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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

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

APP. 002

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

APP. 003

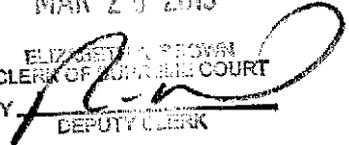
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 74552-COA

FILED

MAR 20 2019

ELIZABETH A. PROWSE
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

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).

APP. 004

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

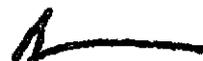
APP. 005

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

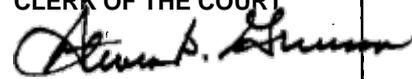
ORDER the judgment of the district court AFFIRMED.


_____, 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



1 **FCL**
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7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ROME CHACON,
13 #1022841

14 Defendant.

CASE NO: 92C105423

DEPT NO: VIII

15 **FINDINGS OF FACT, CONCLUSIONS OF**
16 **LAW AND ORDER**

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

19 THIS CAUSE having come on for hearing before the Honorable DOUGLAS E.
20 SMITH, District Judge, on the 13th day of September, 2017, Petitioner not being present,
21 REPRESENTED BY LORI TEICHER, Federal Public Defender, the Respondent being
22 represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through
23 KELSEY R. EINHORN, Deputy District Attorney, and the Court having considered the
24 matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now
25 therefore, the Court makes the following findings of fact and conclusions of law:

26 **PROCEDURAL BACKGROUND**

27 On March 24, 1992, the State charged Rome Richard Chacon ("Petitioner") by way of
28 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,

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1 1992, the jury returned a verdict finding Petitioner guilty of Burglary with Use of a Deadly
2 Weapon and Murder of the First Degree Murder with Use of a Deadly Weapon. On October
3 27, 1992, Petitioner was adjudged guilty and sentenced to Nevada State Prison as follows: as
4 to Count 1 (Burglary with Use of a Deadly Weapon), five years plus a consecutive term of five
5 years for the use of a deadly weapon; as to Count 2 (First Degree Murder with Use of a Deadly
6 Weapon), life without the possibility of parole plus a consecutive term of life without the
7 possibility of parole for the use of a deadly weapon. The Judgment of Conviction was entered
8 on December 9, 1992. On January 20, 1994, the Nevada Supreme Court dismissed Petitioner's
9 appeal and affirmed the judgment. Remittitur issued on February 8, 1994.

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

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

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

28 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

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1 On April 18, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-
2 Conviction), which now constitutes Petitioner's third habeas petition. The State responded on
3 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).

4
5
6
7 The Court finds that the Petition is procedurally barred under both NRS 34.726(1), NRS
8 34.810(2), and NRS 34.800(2). The instant Petition has been filed more than 23 years after the
9 Nevada Supreme Court issued its remittitur on Petitioner's direct appeal from the Judgment of
10 Conviction. Accordingly, the Court finds it is untimely under NRS 34.726(1). In an attempt to
11 establish good cause to excuse this untimeliness, Petitioner relied on the United States
12 Supreme Court's decisions in Montgomery v. Louisiana, __ U.S. __, 136 S. Ct. 718 (2016),
13 and Welch v. United States, __ U.S. __, 136 S. Ct. 1257 (2016). Montgomery and Welch,
14 however, fail to serve as good cause necessary to overcome NRS 34.726(1)'s procedural bar.
15 Moreover, because the instant Petition constitutes Petitioner's third habeas petition, it is
16 successive under NRS 34.810(2). And for the same reasons that Montgomery and Welch fail
17 to constitute good cause to overcome NRS 34.726(1)'s procedural bar, it likewise fails to
18 constitute good cause sufficient to overcome NRS 34.810(2)'s procedural bar. Lastly, because
19 more than 23 years have elapsed between the Nevada Supreme Court's decision on Petitioner's
20 direct appeal of the Judgment of Conviction and the filing of the instant Petition, the State
21 plead laches pursuant to NRS 34.800(2) and properly availed itself of that statute's rebuttable
22 presumption of prejudice.

23 ///

24 ///

25 ///

26 _____
27 to dismiss is not entirely attributable to Chacon, as Chacon's timely first postconviction petition for writ of habeas corpus was not
28 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).

APP. 009

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

3 This Court finds that the Petition is untimely under NRS 34.726(1) and Petitioner has
4 failed to establish good cause for delay. Under NRS 34.726(1), “a petition that challenges the
5 validity of a judgment or sentence must be filed within 1 year after entry of the judgment of
6 conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate
7 court of competent jurisdiction . . . issues its remittitur,” absent a showing of good cause for
8 delay. In State v. Eighth Judicial Dist. Court (Riker), the Nevada Supreme Court noted that
9 “the statutory rules regarding procedural default are mandatory and cannot be ignored when
10 properly raised by the State.” 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005).

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

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

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

23 The Court finds that Petitioner failed to establish that the delay is not his fault. To meet
24 NRS 34.726(1)’s first requirement, “a petitioner must show that an impediment external to the
25 defense prevented him or her from complying with the state procedural default rules.”
26 Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “An impediment external to
27 the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was
28

APP. 010

1 not reasonably available to counsel, or that some interference by officials, made compliance
2 impracticable.’ ” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986)).

3 Petitioner attempted to meet this first requirement by arguing new case law. Specifically, he
4 alleged that Montgomery and Welch “represent a change in law that allows petitioner to obtain
5 the benefit of Byford^[2] on collateral review.” Petition at 9. In essence, Petitioner avers that
6 Montgomery and Welch establish a legal basis for a claim that was not previously available.
7 Petitioner’s reliance on Montgomery and Welch is misguided.

8 As noted by Petitioner, he received the following jury instruction on premeditation and
9 deliberation:

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

12 Premeditation need not be for a day, an hour or even a minute. It
13 may be as instantaneous as successive thoughts of the mind. For if
14 the jury believes from the evidence that the act constituting the
15 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.

16 Instructions to the Jury, filed September 26, 1992, Instruction No. 9. This instruction is known
17 as the Kazalyn³ instruction.

18 The Nevada Supreme Court held in Byford that this Kazalyn instruction did “not do
19 full justice to the [statutory] phrase ‘willful, deliberate and premeditated.’ ” 116 Nev. at 235,
20 994 P.2d at 713. As explained by the Court in Byford, the Kazalyn instruction
21 “underemphasized the element of deliberation,” and “[b]y defining only premeditation and
22 failing to provide deliberation with any independent definition, the Kazalyn instruction
23 blur[red] the distinction between first- and second-degree murder.” 116 Nev. at 234-35, 994
24 P.2d at 713. Therefore, in order to make it clear to the jury that “deliberation is a distinct
25 element of *mens rea* for first-degree murder,” the Court directed “the district courts to cease

26 _____
27 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).

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

APP. 011

1 instructing juries that a killing resulting from premeditation is ‘willful, deliberate, and
2 premeditated murder.’ ” *Id.* at 235, 994 P.2d at 713. The Court then went on to provide a set
3 of instructions to be used by the district courts “in cases where defendants are charged with
4 first-degree murder based on willful, deliberate, and premeditated killing.” *Id.* at 236-37, 994
5 P.2d at 713-15.

6 Seven years later, in Polk v. Sandoval, the United States Court of Appeals for the Ninth
7 Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held
8 that the use of the Kazalyn instruction violated the Due Process Clause of the United States
9 Constitution because the instruction “relieved the state of the burden of proof on whether the
10 killing was deliberate as well as premeditated.” *Id.* at 909. In Polk, the Ninth Circuit took issue
11 with the Nevada Supreme Court’s conclusion in cases decided in the wake of Byford that
12 “giving the Kazalyn instruction in cases predating Byford did not constitute constitutional
13 error.”⁴ *Id.* at 911. According to the Ninth Circuit, “the Nevada Supreme Court erred by
14 conceiving of the Kazalyn instruction issue as purely a matter of state law” insofar as it “failed
15 to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin,
16 and Winship and thus ignored the law the Supreme Court clearly established in those
17 decisions—that an instruction omitting an element of the crime and relieving the state of its
18 burden of proof violates the federal Constitution.” *Id.*

19 A little more than a year after Polk was decided, the Nevada Supreme Court addressed
20 that decision in Nika v. State, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008). In commenting
21 on the Ninth Circuit’s decision in Polk, the Court in Nika pointed out that “[t]he fundamental
22 flaw . . . in Polk’s analysis is the underlying assumption that Byford merely reaffirmed a
23 distinction between ‘willfulness,’ ‘deliberation’ and ‘premeditation.’ ” *Id.* Rather than being
24 simply a clarification of existing law, the Nevada Supreme Court in Nika took the “opportunity
25 to reiterate that Byford announced *a change in state law*.” *Id.* (emphasis added). In rejecting
26 the Ninth Circuit’s reasoning in Polk, the Nevada Supreme Court noted that “[u]ntil Byford,

27
28 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).

APP. 012

1 we had not required separate definitions for ‘willfulness,’ ‘premeditation’ and ‘deliberation’
2 when the jury was instructed on any one of those terms.” *Id.* Indeed, *Nika* explicitly held that
3 “the *Kazalyn* instruction correctly reflected Nevada law before *Byford*.” *Id.* at 1287, 198 P.3d
4 at 850.

5 The Court in *Nika* then went on to affirm its previous holding that *Byford* is not
6 retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing *Rippo v. State*, 122 Nev. 1086, 1097,
7 146 P.3d 279, 286 (2006)). For purposes here, *Nika*’s discussion on retroactivity merits close
8 analysis. The Court in *Nika* commenced its retroactivity analysis with *Colwell v. State*, 118
9 Nev. 807, 59 P.3d 463 (2002). In *Colwell*, the Nevada Supreme Court “detailed the rules of
10 retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if
11 those rules fell within one of two narrow exceptions.” *Nika*, 124 Nev. at 1288, 198 P.3d at 850
12 (citing *Colwell*, 118 Nev. at 820, 59 P.3d at 531). *Colwell*, in turn, was premised on the United
13 States Supreme Court’s decision in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989).

14 In *Teague*, the United States Supreme Court did away with its previous retroactivity
15 analysis in *Linkletter*,⁵ replacing it with “a general requirement of nonretroactivity of new rules
16 in federal collateral review.” *Colwell*, 118 Nev. at 816, 59 P.3d at 469-70 (citing *Teague*, 489
17 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Court in *Teague* held that “new
18 *constitutional* rules of criminal procedure will not be applicable to those cases which have
19 become final before the new rules are announced.” 489 U.S. at 310, 109 S. Ct. at 1075
20 (emphasis added). This holding, however, was subject to two exceptions: first, “a new rule
21 should be applied retroactively if it places ‘certain kinds of primary, private individual conduct
22 beyond the power of the criminal law-making authority to proscribe,’ ” *Id.* at 311, 109 S. Ct.
23 at 1075 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971)
24 (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new
25 constitutional rule of criminal procedure should be applied retroactively if it is a “watershed
26 rule[] of criminal procedure.” *Id.* at 311, 109 S. Ct. at 1076 (citing *Mackey*, 401 U.S. at 693-
27 94, 91 S. Ct. at 1165).

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

APP. 013

1 That Teague was concerned exclusively with new *constitutional* rules of criminal
2 procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the
3 Court in Teague. See Mackey, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan's
4 opinion in Mackey starts off acknowledging the nature of the issue facing the Court. See id. at
5 675, 91 S. Ct. at 1165 ("These three cases have one question in common: the extent to which
6 new *constitutional* rules prescribed by this Court for the conduct of criminal cases are
7 applicable to other such cases which were litigated under different but then-prevailing
8 *constitutional* rules." (emphasis added)). And when outlining the two exceptions that were
9 ultimately adopted by the Court in Teague, Justice Harlan explicitly acknowledged the
10 constitutional nature of these exceptions. See id. at 692, 91 S. Ct. at 1165 ("New 'substantive
11 due process' rules, that is, those that place, *as a matter of constitutional interpretation*, certain
12 kinds of primary, private individual conduct beyond the power of the criminal law-making
13 authority to proscribe, must, in my view, be placed on a different footing." (emphasis added));
14 id. at 693, 91 S. Ct. at 1165 ("Typically, it should be the case that any conviction free from
15 federal *constitutional* error at the time it became final, will be found, upon reflection, to have
16 been fundamentally fair and conducted under those procedures essential to the substance of a
17 full hearing. However, in some situations it might be that time and growth in social capacity,
18 as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will
19 properly alter our understanding of the bedrock procedural elements that must be found to
20 vitiate the fairness of a particular conviction." (emphasis added)).

21 The Nevada Supreme Court's decision in Colwell further reinforces the notion that
22 Teague's exceptions were concerned exclusively with new *constitutional* rules. See 118 Nev.
23 at 817, 59 P.3d at 470. In Colwell, the Court provided examples of "new rules" that fall into
24 either exception. As to the first exception, the Nevada Supreme Court explained that "the
25 Supreme Court's holding that the *Fourteenth Amendment* prohibits states from criminalizing
26 marriages between persons of different races" is an example of a new substantive rule of law
27 that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 692
28 n.7, 91 S. Ct at 1165 n.7) (emphasis added). Noting that this first exception "also covers 'rules

APP. 014

1 prohibiting a certain category of punishment for a class of defendants because of their status,’
2 ” id. (quoting Penry v. Lynaugh, 492 U.S. 302, 329-30, 109 S. Ct. 2934, 2952-53 (1989),
3 overruled on other grounds by Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002)), the
4 Nevada Supreme Court cited “the Supreme Court’s [] holding that the *Eighth Amendment*
5 prohibits the execution of mentally retarded criminals” as another example of a new
6 substantive rule of law that should be applied retroactively on collateral review. Id. (citing
7 Penry, 492 U.S. at 329-30, 109 S. Ct. at 2952-53) (emphasis added). As to the second
8 exception, the Nevada Supreme Court cited “the right to counsel at trial”⁶ as an example of a
9 watershed rule of criminal procedure that should be applied retroactively on collateral review.
10 Id. (citing Mackey, 401 U.S. at 694, 91 S. Ct. at 1165).

11 The Court in Colwell, however, found Teague’s retroactivity analysis too restrictive
12 and, therefore, while adopting its general framework, chose “to provide broader retroactive
13 application of new constitutional rules of criminal procedure than Teague and its progeny
14 require.” Id. at 818, 59 P.3d at 470; see also id. at 818, 59 P.3d at 471 (“Though we consider
15 the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court
16 has applied it so strictly in practice that decisions defining a constitutional safeguard rarely
17 merit application on collateral review.”).⁷ First, the Court in Colwell narrowed Teague’s
18 definition of a “new rule,” which it had found too expansive.⁸ Id. at 819-20, 59 P.3d. at 472
19 (“We consider too sweeping the proposition, noted above, that a rule is new whenever any
20 other reasonable interpretation or prior law was possible. However, a rule is new, for example,
21 when the decision announcing it overrules precedent, or ‘disapproves a practice this Court had
22 arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had

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

25 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
26 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.
27 719, 733, 86 S. Ct. 1772, 1781 (1966)).

28 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.

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1 uniformly approved.’ ” (quoting Griffith v. Kentucky, 479 U.S. 314, 325, 107 S. Ct. 708, 714
2 (1987)). And second, the Court in Colwell expanded on Teague’s two exceptions, which it had
3 found too “narrowly drawn”:

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

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

22 One year later in Clem v. State, the Nevada Supreme Court reaffirmed the modified
23 Teague retroactivity analysis set out in Colwell. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32
24 (2008). Notably, the Court in Clem explained that it is “not required to make retroactive its
25 new rules of state law that do not implicate constitutional rights.” Id. at 626, 81 P.3d at 529.
26 The Court further noted that “[t]his is true even where [its] decisions overrule or reverse prior
27 decisions to narrow the reach of a substantive criminal statute.” Id. The Court then provided
28 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.

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1 Id. at 628, 81 P.3d at 531. Thus, Clem reiterated that if the new rule of criminal procedure is
2 not constitutional in nature, Teague's retroactivity analysis has no relevance. Id. at 628-629,
3 81 P.3d at 531 (“Both Teague and Colwell require limited retroactivity on collateral review,
4 but neither upset the usual rule of nonretroactivity for rules that carry no constitutional
5 significance.”).⁹

6 It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous
7 holding¹⁰ that Byford is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 (“We reaffirm our
8 decisions in Clem and Colwell and maintain our course respecting retroactivity analysis—if a
9 rule is new but not a constitutional rule, it has no retroactive application to convictions that are
10 final at the time of the change in the law.”). The Court in Nika then explained how the change
11 in the law made by Byford “was a matter of interpreting a state statute, not a matter of
12 constitutional law.” Id. Accordingly, because it was not a new *constitutional* rule of criminal
13 procedure of the type contemplated by Teague and Colwell, the change wrought in Byford was
14 not to have retroactive effect on collateral review to convictions that were final before the
15 change in the law.

16 Neither Montgomery nor Welch alter Teague's—and, by extension, Colwell's—
17 underlying premise that the two exceptions to the general rule of nonretroactivity must
18 implicate constitutional concerns before coming into play. In Montgomery, the United States
19 Supreme Court had to consider whether Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455
20 (2012), which held that a mandatory sentence of life without parole for juvenile homicide
21 offenders violates the Eighth Amendment's prohibition on “cruel and unusual punishment,”
22 had to be applied retroactively to juvenile offenders whose convictions and sentences were

23 _____
24 ⁹ Petitioner omits any mention of Colwell or Clem, which were central to Nika's retroactivity analysis regarding convictions that were
25 final at the time of the change in the law. Instead, Petitioner cites Nika's preceding analysis of why “the change effected by Byford
26 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*
27 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,
28 538 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.

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1 final at the time when Miller was decided. __ U.S. at __, 136 S. Ct. at 725. To answer this
2 question, the Court in Montgomery employed the retroactivity analysis set out in Teague. Id.
3 at __, 136 S. Ct. at 728-36. As to whether Miller announced a new “substantive rule of
4 constitutional law,” id. at __, 136 S. Ct. at 734, such that it fell within the first of the two
5 exceptions announced in Teague, the Court in Montgomery commenced its analysis by noting
6 that “the ‘foundation stone’ for Miller’s analysis was [the] Court’s line of precedent holding
7 certain punishments disproportionate when applied to juveniles.” Id. at __, 136 S. Ct. at 732.
8 This “line of precedent” included the Court’s previous decision in Graham v. Florida, 560 U.S.
9 48, 130 S. Ct. 2011 (2010), and Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005), the
10 holdings of which were premised on constitutional concerns—namely, the Eighth
11 Amendment. __ U.S. at __, 136 S. Ct. at 723 (explaining how Graham “held that the Eighth
12 Amendment bars life without parole for juvenile nonhomicide offenders” and how Roper “held
13 that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the
14 time of their crimes”). After elaborating further on the considerations discussed in Roper and
15 Graham that underlay the Court’s holding in Miller, id. at __, 136 S. Ct. at 733-34, the Court
16 went on to conclude the following:

17 Because Miller determined that sentencing a child to life without
18 parole is excessive for all but the rare juvenile offender whose
19 crime reflects irreparable corruption, [] it rendered life without
20 parole *an unconstitutional penalty* for a class of defendants
21 because of their status—that is, juvenile offenders whose crimes
22 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.

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

25 Petitioner, however, was caught up in Montgomery’s preceding jurisdictional analysis
26 in which it had to decide, as a preliminary matter, whether a State is under an “obligation to
27 give a new rule of constitutional law retroactive effect in its own collateral review
28 proceedings.” Id. at __, 136 S. Ct. at 727; see Petition at 15, 17, 22-23. Petitioner makes much

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1 ado about Montgomery's discussion on this front, when he argued that the Court in
2 Montgomery "established a new rule of constitutional law, namely that the 'substantive'
3 exception to the Teague rule applies in state courts as a matter of due process." Petition at 22-
4 23. This assertion, while true, shortchanges the Court's jurisdictional analysis. In addressing
5 the jurisdictional question and discussing Teague's first exception to the general rule of
6 nonretroactivity in collateral review proceedings, Montgomery actually reinforces the notion
7 that Teague's retroactivity analysis is relevant only when considering a new *constitutional*
8 rule. See, e.g., id. at ___, 136 S. Ct. at 727 ("States may not disregard a controlling,
9 *constitutional* command in their own courts." (emphasis added)); id. at ___, 136 S. Ct. at 728
10 (explaining that under the first exception to the general rule of nonretroactivity discussed in
11 Teague, "courts must give retroactive effect to new substantive rules of *constitutional* law"
12 (emphasis added)); id. at ___, 136 S. Ct. at 729 ("The Court now holds that when a new
13 substantive rule of *constitutional* law controls the outcome of a case, the Constitution requires
14 state collateral review courts to give retroactive effect to that rule." (emphasis added)); id. at
15 ___, 136 S. Ct. at 729-30 ("Substantive rules, then, set forth categorical *constitutional*
16 guarantees that place certain criminal laws and punishments altogether beyond the State's
17 power to impose. It follows that when a State enforces a proscription or penalty barred by the
18 *Constitution*, the resulting conviction or sentence is, by definition, unlawful." (emphasis
19 added)); id. at ___, 136 S. Ct. at 730 ("By holding that new substantive rules are, indeed,
20 retroactive, Teague continued a long tradition of giving retroactive effect to *constitutional*
21 rights that go beyond procedural guarantees." (emphasis added)); id. at ___, 136 S. Ct. at 731
22 ("A penalty imposed pursuant to an *unconstitutional* law is no less void because the prisoner's
23 sentence became final before the law was held unconstitutional. There is no grandfather clause
24 that permits States to enforce punishments the *Constitution* forbids." (emphasis added)); id. at
25 ___, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to
26 challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect
27 to a substantive *constitutional* right that determines the outcome of that challenge." (emphasis
28 added)). Montgomery's holding that State courts are to give retroactive effect to new

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1 substantive rules of constitutional law simply makes universal what has already been accepted
2 as common practice in Nevada for almost 15 years—i.e., that new rules of constitutional law
3 are to have retroactive effect in State collateral review proceedings. See Colwell, 118 Nev. at
4 818-21, 59 P.3d at 471-72; Clem, 119 Nev. at 628-29, 81 P.3d at 530-31.

5 Petitioner, however, used Montgomery as a bridge to explain why he believes that the
6 United States Supreme Court’s more recent decision in Welch mandates that Byford is
7 retroactive even as to those convictions that were final at the time that it was decided. Thus,
8 the focal point is not so much Montgomery—which, again, made constitutional (i.e., that State
9 courts must give retroactive effect to new substantive rules of constitutional law) what the
10 Nevada Supreme Court has already accepted in practice—but rather Welch, which according
11 to Petitioner, “indicated that the *only* requirement for determining whether an interpretation of
12 a criminal statute applies retroactivity is whether the interpretation narrows the class of
13 individuals who can be convicted of the crime.” Petition at 9 (emphasis in original). Once
14 again Petitioner shortchanged the Supreme Court’s analysis by making such an unqualified
15 assertion—this time to the point of misrepresenting the Court’s holding in Welch.

16 In Welch, the Court had to consider whether Johnson v. United States, 576 U.S. ___, 135
17 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act
18 (“ACCA”) of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness,
19 is retroactive in cases on collateral review. ___ U.S. at ___, 136 S. Ct. at 1260-61. Not
20 surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in
21 Teague. Id. at ___, 136 S. Ct. at 1264-65. The Court commenced its application of the Teague
22 retroactivity analysis by recognizing that “[u]nder Teague, as a general matter, ‘new
23 *constitutional* rules of criminal procedure will not be applicable to those cases which have
24 become final before the new rules are announced,’ ” id. at ___, 136 S. Ct. at 1264 (quoting
25 Teague, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was
26 subject to the two exceptions that have already been discussed at great length above. Finding
27 it “undisputed that Johnson announced a new rule,” the Court explained that the specific

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1 question at issue was whether this new rule was “substantive.” *Id.*¹¹ Then, upon concluding
2 that “Johnson changed the substantive reach of the [ACCA]” by “ ‘altering the range of
3 conduct or the class of persons that the [Act] punishes,’ ” the Court held that “the rule
4 announced in Johnson is substantive.” *Id.* at ___, 136 S. Ct. at 1265 (quoting Schriro v.
5 Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)).

6 Salient in the Court’s analysis was the principle announced in Schriro, that “[a] rule is
7 substantive rather than procedural if it alters the range of conduct or the class of persons that
8 the law punishes.” 542 U.S. at 353, 124 S. Ct. at 2523; see Welch, ___ U.S. at ___, 136 S. Ct. at
9 1264-65 (citing Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the
10 Court in Schriro relied upon Bousley v. United States, which, in turn, relied upon Teague in
11 explaining the “distinction between substance and procedure” as far as new rules of
12 constitutional law are concerned. See 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998)
13 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle
14 relied on by the Court in Welch in holding that Johnson was a new substantive rule is
15 ultimately rooted in Teague, which, as discussed above, is concerned exclusively with new
16 rules of *constitutional* import. That is to say, if the rule is new, but not constitutional in nature,
17 there is no need to resort to either of the Teague exceptions.

18 Juxtaposing the invalidation of the residual clause of the ACCA by Johnson with the
19 change in Nevada law on first-degree murder¹² effected by Byford will help drive home the
20 point that the former was premised on constitutional concerns not present in the latter. This, in
21 turn, will help illustrate why Teague’s retroactivity analysis has relevance only to the former.
22 In Johnson, the United States Supreme Court considered whether the residual clause of the
23 ACCA violated “the Constitution’s prohibition of vague criminal laws.” 576 U.S. at ___, 135
24 S. Ct. at 2555. The “residual clause” is part of the ACCA’s definition of the term “violent
25 felony”:

26 ///

27 _____
28 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).

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1 the term ‘violent felony’ means any crime punishable by
2 imprisonment for a term exceeding one year . . . that—

3 (i) has as an element the use, attempted use, or threatened use of
4 physical force against the person of another; or

5 (ii) is burglary, arson, or extortion, involves use of explosives, *or*
6 *otherwise involves conduct that presents a serious potential risk*
7 *of physical injury to another;*

8 18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of §
9 924(e)(2)(B) that came to be known as the “residual clause.” Johnson, 576 U.S. at ___, 135 S.
10 Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more
11 convictions for a “violent felony” (defined above) is subject to a minimum term of
12 imprisonment of 15 years to a maximum term of life. § 924(e)(1); Johnson, 576 U.S. at ___,
13 135 S. Ct. at 2556. Thus, a conviction for a felony that “involves conduct that presents a serious
14 potential risk of physical injury”—i.e., a felony that fell under the residual clause—could very
15 well have made the difference between serving a maximum of 10 years in prison versus a
16 maximum of life in prison. See Johnson, 576 U.S. at ___, 135 S. Ct. at 2555 (“In general, the
17 law punishes violation of this ban by up to 10 years’ imprisonment. [] But if the violator has
18 three or more earlier convictions for . . . a ‘violent felony,’ the [ACCA] increases his prison
19 term to a minimum of 15 years and a maximum of life.” (internal citation omitted)).

20 To understand the issue that arose with the residual clause, it helps to understand the
21 context in which it was applied. See Welch, ___ U.S. at ___, 136 S. Ct. at 1262 (“The vagueness
22 of the residual clause rests in large part on its operation under the categorical approach.”). The
23 United States Supreme Court employs what is known as the categorical approach in deciding
24 whether an offense qualifies as a violent felony under § 924(e)(2)(B). Id. at ___, 136 S. Ct. at
25 1262 (citing Johnson, 576 U.S. at ___, 135 S. Ct. at 2557). Under the categorical approach, “a
26 court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines
27 the offense and not in terms of how an individual offender might have committed it on a
28 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

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1 ordinary case,’ and to judge whether that abstraction presents a serious potential risk of
2 physical injury.” Id. (quoting James v. United States, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597
3 (2007)).

4 The Court in Johnson found that “[t]wo features of the residual clause conspire[d] to
5 make it unconstitutionally vague.” Id. First, that the residual clause left “grave uncertainty
6 about how to estimate the risk posed by a crime”; and second, that it left “uncertainty about
7 how much risk it takes for a crime to qualify as a violent felony.” Id. at ___, 135 S. Ct. at 2557-
8 58. Because of these uncertainties, the Court in Johnson explained that “[i]nvoking so
9 shapeless a provision to condemn someone to prison for 15 years to life does not comport with
10 the Constitution’s guarantee of due process.” Id. at ___, 135 S. Ct. at 2560. Accordingly, “[t]he
11 Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine,
12 a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect
13 to the Federal Government) and the *Fourteenth Amendment* (with respect to the States).”
14 Welch, ___ U.S. ___, 136 S. Ct. at 1261-62 (emphasis added).

15 Unlike the invalidation of the residual clause of the ACCA on constitutional grounds,
16 the change in the law on first-degree murder effected by Byford implicated no constitutional
17 concerns. The Nevada Supreme Court in Nika explained in very clear terms that its “decision
18 in Byford to change Nevada law and distinguish between ‘willfulness,’ ‘premeditation,’ and
19 ‘deliberation’ was a matter of interpreting a state statute, *not a matter of constitutional law.*”
20 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in Nika
21 noted how other jurisdictions “differ in their treatment of the terms ‘willful,’ ‘premeditated,’
22 and ‘deliberate’ for first-degree murder.” Id.; see id. at 1288-89, 198 P.3d at 850-51 (“As
23 explained earlier, several jurisdictions treat these terms as synonymous while others, for
24 example California and Tennessee, ascribe distinct meanings to these words. These different
25 decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional
26 law.”).

27 Conflating the change effected by Johnson with that made by Byford ignores a
28 fundamental legal distinction between the two. Because the residual clause was found

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1 unconstitutionally void for vagueness, defendants whose sentences were increased on the basis
2 of this clause were sentenced on the basis of an unconstitutional provision and, thus, were
3 unconstitutionally sentenced. Such a sentence is, as the Court in Montgomery would put it,
4 “not just erroneous but contrary to law and, as a result, void.” See ___ U.S. at ___, 136 S. Ct. at
5 731 (citing Ex parte Siebold, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the
6 change effected by Byford. At no point has Nevada’s law on first-degree murder been found
7 unconstitutional. Defendants who were convicted of first-degree murder under NRS
8 200.030(1)(a) prior to Byford were convicted under a constitutionally valid statute and, thus,
9 were lawfully convicted. See Nika, 124 Nev. at 1287, 198 P.3d at 850 (explaining that “the
10 Kazalyn instruction correctly reflected Nevada law before Byford”).

11 It was the constitutional rights that underlay Johnson’s invalidation of the residual
12 clause that made it a “substantive rule of constitutional law.” See Montgomery, ___ U.S. at ___,
13 136 S. Ct. at 729. And as a “new” substantive rule of constitutional law, it fell within the first
14 of the two exceptions to Teague’s general rule of nonretroactivity. Because *no* constitutional
15 rights underlay the Nevada Supreme Court’s change in Nevada’s law on first-degree murder,
16 the new rule announced in Byford does not fall within Teague’s “substantive rule” exception.
17 The constitutional underpinnings of Johnson’s invalidation of the residual clause and the legal
18 ramifications stemming from this (i.e., that those whose sentences were increased pursuant to
19 an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to
20 Welch’s holding that the change effected by Johnson is retroactive under the Teague
21 framework.

22 Petitioner’s reliance on Welch, however, goes beyond the Court’s holding and *ratio*
23 *decidendi*. In his exposition of Welch, Petitioner goes on to describe the Court’s treatment of
24 the arguments raised by *Amicus*. See Petition at 16-17; Welch, ___ U.S. at ___, 136 S. Ct. at
25 1265-68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a
26 different understanding of the Teague framework, “apply[ing] that framework by asking
27 whether the constitutional right underlying the new rule is substantive or procedural”; (2) that
28 a rule is only substantive if it limits Congress’ power to legislate; and (3) that only “statutory

APP. 024

1 construction cases are substantive because they define what Congress always intended the law
2 to mean” as opposed to cases invalidating statutes (or parts thereof). Welch, __ U.S. at __, 136
3 S. Ct. at 1265-68. It was in addressing this third argument that the Court set out the “test” for
4 determining when a rule is substantive that Petitioner’s argument hinges on:

5 Her argument is that statutory construction cases are substantive
6 because they define what Congress always intended the law to
7 mean—unlike Johnson, which struck down the residual clause
8 regardless of Congress’ intent.

9 That argument is not persuasive. Neither Bousley nor any other
10 case from this Court treats statutory interpretation cases as a
11 special class of decisions that are substantive because they
12 implement the intent of Congress. Instead, decisions that interpret
13 a statute are substantive if and when they meet the normal criteria
14 for a substantive rule: when they ‘alte[r] the range of conduct or
15 the class of persons that the law punishes.’

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

18 What is critically important, and new, about Welch is that it
19 explains, for the very first time, that the *only* test for determining
20 whether a decision that interprets the meaning of a statute is
21 substantive, and must apply retroactively to all cases, is whether
22 the new interpretation meets the criteria for a substantive rule,
23 namely whether it alters the range of conduct or the class of
24 persons that the law punishes. Because this aspect of *Teague* is
25 now a matter of constitutional law, state courts are required to
26 apply this rule from *Welch*.

27 Petition at 18 (emphasis in original).

28 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)))

APP. 025

1 Interestingly, though, in setting out this test, the Court quoted verbatim from the very
2 portion of its decision in Schriro that has been cited above, see supra at 15, for the proposition
3 that the key principle relied on by the Welch Court—in holding that Johnson was a new
4 substantive rule—is ultimately rooted in Teague, which, again, is concerned exclusively with
5 new rules of constitutional import. Thus, to the extent the “test” relied on by Petitioner is
6 grounded on this text from Schriro, Petitioner takes it out of context by ignoring the fact that
7 this statement in Schriro was based on Bousley’s discussion of the substance/procedure
8 distinction respecting new rules of constitutional law, which was, in turn, premised largely on
9 Teague. See Bousley, 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing Teague, 489 U.S. at 311,
10 109 S. Ct. at 1075). But, to the extent that this “test” is unmoored from the constitutional
11 underpinnings of Teague’s retroactivity analysis, it is, after all, nothing more than dictum.
12 Either way, Petitioner’s reliance on this language from Welch is misguided.

13 Because neither Montgomery nor Welch alter Teague’s retroactivity analysis, the
14 Nevada Supreme Court’s decision in Colwell, which adopted Teague’s framework, remains
15 valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in
16 Nika, Byford has no retroactive application on collateral review to convictions, like
17 Petitioner’s, that became final before the new rule was announced. 124 Nev. at 1287-89, 198
18 P.3d at 850-51. Consequently, Petitioner’s reliance on Montgomery and Welch to meet NRS
19 34.726(1)(a)’s criterion fails.

20 **2. Petitioner Has Failed To Establish That Dismissal Of The Petition As Untimely** 21 **Will Unduly Prejudice Him.**

22 Turning now to NRS 34.726(1)’s second prong—i.e., undue prejudice—necessary to
23 establish good cause, this Court finds that Petitioner has failed to establish that he was unduly
24 prejudiced by the use of the Kazalyn instruction. To meet NRS 34.726(1)(b)’s criterion, “a
25 petitioner must show that errors in the proceedings underlying the judgment worked to the
26 petitioner’s actual and substantial disadvantage.” State v. Huebler, 128 Nev. ___, ___, 275 P.3d
27 91, 95 (2012) (citing Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 716 (1993)).
28

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

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

22 Chacon v. State, Docket No. 24085 at *3-4 (Order Dismissing Appeal, filed on January 20,
23 1994). Particularly significant for purposes of “deliberation” (the element underemphasized
24 by the Kazalyn instruction) is the fact that Petitioner returned to his apartment after the
25 altercation—reflecting that Petitioner had “time for the passion to subside and deliberation to
26 occur,” see Byford v. State, 994 P.2d at 714, 116 Nev. at 236—before returning to the 7-11 in
27 order to seek out the victim and carry out his design.

28 Petitioner’s argument fails because he cannot establish prejudice on the basis of the
29 Kazalyn instruction due to the fact that the evidence clearly established first-degree murder on
30 a theory of felony murder. See Moore v. State, 2017 Nev. Unpub. LEXIS 224, *2, 2017 WL
31 1397380 (Nev. Apr. 14, 2017) (explaining that appellant could not establish that he was
32 prejudiced by the Kazalyn instruction “because he did not demonstrate that the result of trial
33 would have been different considering that the evidence clearly establish[ed] first-degree

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

12 Based on the foregoing, the Court finds that the instant Petition is untimely pursuant to
13 NRS 34.726(1) and that Petitioner has failed to establish “good cause for delay.” The United
14 States Supreme Court’s decisions in Montgomery and Welch do not provide a new legal basis
15 to satisfy NRS 34.726(1)(a)’s criterion that the delay not be the fault of the petitioner. And
16 Petitioner has also failed to establish NRS 34.726(1)(b)’s criterion inasmuch as he has failed
17 to establish that he was unduly prejudiced by the use of the Kazalyn instruction. That being
18 the case, this Court denies the Petition on the basis that it is procedurally barred under NRS
19 34.726(1).

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

22 The Court finds that the Petition is successive under NRS 34.810(2), and Petitioner has
23 failed to establish good cause and actual prejudice. NRS 34.810(2) requires the district court
24 to dismiss “[a] second or successive petition if the judge or justice determines that it fails to
25 allege new or different grounds for relief and that the prior determination was on the merits or,
26 if new and different grounds are alleged, the judge or justice finds that the failure of the
27 petitioner to assert those grounds in a prior petition constituted an abuse of the writ.” And as
28 with NRS 34.726(1), the procedural bar described in NRS 34.810(2) is mandatory. See Evans

APP. 028

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

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

13 While Petitioner’s claim attacking the Kazalyn instruction has been raised twice
14 before,¹⁴ this is the first time that he has attacked it on the basis of the United States Supreme
15 Court’s decisions in Montgomery and Welch. To the extent that this claim constitutes a “new
16 and different” ground for relief, Court finds that Petitioner’s failure to raise it in a prior petition
17 and the disingenuous nature of the argument constitutes an abuse of the writ. And while NRS
18 34.810(3) affords Petitioner the opportunity to overcome the procedural bar described in
19 subsection (2), Petitioner failed to establish either good cause or actual prejudice for the very
20 same reasons that he failed to establish good cause for delay under NRS 34.726(1). See supra
21 at 4-22. That being the case, this Court denies the Petition on the basis that it is procedurally
22 barred under NRS 34.810(2).

23 ///

24 ///

25 ///

26 ///

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

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

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

4 This Court finds since more than 23 years have elapsed between the Nevada Supreme
5 Court’s decision on Petitioner’s direct appeal of the judgement of conviction and the filing of
6 the instant petition laches applies. NRS 34.800(2) creates a rebuttable presumption of
7 prejudice to the State if “[a] period exceeding 5 years [elapses] between the filing of a
8 judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct
9 appeal of a judgment of conviction and the filing of a petition challenging the validity of a
10 judgment of conviction.” The Nevada Supreme Court observed in Groesbeck v. Warden, 100
11 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how “petitions that are filed many years after
12 conviction are an unreasonable burden on the criminal justice system” and that “[t]he necessity
13 for a workable system dictates that there must exist a time when a criminal conviction is final.”
14 To invoke NRS 34.800(2)’s presumption of prejudice, the statute requires that the State
15 specifically plead laches.

16 The State affirmatively plead laches in this case. In order to overcome the presumption
17 of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage
18 of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on
19 Petitioner’s representations and on what he has filed with this Court, Petitioner has failed to
20 meet that burden. That being the case, this Court dismisses the Petition pursuant to NRS
21 34.800(2).

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

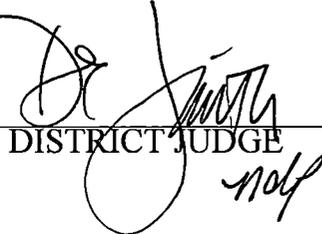
28 ///

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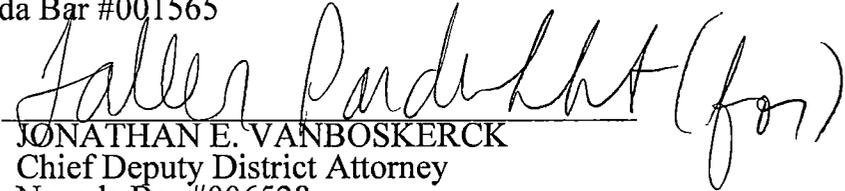
ORDER

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

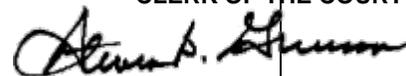
CERTIFICATE OF SERVICE

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

91F06416X/mah/L1



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1 PET
2 RENE L. VALLADARES
3 Federal Public Defender
4 Nevada State Bar No. 11479
5 LORI C. TEICHER
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8 411 E. Bonneville, Ste. 250
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10 (702) 388-6577
11 (702) 388-6419 (Fax)
12 Lori_Teicher@fd.org

13 Attorney for Petitioner Rome Chacon

14 EIGHTH JUDICIAL DISTRICT COURT
15 CLARK COUNTY

16 ROME RICHARD CHACON,

17 Petitioner,

18 v.

19 THE STATE OF NEVADA, et al.,

20 Respondents.

Case No. **C105423**

Dept. No. 11

Date of Hearing:

Time of Hearing:

(Not a Death Penalty Case)

21 PETITION FOR WRIT OF HABEAS CORPUS

22 (POST-CONVICTION)

23 1. Name of institution and county in which you are presently imprisoned
24 or where and how you are presently restrained of your liberty: Transferred by NDOC
to Massachusetts Correctional Institution - Concord in Concord, MA.

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

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

2 4. Case Number: C105423

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

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

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

13 If "yes", list crime, case number and sentence being served at this time:

14 Nature of offense involved in conviction being challenged:

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

18 8. What was your plea?

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

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

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

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

27

APP. 033

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

2 12. Did you appeal from the judgment of conviction? Yes X

3 No _____

4 13. If you did appeal, answer the following:

5 (a) Name of Court: Nevada Supreme Court

6 (b) Case number or citation: 24085

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

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

9 15. Other than a direct appeal from the judgment of conviction
10 and sentence, have you previously filed any petitions, applications or
11 motions with respect to this judgment in any court, state or federal?

12 Yes X _____ No _____

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

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

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

18 (3) Ground raised:

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

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

23 A. TRIAL COUNSEL MADE MISTAKES OF OMISSION AND COMMISSION.

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

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

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

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

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

5 (5) Result: Affirmed

6 (6) Date of Result: Case No. 39149, February 14, 2002; Case No.
7 39384, February 27, 2003.

8 (7) If known, citations of any written opinion or date of orders
9 entered pursuant to such result: Chacon's original petition was never
10 ruled upon. Chacon filed another petition, which the district court found
11 to be procedurally barred on March 5, 1999. Chacon filed a timely Notice
12 of Appeal in proper person in the Nevada Supreme Court, Case No.
13 33939, on March 18, 1999. On May 22, 2000, Chacon filed a pro se Writ
14 of Mandamus as the court never ruled upon his timely petition. The
15 Nevada Supreme Court remanded, finding that Chacon's petition had
16 been pending in the district court since 1995 and should be ruled upon.
17 The district court did not appoint counsel, held no argument and denied
18 the petition on October 4, 2000. Chacon again filed a timely appeal and
19 a proper person brief to the Nevada Supreme Court, which was affirmed.

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

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

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

24 (3) Grounds raised:

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

APP. 035

1 GROUND TWO: The trial court erred by denying defendant's motion in limine to prevent
2 impeachment of the defendant by a prior felony conviction for possession
3 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.

4 GROUND THREE: The instruction on premeditation given during trial improperly minimized
5 the state's burden of proof. As a result of the erroneous instruction, Mr.
6 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.

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

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

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

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

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

16 (6) Date of result: September 26, 2007

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

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

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

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

27 (3) Grounds raised:

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

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

6 (6) Date of result: August 20, 2010

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

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

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

16 b. The proceedings in which these grounds were raised: Chacon's
17 direct appeal; it was also raised in the second state post-
18 conviction petition and in federal district court.

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

20 Ground One is based upon a previously unavailable constitutional claim. *Clem*
21 *v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one year to
22 file a petition from the date that the claim has become available. *Rippo v. State*, 132
23 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds, Rippo v. Baker*,
24 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court
25 decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United*
26 *States*, 136 S. Ct. 1257 (2016). *Montgomery* established a new rule of constitutional
27 law, namely that the “substantive rule” exception to the *Teague* rule applies in state

APP. 037

1 courts as a matter of due process. Furthermore, *Welch* clarified that this
2 constitutional rule includes the Supreme Court's prior statutory interpretation
3 decisions. Moreover, *Welch* established that the only requirement for an
4 interpretation of a statute to apply retroactively under the "substantive rule"
5 exception to *Teague* is whether the interpretation narrowed the class of individuals
6 who could be convicted under the statute.

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

11 19. Are you filing this petition more than 1 year following the filing of the
12 judgment of conviction or the filing of a decision on direct appeal? Yes If so, state
13 briefly the reasons for the delay.

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

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

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

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

APP. 039

1 under the “substantive exception” to the *Teague* retroactivity rules is a matter of due
2 process. Second, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme
3 Court clarified that the “substantive exception” of the *Teague* rules includes
4 “interpretations” of criminal statutes. It further indicated that the *only* requirement
5 for determining whether an interpretation of a criminal statute applies retroactively
6 is whether the interpretation narrows the class of individuals who can be convicted
7 of the crime.

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

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

25 Petitioner can also establish good cause to overcome the procedural bars. The
26 new constitutional arguments based upon *Montgomery* and *Welch* were not
27

APP. 040

1 previously available. Petitioner has filed the petition within one year of *Welch*.
2 Petitioner can also show actual prejudice.

3 Accordingly, the petition should be granted.

4 I. BACKGROUND

5 A. *Kazalyn* First-Degree Murder Instruction

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

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

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

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

24 (Jury Instructions, Instruction No. 9.)

25 B. Appeal and Date Conviction Became Final

26 According to the verdict form, the jury found Chacon guilty of Burglary With
27 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

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

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

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

7 C. *Byford v. State*

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

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

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

26 *Id.* The court emphasized that deliberation remains a “critical element of the *mens*
27 *rea* necessary for first-degree murder, connoting a dispassionate weighting process

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1 and consideration of consequences before acting.” *Id.* at 714. It is an element that
2 “must be proven beyond a reasonable doubt before an accused can be convicted or
3 first degree murder.” *Id.* at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d
4 278, 280 (1981)).

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

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

24 The NSC explained that the decision in *Byford* was a clarification of the law as
25 it existed prior to *Byford* because the case law prior to *Byford* was “divided on the
26 issue”:
27

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1 This does not mean, however, that the reasoning of
2 *Byford* is unprecedented. Although *Byford* expressly
3 abandons some recent decisions of this court, it also relies
4 on the longstanding statutory language and other prior
5 decisions of this court in doing so. Basically, *Byford*
6 *interprets and clarifies* the meaning of a preexisting
7 statute by resolving conflict in lines in prior case law.
8 Therefore, its reasoning is not altogether new.

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

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

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

16 In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S.
17 225 (2001). In *Fiore*, the Supreme Court held that due process requires that a
18 clarification of the law apply to all convictions, even a final conviction that has been
19 affirmed on appeal, where the clarification reveals that a defendant was convicted
20 “for conduct that [the State’s] criminal statute, as properly interpreted, does not
21 prohibit.” *Id.* at 228.

22 In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S.
23 835 (2003). In *Bunkley*, the Court held that, as a matter of due process, a change in
24 state law that narrows the category of conduct that can be considered criminal, had
25 to be applied to convictions that had yet to become final. *Id.* at 840-42.

26 E. *Nika v. State*

27 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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1 In response to *Polk*, the NSC in 2008 issued *Nika v. State*, 124 Nev. 1272, 198
2 P.3d 839, 849 (2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk's*
3 conclusion that a *Winship* violation occurred. The court stated that, rather than
4 implicate *Winship* concerns, the only due process issue was the retroactivity of
5 *Byford*. It reasoned that it was within the court's power to determine whether *Byford*
6 represented a clarification of the interpretation of a statute, which would apply to
7 everybody, or a change in the interpretation of a statute, which would only apply to
8 those convictions that had yet to become final. *Id.* at 849-50. The court held that
9 *Byford* represented a change in the law as to the interpretation of the first-degree
10 murder statute. *Id.* at 849-50. The court specifically "disavow[ed]" any language in
11 *Garner* indicating that *Byford* was anything other than a change in the law, stating
12 that language in *Garner* indicating that *Byford* was a clarification was dicta. *Id.* at
13 849-50.

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

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

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

25 On January 25, 2016, the United States Supreme Court decided *Montgomery*
26 *v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, the Court addressed the question
27 of whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited under the

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

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

16 The primary question the Court addressed in *Montgomery* was whether it had
17 jurisdiction to review the question. The Court stated that it did, holding “when a new
18 substantive rule of constitutional law controls the outcome of a case, the Constitution
19 requires state collateral review courts to give retroactive effect to that rule.”
20 *Montgomery*, 136 S. Ct. at 729. “*Teague’s* conclusion establishing the retroactivity of
21 new substantive rules is best understood as resting upon constitutional premises.”
22 *Id.* “States may not disregard a controlling constitutional command in their own
23 courts.” *Id.* at 727 (citing *Martin v. Hunter’s Lessess*, 1 Wheat. 304, 340-41, 344
24 (1816)).

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

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1 On April 18, 2016, the United States Supreme Court decided *Welch v. United*
2 *States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether
3 *Johnson v. United States*, which held that the residual clause in the Armed Career
4 Criminal Act was void for vagueness under the Due Process Clause, applied
5 retroactively to convictions that had already become final at the time of *Johnson*.
6 *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether
7 *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a
8 substantive rule as one that “alters the range of conduct or the class of persons that
9 the law punishes.” *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)).
10 “This includes decisions that narrow the scope of a criminal statute by interpreting
11 its terms, as well as constitutional determinations that place particular conduct or
12 persons covered by the statute beyond the State’s power to punish.” *Id.* at 1265
13 (quoting *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the
14 Court concluded that *Johnson* was substantive. *Id.*

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

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

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1 (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following
2 parenthetical as further support: “A decision that modifies the elements of an offense
3 is normally substantive rather than procedural.” The Court pointed out that *Bousley*
4 did not fit under the *amicus*’s *Teague* framework as Congress amended § 924(c)(1) in
5 response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

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

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

14 Neither *Bousley* nor any other case from this Court treats
15 statutory interpretation cases as a special class of decisions
16 that are substantive because they implement the intent of
17 Congress. Instead, decisions that interpret a statute are
18 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.”

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

20 II. ANALYSIS

21 A. *Welch* And *Montgomery* Establish That the Narrowing 22 Interpretation Of The First-Degree Murder Statute In *Byford* 23 Must Be Applied Retroactively in State Court To Convictions That Were Final At The Time *Byford* Was Decided

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

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

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

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

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

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

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

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

24 This error had a prejudicial impact on this case. As discussed previously, the
25 evidence presented to the jury was not sufficient to establish that Chacon was even
26

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

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

4 Insufficient evidence was produced at trial to support a finding that Chacon
5 murdered Mr. Warianaka. However, even if Chacon did murder Mr. Warianaka,
6 which Chacon does not admit or concede, he has still been unconstitutionally
7 convicted of first degree murder. The one central fact that permeates the proffered
8 evidence is that the killing of Mr. Warianaka was performed impulsively, in the heat
9 of passion, and aroused by a confrontation that occurred in the minutes prior to the
10 slaying. As such, the death of Mr. Warianaka was not performed willfully,
11 deliberately, and with premeditation.
12

13 No direct or physical evidence existed that could be used by the State to
14 establish that Chacon acted willfully, deliberately, or with premeditation in carrying
15 out the murder of Mr. Warianaka. The State again relied on testimonial evidence to
16 establish this essential element and obtain a first degree murder conviction. The
17 State relied on Tammy Manley's account of the evening of the homicide.
18

19 Tammy Manley testified that she heard the man she believed to have stabbed
20 Mr. Warianaka scream, "I am going to kill you" upon his entrance into the store.
21 (Trial Testimony at 96.) Ms. Manley claimed that an African-American male then
22 pursued Mr. Warianaka into the store, wielding a knife. (*Id.* at 96, 145.) Other
23 witnesses, however, remember a different version of events. Ms. McGregor, a
24 customer who claimed to have witnessed the actual slaying of Mr. Warianaka,
25 claimed that Mr. Warianaka was the individual screaming as he entered the store.
26
27

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1 (*Id.* at 218.) John Stevenson, a clerk that was also present inside the 7-11, also
2 testified that Mr. Warianaka was screaming when he entered the store. (*Id.* at 205.)
3 Neither Ms. McGregor or Mr. Stevenson claimed that anyone threatened Mr.
4 Warianaka at any time.
5

6 Not only does the evidence offered by the State insufficiently establish that the
7 murder of Mr. Warianaka was performed willfully, deliberately, and with
8 premeditation, other evidence directly contradicts this assertion. Chacon has
9 consistently maintained that he was in a prior altercation with Mr. Warianaka.
10 (*Trial Testimony* at 592.) According to testimony taken from Thaddeus Hashley,
11 Chacon asked his friends to return with him to the convenience store parking lot “in
12 case he were to get into a fight.” (*Id.* at 397). Mr. Hasley testified that Chacon had
13 claimed he had been in a verbal confrontation with another individual, and that he
14 wanted his friends with him because he was afraid Mr. Warianaka and his friends
15 might “beat him up or something.” (*Id.* at 675.) Mr. Hasley further testified that he
16 never heard anyone saying anything about killing anyone, and that he did not believe
17 Chacon intended to kill anyone that night. (*Id.* at 419.)
18

19
20 Upon Chacon’s return to the 7-11 with his friends, a physical confrontation
21 broke out between Chacon and Mr. Warianaka. (*Id.* at 592.) Eyewitness testimony
22 from Ms. Manley (*Id.* at 124), Mr. Stephenson (*Id.* at 203), and Mr. Hashley (*Id.* at
23 402) describe the confrontation while testifying at Chacon’s trial. All of the
24 participants at the scene were also intoxicated. Mr. Hashley, who was present during
25 the altercation, claimed to have drunk approximately ten beers that night. (*Id.* at
26
27

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1 418.) When asked if the other individuals had drank as much alcohol as he did, he
2 responded, “At least.” (*Id.*) This evidence, coupled with the fact that Chacon “never
3 intended to kill” Mr. Warianaka, demonstrates that the killing of Mr. Warianaka was
4 an impulsive killing, done during the heat of passion. This was not a cool, calculated,
5 deliberate type of killing, but rather a rash and impulsive act which was at the most
6 second degree murder.
7

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

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

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

26 The decisions in *Montgomery* and *Welch* provide good cause for overcoming the
27 procedural bars. *Montgomery* established a new rule of constitutional law, namely

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1 that the “substantive rule” exception to the *Teague* rule applies in state courts as a
2 matter of due process. Furthermore, *Welch* clarified that this constitutional rule
3 includes the Supreme Court’s prior statutory interpretation decisions. Moreover,
4 *Welch* established that the only requirement for an interpretation of a statute to
5 apply retroactively under the “substantive rule” exception to *Teague* is whether the
6 interpretation narrowed the class of individuals who could be convicted under the
7 statute. These rules were not previously available to petitioner. Finally, petitioner
8 submitted this petition within one year of *Welch*, which was decided on April 18,
9 2016.

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

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

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

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1 Finally, petitioner can establish actual prejudice for the reasons discussed on
2 pages 20 to 21.

3 **III. PRAYER FOR RELIEF**

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

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

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

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

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

16 DATED this 18th day of April, 2017.

17 Respectfully submitted,
18 RENE L. VALLADARES
Federal Public Defender

19 /s/ Lori C. Teicher

20 LORI C. TEICHER

21 First Assistant Federal Public Defender
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23
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VERIFICATION

1
2 Under penalty of perjury, the undersigned declares that he is counsel for the
3 petitioner named in the foregoing petition and knows the contents thereof; that the
4 pleading is true of his own knowledge except as to those matters stated on
5 information and belief and as to such matters he believes them to be true. Petitioner
6 personally authorized undersigned counsel to commence this action.

7 DATED this 18th day of April, 2017.

8
9 /s/ Lori C. Teicher _____

10 LORI C. TEICHER

11 First Assistant Federal Public Defender
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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that she is an employee in the office of the
3 Federal Public Defender for the District of Nevada and is a person of such age and
4 discretion as to be competent to serve papers.

5 That on April 18, 2017, she served a true and accurate copy of the foregoing
6 NOTICE OF APPEARANCE by placing it in the United States mail, first-class
7 postage paid, addressed to:

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

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

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

17
18 /s/ Leianna Jeske
19 An Employee of the Federal Public
20 Defender, District of Nevada
21
22
23
24
25
26
27

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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 *J. Richard*
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 following¹: (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

¹Chacon 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.

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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

²Chacon'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).

³Jury 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...)

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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

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.

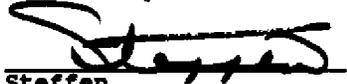
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what had happened and asked them to return to the 7-11 Store to fight the victim. Approximately ten minutes later, Chacon and his four friends returned to the 7-11 Store looking for the victim. Upon their arrival, Chacon and his friend Ken approached 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.

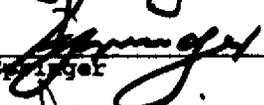
We have considered Chacon's other contentions and conclude that they lack merit. Accordingly, we

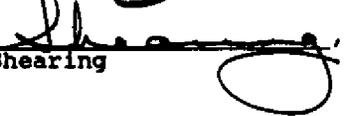
ORDER this appeal dismissed.


_____, C.J.
Rose


_____, J.
Steffen


_____, J.
Young


_____, J.
Springer


_____, J.
Shearing

cc: Hon. Addelias 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

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:

- Certified copy of Judgment and copy of Order.
- Certified copy of Judgment and copy of Opinion.
- Certified copy of Judgment and Opinion.
- Receipt for Remittitur. (County Clerk please sign below and return. Retain the attached copy for your records.)
- Record on Appeal. Volumes.....
- 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 10 1994

1077

County Clerk

FILED

DEC 9 10 55 AM '92

Loretta B. ...
CLERK

1 REX BELL
2 DISTRICT ATTORNEY
3 Nevada Bar #001799
4 200 S. Third Street
5 Las Vegas, Nevada 89155
6 (702) 455-4711
7 Attorney for Plaintiff
8 THE STATE OF NEVADA

DISTRICT COURT
CLARK COUNTY, NEVADA

10	THE STATE OF NEVADA,)	CASE NO. C105423
11	Plaintiff,)	DEPT. NO. XI
12	-vs-)	DOCKET NO. S
13	ROME RICHARD CHACON,)	
14	aka Richard Chacon)	
15	#1022841)	
16	Defendant,)	

JUDGMENT OF CONVICTION (JURY TRIAL)

18 WHEREAS, on the 31st day of March, 1992, the Defendant ROME
19 RICHARD CHACON aka Richard Chacon, entered a plea of not guilty to
20 the crimes of COUNT I - BURGLARY WITH USE OF A DEADLY WEAPON
21 (Felony) and COUNT II - MURDER WITH USE OF A DEADLY WEAPON (Felony)
22 committed on the 20th day of September, 1991, in violation of NRS
23 205.060, 193.165, 200.010, 200.030, 193.165, and the matter having
24 been tried before a jury, and the defendant being represented by
25 counsel and having been found guilty of the crimes of COUNT I -
26 BURGLARY WITH USE OF A DEADLY WEAPON (Felony) and COUNT II - MURDER
27 OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); and

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

CEDE

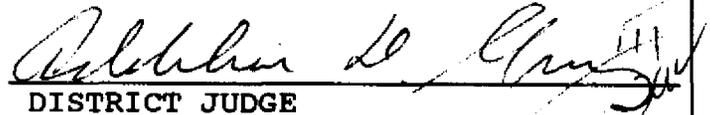
DEC 02 1992

APP. 063

1 defendant being present in Court with his counsel, TERRY JACKSON,
2 Deputy Public Defender, and KARL M. LEDEBOHM, Deputy District
3 Attorney also being present; the above entitled Court did adjudge
4 defendant guilty thereof by reason of said trial and verdict and
5 sentenced defendant to the Nevada State Prison on Count I - FIVE
6 (5) years for BURGLARY plus a consecutive FIVE (5) years for USE OF
7 A DEADLY WEAPON and on Count II - LIFE WITHOUT THE POSSIBILITY OF
8 PAROLE for MURDER OF THE FIRST DEGREE plus a consecutive LIFE
9 WITHOUT THE POSSIBILITY OF PAROLE for USE OF A DEADLY WEAPON.
10 Count II to run concurrent to Count I. Pay \$518.71 restitution and
11 \$25.00 Assessment Fee. Credit for time served 271 days.

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

15 DATED this 9th day of December, 1992, in the City of Las
16 Vegas, County of Clark, State of Nevada.

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DISTRICT JUDGE

27 92-105423X/kjh
28 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. Yocum
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

Parraguirre

Stiglich, J.

Stiglich

Silver, J.

Silver

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

APP. 065

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

APP. 066

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 74554-COA

FILED

MAR 20 2019

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

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).

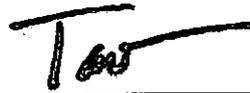
¹Chavez did not appeal his conviction.

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.

APP. 067

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

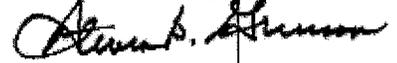


_____, J.
Bulla

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

APP. 068
COPY

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



1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 CHARLES CHAVEZ,
5
6 Petitioner,
7
8 vs.
9 THE STATE OF NEVADA,
10 Respondent,

Case No: 97C146562

Dept No: VI

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

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

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

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 CERTIFICATE OF E-SERVICE / MAILING

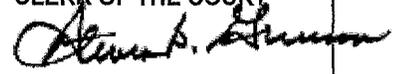
20 I hereby certify that on this 20 day of October 2017, I served a copy of this Notice of Entry on the
21 following:

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

25 The United States mail addressed as follows:
26 Charles Chavez # 57418 Rene L. Valladares
27 P.O. Box 7007 Federal Public Defender
28 Carson City, NV 89702 411 E. Bonneville, Ste 250
Las Known Address Las Vegas, NV 89101

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk



1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES THOMAN
6 Deputy District Attorney
7 Nevada Bar #012649
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 -vs-
12 CHARLES KELLY CHAVEZ,
13 #1156097
14 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

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

25 ///
26 ///
27 ///
28 ///

FINDINGS OF FACT, CONCLUSIONS OF LAW

Procedural History

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

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

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

28

APP. 071

1 On December 23, 2011, Petitioner filed his third habeas petition. On March 19, 2012,
2 the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order
3 to that effect on April 4, 2012. On December 12, 2012, the Nevada Supreme Court issued an
4 Order affirming the denial of Petitioner's third habeas petition. Remittitur issued on January
5 8, 2013.

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

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

12 *Analysis*

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

18 **I. PETITIONER'S PETITION IS PROCEDURALLY BARRED.**

19
20 The instant Petition WAS filed more than 19 years after the Judgment of Conviction
21 was entered. Accordingly, it is untimely under NRS 34.726(1). In an attempt to establish good
22 cause to excuse this untimeliness, Petitioner relies on the United States Supreme Court's
23 decisions in Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718 (2016), and Welch v. United
24 States, ___ U.S. ___, 136 S. Ct. 1257 (2016). Montgomery and Welch, however, fail to serve as
25 good cause necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the
26 instant Petition constitutes Petitioner's fifth habeas petition, it is successive under NRS
27 34.810(2). And for the same reasons that Montgomery and Welch fail to constitute good cause
28

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

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

8 Under NRS 34.726(1), "a petition that challenges the validity of a judgment or sentence
 9 must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been
 10 taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . .
 11 issues its remittitur," absent a showing of good cause for delay. In State v. Eighth Judicial Dist.
 12 Court (Riker), the Nevada Supreme Court noted that "the statutory rules regarding procedural
 13 default are mandatory and cannot be ignored when properly raised by the State." 121 Nev.
 14 225, 233, 112 P.3d 1070, 1075 (2005)

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

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

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

24 To meet NRS 34.726(1)'s first requirement, "a petitioner must show that an impediment
 25 external to the defense prevented him or her from complying with the state procedural default
 26 rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment
 27 external to the defense may be demonstrated by a showing 'that the factual or legal basis for a
 28 claim was not reasonably available to counsel, or that some interference by officials, made

1 compliance impracticable.’ ” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct.
2 2639 (1986)).

3 Petitioner attempted to meet this first requirement by arguing new case law.
4 Specifically, he argued that Montgomery and Welch “represent a change in law that allows
5 petitioner to obtain the benefit of Byford^[1] on collateral review.” Petition at 12. In essence,
6 Petitioner avered that Montgomery and Welch establish a legal basis for a claim that was not
7 previously available. Petitioner’s reliance on Montgomery and Welch was misguided.

8 As noted by Petitioner, he received the following jury instruction on premeditation and
9 deliberation:

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

12 Premeditation need not be for a day, an hour or even a minute. It may be as
13 instantaneous as successive thoughts of the mind. For if the jury believes from
14 the evidence that the act constituting the killing has been preceded by and has
15 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.

16 Instructions to the Jury, filed February 6, 1998, Instruction No. 10. This instruction is known
17 as the Kazalyn² instruction.

18 The Nevada Supreme Court held in Byford that this Kazalyn instruction did “not do
19 full justice to the [statutory] phrase ‘willful, deliberate and premeditated.’ ” 116 Nev. at 235,
20 994 P.2d at 713. As explained by the Court in Byford, the Kazalyn instruction
21 “underemphasized the element of deliberation,” and “[b]y defining only premeditation and
22 failing to provide deliberation with any independent definition, the Kazalyn instruction
23 blur[red] the distinction between first- and second-degree murder.” 116 Nev. at 234-35, 994
24 P.2d at 713. Therefore, in order to make it clear to the jury that “deliberation is a distinct
25 element of *mens rea* for first-degree murder,” the Court directed “the district courts to cease

26 _____
27 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).

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

1 instructing juries that a killing resulting from premeditation is ‘willful, deliberate, and
2 premeditated murder.’ ” *Id.* at 235, 994 P.2d at 713. The Court then went on to provide a set
3 of instructions to be used by the district courts “in cases where defendants are charged with
4 first-degree murder based on willful, deliberate, and premeditated killing.” *Id.* at 236-37, 994
5 P.2d at 713-15.

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

19 A little more than a year after Polk was decided, the Nevada Supreme Court addressed
20 that decision in Nika v. State, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008). In commenting
21 on the Ninth Circuit’s decision in Polk, the Court in Nika pointed out that “[t]he fundamental
22 flaw . . . in Polk’s analysis is the underlying assumption that Byford merely reaffirmed a
23 distinction between ‘willfulness,’ ‘deliberation’ and ‘premeditation.’” *Id.* Rather than being
24 simply a clarification of existing law, the Nevada Supreme Court in Nika took the “opportunity
25 to reiterate that Byford announced a *change in state law*.” *Id.* (emphasis added). In rejecting
26

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

APP. 075

1 the Ninth Circuit's reasoning in Polk, the Nevada Supreme Court noted that "[u]ntil Byford,
2 we had not required separate definitions for 'willfulness,' 'premeditation' and 'deliberation'
3 when the jury was instructed on any one of those terms." Id. Indeed, Nika explicitly held that
4 "the Kazalyn instruction correctly reflected Nevada law before Byford." Id. at 1287, 198 P.3d
5 at 850.

6 The Court in Nika then went on to affirm its previous holding that Byford is not
7 retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing Rippo v. State, 122 Nev. 1086, 1097,
8 146 P.3d 279, 286 (2006)). For purposes here, Nika's discussion on retroactivity merits close
9 analysis. The Court in Nika commenced its retroactivity analysis with Colwell v. State, 118
10 Nev. 807, 59 P.3d 463 (2002). In Colwell, the Nevada Supreme Court "detailed the rules of
11 retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if
12 those rules fell within one of two narrow exceptions." Nika, 124 Nev. at 1288, 198 P.3d at 850
13 (citing Colwell, 118 Nev. at 820, 59 P.3d at 531). Colwell, in turn, was premised on the United
14 States Supreme Court's decision in Teague v. Lane, 489 U.S. 288; 109 S. Ct. 1060 (1989). A
15 brief digression on Teague is therefore in order.

16 In Teague, the United States Supreme Court did away with its previous retroactivity
17 analysis in Linkletter,⁴ replacing it with "a general requirement of nonretroactivity of new rules
18 in federal collateral review." Colwell, 118 Nev. at 816, 59 P.3d at 469-70 (citing Teague, 489
19 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Court in Teague held that "new
20 *constitutional* rules of criminal procedure will not be applicable to those cases which have
21 become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075
22 (emphasis added). This holding, however, was subject to two exceptions: first, "a new rule
23 should be applied retroactively if it places 'certain kinds of primary, private individual conduct
24 beyond the power of the criminal law-making authority to proscribe,'" Id. at 311, 109 S. Ct.
25 at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971)
26 (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new
27 constitutional rule of criminal procedure should be applied retroactively if it is a "watershed
28

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

APP. 076

1 rule[] of criminal procedure.” Id. at 311, 109 S. Ct. at 1076 (citing Mackey, 401 U.S. at 693-
2 94, 91 S. Ct. at 1165).

3 That Teague was concerned exclusively with new *constitutional* rules of criminal
4 procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the
5 Court in Teague. See Mackey, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan’s
6 opinion in Mackey starts off acknowledging the nature of the issue facing the Court. See id. at
7 675, 91 S. Ct. at 1165 (“These three cases have one question in common: the extent to which
8 new *constitutional* rules prescribed by this Court for the conduct of criminal cases are
9 applicable to other such cases which were litigated under different but then-prevailing
10 *constitutional* rules.” (emphasis added)). And when outlining the two exceptions that were
11 ultimately adopted by the Court in Teague, Justice Harlan explicitly acknowledged the
12 constitutional nature of these exceptions. See id. at 692, 91 S. Ct. at 1165 (“New ‘substantive
13 due process’ rules, that is, those that place, *as a matter of constitutional interpretation*, certain
14 kinds of primary, private individual conduct beyond the power of the criminal law-making
15 authority to proscribe, must, in my view, be placed on a different footing.” (emphasis added));
16 id. at 693, 91 S. Ct. at 1165 (“Typically, it should be the case that any conviction free from
17 federal *constitutional* error at the time it became final, will be found, upon reflection, to have
18 been fundamentally fair and conducted under those procedures essential to the substance of a
19 full hearing. However, in some situations it might be that time and growth in social capacity,
20 as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will
21 properly alter our understanding of the bedrock procedural elements that must be found to
22 vitiate the fairness of a particular conviction.” (emphasis added)).

23 The Nevada Supreme Court’s decision in Colwell further reinforces the notion that
24 Teague’s exceptions were concerned exclusively with new *constitutional* rules. See 118 Nev.
25 at 817, 59 P.3d at 470. In Colwell, the Court provided examples of “new rules” that fall into
26 either exception. As to the first exception, the Nevada Supreme Court explained that “the
27 Supreme Court’s holding that the *Fourteenth Amendment* prohibits states from criminalizing
28 marriages between persons of different races” is an example of a new substantive rule of law

1 that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 692
2 n.7, 91 S. Ct at 1165 n.7) (emphasis added). Noting that this first exception “also covers ‘rules
3 prohibiting a certain category of punishment for a class of defendants because of their status,’
4 ” id. (quoting Penry v. Lynaugh, 492 U.S. 302, 329-30, 109 S. Ct. 2934, 2952-53 (1989),
5 *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)), the
6 Nevada Supreme Court cited “the Supreme Court’s [] holding that the *Eighth Amendment*
7 prohibits the execution of mentally retarded criminals” as another example of a new
8 substantive rule of law that should be applied retroactively on collateral review. Id. (citing
9 Penry, 492 U.S. at 329-30, 109 S. Ct. at 2952-53) (emphasis added). As to the second
10 exception, the Nevada Supreme Court cited “the right to counsel at trial”⁵ as an example of a
11 watershed rule of criminal procedure that should be applied retroactively on collateral review.
12 Id. (citing Mackey, 401 U.S. at 694, 91 S. Ct. at 1165).

13 The Court in Colwell, however, found Teague’s retroactivity analysis too restrictive
14 and, therefore, while adopting its general framework, chose “to provide broader retroactive
15 application of new constitutional rules of criminal procedure than Teague and its progeny
16 require.” Id. at 818, 59 P.3d at 470; see also id. at 818, 59 P.3d at 471 (“Though we consider
17 the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court
18 has applied it so strictly in practice that decisions defining a constitutional safeguard rarely
19 merit application on collateral review.”).⁶ First, the Court in Colwell narrowed Teague’s
20 definition of a “new rule,” which it had found too expansive.⁷ Id. at 819-20, 59 P.3d. at 472

21
22 ⁵ As per Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was
23 premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

24 ⁶ As the Nevada Supreme Court explained in Colwell, it was free to deviate from the
25 standard laid out in Teague so long as it observed the minimum protections afforded by
26 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)).

27 ⁷ This has the effect of affording greater protection than Teague insofar as defendants
28 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.”

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1 (“We consider too sweeping the proposition, noted above, that a rule is new whenever any
2 other reasonable interpretation or prior law was possible. However, a rule is new, for example,
3 when the decision announcing it overrules precedent, or ‘disapproves a practice this Court had
4 arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had
5 uniformly approved.’ ” (quoting Griffith v. Kentucky, 479 U.S. 314, 325, 107 S. Ct. 708, 714
6 (1987)). And second, the Court in Colwell expanded on Teague’s two exceptions, which it had
7 found too “narrowly drawn”:

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

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

24 One year later in Clem v. State, the Nevada Supreme Court reaffirmed the modified
25 Teague retroactivity analysis set out in Colwell. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32
26 (2008). Notably, the Court in Clem explained that it is “not required to make retroactive its
27 new rules of state law that do not implicate constitutional rights.” Id. at 626, 81 P.3d at 529.
28 The Court further noted that “[t]his is true even where [its] decisions overrule or reverse prior

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.

1 decisions to narrow the reach of a substantive criminal statute.” Id. The Court then provided
 2 the following concise overview of the modified Teague retroactivity analysis set out in
 3 Colwell:

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

8 Id. at 628, 81 P.3d at 531. Thus, Clem reiterated that if the new rule of criminal procedure is
 9 not constitutional in nature, Teague’s retroactivity analysis has no relevance. Id. at 628-629,
 10 81 P.3d at 531 (“Both Teague and Colwell require limited retroactivity on collateral review,
 11 but neither upset the usual rule of nonretroactivity for rules that carry no constitutional
 12 significance.”).⁸

13 It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous
 14 holding⁹ that Byford is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 (“We reaffirm our
 15 decisions in Clem and Colwell and maintain our course respecting retroactivity analysis—if a
 16 rule is new but not a constitutional rule, it has no retroactive application to convictions that are
 17 final at the time of the change in the law.”). The Court in Nika then explained how the change
 18 in the law made by Byford “was a matter of interpreting a state statute, not a matter of
 19

20 ⁸ Petitioner omits any mention of Colwell or Clem, which were central to Nika’s
 21 retroactivity analysis regarding convictions that were final at the time of the change in the law.
 22 Instead, Petitioner cites Nika’s preceding analysis of why “the change effected by Byford
 23 properly applied to [the defendant in Polk, 503 F.3d at 910] as a matter of due process.” Nika,
 24 124 Nev. at 1287, 198 P.3d at 850; see Petition at 12. To be sure, the Court in Nika, in
 25 conducting this analysis, did rely on the retroactivity rules set out in Bunkley v. Florida, 538
 26 U.S. 835, 123 S. Ct. 2020 (2003), and Fiore v. White, 531 U.S. 225, 121 S. Ct. 712 (2001),
 27 which, according to Petitioner were “drastically changed,” Petition at 12, by the United States
 28 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.

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1 constitutional law.” *Id.* Accordingly, because it was not a new *constitutional* rule of criminal
2 procedure of the type contemplated by *Teague* and *Colwell*, the change wrought in *Byford* was
3 not to have retroactive effect on collateral review to convictions that were final before the
4 change in the law.

5 Neither *Montgomery* nor *Welch* alter *Teague*’s—and, by extension, *Colwell*’s—
6 underlying premise that the two exceptions to the general rule of nonretroactivity must
7 implicate constitutional concerns before coming into play. In *Montgomery*, the United States
8 Supreme Court had to consider whether *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455
9 (2012), which held that a mandatory sentence of life without parole for juvenile homicide
10 offenders violates the Eighth Amendment’s prohibition on “cruel and unusual punishment,”
11 had to be applied retroactively to juvenile offenders whose convictions and sentences were
12 final at the time when *Miller* was decided. ___ U.S. at ___, 136 S. Ct. at 725. To answer this
13 question, the Court in *Montgomery* employed the retroactivity analysis set out in *Teague*. *Id.*
14 at ___, 136 S. Ct. at 728-36. As to whether *Miller* announced a new “substantive rule of
15 constitutional law,” *id.* at ___, 136 S. Ct. at 734, such that it fell within the first of the two
16 exceptions announced in *Teague*, the Court in *Montgomery* commenced its analysis by noting
17 that “the ‘foundation stone’ for *Miller*’s analysis was [the] Court’s line of precedent holding
18 certain punishments disproportionate when applied to juveniles.” *Id.* at ___, 136 S. Ct. at 732.
19 This “line of precedent” included the Court’s previous decision in *Graham v. Florida*, 560 U.S.
20 48, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), the
21 holdings of which were premised on constitutional concerns—namely, the Eighth
22 Amendment. ___ U.S. at ___, 136 S. Ct. at 723 (explaining how *Graham* “held that the Eighth
23 Amendment bars life without parole for juvenile nonhomicide offenders” and how *Roper* “held
24 that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the
25 time of their crimes”). After elaborating further on the considerations discussed in *Roper* and
26 *Graham* that underlay the Court’s holding in *Miller*, *id.* at ___, 136 S. Ct. at 733-34, the Court
27 went on to conclude the following:
28

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

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

12 Petitioner, however, got caught up in Montgomery's preceding jurisdictional analysis
13 in which it had to decide, as a preliminary matter, whether a State is under an “obligation to
14 give a new rule of constitutional law retroactive effect in its own collateral review
15 proceedings.” Id. at __, 136 S. Ct. at 727; see Petition at 12, 19, 24. Petitioner made much ado
16 about Montgomery's discussion on this front, arguing that the Court in Montgomery
17 “established a new rule of constitutional law, namely that the ‘substantive’ exception to the
18 Teague rule applies in state courts as a matter of due process.” Petition at 24. This assertion,
19 while true, shortchanges the Court’s jurisdictional analysis. In addressing the jurisdictional
20 question and discussing Teague's first exception to the general rule of nonretroactivity in
21 collateral review proceedings, Montgomery actually reinforces the notion that Teague's
22 retroactivity analysis is relevant only when considering a new *constitutional* rule. *See, e.g., id.*
23 at __, 136 S. Ct. at 727 (“States may not disregard a controlling, *constitutional* command in
24 their own courts.” (emphasis added)); id. at __, 136 S. Ct. at 728 (explaining that under the
25 first exception to the general rule of nonretroactivity discussed in Teague, “courts must give
26 retroactive effect to new substantive rules of *constitutional* law” (emphasis added)); id. at __,
27 136 S. Ct. at 729 (“The Court now holds that when a new substantive rule of *constitutional*
28 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

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1 criminal laws and punishments altogether beyond the State's power to impose. It follows that
2 when a State enforces a proscription or penalty barred *by the Constitution*, the resulting
3 conviction or sentence is, by definition, unlawful." (emphasis added)); *id.* at ___, 136 S. Ct. at
4 730 ("By holding that new substantive rules are, indeed, retroactive, Teague continued a long
5 tradition of giving retroactive effect to *constitutional* rights that go beyond procedural
6 guarantees." (emphasis added)); *id.* at ___, 136 S. Ct. at 731 ("A penalty imposed pursuant to
7 an *unconstitutional* law is no less void because the prisoner's sentence became final before the
8 law was held unconstitutional. There is no grandfather clause that permits States to enforce
9 punishments the *Constitution* forbids." (emphasis added)); *id.* at ___, 136 S. Ct. at 731-32
10 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of
11 their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional*
12 right that determines the outcome of that challenge." (emphasis added)). Montgomery's
13 holding that State courts are to give retroactive effect to new substantive rules of constitutional
14 law simply makes universal what has already been accepted as common practice in Nevada
15 for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in
16 State collateral review proceedings. See Colwell, 118 Nev. at 818-21, 59 P.3d at 471-72; Clem,
17 119 Nev. at 628-29, 81 P.3d at 530-31.

18 Petitioner, however, really just used Montgomery as a bridge to explain why he believes
19 that the United States Supreme Court's more recent decision in Welch mandates that Byford
20 is retroactive even as to those convictions that were final at the time that it was decided. Thus,
21 the focal point is not so much Montgomery—which, again, made constitutional (i.e., that State
22 courts must give retroactive effect to new substantive rules of constitutional law) what the
23 Nevada Supreme Court has already accepted in practice—but rather Welch, which according
24 to Petitioner, "indicated that the *only* requirement for determining whether an interpretation of
25 a criminal statute applies retroactivity is whether the interpretation narrows the class of
26 individuals who can be convicted of the crime." Petition at 12 (emphasis in original). Once
27 again Petitioner shortchanged the Supreme Court's analysis by making such an unqualified
28 assertion—this time to the point of misrepresenting the Court's holding in Welch.

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1 In Welch, the Court had to consider whether Johnson v. United States, 576 U.S. ___, 135
2 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act
3 (“ACCA”) of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness,
4 is retroactive in cases on collateral review. ___ U.S. at ___, 136 S. Ct. at 1260-61. Not
5 surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in
6 Teague. Id. at ___, 136 S. Ct. at 1264-65. The Court commenced its application of the Teague
7 retroactivity analysis by recognizing that “[u]nder Teague, as a general matter, ‘new
8 constitutional rules of criminal procedure will not be applicable to those cases which have
9 become final before the new rules are announced,’ ” id. at ___, 136 S. Ct. at 1264 (quoting
10 Teague, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was
11 subject to the two exceptions that have already been discussed at great length above. Finding
12 it “undisputed that Johnson announced a new rule,” the Court explained that the specific
13 question at issue was whether this new rule was “substantive.” Id.¹⁰ Then, upon concluding
14 that “Johnson changed the substantive reach of the [ACCA]” by “ ‘altering the range of
15 conduct or the class of persons that the [Act] punishes,’ ” the Court held that “the rule
16 announced in Johnson is substantive.” Id. at ___, 136 S. Ct. at 1265 (quoting Schriro v.
17 Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)).

18 Salient in the Court’s analysis was the principle announced in Schriro, that “[a] rule is
19 substantive rather than procedural if it alters the range of conduct or the class of persons that
20 the law punishes.” 542 U.S. at 353, 124 S. Ct. at 2523; see Welch, ___ U.S. at ___, 136 S. Ct. at
21 1264-65 (citing Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the
22 Court in Schriro relied upon Bousley v. United States, which, in turn, relied upon Teague in
23 explaining the “distinction between substance and procedure” as far as new rules of
24 constitutional law are concerned. See 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998)
25 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle
26

27 ¹⁰ The parties agreed that the second Teague exception was not applicable. Welch, ___ U.S. at
28 ___, 136 S. Ct. at 1264.

1 relied on by the Court in *Welch* in holding that *Johnson* was a new substantive rule is ultimately
 2 rooted in *Teague*, which, as discussed above, is concerned exclusively with new rules of
 3 *constitutional* import. That is to say, if the rule is new, but not constitutional in nature, there is
 4 no need to resort to either of the *Teague* exceptions.

5 Juxtaposing the invalidation of the residual clause of the ACCA by *Johnson* with the
 6 change in Nevada law on first-degree murder¹¹ effected by *Byford* will help drive home the
 7 point that the former was premised on constitutional concerns not present in the latter. This, in
 8 turn, will help illustrate why *Teague*'s retroactivity analysis has relevance only to the former.
 9 In *Johnson*, the United States Supreme Court considered whether the residual clause of the
 10 ACCA violated "the Constitution's prohibition of vague criminal laws." 576 U.S. at ___, 135
 11 S. Ct. at 2555. The "residual clause" is part of the ACCA's definition of the term "violent
 12 felony":

13 the term 'violent felony' means any crime punishable by imprisonment for a
 14 term exceeding one year . . . that—

15 (i) has as an element the use, attempted use, or threatened use of physical force
 16 against the person of another; or

17 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise*
 18 *involves conduct that presents a serious potential risk of physical injury to*
another;

19 18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of §
 20 924(e)(2)(B) that came to be known as the "residual clause." *Johnson*, 576 U.S. at ___, 135 S.
 21 Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more
 22 convictions for a "violent felony" (defined above) is subject to a minimum term of
 23 imprisonment of 15 years to a maximum term of life. § 924(e)(1); *Johnson*, 576 U.S. at ___,
 24 135 S. Ct. at 2556. Thus, a conviction for a felony that "involves conduct that presents a serious
 25 potential risk of physical injury"—i.e., a felony that fell under the residual clause—could very
 26 well have made the difference between serving a maximum of 10 years in prison versus a

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

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1 maximum of life in prison. See Johnson, 576 U.S. at ___, 135 S. Ct. at 2555 (“In general, the
2 law punishes violation of this ban by up to 10 years’ imprisonment. [] But if the violator has
3 three or more earlier convictions for . . . a ‘violent felony,’ the [ACCA] increases his prison
4 term to a minimum of 15 years and a maximum of life.” (internal citation omitted)).

5 To understand the issue that arose with the residual clause, it helps to understand the
6 context in which it was applied. See Welch, ___ U.S. at ___, 136 S. Ct. at 1262 (“The vagueness
7 of the residual clause rests in large part on its operation under the categorical approach.”). The
8 United States Supreme Court employs what is known as the categorical approach in deciding
9 whether an offense qualifies as a violent felony under § 924(e)(2)(B). Id. at ___, 136 S. Ct. at
10 1262 (citing Johnson, 576 U.S. at ___, 135 S. Ct. at 2557). Under the categorical approach, “a
11 court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines
12 the offense and not in terms of how an individual offender might have committed it on a
13 particular occasion.’ ” Johnson, 576 U.S. at ___, 135 S. Ct. at 2557 (quoting Begay v. United
14 States, 553 U.S. 137, 141, 128 S. Ct. 1581, 1584 (2008)). The issue with the residual clause
15 was that it required “a court to picture the kind of conduct that the crime involves in ‘the
16 ordinary case,’ and to judge whether that abstraction presents a serious potential risk of
17 physical injury.” Id. (quoting James v. United States, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597
18 (2007)).

19 The Court in Johnson found that “[t]wo features of the residual clause conspire[d] to
20 make it unconstitutionally vague.” Id. First, that the residual clause left “grave uncertainty
21 about how to estimate the risk posed by a crime”; and second, that it left “uncertainty about
22 how much risk it takes for a crime to qualify as a violent felony.” Id. at ___, 135 S. Ct. at 2557-
23 58. Because of these uncertainties, the Court in Johnson explained that “[i]nvolving so
24 shapeless a provision to condemn someone to prison for 15 years to life does not comport with
25 the Constitution’s guarantee of due process.” Id. at ___, 135 S. Ct. at 2560. Accordingly, “[t]he
26 Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine,
27 a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect
28 to the Federal Government) and the *Fourteenth Amendment* (with respect to the States).”

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1 Welch, ___ U.S. ___, 136 S. Ct. at 1261-62 (emphasis added).

2 Unlike the invalidation of the residual clause of the ACCA on constitutional grounds,
3 the change in the law on first-degree murder effected by Byford implicated no constitutional
4 concerns. The Nevada Supreme Court in Nika explained in very clear terms that its “decision
5 in Byford to change Nevada law and distinguish between ‘willfulness,’ ‘premeditation,’ and
6 ‘deliberation’ was a matter of interpreting a state statute, *not a matter of constitutional law.*”
7 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in Nika
8 noted how other jurisdictions “differ in their treatment of the terms ‘willful,’ ‘premeditated,’
9 and ‘deliberate’ for first-degree murder.” Id.; see id. at 1288-89, 198 P.3d at 850-51 (“As
10 explained earlier, several jurisdictions treat these terms as synonymous while others, for
11 example California and Tennessee, ascribe distinct meanings to these words. These different
12 decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional
13 law.”).

14 Conflating the change effected by Johnson with that effected by Byford ignores a
15 fundamental legal distinction between the two. Because the residual clause was found
16 unconstitutionally void for vagueness, defendants whose sentences were increased on the basis
17 of this clause were sentenced on the basis of an unconstitutional provision and, thus, were
18 unconstitutionally sentenced. Such a sentence is, as the Court in Montgomery would put it,
19 “not just erroneous but contrary to law and, as a result, void.” See ___ U.S. at ___, 136 S. Ct. at
20 731 (citing Ex parte Siebold, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the
21 change effected by Byford. At no point has Nevada’s law on first-degree murder been found
22 unconstitutional. Defendants who were convicted of first-degree murder under NRS
23 200.030(1)(a) prior to Byford were nonetheless convicted under a constitutionally valid statute
24 and, thus, were lawfully convicted. See Nika, 124 Nev. at 1287, 198 P.3d at 850 (explaining
25 that “the Kazalyn instruction correctly reflected Nevada law before Byford”).

26 It was the constitutional rights that underlay Johnson’s invalidation of the residual
27 clause that made it a “substantive rule of constitutional law.” See Montgomery, ___ U.S. at ___,
28 136 S. Ct. at 729. And as a “new” substantive rule of constitutional law, it fell within the first

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

9 Petitioner's reliance on Welch, however, goes beyond the Court's holding and *ratio*
10 *decidendi*. In his exposition of Welch, Petitioner went on to describe the Court's treatment of
11 the arguments raised by *Amicus*. See Petition at 20-21; Welch, __ U.S. at __, 136 S. Ct. at
12 1265-68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a
13 different understanding of the Teague framework, "apply[ing] that framework by asking
14 whether the constitutional right underlying the new rule is substantive or procedural"; (2) that
15 a rule is only substantive if it limits Congress' power to legislate; and (3) that only "statutory
16 construction cases are substantive because they define what Congress always intended the law
17 to mean" as opposed to cases invalidating statutes (or parts thereof). Welch, __ U.S. at __, 136
18 S. Ct. at 1265-68. It was in addressing this third argument that the Court set out the "test" for
19 determining when a rule is substantive that Petitioner's argument hinged on:

20 Her argument is that statutory construction cases are substantive because they
21 define what Congress always intended the law to mean—unlike Johnson, which
22 struck down the residual clause regardless of Congress' intent.

23 That argument is not persuasive. Neither Bousley nor any other case from this
24 Court treats statutory interpretation cases as a special class of decisions that are
25 substantive because they implement the intent of Congress. Instead, decisions
26 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.'

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

1 What is critically important, and new, about Welch is that it explains, for the
2 very first time, that the *only* test for determining whether a decision that
3 interprets the meaning of a statute is substantive, and must apply retroactively to
4 all cases, is whether the new interpretation meets the criteria for a substantive
5 rule, namely whether it alters the range of conduct or the class of persons that
6 the law punishes. Because this aspect of Teague is now a matter of constitutional
7 law, state courts are required to apply this rule from Welch.

8 Petition at 21 (emphasis in original).

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

18 Interestingly, though, in setting out this test, the Court quoted verbatim from the very
19 portion of its decision in Schriro that has been cited above, see supra at 15, for the proposition
20 that the key principle relied on by the Welch Court—in holding that Johnson was a new
21 substantive rule—is ultimately rooted in Teague, which, again, is concerned exclusively with
22 new rules of constitutional import. Thus, to the extent the “test” relied on by Petitioner is
23 grounded on this text from Schriro, Petitioner took it out of context by ignoring the fact that
24 this statement in Schriro was based on Bousley’s discussion of the substance/procedure
25 distinction respecting new rules of constitutional law, which was, in turn, premised largely on
26 Teague. See Bousley, 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing Teague, 489 U.S. at 311,
27 109 S. Ct. at 1075). But, to the extent that this “test” is unmoored from the constitutional
28 underpinnings of Teague’s retroactivity analysis, it is, after all, nothing more than dictum.
29 Either way, Petitioner’s reliance on this language from Welch was misguided.

30 ///

1 Because neither Montgomery nor Welch alter Teague's retroactivity analysis, the
2 Nevada Supreme Court's decision in Colwell, which adopted Teague's framework, remains
3 valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in
4 Nika, Byford has no retroactive application on collateral review to convictions, like
5 Petitioner's, that became final before the new rule was announced. 124 Nev. at 1287-89, 198
6 P.3d at 850-51. Consequently, Petitioner's reliance on Montgomery and Welch to meet NRS
7 34.726(1)(a)'s criterion fails.

8
9 **2. Petitioner Has Failed To Establish That Dismissal Of The Petition As**
10 **Untimely Will Unduly Prejudice Him.**

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

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

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

4 The day after strangling Ms. Rodgers, Petitioner and two of his acquaintances prepared
5 to leave town. See Reporter's Transcript of Proceedings: Jury Trial, February 3, 1997, at 164,
6 186. They took Ms. Rodgers' car and traveled to her apartment where Petitioner proceeded to
7 remove several items of jewelry. *Id.* at 164, 177, 187. The trio then drove to California. *Id.* at
8 164, 189. Before driving off to California, they stopped to pull out \$300 from an ATM with
9 Ms. Rodgers' ATM card. *Id.* at 166-67. On September 12, 1997, officers of the San Bernardino
10 Police Department arrested Petitioner in California. *Id.* at 140. At the time he was arrested,
11 Petitioner was driving Ms. Rodgers' car and had Rodgers' ATM card. *Id.*

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

19 Petitioner also cannot establish prejudice on the basis of the Kazalyn instruction due to
20 the fact that the evidence clearly established first-degree murder on a theory of felony murder
21 in addition to the theory of premeditation, deliberation, and willfulness. See Moore v. State,
22 2017 Nev. Unpub. LEXIS 224, *2, 2017 WL 1397380 (Nev. Apr. 14, 2017) (explaining that
23 appellant could not establish that he was prejudiced by the Kazalyn instruction “because he
24 did not demonstrate that the result of trial would have been different considering that the
25 evidence clearly establish[ed] first-degree murder based on felony murder”). Here, Petitioner
26 was charged with and ultimately convicted of Robbery—which is among the enumerated
27 felonies that can serve as a predicate to a theory of felony murder. See NRS 200.030(1)(b)
28 (defining first-degree murder as murder “[c]ommitted in the perpetration or attempted

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1 perpetration of sexual assault, kidnapping, arson, *robbery*, burglary, invasion of the home,
2 sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or
3 abuse of an older person or vulnerable person pursuant to NRS 200.5099” (emphasis added)).
4 Accordingly, because the evidence established that Petitioner was guilty of first-degree murder
5 under a felony-murder theory, he cannot establish that the error in giving the Kazalyn
6 instruction worked to his “*actual* and substantial disadvantage.” See Huebler, 128 Nev. at __,
7 275 P.3d at 95 (emphasis added).

8 Based on the foregoing, this Court finds that the instant Petition is untimely pursuant to
9 NRS 34.726(1) and that Petitioner has failed to establish “good cause for delay.” The United
10 States Supreme Court’s decisions in Montgomery and Welch do not provide a new legal basis
11 to satisfy NRS 34.726(1)(a)’s criterion that the delay not be the fault of the petitioner. And
12 Petitioner has also failed to establish NRS 34.726(1)(b)’s criterion inasmuch as he has failed
13 to establish that he was unduly prejudiced by the use of the Kazalyn instruction. That being
14 the case, this Court denies the Petition on the basis that it is procedurally barred under NRS
15 34.726(1).

16 **B. The Petition Is Successive Under NRS 34.810(2), And Petitioner Has Failed To** 17 **Establish Good Cause And Actual Prejudice.**

18 NRS 34.810(2) requires the district court to dismiss “[a] second or successive petition
19 if the judge or justice determines that it fails to allege new or different grounds for relief and
20 that the prior determination was on the merits or, if new and different grounds are alleged, the
21 judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition
22 constituted an abuse of the writ.” And as with NRS 34.726(1), the procedural bar described in
23 NRS 34.810(2) is mandatory. See Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001)
24 (“[A] court *must dismiss* a habeas petition if it presents claims that either were or could have
25 been presented in an earlier proceeding, unless the court finds both cause for failing to present
26 the claims earlier or for raising them again and actual prejudice to the petitioner.” (emphasis
27 added)).

28

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

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

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

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

23
24 ¹² The Court denied the second habeas petition on September 8, 2004, and entered its Findings of
25 Fact, Conclusions of Law and Order to that effect on September 29, 2004. The Court denied the
26 third habeas petition on March 19, 2012, and entered its Findings of Fact, Conclusions of Law and
27 Order to that effect on April 4, 2012. The Court denied the fourth habeas petition on November 18,
28 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.

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1 a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
2 filing of a petition challenging the validity of a judgment of conviction.” The Nevada Supreme
3 Court observed in Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how
4 “petitions that are filed many years after conviction are an unreasonable burden on the criminal
5 justice system” and that “[t]he necessity for a workable system dictates that there must exist a
6 time when a criminal conviction is final.” To invoke NRS 34.800(2)’s presumption of
7 prejudice, the statute requires that the State specifically plead laches.

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

14 **ORDER**

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

17 DATED this 12 day of October, 2017.

18 
19 _____
DISTRICT JUDGE 

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

23 BY /s/ Charles Thomas
24 CHARLES THOMAN
25 Deputy District Attorney
26 Nevada Bar #012649

27
28 ///

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CERTIFICATE OF ELECTRONIC FILING

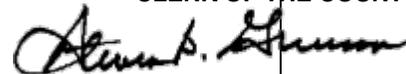
I hereby certify that service of Findings of Fact, Conclusions of Law and Order was made this 3rd day of October, 2017, by Electronic Filing to:

LORI TEICHER,
First Assistant Federal PD
Lori_Teicher@fd.org

BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

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1 PWHC
2 RENE L. VALLADARES
3 Federal Public Defender
4 Nevada State Bar No. 11479
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6 First Assistant Federal Public Defender
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11 (702) 388-6419 (Fax)
12 Lori_Teicher@fd.org

13 Attorney for Petitioner Charles Chavez

14 EIGHTH JUDICIAL DISTRICT COURT
15 CLARK COUNTY

16 CHARLES KELLY CHAVEZ,

17 Petitioner,

18 v.

19 THE STATE OF NEVADA, et al.,

20 Respondents.

Case No. C146562
Dept. No. 8

Date of Hearing:
Time of Hearing:

(Not a Death Penalty Case)

21 PETITION FOR WRIT OF HABEAS CORPUS

22 (POST-CONVICTION)

23 1. Name of institution and county in which you are presently imprisoned
24 or where and how you are presently restrained of your liberty: Warm Springs
Correctional Center.

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

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

2 4. Case Number: C146562

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

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

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

11 If “yes”, list crime, case number and sentence being served at this time:

12 Nature of offense involved in conviction being challenged:

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

15 8. What was your plea?

16 (a) Not guilty X (c) Guilty but mentally ill _____

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

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

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

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

25 12. Did you appeal from the judgment of conviction?

26 Yes _____ No X

27

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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.

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- 1 F. COUNSEL FAILED TO OBJECT TO THE PROSECUTOR PLAYING THE PART
2 OF THE DEFENDANT IN READING INTO THE RECORD CHAVEZ'
3 STATEMENT.
4 G. FAILURE TO OBJECT TO HEARSAY CONTAINED IN LETTERS WRITTEN
5 BY JAMIE RODGERS
6 H. FAILED TO INTRODUCE TESTIMONY THAT A FALL COULD HAVE
7 CAUSED THE INJURIES SUFFERED BY RODGERS.
8 I. FAILURE TO OBJECT TO REPEATED PROSECUTORIAL MISCONDUCT.
9 J. WASN'T PREPARED FOR HIS CLOSING ARGUMENT AND APOLOGIZED IN
10 ADVANCE TO THE JURY FOR HIS DISJOINTED ARGUMENT.

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

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

15 (5) Result: Affirmed

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

17 (7) If known, citations of any written opinion or date of orders
18 entered pursuant to such result: Findings of Fact, Conclusions of Law
19 denying the petition, March 29, 2001; Order of Affirmance, February 4,
20 2003. Case No. 37759.

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

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

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

25 (3) Grounds raised:

26 A. Petitioner was denied effective assistance of counsel in violation of the
27 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

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

- 3 3. Failure of defense counsel to request appointment of an expert to
4 determine the authenticity of the letter allegedly authored by Jamie
Rodgers.
- 5 4. Failure of defense counsel to conduct an independent investigation
6 or to request the appointment of independent experts to examine
7 the body and conduct independent crime scene investigation for
the purpose of establishment of exact date, time and cause of
8 death, for the purpose of corroborating the defense theory of
9 accident.
- 10 5. Failure of defense counsel to conduct an independent investigation
11 or to request videotape record from security cameras at the
12 apartment complex, and other locations said to have been visited
13 by Petitioner and the putative victim, re: the dates and times are
14 conflicting and appear manufactured to fit the use of the ATM card
on August 20, 21 and make it appear as if pecuniary gain was a
motivation in the death -aggravating circumstances- when the
death penalty was never at issue.
- 15 6. Failure of defense counsel to file a motion in limine, to object to
16 testimony of coroner as to vaginal abrasion, or to demand a
17 *Petrocelli* hearing on alleged evidence of other bad act. Said
18 testimony was obviously.

Amended Petition:

- 19 A. Petitioner reserves all claims and issues raised in all prior proceedings.
- 20 B. Petitioner incorporates herein the opposition to state's motion to dismiss
21 successive petition, petitioner's motions for the appointment of counsel,
22 appointment of investigator, leave to conduct discovery, and for
evidentiary hearing.
- 23 C. Petitioner was denied the right to fair trial and effective assistance of
24 counsel in violation of the Sixth Amendment to the Constitution of the
United States and Article I of the Nevada Constitution by defense counsel,
25 an associate with the office of the Clark County public defender, failing to
26 disclose an unconscionable conflict of interest that said office was also
27 representing the star prosecution witness who appeared at trial and
testified against the petitioner.
- 28 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

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

- 3 2. Defense counsel failed to interview witnesses necessary for the
4 defense, and failed to allow the petitioner to take the stand to
5 testify.
- 6 3. Defense counsel's failure to prepare resulting in defense counsel
7 eliciting prejudicial testimony against the petitioner.
- 8 4. Defense counsel failed to request competency hearing.
- 9 5. Defense counsel failed to recognize the warrantless entry and
10 seizure of letters and to file a motion to suppress the search and the
11 letters, as well as the subsequent fruit of the illegal search.
- 12 6. Defense counsel failed to file a motion in limine, and later, failure
13 to demand a *Petrocelli* hearing on issues of improper character
14 evidence/uncharged acts.
- 15 7. Defense counsel failed to file a motion in limine, to object to
16 testimony of coroner as to vaginal abrasion, or to demand a
17 *Petrocelli* hearing on alleged evidence of other bad act. Said
18 testimony was obviously structured to create an impression of
19 death after inferred violent sexual assault, a crime which was not
20 charged, but one which is also considered an aggravating
21 circumstance.
- 22 8. Defense counsel failed to object or to demand a *Jackson v. Denno*
23 hearing relating to admissibility of the videotaped and transcribed
24 statement while in custody in California.
- 25 9. Defense counsel failed to request appointment of an expert to
26 determine the authenticity of the letters allegedly authored by
27 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

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

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

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

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

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

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

26 2. Prosecution committed misconduct by improper and inflammatory
27 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.

1. 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.

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- 1 H. Actual innocence of the petitioner and that but for the conflict of interest
2 and ineffective assistance of counsel and failures to perform to the
3 reasonable standards of the profession, trial would have shown there was
4 insufficient evidence to convict the Petitioner of the accusations charged
5 beyond a reasonable doubt by a rational trier of fact.
- 6 I. Doctrine of cumulative review, "grave doubt" and the fundamental
7 miscarriage of justice standard indicate that substantial miscarriage of
8 justice has undermined the accuracy of the proceedings, and more
9 probably than not, upon examination of all of the available facts,
10 information, and evidence, that the accumulation of error viewed under the
11 totality of circumstances, would mandate a new trial.
- 12 J. Petitioner reserves the right to allege additional issues and grounds for
13 relief at the time set for evidentiary hearing.

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

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

17 (6) Date of result: September 26, 2007

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

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

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

26 (2) Nature of proceeding: Petition for Writ of Habeas Corpus
27 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.

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- 1 B. Failure to object to character evidence during the trial, or
2 to request a *Petrocelli* hearing.
- 3 C. Failure to investigate and present evidence.
- 4 D. Defense counsel elicited testimony of other bad acts that
5 were prejudicial to Mr. Chavez.
- 6 E. Trial counsel failed to file a motion to preclude the State
7 from admitting evidence of an unrelated vaginal bruise
8 found on Ms. Rodgers.
- 9 F. Trial counsel's failure to introduce testimony that a fall
10 could have caused Ms. Rodgers injuries.
- 11 G. Failure to object to repeated prosecutorial misconduct
12 during closing argument.

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

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

21 (5) Result: United States District Court denied relief, Case No.
22 2:03-cv-0173-KKD-LRL

23 (6) Date of result: May 15, 2008

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

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

- 4 a. Which of the grounds is the same: Ground One
5 b. The proceedings in which these grounds were raised: Chavez's
6 post-conviction petition and in federal district court.
7 c. Briefly explain why you are again raising these grounds.

8 Ground One is based upon a previously unavailable constitutional claim. *Clem*
9 *v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one year to
10 file a petition from the date that the claim has become available. *Rippo v. State*, 132
11 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds, Rippo v. Baker*,
12 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court
13 decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United*
14 *States*, 136 S. Ct. 1257 (2016). *Montgomery* established a new rule of constitutional
15 law, namely that the “substantive rule” exception to the *Teague* rule applies in state
16 courts as a matter of due process. Furthermore, *Welch* clarified that this
17 constitutional rule includes the Supreme Court’s prior statutory interpretation
18 decisions. Moreover, *Welch* established that the only requirement for an
19 interpretation of a statute to apply retroactively under the “substantive rule”
20 exception to *Teague* is whether the interpretation narrowed the class of individuals
21 who could be convicted under the statute.

22 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any
23 additional pages you have attached, were not previously presented in any other court,
24 state or federal, list briefly what grounds were not so presented, and give your reasons
25 for not presenting them. N/A
26
27

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1 19. Are you filing this petition more than 1 year following the filing of the
2 judgment of conviction or the filing of a decision on direct appeal? Yes If so, state
3 briefly the reasons for the delay.

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

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

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

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

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

GROUND ONE

21
22 **UNDER RECENTLY DECIDED SUPREME COURT**
23 **CASES, PETITIONER MUST BE GIVEN THE BENEFIT**
24 **OF *BYFORD V. STATE*, AS A MATTER OF DUE**
25 **PROCESS BECAUSE *BYFORD* WAS A SUBSTANTIVE**
26 **CHANGE IN LAW THAT NOW MUST BE APPLIED**
27 **RETROACTIVELY TO ALL CASES, INCLUDING**
 THOSE THAT BECAME FINAL PRIOR TO *BYFORD*.

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

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

16 However, in 2016, the United States Supreme Court drastically changed these
17 retroactivity rules. First, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the
18 Supreme Court held that the question of whether a new constitutional rule falls
19 under the “substantive exception” to the Teague retroactivity rules is a matter of due
20 process. Second, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme
21 Court clarified that the “substantive exception” of the *Teague* rules includes
22 “interpretations” of criminal statutes. It further indicated that the *only* requirement
23 for determining whether an interpretation of a criminal statute applies retroactively
24 is whether the interpretation narrows the class of individuals who can be convicted
25 of the crime.

26 *Montgomery* and *Welch* represent a change in law that allows petitioner to
27 obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has

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1 acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that
2 means that it must be applied retroactively to convictions that had already become
3 final at the time *Byford* was decided. The Nevada Supreme Court’s distinction
4 between “change” and “clarification” is no longer valid in determining retroactivity.
5 And the state courts are required to apply the rules set forth in *Welch* because those
6 retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional
7 principle. Petitioner is entitled to relief because there is a reasonable likelihood that
8 the jury applied the *Kazalyn* instruction in an unconstitutional manner. Further, the
9 instruction had a prejudicial impact at trial.

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

14 Accordingly, the petition should be granted.

15 I. BACKGROUND

16 A. *Kazalyn* First-Degree Murder Instruction

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

19 Premeditation is a design, a determination to kill,
20 distinctly formed in the mind at any moment before or at
21 the time of the killing.

22 Premeditation need not be for a day, an hour or even
23 a minute. It may be as instantaneous as successive
24 thoughts of the mind. For if the jury believes from the
25 evidence that the act constituting the killing has been
26 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.

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

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1
2 Premeditation is a question of fact for the jury and
3 may be determined from the facts and circumstances of the
4 killing, such as the use of an instrument calculated to
produce death, the maker of the use, and the circumstances
surrounding the act.

5 (Jury Instructions, Instruction No. 10.)

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

10 **B. Appeal and Date Conviction Became Final**

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

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

20 **C. *Byford v. State***

21 On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116
22 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn*
23 instruction because it did not define premeditation and deliberation as separate
24 elements of first-degree murder. *Id.* Its prior cases, including *Kazalyn*, had
25 “underemphasized the element of deliberation.” *Id.* Cases such as *Kazalyn* and
26 *Powell v. State*, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), had reduced
27 “premeditation” and “deliberation” to synonyms and that, because they were

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1 “redundant,” no instruction separately defining deliberation was required. *Id.* It
2 pointed out that, in *Greene v. State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997), the
3 court went so far as to state that “the terms premeditated, deliberate, and willful are
4 a single phrase, meaning simply that the actor intended to commit the act and
5 intended death as a result of the act.”

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

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

12 *Id.* The court emphasized that deliberation remains a “critical element of the *mens*
13 *rea* necessary for first-degree murder, connoting a dispassionate weighting process
14 and consideration of consequences before acting.” *Id.* at 714. It is an element that
15 “must be proven beyond a reasonable doubt before an accused can be convicted or
16 first degree murder.” *Id.* at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d
17 278, 280 (1981)).

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

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1 On August 23, 2000, the NSC decided *Garner v. State*, 116 Nev. 770, 6 P.3d
2 1013, 1025 (2000). In *Garner*, the NSC held that the use of the *Kazalyn* instruction
3 at trial was neither constitutional nor plain error. *Id.* at 1025. The NSC rejected the
4 argument that, under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford* had to apply
5 retroactively to Garner’s case as his conviction had not yet become final. *Id.*
6 According to the court, *Griffith* only concerned constitutional rules and *Byford* did
7 not concern a constitutional error. *Id.* The jury instructions approved in *Byford* did
8 not have any retroactive effect as they were “a new requirement with prospective
9 force only.” *Id.*

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

13 This does not mean, however, that the reasoning of
14 *Byford* is unprecedented. Although *Byford* expressly
15 abandons some recent decisions of this court, it also relies
16 on the longstanding statutory language and other prior
17 decisions of this court in doing so. Basically, *Byford*
18 *interprets and clarifies* the meaning of a preexisting
19 statute by resolving conflict in lines in prior case law.
20 Therefore, its reasoning is not altogether new.

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

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

27 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

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1 “for conduct that [the State’s] criminal statute, as properly interpreted, does not
2 prohibit.” *Id.* at 228.

3 In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S.
4 835 (2003). In *Bunkley*, the Court held that, as a matter of due process, a change in
5 state law that narrows the category of conduct that can be considered criminal, had
6 to be applied to convictions that had yet to become final. *Id.* at 840-42.

7 E. *Nika v. State*

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

12 In response to *Polk*, the NSC in 2008 issued *Nika v. State*, 124 Nev. 1272, 198
13 P.3d 839, 849 (2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk*’s
14 conclusion that a *Winship* violation occurred. The court stated that, rather than
15 implicate *Winship* concerns, the only due process issue was the retroactivity of
16 *Byford*. It reasoned that it was within the court’s power to determine whether *Byford*
17 represented a clarification of the interpretation of a statute, which would apply to
18 everybody, or a change in the interpretation of a statute, which would only apply to
19 those convictions that had yet to become final. *Id.* at 849-50. The court held that
20 *Byford* represented a change in the law as to the interpretation of the first-degree
21 murder statute. *Id.* at 849-50. The court specifically “disavow[ed]” any language in
22 *Garner* indicating that *Byford* was anything other than a change in the law, stating
23 that language in *Garner* indicating that *Byford* was a clarification was dicta. *Id.* at
24 849-50.

25 The court acknowledged that because *Byford* had changed the meaning of the
26 first-degree murder statute by narrowing its scope, due process required that *Byford*
27 had to be applied to those convictions that had not yet become final at the time it was

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1 decided, citing *Bunkley* and *Fiore*. *Id.* at 850, 850 n.7, 859. In this regard, the court
2 also overruled *Garner* to the extent that it had held that *Byford* relief could only be
3 prospective. *Id.* at 859.

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

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

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

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

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1 The primary question the Court addressed in *Montgomery* was whether it had
2 jurisdiction to review the question. The Court stated that it did, holding “when a new
3 substantive rule of constitutional law controls the outcome of a case, the Constitution
4 requires state collateral review courts to give retroactive effect to that rule.”
5 *Montgomery*, 136 S. Ct. at 729. “*Teague’s* conclusion establishing the retroactivity of
6 new substantive rules is best understood as resting upon constitutional premises.”
7 *Id.* “States may not disregard a controlling constitutional command in their own
8 courts.” *Id.* at 727 (citing *Martin v. Hunter’s Lessess*, 1 Wheat. 304, 340-41, 344
9 (1816)).

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

13 On April 18, 2016, the United States Supreme Court decided *Welch v. United*
14 *States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether
15 *Johnson v. United States*, which held that the residual clause in the Armed Career
16 Criminal Act was void for vagueness under the Due Process Clause, applied
17 retroactively to convictions that had already become final at the time of *Johnson*.
18 *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether
19 *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a
20 substantive rule as one that “alters the range of conduct or the class of persons that
21 the law punishes.” *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)).
22 “*This includes decisions that narrow the scope of a criminal statute by interpreting*
23 *its terms*, as well as constitutional determinations that place particular conduct or
24 persons covered by the statute beyond the State’s power to punish.” *Id.* at 1265
25 (quoting *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the
26 Court concluded that *Johnson* was substantive. *Id.*

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

5 The Court rejected this argument, pointing out that some of the Court’s
6 “substantive decisions do not impose such restrictions.” *Id.* The “clearest example”
7 was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was
8 whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*,
9 the Court had “held as a matter of statutory interpretation that the ‘use’ prong [of 18
10 U.S.C. § 924(c)(1)] punishes only ‘active employment of the firearm’ and not mere
11 possession.” *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). The Court in *Bousley* had
12 “no difficulty concluding that *Bailey* was substantive, as it was a decision ‘holding
13 that a substantive federal criminal statute does not reach certain conduct.’” *Id.*
14 (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following
15 parenthetical as further support: “A decision that modifies the elements of an offense
16 is normally substantive rather than procedural.” The Court pointed out that *Bousley*
17 did not fit under the *amicus*’s *Teague* framework as Congress amended § 924(c)(1) in
18 response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

19 Recognizing that *Bousley* did not fit, *amicus* argued that *Bousley* was simply
20 an exception to the proposed framework because, according to *amicus*, “*Bousley*
21 ‘recognized a separate subcategory of substantive rules for decisions that interpret
22 statutes (but not those, like *Johnson*, that invalidate statutes).” *Welch*, 136 S. Ct. at
23 1267 (quoting *Amicus* brief). *Amicus* argued that statutory construction cases are
24 substantive because they define what Congress always intended the law to mean. *Id.*

25 The Court rejected this argument. It stated that statutory interpretation cases
26 are substantive solely because they meet the criteria for a substantive rule:
27

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

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

9 II. ANALYSIS

10 A. *Welch* And *Montgomery* Establish That the Narrowing 11 Interpretation Of The First-Degree Murder Statute In *Byford* 12 Must Be Applied Retroactively in State Court To Convictions 13 That Were Final At The Time *Byford* Was Decided

14 In *Montgomery*, the United States Supreme Court, for the first time,
15 constitutionalized the “substantive rule” exception to the *Teague* retroactivity rules.
16 The consequence of this step is that state courts are now required to apply the
17 “substantive rule” exception in the manner in which the United States Supreme
18 Court applies it. *See Montgomery*, 136 U.S. at 727 (“States may not disregard a
19 controlling constitutional command in their own courts.”).

20 In *Welch*, the Supreme Court made clear that the “substantive rule” exception
21 includes “*decisions that narrow the scope of a criminal statute by interpreting its*
22 *terms.*” What is critically important, and new, about *Welch* is that it explains, for the
23 very first time, that the *only* test for determining whether a decision that interprets
24 the meaning of a statute is substantive, and must apply retroactively to all cases, is
25 whether the new interpretation meets the criteria for a substantive rule, namely
26 whether it alters the range of conduct or the class of persons that the law punishes.
27 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

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1 substantive. The court held specifically that *Byford* represented an interpretation of
2 a criminal statute that narrowed its meaning. This was correct as *Byford's*
3 interpretation of the first-degree murder statute, in which the court stated that a jury
4 is required to separately find the element of deliberation, narrowed the range of
5 individuals who could be convicted of first-degree murder.

6 Nevertheless, the court concluded that, because *Byford* was a change in law,
7 as opposed to a clarification, it did not need to apply retroactively. In light of *Welch*,
8 this distinction between a “change” and “clarification” no longer matters. The *only*
9 relevant question is whether the new interpretation represents a new substantive
10 rule. In fact, a “change in law” fits far more clearly under the *Teague* substantive
11 rule framework than a clarification because it is a “new” rule. The Supreme Court
12 has suggested as much previously. *See Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9
13 (2005) (“A *change* in the interpretation of a *substantive* statute may have
14 consequences for cases that have already reached final judgment, particularly in the
15 criminal context.” (emphasis added); citing *Bousley v. United States*, 523 U.S. 614
16 (1998); and *Fiore*).² Critically, in *Welch*, the Supreme Court never used the word
17 “clarification” once when it analyzed how the statutory interpretation decisions fit
18 under *Teague*. Rather, it only used the term “interpretation” without qualification.
19 The analysis in *Welch* shows that the Nevada Supreme Court’s distinction between
20 “change” and “clarification” is no longer a relevant factor in determining the
21 retroactive effect of a decision that interprets a criminal statute by narrowing its
22 meaning.

23 Accordingly, under *Welch* and *Montgomery*, Chavez is entitled to the benefit
24 of having *Byford* apply to his case, which became final prior to *Byford*. The *Kazalyn*
25 instruction defining premeditation and deliberation given in his case was improper.

26
27 ² In contrast, the United States Supreme Court has never cited *Bunkley* in any subsequent case.

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1 It is reasonably likely that the jury applied the challenged instruction in a way
2 that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004). As
3 the Nevada Supreme Court explained in *Byford*, the *Kazalyn* instruction blurred the
4 distinction between first and second degree murder. It reduced premeditation and
5 deliberation down to intent to kill. The State was relieved of its obligation to prove
6 essential elements of the crime, including deliberation. In turn, the jury was not
7 required to find deliberation as defined in *Byford*. The jury was never required to
8 find whether there was “coolness and reflection” as required under *Byford*. *Byford*,
9 994 P.2d at 714. The jury was never required to find whether the murder was the
10 result of a “process of determining upon a course of action to kill as a result of thought,
11 including weighing the reasons for and against the action and considering the
12 consequences of the action.” *Id.*

13 This error had a prejudicial impact on this case. As discussed previously, the
14 evidence presented to the jury was not sufficient to establish that Chavez
15 premeditated and deliberately killed Jamie Rogers. Evidence was proffered at trial
16 that Chavez tried to save Rogers from drowning at Lake Mead. Her injuries were
17 catalogued, but there was no evidence was inconsistent with a fall into the lake and
18 striking her head on a rock.

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

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

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

14 Finally, petitioner can establish actual prejudice for the reasons discussed on
15 pages 23.

16 **III. PRAYER FOR RELIEF**

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

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

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

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

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

3 DATED this 18th day of April, 2017.

4 Respectfully submitted,
5 RENE L. VALLADARES
6 Federal Public Defender

7 /s/ Lori C. Teicher
8 LORI C. TEICHER
9 First Assistant Federal Public Defender
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VERIFICATION

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

7 DATED this 18th day of April, 2017.
8
9

10 /s/ Lori C. Teicher
11 LORI C. TEICHER
12 First Assistant Federal Public Defender
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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that she is an employee in the office of the
3 Federal Public Defender for the District of Nevada and is a person of such age and
4 discretion as to be competent to serve papers.

5 That on April 18, 2017, she served a true and accurate copy of the foregoing
6 PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) by placing it
7 in the United States mail, first-class postage paid, addressed to:

8 Steve Wolfson
9 Clark County District Attorney
10 200 Lewis Ave.
11 Las Vegas, NV 89101

12 Adam P. Laxalt
13 Nevada Attorney General
14 100 North Carson Street
15 Carson City, NV 89701

16 Charles Kelly Chavez
17 #57418
18 Warm Springs Correctional Center
19 P.O. Box 7007
20 Carson City, Nevada 89701

21
22
23
24
25
26
27
/s/ Leianna Jeske

An Employee of the Federal Public
Defender, District of Nevada

1 JOC
2 STEWART L. BELL
3 DISTRICT ATTORNEY
4 Nevada Bar #000477
5 200 S. Third Street
6 Las Vegas, Nevada 89155
7 (702) 455-4711
8 Attorney for Plaintiff

FILED

APR 14 1 03 PM '98

Amelia L. ...
CLERK

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 CHARLES KELLY CHAVEZ,
12 #1156097

13 Defendant.

Case No. C146562X
Dept. No. VIII
Docket M

14
15 JUDGMENT OF CONVICTION (JURY TRIAL)

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

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

APR 06 1998

CE-03

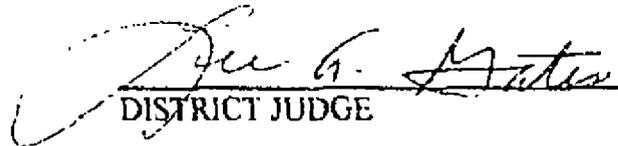
APR 16 1998

CLERK

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

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

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

13
14 
15 DISTRICT JUDGE 
16

17 DA#97-146562X/rmf
18 LVMPD EV#97082115651
19 First Degree Murder/Robbery/
20 Unlawful Use Card Withdraw Money-F
(TK7)
21 p:\wpdocs\judg\outlying\7h128901\rmf
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28

APP. 125

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

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

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

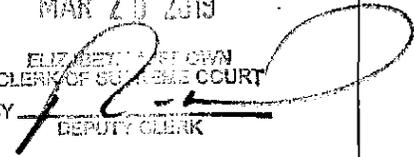
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 74159-COA

FILED

MAR 20 2019

ELIZABETH JEFF DOWD
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

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

19-12418

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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).

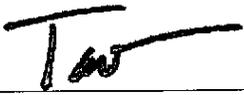
Cooper also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 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

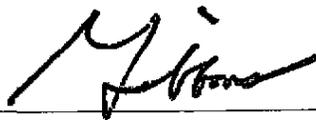
27, 1991); *Cooper v. State*, Docket No. 18679 (Order Dismissing Appeal, September 21, 1988).

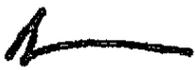
APP. 129

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

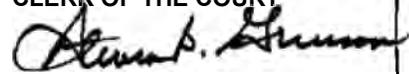
ORDER the judgment of the district court AFFIRMED.


_____, 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



1 FFCL

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 STATE OF NEVADA,

Case No. 83C062939

Dept. No. XXII

5 Plaintiff,

6 Vs.

7 RICKEY DENNIS COOPER,

8 Defendant.

9 RICKEY DENNIS COOPER,

10 Petitioner,

11 Vs.

12 JO GENTRY, WARDEN,¹

13 Respondent.

14 ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS

15 This matter concerning Defendant RICKEY DENNIS COOPER'S Writ of Habeas Corpus
16 (Post Conviction) filed April 17, 2017 came on for hearing on the 24th day of August 2017² at the
17 hour of 10:30 a. m. before Department XXII of the Eighth Judicial District Court, in and for Clark
18 County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Petitioner RICKEY DENNIS
19 COOPER appeared by and through his attorney, MEGAN C. HOFFMAN, ESQ., Assistant Federal
20 Public Defender; and Respondent JO GENTRY, WARDEN appeared by and through SANDRA K.
21
22
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25

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

²This 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.

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

5 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

6
7 1. By way of Information filed June 13, 1983, Defendant/Petitioner RICKEY DENNIS
8 COOPER was charged with committing the following crimes:

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

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

13 COUNT 3 – Battery With Use of a Deadly Weapon (Felony) in violation of NRS
14 200.481 and 193.165; and

15 COUNT 4 – Murder With Use of a Deadly Weapon (Felony) in violation of NRS
16 200.010, 200.030 and 193.165.

17
18 2. The aforementioned charges were brought to trial from November 1 to 7, 1983, and
19 the jury found MR. COOPER guilty of committing all four crimes. The penalty phase commenced
20 one week later, and the jury returned a verdict imposing a sentence of life imprisonment without the
21 possibility of parole. On January 5, 1984, MR. COOPER was adjudged guilty of all four counts and
22 received terms of imprisonment to run consecutively; the most lengthy sentence was serving life
23 without the possibility of parole plus a consecutive identical term for the use of the deadly weapon.³
24

25 ...

26 ...

27
28 ³See Judgment of Conviction filed January 20, 1984.

APP. 132

1 3. MR. COOPER appealed the judgment on February 3, 1984, claiming the district
2 court committed error in the penalty phase⁴ by (1) admitting evidence Defendant was involved in a
3 gang, and (2) refusing to admit into evidence a letter setting forth mitigating circumstances. The
4 appeal was considered and dismissed by the Nevada Supreme Court on May 15, 1986.⁵

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

7 a. The first, filed December 8, 1986 in the Eighth Judicial District Court, raised
8 claims (1) Defendant was denied effective assistance of trial counsel as the lawyer "did not
9 object to questions assuming facts not in evidence, hearsay, inappropriate evidence of
10 Cooper's unemployment, misleading questioning and prosecutorial misconduct in closing
11 argument;" (2) "the prosecutor engaged in misconduct by inflaming the passions of the jury
12 and vouching for a witness;" and (3) Defendant was deprived the effective assistance of
13 appellate counsel for the lawyer's "failure to argue the trial errors of admitting evidence of
14 other crimes, ...of rocks thrown through a witness's (sic) window, the trial court's canvass of
15 a witness as to his religious beliefs, and prosecutorial misstatements of evidence."⁶ This
16 petition was denied by the district court on November 2, 1987; such decision was appealed,
17 and ultimately, the appeal was denied by the Nevada Supreme Court on September 21,
18 1988.⁷

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

20 ⁵See *Cooper v. State*, Docket No. 15653.

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

25 ⁷See *Cooper v. State*, Docket No. 18679. While the trial court's written decision summarily denied the
26 originally-filed Petition for Writ of Habeas Corpus, the Nevada Supreme Court deemed, with respect to the first ground
27 presented, trial counsel's "failure" to object in one instance as a "sound tactical decision." With respect to another
28 "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

1 b. The second Petition for Writ of Habeas Corpus was filed July 12, 1990 in the
 2 Seventh Judicial District Court. The four grounds raised there were (1) violation of the First
 3 Amendment to the United States Constitution as the district court denied MR. COOPER'S
 4

5
 6 pursuant to NRS 51.035(2), MR. COOPER failed to show his lawyer's allegedly tardy objection represented deficient
 7 performance. With respect to the prosecutor's emphasizing MR. COOPER'S unemployment status,
 8 Petitioner/Defendant failed to identify how he was prejudiced by such "emphasis," and thus, that his lawyer's
 9 performance was deficient. The "vouching" for a witness by the prosecutor consisted of the district attorney arguing in
 10 closing the witness "stuck his neck out" to testify, which could be appropriately tied to evidence showing at least one
 11 witness had been warned not to testify. The Nevada Supreme Court concluded the State's remark represented an
 12 appropriate comment on the evidence, and therefore, the defense lawyer was not "ineffective" by failing to object to
 13 such "vouching" by the prosecutor. MR. COOPER also maintained his lawyer failed to object to an alleged
 14 prosecutorial comment Defendant/Petitioner did not testify. The high court noted a review of the record revealed the
 15 State was not commenting on MR. COOPER'S failure to testify; rather, the State pointed out an inconsistency between a
 16 statement made by Petitioner/Defendant following his arrest and that of his stepfather's testimony. The State's argument
 17 was a permissible comment on the evidence before the jury.

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

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

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1 motion for production of transcripts; (2) violation of the Fifth Amendment during pre-trial,
2 trial and post-trial proceedings; (3) violation of the Sixth Amendment "because of excessive
3 media and political pressure prevented Petitioner from having a fair trial; and (4) violation of
4 the Fourteenth Amendment and Petitioner's right to Equal Protection due to numerous acts
5 of misconduct by the arresting officers, the trial court and the prosecution. The petition was
6 denied November 2, 1990, and the appeal to the Nevada Supreme Court was denied June 27,
7 1991.⁸

8
9 c. The third post-conviction Petition for Writ of Habeas Corpus was pursuant to
10 Title 28 U.S.C. §2254 and filed in the United States District Court, District of Nevada on
11 November 16, 1993.⁹ There were five grounds raised in this petition: (1) denial of due
12 process by the court's admission of evidence MR. COOPER was a gang leader that
13 committed violent acts without evidence, and by the court's failure to give a cautionary
14 instruction concerning the evidence; (2) denial of due process by the court's exclusion of
15 mitigating evidence at the penalty hearing; (3) denial of effective assistance of trial counsel
16 as he did not object to questions assuming facts not in evidence, hearsay, inappropriate
17 evidence of Petitioner's unemployment, misleading questions and prosecutorial misconduct
18 in closing argument; (4) denial of effective assistance of appellant counsel for failing to
19 argue trial errors of admitting evidence of other crimes, of rocks thrown through a witness'
20 window, the trial court's canvass of a witness as to his religious beliefs and prosecutorial
21 misstatement of the evidence; and (5) denial of First Amendment right to redress of
22

23
24 ...

25
26 ⁸See *Cooper v. State*, Docket No. 22086. As this post-conviction petition for writ of habeas corpus was filed in
27 the Seventh Judicial District Court, this Court did not have access to the district court judge's decision. It was not
28 provided a copy of the Nevada Supreme Court's decision by either of the parties.

⁹Although 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.

APP. 135

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

3 d. MR. COOPER'S fourth post-conviction Petition for Writ of Habeas Corpus
4 was filed in the Nevada Supreme Court on January 6, 1997. The grounds raised there were
5 (1) denial of due process by court's admission of evidence MR. COOPER was a gang leader
6 that committed violent acts without evidence he committed the acts and by the court's failure
7 to give a cautionary instruction that evidence; (2) denial of due process by the court's
8 exclusion of mitigating evidence at the penalty hearing; and (3) denial of effective assistance
9 of appellate counsel for failing to argue trial errors of admitting evidence of other crimes, of
10 rocks thrown through a witness' window, the trial court's canvass of a witness as to his
11 religious beliefs and prosecutorial misstatement of evidence. The petition was denied by the
12 high court on February 24, 1997¹¹ given MR. COOPER'S failure to first bring it in the state
13 district court.
14

15
16 e. The fifth post-conviction petition was filed in the Eighth Judicial District
17 Court. There, the eight grounds raised were: (1) MR. COOPER'S Fifth and Fourteenth
18 Amendments' rights to Due Process and Equal Protection were violated by the prosecutor's
19 misconduct in (a) injecting race into the proceedings, and (b) failing to produce material
20 evidence of a witness' lack of credibility and knowingly admitting false testimony; (2)
21 violation of MR. COOPER'S Fifth and Fourteen Amendments' rights to Due Process
22
23

24
25 ¹⁰This Court had no access to and was not provided a copy of the federal district court's decision rendered
26 February 29, 1996. However, a review of the district court's Amended Findings of Fact, Conclusions of Law and Order
27 filed in this case on February 24, 2005, p. 2, indicates the dismissal was due to MR. COOPER not exhausting his state
28 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).

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

APP. 136

1 because instructions given to the jury in the guilt phase unconstitutionally minimized the
2 State's burden of proof and unconstitutionally defined some of the essential elements of first
3 degree murder, to wit: instructions regarding "reasonable doubt," "malice aforethought" and
4 "premeditation and deliberation;" (3) MR. COOPER was denied his Sixth and Fourteenth
5 Amendments' rights to effective assistance of counsel at trial as his lawyer failed to object to
6 (a) the prosecutor's injection of race into the trial proceedings, (b) the unconstitutional
7 reasonable doubt instruction, (3) unconstitutional implied malice instruction and (d) the
8 unconstitutional premeditation and deliberation instruction; (4) MR. COOPER was denied
9 his Sixth and Fourteenth Amendments' rights to effective assistance of counsel on appeal as
10 his appeals lawyer failed to raise as an issue on appeal (a) the prosecutor's injection of race
11 into the trial proceedings, (b) the unconstitutional reasonable doubt instruction, (3)
12 unconstitutional implied malice instruction and (d) the unconstitutional premeditation and
13 deliberation instruction; (5) the court violated MR. COOPER'S Fifth and Fourteenth
14 Amendments' rights to Due Process as instructions given to the jury in the penalty phase
15 unconstitutionally minimized the State's burden of proof and misled the jury about the
16 unanimity requirement for mitigating circumstances, to wit: instructions regarding
17 "reasonable doubt" and "unanimity" "as to mitigating circumstances;" (6) the court violated
18 MR. COOPER'S Fifth and Fourteenth Amendment rights to Due Process when it excluded
19 evidence of mitigating factors from the penalty hearing; (7) MR. COOPER was denied his
20 Sixth and Fourteenth Amendment Rights to effective assistance of counsel at the penalty
21 phase as the defense lawyer failed to object (a) to the unconstitutional reasonable doubt
22 instruction, (b) to the unconstitutional unanimity instruction and (c) on constitutional grounds
23 to the court's exclusion of mitigating evidence in the penalty phase; and (8) MR. COOPER
24 was denied his Sixth and Fourteen Amendments' rights to effective assistance of counsel on
25
26
27
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APP. 137

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

8
9 MR. COOPER appealed this decision to the Nevada Supreme Court on January 8,
10 1998. On July 24, 2000, the high court affirmed the district court's judgment in all respects,
11 except for one;¹³ it remanded the petition to the lower court to determine whether MR.
12 COOPER had good cause to excuse the procedural defects in the filing of his post-conviction
13 petition given his claim one of the eyewitnesses, DONNELL WELLS, recanted his trial
14 testimony, and the prosecutor withheld evidence MR. WELLS received undisclosed benefits
15 for his testimony in violation of Brady v. Maryland, 373 U.S. 83 (1963).¹⁴ On December 17,
16 2004, the district court held an evidentiary hearing and determined MR. COOPER had not
17 shown good cause to excuse the procedural defect in his filing, and denied the post-
18 conviction petition for writ of habeas corpus.¹⁵

19
20
21 MR. COOPER appealed the district court's amended decision to the Nevada Supreme
22 Court on March 11, 2005. The high court issued its Order of Affirmance on March 2, 2006,
23 concluding, summarily, the substantial evidence demonstrated the district attorney's office
24

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

27 ¹³See Cooper v. State, Docket No. 31667, fn. 1 ("We conclude, ..., that as to the remaining contentions in
28 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.")

¹⁴See Cooper v. State, Docket No. 31667.

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

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

13
14
15 f. MR. COOPER thereafter filed his sixth post-conviction Petition for Writ of
16 Habeas Corpus in the United States District Court, District of Nevada pursuant to Title 28
17 U.S.C. §2254 on November 9, 2006.¹⁷ There, ten grounds were raised: (1) MR. COOPER'S
18 conviction was based upon false testimony as shown by the recantation of witness,
19 DONNELL WELLS, in violation of Petitioner's/Defendant's Right to Due Process and Fair
20 Trial pursuant to the Fifth and Fourteenth Amendments; (2) the prosecution failed to produce
21 material evidence regarding witness, DONNELL WELLS, in violation of MR. COOPER'S
22 Right to Due Process, Fair Trial, and Equal Protection pursuant to the Fifth and Fourteenth
23 Amendments; (3) MR. COOPER was denied his right to Due Process, Fair Trial and Equal
24 Protection pursuant to the Fifth and Fourteenth Amendments based upon instances of
25
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27 ¹⁶See *Cooper*, 641 F.3d at 326.

28 ¹⁷In *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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1 prosecutorial misconduct, to wit: (a) improper vouching and commentary regarding the
2 credibility of MR. WELLS, and improper injection of race into the proceedings; (4) given the
3 trial court's improper questioning and vouching for MR. WELLS, MR. COOPER was denied
4 his right to Due Process, Fair Trial and Equal Protection pursuant to the Fifth and Fourteenth
5 Amendments; (5) the instructions given to the jury during the guilt phase unconstitutionally
6 minimized the State's burden of proof and unconstitutionally defined some of the essential
7 elements of first degree murder in violation of MR. COOPER'S Fifth and Fourteenth
8 Amendment rights to Due Process of Law, to wit: instructions regarding "reasonable doubt,"
9 "malice aforethought," and "premeditation and deliberation;" (6) MR. COOPER was denied
10 his right to Due Process, fair trial and Equal Protection pursuant to the Fifth and Fourteenth
11 Amendments because of trial court error during the penalty phase hearing, to wit: (a)
12 excluding mitigating evidence and (b) giving certain jury instructions at the penalty phase
13 (the "unanimity" and "reasonable doubt" instructions); (7) MR. COOPER was denied his
14 right to effective assistance of trial counsel in violation of the Sixth and Fourteen
15 Amendments as he failed to (a) adequately prepare and investigate the case for trial, (b)
16 impeach and cross-examine MR. WELLS and develop facts as to MR. WELLS' motive for
17 testifying against MR. COOPER, (c) object to instances of prosecutorial misconduct, (d) to
18 challenge judicial misconduct, (e) object at trial to the giving of unconstitutional jury
19 instructions and (f) object to jury instructions during the penalty phase; (8) MR. COOPER
20 was denied his right to effective assistance of appellate counsel in violation of his Sixth and
21 Fourteenth Amendments; (9) during the post-conviction evidentiary hearing, the state district
22 court failed to conduct an adequate *in camera* inspection of the prosecutor's trial file, which
23 denied MR. COOPER his right to Due Process in violation of the Fifth and Fourteenth
24 Amendments; and (10) the State's destruction or loss of the prosecutor's notes after the
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1 evidentiary hearing denied MR. COOPER his right to Due Process and Equal Protection
2 pursuant to the Fifth and Fourteenth Amendments. The federal district court dismissed the
3 habeas petition on August 11, 2008 as being procedurally barred. The matter was appealed
4 to the Ninth Circuit Court of Appeals. The federal appeals court affirmed the district court's
5 dismissal of MR. COOPER'S petition with respect to Grounds 3A, 4, 9 and 10, but reversed
6 its dismissal concerning Grounds 7A(3), 8(3) and 8(5). The high court also reversed the
7 lower court's dismissal with respect to the Brady and Napue claims and remanded for further
8 proceedings consistent with its opinion. See Cooper, 641 F.3d at 333. Ultimately, this
9 petition was denied March 17, 2015 by the federal district court, and such decision was
10 affirmed by the Ninth Circuit Court of Appeals on December 2, 2016.

11
12 5. MR. COOPER has now filed his seventh post-conviction Petition for Writ of Habeas
13 Corpus to be decided by this Court. The basis for such filing stems from one ground: the recent
14 United States Supreme Court decisions, Montgomery v. Louisiana, ___ S.Ct. ___, 136 S.Ct. 718,
15 193 L.Ed.2d 599 (2016), and Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d
16 387 (2016). In MR. COOPER'S view, Montgomery establishes a new rule of constitutional law,
17 namely the "substantive rule" exception to the retroactivity procedures expressed in Teague v. Lane,
18 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Welch clarified this constitutional decree
19 includes the United States Supreme Court's prior statutory interpretation decisions, and further,
20 established the only requirement for an interpretation of a statute to apply retroactively under the
21 "substantive rule" exception to Teague is whether it narrowed the class of individuals who could be
22 convicted under the statute. In MR. COOPER'S view, the filing of the instant post-conviction

23 ...

24 ...

25 ...

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1 Petition for Writ of Habeas Corpus is timely as it was filed within one year of *Welch* being decided,
2 i.e. April 18, 2016.¹⁸

3 Respondent WARDEN GENTRY opposes, arguing, MR. COOPER'S Petition for Writ of
4 Habeas Corpus is procedurally barred under both NRS 34.726(1) and 34.810(2). Furthermore, as
5 more than thirty (30) years have elapsed between the Nevada Supreme Court's decision on MR.
6 COOPER'S direct appeal of the Judgment of Conviction and the filing of the instant petition, laches
7 are specifically pled in order to invoke NRS 34.800(2)'s presumption of prejudice to the STATE OF
8 NEVADA.
9

10 CONCLUSIONS OF LAW

11 1. As noted above, Petitioner RICKEY DENNIS COOPER has filed what appears to be
12 his seventh post-conviction Petition for Writ of Habeas Corpus. There is no question MR. COOPER
13 falls within the category of persons entitled to file post-conviction petitions for writ of habeas
14 corpus. NRS 34.724(1) provides in pertinent part:
15

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

21 2. However, there are limitations on the time to file such post-conviction petitions for
22 writ of habeas corpus. NRS 34.726(1) states:

23 Unless there is good cause shown for delay, a petition that challenges the validity of a
24 judgment or sentence must be filed within 1 year after entry of the judgment of conviction or,
25 if an appeal has been taken from the judgment, within 1 year after the appellate court of
26 competition jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section
27 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this
28 subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the
29 court:

...

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 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

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

6
7 5. In this case, as noted above, MR. COOPER'S Judgment of Conviction was affirmed,
8 on appeal, by the Nevada Supreme Court on May 15, 1986. The currently filed post-conviction
9 petition for writ of habeas corpus is extremely tardy--by over thirty (30) years. Respondent and the
10 STATE OF NEVADA have specifically pled and claim laches, whereby MR. COOPER'S filing
11 which challenges the validity of the 1983 Judgment of Conviction creates a rebuttable presumption
12 of prejudice to the STATE. Notwithstanding the timeliness hurdles faced by MR. COOPER, his
13 currently filed petition is successive; between those filed in the state and federal courts, the post-
14 conviction Petition for Habeas Corpus filed April 17, 2017 is the seventh one filed. MR. COOPER
15 has the burden of pleading and proving specific facts demonstrating good cause for his failure to
16 present the claim or presenting it again, and further, he suffers actual prejudice.

17
18 6. MR. COOPER argues he has good cause as his ground for filing the instant petition is
19 based upon a previously unavailable constitutional claim,¹⁹ and he has up to one year to file a
20 petition from the date the claim has become available. *See Rippo v. State*, 132 Nev.Ad.Op. 11, 368
21 P.3d 729, 739-740 (2016), *reversed on other grounds*, *Rippo v. Baker*, ___ U.S. ___, 137 S.Ct. 905,
22 197 L.Ed.2d 167 (2017). In this case, as noted above, MR. COOPER'S basis or good cause for
23 filing a tardy and successive post-conviction Petition for Writ of Habeas Corpus stems from the
24 recent rulings of the United States Supreme Court, to wit: *Montgomery v. Louisiana*, ___ S.Ct. ___,
25 136 S.Ct. 718, 193 L.Ed.2d 599, decided, as revised, January 27, 2016, and *Welch v. United States*,

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27
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¹⁹*See Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-526 (2003).

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

10 7. Notwithstanding its concerns regarding the timeliness of the currently-filed petition,
11 this Court notes, as a general matter, "new constitutional rules of criminal procedure will not be
12 applicable to those cases which have become final before the new rules are announced." *Teague*,
13 489 U.S. at 310, 109 S.Ct. 1060, *quoted by Welch*, ___ U.S. at ___, 136 S.Ct. at 1264. However,
14 *Teague* and its progeny do recognize two categories of decisions that fall outside this general bar on
15 retroactivity for procedural rules. *First*, "[n]ew substantive rules generally apply retroactively."
16 *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), *quoted by*
17 *Welch*, ___ U.S. at ___, 136 S.Ct. at 1264. (Emphasis added) *Second*, new "'watershed rules of
18 criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy
19 of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 495,
20 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

21 ...

22 ...

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24
25
26 ²⁰Quoting *Clem*, 119 Nev. at 621, 81 P.3d at 525.

27 ²¹See post-conviction Petition for Writ of Habeas Corpus filed April 17, 2017, p. 15. Notably, the holding of
28 *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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1 8. In this case, the Nevada Supreme Court decision, Byford v. State, 116 Nev. 215, 994
2 P.2d 700, rendered February 28, 2000, announced a new rule,²² which MR. COOPER claims affects
3 the validity of his Judgment of Conviction. “[A] case announces a new rule if the result was not
4 *dictated* by precedent existing at the time the defendant’s conviction became final.” Welch, ___
5 U.S. at ___, 136 S.Ct. at 1264, *quoting* Teague, 489 U.S. at 310, 109 S.Ct. 1060, 103 L.Ed.2d 334.
6 The question here is whether the new rule set forth in Byford falls within one of the two categories
7 that have retroactive effect under Teague.

9 9. “A rule is substantive rather than procedural if it alters the range of conduct or the
10 class of persons that the law punishes.” Welch, ___ U.S. at ___, 136 S.Ct. at 1264-1265, *quoting*
11 Schriro, 542 U.S. at 353, 124 S.Ct. 2519. “This includes decisions that narrow the scope of a
12 criminal statute by interpreting its terms, as well as constitutional determinations that place
13 particular conduct or persons covered by the statute beyond the State’s power to punish.” Id., ___
14 U.S. at ___, 136 S.Ct. at 1265, *quoting* Schriro, 542 U.S. at 351-352, 124 S.Ct. 2519. Procedural
15 rules, by contrast, “regulate only the *manner of determining* the defendant’s culpability.” Id.,
16 *quoting* Schriro, 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter “the range of permissible methods
17 for determining whether a defendant’s conduct is punishable.” Id. “They do not produce a class of
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19
20

21 ²²This rule concerns use of the jury instruction first appearing in Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d
22 578, 583 (1992) (this instruction has come to be known as the Kazalyn jury instruction). The Kazalyn instruction was
23 found to underemphasize the element of “deliberation” contained in defining the *mens rea* required for first-degree
24 murder. In Kazalyn, the Nevada Supreme Court concluded the term “deliberate” was simply redundant to
25 “premeditated,” and thus, required no discrete definition. *Also see* Powell v. State, 108 Nev. 700, 708-710, 838 P.2d
26 921, 926-927 (1992), *vacated on other grounds*, 511 U.S. 79, 114 S.Ct. 1280, 128 L.Ed.2d 1 (1994). Citing Powell, the
27 high court went so far as to state “the terms premeditated, deliberate and willful are a single phrase, meaning simply that
28 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.

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

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

11
12 11. In addition, MR. COOPER has not shown he suffers actual prejudice if this Court
13 dismisses his petition as being untimely. Notwithstanding the overwhelming evidence of
14 premeditation, deliberation and willfulness,²³ Respondent notes MR. COOPER cannot establish
15 actual prejudice on the basis the *Kazalyn* instruction was used as the evidence also clearly
16 established first-degree murder on a theory of felony murder. In addition to MR. COOPER being
17 convicted of first-degree murder, he was also charged and convicted of committing Attempted
18 Robbery, which is among the enumerated felonies that can serve as a predicate to a theory of felony
19 murder. Because he was found guilty of committing first-degree murder under the felony-murder
20 theory, MR. COOPER has failed to show this Court he was actually and unduly prejudiced by use of
21 the *Kazalyn* instruction.
22
23

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26 ²³The evidence at trial demonstrated, while he was seated in a motor vehicle, MR. COOPER asked LARRY
27 COLLIER, who was with his friends around the area of Lake Mead Boulevard and "H" Street during the evening of
28 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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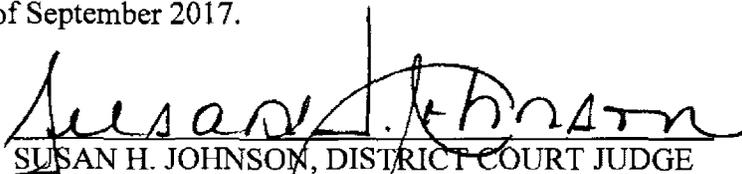
1 12. Notwithstanding the aforementioned, MR. COOPER'S currently-filed post-
2 conviction Petition for Writ of Habeas Corpus is successive of many petitions filed within the past
3 thirty years. Further, this Court notes the Nevada Supreme Court even had the benefit of *Byford*
4 when it decided the fifth post-conviction Petition for Writ of Habeas Corpus on July 24, 2000, and
5 still found "the district court did not err in determining that appellant failed to demonstrate adequate
6 cause or prejudice to excuse the procedural defects." As noted above, a second or successive
7 petition *must* be dismissed if the judge or justice determines it fails to allege new or different
8 grounds for relief and the prior determination was on the merits, or, if new and different grounds are
9 alleged, the judge or justice finds the failure of the petitioner to assert those grounds in a prior
10 petition constituted an abuse of the writ. In this case, as noted above, MR. COOPER did argue the
11 jury instructions were defective, and the Nevada Supreme Court, in affirming the lower court, found
12 such position lacked merit. Again, MR. COOPER has not shown good cause or actual prejudice if
13 this Court denies the currently-filed petition for being successive.
14
15

16 13. Further, given what has been stated above, this Court also concludes MR. COOPER
17 has not overcome the rebuttable presumption of prejudice to the STATE OF NEVADA under NRS
18 34.800(2). Again, it has now been over thirty years since the Nevada Supreme Court affirmed, on
19 appeal, MR. COOPER'S Judgment of Conviction.
20

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

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

24 DATED this 5th day of September 2017.

25
26 
27 SUSAN H. JOHNSON, DISTRICT COURT JUDGE
28

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CERTIFICATE OF SERVICE

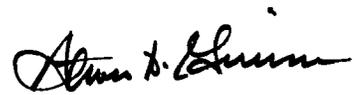
1
2 I hereby certify that on the 6th day of September 2017, I electronically served (E-served),
3 placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed
4 a true and correct copy of the foregoing ORDER DENYING DEFENDANT'S WRIT OF HABEAS
5 CORPUS to the following counsel of record, and that first-class postage was fully prepaid thereon:

6 RENE L. VALLADARES, ESQ., Federal Public Defender
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Laura Banks, Judicial Executive Assistant



CLERK OF THE COURT

1 PWHC
 2 RENE L. VALLADARES
 3 Federal Public Defender
 Nevada State Bar No. 11479
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10 Attorney for Petitioner Rickey Cooper

11
 12 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
 13 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

14 RICKEY DENNIS COOPER,

15 Petitioner,

16 v.

17 JO GENTRY, WARDEN, etc.

18 Respondents.
 19

Case No. C062939

Dept No. _____

Date of Hearing: _____

Time of Hearing: _____

(Not a Death Penalty Case)

20
 21 **PETITION FOR WRIT OF HABEAS CORPUS**
 22 **(POST CONVICTION)**

23 INSTRUCTIONS:

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

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

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

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

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

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

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

23 ///

24 ///

25 ///

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

PETITION

7
8 1. Name of institution and county in which you are presently imprisoned
9 or where and how you are presently restrained of your liberty: Southern Desert
10 Correctional Center, Indian Springs, Nevada

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

13 3. Date of judgment of conviction: January 20 1984

14 4. Case Number: C62939

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

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

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

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

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1 (3) Grounds raised:

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

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

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

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

18 (5) Result: Petition Denied.

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

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

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

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

26 (2) Nature of proceeding: Post-Conviction Petition for Writ of
27 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.

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

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

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

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

12 (5) Result: Petition Denied.

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

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

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

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

21 (2) Nature of proceeding: Petition For Writ of Habeas Corpus
22 Pursuant To 28 U.S.C. §2254

23 (3) Grounds raised:

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

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

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

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

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

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

17 (5) Result: Petition dismissed without prejudice.

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

19 (7) If known, citations of any written opinion or date of orders
20 entered pursuant to such result: Unpublished Order dated
21 2/29/1996.

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

24 (1) Name of court: Nevada Supreme Court

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

27 (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

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

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

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

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

10 (5) Result: Petition Denied.

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

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

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

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

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

21 (3) Grounds raised:

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

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

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

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

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

27 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

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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.

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

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

5 (2) Nature of proceeding: Petition For Writ Of Habeas Corpus
6 Pursuant To 28 U.S.C. §2254

7 (3) Grounds raised:

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

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

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

24 Ground Four: Based Upon The Trial Court's Improper Questioning And
25 Vouching For Witness Donnell Wells, Cooper Was Denied His
26 Right To Due Process, Fair Trial, And Equal Protection Pursuant
27 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"

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1 Instruction; (C) The “Premeditation And Deliberation”
2 Instruction.

3 Ground Six: Based Upon Trial Court Error During The Penalty Phase
4 Hearing, Cooper Was Denied His Right To Due Process, Fair
5 Trial, And Equal Protection Pursuant To The Fifth And
6 Fourteenth Amendments To The United States Constitution: (A)
7 Exclusion Of Mitigation Evidence; (B) Jury Instructions Given At
8 Penalty Phase: (1)The Unanimity Instruction,(2)The Reasonable
9 Doubt Instruction.

10 Ground Seven: Cooper Was Denied His Right To The Effective Assistance Of
11 Counsel Prior To And During Trial In Violation Of The Sixth And
12 Fourteenth Amendments To The United States Constitution: (A)
13 Trial Counsel Failed To Adequately Prepare And Investigate The
14 Case For Trial: (1)Counsel Failed To Impeach And Effectively
15 Cross-Examine Witnesses As To Their Inconsistent Version Of
16 Events, (2)Counsel Failed To Impeach And Cross-Examine Wells
17 And Failed To Develop Facts As To Wells’s Motive For Testifying
18 Against Cooper, (3)Counsel Failed To Object To Instances Of
19 Prosecutorial Misconduct, (4)Counsel Permitted Instances Of
20 Judicial Misconduct To Go By Unchallenged, (5)Counsel Failed
21 To Object At Trial To Unconstitutional Jury
22 Instructions,(6)Counsel Failed To Object To Jury Instructions
23 During Penalty Phase.

24 Ground Eight: Cooper Was Denied His Right To The Effective Assistance Of
25 Counsel On Appeal In Violation Of The Sixth And Fourteenth
26 Amendments To The United States Constitution.

27 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.

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

3 (5) Result: Petition dismissed.

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

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

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

12 (9) Result: Petition denied.

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

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

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

20 (1) First petition, application or motion?

21 Yes X No _____

22 (2) Second petition, application or motion?

23 Yes X No _____

24 (3) Third petition, application or motion?

25 Yes X No _____

26 (4) Fourth petition, application or motion?

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1 Yes X No _____

2 (5) Fifth petition, application or motion?

3 Yes X No _____

4 (6) Sixth petition, application or motion?

5 Yes X No _____

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

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

11 a. Which of the grounds is the same: Ground One in this proceeding
12 is the same as Ground Two(C) in 1997 State Post-Conviction
13 Petition and as Ground Five(C) in 1997 Federal Petition For Writ
14 of Habeas Corpus

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

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

19 Ground One is based upon a previously unavailable constitutional claim. *Clem*
20 *v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to
21 file a petition from the date that the claim has become available. *Rippo v. State*, 132
22 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds, Rippo v. Baker*,
23 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court
24 decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United*
25 *States*, 136 S. Ct. 1257 (2016). *Montgomery* established a new rule of constitutional
26 law, namely that the “substantive rule” exception to the *Teague* rule applies in state

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1 courts as a matter of due process. Furthermore, *Welch* clarified that this
2 constitutional rule includes the Supreme Court’s prior statutory interpretation
3 decisions. Moreover, *Welch* established that the only requirement for an
4 interpretation of a statute to apply retroactively under the “substantive rule”
5 exception to *Teague* is whether the interpretation narrowed the class of individuals
6 who could be convicted under the statute.

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

11 19. Are you filing this petition more than 1 year following the filing of the
12 judgment of conviction or the filing of a decision on direct appeal? Yes. If so, state
13 briefly the reasons for the delay.

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

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

25 If yes, state what court and the case number:
26
27

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1 final at the time it was decided. The court concluded, as a result, that *Byford* did not
2 apply retroactively to those convictions that had already become final.

3 However, in 2016, the United States Supreme Court drastically changed these
4 retroactivity rules. First, in *Montgomery v. Louisiana*, the Supreme Court held that
5 the question of whether a new constitutional rule falls under the “substantive
6 exception” to the *Teague v. Lane*, 489 U.S. 288 (1989), retroactivity rules is a matter
7 of due process. Second, in *Welch v. United States*, the Supreme Court clarified that
8 the “substantive exception” of the *Teague* rules includes “interpretations” of criminal
9 statutes. It further indicated that the *only* requirement for determining whether an
10 interpretation of a criminal statute applies retroactively is whether the
11 interpretation narrows the class of individuals who can be convicted of the crime.

12 *Montgomery* and *Welch* represent a change in law that allows petitioner to
13 obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has
14 acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that
15 means that it must be applied retroactively to convictions that had already become
16 final at the time *Byford* was decided. The Nevada Supreme Court’s distinction
17 between “change” and “clarification” is no longer valid in determining retroactivity.
18 And the state courts are required to apply the rules set forth in *Welch* because those
19 retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional
20 principle.

21 Petitioner is entitled to relief because there is a reasonable likelihood that the
22 jury applied the *Kazalyn* instruction in an unconstitutional manner. As such,
23 Petitioner can show actual prejudice. Petitioner can also establish good cause to
24 overcome the procedural bars. The new constitutional arguments based upon
25 *Montgomery* and *Welch* were not previously available. Petitioner has filed the
26 petition within one year of *Welch*. Petitioner can also show actual prejudice.

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1 Accordingly, the petition should be granted.

2 **I. BACKGROUND**

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

4 Cooper was charged, *inter alia*, with first-degree murder with use of a deadly
5 weapon based on allegations that he shot Ricky Williams. (6/13/1983 Information.)

6 The court provided the jury with the following instruction on premeditation:

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

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

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

17 **B. Conviction and Direct Appeal**

18 The jury convicted Cooper, in pertinent part, of first-degree murder with use
19 of a deadly weapon. (11/7/1983 Verdict.) Following a penalty hearing held 11/14/1983
20 - 11/15/1983, the jury imposed a sentence of life without the possibility of parole.
21 (11/15/1983 Verdict.) Cooper was sentenced, *inter alia*, to consecutive sentences of life
22 without the possibility of parole for the first degree murder conviction. (1/20/1984
23 Judgment.)

24
25
26
27

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

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

7 C. *Byford v. State*

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

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

22 By defining only premeditation and failing to provide
23 deliberation with any independent definition, the *Kazalyn*
24 instruction blurs the distinction between first- and second-
25 degree murder. *Greene’s* further reduction of
26 premeditation and deliberation to simply “intent”
27 unacceptably carries this blurring to a complete erasure.

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1 *Id.* The court emphasized that deliberation remains a “critical element of the *mens*
2 *rea* necessary for first-degree murder, connoting a dispassionate weighting process
3 and consideration of consequences before acting.” *Id.* at 714. It is an element that
4 “must be proven beyond a reasonable doubt before an accused can be convicted or
5 first degree murder.” *Id.* at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d
6 278, 280 (1981)).

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

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

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

4 This does not mean, however, that the reasoning of
5 *Byford* is unprecedented. Although *Byford* expressly
6 abandons some recent decisions of this court, it also relies
7 on the longstanding statutory language and other prior
8 decisions of this court in doing so. Basically, *Byford*
9 *interprets and clarifies* the meaning of a preexisting
10 statute by resolving conflict in lines in prior case law.
11 Therefore, its reasoning is not altogether new.

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

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

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

19 In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S.
20 225 (2001). In *Fiore*, the Supreme Court held that due process requires that a
21 clarification of the law apply to all convictions, even a final conviction that has been
22 affirmed on appeal, where the clarification reveals that a defendant was convicted
23 “for conduct that [the State’s] criminal statute, as properly interpreted, does not
24 prohibit.” *Id.* at 228.

25 In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S.
26 835 (2003). In *Bunkley*, the Court held that, as a matter of due process, a change in
27 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.

1 **E. 1997 Post-Conviction Petition**

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

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

16 **F. *Nika v. State***

17 In 2007, the Ninth Circuit decided *Polk v. Sandoval*, 503 F.3d 903 (9th Cir.
18 2007). In *Polk*, that court concluded that the *Kazalyn* instruction violated due process
19 under *In Re Winship*, 397 U.S. 358 (1970), because it relieved the State of its burden
20 of proof as to the element of deliberation. *Polk*, 503 F.3d at 910-12.

23 ² Following the February 27, 2004 evidentiary hearing, the district court filed
24 a Notice of Entry of Decision and Order and Amended Findings of Fact and
25 Conclusions of Law denying Cooper’s 1997 Petition on the basis of procedural default.
26 (3/1/2005 Decision and Order.) The Nevada Supreme Court (Case No. 44764),
27 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.)

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1 In response to *Polk*, the NSC in 2008 issued *Nika v. State*, 124 Nev. 1272, 198
2 P.3d 839, 849 (Nev. 2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk*'s
3 conclusion that a *Winship* violation occurred. The court stated that, rather than
4 implicate *Winship* concerns, the only due process issue was the retroactivity of
5 *Byford*. It reasoned that it was within the court's power to determine whether *Byford*
6 represented a clarification of the interpretation of a statute, which would apply to
7 everybody, or a change in the interpretation of a statute, which would only apply to
8 those convictions that had yet to become final. *Id.* at 849-50. The court held that
9 *Byford* represented a change in the law as to the interpretation of the first-degree
10 murder statute. *Id.* at 849-50. The court specifically "disavow[ed]" any language in
11 *Garner* indicating that *Byford* was anything other than a change in the law, stating
12 that language in *Garner* indicating that *Byford* was a clarification was dicta. *Id.* at
13 849-50.

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

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

24 **G. *Montgomery v. Louisiana* and *Welch v. United States***

25 On January 25, 2016, the United States Supreme Court decided *Montgomery*
26 *v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, the Court addressed the question

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1 of whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited under the
2 Eighth Amendment mandatory life sentences for juvenile offenders, applied
3 retroactively to cases that had already become final by the time of *Miller*.
4 *Montgomery*, 136 S. Ct. at 725.

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

17 The primary question the Court addressed in *Montgomery* was whether it had
18 jurisdiction to review the question. The Court stated that it did, holding “when a new
19 substantive rule of constitutional law controls the outcome of a case, the Constitution
20 requires state collateral review courts to give retroactive effect to that rule.”
21 *Montgomery*, 136 S. Ct. at 729. “*Teague’s* conclusion establishing the retroactivity of
22 new substantive rules is best understood as resting upon constitutional premises.”
23 *Id.* “States may not disregard a controlling constitutional command in their own
24 courts.” *Id.* at 727 (citing *Martin v. Hunter’s Lessess*, 1 Wheat. 304, 340-41, 344
25 (1816)).

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

4 On April 18, 2016, the United States Supreme Court decided *Welch v. United*
5 *States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether
6 *Johnson v. United States*, which held that the residual clause in the Armed Career
7 Criminal Act was void for vagueness under the Due Process Clause, applied
8 retroactively to convictions that had already become final at the time of *Johnson*.
9 *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether
10 *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a
11 substantive rule as one that “alters the range of conduct or the class of persons that
12 the law punishes.” *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)).
13 “*This includes decisions that narrow the scope of a criminal statute by interpreting*
14 *its terms*, as well as constitutional determinations that place particular conduct or
15 persons covered by the statute beyond the State’s power to punish.” *Id.* at 1265
16 (quoting *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the
17 Court concluded that *Johnson* was substantive. *Id.*

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

22 The Court rejected this argument, pointing out that some of the Court’s
23 “substantive decisions do not impose such restrictions.” *Id.* The “clearest example”
24 was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was
25 whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*,
26 the Court had “held as a matter of statutory interpretation that the ‘use’ prong [of 18
27

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1 U.S.C. § 924(c)(1)] punishes only ‘active employment of the firearm’ and not mere
2 possession.” *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). The Court in *Bousley* had
3 “no difficulty concluding that *Bailey* was substantive, as it was a decision ‘holding
4 that a substantive federal criminal statute does not reach certain conduct.’” *Id.*
5 (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following
6 parenthetical as further support: “A decision that modifies the elements of an offense
7 is normally substantive rather than procedural.” The Court pointed out that *Bousley*
8 did not fit under the *amicus’s* *Teague* framework as Congress amended § 924(c)(1) in
9 response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

10 Recognizing that *Bousley* did not fit, *amicus* argued that *Bousley* was simply
11 an exception to the proposed framework because, according to *amicus*, “*Bousley*
12 ‘recognized a separate subcategory of substantive rules for decisions that interpret
13 statutes (but not those, like *Johnson*, that invalidate statutes).” *Welch*, 136 S. Ct. at
14 1267 (quoting *Amicus* brief). *Amicus* argued that statutory construction cases are
15 substantive because they define what Congress always intended the law to mean. *Id.*

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

18 Neither *Bousley* nor any other case from this Court treats
19 statutory interpretation cases as a special class of decisions
20 that are substantive because they implement the intent of
21 Congress. Instead, decisions that interpret a statute are
22 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.”

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

24 ///

25 ///

26 ///

1 II. ANALYSIS

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

5 In *Montgomery*, the United States Supreme Court, for the first time,
6 constitutionalized the “substantive rule” exception to the *Teague* retroactivity rules.
7 The consequence of this step is that state courts are now required to apply the
8 “substantive rule” exception in the manner in which the United States Supreme
9 Court applies it. *See Montgomery*, 136 U.S. at 727 (“States may not disregard a
10 controlling constitutional command in their own courts.”).

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

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

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1 Nevertheless, the court concluded that, because *Byford* was a change in law,
2 as opposed to a clarification, it did not need to apply retroactively to convictions that
3 had already become final, like Cooper’s. In light of *Welch*, however, this distinction
4 between a “change” and “clarification” no longer matters. The *only* relevant question
5 is whether the new interpretation represents a new substantive rule. In fact, a
6 “change in law” fits far more clearly under the *Teague* substantive rule framework
7 than a clarification because it is a “new” rule. The Supreme Court has suggested as
8 much previously. *See Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9 (2005) (“A *change* in
9 the interpretation of a *substantive* statute may have consequences for cases that have
10 already reached final judgment, particularly in the criminal context.” (emphasis
11 added); citing *Bousley v. United States*, 523 U.S. 614 (1998); and *Fiore*).³ Critically,
12 in *Welch*, the Supreme Court never used the word “clarification” once when it
13 analyzed how the statutory interpretation decisions fit under *Teague*. Rather, it only
14 used the term “interpretation” without qualification. The analysis in *Welch* shows
15 that the Nevada Supreme Court’s distinction between “change” and “clarification” is
16 no longer a relevant factor in determining the retroactive effect of a decision that
17 interprets a criminal statute by narrowing its meaning.

18 Accordingly, under *Welch* and *Montgomery*, petitioner is entitled to the benefit
19 of having *Byford* apply retroactively to his case. The *Kazalyn* instruction defining
20 premeditation and deliberation, which this Court has already determined was given
21 in his case, was improper.

22 It is reasonably likely that Cooper’s jury applied the challenged instruction in
23 a way that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437
24 (2004). As the Nevada Supreme Court explained in *Byford*, the instruction blurred
25

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

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1 the distinction between first and second degree murder. It reduced premeditation
2 and deliberation down to intent to kill. The State was relieved of its obligation to
3 prove essential elements of the crime. In turn, the jury was not required to find
4 deliberation. The jury was never required to find whether there was “coolness and
5 reflection” as required under *Byford*. *Byford*, 994 P.2d at 714. The jury was never
6 required to find whether the murder was the result of a “process of determining upon
7 a course of action to kill as a result of thought, including weighing the reasons for and
8 against the action and considering the consequences of the action.” *Id.*

9 This error had a prejudicial impact on this case. The evidence against Cooper
10 was not so great that it precluded a verdict of second-degree murder.

11 Cooper was tried and convicted of a series of events occurring on April 13, 1983
12 during which Larry Collier (“Collier”) and Ricky Williams (“Williams”) were
13 attempting to buy/sell drugs at the scene and culminated in the shooting death of
14 Williams. The State’s theory of the case was that Williams was shot by Cooper who
15 was sitting in the passenger side of a car that was parked in front of a Seven Seas
16 market. At least that was the State’s theory until Donnell Wells (“Wells”) testified
17 and provided the State with a motive. Wells was not mentioned by the prosecutor
18 (Melvyn Harmon) in his opening statement, yet he was picked up from school, without
19 notification to his parents and brought to court by D.A. investigators on the fourth
20 day of trial to testify against Cooper.⁴ Wells has since, and under oath, recanted his
21 trial testimony (*see* 2/27/2004 Evidentiary Hearing Transcript (“EHT”) at 11-45),
22

23
24 ⁴ By the time 15-year-old Wells was brought to court by D.A. investigators to
25 testify, the State’s case was falling apart. The witnesses’s testimonies were so
26 unreliable that the prosecution had resorted to introducing portions of their unread
27 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.

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

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

6 Murder of the First Degree is Murder which is (a)
7 perpetrated by any kind of wilfull, deliberate and
8 premeditated killing, and (b) committed in the
9 perpetration or attempted perpetration of any robbery.
(Instruction No. 19.)

10 Murder in the Second Degree is murder with malice
11 aforethought, but without the admixture of premeditation.
12 All murder which is not Murder in the First Degree is
Murder in the Second Degree. (Instruction No.23.)

13 In closing argument, the prosecutor disregarded the other witnesses’s accounts
14 that Williams was shot while the car was parked and relied on Wells’s testimony of
15 shots being fired while the car was moving down the street. (11/7/1983 TT at 483-
16 484.) The prosecutor told the jury he was not to blame for the contradictory testimony
17 of the other witnesses yet extolled Wells’s heroism to testify against Cooper.
18 (11/7/1983 TT at 475.) By ignoring the other witnesses’ testimony of a shooting from
19 a parked car and adopting Wells’s now recanted testimony of shots coming from a
20 moving car, the prosecutor was able to avoid any discussion of deliberation and argue
21 solely based on premeditation that the jury convict Cooper of first degree murder:

22 Now what was this a case of: premeditation, is it first
23 degree or second degree murder? ... We have a case where
24 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.

25 (11/7/1983 TT at 482-483.)
26
27

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1 All three elements, willful, deliberate and premeditated killing, must be
2 proven beyond a reasonable doubt in order to obtain a conviction. An intentional
3 killing committed with malice aforethought will constitute first degree murder if it is
4 also accompanied by premeditation and deliberation. NRS 200.030. Instruction No.
5 20 given in this case created a mandatory presumption that a killing is deliberate if
6 it is premeditated. The instruction provided that if a killing is the result of
7 premeditation, “it is willful, deliberate and premeditated murder.” By approving of
8 the concept of instantaneous premeditation and deliberation, the giving of this
9 instruction created a reasonable likelihood that the jury convicted Cooper of first
10 degree murder without any rational basis for distinguishing its verdict from one of
11 second degree murder, and without proof beyond a reasonable doubt of both elements
12 of premeditation and deliberation.

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

22 Because of the State’s ability to directly rely on the *Kazalyn* instruction, the
23 prosecutor was able to argue that “if the jury believes from the evidence that the act
24 constituting the killing has been preceded by and has been the result of
25 premeditation, no matter how rapidly the premeditation is followed by the act
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1 constituting the killing, it is willful, deliberate and premeditated murder.” (11/7/1983
2 TT at 447.)

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

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

13 **B. Petitioner Has Good Cause to Raise this Claim in a Second** 14 **or Successive Petition**

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

25 The decisions in *Montgomery* and *Welch* provide good cause for overcoming the
26 procedural bars. *Montgomery* established a new rule of constitutional law, namely

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1 that the “substantive rule” exception to the *Teague* rule applies in state courts as a
2 matter of due process. Furthermore, *Welch* clarified that this constitutional rule
3 includes the Supreme Court’s prior statutory interpretation decisions. Moreover,
4 *Welch* established that the only requirement for an interpretation of a statute to
5 apply retroactively under the “substantive rule” exception to *Teague* is whether the
6 interpretation narrowed the class of individuals who could be convicted under the
7 statute. These rules were not previously available to petitioner. In fact, this Court
8 previously denied this claim based on reasoning that *Montgomery* and *Welch* have
9 now changed. Finally, petitioner submitted this petition within one year of *Welch*,
10 which was decided on April 18, 2016.

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

23 As discussed before, the Nevada Supreme Court has previously indicated that
24 *Byford* represented a narrowing of the definition of first-degree murder. Under *Welch*
25 and *Montgomery*, that decision is substantive. In other words, there is a significant
26

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1 risk that petitioner stands convicted of an act that the law does not make criminal.
2 For the reasons discussed before, the facts in this case established that petitioner
3 only committed a second-degree murder. As such, in light of the entire evidentiary
4 record in this case, it is more likely than not no reasonable juror would convict Cooper
5 of first-degree murder.
6

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

16 Here, *Welch* and *Montgomery* represent an intervening change in controlling
17 law. These cases establish new rules that control the control both the state courts as
18 well as the outcome here. In fact, this Court previously denied this claim based on
19 reasoning that *Montgomery* and *Welch* have now changed. Thus, law of the case does
20 not bar consideration of the issue here.

21 Finally, petitioner can establish actual prejudice for the reasons discussed on
22 Pages 29 - 31, above. It is reasonably likely that the jury applied the challenged
23 instruction in a way that violates the Constitution. The State was relieved of its
24 obligation to prove essential elements of the crime. In turn, the jury was not required
25 to find deliberation. This error had a prejudicial impact on this case. The evidence
26 against Cooper was not so great that it precluded a verdict of second-degree murder.
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1 **III. PRAYER FOR RELIEF**

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

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

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

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

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

14 DATED this 17th day of April, 2017.

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

18 /s/ Megan C. Hoffman
19 MEGAN C. HOFFMAN
20 Assistant Federal Public Defender
21
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VERIFICATION

1
2 Under penalty of perjury, the undersigned declares that she is counsel for the
3 petitioner named in the foregoing petition and knows the contents thereof; that the
4 pleading is true of her own knowledge except as to those matters stated on
5 information and belief and as to such matters she believes them to be true. Petitioner
6 personally authorized undersigned counsel to commence this action.

7 DATED this 17th day of April, 2017.

8
9 */s/Megan C. Hoffman*
10 MEGAN C. HOFFMAN
11 Assistant Federal Public Defender
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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that he is an employee in the office of the
3 Federal Public Defender for the District of Nevada and is a person of such age and
4 discretion as to be competent to serve papers.

5 That on April 17, 2017, he served a true and accurate copy of the foregoing by
6 placing it in the United States mail, first-class postage paid, addressed to:

7 Steve Wolfson
8 Clark County District Attorney
9 301 E. Clark Ave #100
Las Vegas, NV 89101

10 Attorney General Adam P. Laxalt
11 Office of the Attorney General
12 555 E. Washington Ave #3900
Las Vegas, NV 89101

13 Rickey Cooper
14 #19118
15 Southern Desert Correctional Center
P.O. Box 208
Indian Sorings, NV 89070

/s/ Dayron Rodriguez _____

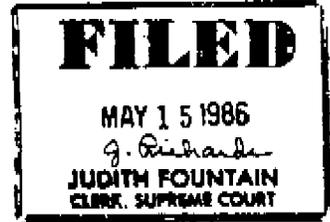
An Employee of the
Federal Public Defender
District of Nevada

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 15653



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

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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.
Mowbray

Springer, J.
Springer

Gunderson, J.
Gunderson

Staffen, J.
Staffen

Young, J.
Young

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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

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B

See above

1 CASE NO. C62939

2 DEPT. NO. XIII

3
4 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
5 IN AND FOR THE COUNTY OF CLARK.

6
7 THE STATE OF NEVADA,)
8 Plaintiff,)
9 -vs-)
10 RICKEY DENNIS COOPER,)
11 Defendant.)

JUDGMENT OF CONVICTION
(JURY TRIAL)

12
13 WHEREAS, on the 14th day of June, 1983, the Defendant,
14 RICKEY DENNIS COOPER, entered a plea of not guilty to the crimes
15 of ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Ct. I), ATTEMPT
16 MURDER WITH USE OF A DEADLY WEAPON (Ct. II), BATTERY WITH USE OF
17 A DEADLY WEAPON (Ct. III), and FIRST DEGREE MURDER WITH USE OF A
18 DEADLY WEAPON (Ct. IV), committed on the 13th day of April, 1983,
19 in violation of NRS 200.380; 208.070; 193.165; 200.010; 200.030;
20 200.481, and the matter having been tried before a jury, and the
21 Defendant being represented by counsel and having been found
22 guilty of the crimes of ATTEMPT ROBBERY WITH USE OF A DEADLY
23 WEAPON (Ct. I); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON Ct. II);
24 BATTERY WITH USE OF A DEADLY WEAPON (Ct. III); and FIRST DEGREE
25 MURDER WITH USE OF A DEADLY WEAPON (Ct. IV); and

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

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

(2)

APP. 190

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

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

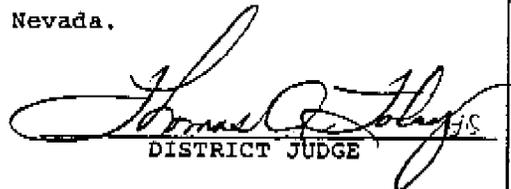
6 Count III (BWDW) - Ten years, said sentence to run consecu-
7 tive to sentence imposed in Count II.

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

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

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

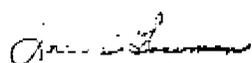
17 DATED this 19th day of January, 1984, in the City of Las
18 Vegas, County of Clark, State of Nevada.


DISTRICT JUDGE

31 83-62939X/1b
32 LVMPD 83-39593
Att.Rob w/wpn; Att.
Murder w/wpn; BWDW;
1° Murder w/wpn - F

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CLERK

APP. 191

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. Yoney
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

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

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 74513-COA

FILED

MAR 20 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

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

¹An 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).

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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

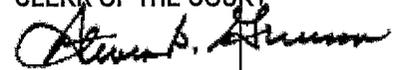

_____, J.
Gibbons


_____, 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

COPY 94

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



1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 RUEL S. MERCADO,

5
6 Petitioner,

Case No: 95C125649-1

Dept No: VI

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

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

10
11 **PLEASE TAKE NOTICE** that on October 16, 2017, the court entered a decision or order in this matter,
12 a true and correct copy of which is attached to this notice.

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

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 CERTIFICATE OF E-SERVICE / MAILING

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

22 By e-mail:

Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

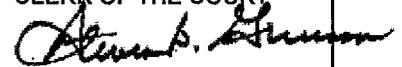
23
24 The United States mail addressed as follows:

25 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

26
27 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk



1 FCL
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 CHARLES THOMAN
6 Deputy District Attorney
7 Nevada Bar #012649
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,
11 -vs-
12 RUEL SALVA MERCADO,
13 #1139691
14 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

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

25 ///
26 ///
27 ///
28 ///

FINDINGS OF FACT, CONCLUSIONS OF LAW

Procedural History

1
2
3 On July 14, 1995, the State filed an Information charging Petitioner Ruel Salva
4 Mercado ("Petitioner") with: Count 1 – Murder with Use of a Deadly Weapon (Open Murder)
5 With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.010, 200.030,
6 193.165, 193.168, 193.169); Count 2 – Attempt Murder with the Use of a Deadly Weapon
7 (Open Murder) With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.010,
8 200.030, 193.165, 193.330, 193.168, 193.169); Count 3 – Burglary While in Possession of a
9 Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang (NRS 205.060,
10 193.168, 193.169); Counts 4 through 6 – Attempt Robbery With the Use of a Deadly Weapon
11 With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.380, 193.165,
12 193.330, 193.168, 193.169); Counts 7 and 9 – First Degree Kidnapping With the Use of a
13 Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang (NRS 200.310,
14 200.320, 193.165, 193.168, 193.169); Counts 8 and 10 through 22 – Coercion with the Use of
15 a Deadly Weapon, With the Intent to Promote, Further or Assist a Criminal Gang (NRS
16 207.190, 193.165, 193.168, 193.169).

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

23 On March 25, 1999, Petitioner filed a pro per Petition for Writ of Habeas Corpus. On
24 September 1, 1999, the district court denied Petitioner's first Petition for Writ of Habeas
25 Corpus (Post-Conviction). The Findings of Fact, Conclusions of Law were filed on September
26 21, 1999. Petitioner filed a Notice of Appeal on October 15, 1999. On June 3, 2002, the Nevada
27 Supreme Court filed an Order of Affirmance in Part and Reversal and Remand in Part. The
28 Nevada Supreme Court affirmed this Court's order as it related to all but one of the claims

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

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

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

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

Analysis

21
22 This Court will deny the Petition on the basis that it is procedurally barred under both
23 NRS 34.726(1) and NRS 34.810(2). The Court also finds that laches under NRS 34.800(2)
24 applies here and that prejudice to the State should be presumed given that more than 19 years
25 have elapsed between the Nevada Supreme Court issuing it s remittitur and the filing of the
26 instant Petition.

27 ///

28 ///

1 **I. PETITIONER’S PETITION IS PROCEDURALLY BARRED**

2 **a. The Procedural Bars are Mandatory**

3 The Nevada Supreme Court has held that “[a]pplication of the statutory procedural
4 default rules to post-conviction habeas petitions is *mandatory*,” noting:

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

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

14 **b. Petitioner’s Petition is Time Barred**

15 The mandatory provision of NRS 34.726(1) states:

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

21 (emphasis added). “[T]he statutory rules regarding procedural default are mandatory and
22 cannot be ignored when properly raised by the State.” Riker, 121 Nev. at 233, 112 P.3d at
23 1075.

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

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1 In Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002), the Nevada Supreme
2 Court affirmed the rejection of a habeas petition that was filed two days late, pursuant to the
3 “clear and unambiguous” mandatory provisions of NRS 34.726(1). Gonzales reiterated the
4 importance of filing the petition with the District Court within the one-year mandate, absent a
5 showing of “good cause” for the delay in filing. Gonzales, 590 P.3d at 902. The one-year time
6 bar is therefore strictly construed. In contrast with the short amount of time to file a notice of
7 appeal, a prisoner has an ample full year to file a post-conviction habeas petition, so there is
8 no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the
9 postal system. Gonzales, 118 Nev. at 595, 53 P.3d at 903.

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

17 c. Petitioner’s Petition is Barred By Laches

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

24 Here, Petitioner filed a direct appeal from his Judgment of Conviction. Remittitur
25 issued on May 5, 1998. Petitioner filed the instant petition on April 18, 2017, more than 19
26 years from the issuance of Remittitur. Since more than 19 years have elapsed between the
27 Petitioner’s Judgment of Conviction and the filing of the instant Petition, NRS 34.800 directly
28 applies in this case, and a presumption of prejudice to the State arises. Moreover, Petitioner

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1 failed to address the presumption, nor did he offer anything to rebut it. Pursuant to NRS 34.800,
2 Petitioner's instant Petition is statutorily barred and is dismissed.

3 **d. Petitioner's Petition is Successive**

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

6 A second or successive petition *must* be dismissed if the judge or
7 justice determines that it fails to allege new or different grounds
8 for relief and that the prior determination was on the merits or, if
9 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.

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

16 The Nevada Supreme Court has stated that "[w]ithout [] limitations on the availability
17 of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse
18 post-conviction remedies. In addition, meritless, successive and untimely petitions clog the
19 court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at
20 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly
21 require a careful review of the record, successive petitions may be dismissed based solely on
22 the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In
23 other words, if the claim or allegation was previously available with reasonable diligence, it is
24 an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467,
25 497-498 (1991).

26 Here, Petitioner filed a previous Petition for Writ of Habeas Corpus on March 25, 1999,
27 which was denied and affirmed, after a limited remand, on September 29, 2006. Consequently,
28 the instant petition filed on April 18, 2017, is a successive petition. To avoid the procedural

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1 default under NRS 34.810, Petitioner had the burden of pleading and proving specific facts
2 that demonstrate both good cause for his failure to present his claim in earlier proceedings and
3 actual prejudice. NRS 34.810(3); Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710,
4 715-16 (1993); Phelps v. Director, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). As
5 Petitioner failed to do so, his *third* Petition for Writ of Habeas Corpus is denied.

6 e. Petitioner Cannot Establish Good Cause

7 To meet NRS 34.726(1)'s first requirement, "a petitioner must show that an impediment
8 external to the defense prevented him or her from complying with the state procedural default
9 rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment
10 external to the defense may be demonstrated by a showing 'that the factual or legal basis for a
11 claim was not reasonably available to counsel, or that some interference by officials, made
12 compliance impracticable.' " Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct.
13 2639 (1986)).

14 Petitioner attempts to meet this first requirement by arguing new case law. Specifically,
15 he argues that Montgomery and Welch "represent a change in law that allows petitioner to
16 obtain the benefit of Byford¹ on collateral review." Petition at 22. In essence, Petitioner averred
17 that Montgomery and Welch establish a legal basis for a claim that was not previously
18 available. Petitioner's reliance on Montgomery and Welch is misguided.

19 As noted by Petitioner, he received the Kazalyn² jury instructions on premeditation and
20 deliberation:

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

23 Premeditation need not be for a day, an hour or even a minute. It may be as
24 instantaneous as successive thoughts of the mind. For if the jury believes from
25 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

26 ¹ Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), cert. denied, Byford v. Nevada,
27 531 U.S. 1016, 121 S. Ct. 576 (2000).

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

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1 followed by the act constituting the killing, it is willful, deliberate and
2 premeditated murder.

3 The Nevada Supreme Court held in Byford that this Kazalyn instruction did “not do
4 full justice to the [statutory] phrase ‘willful, deliberate and premeditated.’ ” 116 Nev. at 235,
5 994 P.2d at 713. As explained by the Court in Byford, the Kazalyn instruction
6 “underemphasized the element of deliberation,” and “[b]y defining only premeditation and
7 failing to provide deliberation with any independent definition, the Kazalyn instruction
8 blur[red] the distinction between first- and second-degree murder.” 116 Nev. at 234-35, 994
9 P.2d at 713. Therefore, in order to make it clear to the jury that “deliberation is a distinct
10 element of *mens rea* for first-degree murder,” the Court directed “the district courts to cease
11 instructing juries that a killing resulting from premeditation is ‘willful, deliberate, and
12 premeditated murder.’ ” Id. at 235, 994 P.2d at 713. The Court then went on to provide a set
13 of instructions to be used by the district courts “in cases where Petitioners are charged with
14 first-degree murder based on willful, deliberate, and premeditated killing.” Id. at 236-37, 994
15 P.2d at 713-15.

16 Seven years later, in Polk v. Sandoval, the United States Court of Appeals for the Ninth
17 Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held
18 that the use of the Kazalyn instruction violated the Due Process Clause of the United States
19 Constitution because the instruction “relieved the state of the burden of proof on whether the
20 killing was deliberate as well as premeditated.” Id. at 909. In Polk, the Ninth Circuit took issue
21 with the Nevada Supreme Court’s conclusion in cases decided in the wake of Byford that
22 “giving the Kazalyn instruction in cases predating Byford did not constitute constitutional
23 error.”³ Id. at 911. According to the Ninth Circuit, “the Nevada Supreme Court erred by
24 conceiving of the Kazalyn instruction issue as purely a matter of state law” insofar as it “failed
25 to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin,

26
27 ³ See, e.g., Garner v. State, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), overruled on other
28 grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

1 and Winship and thus ignored the law the Supreme Court clearly established in those
2 decisions—that an instruction omitting an element of the crime and relieving the state of its
3 burden of proof violates the federal Constitution.” Id.

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

16 The Court in Nika then went on to affirm its previous holding that Byford is not
17 retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing Rippo v. State, 122 Nev. 1086, 1097,
18 146 P.3d 279, 286 (2006)). For purposes here, Nika’s discussion on retroactivity merits close
19 analysis. The Court in Nika commenced its retroactivity analysis with Colwell v. State, 118
20 Nev. 807, 59 P.3d 463 (2002). In Colwell, the Nevada Supreme Court “detailed the rules of
21 retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if
22 those rules fell within one of two narrow exceptions.” Nika, 124 Nev. at 1288, 198 P.3d at 850
23 (citing Colwell, 118 Nev. at 820, 59 P.3d at 531). Colwell, in turn, was premised on the United
24 States Supreme Court’s decision in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989).

25 In Teague, the United States Supreme Court did away with its previous retroactivity
26 analysis in Linkletter,⁴ replacing it with “a general requirement of nonretroactivity of new rules
27

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

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1 in federal collateral review.” Colwell, 118 Nev. at 816, 59 P.3d at 469-70 (citing Teague, 489
2 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Court in Teague held that “new
3 *constitutional* rules of criminal procedure will not be applicable to those cases which have
4 become final before the new rules are announced.” 489 U.S. at 310, 109 S. Ct. at 1075
5 (emphasis added). This holding, however, was subject to two exceptions: first, “a new rule
6 should be applied retroactively if it places ‘certain kinds of primary, private individual conduct
7 beyond the power of the criminal law-making authority to proscribe,’ ” Id. at 311, 109 S. Ct.
8 at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971)
9 (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new
10 constitutional rule of criminal procedure should be applied retroactively if it is a “watershed
11 rule[] of criminal procedure.” Id. at 311, 109 S. Ct. at 1076 (citing Mackey, 401 U.S. at 693-
12 94, 91 S. Ct. at 1165).

13 That Teague was concerned exclusively with new *constitutional* rules of criminal
14 procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the
15 Court in Teague. See Mackey, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan’s
16 opinion in Mackey starts off acknowledging the nature of the issue facing the Court. See id. at
17 675, 91 S. Ct. at 1165 (“These three cases have one question in common: the extent to which
18 new *constitutional* rules prescribed by this Court for the conduct of criminal cases are
19 applicable to other such cases which were litigated under different but then-prevailing
20 *constitutional* rules.” (emphasis added)). And when outlining the two exceptions that were
21 ultimately adopted by the Court in Teague, Justice Harlan explicitly acknowledged the
22 constitutional nature of these exceptions. See id. at 692, 91 S. Ct. at 1165 (“New ‘substantive
23 due process’ rules, that is, those that place, *as a matter of constitutional interpretation*, certain
24 kinds of primary, private individual conduct beyond the power of the criminal law-making
25 authority to proscribe, must, in my view, be placed on a different footing.” (emphasis added));
26 id. at 693, 91 S. Ct. at 1165 (“Typically, it should be the case that any conviction free from
27 federal *constitutional* error at the time it became final, will be found, upon reflection, to have
28 been fundamentally fair and conducted under those procedures essential to the substance of a

1 full hearing. However, in some situations it might be that time and growth in social capacity,
2 as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will
3 properly alter our understanding of the bedrock procedural elements that must be found to
4 vitiate the fairness of a particular conviction.” (emphasis added)).

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

23 The Court in Colwell, however, found Teague’s retroactivity analysis too restrictive
24 and, therefore, while adopting its general framework, chose “to provide broader retroactive
25 application of new constitutional rules of criminal procedure than Teague and its progeny
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27 ⁵ As per Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was
28 premised the Sixth and Fourteenth Amendments—i.e., *constitutional* principles.

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1 require.” Id. at 818, 59 P.3d at 470; See also id. at 818, 59 P.3d at 471 (“Though we consider
2 the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court
3 has applied it so strictly in practice that decisions defining a constitutional safeguard rarely
4 merit application on collateral review.”).⁶ First, the Court in Colwell narrowed Teague’s
5 definition of a “new rule,” which it had found too expansive.⁷ Id. at 819-20, 59 P.3d. at 472
6 (“We consider too sweeping the proposition, noted above, that a rule is new whenever any
7 other reasonable interpretation or prior law was possible. However, a rule is new, for example,
8 when the decision announcing it overrules precedent, or ‘disapproves a practice this Court had
9 arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had
10 uniformly approved.’ ” (quoting Griffith v. Kentucky, 479 U.S. 314, 325, 107 S. Ct. 708, 714
11 (1987)). And second, the Court in Colwell expanded on Teague’s two exceptions, which it had
12 found too “narrowly drawn”:

13 When a rule is new, it will still apply retroactively in two instances: (1) if the
14 rule establishes that it is unconstitutional to proscribe certain conduct as criminal
15 or to impose a type of punishment on certain Petitioners because of their status

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

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

23 118 Nev. at 817-18, 59 P.3d at 470-71 (quoting Johnson v. New Jersey, 384 U.S. 719, 733, 86
24 S. Ct. 1772, 1781 (1966)).

25 ⁷ This has the effect of affording greater protection than Teague insofar as Petitioners seeking
26 collateral review here in Nevada will be able to avail themselves more frequently of the
27 principle that “[i]f a rule is not new, then it applies even on collateral review of final cases.”
28 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.

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1 or offense; or (2) if it establishes a procedure without which the likelihood of an
2 accurate conviction is seriously diminished. These are basically the exceptions
3 defined by the Supreme Court. But we do not limit the first exception to
4 'primary, private individual' conduct, allowing the possibility that other conduct
5 may be constitutionally protected from criminalization and warrant retroactive
6 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.

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

11 One year later in Clem v. State, the Nevada Supreme Court reaffirmed the modified
12 Teague retroactivity analysis set out in Colwell. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32
13 (2008). Notably, the Clem Court explained that it is "not required to make retroactive its new
14 rules of state law that do not implicate constitutional rights." Id. at 626, 81 P.3d at 529. The
15 Court further noted that "[t]his is true even where [its] decisions overrule or reverse prior
16 decisions to narrow the reach of a substantive criminal statute." Id. The Court then provided
17 the following concise overview of the modified Teague retroactivity analysis set out in
18 Colwell:

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

23 Id. at 628, 81 P.3d at 531. Thus, Clem reiterated that if the new rule of criminal procedure is
24 not constitutional in nature, Teague's retroactivity analysis has no relevance. Id. at 628-629,
25 81 P.3d at 531 ("Both Teague and Colwell require limited retroactivity on collateral review,

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1 but neither upset the usual rule of nonretroactivity for rules that carry no constitutional
2 significance.”).⁸

3 It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous
4 holding⁹ that Byford is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 (“We reaffirm our
5 decisions in Clem and Colwell and maintain our course respecting retroactivity analysis—if a
6 rule is new but not a constitutional rule, it has no retroactive application to convictions that are
7 final at the time of the change in the law.”). The Court in Nika then explained how the change
8 in the law made by Byford “was a matter of interpreting a state statute, not a matter of
9 constitutional law.” Id. Accordingly, because it was not a new *constitutional* rule of criminal
10 procedure of the type contemplated by Teague and Colwell, the change wrought in Byford was
11 not to have retroactive effect on collateral review to convictions that were final before the
12 change in the law.

13 Neither Montgomery nor Welch alter Teague’s—and, by extension, Colwell’s—
14 underlying premise that the two exceptions to the general rule of nonretroactivity must
15 implicate constitutional concerns before coming into play. In Montgomery, the United States
16 Supreme Court had to consider whether Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455
17 (2012), which held that a mandatory sentence of life without parole for juvenile homicide
18 offenders violates the Eighth Amendment’s prohibition on “cruel and unusual punishment,”

19
20 ⁸ Petitioner omitted any mention of Colwell or Clem, which were central to Nika’s retroactivity
21 analysis regarding convictions that were final at the time of the change in the law. Instead,
22 Petitioner cited Nika’s preceding analysis of why “the change effected by Byford properly
23 applied to [the Petitioner in Polk, 503 F.3d at 910] as a matter of due process.” Petition at 21;
24 Nika, 124 Nev. at 1287, 198 P.3d at 850. To be sure, the Court in Nika, in conducting this
25 analysis, did rely on the retroactivity rules set out in Bunkley v. Florida, 538 U.S. 835, 123 S.
26 Ct. 2020 (2003), and Fiore v. White, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to
27 Petitioner were “drastically changed,” Petition at 21, by the United States Supreme Court’s
28 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.

1 had to be applied retroactively to juvenile offenders whose convictions and sentences were
2 final at the time when Miller was decided. __ U.S. at __, 136 S. Ct. at 725. To answer this
3 question, the Court in Montgomery employed the retroactivity analysis set out in Teague. Id.
4 at __, 136 S. Ct. at 728-36. As to whether Miller announced a new “substantive rule of
5 constitutional law,” id. at __, 136 S. Ct. at 734, such that it fell within the first of the two
6 exceptions announced in Teague, the Montgomery Court commenced its analysis by noting
7 that “the ‘foundation stone’ for Miller’s analysis was [the] Court’s line of precedent holding
8 certain punishments disproportionate when applied to juveniles.” Id. at __, 136 S. Ct. at 732.
9 This “line of precedent” included the Court’s previous decision in Graham v. Florida, 560 U.S.
10 48, 130 S. Ct. 2011 (2010), and Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005), the
11 holdings of which were premised on constitutional concerns—namely, the Eighth
12 Amendment. __ U.S. at __, 136 S. Ct. at 723 (explaining how Graham “held that the Eighth
13 Amendment bars life without parole for juvenile nonhomicide offenders” and how Roper “held
14 that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the
15 time of their crimes”). After elaborating further on the considerations discussed in Roper and
16 Graham that underlay the Court’s holding in Miller, id. at __, 136 S. Ct. at 733-34, the Court
17 went on to conclude the following:

18 Because Miller determined that sentencing a child to life without parole is
19 excessive for all but the rare juvenile offender whose crime reflects irreparable
20 corruption, [] it rendered life without parole *an unconstitutional penalty* for a
21 class of Petitioners because of their status—that is, juvenile offenders whose
22 crimes reflect the transient immaturity of youth. As a result, Miller announced a
23 substantive rule of *constitutional* law. Like other substantive rules, Miller is
24 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.

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

27 Petitioner, however, gets caught up in Montgomery’s preceding jurisdictional analysis
28 in which it had to decide, as a preliminary matter, whether a State is under an “obligation to

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1 give a new rule of constitutional law retroactive effect in its own collateral review
2 proceedings.” *Id.* at ___, 136 S. Ct. at 727; *see* Petition at 21-22, 29, 36. Petitioner made much
3 ado about *Montgomery*’s discussion on this front, arguing that the Court in *Montgomery*
4 “established a new rule of constitutional law, namely that the ‘substantive’ exception to the
5 *Teague* rule applies in state courts as a matter of due process.” Petition at 37. This assertion,
6 while true, shortchanged the Court’s jurisdictional analysis. In addressing the jurisdictional
7 question and discussing *Teague*’s first exception to the general rule of nonretroactivity in
8 collateral review proceedings, *Montgomery* actually reinforces the notion that *Teague*’s
9 retroactivity analysis is relevant only when considering a new *constitutional* rule. *See, e.g., id.*
10 at ___, 136 S. Ct. at 727 (“States may not disregard a controlling, *constitutional* command in
11 their own courts.” (emphasis added)); *id.* at ___, 136 S. Ct. at 728 (explaining that under the
12 first exception to the general rule of nonretroactivity discussed in *Teague*, “courts must give
13 retroactive effect to new substantive rules of *constitutional* law” (emphasis added)); *id.* at ___,
14 136 S. Ct. at 729 (“The Court now holds that when a new substantive rule of *constitutional*
15 law controls the outcome of a case, the Constitution requires state collateral review courts to
16 give retroactive effect to that rule.” (emphasis added)); *id.* at ___, 136 S. Ct. at 729-30
17 (“Substantive rules, then, set forth categorical *constitutional* guarantees that place certain
18 criminal laws and punishments altogether beyond the State’s power to impose. It follows that
19 when a State enforces a proscription or penalty barred *by the Constitution*, the resulting
20 conviction or sentence is, by definition, unlawful.” (emphasis added)); *id.* at ___, 136 S. Ct. at
21 730 (“By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long
22 tradition of giving retroactive effect to *constitutional* rights that go beyond procedural
23 guarantees.” (emphasis added)); *id.* at ___, 136 S. Ct. at 731 (“A penalty imposed pursuant to
24 an *unconstitutional* law is no less void because the prisoner’s sentence became final before the
25 law was held unconstitutional. There is no grandfather clause that permits States to enforce
26 punishments the *Constitution* forbids.” (emphasis added)); *id.* at ___, 136 S. Ct. at 731-32
27 (“Where state collateral review proceedings permit prisoners to challenge the lawfulness of
28 their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional*

1 right that determines the outcome of that challenge.” (emphasis added)). Montgomery’s
2 holding that State courts are to give retroactive effect to new substantive rules of constitutional
3 law simply makes universal what has already been accepted as common practice in Nevada
4 for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in
5 State collateral review proceedings. See Colwell, 118 Nev. at 818-21, 59 P.3d at 471-72; Clem,
6 119 Nev. at 628-29, 81 P.3d at 530-31.

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

19 In Welch, the Court had to consider whether Johnson v. United States, 576 U.S. ___, 135
20 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act
21 (“ACCA”) of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness,
22 is retroactive in cases on collateral review. ___ U.S. at ___, 136 S. Ct. at 1260-61. Not
23 surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in
24 Teague. Id. at ___, 136 S. Ct. at 1264-65. The Court commenced its application of the Teague
25 retroactivity analysis by recognizing that “[u]nder Teague, as a general matter, ‘new
26 constitutional rules of criminal procedure will not be applicable to those cases which have
27 become final before the new rules are announced,’ ” id. at ___, 136 S. Ct. at 1264 (quoting
28 Teague, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was

1 subject to the two exceptions that have already been discussed at great length above. Finding
2 it “undisputed that Johnson announced a new rule,” the Court explained that the specific
3 question at issue was whether this new rule was “substantive.” Id.¹⁰ Then, upon concluding
4 that “Johnson changed the substantive reach of the [ACCA]” by “altering the range of conduct
5 or the class of persons that the [Act] punishes,” the Court held that “the rule announced in
6 Johnson is substantive.” Id. at ___, 136 S. Ct. at 1265 (quoting Schriro v. Summerlin, 542 U.S.
7 348, 353, 124 S. Ct. 2519, 2523 (2004)).

8 Salient in the Court’s analysis was the principle announced in Schriro, that “[a] rule is
9 substantive rather than procedural if it alters the range of conduct or the class of persons that
10 the law punishes.” 542 U.S. at 353, 124 S. Ct. at 2523; see Welch, ___ U.S. at ___, 136 S. Ct. at
11 1264-65 (citing Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the
12 Court in Schriro relied upon Bousley v. United States, which, in turn, relied upon Teague in
13 explaining the “distinction between substance and procedure” as far as new rules of
14 constitutional law are concerned. See 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998)
15 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle
16 relied on by the Court in Welch in holding that Johnson was a new substantive rule is
17 ultimately rooted in Teague, which, as discussed above, is concerned exclusively with new
18 rules of *constitutional* import. That is to say, if the rule is new, but not constitutional in nature,
19 there is no need to resort to either of the Teague exceptions.

20 Juxtaposing the invalidation of the residual clause of the ACCA by Johnson with the
21 change in Nevada law on first-degree murder¹¹ effected by Byford will help drive home the
22 point that the former was premised on constitutional concerns not present in the latter. This, in
23 turn, will help illustrate why Teague’s retroactivity analysis has relevance only to the former.
24 In Johnson, the United States Supreme Court considered whether the residual clause of the
25 ACCA violated “the Constitution’s prohibition of vague criminal laws.” 576 U.S. at ___, 135

26 ¹⁰ The parties agreed that the second Teague exception was not applicable. Welch, ___ U.S. at
27 ___, 136 S. Ct. at 1264.

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

1 S. Ct. at 2555. The “residual clause” is part of the ACCA’s definition of the term “violent
2 felony”:

3 the term ‘violent felony’ means any crime punishable by imprisonment for a
4 term exceeding one year . . . that—

5 (i) has as an element the use, attempted use, or threatened use of physical force
6 against the person of another; or

7 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise*
8 *involves conduct that presents a serious potential risk of physical injury to*
another;

9 18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of §
10 924(e)(2)(B) that came to be known as the “residual clause.” Johnson, 576 U.S. at ___, 135 S.
11 Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more
12 convictions for a “violent felony” (defined above) is subject to a minimum term of
13 imprisonment of 15 years to a maximum term of life. § 924(e)(1); Johnson, 576 U.S. at ___,
14 135 S. Ct. at 2556. Thus, a conviction for a felony that “involves conduct that presents a serious
15 potential risk of physical injury”—i.e., a felony that fell under the residual clause—could very
16 well have made the difference between serving a maximum of 10 years in prison versus a
17 maximum of life in prison. See Johnson, 576 U.S. at ___, 135 S. Ct. at 2555 (“In general, the
18 law punishes violation of this ban by up to 10 years’ imprisonment. [] But if the violator has
19 three or more earlier convictions for . . . a ‘violent felony,’ the [ACCA] increases his prison
20 term to a minimum of 15 years and a maximum of life.” (internal citation omitted)).

21 To understand the issue that arose with the residual clause, it helps to understand the
22 context in which it was applied. See Welch, ___ U.S. at ___, 136 S. Ct. at 1262 (“The vagueness
23 of the residual clause rests in large part on its operation under the categorical approach.”). The
24 United States Supreme Court employs what is known as the categorical approach in deciding
25 whether an offense qualifies as a violent felony under § 924(e)(2)(B). Id. at ___, 136 S. Ct. at
26 1262 (citing Johnson, 576 U.S. at ___, 135 S. Ct. at 2557). Under the categorical approach, “a
27 court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines
28 the offense and not in terms of how an individual offender might have committed it on a

1 particular occasion.’ ” Johnson, 576 U.S. at ___, 135 S. Ct. at 2557 (quoting Begay v. United
2 States, 553 U.S. 137, 141, 128 S. Ct. 1581, 1584 (2008)). The issue with the residual clause
3 was that it required “a court to picture the kind of conduct that the crime involves in ‘the
4 ordinary case,’ and to judge whether that abstraction presents a serious potential risk of
5 physical injury.” Id. (quoting James v. United States, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597
6 (2007)).

7 The Court in Johnson found that “[t]wo features of the residual clause conspire[d] to
8 make it unconstitutionally vague.” Id. First, that the residual clause left “grave uncertainty
9 about how to estimate the risk posed by a crime”; and second, that it left “uncertainty about
10 how much risk it takes for a crime to qualify as a violent felony.” Id. at ___, 135 S. Ct. at 2557-
11 58. Because of these uncertainties, the Court in Johnson explained that “[i]nvolving so
12 shapeless a provision to condemn someone to prison for 15 years to life does not comport with
13 the Constitution’s guarantee of due process.” Id. at ___, 135 S. Ct. at 2560. Accordingly, “[t]he
14 Johnson Court held the residual clause unconstitutional under the void-for-vagueness doctrine,
15 a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect
16 to the Federal Government) and the *Fourteenth Amendment* (with respect to the States).”
17 Welch, ___ U.S. ___, 136 S. Ct. at 1261-62 (emphasis added).

18 Unlike the invalidation of the residual clause of the ACCA on constitutional grounds,
19 the change in the law on first-degree murder effected by Byford implicated no constitutional
20 concerns. The Nevada Supreme Court in Nika explained in very clear terms that its “decision
21 in Byford to change Nevada law and distinguish between ‘willfulness,’ ‘premeditation,’ and
22 ‘deliberation’ was a matter of interpreting a state statute, *not a matter of constitutional law.*”
23 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in Nika
24 noted how other jurisdictions “differ in their treatment of the terms ‘willful,’ ‘premeditated,’
25 and ‘deliberate’ for first-degree murder.” Id.; see id. at 1288-89, 198 P.3d at 850-51 (“As
26 explained earlier, several jurisdictions treat these terms as synonymous while others, for

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1 example California and Tennessee, ascribe distinct meanings to these words. These different
2 decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional
3 law.”).

4 Conflating the change effected by Johnson with that effected by Byford ignores a
5 fundamental legal distinction between the two. Because the residual clause was found
6 unconstitutionally void for vagueness, Petitioners whose sentences were increased on the basis
7 of this clause were sentenced on the basis of an unconstitutional provision and, thus, were
8 unconstitutionally sentenced. Such as sentence is, as the Court in Montgomery would put it,
9 “not just erroneous but contrary to law and, as a result, void.” See ___ U.S. at ___, 136 S. Ct. at
10 731 (citing Ex parte Siebold, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the
11 change effected by Byford. At no point has Nevada’s law on first-degree murder been found
12 unconstitutional. Petitioners who were convicted of first-degree murder under NRS
13 200.030(1)(a) prior to Byford were nonetheless convicted under a constitutionally valid statute
14 and, thus, were lawfully convicted. See Nika, 124 Nev. at 1287, 198 P.3d at 850 (explaining
15 that “the Kazalyn instruction correctly reflected Nevada law before Byford”).

16 It was the constitutional rights that underlay Johnson’s invalidation of the residual
17 clause that made it a “substantive rule of constitutional law.” See Montgomery, ___ U.S. at ___,
18 136 S. Ct. at 729. And as a “new” substantive rule of constitutional law, it fell within the first
19 of the two exceptions to Teague’s general rule of nonretroactivity. Because *no* constitutional
20 rights underlay the Nevada Supreme Court’s change in Nevada’s law on first-degree murder,
21 the new rule announced in Byford does not fall within Teague’s “substantive rule” exception.
22 The constitutional underpinnings of Johnson’s invalidation of the residual clause and the legal
23 ramifications stemming from this (i.e., that those whose sentences were increased pursuant to
24 an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to
25 Welch’s holding that the change effected by Johnson is retroactive under the Teague
26 framework.

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1 Petitioner's reliance on Welch, however, went beyond the Court's holding and *ratio*
2 *decidendi*. In his exposition of Welch, Petitioner went on to describe the Court's treatment of
3 the arguments raised by *Amicus*. See Petition at 30-31; Welch, ___ U.S. at ___, 136 S. Ct. at
4 1265-68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a
5 different understanding of the Teague framework, "apply[ing] that framework by asking
6 whether the constitutional right underlying the new rule is substantive or procedural"; (2) that
7 a rule is only substantive if it limits Congress' power to legislate; and (3) that only "statutory
8 construction cases are substantive because they define what Congress always intended the law
9 to mean" as opposed to cases invalidating statutes (or parts thereof). Welch, ___ U.S. at ___, 136
10 S. Ct. at 1265-68. It was in addressing this third argument that the Court set out the "test" for
11 determining when a rule is substantive that Petitioner's argument hinges on:

12 Her argument is that statutory construction cases are substantive because they
13 define what Congress always intended the law to mean—unlike Johnson, which
14 struck down the residual clause regardless of Congress' intent.

15 That argument is not persuasive. Neither Bousley nor any other case from this
16 Court treats statutory interpretation cases as a special class of decisions that are
17 substantive because they implement the intent of Congress. Instead, decisions
18 that interpret a statute are substantive if and when they meet the normal criteria
19 for a substantive rule: when they 'alte[r] the range of conduct or the class of
20 persons that the law punishes.'

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

21 What is critically important, and new, about Welch is that it explains, for the
22 very first time, that the *only* test for determining whether a decision that
23 interprets the meaning of a statute is substantive, and must apply retroactively to
24 all cases, is whether the new interpretation meets the criteria for a substantive
25 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.

26 Petition at 32 (emphasis in original).

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

10 Interestingly, though, in setting out this test, the Court quoted verbatim from the very
11 portion of its decision in Schriro that has been cited above, see supra, for the proposition that
12 the key principle relied on by the Welch Court—in holding that *Johnson* was a new substantive
13 rule—is ultimately rooted in Teague, which, again, is concerned exclusively with new rules of
14 constitutional import. Thus, to the extent the “test” relied on by Petitioner is grounded on this
15 text from Schriro, Petitioner took it out of context by ignoring the fact that this statement in
16 Schriro was based on Bousley’s discussion of the substance/procedure distinction respecting
17 new rules of constitutional law, which was, in turn, premised largely on Teague. See Bousley,
18 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075).
19 But, to the extent that this “test” is unmoored from the constitutional underpinnings of
20 Teague’s retroactivity analysis, it is, after all, nothing more than dictum. Either way,
21 Petitioner’s reliance on this language from Welch was misguided.

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

28 ///

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

3 **f. Petitioner Cannot Establish Actual Prejudice**

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

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

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

16 Mercado v. State, Docket No. 35006 at *22 (Order of Affirmance in Part and Reversal and
17 Remand in Part, filed June 3, 2002) (footnotes omitted). Thus, to the extent that he Nevada
18 Supreme Court rejected Petitioner's challenge to the Kazalyn instruction on the merits, the
19 Court's decision is the law of the case and cannot be reargued. Pellegrini v. State, 117 Nev.
20 860, 879, 34 P.3d 519, 532 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d
21 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV.
22 CONST. Art. VI § 6.

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

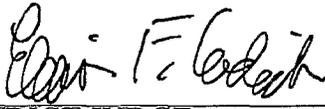
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1 felony murder”). Here, Petitioner was also charged with and ultimately convicted¹² of
2 Burglary—which is among the enumerated felonies that can serve as predicates to a theory of
3 felony murder. See NRS 200.030(1)(b) (defining first-degree murder as murder “[c]ommitted
4 in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery,
5 burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under
6 the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to
7 NRS 200.5099” (emphasis added)). Accordingly, because the evidence established that
8 Petitioner was guilty of first-degree murder under a felony-murder theory, he was unable to
9 establish that the error in giving the Kazalyn instruction worked to his “actual and substantial
10 disadvantage.” See Huebler, 128 Nev. at ___, 275 P.3d at 95 (emphasis added). As such,
11 Petitioner has failed to demonstrate actual prejudice and his Petition is denied.

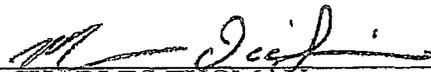
12
13 **ORDER**

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

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

17 
18 _____
DISTRICT JUDGE *ae*

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

21 BY  (for)
22 CHARLES THOMAN
23 Deputy District Attorney
Nevada Bar #012649

24
25
26
27 ¹² Although Petitioner was originally convicted of First Degree Kidnapping with the Use of a
28 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.

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CERTIFICATE OF ELECTRONIC FILING

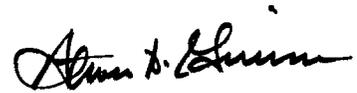
I hereby certify that service of Findings of Fact, Conclusions of Law and Order, was made this 26th day of September, 2017, by Electronic Filing to:

MEGAN C. HOFFMAN
Assistant Federal Public Defender
Megan_hoffman@fd.org

JEREMY C. BARON
Assistant Federal Public Defender
Jeremy_baron@fd.org

BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

94FH0892A/JW/saj/MVU



CLERK OF THE COURT

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16 Attorneys for Petitioner Ruel Salva Mercado

17
18
19 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
20 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

21 RUEL SALVA MERCADO,

22 Petitioner,

23 v.

24 RENEE BAKER, et al.

25 Respondents.

26 Case No. 95C125649
27 Dept No. VI

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

(Not a Death Penalty Case)

28
29 **PETITION FOR WRIT OF HABEAS CORPUS**
30 **(POST CONVICTION)**

31 1. Name of institution and county in which you are presently imprisoned
32 or where and how you are presently restrained of your liberty: Lovelock Correctional
33 Center, Pershing County, Nevada

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

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

37 4. Case Number: 95C125649

APP. 222

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

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

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

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

11 8. What was your plea?

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

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

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

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

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

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

22 13. If you did appeal, answer the following:

23 (a) Name of Court: Nevada Supreme Court

24 (b) Case number or citation: 27877

APP. 223

1 (c) Result: Conviction Affirmed on 4/9/1998; Remittitur Issued on
2 5/8/1998

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

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

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

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

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

11 (3) Grounds raised:

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

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

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

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

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

APP. 224

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(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.

APP. 225

- 1 Ground 11: Was denied due process and fair trial when district court allowed
2 Flores' unreliable testimony.
- 3 Ground 12: Was denied due process and fair trial when prosecutor engaged
4 in vindictive and malicious prosecution (collaborating with
5 Flores).
- 6 Ground 13: Was denied due process and fair trial when district court allowed
7 biased testimony by Flores
- 8 Ground 14: Was denied due process and fair trial when district court allowed
9 uncorroborated testimony of Flores to stand.
- 10 Ground 15: Was denied due process and fair trial when prosecutor introduced
11 tainted evidence/testimony by Carl Flores into evidence.
- 12 Ground 16: Was denied due process and fair trial when prosecutor introduced
13 tainted testimony of FBI agent Carolyn Kelliher into evidence
14 and court allowed it to stand.
- 15 Ground 17: Was denied due process and fair trial when prosecutor failed to
16 produce positive identification of Mercado.
- 17 Ground 18: Was denied constitutional right to have jury hear all of the
18 evidence.
- 19 Ground 19: Was denied due process and fair trial when judge allowed more
20 prejudicial than probative testimonial evidence to stand.
21 (Testimony of James Debolt.)
- 22 Ground 20: Was denied due process and fair trial when prosecutor used non-
23 substantive evidence. (Testimony by George Good, ballistics
24 expert.)
- 25 Ground 21: Was denied due process and fair trial when prosecutor engaged
26 in vindictive and malicious prosecution; Austria's offered
27 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).

APP. 226

- 1
2 Ground 23: Was denied due process and fair trial when district court abused
3 its discretion (by denying defendant's motion for new trial based
4 on suppression of evidence by the prosecutor).
- 4 Ground 24: Was denied due process and fair trial when Mercado was denied
5 his rights to fully cross-examine a witness (Felix Austria).
- 6 Ground 25: Was denied due process and fair trial when prosecutor introduced
7 non-substantive prejudicial evidence (bullets).
- 8 Ground 26: Was denied due process and fair trial when prosecutor used
9 tainted evidence in a vindictive and malicious manner (prosecutor
10 admitted on record that the state agreed to lenience for Austria
11 in exchange for his testimony against Mercado).
- 11 Ground 27: Was denied due process and fair trial when prosecutor used
12 prejudicial non-substantive testimony (Austria's testimony
13 regarding the shooting).
- 13 Ground 28: Was denied due process and fair trial when prosecutor used
14 tainted, prejudicial testimony (Austria).
- 15 Ground 29: Was denied due process and fair trial when district court judge
16 abused its discretion (court initiates conspiracy to conceal
17 evidentiary evidence regarding plea offer to Mercado).
- 17 Ground 30: Was denied due process and fair trial through prosecutorial
18 misconduct (Detective Newman's testimony regarding a promise
19 that Austria could go back to Philippines in exchange for his
20 turning state's evidence against Mercado).
- 20 Ground 31: Was denied due process and fair trial in violation of Fifth, Sixth,
21 and Fourteenth amendments by the erroneous and prejudicial
22 jury instructions regarding reasonable doubt, malice and
23 premeditation.
- 23 Ground 32: Was denied Sixth Amendment right to effective assistance of
24 counsel through trial counsel's failure to object to the erroneous
25 and prejudicial jury instructions regarding reasonable doubt,
26 malice and premeditation.
- 27

APP. 227

1 Ground 33: District court abused its discretion at sentencing by enhancing
2 Mercado's sentence, thereby violating the double jeopardy clause
3 under the Fifth Amendment and due process clause under the
Fourteenth Amendment.

4 Ground 34: Was denied Sixth Amendment right to effective assistance of
5 appellate counsel.

6 Ground I:¹ The evidence presented at trial established that the plan for the
7 robbery focused on taking money from the cashier's cage at
8 Renata's. Insufficient factual support existed to support
9 attempted robbery convictions for the bartender and slot manager
in violation of the Fifth, Sixth, and Fourteenth Amendment of the
United States Constitution.

10 Ground II: Insufficient factual support was presented for Mr. Mercado's
11 kidnapping with use of a deadly weapon convictions for Mr. Murr
12 and Mr. Serna, in violation of the Constitutional rights
13 guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the
United States Constitution.

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

21 Ground IV: The trial court improperly limited testimony regarding the bias
22 of paid informant Carl Flores' in violation of Mr. Mercado's rights

21 ¹ Mr. Mercado initially proceeded in proper person during this state post-
22 conviction proceeding and raised 34 claims. The district court initially denied the
23 petition in full. On appeal, the Nevada Supreme Court affirmed in part with respect
24 to the district court's dismissal of certain claims, including as relevant here Ground
25 31, and reversed and remanded in part. On remand, the district court appointed
26 counsel for Mr. Mercado. Mr. Mercado then filed a counseled petition for writ of
27 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.

APP. 228

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

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

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

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

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

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

27 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

APP. 229

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

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

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

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

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

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

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

26 (G) Trial counsel was ineffective for calling Felix Austria as a
27 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.

APP. 230

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

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

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

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

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

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

25 (B) Appellate counsel was ineffective for failing to raise the
26 claim that there was insufficient factual support for
27 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.

APP. 231

1
2 (E) Appellate counsel erred in failing to raise the issue of the
3 violation of Mr. Mercado's Fifth Amendment rights when
4 the court required Mr. Mercado to display his tattoos to the
5 jury even though Mr. Mercado did not testify.

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

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

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

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

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

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

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

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

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

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

APP. 232

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

3 (3) Grounds raised:

4 Ground One: The prosecutors used their peremptory challenges in an
5 intentionally racially-discriminatory manner by removing one of
6 the only Filipino jurors from the jury. Consequently, Mr.
7 Mercado's conviction is invalid under the Constitutional
8 guarantees of due process, equal protection, and the right to trial

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

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

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

24 Ground Five: The state engaged in prosecutorial misconduct by improperly
25 bolstering of Felix Austria's credibility during Mr. Mercado's
26 trial, in violation of the Constitutional rights to due process and
27 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.

APP. 233

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

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

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

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

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

20 Ground Twelve: Insufficient factual support was presented for Mr. Mercado's
21 Kidnapping with Use of a Deadly Weapon convictions of Mr. Murr
22 and Mr. Serna, in violation of the Constitutional rights
23
24

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

APP. 234

1 guaranteed in the Fifth, Sixth, and Fourteenth Amendment of the
2 United States Constitution.³

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

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

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

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

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

26 Ground Eighteen: During the penalty phase of Mr. Mercado's trial, the court allowed
27 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.

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.

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

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

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

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

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

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

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

26 (G) Trial counsel was ineffective for calling Felix Austria as a
27 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

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

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

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

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

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

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

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

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

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

26 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.

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- 1 (A) Appellate counsel failed to raise the issue that a juror who
2 indicated that she believed that Mr. Mercado was probably
3 guilty since the prosecution had gone to the trouble of
4 bringing a case and that he should have to prove his
5 innocence was not excused.
- 6 (B) Appellate counsel failed to raise the issue that a Filipino
7 juror was excused by the prosecution and the prosecution
8 failed to present a valid, race-neutral reason for exercising
9 a peremptory challenge against her.
- 10 (C) Appellate counsel failed to raise the issue of the trial court
11 limiting testimony regarding Carl Flores' role as an FBI
12 informant.
- 13 (D) Appellate counsel failed to raise the issue that the state
14 engaged in prosecutorial misconduct by improperly
15 bolstering of Felix Austria's credibility during Mr.
16 Mercado's trial.
- 17 (E) Appellate counsel erred in failing to raise the issue of the
18 violation of Mr. Mercado's Fifth Amendment rights when
19 the court required Mr. Mercado to display his tattoos to the
20 jury even though Mr. Mercado did not testify.
- 21 (F) Appellate counsel failed to raise the issue of the improper
22 jury instruction regarding reasonable doubt.
- 23 (G) Appellate counsel failed to raise the issue of the improper
24 jury instruction regarding premeditation and deliberation.
- 25 (H) Appellate counsel failed to raise the issue of the improper
26 jury instruction regarding malice.
- 27 (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.

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1
2 (K) Appellate counsel was ineffective by failing to challenge all
counts of coercion on appeal.

3
4 (L) Appellate counsel failed to raise the issue that there was
insufficient factual support for the gang sentencing
5 enhancement on each of Mr. Mercado's eighteen
convictions.

6
7 (M) Appellate counsel failed to challenge the prosecution's
failure to present sufficient evidence to convict Mr.
8 Mercado.

9
10 (N) Appellate counsel failed to raise the issue of improper
victim impact statements during the penalty hearing.

11
12 (O) Appellate counsel failed to object to pervasive prosecutorial
misconduct that occurred during Mr. Mercado's penalty
hearing closing arguments.

13
14 (4) Did you receive an evidentiary hearing on your petition,
application or motion? Yes _____ No XX

15
16 (5) Result: Petition Denied

17
18 (6) Date of result: 4/26/2010.

19
20 (7) If known, citations of any written opinion or date of orders
entered pursuant to such result: Judgment entered 4/26/2010

21
22 (c) As to any third petition, application or motion, give the same
information: N/A

23
24 (d) Did you appeal to the highest state or federal court having
jurisdiction, the result or action taken on any petition, application or motion?

25
26 (1) First petition, application or motion?

27
Yes X No _____

(2) Second petition, application or motion?

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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

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1 not all statutory interpretation decisions that narrow the class of individuals who can
2 be convicted under the statute.

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

7 19. Are you filing this petition more than 1 year following the filing of the
8 judgment of conviction or the filing of a decision on direct appeal? Yes. If so, state
9 briefly the reasons for the delay.

10 Ground One is based upon a previously unavailable constitutional claim. *Clem*
11 *v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one year to
12 file a petition from the date that the claim has become available. *Rippo v. State*, 132
13 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds, Rippo v. Baker*,
14 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court
15 decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United*
16 *States*, 136 S. Ct. 1257 (2016), which established a new constitutional rule applicable
17 to this case. This petition was filed within one year of *Welch*, which was decided on
18 April 18, 2016.

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

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

22 21. Give the name of each attorney who represented you in the proceeding
23 resulting in your conviction and on direct appeal: Philip Dunleavy and Paul Wommer
24 (trial); Norman Reed (direct appeal).

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1 22. Do you have any future sentences to serve after you complete the
2 sentence imposed by the judgment under attack: Yes ____ No XX

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

GROUND ONE

7 **UNDER RECENTLY DECIDED SUPREME COURT**
8 **CASES, MR. MERCADO MUST BE GIVEN THE**
9 **BENEFIT OF *BYFORD V. STATE* AS A MATTER OF**
10 **FEDERAL LAW. *BYFORD* WAS A SUBSTANTIVE**
11 **CHANGE IN LAW THAT MUST NOW BE APPLIED**
12 **RETROACTIVELY TO ALL CASES, INCLUDING**
13 **THOSE THAT BECAME FINAL PRIOR TO *BYFORD*.**

14 In *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme
15 Court concluded that the common jury instruction previously used to define
16 premeditation and deliberation (the so-called *Kazalyn* instruction) improperly
17 blurred the line between these two elements. The court interpreted the first-degree
18 murder statute to require that the jury find deliberation as a separate element.
19 However, the court stated that this rule was not of constitutional magnitude and that
20 it only applied prospectively.

21 In *Nika v. State*, the Nevada Supreme Court acknowledged that *Byford*
22 interpreted the first-degree murder statute by narrowing its terms. However, relying
23 upon its interpretation of the then-current state of United States Supreme Court
24 retroactivity jurisprudence, it held that *Byford* represented only a “change” in state
25 law, not a “clarification,” and so *Byford* applied only to those convictions that had yet
26 to become final at the time it was decided.
27

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1 However, in 2016, the United States Supreme Court drastically changed its
2 retroactivity rules. First, in *Montgomery v. Louisiana*, the Supreme Court held that
3 the question whether a new criminal law rule is retroactive (for example, because it
4 falls under the “substantive rule” exception to the *Teague* bar on retroactivity) is a
5 matter of federal constitutional law. Second, in *Welch v. United States*, the Supreme
6 Court clarified that narrowing “interpretations” of criminal statutes fall under the
7 “substantive rule” exception to the *Teague* doctrine and therefore apply retroactively.
8 It further indicated that the *only* requirement for determining whether an
9 interpretation of a criminal statute applies retroactively is whether the
10 interpretation narrows the class of individuals who can be convicted of the crime.

11 *Montgomery* and *Welch* represent a reworking of federal retroactivity law, and
12 under those cases Mr. Mercado may obtain the benefit of *Byford* on collateral review.
13 The Nevada Supreme Court has acknowledged that *Byford* represented a substantive
14 rule. Under *Welch*, that means it must be applied retroactively to convictions that
15 had already become final at the time *Byford* was decided. The Nevada Supreme
16 Court’s distinction between “changes” and “clarifications” of laws is no longer relevant
17 in determining whether a new interpretation of a statute applies retroactively.
18 Moreover, the Nevada state courts are bound to apply *Welch* because under
19 *Montgomery*, the *Teague* retroactivity rules apply to the states as a matter of federal
20 constitutional law. Under those rules, the *Byford* decision applies retroactively to
21 petitioners like Mr. Mercado.

22 Moreover, Mr. Mercado is entitled to relief because there is a reasonable
23 likelihood that the jury applied the improper *Kazalyn* instruction in an
24 unconstitutional manner. The evidence that Mr. Mercado committed a premeditated
25 and deliberate murder was weak. Although the State also pursued a felony murder
26
27

1 theory at trial, that should not change the analysis. Mr. Mercado can also establish
2 good cause to overcome the procedural bars. The new constitutional arguments based
3 upon *Montgomery* and *Welch* were not previously available. Mr. Mercado has filed
4 the petition within one year of *Welch*. Mr. Mercado can also show actual prejudice.

5 Accordingly, the petition should be granted.

6 **I. LEGAL BACKGROUND**

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

8 As relevant here, Mr. Mercado was charged with first-degree murder with use
9 of a deadly weapon with intent to promote, further or assist a criminal gang.
10 According to the State, Mr. Mercado and other gang members had attempted to rob
11 a bar, and Mr. Mercado shot and killed an employee during the alleged attempted
12 robbery. With respect to the murder charge, the State alleged that Mr. Mercado had
13 committed a premeditated and deliberate murder when he shot and killed this
14 individual. (Second Amended Criminal Complaint.) The State also alleged that Mr.
15 Mercado and his co-defendants had all committed felony murder, based on the
16 attempted robbery and other associated alleged felonies. (*Id.*) The court provided the
17 jury with the following instruction on premeditation:

18 Premeditation or intent to kill need not be for a day,
19 an hour or even a minute, for if the jury believes from the
20 evidence that there was a design, a determination to kill,
21 distinctly formed in the mind at any moment before or at
22 the time of the killing the act constituting the killing, it was
23 willful, deliberate and premeditated murder

24 The intention to kill and the act constituting the
25 killing may be as instantaneous as successive thoughts of
26 the mind. It is only necessary that the act constituting the
27 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

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1 succeed each other or how quickly they may be followed by
2 the acts constituting murder.

3 (Jury Instructions, Instruction No. 10.) This instruction provided the same definition
4 of premeditation as set forth in the *Kazalyn* instruction. *See Kazalyn v. State*, 108
5 Nev. 67, 825 P.2d 578 (1992).

6 **B. Conviction and Direct Appeal.**

7 The jury convicted Mr. Mercado of first-degree murder with use of a deadly
8 weapon with intent to promote, further or assist a criminal gang. (Verdict.) Although
9 the State pursued the death penalty, the jury sentenced Mr. Mercado to consecutive
10 sentences of life without the possibility of parole for that crime. (Judgment.) Mr.
11 Mercado was also convicted of and sentenced on additional crimes.

12 Mr. Mercado appealed from the judgment of conviction. The Nevada Supreme
13 Court issued an order dismissing the appeal on April 9, 1998. Thus, Mr. Mercado's
14 conviction became final on July 8, 1998. *See Nika v. State*, 124 Nev. 1272, 198 P.3d
15 839, 849 (2008) (conviction becomes final when judgment of conviction is entered and
16 90-day time period for filing petition for writ of certiorari to the United States
17 Supreme Court has expired).

18 **C. *Byford v. State.***

19 On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116
20 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn*
21 instruction because it did not define premeditation and deliberation as separate
22 elements of first-degree murder. The court's prior cases, including *Kazalyn*, had
23 "underemphasized the element of deliberation." 116 Nev. at 234. Cases such as
24 *Kazalyn* and *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992), had reduced
25 "premeditation" and "deliberation" to synonyms; because those cases treated the
26 terms as "redundant," they did not require an instruction separately defining

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1 deliberation. *Byford*, 116 Nev. at 235. The *Byford* decision pointed out that in *Greene*
2 *v. State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997), the court went so far as to state
3 that “the terms premeditated, deliberate, and willful are a single phrase, meaning
4 simply that the actor intended to commit the act and intended death as a result of
5 the act.” *Byford*, 116 Nev. at 235.

6 The *Byford* court specifically “abandoned” this line of authority. *Id.* It held as
7 follows:

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

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

17 The *Byford* court further explained that “[b]ecause deliberation is a distinct
18 element of *mens rea* for first-degree murder, we direct the district courts to cease
19 instructing juries that a killing resulting from premeditation is ‘willful, deliberate,
20 and premeditated murder.’” *Id.* The court directed the state district courts in the
21 future to separately define deliberation in jury instructions and provided model
22 instructions for the lower courts to use. *Id.* at 235-36.

23 However, the court did not grant relief to Mr. Byford because it believed the
24 evidence was “sufficient for the jurors to reasonably find that before acting to kill the
25 victim Byford weighed the reasons for and against his action, considered its
26

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1 consequences, distinctly formed a design to kill, and did not act simply from a rash,
2 unconsidered impulse.” *Id.* at 233-34.

3 On August 23, 2000, the Nevada Supreme Court decided *Garner v. State*, 116
4 Nev. 770, 6 P.3d 1013 (2000). In *Garner*, the court held that the use of the *Kazalyn*
5 instruction at trial was neither constitutional nor plain error. *Id.* at 788. The court
6 rejected the argument that under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford*
7 had to apply retroactively to Mr. Garner, whose conviction had not yet become final
8 at the time the court issued *Byford*. According to the court, *Griffith* only concerned
9 constitutional rules, and *Byford* did not recognize a *constitutional* error. Thus, the
10 court reasoned, the jury instructions approved in *Byford* did not have any retroactive
11 effect as they were “a new requirement with prospective force only.” *Id.* at 789.

12 The court explained that the decision in *Byford* was a clarification of the law
13 as it existed prior to *Byford* because the case law prior to *Byford* was “divided on the
14 issue”:

15 This does not mean, however, that the reasoning of
16 *Byford* is unprecedented. Although *Byford* expressly
17 abandons some recent decisions of this court, it also relies
18 on the longstanding statutory language and other prior
19 decisions of this court in doing so. Basically, *Byford*
20 *interprets and clarifies* the meaning of a preexisting
21 statute by resolving conflict in lines in prior case law.
22 Therefore, its reasoning is not altogether new.

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

Id. at 789 n.9 (emphasis added).

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

1
2 In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S.
3 225 (2001). In *Fiore*, the Supreme Court held as a matter of due process that a
4 *clarification* of the law must apply to all convictions, even a final conviction that has
5 been affirmed on appeal, where the clarification reveals that a defendant was
6 convicted “for conduct that [the State’s] criminal statute, as properly interpreted,
7 does not prohibit.” *Id.* at 228.

8 In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S.
9 835 (2003). In *Bunkley*, the Court again held as a matter of due process that a *change*
10 in state law that narrows the category of conduct that can be considered criminal
11 must be applied to convictions that have yet to become final. *Id.* at 840-42.

E. First Post-Conviction Petition.

12
13 In 1999, Mr. Mercado filed a state post-conviction petition, arguing under
14 Ground 31 that the jury instructions in his case improperly relieved the State of
15 proving the elements of premeditation and deliberation. (Proper Person Petition at
16 53-58.)

17 In September 1999, the district court denied this ground, reasoning that Mr.
18 Mercado should have raised the claim on direct appeal. (Order Denying Petition,
19 9/21/99, at 6, ¶ 10.) The Nevada Supreme Court affirmed the denial of this claim.

F. *Nika v. State.*

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

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1 In response to *Polk*, the Nevada Supreme Court in 2008 issued *Nika v. State*,
2 124 Nev. 1272, 198 P.3d 839 (Nev. 2008). In *Nika*, the court disagreed with *Polk*'s
3 conclusion that the use of the *Kazalyn* instruction violated due process. The court
4 stated that, rather than implicating *Winship* concerns, the only relevant issue was
5 the retroactivity of *Byford*. It reasoned that it was within the court's power to
6 determine whether *Byford* represented a *clarification of* the interpretation of a
7 statute, which it believed would apply to everybody, or a *change in* the interpretation
8 of a statute, which it believed would only apply to those convictions that had yet to
9 become final. The court held that *Byford* represented a change in the law as to the
10 interpretation of the first-degree murder statute. The court specifically "disavow[ed]"
11 any language in *Garner* indicating that *Byford* was anything other than a change in
12 the law, stating that language in *Garner* indicating that *Byford* was a clarification
13 was dicta. *Id.* at 1287.

14 The court acknowledged that because *Byford* had changed the meaning of the
15 first-degree murder statute by narrowing its scope, *Byford* had to be applied to
16 convictions that had yet to become final at the time it was decided. To that end, the
17 court cited the Supreme Court's decision in *Bunkley* and *Fiore*. *Nika*, 124 Nev. at
18 1286-87 & nn.66, 72, 74. In this regard, the court also overruled *Garner* to the extent
19 that it held that *Byford* could only apply prospectively and would not apply to cases
20 that had yet to become final by the time of the *Byford* decision. *Id.* at 1287.

21 The court emphasized that *Byford* was a matter of statutory interpretation and
22 not a matter of constitutional law. According to the *Nika* court, the *Byford* decision
23 solely addressed a state law issue, namely "the interpretation and definition of the
24 elements of a state criminal statute." *Id.* at 1288.

1 **G. *Montgomery v. Louisiana and Welch v. United States.***

2 On January 25, 2016, the United States Supreme Court decided *Montgomery*
3 *v. Louisiana*, 136 S.Ct. 718 (2016). In *Montgomery*, the Court addressed the question
4 of whether *Miller v. Alabama*, 567 U.S. 460 (2012)—which prohibited under the
5 Eighth Amendment mandatory sentences of life without the possibility of parole for
6 juvenile offenders—applied retroactively to cases that had already become final by
7 the time of *Miller*. *Montgomery*, 136 S.Ct. at 725.

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

20 The initial question the Court addressed in *Montgomery* was whether it had
21 jurisdiction over the case. The lower court (the Louisiana Supreme Court) purported
22 to decide whether *Miller* was retroactive as a matter of *state* law. Arguably, that
23 state law issue was insufficient to create a federal question to support the United
24 States Supreme Court’s review. But the Court held otherwise, stating that “when a
25 new substantive rule of constitutional law controls the outcome of a case, the
26

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1 Constitution requires state collateral review courts to give retroactive effect to that
2 rule.” *Montgomery*, 136 S. Ct. at 729. That is because “*Teague’s* conclusion
3 establishing the retroactivity of new substantive rules is best understood as resting
4 upon constitutional premises.” *Id.* Because a state “may not disregard a controlling
5 constitutional command in their own courts,” the states were therefore obligated to
6 apply new rules retroactively when they fit within one of *Teague’s* exceptions. *Id.* at
7 727 (citing *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 340-41, 344 (1816)).

8 Moving on, the *Montgomery* Court concluded that *Miller* was a new
9 substantive rule, so the states had to apply it retroactively on collateral review.
10 *Montgomery*, 136 S.Ct. at 732.

11 On April 18, 2016, the United States Supreme Court decided *Welch v. United*
12 *States*, 136 S.Ct. 1257 (2016). In *Welch*, the Court addressed the retroactivity of its
13 prior decision in *Johnson v. United States*, which held that the residual clause in the
14 Armed Career Criminal Act was void for vagueness under the due process clause.
15 *Welch*, 136 S.Ct. at 1260-61, 1264. More specifically, the Court analyzed whether
16 *Johnson* represented a new substantive rule. *Id.* at 1264-65. The Court defined a
17 substantive rule as one that “alters the range of conduct or the class of persons that
18 the law punishes.” *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)).
19 “*This includes decisions that narrow the scope of a criminal statute by interpreting*
20 *its terms*, as well as constitutional determinations that place particular conduct or
21 persons covered by the statute beyond the State’s power to punish.” *Id.* at 1265
22 (quoting *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the
23 Court concluded that *Johnson* was substantive. *Id.*

24 The Court rejected the argument that a rule is only substantive when it limits
25 Congress’s power to act. *Id.* at 1267. It pointed out that some of the Court’s
26

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1 “substantive decisions do not impose such restrictions.” *Id.* The “clearest example”
2 was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was
3 whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*,
4 the Court had “held as a matter of statutory interpretation that the ‘use’ prong [of 18
5 U.S.C. § 924(c)(1)] punishes only ‘active employment of the firearm’ and not mere
6 possession.” *Welch*, 136 S.Ct. at 1267 (quoting *Bailey*). The Court in *Bousley* had “no
7 difficulty concluding that *Bailey* was substantive, as it was a decision ‘holding that a
8 substantive federal criminal statute does not reach certain conduct.’” *Welch*, 136
9 S.Ct. at 1267 (quoting *Bousley*). The *Welch* Court also cited *Schriro*, 542 U.S. at 354,
10 and noted the following in a parenthetical to that citation: “A decision that modifies
11 the elements of an offense is normally substantive rather than procedural.” *Welch*,
12 136 S.Ct. at 1267.

13 The Court also rejected the distinction between decisions, like *Bousley*, that
14 interpret statutes, as opposed to decisions, like *Johnson*, that invalidate portions of
15 statutes. *Welch*, 136 S. Ct. at 1267. To the contrary, it stated that all statutory
16 interpretation cases (including decisions that interpret statutes and decisions that
17 invalidate statutes) are substantive so long as meet the criteria for a substantive rule:

18 Neither *Bousley* nor any other case from this Court treats
19 statutory interpretation cases as a special class of decisions
20 that are substantive because they implement the intent of
21 Congress. *Instead, decisions that interpret a statute are*
22 *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.”

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

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1 II. ANALYSIS

2 A. ***Welch* And *Montgomery* Establish That The Narrowing**
3 **Interpretation Of The First-Degree Murder Statute In *Byford***
4 **Must Be Applied Retroactively In State Court To Convictions**
5 **That Were Final At The Time *Byford* Was Decided.**

6 In *Montgomery*, the United States Supreme Court held for the first time as a
7 matter of federal constitutional law that state courts must apply *Teague's*
8 "substantive rule" exception in the manner in which the United States Supreme
9 Court applies it. See *Montgomery*, 136 S.Ct. at 727 ("States may not disregard a
controlling constitutional command in their own courts.").

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

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

25 Nevertheless, the court concluded in *Nika* that because *Byford* was a *change*
26 in law as opposed to a *clarification*, *Byford* did not apply retroactively to convictions

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1 that had already become final. In light of *Welch*, however, this distinction between a
2 “change” and “clarification” no longer matters. The *only* relevant question is whether
3 the new interpretation represents a new substantive rule. Critically, in *Welch*, the
4 Supreme Court never used the word “clarification” when it analyzed how its statutory
5 interpretation decisions fit under *Teague*. Rather, it explained that “interpretations,”
6 without qualification, apply retroactively. The analysis in *Welch* shows that the
7 Nevada Supreme Court’s distinction between “change” and “clarification” is no longer
8 a relevant factor in determining the retroactive effect of a decision that interprets a
9 criminal statute by narrowing its meaning.

10 Accordingly, under *Welch* and *Montgomery*, the Nevada Supreme Court’s
11 decision in *Byford* applies retroactively to Mr. Mercado’s case. The jury was allowed
12 to convict Mr. Mercado of murder under the improper *Kazalyn* instruction. He is
13 therefore entitled to a new trial.

14 To the extent that the jury analyzed whether Mr. Mercado committed a
15 premeditated and deliberate murder, it is reasonably likely that the jury applied the
16 *Kazalyn* instruction in a way that violated Mr. Mercado’s constitutional rights. *See*
17 *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). As the Nevada Supreme Court
18 explained in *Byford*, the *Kazalyn* instruction blurred the distinction between first-
19 and second-degree murder. It reduced premeditation and deliberation down to intent
20 to kill, and so it relieved the State of its obligation to prove essential elements of the
21 crime. In turn, the jury in Mr. Mercado’s case was not required to find deliberation.
22 The jury was never required to find whether Mr. Mercado committed the murder after
23 a period of “coolness and reflection,” and whether the murder was the result of a
24 “process of determining upon a course of action to kill as a result of thought, including
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1 weighing the reasons for and against the action and considering the consequences of
2 the action.” *Byford*, 116 Nev. at 235-36.

3 With respect to the premeditation and deliberation theory, this error proved
4 prejudicial. There was little if any evidence that Mr. Mercado had committed a
5 premeditated and deliberate murder when he shot the victim. Instead, the evidence
6 suggested that the shooting was the product of a rash impulse, spurred by the chaos
7 that took place after one of Mr. Mercado’s alleged co-defendants shot at another
8 victim. While the State in closing arguments argued that Mr. Mercado shot at the
9 victim twice and had to change the direction of his aim after the first shot (Trial
10 Transcript Vol. VII, 7/20/95, at 38), this evidence does little to undermine the
11 conclusion that the murder in this case did not follow a period of cool reflection but
12 instead occurred in the heat of the moment.

13 Although the State presented a felony murder theory in addition to the
14 premeditation and deliberation theory, that should not alter the outcome here. The
15 jury returned a general verdict of guilt with respect to the first-degree murder charge,
16 and it is unclear which theory the jury relied upon in reaching the guilty verdict. The
17 jury may well have convicted Mr. Mercado under the flawed premeditation and
18 deliberation theory, without having properly found deliberation first. Because one of
19 the theories the jury could have convicted under was sufficiently flawed, the entire
20 verdict is tainted, and Mr. Mercado’s conviction on this count should be reversed as
21 a matter of course. Mr. Mercado recognizes that in situations like this—where the
22 State charges a defendant under multiple theories of liability, one of those theories
23 (or the relevant instructions) is legally deficient, and the jury returns a general
24 verdict—the Nevada Supreme Court and the United States Supreme Court have held
25 that a harmless error analysis applies. *See Cortinas v. State*, 124 Nev. 1013, 1026,

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1 195 P.3d 315, 324 (2008); *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008). However, and
2 with respect, those cases were wrongly decided. Trial errors of this sort should be
3 treated as structural errors. Accordingly, Mr. Mercado is preserving the issue for
4 potential review in the Nevada Supreme Court and the United States Supreme Court.

5 Even if harmless error review applies here, the legally deficient premeditation
6 and deliberation theory was not harmless here. The harmless error analysis turns
7 on whether the court can be reasonably certain that every juror *actually did* vote to
8 convict on a proper felony murder theory, as opposed to the invalid premeditation and
9 deliberation theory. *See Riley v. McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015). There
10 are reasons to doubt that in this case. The State's theory was that the killing occurred
11 during an attempted robbery of a bar, and that Mr. Mercado was the shooter. Because
12 the State argued that Mr. Mercado was the shooter, the premeditation and
13 deliberation theory was a natural fit. Indeed, the prosecutor stressed this point
14 during closing arguments and during rebuttal. In addition, while the prosecutor
15 argued that the killing rose to the level of a felony murder, there were problems with
16 that theory as well. During Mr. Mercado's state post-conviction proceedings, the state
17 court vacated certain underlying felony convictions that the prosecutor had argued
18 were the basis for a felony murder conviction. Assuming that some of the jurors relied
19 on a felony murder theory when they voted to convict Mr. Mercado of first-degree
20 murder, certain of those jurors may well have relied on the invalid felonies as the
21 basis for their vote to convict Mr. Mercado of felony murder.

22 Because the State argued that Mr. Mercado was the shooter, and because at
23 least some of the felony murder theories were legally flawed as well, it is not
24 reasonably certain that every juror actually did vote to convict Mr. Mercado on the
25 basis of a proper felony murder theory. More broadly, the use of a general verdict is
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1 always problematic, because those forms can blur an already opaque decision-making
2 process. *See Babb v. Lozowski*, 719 F.3d 1019, 1035 (9th Cir. 2013). For those
3 reasons, the instructional error in this case was either structural or it was not
4 harmless, and Mr. Mercado is entitled to relief.

5 **B. Mr. Mercado Has Good Cause To Raise This Claim In A** 6 **Second Or Successive Petition**

7 To overcome the procedural bars of NRS 34.726 and NRS 34.810, a petitioner
8 has the burden to show “good cause” for delay in bringing his claim or for presenting
9 the same claims again. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537
10 (2001). One manner in which a petitioner can establish good cause is to show that
11 the legal basis for the claim was not reasonably available at the time of the default.
12 *Id.* A claim based on a newly available legal basis must rest on a previously
13 unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-
14 26 (2003). A petitioner has one year to file a petition from the date that the claim has
15 become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016),
16 *rev’d on other grounds, Rippo v. Baker*, 2017 WL 855913 (Mar. 6, 2017).

17 The decisions in *Montgomery* and *Welch* provide good cause for overcoming the
18 procedural bars. *Montgomery* established a new rule of constitutional law, namely
19 that the “substantive rule” exception to the *Teague* doctrine applies in state courts as
20 a matter of federal constitutional law. Furthermore, *Welch* clarified that this
21 constitutional rule includes the Supreme Court’s prior statutory interpretation
22 decisions. Moreover, *Welch* established that the only requirement for an
23 interpretation of a statute to apply retroactively under the “substantive rule”
24 exception to *Teague* is whether the interpretation narrowed the class of individuals
25 who could be convicted under the statute. These rules were not previously available

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1 to Mr. Mercado. As a result, Mr. Mercado has timely submitted this petition within
2 one year of *Welch*, which was decided on April 18, 2016.

3 Finally, Mr. Mercado can establish actual prejudice for the reasons discussed
4 on pages 33-36, *supra*. It is reasonably likely that the jury applied the challenged
5 instruction in a way that violates the Constitution. The State was relieved of its
6 obligation to prove essential elements of the crime. In turn, the jury was not required
7 to find deliberation. This error had a prejudicial impact on this case. Because the
8 jury returned a general verdict, this error should invalidate the conviction.

9 **III. PRAYER FOR RELIEF**

10 Based on the grounds presented in this petition, Petitioner Ruel Salva Mercado
11 respectfully requests that this honorable Court:

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

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

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

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

22 DATED this 18th day of April, 2017.

23 Respectfully submitted,
24 RENE L. VALLADARES
Federal Public Defender

25 /s/ Jeremy C. Baron
26 JEREMY C. BARON
Assistant Federal Public Defender

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VERIFICATION

1
2 Under penalty of perjury, the undersigned declares that he is counsel for the
3 petitioner named in the foregoing petition and knows the contents thereof; that the
4 pleading is true of his own knowledge except as to those matters stated on
5 information and belief and as to such matters he believes them to be true. Petitioner
6 personally authorized undersigned counsel to commence this action.

7 DATED this 18th day of April, 2017.

8
9 */s/Jeremy C. Baron*

10 JEREMY C. BARON

11 Assistant Federal Public Defender
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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies that she is an employee in the office of the
3 Federal Public Defender for the District of Nevada and is a person of such age and
4 discretion as to be competent to serve papers.

5 That on April 18, 2017, she served a true and accurate copy of the foregoing
6 PETITION FOR WRIT OF HABEAS CORPUS by placing it in the United States mail,
7 first-class postage paid, addressed to:

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

11 Attorney General Adam P. Laxalt
12 Office of the Attorney General
555 E. Washington Ave #3900
13 Las Vegas, NV 89101

14 Ruel S. Mercado
15 No. 48165
Lovelock Correctional Center
16 1200 Prison Road
Lovelock, NV 89419

17
18 /s/ Jessica Pillsbury
19 An Employee of the
20 Federal Public Defender
21 District of Nevada
22
23
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APP. 260

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 J. R. [Signature]
 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 ("Chuato") 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

¹Mercado 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...)

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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

³(...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.

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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 agreement² 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.

²Austria 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.

³NRS 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.

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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

⁴Austria 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.

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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]pppearance, 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

⁵The 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.

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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).

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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

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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.

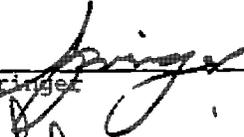
We conclude that any error created by the State's failure to disclose the Scope reports was cured when the district court allowed Mercado access to the Scope reports later in the jury selection process and because Mercado was given the opportunity to use the Scope reports to reexamine those jurors who had been seated.⁶

⁶Access was allowed prior to the exercise of peremptory challenges.

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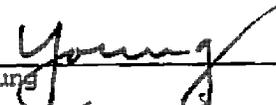
Accordingly, having concluded that Mercado's arguments lack merit, we

ORDER this appeal dismissed.


_____, C.J.
Springet


_____, J.
Shearing


_____, J.
Rose


_____, J.
Young


_____, J.
Maupin

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

FILED

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Loretta S. ...
CLERK

1 **JOC**
2 **STEWART L. BELL**
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7 **(702) 455-4711**
8 **Attorney for Plaintiff**

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 **THE STATE OF NEVADA,**
12 **Plaintiff,**

13 **-vs-**

14 **RUEL SALVA MERCADO,**
15 **#1139691**

16 **Defendant.**

17 **Case No. C125649**
18 **Dept. No. XIII**
19 **Docket G**

20 **JUDGMENT OF CONVICTION (JURY TRIAL)**

21 **WHEREAS, on the 7th day of February, 1995, the Defendant RUEL SALVA MERCADO,**
22 **entered a plea of not guilty to the crimes of COUNT I - MURDER WITH USE OF A DEADLY**
23 **WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG**
24 **(Felony); COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON WITH THE**
25 **INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT III -**
26 **BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON WITH THE INTENT TO**
27 **PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT IV - ATTEMPT**
28 **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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1 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT VIII - COERCION
2 WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST
3 A CRIMINAL GANG (Felony); COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A
4 DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
5 GANG (Felony); COUNT X - COERCION WITH USE OF A DEADLY WEAPON WITH THE
6 INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XI -
7 COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE,
8 FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XII - COERCION WITH USE OF
9 A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
10 GANG (Felony); COUNT XIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE
11 INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIV -
12 COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE,
13 FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XV - COERCION WITH USE OF
14 A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
15 GANG (Felony); COUNT XVI - COERCION WITH USE OF A DEADLY WEAPON WITH THE
16 INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVII -
17 COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE,
18 FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVIII - COERCION WITH USE
19 OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A
20 CRIMINAL GANG (Felony); COUNT XIX - COERCION WITH USE OF A DEADLY WEAPON
21 WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony) and
22 COUNT XX - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO
23 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony), committed on the 25th day of
24 November, 1994, in violation of NRS 200.010, 200.030, 193.165, 193.168, 193.169, 193.330, 205.060,
25 200.380, 200.310, 200.320, 207.190, and the matter having been tried before a jury, and the Defendant
26 being represented by counsel and having been found guilty of the crimes of COUNT I - FIRST DEGREE
27 MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER
28 OR ASSIST A CRIMINAL GANG (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A

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1 DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
2 GANG (Felony); COUNT III - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON
3 WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony);
4 COUNT IV - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT
5 TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT V - ATTEMPT
6 ROBBERY WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER
7 OR ASSIST A CRIMINAL GANG (Felony); COUNT VI - ATTEMPT ROBBERY WITH USE OF A
8 DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
9 GANG (Felony); COUNT VII - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY
10 WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG
11 (Felony); COUNT IX - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON WITH
12 THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XI -
13 COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE,
14 FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XII - COERCION WITH USE OF
15 A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
16 GANG (Felony); COUNT XIII - COERCION WITH USE OF A DEADLY WEAPON WITH THE
17 INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XIV -
18 COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE,
19 FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XV - COERCION WITH USE OF
20 A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
21 GANG (Felony); COUNT XVI - COERCION WITH USE OF A DEADLY WEAPON WITH THE
22 INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVII -
23 COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE,
24 FURTHER OR ASSIST A CRIMINAL GANG (Felony); COUNT XVIII - COERCION WITH USE
25 OF A DEADLY WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A
26 CRIMINAL GANG (Felony); COUNT XIX - COERCION WITH USE OF A DEADLY WEAPON
27 WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony) and
28 COUNT XX - COERCION WITH USE OF A DEADLY WEAPON WITH THE INTENT TO

1 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG (Felony); and

2 WHEREAS, thereafter, on the 24th day of October, 1995, the Defendant being present in Court
3 with his counsel PHILIP DUNLEAVY, ESQ. and PAUL WOMMER, ESQ., and JAY SIEGEL, Deputy
4 District Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by
5 reason of said trial and verdict and, in addition to the \$25.00 Administrative Assessment Fee, sentenced
6 Defendant to the following terms of imprisonment in the Nevada State Prison::

7 COUNT I - LIFE WITHOUT THE POSSIBILITY OF PAROLE for FIRST DEGREE MURDER
8 plus a consecutive LIFE WITHOUT THE POSSIBILITY OF PAROLE for USE OF A
9 DEADLY WEAPON and pay Restitution of \$2,213.49 jointly and severally with co-
10 defendants;

11 COUNT II - TWENTY (20) years for ATTEMPT MURDER plus a consecutive TWENTY (20) years
12 for USE OF A DEADLY WEAPON and pay Restitution of \$342.27 jointly and severally
13 with co-defendants, to run consecutive to Count I;

14 COUNT III - TEN (10) years for BURGLARY plus a consecutive TEN (10) years for USE OF A
15 DEADLY WEAPON, to run concurrent with Count II;

16 COUNT IV - SEVEN AND ONE-HALF (7½) years for ATTEMPT ROBBERY plus a consecutive
17 SEVEN AND ONE-HALF (7½) years for USE OF A DEADLY WEAPON, to run
18 consecutive to Count II;

19 COUNT V - SEVEN AND ONE-HALF (7½) years for ATTEMPT ROBBERY plus a consecutive
20 SEVEN AND ONE-HALF (7½) years for USE OF A DEADLY WEAPON, to run
21 consecutive to Count IV;

22 COUNT VI - SEVEN AND ONE-HALF (7½) years for ATTEMPT ROBBERY plus a consecutive
23 SEVEN AND ONE-HALF (7½) years for USE OF A DEADLY WEAPON, to run
24 consecutive to Count V;

25 COUNT VII - LIFE WITH THE POSSIBILITY OF PAROLE for FIRST DEGREE KIDNAPPING
26 plus a consecutive LIFE WITH THE POSSIBILITY OF PAROLE for USE OF A
27 DEADLY WEAPON, to run concurrent with Count I;

28 ///

- 1 COUNT IX - LIFE WITH THE POSSIBILITY OF PAROLE for FIRST DEGREE KIDNAPPING
- 2 plus a consecutive LIFE WITH THE POSSIBILITY OF PAROLE for USE OF A
- 3 DEADLY WEAPON, to run concurrent with Count I;
- 4 COUNT XI - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY
- 5 WEAPON;
- 6 COUNT XII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A DEADLY
- 7 WEAPON;
- 8 COUNT XIII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 9 DEADLY WEAPON;
- 10 COUNT XIV - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 11 DEADLY WEAPON;
- 12 COUNT XV - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 13 DEADLY WEAPON;
- 14 COUNT XVI - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 15 DEADLY WEAPON;
- 16 COUNT XVII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 17 DEADLY WEAPON;
- 18 COUNT XVIII - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 19 DEADLY WEAPON;
- 20 COUNT XIX - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 21 DEADLY WEAPON;
- 22 COUNT XX - SIX (6) years for COERCION plus a consecutive SIX (6) years for USE OF A
- 23 DEADLY WEAPON;
- 24 COUNTS XI -XX to run concurrent with each other and concurrent with Count I. Credit for time served
- 25 325 days.
- 26 ///
- 27 ///
- 28 ///

