 (2000).

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

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 defendants 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 law" insofar as it "failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and 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

[3] *See, e.g.,* Garner v. State, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), *overruled on other ground by* Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

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). A brief digression on Teague is therefore in order.

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 in 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

[4] Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

rule[ ] of criminal procedure." Id. at 311, 109 S. Ct. at 1076 (citing Mackey, 401 U.S. at 693-94, 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 full 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 P.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 defendants 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.[7] Id. at 819-20, 59 P.3d. at 472

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[5] As per Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

[6] As the Nevada Supreme Court explained in Colwell, it was free to deviate from the standard laid out in Teague so long as it observed the minimum protections afforded by Teague. See 118 Nev. at 817-18, 59 P.3d at 470-71; see also Johnson v. New Jersey, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

[7] This has the effect of affording greater protection than Teague insofar as defendants seeking collateral review here in Nevada will be able to avail themselves more frequently of the principle that "[i]f a rule is not new, then it applies even on collateral review of final cases."

("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 defendants because of their status or 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 Teague's retroactivity analysis 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 Court in Clem 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

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Colwell, 118 Nev. at 820, 59 P.3d at 472. Under Teague's expansive definition for "new rule," most rules would be considered new by Teague's standards and, thus, "given only prospective effect, absent an exception." Id. at 819, 59 P.3d at 471.

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, but 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

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[8] Petitioner omits any mention of Colwell or Clem, which were central to Nika's retroactivity analysis regarding convictions that were final at the time of the change in the law. Instead, Petitioner cites Nika's preceding analysis of why "the change effected by Byford properly applied to [the defendant in Polk, 503 F.3d at 910] as a matter of due process." Nika, 124 Nev. at 1287, 198 P.3d at 850; see Petition at 12. To be sure, the Court in Nika, in conducting this analysis, did rely on the retroactivity rules set out in Bunkley v. Florida, 538 U.S. 835, 123 S. Ct. 2020 (2003), and Fiore v. White, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to Petitioner were "drastically changed," Petition at 12, by the United States Supreme Court's decisions in Montgomery and Welch. Whether or not this is true is of no moment. The analysis in Nika regarding retroactivity in Polk had absolutely no bearing on Nika's later analysis of the rules of retroactivity respecting convictions that were final at the time of the change in the law.

[9] See Rippo, 122 Nev. at 1097, 146 P.3d at 286.

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," had 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 Court in Montgomery 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. at __, 136 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 defendants 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 defendant—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, got 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." Id. at __, 136 S. Ct. at 727; see Petition at 12, 19, 24. 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 24. This assertion, while true, shortchanges 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 __, 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 believes 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 is 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 12 (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 "[u]nder 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.[10] 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 rule 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 Schriro 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

[10] The parties agreed that the second Teague exception was not applicable. Welch, __ U.S. at __, 136 S. Ct. at 1264.

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[11] 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 S. 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

[11] Specially, where the first-degree murder is premised on a theory of willfulness, deliberation, and premeditation. NRS 200.030(1)(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. [ ] 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 particular 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 "[t]wo 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 __, 135 S. Ct. at 2557-58. Because of these uncertainties, the Court in Johnson explained that "[i]nvoking 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 example 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, defendants 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 a 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. Defendants 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, goes 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 20-21; 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 hinged 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. Ct. at 1267 (quoting Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). On the basis of this language, Petitioner comes 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 21 (emphasis in original).

Petitioner, however, failed to grasp 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 (E.D. 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 at 15, 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, like Petitioner's, that became final before the new rule was announced. 124 Nev. at 1287-89, 198 P.3d at 850-51. Consequently, Petitioner's reliance on Montgomery and Welch to meet NRS 34.726(1)(a)'s criterion fails.

2. Petitioner Has Failed To Establish That Dismissal Of The Petition As Untimely Will Unduly Prejudice Him.

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)).

Here, Petitioner could not 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 introduced at trial reflected that Petitioner had driven the victim, Jamie Rodgers, to Lake Mead late at night on August 20, 1997, where he strangled her to death and left her body in the lake. See Reporter's Transcript of Proceedings: Jury Trial, February 5, 1997, at 37-42, 56-86. The autopsy performed the next day by forensic pathologist Robert Bucklin revealed that Ms. Rodgers had been manually strangled by an attacker using his hands, resulting in massive injuries to the neck with extensive hemorrhaging and a fracture to the hyoid bone. Id. at 67-78. Mr. Bucklin identified linear fingermarks on both sides of the neck indicating that Ms. Rodger's assailant had placed both hands around her neck and applied a tremendous amount of force continuously for over a period of at least 30 seconds to a minute, and possibly much longer, until Ms. Rodgers asphyxiated from the lack of oxygen. Id. at 76-78. The evidence also indicated that Ms. Rodgers had been immersed or held underwater while being strangled. Id. at 85-86. Ms. Rodgers also suffered blows to her head before death,

causing two skull fractures, lacerations and abrasions to her face, and a major hemorrhage behind her right ear. Id. at 75-76, 80-83. According to Mr. Bucklin, Ms. Rodger's injuries excluded the possibility that Ms. Rodger's had accidentally drowned. Id. at 85.

The day after strangling Ms. Rodgers, Petitioner and two of his acquaintances prepared to leave town. See Reporter's Transcript of Proceedings: Jury Trial, February 3, 1997, at 164, 186. They took Ms. Rodgers' car and traveled to her apartment where Petitioner proceeded to remove several items of jewelry. Id. at 164, 177, 187. The trio then drove to California. Id. at 164, 189. Before driving off to California, they stopped to pull out $300 from an ATM with Ms. Rodgers' ATM card. Id. at 166-67. On September 12, 1997, officers of the San Bernardino Police Department arrested Petitioner in California. Id. at 140. At the time he was arrested, Petitioner was driving Ms. Rodgers' car and had Rodgers' ATM card. Id.

A subsequent search of Ms. Rodgers apartment uncovered two letters—written the night of her death—in Ms. Rodger's handwriting addressed to Petitioner in which she indicated that she wanted to end the relationship because she realized that Petitioner did not care for her and was only using her for her money. See id. at 141-46. Petitioner himself admitted to using Ms. Rodgers for money. See Reporter's Transcript of Proceedings: Jury Trial, February 5, 1997, at 35-36. This evidence all served to establish that the murder of Ms. Rodgers was willful, premeditated, and deliberate.

Petitioner also cannot establish prejudice on the basis of the Kazalyn instruction due to the fact that the evidence clearly established first-degree murder on a theory of felony murder in addition to the theory of premeditation, deliberation, and willfulness. *See* Moore v. State, 2017 Nev. Unpub. LEXIS 224, *2, 2017 WL 1397380 (Nev. Apr. 14, 2017) (explaining that appellant could not establish that he was prejudiced by the Kazalyn instruction "because he did not demonstrate that the result of trial would have been different considering that the evidence clearly establish[ed] first-degree murder based on felony murder"). Here, Petitioner was charged with and ultimately convicted of Robbery—which is among the enumerated felonies that can serve as a predicate to a theory of felony murder. See NRS 200.030(1)(b) (defining first-degree murder as murder "[c]ommitted in the perpetration or attempted

perpetration of sexual assault, kidnapping, arson, *robbery*, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099" (emphasis added)). Accordingly, because the evidence established that Petitioner was guilty of first-degree murder under a felony-murder theory, he cannot establish that the error in giving the Kazalyn instruction worked to his "*actual* and substantial disadvantage." See Huebler, 128 Nev. at __, 275 P.3d at 95 (emphasis added).

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. That being the case, this Court denies the Petition on the basis that it is procedurally barred under NRS 34.726(1).

B. The Petition Is Successive Under NRS 34.810(2), And Petitioner Has Failed To Establish Good Cause And Actual Prejudice.

NRS 34.810(2) requires the district court to dismiss "[a] second or successive petition 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." And as with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. See Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001) ("[A] court *must dismiss* a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." (emphasis added)).

As noted above, the instant Petition constitutes the fifth habeas petition that Petitioner has filed. Petitioner filed his first habeas petition on September 25, 1998. On March 3, 2001, the Court denied the petition on the merits and entered its Findings of Fact, Conclusions of Law and Order to that effect on March 29, 2001. Petitioner then proceeded to file his second habeas petition on December 19, 2003, his third habeas petition on December 23, 2011, and his fourth habeas petition on August 24, 2015. All three petitions were denied, in part, on the basis that they were successive pursuant to NRS 34.810(2).[12] This Court treats the instant Petition no differently.

While Petitioner's claim attacking the Kazalyn instruction has been raised twice before,[13] this is the first time that he has attacked it on the basis of the United States Supreme Court's decisions in Montgomery and Welch. To the extent that this claim constitutes a "new and different" ground for relief, this Court finds that Petitioner's failure to raise it in a prior petition constitutes an abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome the procedural bar described in subsection (2), Petitioner failed to establish either good cause or actual prejudice for the very same reasons that he failed to establish good cause for delay under NRS 34.726(1). See supra at 4-23. That being the case, this Court denies the Petition on the basis that it is procedurally barred under NRS 34.810(2).

C. The State Specifically Plead Laches Under NRS 34.800(2) Because More Than 19 Years Had Elapsed Between The Filing Of The Judgment Of Conviction And The Filing Of The Instant Petition.

NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing

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[12] The Court denied the second habeas petition on September 8, 2004, and entered its Findings of Fact, Conclusions of Law and Order to that effect on September 29, 2004. The Court denied the third habeas petition on March 19, 2012, and entered its Findings of Fact, Conclusions of Law and Order to that effect on April 4, 2012. The Court denied the fourth habeas petition on November 18, 2015, and entered its Findings of Fact, Conclusions of Law and Order to that effect on December 23, 2015.

[13] Petitioner previously attacked the Kazalyn instruction in his first and second habeas petitions.

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 Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State affirmatively plead laches in this case. In order to overcome the presumption of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Petitioner's representations and on what he has filed with this Court thus far, Petitioner has failed to meet that burden. That being the case, this Court dismisses the Petition pursuant to NRS 34.800(2).

ORDER

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

DATED this 12 day of October, 2017.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ Charles Thomas
CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649

///

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order was made this 3rd day of October, 2017, by Electronic Filing to:

LORI TEICHER,
First Assistant Federal PD
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BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY

CHARLES KELLY CHAVEZ, Petitioner, v. THE STATE OF NEVADA, et al., Respondents.	Case No. C146562 Dept. No. 8 Date of Hearing: Time of Hearing: (Not a Death Penalty Case)

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: Warm Springs Correctional Center.

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District, Department 6, 200 S. Third Street, Las Vegas, NV, 89101

3. Date of judgment of conviction: April 14, 1998

4. Case Number: C146562

5. (a) Length of Sentence: Life with the Possibility of Parole (Murder - Count I), 180 months (Robbery - Count II); and 120 months (Count III – Unlawful Use of Credit Card for Withdrawal of Money. All terms are to run concurrent to Count I.

(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:

Nature of offense involved in conviction being challenged:

7. Nature of offense involved in conviction being challenged: Murder, Robbery, Unlawful Use of a Credit Card

8. What was your plea?

(a) Not guilty X (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 X (b) Judge without a jury _____

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

12. Did you appeal from the judgment of conviction?

Yes _____ No X

13. If you did appeal, answer the following:

(a) Name of Court: N/A

(b) Case number or citation: N/A

(c) Result: N/A

14. If you did not appeal, explain briefly why you did not: On February 19, 1998 Chavez stipulated to waive his direct appeal from judgment and no appeal was taken.

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 X No _____

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

(a) (1) Name of Court: Eighth Judicial District

(2) Nature of proceeding: Petition for Writ of Habeas Corpus

(3) Ground raised:

I. CHAVEZ IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION.

II. CHAVEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

A. FAILURE TO OBJECT TO IMPROPER OPENING STATEMENT BY THE PROSECUTOR.

B. FAILURE TO OBJECT TO CHARACTER EVIDENCE DURING THE TRIAL, OR TO REQUEST A *PETROCELLI* HEARING.

C. FAILURE TO INVESTIGATE AND PRESENT EVIDENCE.

D. DEFENSE COUNSEL ELICITED TESTIMONY OF OTHER BAD ACTS THAT WERE PREJUDICIAL TO CHAVEZ.

E. FAILED TO FILE A MOTION TO PRECLUDE THE STATE FROM INTRODUCING EVIDENCE OF THE NON-RELATED VAGINAL BRUISE FOR THE SOLE PURPOSE OF SHOWING PAINFUL INTERCOURSE OR TO OBJECT TO THE ADMISSION OF SAME DURING TRIAL AND REFERENCE TO SEXUAL ASSAULT IN CLOSING ARGUMENT.

F. COUNSEL FAILED TO OBJECT TO THE PROSECUTOR PLAYING THE PART OF THE DEFENDANT IN READING INTO THE RECORD CHAVEZ' STATEMENT.

G. FAILURE TO OBJECT TO HEARSAY CONTAINED IN LETTERS WRITTEN BY JAMIE RODGERS

H. FAILED TO INTRODUCE TESTIMONY THAT A FALL COULD HAVE CAUSED THE INJURIES SUFFERED BY RODGERS.

I. FAILURE TO OBJECT TO REPEATED PROSECUTORIAL MISCONDUCT.

J. WASN'T PREPARED FOR HIS CLOSING ARGUMENT AND APOLOGIZED IN ADVANCE TO THE JURY FOR HIS DISJOINTED ARGUMENT.

II. CHAVEZ'S RIGHTS UNDER THE DUE PROCESS CLAUSE WERE VIOLATED BY THE GIVING OF THE IMPROPER PREMEDITATION AND MALICE INSTRUCTIONS.

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

(5) Result: Affirmed

(6) Date of Result: February 4, 2003.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Findings of Fact, Conclusions of Law denying the petition, March 29, 2001; Order of Affirmance, February 4, 2003. Case No. 37759.

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

(1) Name of court: Eighth Judicial District Court

(2) Nature of proceeding: Second Post-Conviction Petition

(3) Grounds raised:

A. Petitioner was denied effective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States, and Article I of the Nevada Constitution.

1. Failure of defense counsel to recognize the warrantless entry and seizure of letter and to file a motion to suppress the search and the letters, as well as the subsequent fruit of the illegal search.

2. Failure of defense counsel to file a motion to suppress, or in the alternative to request a *Jackson v. Denno* hearing on the videotaped and transcribed statement while in custody in

California, obtained after informing Petitioner that the above letters were in the possession of law enforcement officers in Nevada, forcing him to comment.

3. Failure of defense counsel to request appointment of an expert to determine the authenticity of the letter allegedly authored by Jamie Rodgers.

4. Failure of defense counsel to conduct an independent investigation or to request the appointment of independent experts to examine the body and conduct independent crime scene investigation for the purpose of establishment of exact date, time and cause of death, for the purpose of corroborating the defense theory of accident.

5. Failure of defense counsel to conduct an independent investigation or to request videotape record from security cameras at the apartment complex, and other locations said to have been visited by Petitioner and the putative victim, re: the dates and times are conflicting and appear manufactured to fit the use of the ATM card on August 20, 21 and make it appear as it pecuniary gain was a motivation in the death -aggravating circumstances- when the death penalty was never at issue.

6. Failure of defense counsel to file a motion in limine, to object to testimony of coroner as to vaginal abrasion, or to demand a *Petrocelli* hearing on alleged evidence of other bad act. Said testimony was obviously.

Amended Petition:

A. Petitioner reserves all claims and issues raised in all prior proceedings.

B. Petitioner incorporates herein the opposition to state's motion to dismiss successive petition, petitioner's motions for the appointment of counsel, appointment of investigator, leave to conduct discovery, and for evidentiary hearing.

C. Petitioner was denied the right to fair trial and effective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States and Article I of the Nevada Constitution by defense counsel, an associate with the office of the Clark County public defender, failing to disclose an unconscionable conflict of interest that said office was also representing the star prosecution witness who appeared at trial and testified against the petitioner.

D. Petitioner was denied the right to fair trial and effective assistance of counsel in violation of the Sixth Amendment to the Constitution of the United States, and Article I of the Nevada Constitution:

1. Defense counsel failed to conduct an independent investigation into the Petitioner's theories of defense as to accident or another, later assailant, or to request the appointment of independent experts to examine the body and conduct independent crime scene investigation for the purpose of establishment of exact, date, time

and cause of death, for the purpose of corroborating defense theories of accident or another, later assailant.

2. Defense counsel failed to interview witnesses necessary for the defense, and failed to allow the petitioner to take the stand to testify.

3. Defense counsel's failure to prepare resulting in defense counsel eliciting prejudicial testimony against the petitioner.

4. Defense counsel failed to request competency hearing.

5. Defense counsel failed to recognize the warrantless entry and seizure of letters and to file a motion to suppress the search and the letters, as well as the subsequent fruit of the illegal search.

6. Defense counsel failed to file a motion in limine, and later, failure to demand a Petrocelli hearing on issues of improper character evidence/uncharged acts.

7. Defense counsel failed to file a motion in limine, to object to testimony of coroner as to vaginal abrasion, or to demand a *Petrocelli* hearing on alleged evidence of other bad act. Said testimony was obviously structured to create an impression of death after inferred violent sexual assault, a crime which was not charged, but one which is also considered an aggravating circumstance.

8. Defense counsel failed to object or to demand a *Jackson v. Denno* hearing relating to admissibility of the videotaped and transcribed statement while in custody in California.

9. Defense counsel failed to request appointment of an expert to determine the authenticity of the letters allegedly authored by Jamie Rodgers and the petitioner, and failed to object to lack of scientific evidence as to authorship and admissibility at time of trial obtained after informing petitioner that the above letters were in the possession of law enforcement officers in Nevada, forcing him to comment.

10. Defense counsel failed to object to the repeated acts of misconduct by the prosecution, including but not limited to, the improper and inflammatory opening and closing statements, the method of introducing and reading the transcript of the California statement by Chavez (the prosecutor played Chavez and used expressions and inflections adversely suggestive to the jury), and the use of highly prejudicial autopsy photographs.

11. Defense counsel failed to object or to otherwise impeach the coroner during trial testimony which changed between preliminary hearing and trial as to potential cause of death being accidental or intentional. Again, defense counsel had never inquired into, investigated or otherwise presented a tenable defense theory. Additionally, defense counsel failed to object to the malice and premeditation instructions to the jury, and failed to request a

proper instruction on lesser offenses, and failed to adequately prepare for closing statements.

12. Defense counsel failed to request dismissal of charges, failed to request dismissal of charges in repealed statute, failed to request correction of illegal sentence, failed to request new trial, and failed to file timely notice of appeal.

13. Defense counsel's failures created an involuntary and unknowing stipulation for penalty and sentencing and waiver of right to appeal in violation of the Constitution of the United States and the State of Nevada.

E. Petitioner was denied the effective assistance of appointed counsel during the first post trial matter of the post conviction by the failure of appointed counsel to recognize and raise the issue of conflict of interest, by the failure of post conviction counsel to raise the issues identified herein, and by failure of appointed counsel to request the appointment of an investigator and to conduct reasonable and necessary discovery to support the defense theories of accident, or alternative, other assailant, and to prepare for evidentiary hearing.

F. Prosecution committed misconduct which denied the petitioner the right to a fair trial in violation of the Sixth Amendment to the Constitution of the United States and Article I of Nevada Constitution.

1. Prosecution committed misconduct by violation of *Brady v. Maryland* and by failure to disclose to the court the background information on Paul Flintroy which may have been used to impeach credibility of a key prosecution witness.

2. Prosecution committed misconduct by improper and inflammatory opening and closing statements, expressing personal opinions and stating alleged facts never received into evidence, and by invoking improper "golden rule" argument which asked the jury to place themselves in the position of the victim.

3. Prosecution committed misconduct by submitting inflammatory and prejudicial autopsy photographs of the putative victim which were highly prejudicial and which served no valid probative purpose.

G. Trial court committed reversible error which denied the petitioner the right to a fair trial in violation of the Sixth Amendment to the Constitution of the United States and Article I of Nevada Constitution.

1. Trial court committed reversible error by admission of improper instructions.

2. Trial court committed reversible error by admission of improper character evidence and evidence of uncharged bad acts.

3. Trial court committed reversible error by admission of evidence without scientific authentication or corroboration.

H. Actual innocence of the petitioner and that but for the conflict of interest and ineffective assistance of counsel and failures to perform to the reasonable standards of the profession, trial would have shown there was insufficient evidence to convict the Petitioner of the accusations charged beyond a reasonable doubt by a rational trier of fact.

I. Doctrine of cumulative review, "grave doubt" and the fundamental miscarriage of justice standard indicate that substantial miscarriage of justice has undermined the accuracy of the proceedings, and more probably than not, upon examination of all of the available facts, information, and evidence, that the accumulation of error viewed under the totality of circumstances, would mandate a new trial.

J. Petitioner reserves the right to allege additional issues and grounds for relief at the time set for evidentiary hearing.

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

(5) Result: Order Dismissing Petition for Writ of Habeas Corpus

(6) Date of result: September 26, 2007

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Finding of Fact, Conclusions of Law and Order, filed on September 29, 2004; Nevada Supreme Court, Case No. 44023, order affirming the district court filed on June 29, 2005.

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

(1) Name of court: Federal District Court, District of Nevada

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

(3) Grounds raised:

GROUND ONE: Mr. Chavez Was Denied His Right to Effective Assistance of Trial Counsel under the Sixth and Fourteenth Amendment to the United States Constitution.

A. Failure to object to the Prosecutor's improper opening statement.

B. Failure to object to character evidence during the trial, or to request a *Petrocelli* hearing.

C. Failure to investigate and present evidence.

D. Defense counsel elicited testimony of other bad acts that were prejudicial to Mr. Chavez.

E. Trial counsel failed to file a motion to preclude the State from admitting evidence of an unrelated vaginal bruise found on Ms. Rodgers.

F. Trial counsel's failure to introduce testimony that a fall could have caused Ms. Rodgers injuries.

G. Failure to object to repeated prosecutorial misconduct during closing argument.

GROUND TWO: The premeditation and malice jury instructions given during trial were improper. As a result of the erroneous instruction, Mr. Chavez's conviction and sentence are invalid under the federal constitutional guarantees of due process under the fifth and fourteenth amendments to the united states constitution.

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

(5) Result: United States District Court denied relief, Case No. 2:03-cv-0173-KKD-LRL

(6) Date of result: May 15, 2008

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Above; Ninth Circuit Court of Appeals, Case No. 08-17191, Memorandum affirming district court, June 21, 2010; United States Supreme Court, certiorari denied November 8, 2010.

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: Chavez's post-conviction petition and in federal district court.

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. 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? Yes If so, state briefly the reasons for the delay.

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 X

If yes, state what court and the case number:

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

22. 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*, 124 Nev. 1272, 198 P.3d 839 (2008), 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*, 136 S. Ct. 718 (2016), 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*, 136 S. Ct. 1257 (2016), 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. Further, the instruction had a prejudicial impact at trial.

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

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.

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

> Premeditation is a question of fact for the jury and may be determined from the facts and circumstances of the killing, such as the use of an instrument calculated to produce death, the maker of the use, and the circumstances surrounding the act.

(Jury Instructions, Instruction No. 10.)

Defense counsel objected to the instruction, and proposed the following instruction of deliberate: "Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of action." (February 6, 1998 Trial Transcript at 13.)

B. Appeal and Date Conviction Became Final

According to the verdict form, the jury found Chavez guilty of First Degree Murder (Count I), Robbery (Count II), and Unlawful Use of Card for Withdrawal of Money. (Verdict.) Chavez was sentenced Life with the Possibility of Parole (Murder - Count I), 180 months (Robbery - Count II); and 120 months (Count III – Unlawful Use of Credit Card for Withdrawal of Money. All terms are to run concurrent to Count I. (Judgment of Conviction.)

Chavez did not appeal the judgment of conviction entered April 14, 1998. The conviction became final on July 13, 1998, once the time for seeking *certiorari* expired. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 n.52 (Nev. 2008).

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 (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*, Chavez is entitled to the benefit of having *Byford* apply to his case, which became final prior to *Byford*. The *Kazalyn* instruction defining premeditation and deliberation given in his case was improper.

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

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 State was relieved of its obligation to prove essential elements of the crime, including deliberation. 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" as required under *Byford*. *Byford*, 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. As discussed previously, the evidence presented to the jury was not sufficient to establish that Chavez premeditated and deliberately killed Jamie Rogers. Evidence was proffered at trial that Chavez tried to save Rogers from drowning at Lake Mead. Her injuries were catalogued, but there was no evidence was inconsistent with a fall into the lake and striking her head on a rock.

The evidence provided by the State to prove Chavez's intent on the night of the homicide does not do so beyond a reasonable doubt. As such, the evidence does not sufficiently support a finding of first degree murder. Accordingly, it is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. This error prejudiced Chavez. He is entitled to relief on this claim.

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 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.

Finally, petitioner can establish actual prejudice for the same reasons discussed on pages 23. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. That error cannot be considered harmless.

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 23.

III. PRAYER FOR RELIEF

Based on the grounds presented in this petition, Petitioner, Charles Chavez, respectfully requests that this honorable Court:

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

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

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

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

DATED this 18th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Lori C. Teicher
LORI C. TEICHER
First Assistant Federal Public Defender

VERIFICATION

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

DATED this 18th day of April, 2017.

/s/ Lori C. Teicher
LORI C. TEICHER
First Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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, she served a true and accurate copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) by placing it in the United States mail, first-class postage paid, addressed to:

Steve Wolfson
Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89101

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

Charles Kelly Chavez
#57418
Warm Springs Correctional Center
P.O. Box 7007
Carson City, Nevada 89701

/s/ Leianna Jeske
An Employee of the Federal Public Defender, District of Nevada

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JOC
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff

FILED
APR 14 1 03 PM '98
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CHARLES KELLY CHAVEZ,
#1156097

Defendant.

Case No. C146562X
Dept. No. VIII
Docket M

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 20th day of November, 1997, the Defendant CHARLES KELLY CHAVEZ, entered a plea of not guilty to the crimes of MURDER (Felony), ROBBERY (Felony) and UNLAWFUL USE OF CARD FOR WITHDRAWAL OF MONEY (Felony), committed on or between August 20, 1997, and August 22, 1997, in violation of NRS 200.010, 200.030, 200.380, 205.237, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crimes of FIRST DEGREE MURDER, ROBBERY, and UNLAWFUL USE OF CARD FOR WITHDRAWAL OF MONEY, Counts I, II and III; and

WHEREAS, thereafter, on the 2nd day of April, 1998, the Defendant being present in Court with his counsel R. ROGER HILLMAN, Deputy Public Defender, and DANAE ADAMS, Deputy District Attorney, and ERIN EHLERT, Deputy District Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, sentenced Defendant to the Nevada

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Department of Prisons as to COUNT I for a term of Life Imprisonment with the possibility of parole after a minimum term of TWENTY (20) years, as to COUNT II, to a maximum term of not more than ONE HUNDRED EIGHTY (180) MONTHS with parole eligibility after a minimum term of not less than SEVENTY-TWO (72) MONTHS to run concurrent to sentence imposed in Count I, as to COUNT III, to a maximum term of not more than ONE HUNDRED TWENTY (120) MONTHS with parole eligibility after a minimum term of not less than FORTY-EIGHT (48) MONTHS to run concurrent to sentence imposed in Count II. Credit for time served of 203 days.

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 ____ day of April, 1998, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#97-146562X/rmf
LVMPD EV#9708211565 1
First Degree Murder/Robbery/
Unlawful Use Card Withdraw Money-F
(TK7)
p:\wpdocs\judg\outlying\7h128901\rmf

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY DENNIS COOPER,
Appellant,
vs.
JO GENTRY, WARDEN,
Respondent.

No. 74159

FILED

JUN 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

We conclude that appellant has not demonstrated that the exercise of our discretion in this matter is warranted. *See* NRAP 40B; *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Accordingly we deny the petition for review.

It is so ORDERED.[1]

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J
Silver

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

19-25605

cc: Hon. Susan Johnson, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICKEY DENNIS COOPER,
Appellant,
vs.
JO GENTRY, WARDEN,
Respondent.

No. 74159-COA

ORDER OF AFFIRMANCE

Rickey Dennis Cooper appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 17, 2017. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Cooper filed his petition more than 30 years after issuance of the remittitur on direct appeal on June 3, 1986, *see Cooper v. State*, Docket No. 15653 (Order Dismissing Appeal, May 15, 1986), and 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12 (2018). Cooper's petition was therefore untimely filed. *See* NRS 34.726(1). Cooper's petition was also successive.[1] *See* NRS

[1]*See Cooper v. State*, Docket No. 44764 (Order of Affirmance, March 2, 2006); *Cooper v. State*, Docket No. 31667 (Order of Remand, July 24, 2000); *Cooper v. Warden*, Docket No. 22086 (Order Dismissing Appeal, June

34.810(1)(b)(2); NRS 34.810(2). Cooper's petition was therefore 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). Further, because the State specifically pleaded laches, Cooper was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Cooper claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. *See Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018).

Cooper also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Cooper claimed that "[t]he facts in this case established that [he] only committed a second-degree murder." This is not actual innocence, and Cooper thus failed to overcome the procedural bars. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("'[A]ctual innocence' means factual innocence, not mere legal

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27, 1991); *Cooper v. State*, Docket No. 18679 (Order Dismissing Appeal, September 21, 1988).

insufficiency."). And because he failed to demonstrate a fundamental miscarriage of justice, Cooper failed to overcome the presumption of prejudice to the State. *See* NRS 34.800. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, Vs. RICKEY DENNIS COOPER, Defendant.	Case No. 83C062939 Dept. No. XXII
RICKEY DENNIS COOPER, Petitioner, Vs. JO GENTRY, WARDEN,[1] Respondent.	

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

This matter concerning Defendant RICKEY DENNIS COOPER'S Writ of Habeas Corpus (Post Conviction) filed April 17, 2017 came on for hearing on the 24th day of August 2017[2] at the hour of 10:30 a. m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Petitioner RICKEY DENNIS COOPER appeared by and through his attorney, MEGAN C. HOFFMAN, ESQ., Assistant Federal Public Defender; and Respondent JO GENTRY, WARDEN appeared by and through SANDRA K.

[1]The caption for the Petition for Writ of Habeas Corpus included as a responding party, "etc." After taking this matter under advisement, this Court's law clerk confirmed with defense counsel such reference to "etc." was in error, and the only respondent is "JO GENTRY, WARDEN."

[2]This matter was originally scheduled to be heard June 6, 2017 at 8:30 a.m. but was continued to allow Defendant to file a reply to WARDEN GENTRY'S Response filed May 30, 2017. Notably, the Response is couched as being filed by the STATE OF NEVADA which is not a respondent in this case. *See* Footnote 1.

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DEPARTMENT XXII

DIGIACOMO, ESQ., Chief Deputy District Attorney. Having reviewed the papers and pleadings on file herein, including Defendant's Opposition to the STATE'S Response filed July 18, 2017, heard arguments of counsel and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. By way of Information filed June 13, 1983, Defendant/Petitioner RICKEY DENNIS COOPER was charged with committing the following crimes:

COUNT 1 – Attempt Robbery With Use of a Deadly Weapon (Felony) in violation of NRS 200.380, 208.070 and 193.165;

COUNT 2 – Attempt Murder With Use of a Deadly Weapon (Felony) in violation of NRS 200.010, 200.030, 208.070 and 193.165;

COUNT 3 – Battery With Use of a Deadly Weapon (Felony) in violation of NRS 200.481 and 193.165; and

COUNT 4 – Murder With Use of a Deadly Weapon (Felony) in violation of NRS 200.010, 200.030 and 193.165.

2. The aforementioned charges were brought to trial from November 1 to 7, 1983, and the jury found MR. COOPER guilty of committing all four crimes. The penalty phase commenced one week later, and the jury returned a verdict imposing a sentence of life imprisonment without the possibility of parole. On January 5, 1984, MR. COOPER was adjudged guilty of all four counts and received terms of imprisonment to run consecutively; the most lengthy sentence was serving life without the possibility of parole plus a consecutive identical term for the use of the deadly weapon.[3]

. . .

. . .

[3]*See* Judgment of Conviction filed January 20, 1984.

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

3. MR. COOPER appealed the judgment on February 3, 1984, claiming the district court committed error in the penalty phase[4] by (1) admitting evidence Defendant was involved in a gang, and (2) refusing to admit into evidence a letter setting forth mitigating circumstances. The appeal was considered and dismissed by the Nevada Supreme Court on May 15, 1986.[5]

4. MR. COOPER thereafter filed six (6) Post-Conviction Petitions for Writ of Habeas Corpus:

a. The first, filed December 8, 1986 in the Eighth Judicial District Court, raised claims (1) Defendant was denied effective assistance of trial counsel as the lawyer "did not object to questions assuming facts not in evidence, hearsay, inappropriate evidence of Cooper's unemployment, misleading questioning and prosecutorial misconduct in closing argument;" (2) "the prosecutor engaged in misconduct by inflaming the passions of the jury and vouching for a witness;" and (3) Defendant was deprived the effective assistance of appellate counsel for the lawyer's "failure to argue the trial errors of admitting evidence of other crimes, ...of rocks thrown through a witness's (sic) window, the trial court's canvass of a witness as to his religious beliefs, and prosecutorial misstatements of evidence."[6] This petition was denied by the district court on November 2, 1987; such decision was appealed, and ultimately, the appeal was denied by the Nevada Supreme Court on September 21, 1988.[7]

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[4]The nature of the offense addressed in the penalty phase was Count 4 – Murder With Use of a Deadly Weapon.

[5]*See* Cooper v. State, Docket No. 15653.

[6]This Court has quoted the words used by Defendant/Petitioner on page 5 of the Petition for Writ of Habeas Corpus currently being addressed, although it has not used the words' capitalization. As seen by Footnote 7 *infra*, the grounds identified by MR. COOPER in his most current Petition for Writ of Habeas Corpus do not mirror those addressed by the Nevada Supreme Court.

[7]*See* Cooper v. State, Docket No. 18679. While the trial court's written decision summarily denied the originally-filed Petition for Writ of Habeas Corpus, the Nevada Supreme Court deemed, with respect to the first ground presented, trial counsel's "failure" to object in one instance as a "sound tactical decision." With respect to another "failure," the high court noted the record showed defense counsel did object on hearsay grounds, but the challenge was meritless as the trial court properly admitted such testimony as a prior inconsistent statement. There was an assertion a late objection was made on hearsay grounds, but as the trial court properly admitted the testimony as non-hearsay

b. The second Petition for Writ of Habeas Corpus was filed July 12, 1990 in the Seventh Judicial District Court. The four grounds raised there were (1) violation of the First Amendment to the United States Constitution as the district court denied MR. COOPER'S

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pursuant to NRS 51.035(2), MR. COOPER failed to show his lawyer's allegedly tardy objection represented deficient performance. With respect to the prosecutor's emphasizing MR. COOPER'S unemployment status, Petitioner/Defendant failed to identify how he was prejudiced by such "emphasis," and thus, that his lawyer's performance was deficient. The "vouching" for a witness by the prosecutor consisted of the district attorney arguing in closing the witness "stuck his neck out" to testify, which could be appropriately tied to evidence showing at least one witness had been warned not to testify. The Nevada Supreme Court concluded the State's remark represented an appropriate comment on the evidence, and therefore, the defense lawyer was not "ineffective" by failing to object to such "vouching" by the prosecutor. MR. COOPER also maintained his lawyer failed to object to an alleged prosecutorial comment Defendant/Petitioner did not testify. The high court noted a review of the record revealed the State was not commenting on MR. COOPER'S failure to testify; rather, the State pointed out an inconsistency between a statement made by Petitioner/Defendant following his arrest and that of his stepfather's testimony. The State's argument was a permissible comment on the evidence before the jury.

With respect to the second ground questioning the effectiveness of his trial lawyer, the Nevada Supreme Court considered defense counsel's comments, although presenting a "somewhat unusual defense statement," as an attempt to generate the inference, if the police investigation had been more thorough, another individual would have been designated as the shooter in the case. The high court noted, since tactical decisions are virtually unchallengeable, MR. COOPER'S trial counsel's actions cannot be labelled deficient. Finally, MR. COOPER argues, by his lawyer calling his stepfather to testify at trial, unnecessary testimony was elicited which ultimately resulted in the State presenting damaging rebuttal evidence. MR. COOPER'S stepfather testified Petitioner/Defendant returned home at 9:00 p.m. on the evening of the killing. In return, the State offered evidence MR. COOPER previously stated he had spent the entire evening with SHARON RAGLAND. As the killing took place at 7:30 p.m., it was pointless to call the stepfather to testify. The Nevada Supreme Court concluded MR. COOPER failed to establish his lawyer's procedure prejudiced the case, as the allegedly damaging testimony concerned his whereabouts after the victim was murdered. As the only disputed issue at trial was whether MR. COOPER was the shooter, any prejudice stemming from the alleged deficient behavior of his lawyer was negligible.

Concerning the third ground, i.e. the ineffectiveness of his appellate counsel, MR. COOPER first declared a transcript of the jury selection process was not ordered as part of the record, and thus, one could only speculate as to the appealable issues contained in the *voir dire* examination. The Nevada Supreme Court concluded the mere failure to order a transcript of the jury selection process without more does not amount to *per se* ineffective assistance of appellate counsel; it did not consider MR. COOPER'S speculation of error in the process. MR. COOPER claimed his appeals lawyer failed to argue the district court inappropriately canvassed a witness concerning his religious beliefs. While the introduction of evidence involving religious beliefs is prohibited if the purpose is to enhance or impair a witness' credibility, the district court's purpose in questioning was to ascertain whether the witness understood and appreciated his oath. Such failure to raise the point on appeal does not show ineffective assistance of counsel. Further, MR. COOPER claimed testimony by a police detective Petitioner/Defendant turned himself over to authorities as there existed an outstanding robbery warrant on him represented inadmissible "other crimes" evidence. Such attached testimony, however, was elicited by defense counsel on cross examination, and NRS 48.045 does not preclude admission of such evidence. Next, MR. COOPER claimed his appeals lawyer failed to argue evidence of a "threat," which, allegedly, was more prejudicial than probative, was improperly admitted at trial. The State, however, properly used the "threat" evidence to explain the discrepancy between a witness' initial statement to the police and her testimony at MR. COOPER'S preliminary hearing. As the "threat" evidence" was not improperly admitted, the appeals lawyer did not perform ineffectively by failing to raise the issue on appeal. Finally, MR. COOPER argued his appellate counsel failed to argue error in connection with an allegedly omitted "mere presence" defense. The high court held trial counsel's failure to forward a "mere presence" defense, if true, would not have been properly addressed on direct appeal. Rather, such an omission would have been indicative of ineffective assistance of trial counsel and properly considered on petition for post-conviction relief. Thus, the appeals lawyer did not inappropriately fail to argue the omission of a "mere presence" defense, and thus, was not ineffective in rendering assistance as appellate counsel.

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motion for production of transcripts; (2) violation of the Fifth Amendment during pre-trial, trial and post-trial proceedings; (3) violation of the Sixth Amendment "because of excessive media and political pressure prevented Petitioner from having a fair trial; and (4) violation of the Fourteenth Amendment and Petitioner's right to Equal Protection due to numerous acts of misconduct by the arresting officers, the trial court and the prosecution. The petition was denied November 2, 1990, and the appeal to the Nevada Supreme Court was denied June 27, 1991.[8]

c. The third post-conviction Petition for Writ of Habeas Corpus was pursuant to Title 28 U.S.C. §2254 and filed in the United States District Court, District of Nevada on November 16, 1993.[9] There were five grounds raised in this petition: (1) denial of due process by the court's admission of evidence MR. COOPER was a gang leader that committed violent acts without evidence, and by the court's failure to give a cautionary instruction concerning the evidence; (2) denial of due process by the court's exclusion of mitigating evidence at the penalty hearing; (3) denial of effective assistance of trial counsel as he did not object to questions assuming facts not in evidence, hearsay, inappropriate evidence of Petitioner's unemployment, misleading questions and prosecutorial misconduct in closing argument; (4) denial of effective assistance of appellant counsel for failing to argue trial errors of admitting evidence of other crimes, of rocks thrown through a witness' window, the trial court's canvass of a witness as to his religious beliefs and prosecutorial misstatement of the evidence; and (5) denial of First Amendment right to redress of

. . .

[8]*See* Cooper v. State, Docket No. 22086. As this post-conviction petition for writ of habeas corpus was filed in the Seventh Judicial District Court, this Court did not have access to the district court judge's decision. It was not provided a copy of the Nevada Supreme Court's decision by either of the parties.

[9]Although it was MR. COOPER'S third post-conviction Petition for Writ of Habeas Corpus, it was the first one filed in the federal district court.

grievances by denial of Petitioner's Motion for Production of Documents. The petition was dismissed, *without prejudice,* on February 29, 1996 for failure to exhaust state remedies.[10]

d. MR. COOPER'S fourth post-conviction Petition for Writ of Habeas Corpus was filed in the Nevada Supreme Court on January 6, 1997. The grounds raised there were (1) denial of due process by court's admission of evidence MR. COOPER was a gang leader that committed violent acts without evidence he committed the acts and by the court's failure to give a cautionary instruction that evidence; (2) denial of due process by the court's exclusion of mitigating evidence at the penalty hearing; and (3) denial of effective assistance of appellate counsel for failing to argue trial errors of admitting evidence of other crimes, of rocks thrown through a witness' window, the trial court's canvass of a witness as to his religious beliefs and prosecutorial misstatement of evidence. The petition was denied by the high court on February 24, 1997[11] given MR. COOPER'S failure to first bring it in the state district court.

e. The fifth post-conviction petition was filed in the Eighth Judicial District Court. There, the eight grounds raised were: (1) MR. COOPER'S Fifth and Fourteenth Amendments' rights to Due Process and Equal Protection were violated by the prosecutor's misconduct in (a) injecting race into the proceedings, and (b) failing to produce material evidence of a witness' lack of credibility and knowingly admitting false testimony; (2) violation of MR. COOPER'S Fifth and Fourteen Amendments' rights to Due Process

[10]This Court had no access to and was not provided a copy of the federal district court's decision rendered February 29, 1996. However, a review of the district court's Amended Findings of Fact, Conclusions of Law and Order filed in this case on February 24, 2005, p. 2, indicates the dismissal was due to MR. COOPER not exhausting his state remedies. It should be noted here, on April 23, 1997, MR. COOPER filed another federal habeas petition, which was amended for a second time on February 17, 1998. Accepting the magistrate judge's recommendation, the federal district judge dismissed the petition *without prejudice* as unexhausted on February 23, 1999. *See* Cooper v. Neven, 641 F.3d 322, 326 (9th Cir. 2011).

[11]This Court was not provided a copy of the Nevada Supreme Court's decision in Cooper v. State, Case No. 29795.

because instructions given to the jury in the guilt phase unconstitutionally minimized the State's burden of proof and unconstitutionally defined some of the essential elements of first degree murder, to wit: instructions regarding "reasonable doubt," "malice aforethought" and "premeditation and deliberation;" (3) MR. COOPER was denied his Sixth and Fourteenth Amendments' rights to effective assistance of counsel at trial as his lawyer failed to object to (a) the prosecutor's injection of race into the trial proceedings, (b) the unconstitutional reasonable doubt instruction, (3) unconstitutional implied malice instruction and (d) the unconstitutional premeditation and deliberation instruction; (4) MR. COOPER was denied his Sixth and Fourteenth Amendments' rights to effective assistance of counsel on appeal as his appeals lawyer failed to raise as an issue on appeal (a) the prosecutor's injection of race into the trial proceedings, (b) the unconstitutional reasonable doubt instruction, (3) unconstitutional implied malice instruction and (d) the unconstitutional premeditation and deliberation instruction; (5) the court violated MR. COOPER'S Fifth and Fourteenth Amendments' rights to Due Process as instructions given to the jury in the penalty phase unconstitutionally minimized the State's burden of proof and misled the jury about the unanimity requirement for mitigating circumstances, to wit: instructions regarding "reasonable doubt" and "unanimity" "as to mitigating circumstances;" (6) the court violated MR. COOPER'S Fifth and Fourteenth Amendment rights to Due Process when it excluded evidence of mitigating factors from the penalty hearing; (7) MR. COOPER was denied his Sixth and Fourteenth Amendment Rights to effective assistance of counsel at the penalty phase as the defense lawyer failed to object (a) to the unconstitutional reasonable doubt instruction, (b) to the unconstitutional unanimity instruction and (c) on constitutional grounds to the court's exclusion of mitigating evidence in the penalty phase; and (8) MR. COOPER was denied his Sixth and Fourteen Amendments' rights to effective assistance of counsel on

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DISTRICT JUDGE
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appeal as he failed to raise as issues on appeal (a) the unconstitutional reasonable doubt instruction, (b) the unconstitutional unanimity instruction and (c) on constitutional grounds to the court's exclusion of mitigating evidence in the penalty phase. The fifth post-conviction petition was dismissed by the district court on October 14, 1997 (a) as it was not filed within the time limit set forth by NRS 34.725; and (b) because it was filed beyond the five years discussed in NRS 34.800(2), a rebuttable presumption of prejudice to the State was created, and thus, the filing of the petition was barred by the doctrine of laches.[12]

MR. COOPER appealed this decision to the Nevada Supreme Court on January 8, 1998. On July 24, 2000, the high court affirmed the district court's judgment in all respects, except for one;[13] it remanded the petition to the lower court to determine whether MR. COOPER had good cause to excuse the procedural defects in the filing of his post-conviction petition given his claim one of the eyewitnesses, DONNELL WELLS, recanted his trial testimony, and the prosecutor withheld evidence MR. WELLS received undisclosed benefits for his testimony in violation of Brady v. Maryland, 373 U.S. 83 (1963).[14] On December 17, 2004, the district court held an evidentiary hearing and determined MR. COOPER had not shown good cause to excuse the procedural defect in his filing, and denied the post-conviction petition for writ of habeas corpus.[15]

MR. COOPER appealed the district court's amended decision to the Nevada Supreme Court on March 11, 2005. The high court issued its Order of Affirmance on March 2, 2006, concluding, summarily, the substantial evidence demonstrated the district attorney's office

[12]*See* Findings of Fact, Conclusions of Law and Order filed November 24, 1997. Notice of Entry of Order indicating service was accomplished December 5, 1997 was filed three days later, on December 8, 1997.

[13]*See* Cooper v. State, Docket No. 31667, fn. 1 ("We conclude, ..., that as to the remaining contentions in appellant's petition, the district court did not err in determining that appellant failed to demonstrate adequate cause or prejudice to excuse the procedural defects."

[14]*See* Cooper v. State, Docket No. 31667.

[15]*See* Amended Findings of Fact, Conclusions of Law and Order filed February 24, 2005.

and its investigators did not act improperly in reimbursing MR. WELLS a total of $75 for his three visits to the courthouse, which included his testifying at the 1983 trial, and therefore, the State did not withhold evidence in violation of the *Brady* decision. Further, *even if* MR. WELLS had falsely testified at trial he clearly saw MR. COOPER shoot the victim, Petitioner/Defendant failed to overcome the procedural bars to raise the claim. Notably, while he demonstrated cause for not raising the claim earlier as MR. WELLS' recantation revealed an impediment external to the defense and was not available until MR. WELLS spoke up, MR. COOPER did not demonstrate prejudice as MR. WELLS' description of the shooting at trial was not particularly convincing, while other evidence of MR. COOPER'S guilt was strong. Further, MR. COOPER failed to rebut the presumption his late claim has prejudiced the State. On April 18, 2006, the Nevada Supreme Court denied MR. COOPER'S petition for rehearing and limited remand.[16]

f. MR. COOPER thereafter filed his sixth post-conviction Petition for Writ of Habeas Corpus in the United States District Court, District of Nevada pursuant to Title 28 U.S.C. §2254 on November 9, 2006.[17] There, ten grounds were raised: (1) MR. COOPER'S conviction was based upon false testimony as shown by the recantation of witness, DONNELL WELLS, in violation of Petitioner's/Defendant's Right to Due Process and Fair Trial pursuant to the Fifth and Fourteenth Amendments; (2) the prosecution failed to produce material evidence regarding witness, DONNELL WELLS, in violation of MR. COOPER'S Right to Due Process, Fair Trial, and Equal Protection pursuant to the Fifth and Fourteenth Amendments; (3) MR. COOPER was denied his right to Due Process, Fair Trial and Equal Protection pursuant to the Fifth and Fourteenth Amendments based upon instances of

[16]*See* Cooper, 641 F.3d at 326.

[17]In *Cooper*, the Ninth Circuit Court of Appeals noted MR. COOPER filed a motion to reopen his federal habeas petition on May 12, 2006, and such was granted on September 27, 2006.

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prosecutorial misconduct, to wit: (a) improper vouching and commentary regarding the credibility of MR. WELLS, and improper injection of race into the proceedings; (4) given the trial court's improper questioning and vouching for MR. WELLS, MR. COOPER was denied his right to Due Process, Fair Trial and Equal Protection pursuant to the Fifth and Fourteenth Amendments; (5) the instructions given to the jury during the guilt phase unconstitutionally minimized the State's burden of proof and unconstitutionally defined some of the essential elements of first degree murder in violation of MR. COOPER'S Fifth and Fourteenth Amendment rights to Due Process of Law, to wit: instructions regarding "reasonable doubt," "malice aforethought," and "premeditation and deliberation;" (6) MR. COOPER was denied his right to Due Process, fair trial and Equal Protection pursuant to the Fifth and Fourteenth Amendments because of trial court error during the penalty phase hearing, to wit: (a) excluding mitigating evidence and (b) giving certain jury instructions at the penalty phase (the "unanimity" and "reasonable doubt" instructions); (7) MR. COOPER was denied his right to effective assistance of trial counsel in violation of the Sixth and Fourteen Amendments as he failed to (a) adequately prepare and investigate the case for trial, (b) impeach and cross-examine MR. WELLS and develop facts as to MR. WELLS' motive for testifying against MR. COOPER, (c) object to instances of prosecutorial misconduct, (d) to challenge judicial misconduct, (e) object at trial to the giving of unconstitutional jury instructions and (f) object to jury instructions during the penalty phase; (8) MR. COOPER was denied his right to effective assistance of appellate counsel in violation of his Sixth and Fourteenth Amendments; (9) during the post-conviction evidentiary hearing, the state district court failed to conduct an adequate *in camera* inspection of the prosecutor's trial file, which denied MR. COOPER his right to Due Process in violation of the Fifth and Fourteenth Amendments; and (10) the State's destruction or loss of the prosecutor's notes after the

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evidentiary hearing denied MR. COOPER his right to Due Process and Equal Protection pursuant to the Fifth and Fourteenth Amendments. The federal district court dismissed the habeas petition on August 11, 2008 as being procedurally barred. The matter was appealed to the Ninth Circuit Court of Appeals. The federal appeals court affirmed the district court's dismissal of MR. COOPER'S petition with respect to Grounds 3A, 4, 9 and 10, but reversed its dismissal concerning Grounds 7A(3), 8(3) and 8(5). The high court also reversed the lower court's dismissal with respect to the *Brady* and *Napue* claims and remanded for further proceedings consistent with its opinion. *See* Cooper, 641 F.3d at 333. Ultimately, this petition was denied March 17, 2015 by the federal district court, and such decision was affirmed by the Ninth Circuit Court of Appeals on December 2, 2016.

5. MR. COOPER has now filed his seventh post-conviction Petition for Writ of Habeas Corpus to be decided by this Court. The basis for such filing stems from one ground: the recent United States Supreme Court decisions, Montgomery v. Louisiana, ___ S.Ct. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). In MR. COOPER'S view, *Montgomery* establishes a new rule of constitutional law, namely the "substantive rule" exception to the retroactivity procedures expressed in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Welch* clarified this constitutional decree includes the United States Supreme Court's prior statutory interpretation decisions, and further, established the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether it narrowed the class of individuals who could be convicted under the statute. In MR. COOPER'S view, the filing of the instant post-conviction

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Petition for Writ of Habeas Corpus is timely as it was filed within one year of *Welch* being decided, i.e. April 18, 2016.[18]

Respondent WARDEN GENTRY opposes, arguing, MR. COOPER'S Petition for Writ of Habeas Corpus is procedurally barred under both NRS 34.726(1) and 34.810(2). Furthermore, as more than thirty (30) years have elapsed between the Nevada Supreme Court's decision on MR. COOPER'S direct appeal of the Judgment of Conviction and the filing of the instant petition, laches are specifically pled in order to invoke NRS 34.800(2)'s presumption of prejudice to the STATE OF NEVADA.

CONCLUSIONS OF LAW

1. As noted above, Petitioner RICKEY DENNIS COOPER has filed what appears to be his seventh post-conviction Petition for Writ of Habeas Corpus. There is no question MR. COOPER falls within the category of persons entitled to file post-conviction petitions for writ of habeas corpus. NRS 34.724(1) provides in pertinent part:

> Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State, ...may, without paying a filing fee, file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence ....

2. However, there are limitations on the time to file such post-conviction petitions for writ of habeas corpus. 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 appellate court of competition jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
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> . . .

[18] *Montgomery* was decided January 25, 2016, and revised two days later, January 27, 2016.

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(a) That the delay is not the fault of the petitioner; and
(b) That dismissal of the petition as untimely will unduly prejudice the prejudice the petitioner.

Where, as here, there is a procedural bar that may be applicable to the filing of a post-conviction petition for writ of habeas corpus, it is without question the petitioner/defendant must show good cause, actual prejudice or a fundamental miscarriage of justice under the provisions of NRS 34.726(1) to overcome the statute's timeliness requirement. *See* Klein v. Warden, 118 Nev. 305, 315, 43 P.3d 1029 (2002).

3. Further, NRS 34.800 provides for dismissal for delay in filing. It states:

1. A petition may be dismissed if delay in the filing of the petition:
(a) Prejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which the petition could not have had knowledge by the exercise of reasonable diligent before the circumstances prejudicial to the State occurred; or
(b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.
2. A period exceeding 5 years between the filing of a judgment of conviction, or 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 creates a rebuttable presumption of prejudice to the state. In a motion to dismiss the petition based on that prejudice, the respondent or the State of Nevada must specifically plead laches. The petitioner must be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made.

Also see Ybarra v. McDaniel, 656 F.3d 984, 990-991 (9th Cir. 2011) (on federal habeas petitioner's claim the district court erred by finding some of his claims procedurally barred by NRS 34.800, petitioner failed to show cause and prejudice to overcome the procedural bar).

4. There are additional reasons for dismissal of a post-conviction petition for writ of habeas corpus. *See, for example,* NRS 34.810. As pertinent here, a second or successive petition must be dismissed if the judge or justice determines it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged, the

judge or justice finds the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. *See* NRS 34.810(2). In such a case, the burden falls upon the petitioner/defendant to plead and prove specific facts that demonstrate (a) good cause for his failure to present the claim or presenting the claim again; and (b) actual prejudice to the petitioner/ defendant.

5. In this case, as noted above, MR. COOPER'S Judgment of Conviction was affirmed, on appeal, by the Nevada Supreme Court on May 15, 1986. The currently filed post-conviction petition for writ of habeas corpus is extremely tardy--by over thirty (30) years. Respondent and the STATE OF NEVADA have specifically pled and claim laches, whereby MR. COOPER'S filing which challenges the validity of the 1983 Judgment of Conviction creates a rebuttable presumption of prejudice to the STATE. Notwithstanding the timeliness hurdles faced by MR. COOPER, his currently filed petition is successive; between those filed in the state and federal courts, the post-conviction Petition for Habeas Corpus filed April 17, 2017 is the seventh one filed. MR. COOPER has the burden of pleading and proving specific facts demonstrating good cause for his failure to present the claim or presenting it again, and further, he suffers actual prejudice.

6. MR. COOPER argues he has good cause as his ground for filing the instant petition is based upon a previously unavailable constitutional claim,[19] and he has up to one year to file a petition from the date the claim has become available. *See* Rippo v. State, 132 Nev.Ad.Op. 11, 368 P.3d 729, 739-740 (2016), *reversed on other grounds,* Rippo v. Baker, ___ U.S. ___, 137 S.Ct. 905, 197 L.Ed.2d 167 (2017). In this case, as noted above, MR. COOPER'S basis or good cause for filing a tardy and successive post-conviction Petition for Writ of Habeas Corpus stems from the recent rulings of the United States Supreme Court, to wit: Montgomery v. Louisiana, ___ S.Ct. ___, 136 S.Ct. 718, 193 L.Ed.2d 599, decided, as revised, January 27, 2016, and Welch v. United States,

[19]*See* Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-526 (2003).

___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387, which became resolute April 18, 2016. Here, MR. COOPER'S recent petition filing falls outside the one-year period following the *Montgomery* decision. Petitioner/Defendant has not shown this Court good cause or "an impediment external to the defense"[20] which prevented him from filing his latest petition within the one-year time period following *Montgomery* being rendered. Given that, this Court questions the timeliness of the instant petition, as even MR. COOPER recognizes the United States Supreme Court's decision in *Welch* simply "clarified that the 'substantive rule' exception of the *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute."[21] (Emphasis in original)

7. Notwithstanding its concerns regarding the timeliness of the currently-filed petition, this Court notes, 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." Teague, 489 U.S. at 310, 109 S.Ct. 1060, *quoted by* Welch, ___ U.S. at ___, 136 S.Ct. at 1264. However, *Teague* and its progeny do recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. *First,* "[n]ew *substantive* rules generally apply retroactively." Schriro v. Summerlin, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), *quoted by* Welch, ___ U.S. at ___, 136 S.Ct. at 1264. (Emphasis added) *Second,* new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. Saffle v. Parks, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

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[20] *Quoting* Clem, 119 Nev. at 621, 81 P.3d at 525.

[21] *See* post-conviction Petition for Writ of Habeas Corpus filed April 17, 2017, p. 15. Notably, the holding of *Montgomery*, upon which MR. COOPER relies in filing his late and successive petition, held "[w]hen 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."

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8. In this case, the Nevada Supreme Court decision, Byford v. State, 116 Nev. 215, 994 P.2d 700, rendered February 28, 2000, announced a new rule,[22] which MR. COOPER claims affects the validity of his Judgment of Conviction. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." Welch, ___ U.S. at ___, 136 S.Ct. at 1264, *quoting* Teague, 489 U.S. at 310, 109 S.Ct. 1060, 103 L.Ed.2d 334. The question here is whether the new rule set forth in *Byford* falls within one of the two categories that have retroactive effect under *Teague.*

9. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Welch, ___ U.S. at ___, 136 S.Ct. at 1264-1265, *quoting* Schriro, 542 U.S. at 353, 124 S.Ct. 2519. "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.*, ___ U.S. at ___, 136 S.Ct. at 1265, *quoting* Schriro, 542 U.S. at 351-352, 124 S.Ct. 2519. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Id.*, *quoting* Schriro, 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Id.* "They do not produce a class of

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[22]This rule concerns use of the jury instruction first appearing in Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992) (this instruction has come to be known as the *Kazalyn* jury instruction). The *Kazalyn* instruction was found to underemphasize the element of "deliberation" contained in defining the *mens rea* required for first-degree murder. In *Kazalyn*, the Nevada Supreme Court concluded the term "deliberate" was simply redundant to "premeditated," and thus, required no discrete definition. *Also see* Powell v. State, 108 Nev. 700, 708-710, 838 P.2d 921, 926-927 (1992), *vacated on other grounds*, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994). Citing *Powell*, the high court went so far as to state "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." Greene v. State, 113 Nev. 157, 168, 931. P.2d 54, 61 (1997). In *Byford*, 116 Nev. at 235, 994 P.2d at 713, the Nevada Supreme Court concluded this line of authority should be abandoned. "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." Because "deliberation" is a distinct element of *mens rea* for first-degree murder, the Nevada Supreme Court directed the district courts to cease instructing juries a killing resulting from premeditation is "willful, deliberate, and premeditated murder." Further, if the jury is instructed separately on the meaning of premeditation, it should also be instructed on the definition of deliberation. *Id.*, 116 Nev. at 235-236, 994 P.2d at 714.

persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.*, *quoting* Schriro, 542 U.S. at 352, 124 S.Ct. 2519.

10. Utilizing this framework identified in the paragraph above, this Court concludes the rule announced in *Byford* is procedural. *Byford* does not alter the range of conduct or the class of persons the law punishes. It merely sets forth the jury should be instructed concerning the term "deliberation," as a distinct element of *mens rea* for first-degree murder. This Court disagrees with MR. COOPER'S contention the rule set forth in *Byford* is substantive and his newest post-conviction Petition for Writ of Habeas Corpus was filed timely. MR. COOPER has not shown good cause for the delay in filing the instant petition.

11. In addition, MR. COOPER has not shown he suffers actual prejudice if this Court dismisses his petition as being untimely. Notwithstanding the overwhelming evidence of premeditation, deliberation and willfulness,[23] Respondent notes MR. COOPER cannot establish actual prejudice on the basis the *Kazalyn* instruction was used as the evidence also clearly established first-degree murder on a theory of felony murder. In addition to MR. COOPER being convicted of first-degree murder, he was also charged and convicted of committing Attempted Robbery, which is among the enumerated felonies that can serve as a predicate to a theory of felony murder. Because he was found guilty of committing first-degree murder under the felony-murder theory, MR. COOPER has failed to show this Court he was actually and unduly prejudiced by use of the *Kazalyn* instruction.

[23]The evidence at trial demonstrated, while he was seated in a motor vehicle, MR. COOPER asked LARRY COLLIER, who was with his friends around the area of Lake Mead Boulevard and "H" Street during the evening of April 13, 1983, what was in his hand, and MR. COLLIER responded by displaying the "sherm" or marijuana cigarettes laced with phencyclidine he had just purchased. MR. COOPER demanded MR. COLLIER give him (COOPER) the "sherm." When MR. COLLIER refused, MR. COOPER responded by pulling out a rifle and opening fire. The victim, RICKY WILLIAMS, who was standing behind MR. COLLIER, was fatally wounded by one of the rounds discharged from MR. COOPER'S firearm.

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12. Notwithstanding the aforementioned, MR. COOPER'S currently-filed post-conviction Petition for Writ of Habeas Corpus is successive of many petitions filed within the past thirty years. Further, this Court notes the Nevada Supreme Court even had the benefit of *Byford* when it decided the fifth post-conviction Petition for Writ of Habeas Corpus on July 24, 2000, and still found "the district court did not err in determining that appellant failed to demonstrate adequate cause or prejudice to excuse the procedural defects." As noted above, a second or successive petition *must* be dismissed if the judge or justice determines it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged, the judge or justice finds the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. In this case, as noted above, MR. COOPER did argue the jury instructions were defective, and the Nevada Supreme Court, in affirming the lower court, found such position lacked merit. Again, MR. COOPER has not shown good cause or actual prejudice if this Court denies the currently-filed petition for being successive.

13. Further, given what has been stated above, this Court also concludes MR. COOPER has not overcome the rebuttable presumption of prejudice to the STATE OF NEVADA under NRS 34.800(2). Again, it has now been over thirty years since the Nevada Supreme Court affirmed, on appeal, MR. COOPER'S Judgment of Conviction.

Accordingly, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Defendant RICKEY DENNIS COOPER'S Writ of Habeas Corpus (Post Conviction) filed April 17, 2017 is denied.

DATED this 5th day of September 2017.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 2017, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing ORDER DENYING DEFENDANT'S WRIT OF HABEAS CORPUS to the following counsel of record, and that first-class postage was fully prepaid thereon:

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SUSAN H. JOHNSON
DISTRICT JUDGE
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

RICKEY DENNIS COOPER, Petitioner, v. JO GENTRY, WARDEN, etc. Respondents.	Case No. C062939 Dept No. _____ Date of Hearing: _____ Time of Hearing:_____ (Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS
(POST CONVICTION)

INSTRUCTIONS:

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

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of

authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

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

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

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

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

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

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Southern Desert Correctional Center, Indian Springs, Nevada

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District, Clark County, Nevada

3. Date of judgment of conviction: January 20 1984

4. Case Number: C62939

5. (a) Length of Sentence: Attempt Robbery With Use of a Deadly Weapon - 7½ plus a consecutive 7½ years; Attempt Murder With Use of a Deadly Weapon - 20 years plus a consecutive 20 years consecutive; Battery With Use of a Deadly Weapon - 10 years consecutive; First Degree Murder With Use of a Deadly Weapon - life without the possibility of parole plus a consecutive life without the possibility of parole; all sentences to run consecutively.

(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: Nature of offense involved in conviction being challenged:

7. Nature of offense involved in conviction being challenged: First Degree Murder With Use of a Deadly Weapon

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 _____ No XX

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: 15653

(c) Result: Appeal Dismissed on 5/15/1986; Remittitur Issued on 6/6/1986.

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

(2) Nature of proceeding: Post-Conviction Petition for a Writ of Habeas Corpus filed 12/8/1986.

(3) Grounds raised:

Ground One: Petitioner Was Denied The Effective Assistance Of Trial Counsel Because Counsel Did Not Object To Questions Assuming Facts Not In Evidence, Hearsay, Inappropriate Evidence Of Cooper's Unemployment, Misleading Questioning And Prosecutorial Misconduct In Closing Argument.

Ground Two: The Prosecutor Engaged In Misconduct By Inflaming The Passions Of The Jury And Vouching For A Witness.

Ground Three: Petitioner Was Deprived The Effective Assistance Of Appellate Counsel By Counsel's Failure To Argue The Trial Errors of Admitting Evidence Of Other Crimes, Evidence Of Rocks Thrown Through A Witness's Window, The Trial Court's Canvass Of A Witness As To His Religious Beliefs, And Prosecutorial Misstatements Of Evidence.

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

(5) Result: Petition Denied.

(6) Date of Result: 11/17/1987.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Case No. 18679; Order Denying Appeal dated 9/21/1988.

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

(1) Name of court: 7th Judicial District of Nevada

(2) Nature of proceeding: Post-Conviction Petition for Writ of Habeas Corpus filed 7/12/1990.

(3) Grounds raised:

Ground One: Violation Of The First Amendment To The United States Constitution Because The District Court Denied Petitioner's Motion For Production of Transcripts.

Ground Two: Violation Of The Fifth Amendment To The United States Constitution During Pre-Trial, Trial and Post-Trial Proceedings.

Ground Three: Violation Of The Sixth Amendment To The United States Constitution Because Excessive Media And Political Pressure Prevented Petitioner From Having A Fair Trial.

Ground Four: Violation Of The Fourteenth Amendment To The United States Constitution And Petitioner's Right To Equal Protection Due To Numerous Acts Of Misconduct By The Arresting Officers, The Trial Court And The Prosecution.

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

(5) Result: Petition Denied.

(6) Date of result: 11/2/1990.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Case No. 22086; Order Denying Appeal dated 6/27/1991.

(c) As to any third 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

(3) Grounds raised:

Ground One: Denial Of Due Process Of Law By Court's Admission Of Evidence That I Was A Leader Of A Gang That Committed Violent Acts Without Any Evidence That I Committed Those Acts And By The Court's Failure To Give A Cautionary Instruction On That Evidence.

Ground Two: Denial Of Due Process By The Court's Exclusion Of Mitigating Evidence At The Penalty Hearing.

Ground Three: Denial Of The Effective Assistance Of Trial Counsel Because Counsel Did Not Object To Questions Assuming Facts Not In Evidence, Hearsay, Inappropriate Evidence Of Petitioner's Unemployment, Misleading Questions, And Prosecutorial Misconduct In Closing Argument.

Ground Four: Denial Of The Effective Assistance Of Appellate Counsel For Failing To Argue Trial Errors Of Admitting Evidence Of Other Crimes, Evidence Of Rocks Thrown Through A Witness's Window, The Trial Court's Canvass Of A Witness As To His Religious Beliefs, And Prosecutorial Misstatement Of Evidence.

Ground Five: Denial Of First Amendment Right To Redress Of Grievances By The Denial Of Petitioner's Motion For Production Of Documents.

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

(5) Result: Petition dismissed without prejudice.

(6) Date of result: 2/29/1996

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Unpublished Order dated 2/29/1996.

(d) As to any fourth petition, application or motion, give the same information:

(1) Name of court: Nevada Supreme Court

(2) Nature of proceeding: Original Petition For Writ Of Habeas Corpus.

(3) Grounds raised:

Ground One: Denial Of Due Process By The Court's Admission Of Evidence That I Was A Leader Of A Gang That Committed Violent Acts Without Any Evidence That I Committed Those Acts And By The

Court's Failure To Give A Cautionary Instruction On That Evidence.

Ground Two: Denial Of Due Process By The Court's Exclusion Of Mitigating Evidence At The Penalty Hearing.

Ground Three: Denial Of The Effective Assistance Of Appellate Counsel For Failing To Argue Trial Errors Of Admitting Evidence Of Other Crimes, Evidence Of Rocks Thrown Through A Witness's Window, The Trial Court's Canvass Of A Witness As To His Religious Beliefs, And Prosecutorial Misstatement Of Evidence.

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

(5) Result: Petition Denied.

(6) Date of result: 2/24/1997

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Case No. 29795, Order Denying Petition For Writ Of Habeas Corpus dated 2/24/1997.

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

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

(2) Nature of proceeding: Post-Conviction Petition For A Writ Of Habeas Corpus.

(3) Grounds raised:

Ground One: Cooper's Fifth And Fourteenth Amendment Rights To Due Process And Equal Protection Were Violated By Misconduct By The Prosecutor: (A) Injection Of Race Into The Proceedings; (B) Failure To Produce Material Evidence Of A Witness's Lack Of Credibility And Knowingly Admitting False Testimony.

Ground Two: Violation Of Cooper's Fifth And Fourteenth Amendment Rights To Due Process Because The Instructions Given To The Jury In

The Guilt Phase Unconstitutionally Minimized The State's Burden Of Proof And Unconstitutionally Defined Some Of The Essential Elements Of First Degree Murder: (A) Reasonable Doubt Instruction; (B) Malice Aforethought Instruction; (C) Premeditation and Deliberation Instruction.

Ground Three: Cooper Was Denied His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel At Trial Because Specific Errors Of His Trial Counsel Fell Below The Constitutionally Minimum Required Level Of Representation: (A) Failure To Object To The Prosecutor's Injection Of Race Into The Trial Proceedings; (B) Failure To Object To The Unconstitutional Reasonable Doubt Instruction; (C) Failure To Object To The Unconstitutional Implied Malice Instruction; (D) Failure To Object To The Unconstitutional Premeditation And Deliberation Instruction.

Ground Four: Petitioner Was Denied His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel On Appeal Because Specific Errors Of His Appellate Counsel Fell Below The Constitutionally Minimum Required Level Of Representation: (A) Failure To Raise The Prosecutor's Injection Of Race Into The Trial Proceedings As An Issue On Appeal; (B) Failure To Raise The Unconstitutional Reasonable Doubt Instruction As An Issue On Appeal; (C) Failure To Raise The Unconstitutional Implied Malice Instruction As An Issue On Appeal; (D) Failure To Raise The Unconstitutional Premeditation And Deliberation Instruction As An Issue On Appeal.

Ground Five: The Court Violated Petitioner's Fifth And Fourteenth Amendment Rights To Due Process Because The Instructions Given To The Jury In The Penalty Phase Unconstitutionally Minimized The State's Burden Of Proof And Misled The Jury About The Unanimity Requirement For Mitigating Circumstances: (A) The Reasonable Doubt Instruction; (B) The Unanimity Instruction As To Mitigating Circumstances.

Ground Six: The Court Violated Petitioner's Fifth And Fourteenth Amendment Rights To Due Process When It Excluded Evidence Of Mitigating Factors From The Penalty Hearing.

Ground Seven: Petitioner Was Denied His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel At The Penalty

Hearing Because Specific Errors Of Trial Counsel Fell Below The Constitutionally Required Minimum Level Of Representation: (A) Failure To Object To The Unconstitutional Reasonable Doubt Instruction; (B) Failure To Object To The Unconstitutional Unanimity Instruction; (C) Failure To Object On Constitutional Grounds To The Court's Exclusion Of Mitigating Evidence In The Penalty Phase.

Ground Eight: Petitioner Was Denied His Sixth And Fourteenth Amendment Rights To The Effective Assistance Of Counsel On Appeal Because Specific Errors Of Appellate Counsel Fell Below The Constitutionally Required Minimum Level Of Representation: (A) Failure To Raise The Unconstitutional Reasonable Doubt Instruction As An Issue On Appeal; (B) Failure To Raise The Unconstitutional Unanimity Instruction As An Issue On Appeal; (C) Failure To Raise The Court's Exclusion Of Mitigating Evidence In The Penalty Phase As A Constitutional Issue On Appeal.

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

(5) Result: Petition dismissed.

(6) Date of result: 11/24/1997

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Case No. 31667, Order of Remand For Evidentiary Hearing.

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

(9) Result: Petition Dismissed

(10) Date of result: 2/24/2005.

(11) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Case No. 44764, Order Of Affirmance dated 3/2/2006.

(f) As to any sixth 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

(3) Grounds raised:

Ground One: Cooper's Conviction Was Based On False Testimony As Shown By The Recantation Of Witness Donnell Wells In Violation Of Cooper's Right To Due Process And A Fair Trial Pursuant To The Fifth And Fourteenth Amendments To The United States Constitution.

Ground Two: The Prosecution Failed To Produce Material Evidence Regarding Witness Donnell Wells In Violation Of Cooper's Right To Due Process, Fair Trial, And Equal Protection Pursuant To The Fifth And Fourteenth Amendments To The United States Constitution.

Ground Three: Based Upon Instances Of Prosecutorial Misconduct, Cooper Was Denied His Right To Due Process, Fair Trial, And Equal Protection Pursuant To The Fifth And Fourteenth Amendments To The United States Constitution: (A) Prosecutor's Improper Vouching And Commentary Regarding The Credibility Of Witness Donnell Wells; (B) Prosecutor's Improper Injection Of Race Into The Proceedings.

Ground Four: Based Upon The Trial Court's Improper Questioning And Vouching For Witness Donnell Wells, Cooper Was Denied His Right To Due Process, Fair Trial, And Equal Protection Pursuant To The Fifth And Fourteenth Amendments To The United States Constitution.

Ground Five: The Instructions Given To The Jury During The Guilt Phase Unconstitutionally Minimized The State's Burden Of Proof And Unconstitutionally Defined Some Of The Essential Elements Of First Degree Murder In Violation Of Cooper's Fifth And Fourteenth Amendment Rights To Due Process Of Law: (A) The "Reasonable Doubt" Instruction; (B) The "Malice Aforethought"

	Instruction; (C) The "Premeditation And Deliberation" Instruction.
Ground Six:	Based Upon Trial Court Error During The Penalty Phase Hearing, Cooper Was Denied His Right To Due Process, Fair Trial, And Equal Protection Pursuant To The Fifth And Fourteenth Amendments To The United States Constitution: (A) Exclusion Of Mitigation Evidence; (B) Jury Instructions Given At Penalty Phase: (1)The Unanimity Instruction,(2)The Reasonable Doubt Instruction.
Ground Seven:	Cooper Was Denied His Right To The Effective Assistance Of Counsel Prior To And During Trial In Violation Of The Sixth And Fourteenth Amendments To The United States Constitution: (A) Trial Counsel Failed To Adequately PrepareAnd Investigate The Case For Trial: (1)Counsel Failed To Impeach And Effectively Cross-Examine Witnesses As To Their Inconsistent Version Of Events, (2)Counsel Failed To Impeach And Cross-Examine Wells And Failed To Develop Facts As To Wells's Motive For Testifying Against Cooper, (3)Counsel Failed To Object To Instances Of Prosecutorial Misconduct, (4)Counsel Permitted Instances Of Judicial Misconduct To Go By Unchallenged, (5)Counsel Failed To Object At Trial To Unconstitutional Jury Instructions,(6)Counsel Failed To Object To Jury Instructions During Penalty Phase.
Ground Eight:	Cooper Was Denied His Right To The Effective Assistance Of Counsel On Appeal In Violation Of The Sixth And Fourteenth Amendments To The United States Constitution.
Ground Nine:	The State District Court's Failure, During The Post-Conviction Evidentiary Hearing, To Conduct An Adequate In Camera Inspection Of The Trial File Of The Prosecuting Attorney, Denied Cooper His Right To Due Process Of Law In Violation Of The Fifth And Fourteenth Amendments To The United States Constitution.
Ground Ten:	The State's Destruction/Loss Of The Notes Of The Prosecuting Attorney After The Evidentiary Hearing Denied Cooper His Right To Due Process And Equal Protection Pursuant To The Fifth And Fourteenth Amendments To The United States Constitution.

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

(5) Result: Petition dismissed.

(6) Date of result: 8/11/2008

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: *Cooper v. Neven*, 641 F.3d 322 (9th Cir. 2011), case reversed and remanded for further proceedings on the merits of petitioner's witness recantation claims.

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

(9) Result: Petition denied.

(10) Date of result: 3/17/2015

(11) If known, citations of any written opinion or date of orders entered pursuant to such result: Ninth Circuit Court of Appeals Order affirming the denial dated 12/2/2016.

(g) 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 ____

(h) 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 in this proceeding is the same as Ground Two(C) in 1997 State Post-Conviction Petition and as Ground Five(C) in 1997 Federal Petition For Writ of Habeas Corpus

b. The proceedings in which these grounds were raised: 1997 State Post-Conviction Petition; 1997 Federal Petition For Writ of Habeas Corpus

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. 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? Yes. If so, state briefly the reasons for the delay.

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:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Robert E. Wolf (trial); Robert L. Miller (direct appeal).

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 v. Lane*, 489 U.S. 288 (1989), 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. As such, Petitioner can show actual prejudice. 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

Cooper was charged, *inter alia*, with first-degree murder with use of a deadly weapon based on allegations that he shot Ricky Williams. (6/13/1983 Information.) The court provided the jury with the following instruction on premeditation:

> 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.

(Jury Instructions, Instruction No. 20.) This instruction provided the same definition of premeditation as set forth in the *Kazalyn*[1] instruction.

B. Conviction and Direct Appeal

The jury convicted Cooper, in pertinent part, of first-degree murder with use of a deadly weapon. (11/7/1983 Verdict.) Following a penalty hearing held 11/14/1983 - 11/15/1983, the jury imposed a sentence of life without the possibility of parole. (11/15/1983 Verdict.) Cooper was sentenced, *inter alia*, to consecutive sentences of life without the possibility of parole for the first degree murder conviction. (1/20/1984 Judgment.)

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

Cooper appealed the judgment of conviction. The Nevada Supreme Court (Case No. 15653) issued an order dismissing the appeal on May 15, 1986. The conviction became final on August 13, 1986. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (Nev. 2008) (conviction becomes final when judgment of conviction is entered and 90-day time period for filing petition for certiorari to Supreme Court has expired).

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. 1997 Post-Conviction Petition

On August 21, 1997, Cooper filed a state post-conviction petition, arguing under Ground 2(C) that the premeditation and deliberation instruction relieved the State of proving the elements of premeditation and deliberation. (Petition at 17-19.)

On December 8, 1997, the district court filed a Notice of Entry of Order of its Findings of Fact and Conclusions of Law, denying the petition, finding the petition to be procedurally barred and that Cooper failed to establish good cause and prejudice. (11/24/1997 Findings of Fact and Conclusions of Law.) On July 24, 2000, the Nevada Supreme Court (Case No. 31667), remanded the matter to the district court for an evidentiary hearing solely with regard to whether Cooper could establish cause and prejudice for his claims of withheld evidence and false testimony. As to all remaining claims (including Cooper's premeditation jury instruction claim) the Nevada Supreme Court determined that Cooper "failed to demonstrate adequate cause or prejudice to excuse the procedural defects." (Nevada Supreme Court Case No. 31667 Order of Remand, p.3 n.1.) [2]

F. *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.

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[2] Following the February 27, 2004 evidentiary hearing, the district court filed a Notice of Entry of Decision and Order and Amended Findings of Fact and Conclusions of Law denying Cooper's 1997 Petition on the basis of procedural default. (3/1/2005 Decision and Order.) The Nevada Supreme Court (Case No. 44764), affirmed the district court's denial of the post-conviction petition finding Cooper had demonstrated cause for not raising his witness recantation and *Brady* claim earlier, but that he did not demonstrate prejudice. (3/2/2006 Order of Affirmance, Case No. 44764.)

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.*

G. *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).

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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 to convictions that had already become final, like Cooper's. In light of *Welch*, however, 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*).[3] 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 retroactively to his case. The *Kazalyn* instruction defining premeditation and deliberation, which this Court has already determined was given in his case, was improper.

It is reasonably likely that Cooper's 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 instruction blurred

---

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

the distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The State was relieved of its obligation to prove essential elements of the crime. In turn, the jury was not required to find deliberation. The jury was never required to find whether there was "coolness and reflection" as required under *Byford*. *Byford*, 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 Cooper was not so great that it precluded a verdict of second-degree murder.

Cooper was tried and convicted of a series of events occurring on April 13, 1983 during which Larry Collier ("Collier") and Ricky Williams ("Williams") were attempting to buy/sell drugs at the scene and culminated in the shooting death of Williams. The State's theory of the case was that Williams was shot by Cooper who was sitting in the passenger side of a car that was parked in front of a Seven Seas market. At least that was the State's theory until Donnell Wells ("Wells") testified and provided the State with a motive. Wells was not mentioned by the prosecutor (Melvyn Harmon) in his opening statement, yet he was picked up from school, without notification to his parents and brought to court by D.A. investigators on the fourth day of trial to testify against Cooper. [4] Wells has since, and under oath, recanted his trial testimony (*see* 2/27/2004 Evidentiary Hearing Transcript ("EHT") at 11-45),

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[4] By the time 15-year-old Wells was brought to court by D.A. investigators to testify, the State's case was falling apart. The witnesses's testimonies were so unreliable that the prosecution had resorted to introducing portions of their unread and unsigned police reports to discredit the trial testimony of the State's own witnesses. Wells was the only purported witness to the shooting of Williams whose testimony the State did not have to resort to impeachment by prior inconsistent statements to support their theory of the case.

however at trial, Wells was the only witness to testify that he had seen Cooper and Williams arguing earlier in the day. (11/3/1983 Trial Transcript ("TT") at 287.) Furthermore, Wells was the only witness to testify at trial that he had actually seen Cooper shoot Williams. (11/3/1983 TT at 277.)

At the close of evidence the jury was instructed, in pertinent part:

> Murder of the First Degree is Murder which is (a) perpetrated by any kind of wilfull, deliberate and premeditated killing, and (b) committed in the perpetration or attempted perpetration of any robbery. (Instruction No. 19.)
>
> Murder in the Second Degree is murder with malice aforethought, but without the admixture of premeditation. All murder which is not Murder in the First Degree is Murder in the Second Degree. (Instruction No.23.)

In closing argument, the prosecutor disregarded the other witnesses's accounts that Williams was shot while the car was parked and relied on Wells's testimony of shots being fired while the car was moving down the street. (11/7/1983 TT at 483-484.) The prosecutor told the jury he was not to blame for the contradictory testimony of the other witnesses yet extolled Wells's heroism to testify against Cooper. (11/7/1983 TT at 475.) By ignoring the other witnesses' testimony of a shooting from a parked car and adopting Wells's now recanted testimony of shots coming from a moving car, the prosecutor was able to avoid any discussion of deliberation and argue solely based on premeditation that the jury convict Cooper of first degree murder:

> Now what was this a case of: premeditation, is it first degree or second degree murder? ... We have a case where a young eye-witness describes a car coming up the street and three shots are fired while the car is moving.... What we have is murder by premeditation.

(11/7/1983 TT at 482-483.)

All three elements, wilfull, deliberate and premeditated killing, must be proven beyond a reasonable doubt in order to obtain a conviction. An intentional killing committed with malice aforethought will constitute first degree murder if it is also accompanied by premeditation and deliberation. NRS 200.030. Instruction No. 20 given in this case created a mandatory presumption that a killing is deliberate if it is premeditated. The instruction provided that if a killing is the result of premeditation, "it is willful, deliberate and premeditated murder." By approving of the concept of instantaneous premeditation and deliberation, the giving of this instruction created a reasonable likelihood that the jury convicted Cooper of first degree murder without any rational basis for distinguishing its verdict from one of second degree murder, and without proof beyond a reasonable doubt of both elements of premeditation and deliberation.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including the weighing the reasons for and against the action and considering the consequences of the action. A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate. *See Byford*, 116 Nev. at 235-237, 994 P.2d at 713-715. However, when Cooper's jury was given a *Kazalyn* instruction it left no room for deliberation.

Because of the State's ability to directly rely on the *Kazalyn* instruction, the prosecutor was able to argue that "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." (11/7/1983 TT at 447.)

The *Kazalyn* instruction left the jury without adequate standards by which to assess culpability and made defense against the charges virtually impossible, due to the juror's inability to discern what the State needed to prove to establish all elements of first degree murder. This instruction substantially and injuriously affected the process to such an extent as to render Cooper's conviction fundamentally unfair and unconstitutional.

The unconstitutional *Kazalyn* instruction relieved the State of its burden of proof as to all essential elements of the charged offense. Accordingly, there can be no doubt that the jury applied the instruction in an unconstitutional manner. This error clearly prejudiced Cooper.

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 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. In fact, this Court previously denied this claim based on reasoning that *Montgomery* and *Welch* have now changed. 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 Cooper 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. In fact, this Court previously denied this claim based on reasoning that *Montgomery* and *Welch* have now changed. 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 29 - 31, above. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. The State was relieved of its obligation to prove essential elements of the crime. In turn, the jury was not required to find deliberation. This error had a prejudicial impact on this case. The evidence against Cooper was not so great that it precluded a verdict of second-degree murder.

III. PRAYER FOR RELIEF

Based on the grounds presented in this petition, Petitioner, Rickey Dennis Cooper, respectfully requests that this honorable Court:

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

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

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

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

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

/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 17, 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
Las Vegas, NV 89101

Rickey Cooper
#19118
Southern Desert Correctional Center
P.O. Box 208
Indian Sorings, NV 89070

/s/ Dayron Rodriguez
An Employee of the
Federal Public Defender
District of Nevada

APP. 186

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY DENNIS COOPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 15653

FILED
MAY 15 1986
JUDITH FOUNTAIN
CLERK, SUPREME COURT

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction of multiple criminal counts. Appellant contends that at the penalty phase of his trial the district court erred by admitting evidence of appellant's involvement in a Las Vegas gang, and by refusing to admit in evidence a letter setting forth possible mitigating circumstances. We disagree.

Appellant contends that the probative value of the testimony regarding his involvement in the gang was outweighed by the danger of unfair prejudice. We note, however, that the prosecution introduced this evidence to rebut the testimony of the five defense witnesses, who portrayed appellant as a nonviolent person. The testimony related to a matter of considerable importance in judging appellant's character. Thus the testimony was relevant and highly probative. In addition, we note that appellant was identified as one of the leaders of the gang. Finally, we note that during the guilt phase of the trial the jury heard testimony that appellant was armed on the evening of the crimes, that he fired several shots, killing one person and wounding another, that he attempted to rob drugs from one of his victims and that he had been shot in a street battle three months earlier. Thus, the additional testimony at the penalty hearing was not highly prejudicial. Since the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, the district court did not err by admitting the

evidence. NRS 48.035. See Milligan v. State, 101 Nev. 627, 706 P.2d 289 (1985).

Next, appellant contends that the district court should have admitted the letter he submitted to the court as a "mitigating circumstance" under NRS 200.035. We disagree. During the penalty phase of a trial the district court may, in its discretion, exclude character evidence whose probative value is outweighed by undue delay and waste of time, or by the danger of confusion of the issues or of misleading the jury. Allen v. State, 99 Nev. 485, 489, 665 P.2d 238, 240 (1983). See NRS 48.035. The district court properly excluded the letter under this standard.

We have previously stated that questions of admissibility of evidence during the penalty phase of a capital murder trial are largely left to the discretion of the trial judge. Milligan v. State, 101 Nev. at 636, 708 P.2d at 295. See NRS 175.552. We conclude that the district court did not abuse its discretion in the present case.

Accordingly, appellant's remaining contentions lacking merit, we hereby

ORDER this appeal dismissed.

Mowbray, C. J.

Springer, J.

Gunderson, J.

Steffen, J.

Young, J.

cc: Hon. Thomas A. Foley, District Judge
Hon. Brian McKay, Attorney General
Hon. Robert J. Miller, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

APP. 189

B

CASE NO. C62939

DEPT. NO. XIII

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,
Plaintiff,
-vs-
RICKEY DENNIS COOPER,
Defendant.

JUDGMENT OF CONVICTION
(JURY TRIAL)

WHEREAS, on the 14th day of June, 1983, the Defendant, RICKEY DENNIS COOPER, entered a plea of not guilty to the crimes of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Ct. I), ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Ct. II), BATTERY WITH USE OF A DEADLY WEAPON (Ct. III), and FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Ct. IV), committed on the 13th day of April, 1983, in violation of NRS 200.380; 208.070; 193.165; 200.010; 200.030; 200.481, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crimes of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Ct. I); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON Ct. II); BATTERY WITH USE OF A DEADLY WEAPON (Ct. III); and FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Ct. IV); and

WHEREAS, thereafter, on the 5th day of January, 1984, the Defendant being present in Court with his counsel ROBERT E. WOLF, and MELVYN T. HARMON, Deputy District Attorney, also being present, the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and sentenced Defendant to serve a term in the Nevada State Prison as follows:

Count I (Att.Rob.w/wpn) - Seven and One-Half Years for Attempt

Robbery and a consecutive Seven and One-Half years for Use of a Deadly Weapon.

Count II (Att.Murder w/wpn) - Twenty years for Attempt Murder and a consecutive Twenty years for Use of a Deadly Weapon, said sentence to run consecutive to sentence imposed in Count I.

Count III (BWDW) - Ten years, said sentence to run consecutive to sentence imposed in Count II.

Count IV (1° Murder w/wpn) - Life without Possibility of Parole for 1° Murder and a consecutive Life without Possibility of Parole for Use of a Deadly Weapon, said sentence to run consecutive to sentence imposed in Count III.

Defendant granted credit for time served of Two Hundred Sixty Six (266) days.

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 19th day of January, 1984, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

83-62939X/lb
LVMPD 83-39593
Att.Rob w/wpn; Att. Murder w/wpn; BWDW; 1° Murder w/wpn - F

OFFICIAL DOCUMENT ATTACHED

JAN 12 '84

CLERK

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUEL SALVA MERCADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74513

FILED

JUN 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR REVIEW

We conclude that appellant has not demonstrated that the exercise of our discretion in this matter is warranted. *See* NRAP 40B; *Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Accordingly we deny the petition for review.

It is so ORDERED.[1]

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Silver, J.
Silver

cc: Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney

[1]The Honorable Mark Gibbons, Chief Justice, and Elissa F. Cadish, Justice, did not participate in the decision of this matter.

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUEL SALVA MERCADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74513-COA

ORDER OF AFFIRMANCE

Ruel Salva Mercado appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 18, 2017. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Mercado filed his petition nearly 19 years after issuance of the remittitur on direct appeal on April 28, 1998. *See Mercado v. State*, Docket No. 27877 (Order Dismissing Appeal, April 9, 1998).[1] Mercado's petition was therefore untimely filed. *See* NRS 34.726(1). Mercado's petition was also successive.[2] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Mercado's petition was therefore 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). Further, because the State specifically pleaded laches, Mercado

[1]An amended judgment of conviction was filed on January 10, 2006. Mercado did not appeal from the amended judgment of conviction. Further, none of the claims raised in Mercado's petition were relevant to those changes. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

[2]*See Mercado v. State*, Docket No. 45584 (Order of Affirmance, September 29, 2006); *Mercado v. State*, Docket No. 35006 (Order of Affirmance in Part and Reversal and Remand in Part, June 3, 2002).

19-12407

was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Mercado claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. *See Branham v. Warden*, 134 Nev. ___, ___, 434 P.3d 313, 316 (Ct. App. 2018). Further, Mercado failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

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

Electronically Filed
10/20/2017 11:53 AM
Steven D. Grierson
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

RUEL S. MERCADO,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 95C125649-1

Dept No: VI

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on October 16, 2017, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on October 20, 2017.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 20 day of October 2017, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Ruel S. Mercado # 48165
1200 Prison Rd.
Lovelock, NV 89419

Rene L. Valladares
Federal Public Defender
411 E. Bonneville, Ste 250
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

Electronically Filed
10/16/2017 10:29 AM
Steven D. Grierson
CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RUEL SALVA MERCADO,
#1139691

Petitioner.

CASE NO: 95C125649-1

DEPT NO: VI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 09/07/2017
TIME OF HEARING: 8:30 AM

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 Lori Teicher 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:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

Procedural History

On July 14, 1995, the State filed an Information charging Petitioner Ruel Salva Mercado ("Petitioner") with: Count 1 – Murder with Use of a Deadly Weapon (Open Murder) With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.010, 200.030, 193.165, 193.168, 193.169); Count 2 – Attempt Murder with the Use of a Deadly Weapon (Open Murder) With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.010, 200.030, 193.165, 193.330, 193.168, 193.169); Count 3 – Burglary While in Possession of a Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang (NRS 205.060, 193.168, 193.169); Counts 4 through 6 – Attempt Robbery With the Use of a Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.380, 193.165, 193.330, 193.168, 193.169); Counts 7 and 9 – First Degree Kidnapping With the Use of a Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.310, 200.320, 193.165, 193.168, 193.169); Counts 8 and 10 through 22 – Coercion with the Use of a Deadly Weapon, With the Intent to Promote, Further or Assist a Criminal Gang (NRS 207.190, 193.165, 193.168, 193.169).

On July 21, 1995, Petitioner was convicted by a jury. On October 24, 1995, Petitioner was sentenced to the Nevada Department of Corrections for life without the possibility of parole, plus an equal and consecutive term for the deadly weapon enhancement. Petitioner filed a Notice of Appeal on November 8, 1995. The Judgment of Conviction was filed on December 19, 1995. On April 9, 1998, the Nevada Supreme Court affirmed Petitioner's convictions on direct appeal. Remittitur issued on May 5, 1998.

On March 25, 1999, Petitioner filed a pro per Petition for Writ of Habeas Corpus. On September 1, 1999, the district court denied Petitioner's first Petition for Writ of Habeas Corpus (Post-Conviction). The Findings of Fact, Conclusions of Law were filed on September 21, 1999. Petitioner filed a Notice of Appeal on October 15, 1999. On June 3, 2002, the Nevada Supreme Court filed an Order of Affirmance in Part and Reversal and Remand in Part. The Nevada Supreme Court affirmed this Court's order as it related to all but one of the claims

raised. The Supreme Court reversed the order denying the petition as it related to the issue regarding sufficient factual support for the attempted robbery with use of a deadly weapon and kidnapping with use of a deadly weapon convictions. The Nevada Supreme Court ordered this Court to appoint counsel to assist Petitioner in his post-conviction proceedings and allowed counsel to supplement the argument and to raise any other meritorious claim that had not been previously addressed.

Petitioner, through appointed counsel, filed a Petition for Writ of Habeas Corpus (Post-Conviction) on April 30, 2003. On August 23, 2004, the Court held an evidentiary hearing. Based on a concession by the State, the Court dismissed Counts 7 and 9. After argument by counsel, the Court also dismissed Counts 4 and 5 (attempt robbery with the use of a deadly weapon with the intent to promote, further or assist a criminal gang). An Amended Judgment of Conviction was filed January 10, 2006.

Petitioner filed a supplemental petition and brief on October 21, 2004, raising additional grounds that were not contained in the original petition. The Court denied Petitioner's additional claims and filed its Findings of Fact, Conclusions of Law on July 1, 2005. Petitioner filed a Notice of Appeal on July 6, 2005. The Nevada Supreme Court affirmed the Court's denial on September 29, 2006. Remittitur issued on November 3, 2006.

On April 18, 2017, filed the instant Petition for Writ of Habeas Corpus (Post-conviction), which now constitutes his third habeas corpus petition. The State filed it's Response on June 2, 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.

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I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

a. The Procedural Bars are Mandatory

The Nevada Supreme Court has held that "[a]pplication 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. Accordingly, Petitioner had until approximately May 5, 1999, to file a post-conviction petition. The instant petition was not filed until April 18, 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, 1998. Petitioner filed the instant petition on April 18, 2017, more than 19 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

failed 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, 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[1] 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

[1] Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), cert. denied, Byford v. Nevada, 531 U.S. 1016, 121 S. Ct. 576 (2000).

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

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 law" insofar as it "failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin,

[3] See, e.g., Garner v. State, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

and 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

[4] Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

in 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 693-94, 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

full 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 P.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

[5] As per Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

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.[7] 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

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[6] As the Nevada Supreme Court explained in Colwell, it was free to deviate from the standard laid out in Teague so long as it observed the minimum protections afforded by Teague:

> Teague is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions. In other words, we may choose to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require. The Supreme Court has recognized that states may apply new constitutional standards 'in a broader range of cases than is required' by the Court's decision not to apply the standards retroactively.

118 Nev. at 817-18, 59 P.3d at 470-71 (quoting Johnson v. New Jersey, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

[7] This has the effect of affording greater protection than Teague insofar as Petitioners seeking collateral review here in Nevada will be able to avail themselves more frequently of the principle that "[i]f a rule is not new, then it applies even on collateral review of final cases." Colwell, 118 Nev. at 820, 59 P.3d at 472. Under Teague's expansive definition for "new rule," most rules would be considered new by Teague's standards and, thus, "given only prospective effect, absent an exception." Id. at 819, 59 P.3d at 471.

> or 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,

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but 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,"

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[8] Petitioner omitted any mention of Colwell or Clem, which were central to Nika's retroactivity analysis regarding convictions that were final at the time of the change in the law. Instead, Petitioner cited Nika's preceding analysis of why "the change effected by Byford properly applied to [the Petitioner in Polk, 503 F.3d at 910] as a matter of due process." Petition at 21; Nika, 124 Nev. at 1287, 198 P.3d at 850. To be sure, the Court in Nika, in conducting this analysis, did rely on the retroactivity rules set out in Bunkley v. Florida, 538 U.S. 835, 123 S. Ct. 2020 (2003), and Fiore v. White, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to Petitioner were "drastically changed," Petition at 21, by the United States Supreme Court's decisions in Montgomery and Welch. Whether or not this is true is of no moment. The analysis in Nika regarding retroactivity in Polk had absolutely no bearing on Nika's later analysis of the rules of retroactivity respecting convictions that were final at the time of the change in the law.

[9] See Rippo, 122 Nev. at 1097, 146 P.3d at 286.

had 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. at __, 136 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." Id. at __, 136 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 __, 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 "[u]nder 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.[10] 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 rule 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[11] 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

[10] The parties agreed that the second Teague exception was not applicable. Welch, __ U.S. at __, 136 S. Ct. at 1264.

[11] Specially, where the first-degree murder is premised on a theory of willfulness, deliberation, and premeditation. NRS 200.030(1)(a).

S. 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. [ ] 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

particular 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 "[t]wo 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 __, 135 S. Ct. at 2557-58. Because of these uncertainties, the Court in *Johnson* explained that "[i]nvoking 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

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example 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.

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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. Ct. at 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).

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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 (E.D. 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.

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Consequently, Petitioner's reliance on Montgomery and Welch to meet NRS 34.726(1)(a)'s criterion fails.

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)).

Here, Petitioner was unable to show that he was unduly prejudiced by the use of the Kazalyn instruction because there was overwhelming evidence of premeditation, deliberation, and willfulness. In its Order affirming the denial of the writ of habeas corpus, the Nevada Supreme Court considered Petitioner's challenge to the Kazalyn instruction given at trial:

> We conclude that appellant failed to demonstrate that appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. The jury was properly instructed pursuant to the controlling statutes and caselaw in effect at the time of his crime and trial. Therefore, appellant is not entitled to relief.

Mercado v. State, Docket No. 35006 at *22 (Order of Affirmance in Part and Reversal and Remand in Part, filed June 3, 2002) (footnotes omitted). Thus, to the extent that he Nevada Supreme Court rejected Petitioner's challenge to the Kazalyn instruction on the merits, the Court's decision is the law of the case and cannot be reargued. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6.

Moreover, Petitioner was unable to establish prejudice on the basis of the Kazalyn instruction due to the fact that the evidence clearly established first-degree murder on a theory of felony murder. See Moore v. State, 2017 Nev. Unpub. LEXIS 224, *2, 2017 WL 1397380 (Nev. Apr. 14, 2017) (explaining that appellant could not establish that he was prejudiced by the Kazalyn instruction "because he did not demonstrate that the result of trial would have been different considering that the evidence clearly establish[ed] first-degree murder based on

felony murder"). Here, Petitioner was also charged with and ultimately convicted[12] of Burglary—which is among the enumerated felonies that can serve as predicates to a theory of felony murder. See NRS 200.030(1)(b) (defining first-degree murder as murder "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, *burglary*, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099" (emphasis added)). Accordingly, because the evidence established that Petitioner was guilty of first-degree murder under a felony-murder theory, he was unable to establish that the error in giving the Kazalyn instruction worked to his "*actual* and substantial disadvantage." See Huebler, 128 Nev. at __, 275 P.3d at 95 (emphasis added). As such, Petitioner has failed to demonstrate actual prejudice and his Petition is denied.

ORDER

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

DATED this 12 day of ~~September~~ October, 2017.

DISTRICT JUDGE

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____ (for)
CHARLES THOMAN
Deputy District Attorney
Nevada Bar #012649

[12] Although Petitioner was originally convicted of First Degree Kidnapping with the Use of a Deadly Weapon with the Intent to Promote, Further or Assist a Criminal Gang, which is among the enumerated felonies, these Counts were struck by the Court.

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 26th day of September, 2017, by Electronic Filing to:

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JEREMY C. BARON
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BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

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Attorneys for Petitioner Ruel Salva Mercado

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

RUEL SALVA MERCADO,

Petitioner,

v.

RENEE BAKER, et al.

Respondents.

Case No. 95C125649
Dept No. VI

Date of Hearing: 6-5-17
Time of Hearing: 8:30AM

(Not a Death Penalty Case)

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: Lovelock Correctional Center, Pershing County, Nevada

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Clark County, Nevada

3. Date of judgment of conviction: December 19, 1995

4. Case Number: 95C125649

5. (a) Length of Sentence: Life without the possibility of parole consecutive to life without the possibility of parole (also serving concurrent sentences on additional counts from the same judgment of conviction)

(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]

7. Nature of offense involved in conviction being challenged: First Degree Murder with Use of a Deadly Weapon with Intent to Promote, Further or Assist a Criminal Gang (plus additional counts from same judgment of conviction)

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 _____ No XX

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: 27877

(c) Result: Conviction Affirmed on 4/9/1998; Remittitur Issued on 5/8/1998

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) (1) Name of Court: Eighth Judicial District Court

(2) Nature of proceeding: Petition for a Writ of Habeas Corpus (Post-Conviction)

(3) Grounds raised:

Ground 1: Justice Court, Henderson Township, lacked and exceeded its jurisdiction by depriving petitioner his procedural due process and substantive due process rights to inadequate coroner's inquests on the deceased, in violation of the Fifth and Fourteenth amendments of the United States Constitution.

Ground 2: Petitioner was denied his Sixth Amendment right to effective assistance of counsel by trial counsel's failure to investigate the procedures per applicable statutes/ordinances by the Clark County Coroner medical examiner and to file a motion to dismiss the criminal complaint.

Ground 3: Prosecutorial misconduct/aggravated prosecution was committed by the State's withholding favorable evidence not specifically requested concerning the failure to conduct an adequate coroner's inquest per applicable statutes and ordinances in violation of the Fifth, Sixth and Fourteenth amendments of the United States Constitution.

Ground 4: Was denied federal and state constitutional rights to due process and fair trial through ineffective assistance of counsel.

(A) During voir dire trial counsel failed to excuse juror no. 28 who admitted her obvious bias against Mercado.

(B) Defense counsel failed to move for mistrial when prosecutor introduced the bullet taken from victim's body as the bullet fired by Mercado.

(C) Failed to impeach key government witness Richard Little, the State's ballistics expert.

Ground 5: Was denied federal and state constitutional rights to due process and fair trial when district court failed to excuse juror no. 28 and defense attorney was ineffective.

Ground 6: Was denied his federal and state constitutional rights to due process and fair trial when district court judge expressed his personal bias.

Ground 7: Was denied his federal and state constitutional rights to due process and fair trial when jury failed to adhere to jury instruction no. 2.

Ground 8: Was denied rights to due process and fair trial when district court allowed non-substantive testimony of pathologist Richard Little.

Ground 9: Was denied right to due process and fair trial when district court prosecutor committed prosecutorial misconduct.

(A) Introduction of bullet evidence.

(B) Allowed tainted identification of Mercado by witness William Murr when witness stated that he did not recognize Mercado and had never seen him before.

Ground 10: Was denied due process and fair trial when

(A) Prosecutor committed misconduct by introducing purchase testimony into evidence at trial of paid informant Carl Flores.

(B) Defense counsel was ineffective when he failed to object to the introduction and presentation of Flores' testimony.

Ground 11:	Was denied due process and fair trial when district court allowed Flores' unreliable testimony.
Ground 12:	Was denied due process and fair trial when prosecutor engaged in vindictive and malicious prosecution (collaborating with Flores).
Ground 13:	Was denied due process and fair trial when district court allowed biased testimony by Flores
Ground 14:	Was denied due process and fair trial when district court allowed uncorroborated testimony of Flores to stand.
Ground 15:	Was denied due process and fair trial when prosecutor introduced tainted evidence/testimony by Carl Flores into evidence.
Ground 16:	Was denied due process and fair trial when prosecutor introduced tainted testimony of FBI agent Carolyn Kelliher into evidence and court allowed it to stand.
Ground 17:	Was denied due process and fair trial when prosecutor failed to produce positive identification of Mercado.
Ground 18:	Was denied constitutional right to have jury hear all of the evidence.
Ground 19:	Was denied due process and fair trial when judge allowed more prejudicial than probative testimonial evidence to stand. (Testimony of James Debolt.)
Ground 20:	Was denied due process and fair trial when prosecutor used non-substantive evidence. (Testimony by George Good, ballistics expert.)
Ground 21:	Was denied due process and fair trial when prosecutor engaged in vindictive and malicious prosecution; Austria's offered purchased testimony; and prosecutor withheld exculpatory evidence (Austria plea agreement).
Ground 22:	Was denied due process and fair trial due to prosecutorial misconduct (introduction of Austria's purchased testimony into evidence knowing that Austria was promised leniency).

Ground 23:	Was denied due process and fair trial when district court abused its discretion (by denying defendant's motion for new trial based on suppression of evidence by the prosecutor).
Ground 24:	Was denied due process and fair trial when Mercado was denied his rights to fully cross-examine a witness (Felix Austria).
Ground 25:	Was denied due process and fair trial when prosecutor introduced non-substantive prejudicial evidence (bullets).
Ground 26:	Was denied due process and fair trial when prosecutor used tainted evidence in a vindictive and malicious manner (prosecutor admitted on record that the state agreed to lenience for Austria in exchange for his testimony against Mercado).
Ground 27:	Was denied due process and fair trial when prosecutor used prejudicial non-substantive testimony (Austria's testimony regarding the shooting.)
Ground 28:	Was denied due process and fair trial when prosecutor used tainted, prejudicial testimony (Austria).
Ground 29:	Was denied due process and fair trial when district court judge abused its discretion (court initiates conspiracy to conceal evidentiary evidence regarding plea offer to Mercado).
Ground 30:	Was denied due process and fair trial through prosecutorial misconduct (Detective Newman's testimony regarding a promise that Austria could go back to Philippines in exchange for his turning state's evidence against Mercado).
Ground 31:	Was denied due process and fair trial in violation of Fifth, Sixth, and Fourteenth amendments by the erroneous and prejudicial jury instructions regarding reasonable doubt, malice and premeditation.
Ground 32:	Was denied Sixth Amendment right to effective assistance of counsel through trial counsel's failure to object to the erroneous and prejudicial jury instructions regarding reasonable doubt, malice and premeditation.

Ground 33:	District court abused its discretion at sentencing by enhancing Mercado's sentence, thereby violating the double jeopardy clause under the Fifth Amendment and due process clause under the Fourteenth Amendment.
Ground 34:	Was denied Sixth Amendment right to effective assistance of appellate counsel.
Ground I:[1]	The evidence presented at trial established that the plan for the robbery focused on taking money from the cashier's cage at Renata's. Insufficient factual support existed to support attempted robbery convictions for the bartender and slot manager in violation of the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.
Ground II:	Insufficient factual support was presented for Mr. Mercado's kidnapping with use of a deadly weapon convictions for Mr. Murr and Mr. Serna, in violation of the Constitutional rights guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.
Ground III:	The prosecutors used their peremptory challenges in an intentionally racially-discriminatory manner by removing one of the only Filipino jurors from the jury. Consequently, Mr. Mercado's conviction is invalid under the Constitutional guarantees of due process, equal protection, and the right to trial by an impartial, representative jury under the Sixth and Fourteenth Amendments to the United States Constitution.
Ground IV:	The trial court improperly limited testimony regarding the bias of paid informant Carl Flores' in violation of Mr. Mercado's rights

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[1] Mr. Mercado initially proceeded in proper person during this state post-conviction proceeding and raised 34 claims. The district court initially denied the petition in full. On appeal, the Nevada Supreme Court affirmed in part with respect to the district court's dismissal of certain claims, including as relevant here Ground 31, and reversed and remanded in part. On remand, the district court appointed counsel for Mr. Mercado. Mr. Mercado then filed a counseled petition for writ of habeas corpus. The counseled petition raised certain additional claims for relief and restarted the sequential numbering scheme for the claims. To minimize confusion, this list follows the numbering schemes from both petitions, using Arabic numerals for the claims from Mr. Mercado's proper person petition and Roman numerals for the claims from Mr. Mercado's counseled petition.

to due process and a fair trial guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Ground V: The State engaged in prosecutorial misconduct by improperly bolstering of Felix Austria's credibility during Mr. Mercado's trial, in violation of the Constitutional rights to due process and a fair trial as guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground VI: Even though Mr. Mercado chose not to testify, the trial court ordered him to remove his shirt and display his tattoos to the jury in violation of Mr. Mercado's right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution.

Ground VII: Insufficient factual support for Mr. Mercado's coercion convictions in violation of the Constitutional rights guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground VIII: Insufficient factual support existed for the gang sentencing enhancement on each of Mr. Mercado's eighteen convictions. The prosecution's pursuit of this enhancement, despite an utter lack of evidence, violated Mr. Mercado's constitutional rights to due process and a fair trial guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground IX: Victim impact statements during the penalty hearing violated the Constitutional rights of fair trial and due process guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground X: The pervasive prosecutorial misconduct that occurred during Mr. Mercado's penalty hearing closing arguments, in violation of the Constitutional rights to due process and fair trial guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground XI: Trial counsel made numerous errors during trial, including failure to object to important pieces of evidence, failure to file pre-trial motions, and failure to request the dismissal of charges unsupported by evidence. As a result, Mr. Mercado was denied

the effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

(A) Mr. Mercado's trial counsel was ineffective for failing to raise a pre-trial motion to dismiss, or a motion for an advisory verdict of acquittal as there was insufficient factual support for Mr. Mercado's attempted robbery convictions of Mr. Murr and Mr. Serna.

(B) Mr. Mercado's trial counsel was ineffective for failing to raise a pre-trial motion to dismiss or an advisory verdict of acquittal as there was insufficient factual support for Kidnapping with Use of a Deadly Weapon convictions.

(C) Trial counsel failed to file a pretrial motion precluding the note allegedly written by Mr. Mercado.

(D) Extensive information existed regarding Flores' instability and bias as a witness. Trial counsel failed to challenge Carl Flores' testimony and failed to sufficiently investigate these issues prior to trial.

(E) Mr. Mercado's trial counsel was ineffective for failing to challenge Carl Flores' testimony as a paid information pretrial and to appropriately argue that the prosecution improperly presented FBI Agent Kelliher's testimony.

(F) Mr. Mercado's trial counsel was ineffective for eliciting on cross-examination the only positive identification of Mr. Mercado as a participant in the offense.

(G) Trial counsel was ineffective for calling Felix Austria as a defense witness during the penalty phase.

(H) Trial counsel erred in failing to file a pretrial motion to preclude the requiring of Mr. Mercado to display his tattoos to the jury when Mr. Mercado did not testify.

(I) Trial counsel was ineffective by failing to move to dismiss before, during or after trial on appeal all counts of coercion.

(J) Trial counsel failed to file a pre-trial motion to dismiss or move for an advisory verdict of acquittal as there was insufficient factual support for the gang sentencing enhancement on each of Mr. Mercado's eighteen convictions.

(K) Trial counsel failed to adequately prepare their expert witness during the penalty phase.

(L) Trial counsel failed to move to limit the improper victim impact statements during the penalty hearing.

(M) Mr. Mercado's trial failed to object to pervasive prosecutorial misconduct that occurred during Mr. Mercado's penalty hearing closing arguments.

Ground XX [*sic*]: Appellate counsel failed to raise a number of issues, including errors during jury selection, concerns over a biased paid informant, concerns regarding the testimony of a co-defendant who received favorable treatment in return for his testimony, and erroneous jury instructions. Because of these failures, Mr. Mercado was denied the effective assistance of appellate counsel in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

(A) Appellate counsel was ineffective for failing to raise an issue on appeal that there was insufficient factual support for Mr. Mercado's attempted robbery convictions of Mr. Murr and Mr. Serna.

(B) Appellate counsel was ineffective for failing to raise the claim that there was insufficient factual support for Kidnapping with Use of a Deadly Weapon convictions.

(C) Appellate counsel was ineffective for failing to raise the issue of the trial court limiting testimony regarding Carl Flores' role as an FBI informant.

(D) Appellate counsel failed to raise the issue that the state engaged in prosecutorial misconduct by improperly bolstering of Felix Austria's credibility during Mr. Mercado's trial.

(E) Appellate counsel erred in failing to raise the issue of the violation of Mr. Mercado's Fifth Amendment rights when the court required Mr. Mercado to display his tattoos to the jury even though Mr. Mercado did not testify.

(F) Appellate counsel was ineffective by failing to challenge all counts of coercion on appeal.

(G) Appellate counsel failed to raise the issue that there was insufficient support for the gang sentencing enhancement on each of Mr. Mercado's eighteen convictions.

(H) Appellate counsel failed to raise the issue of improper victim impact statements during the penalty hearing.

(I) Appellate counsel failed to object to pervasive prosecutorial misconduct that occurred during Mr. Mercado's penalty hearing closing arguments.

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

(5) Result: Petition Granted in Part, Denied In Part (four convictions of attempted robbery and kidnapping dismissed)

(6) Date of Result: 3/9/2005

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Order dated 9/29/2006

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

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

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

(3) Grounds raised:

Ground One: The prosecutors used their peremptory challenges in an intentionally racially-discriminatory manner by removing one of the only Filipino jurors from the jury. Consequently, Mr. Mercado's conviction is invalid under the Constitutional guarantees of due process, equal protection, and the right to trial by an impartial, representative jury under the Sixth and Fourteenth Amendments to the United States Constitution.

Ground Two: The state used criminal history printouts for perspective jurors during voir dire without providing the information to defense counsel in violation of Mr. Mercado's Fifth and Fourteenth Amendment rights to due process and a fair trial under the United States Constitution.

Ground Three: The trial court failed to excuse a juror who believed that a defendant charged with a crime was probably guilty and should have to prove his innocence. As a result, Mr. Mercado was deprived of his right to due process of law, fair trial, and trial by an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution.

Ground Four: The trial court improperly limited testimony regarding the bias of paid informant Carl Flores' in violation of Mr. Mercado's rights to due process and a fair trial guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Ground Five: The state engaged in prosecutorial misconduct by improperly bolstering of Felix Austria's credibility during Mr. Mercado's trial, in violation of the Constitutional rights to due process and a fair trial as guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground Six: Even though Mr. Mercado chose not to testify, the trial court ordered him to remove his shirt and display his tattoos to the jury in violation of Mr. Mercado's right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution.

Ground Seven: The reasonable doubt instruction given during the trial improperly minimized the state's burden of proof. As a result, Mr. Mercado's conviction is invalid under the federal constitutional guarantees of due process and fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Ground Eight: The giving of an erroneous jury instruction on premeditation and deliberation violated Mr. Mercado's rights to a fair trial and due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Ground Nine: The instructions defining malice and implied malice created an improper presumption, thus minimizing the state's burden of proof. As a result of the erroneous instructions, Mr. Mercado's conviction and sentence are invalid under the federal Constitutional guarantees of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Ground Ten: The state's failure to disclose critical impeachment evidence regarding a testifying co-defendant until after the trial violated Mr. Mercado's Fifth and Fourteenth Amendment rights to due process and a fair trial under the United States Constitution.

Ground Eleven: The evidence presented at trial established that the plan for the robbery focused on taking money from the cashier's cage at Renata's. Insufficient factual support existed to support attempted robbery convictions for the bartender and slot manager in violation of the Constitutional rights guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.[2]

Ground Twelve: Insufficient factual support was presented for Mr. Mercado's Kidnapping with Use of a Deadly Weapon convictions of Mr. Murr and Mr. Serna, in violation of the Constitutional rights

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[2] This ground for relief was abandoned because the state district court granted Mr. Mercado relief on this issue and dismissed Counts IV and V.

guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.[3]

Ground Thirteen: Insufficient factual support for Mr. Mercado's coercion convictions in violation of the Constitutional rights guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground Fourteen: Insufficient factual support existed for the gang sentencing enhancement on each of Mr. Mercado's eighteen convictions. The prosecution's pursuit of this enhancement, despite an utter lack of evidence, violated Mr. Mercado's constitutional rights to due process and a fair trial guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground Fifteen: The prosecution failed to present sufficient evidence to convict Mr. Mercado in violation of his right to a fair trial, due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Ground Sixteen: Victim impact statements during the penalty hearing violated the Constitutional rights of fair trial and due process guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground Seventeen: The pervasive prosecutorial misconduct that occurred during Mr. Mercado's penalty hearing closing arguments, in violation of the Constitutional rights to due process and fair trial guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution.

Ground Eighteen: During the penalty phase of Mr. Mercado's trial, the court allowed the prosecution to play a videotape showing Mr. Serna with his family at a holiday family dinner. This improper victim impact testimony violated Mr. Mercado's constitutional rights guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution.

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[3] This ground for relief was abandoned because the state district court granted Mr. Mercado relief on this issue and dismissed Counts VII and IX.

Ground Nineteen: Trial counsel made numerous errors during trial, including failure to object to important pieces of evidence, failure to file pre-trial motions, and failure to request the dismissal of charges unsupported by evidence. As a result, Mr. Mercado was denied the effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

(A) Trial counsel failed to file a pretrial motion precluding the note allegedly written by Mr. Mercado.

(B) Defense counsel failed to challenge a juror who thought that defendants should have to prove their innocence.

(C) Extensive information existed regarding Flores' instability and bias as a witness. Trial counsel failed to challenge Carl Flores' testimony and failed to sufficiently investigate these issues prior to trial.

(D) Mr. Mercado's trial counsel was ineffective for failing to challenge Carl Flores' testimony as a paid informant pretrial and to appropriately argue that the prosecution improperly presented FBI Agent Kelliher's testimony.

(E) Mr. Mercado's trial counsel was ineffective for eliciting on cross-examination the only positive identification of Mr. Mercado as a participant in the offense.

(F) Trial counsel was ineffective for failing to challenge Felix Austria's biased testimony and fully eliciting this critical credibility evidence.

(G) Trial counsel was ineffective for calling Felix Austria as a defense witness during the penalty phase.

(H) Trial counsel erred in failing to file a pretrial motion to preclude the requiring of Mr. Mercado to display his tattoos to the jury when Mr. Mercado did not testify.

(I) Mr. Mercado's trial counsel was ineffective for failing to raise a pre-trial motion to dismiss, or a motion for an advisory verdict of acquittal as there was insufficient

factual support for Mr. Mercado's attempted robbery convictions of Mr. Murr and Mr. Serna.[4]

(J) Mr. Mercado's trial counsel was ineffective for failing to raise a pre-trial motion to dismiss or an advisory verdict of acquittal when there was insufficient factual support for Kidnapping with Use of a Deadly Weapon convictions.[5]

(K) Trial counsel was ineffective by failing to move to dismiss before, during or after trial on appeal all counts of coercion.

(L) Trial counsel failed to file a pre-trial motion to dismiss or move for an advisory verdict of acquittal as there was insufficient factual support for the gang sentencing enhancement on each of Mr. Mercado's eighteen convictions.

(M) Trial counsel failed to adequately prepare their expert witness used during the penalty phase.

(N) Trial counsel failed to move to limit the improper victim impact statements during the penalty hearing.

(O) Mr. Mercado's trial failed to object to pervasive prosecutorial misconduct that occurred during Mr. Mercado's penalty hearing closing arguments.

Ground Twenty: Appellate counsel failed to raise a number of issues, including errors during jury selection, concerns over a biased paid informant, concerns regarding the testimony of a co-defendant who received favorable treatment in return for his testimony, and erroneous jury instructions. Because of these failures, Mr. Mercado was denied the effective assistance of appellate counsel in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

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[4] This ground for relief was abandoned because the state district court granted Mr. Mercado relief on this issue and dismissed Counts IV and V.

[5] This ground for relief was abandoned because the state district court granted Mr. Mercado relief on this issue and dismissed Counts VII and IX.

(A) Appellate counsel failed to raise the issue that a juror who indicated that she believed that Mr. Mercado was probably guilty since the prosecution had gone to the trouble of bringing a case and that he should have to prove his innocence was not excused.

(B) Appellate counsel failed to raise the issue that a Filipino juror was excused by the prosecution and the prosecution failed to present a valid, race-neutral reason for exercising a peremptory challenge against her.

(C) Appellate counsel failed to raise the issue of the trial court limiting testimony regarding Carl Flores' role as an FBI informant.

(D) Appellate counsel failed to raise the issue that the state engaged in prosecutorial misconduct by improperly bolstering of Felix Austria's credibility during Mr. Mercado's trial.

(E) Appellate counsel erred in failing to raise the issue of the violation of Mr. Mercado's Fifth Amendment rights when the court required Mr. Mercado to display his tattoos to the jury even though Mr. Mercado did not testify.

(F) Appellate counsel failed to raise the issue of the improper jury instruction regarding reasonable doubt.

(G) Appellate counsel failed to raise the issue of the improper jury instruction regarding premeditation and deliberation.

(H) Appellate counsel failed to raise the issue of the improper jury instruction regarding malice.

(I) Appellate counsel was ineffective for failing to raise an issue on appeal that there was insufficient factual support for Mr. Mercado's attempted robbery convictions of Mr. Murr and Mr. Serna.

(J) Appellate counsel was ineffective for failing to raise the claim that there was insufficient factual support for Kidnapping with Use of a Deadly Weapon convictions.

(K) Appellate counsel was ineffective by failing to challenge all counts of coercion on appeal.

(L) Appellate counsel failed to raise the issue that there was insufficient factual support for the gang sentencing enhancement on each of Mr. Mercado's eighteen convictions.

(M) Appellate counsel failed to challenge the prosecution's failure to present sufficient evidence to convict Mr. Mercado.

(N) Appellate counsel failed to raise the issue of improper victim impact statements during the penalty hearing.

(O) Appellate counsel failed to object to pervasive prosecutorial misconduct that occurred during Mr. Mercado's penalty hearing closing arguments.

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

(5) Result: Petition Denied

(6) Date of result: 4/26/2010.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Judgment entered 4/26/2010

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

(d) 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? N/A

(e) 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 in this petition is similar to Ground 31 in Mr. Mercado's prior proper person state court post-conviction petition, as well as Ground Eight in Mr. Mercado's counseled federal petition.

b. The proceedings in which these grounds were raised: First state court proper person petition; federal 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 becomes 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* doctrine applies in state courts as a matter of the federal Constitution. As a result, state courts are bound by federal law to apply substantive criminal law decisions retroactively. Furthermore, *Welch* clarified that the "substantive rule" exception includes most if

not all statutory interpretation decisions that narrow the class of individuals who can 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. 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? Yes. If so, state briefly the reasons for the delay.

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: Philip Dunleavy and Paul Wommer (trial); Norman Reed (direct appeal).

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, MR. MERCADO MUST BE GIVEN THE BENEFIT OF *BYFORD V. STATE* AS A MATTER OF FEDERAL LAW. *BYFORD* WAS A SUBSTANTIVE CHANGE IN LAW THAT MUST NOW 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 common jury instruction previously used to define premeditation and deliberation (the so-called *Kazalyn* instruction) 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 court stated that this rule 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. However, relying upon its interpretation of the then-current state of United States Supreme Court retroactivity jurisprudence, it held that *Byford* represented only a "change" in state law, not a "clarification," and so *Byford* applied only to those convictions that had yet to become final at the time it was decided.

However, in 2016, the United States Supreme Court drastically changed its retroactivity rules. First, in *Montgomery v. Louisiana*, the Supreme Court held that the question whether a new criminal law rule is retroactive (for example, because it falls under the "substantive rule" exception to the *Teague* bar on retroactivity) is a matter of federal constitutional law. Second, in *Welch v. United States*, the Supreme Court clarified that narrowing "interpretations" of criminal statutes fall under the "substantive rule" exception to the *Teague* doctrine and therefore apply retroactively. 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 reworking of federal retroactivity law, and under those cases Mr. Mercado may obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has acknowledged that *Byford* represented a substantive rule. Under *Welch*, that means 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 "changes" and "clarifications" of laws is no longer relevant in determining whether a new interpretation of a statute applies retroactively. Moreover, the Nevada state courts are bound to apply *Welch* because under *Montgomery*, the *Teague* retroactivity rules apply to the states as a matter of federal constitutional law. Under those rules, the *Byford* decision applies retroactively to petitioners like Mr. Mercado.

Morever, Mr. Mercado is entitled to relief because there is a reasonable likelihood that the jury applied the improper *Kazalyn* instruction in an unconstitutional manner. The evidence that Mr. Mercado committed a premeditated and deliberate murder was weak. Although the State also pursued a felony murder

theory at trial, that should not change the analysis. Mr. Mercado can also establish good cause to overcome the procedural bars. The new constitutional arguments based upon *Montgomery* and *Welch* were not previously available. Mr. Mercado has filed the petition within one year of *Welch*. Mr. Mercado can also show actual prejudice.

Accordingly, the petition should be granted.

I. LEGAL BACKGROUND

A. *Kazalyn* First-Degree Murder Instruction.

As relevant here, Mr. Mercado was charged with first-degree murder with use of a deadly weapon with intent to promote, further or assist a criminal gang. According to the State, Mr. Mercado and other gang members had attempted to rob a bar, and Mr. Mercado shot and killed an employee during the alleged attempted robbery. With respect to the murder charge, the State alleged that Mr. Mercado had committed a premeditated and deliberate murder when he shot and killed this individual. (Second Amended Criminal Complaint.) The State also alleged that Mr. Mercado and his co-defendants had all committed felony murder, based on the attempted robbery and other associated alleged felonies. (*Id.*) The court provided the jury with the following instruction on premeditation:

> Premeditation or intent to kill need not be for a day, an hour or even a minute, for if the jury believes from the evidence that there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing the act constituting the killing, it was willful, deliberate and premeditated murder
>
> The intention to kill and the act constituting the killing may be as instantaneous as successive thoughts of the mind. It is only necessary that the act constituting the killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the accused no matter how rapidly these acts of the mind

> succeed each other or how quickly they may be followed by the acts constituting murder.

(Jury Instructions, Instruction No. 10.) This instruction provided the same definition of premeditation as set forth in the *Kazalyn* instruction. *See Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

B. Conviction and Direct Appeal.

The jury convicted Mr. Mercado of first-degree murder with use of a deadly weapon with intent to promote, further or assist a criminal gang. (Verdict.) Although the State pursued the death penalty, the jury sentenced Mr. Mercado to consecutive sentences of life without the possibility of parole for that crime. (Judgment.) Mr. Mercado was also convicted of and sentenced on additional crimes.

Mr. Mercado appealed from the judgment of conviction. The Nevada Supreme Court issued an order dismissing the appeal on April 9, 1998. Thus, Mr. Mercado's conviction became final on July 8, 1998. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (2008) (conviction becomes final when judgment of conviction is entered and 90-day time period for filing petition for writ of certiorari to the United States Supreme Court has expired).

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. The court's prior cases, including *Kazalyn*, had "underemphasized the element of deliberation." 116 Nev. at 234. Cases such as *Kazalyn* and *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992), had reduced "premeditation" and "deliberation" to synonyms; because those cases treated the terms as "redundant," they did not require an instruction separately defining

deliberation. *Byford*, 116 Nev. at 235. The *Byford* decision 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." *Byford*, 116 Nev. at 235.

The *Byford* court specifically "abandoned" this line of authority. *Id.* It held as follows:

> 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.* It is an element that "'must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.'" *Id.* (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

The *Byford* court further explained 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.'" *Id.* 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.* at 235-36.

However, the court did not grant relief to Mr. Byford because it believed 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 233-34.

On August 23, 2000, the Nevada Supreme Court decided *Garner v. State*, 116 Nev. 770, 6 P.3d 1013 (2000). In *Garner*, the court held that the use of the *Kazalyn* instruction at trial was neither constitutional nor plain error. *Id.* at 788. The court rejected the argument that under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford* had to apply retroactively to Mr. Garner, whose conviction had not yet become final at the time the court issued *Byford*. According to the court, *Griffith* only concerned constitutional rules, and *Byford* did not recognize a *constitutional* error. Thus, the court reasoned, the jury instructions approved in *Byford* did not have any retroactive effect as they were "a new requirement with prospective force only." *Id.* at 789.

The court 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 789 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 as a matter of due process that a *clarification* of the law must 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 again held as a matter of due process that a *change* in state law that narrows the category of conduct that can be considered criminal must be applied to convictions that have yet to become final. *Id.* at 840-42.

E. First Post-Conviction Petition.

In 1999, Mr. Mercado filed a state post-conviction petition, arguing under Ground 31 that the jury instructions in his case improperly relieved the State of proving the elements of premeditation and deliberation. (Proper Person Petition at 53-58.)

In September 1999, the district court denied this ground, reasoning that Mr. Mercado should have raised the claim on direct appeal. (Order Denying Petition, 9/21/99, at 6, ¶ 10.) The Nevada Supreme Court affirmed the denial of this claim.

F. *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 use of 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 Nevada Supreme Court in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (Nev. 2008). In *Nika*, the court disagreed with *Polk*'s conclusion that the use of the *Kazalyn* instruction violated due process. The court stated that, rather than implicating *Winship* concerns, the only relevant 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 it believed would apply to everybody, or a *change in* the interpretation of a statute, which it believed would only apply to those convictions that had yet to become final. The court held that *Byford* represented a change in the law as to the interpretation of the first-degree murder statute. 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 1287.

The court acknowledged that because *Byford* had changed the meaning of the first-degree murder statute by narrowing its scope, *Byford* had to be applied to convictions that had yet to become final at the time it was decided. To that end, the court cited the Supreme Court's decision in *Bunkley* and *Fiore*. *Nika*, 124 Nev. at 1286-87 & nn.66, 72, 74. In this regard, the court also overruled *Garner* to the extent that it held that *Byford* could only apply prospectively and would not apply to cases that had yet to become final by the time of the *Byford* decision. *Id.* at 1287.

The court emphasized that *Byford* was a matter of statutory interpretation and not a matter of constitutional law. According to the *Nika* court, the *Byford* decision solely addressed a state law issue, namely "the interpretation and definition of the elements of a state criminal statute." *Id.* at 1288.

G. *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*, 567 U.S. 460 (2012)—which prohibited under the Eighth Amendment mandatory sentences of life without the possibility of parole 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*, new constitutional rules of criminal procedure generally do not apply 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. *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 initial question the Court addressed in *Montgomery* was whether it had jurisdiction over the case. The lower court (the Louisiana Supreme Court) purported to decide whether *Miller* was retroactive as a matter of *state* law. Arguably, that state law issue was insufficient to create a federal question to support the United States Supreme Court's review. But the Court held otherwise, stating 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." *Montgomery*, 136 S. Ct. at 729. That is because "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* Because a state "may not disregard a controlling constitutional command in their own courts," the states were therefore obligated to apply new rules retroactively when they fit within one of *Teague*'s exceptions. *Id.* at 727 (citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-41, 344 (1816)).

Moving on, the *Montgomery* Court concluded that *Miller* was a new substantive rule, so the states 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 retroactivity of its prior decision in *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. *Welch*, 136 S.Ct. at 1260-61, 1264. More specifically, the Court analyzed 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 rejected the argument that a rule is only substantive when it limits Congress's power to act. *Id.* at 1267. It pointed 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.'" *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*). The *Welch* Court also cited *Schriro*, 542 U.S. at 354, and noted the following in a parenthetical to that citation: "A decision that modifies the elements of an offense is normally substantive rather than procedural." *Welch*, 136 S.Ct. at 1267.

The Court also rejected the distinction between decisions, like *Bousley*, that interpret statutes, as opposed to decisions, like *Johnson*, that invalidate portions of statutes. *Welch*, 136 S. Ct. at 1267. To the contrary, it stated that all statutory interpretation cases (including decisions that interpret statutes and decisions that invalidate statutes) are substantive so long as 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).

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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 held for the first time as a matter of federal constitutional law that state courts must apply *Teague*'s "substantive rule" exception in the manner in which the United States Supreme Court applies it. *See Montgomery*, 136 S.Ct. 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; *Byford* held that a jury is required to separately find the element of deliberation, so it narrowed the range of individuals who could be convicted of first-degree murder.

Nevertheless, the court concluded in *Nika* that because *Byford* was a *change* in law as opposed to a *clarification*, *Byford* did not apply retroactively to convictions

that had already become final. In light of *Welch*, however, this distinction between a "change" and "clarification" no longer matters. The *only* relevant question is whether the new interpretation represents a new substantive rule. Critically, in *Welch*, the Supreme Court never used the word "clarification" when it analyzed how its statutory interpretation decisions fit under *Teague*. Rather, it explained that "interpretations," without qualification, apply retroactively. 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*, the Nevada Supreme Court's decision in *Byford* applies retroactively to Mr. Mercado's case. The jury was allowed to convict Mr. Mercado of murder under the improper *Kazalyn* instruction. He is therefore entitled to a new trial.

To the extent that the jury analyzed whether Mr. Mercado committed a premeditated and deliberate murder, it is reasonably likely that the jury applied the *Kazalyn* instruction in a way that violated Mr. Mercado's constitutional rights. *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, and so it relieved the State of its obligation to prove essential elements of the crime. In turn, the jury in Mr. Mercado's case was not required to find deliberation. The jury was never required to find whether Mr. Mercado committed the murder after a period of "coolness and reflection," and 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." *Byford*, 116 Nev. at 235-36.

With respect to the premeditation and deliberation theory, this error proved prejudicial. There was little if any evidence that Mr. Mercado had committed a premeditated and deliberate murder when he shot the victim. Instead, the evidence suggested that the shooting was the product of a rash impulse, spurned by the chaos that took place after one of Mr. Mercado's alleged co-defendants shot at another victim. While the State in closing arguments argued that Mr. Mercado shot at the victim twice and had to change the direction of his aim after the first shot (Trial Transcript Vol. VII, 7/20/95, at 38), this evidence does little to undermine the conclusion that the murder in this case did not follow a period of cool reflection but instead occurred in the heat of the moment.

Although the State presented a felony murder theory in addition to the premeditation and deliberation theory, that should not alter the outcome here. The jury returned a general verdict of guilt with respect to the first-degree murder charge, and it is unclear which theory the jury relied upon in reaching the guilty verdict. The jury may well have convicted Mr. Mercado under the flawed premeditation and deliberation theory, without having properly found deliberation first. Because one of the theories the jury could have convicted under was sufficiently flawed, the entire verdict is tainted, and Mr. Mercado's conviction on this count should be reversed as a matter of course. Mr. Mercado recognizes that in situations like this—where the State charges a defendant under multiple theories of liability, one of those theories (or the relevant instructions) is legally deficient, and the jury returns a general verdict—the Nevada Supreme Court and the United States Supreme Court have held that a harmless error analysis applies. *See Cortinas v. State*, 124 Nev. 1013, 1026,

195 P.3d 315, 324 (2008); *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008). However, and with respect, those cases were wrongly decided. Trial errors of this sort should be treated as structural errors. Accordingly, Mr. Mercado is preserving the issue for potential review in the Nevada Supreme Court and the United States Supreme Court.

Even if harmless error review applies here, the legally deficient premeditation and deliberation theory was not harmless here. The harmless error analysis turns on whether the court can be reasonably certain that every juror *actually did* vote to convict on a proper felony murder theory, as opposed to the invalid premeditation and deliberation theory. *See Riley v. McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015). There are reasons to doubt that in this case. The State's theory was that the killing occurred during an attempted robbery of a bar, and that Mr. Mercado was the shooter. Because the State argued that Mr. Mercado was the shooter, the premeditation and deliberation theory was a natural fit. Indeed, the prosecutor stressed this point during closing arguments and during rebuttal. In addition, while the prosecutor argued that the killing rose to the level of a felony murder, there were problems with that theory as well. During Mr. Mercado's state post-conviction proceedings, the state court vacated certain underlying felony convictions that the prosecutor had argued were the basis for a felony murder conviction. Assuming that some of the jurors relied on a felony murder theory when they voted to convict Mr. Mercado of first-degree murder, certain of those jurors may well have relied on the invalid felonies as the basis for their vote to convict Mr. Mercado of felony murder.

Because the State argued that Mr. Mercado was the shooter, and because at least some of the felony murder theories were legally flawed as well, it is not reasonably certain that every juror actually did vote to convict Mr. Mercado on the basis of a proper felony murder theory. More broadly, the use of a general verdict is

always problematic, because those forms can blur an already opaque decision-making process. *See Babb v. Lozowski*, 719 F.3d 1019, 1035 (9th Cir. 2013). For those reasons, the instructional error in this case was either structural or it was not harmless, and Mr. Mercado is entitled to relief.

B. Mr. Mercado 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 a newly available legal basis must rest on 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).

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* doctrine applies in state courts as a matter of federal constitutional law. 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 Mr. Mercado. As a result, Mr. Mercado has timely submitted this petition within one year of *Welch*, which was decided on April 18, 2016.

Finally, Mr. Mercado can establish actual prejudice for the reasons discussed on pages 33-36, *supra*. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. The State was relieved of its obligation to prove essential elements of the crime. In turn, the jury was not required to find deliberation. This error had a prejudicial impact on this case. Because the jury returned a general verdict, this error should invalidate the conviction.

III. PRAYER FOR RELIEF

Based on the grounds presented in this petition, Petitioner Ruel Salva Mercado respectfully requests that this honorable Court:

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

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

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

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

DATED this 18th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Jeremy C. Baron
JEREMY C. BARON
Assistant Federal Public Defender

VERIFICATION

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

DATED this 18th day of April, 2017.

/s/Jeremy C. Baron
JEREMY C. BARON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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, she served a true and accurate copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS 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
Las Vegas, NV 89101

Ruel S. Mercado
No. 48165
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender
District of Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUEL SALVA MERCADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 27877

FILED

APR 09 1998

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction pursuant to a jury verdict of first-degree murder and robbery.

Appellant Ruel Salva Mercado ("Mercado") and four co-defendants were charged with the November 24, 1994 robbery and murder, at Renata's Restaurant and Bar in Henderson, Nevada. Following a preliminary hearing, defendants George Chuatoco ("Chuatoco") and Felix Reno Austria ("Austria") each pleaded guilty to one count of first-degree murder. The remaining counts against these defendants were dropped.

Mercado chose to proceed to trial. At the conclusion of the guilt phase, the jury found Mercado guilty of twenty separate offenses. Following the penalty hearing, the jury opted to sentence Mercado to life without the possibility of parole. On October 24, 1995, Mercado was sentenced to life without the possibility of parole for murder in the first degree and an equal and consecutive life sentence without possibility of parole for use of a deadly weapon.[1]

[1]Mercado was sentenced on the other counts as follows:

COUNT II Twenty years in the Nevada Department of Prisons ("NDP") for attempted murder and a consecutive twenty years in NDP for use of a deadly weapon, restitution on Count II in the amount of $342.27, jointly and severally with co-defendants, Count II to run consecutive to Count I;

(continued...)

On appeal, Mercado maintains that five assignments of error warrant a new trial, to wit: (1) the district court erred in denying his motion for mistrial; (2) the district court erred in admitting allegedly prejudicial evidence; (3) the district court erred in admitting victim impact evidence at the penalty hearing; (4) evidence was insufficient to support the jury's

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[1](...continued)

COUNT III Burglary ten years in NDP and a consecutive ten years for use of a deadly weapon, Count III to run concurrent with Count II;

COUNT IV Seven and one-half years in NDP for attempted robbery plus a consecutive seven and one-half years in NDP for use of a deadly weapon, to run consecutive to Count II;

COUNT V Seven and one-half years in NDP for attempted robbery and a consecutive seven and one-half years in NDP for use of a deadly weapon, Count V to run consecutive to Count IV;

COUNT VI Seven and one-half years in NDP for attempted robbery and a consecutive seven and one-half years in NDP for use of a deadly weapon, Count VI to run consecutive to Count V;

COUNT VII Life with the possibility of parole for first-degree kidnapping and a consecutive life with possibility of parole for use of a deadly weapon, Count VII to run concurrent with Count I;

COUNT IX Life with possibility of parole for first-degree kidnapping and a consecutive life with possibility of parole for use of a deadly weapon, Count IX to run concurrent with Count I;

CTS. XI THROUGH XX
Coercion with use of a deadly weapon--Court sentences deft. to six years in NDP for coercion on each count and a consecutive six years for use of a deadly weapon on each count, Counts XI-XX to run concurrent with each other and concurrent with Count I, with 325 days credit for time served.

finding of an aggravating circumstance; and (5) he was denied a fair trial because the State failed to disclose "Scope Printouts" containing criminal records of potential jurors. Having considered the briefs and having had the benefit of oral argument, we conclude that none of Mercado's contentions merit reversal.

DISCUSSION

Whether the district court erred in denying Mercado's motion for mistrial.

Denial of a motion for mistrial is within the trial court's sound discretion and will not be disturbed on appeal in the absence of a clear showing of abuse. Sparks v. State, 96 Nev. 26, 30, 604 P.2d 802, 804 (1980).

Mercado argues that the district court should have granted his motion for a mistrial because the State failed to provide the jury with a redacted version of Austria's guilty plea agreement[2] during its deliberation. Mercado maintains that the State's withholding of this impeachment evidence violated NRS 175.282, and denied him his right to a fair trial.[3] We disagree.

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[2]Austria pleaded guilty to first-degree murder and agreed to testify in Mercado's trial in exchange for the State's agreement to drop all penalty enhancements and for a sentence of ten years to life with parole eligibility in ten years.

[3]NRS 175.282 provides, in relevant part:

> If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty . . . the court shall:
> 1. After excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the agreement;
> 2. If the defendant who is testifying has not entered his plea or been sentenced pursuant to the agreement, instruct the jury regarding the possible related pressures on the defendant by providing the jury with an appropriate cautionary instruction; and
> 3. Allow the defense to cross-examine fully the defendant who is testifying concerning the agreement.

Although decided prior to the legislative enactment of NRS 175.282, this court's holding in Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991), addresses concerns that are at issue when a testifying co-defendant has entered plea negotiations:

> [T]he terms of the quid pro quo must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction.

Id. at 669, 819 P.2d at 200. In this case, the district court granted Mercado considerable leeway during the cross-examination of Austria with respect to his plea agreement. In fact, Mercado's counsel acknowledged that while cross-examining Austria, he had delved into Austria's plea agreement with the State.[4] The record indicates that Mercado was accorded every opportunity to impeach Austria during cross-examination and closing argument. Although the district court provided no cautionary instruction, any concerns raised by NRS 175.281 have been substantially satisfied. We cannot conclude, therefore, that the result of the proceeding would have been different had the jury had the benefit of a written guilty plea agreement rather than the live testimony developed at trial. Having concluded that the district court did not abuse its discretion in denying Mercado's motion for mistrial, we dismiss Mercado's first argument.

Whether the district court erred in allowing a letter allegedly written by Mercado into evidence.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed on appeal unless manifestly

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[4]Austria was questioned concerning his gang involvement and drug sales, his deal with the State if he were to testify, his sentence arrangement if he testified, and the charges that would be dropped.

wrong. Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

While executing the search warrant at Mercado's residence, police discovered a letter, allegedly handwritten by Mercado, in a trash can in his bedroom.[5] Mercado argues that the district court erred in admitting this letter into evidence because the State failed to establish the letter's authenticity and the letter was more prejudicial than probative.

(1) Authentication

Authentication is a condition precedent to the admissibility of evidence. See NRS 52.015(1). Authentication is satisfied "by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Id. With regard to the authentication of handwriting, NRS 52.055 states that "[a]ppearance, contents, substance, internal patterns or other distinctive characteristics are sufficient for authentication when taken in conjunction with other circumstances."

In this case, the letter was signed R-U-E-L, it was found in a trashcan in Mercado's bedroom, and latent fingerprint analysis revealed that three of the prints found on the letter belonged to Mercado. Given these circumstances, we conclude that the district court did not abuse its discretion in determining that a handwriting expert was not required to establish the letter's authenticity. As an adequate foundation was established for the admission of the letter, we conclude that the weight of that evidence is a question properly left to

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[5]The letter stated:

> What's fucked up about is [sic] cops are looking for me and the worst thing is that I don't have a job and then I'm doing this fucked up job so I can get fast money. Shit, I'm going to hell and going to prison for about 15 to 30 years. But if it goes well, I live good and with a lot of money.

the jury. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (it is the jury's function, not that of the court, to assess the weight of the evidence).

Accordingly, Mercado's inadequate authentication argument is without merit.

(2) Probative vs. prejudicial value

NRS 48.035(1) provides that evidence should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury." Questions of probative value are left to the sound discretion of the district court and will not be disturbed on appeal absent a showing of abuse. Libby v. State, 109 Nev. 905, 915, 859 P.2d 1050, 1057 (1993).

In this case, the letter contained no substantive admission of the crime but alluded to the author's desire for money as well as a potential jail sentence. The State offered the letter as circumstantial evidence of Mercado's motive to commit the robbery. We conclude that it was within the trial court's discretion to find that the letter's probative value on the issue of Mercado's motive outweighed any prejudice to Mercado. Accordingly, we reject Mercado's argument that the letter was more prejudicial than probative.

Whether the admission of victim impact evidence at the penalty hearing was proper.

Questions of admissibility of evidence during the penalty phase of a capital case are left largely to the discretion of the trial judge. Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994). Evidence otherwise not admissible at trial is generally admissible at a penalty hearing. Riker v. State, 111 Nev. 1316, 1327, 905 P.2d 706, 713 (1995).

Mercado argues that the district court erred in allowing the jury to view a videotape of the victim on the day before his murder. A sentimental audio track accompanied the video. Mercado contends that the admission of this victim impact evidence violated his due process right to fundamental fairness during penalty phase hearings.

We conclude that the district court did not abuse its discretion in admitting the videotape at the penalty hearing. Just as Mercado was allowed to offer any mitigating evidence, the State

> "'has a legitimate interest in counteracting the mitigating evidence . . . by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)."

Homick v. State, 108 Nev. 127, 136, 825 P.2d 600, 606 (1992) (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991)). We conclude that Mercado's penalty hearing was not fundamentally unfair.

Accordingly, we reject Mercado's request for a new penalty hearing on the basis of improper victim impact evidence.

Whether there was sufficient evidence for the jury to conclude at the penalty phase that Mercado committed the murder to avoid arrest.

"The standard of review on appeal in a criminal case for sufficiency of the evidence is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by evidence that was properly before it." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

Mercado maintains that he is entitled to a new penalty hearing because there was insufficient evidence to prove the existence of an aggravating circumstance; namely, that Mercado

committed the murder to avoid arrest. Thus, Mercado argues that the district court erred in allowing the jury to consider this aggravating circumstance when making its determination.

We conclude that the jury could have concluded on the basis of the evidence presented that Mercado committed murder to avoid arrest. A review of the record indicates that the robbery did not proceed as planned and that Mercado may have been concerned that the victim activated a silent alarm. In addition, the victim was unarmed and was shot in the back. Thus, the jury could have inferred that Mercado committed murder to avoid arrest.

Accordingly, we dismiss Mercado's request for a new penalty hearing on the basis of insufficiency of evidence.

Whether the State's use of Scope printouts during voir dire, containing criminal records of prospective jurors, denied Mercado a fair trial.

Mercado claims that he was denied his constitutional right to a fair trial because the State failed to disclose sixteen Scope reports prior to its voir dire examination of potential jurors. Mercado maintains that the State had an unfair advantage because it possessed the criminal records of prospective jurors to the exclusion of the defense during a critical stage of the proceeding.

We conclude that any error created by the State's failure to disclose the Scope reports was cured when the district court allowed Mercado access to the Scope reports later in the jury selection process and because Mercado was given the opportunity to use the Scope reports to reexamine those jurors who had been seated.[6]

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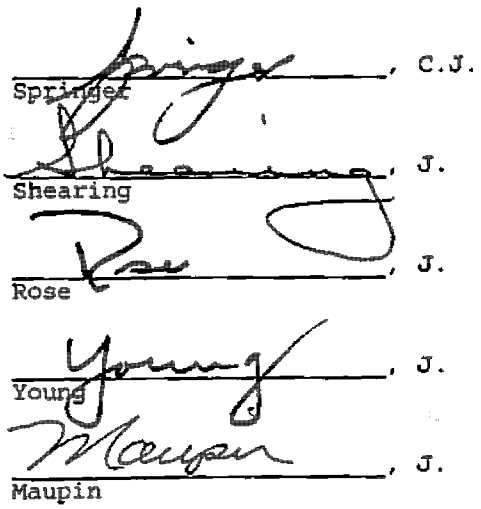
[6]Access was allowed prior to the exercise of peremptory challenges.

Accordingly, having concluded that Mercado's arguments lack merit, we

ORDER this appeal dismissed.



Springer, C.J.

Shearing, J.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Don P. Chairez, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Stewart L. Bell, Clark County District Attorney
Patricia M. Erickson
Loretta Bowman, Clerk

ORIGINAL

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

RUEL SALVA MERCADO,
#1139691

Defendant.

Case No. C125649
Dept. No. XIII
Docket G

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 7th day of February, 1995, the Defendant RUEL SALVA MERCADO, entered a plea of not guilty to the crimes of COUNT I - MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT III - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT IV - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT V - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT VI - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT VII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH THE INTENT TO

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PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT VIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT X - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XI - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIV - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XV - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVI - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIX - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony) and COUNT XX - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony), committed on the 25th day of November, 1994, in violation of NRS 200.010, 200.030, 193.165, 193.168, 193.169, 193.330, 205.060, 200.380, 200.310, 200.320, 207.190, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crimes of COUNT I - FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A

DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT III - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT IV - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT V - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT VI - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT VII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XI - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIV - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XV - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVI - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIX - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony) and COUNT XX - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO

PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); and

WHEREAS, thereafter, on the 24th day of October, 1995, the Defendant being present in Court with his counsel PHILIP DUNLEAVY, ESQ. and PAUL WOMMER, ESQ., and JAY SIEGEL, Deputy District Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, sentenced Defendant to the following terms of imprisonment in the Nevada State Prison::

COUNT I - LIFE WITHOUT THE POSSIBILITY OF PAROLE for FIRST DEGREE MURDER plus a consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE for USE OF A DEADLY WEAPON and pay Restitution of $2,213.49 jointly and severally with co-defendants;

COUNT II - TWENTY (20) years for ATTEMPT MURDER plus a consecutive TWENTY (20) years for USE OF A DEADLY WEAPON and pay Restitution of $342.27 jointly and severally with co-defendants, to run conseuctive to Count I;

COUNT III - TEN (10) years for BURGLARY plus a consecutive TEN (10) years for USE OF A DEADLY WEAPON, to run concurrent with Count II;

COUNT IV - SEVEN AND ONE-HALF (7½) years for ATTEMPT ROBBERY plus a consecutive SEVEN AND ONE-HALF (7½) years for USE OF A DEADLY WEAPON, to run consecutive to Count II;

COUNT V - SEVEN AND ONE-HALF (7½) years for ATTEMPT ROBBERY plus a consecutive SEVEN AND ONE-HALF (7½) years for USE OF A DEADLY WEAPON, to run consecutive to Count IV;

COUNT VI - SEVEN AND ONE-HALF (7½) years for ATTEMPT ROBBERY plus a consecutive SEVEN AND ONE-HALF (7½) years for USE OF A DEADLY WEAPON, to run consecutive to Count V;

COUNT VII - LIFE WITH THE POSSIBILITY OF PAROLE for FIRST DEGREE KIDNAPPING plus a consecutive LIFE WITH THE POSSIBILITY OF PAROLE for USE OF A DEADLY WEAPON, to run concurrent with Count I;

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COUNT IX - LIFE WITH THE POSSIBILITY OF PAROLE for FIRST DEGREE KIDNAPPING plus a consecutive LIFE WITH THE POSSIBILITY OF PAROLE for USE OF A DEADLY WEAPON, to run concurrent with Count I;

COUNT XI - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XIII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XIV - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XV - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XVI - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XVII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XVIII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XIX - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNT XX - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY WEAPON;

COUNTS XI -XX to run concurrent with each other and concurrent with Count I. Credit for time served 325 days.

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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 18th day of December, 1995, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#95-125649A/kjh
HPD DR#94-13888
1° MWDW;ATT MWDW;BURG W/WPN;
ATT ROBB W/WPN;1° KIDNAP W/WPN;
COERCION W/WPN - F
(TK7)