No. 19-7491

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE WILLIAM JAMES BERRY, SR., PETITIONER

ON Petition FOR Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS

William J. Berry
ID No. 23739
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702

Petitioner Pro Se

QUESTIONS PRESENTED (RESTATEMENT)

1. Did the jury instruction given in Berry's capital murder trial which defined the element of premeditation impermissibly relieve the state of its burden to prove beyond a reasonable doubt the essential element of deliberation, in Vidation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. If so, given that adequate relief cannot be obtained in any other form or from any other court, do exceptional circumstances warrant the exercise of this Court's discretionary power to grant an original writ of habeas corpus?

3. Or, alternatively, is an order of transfer of this case to the District Court for the District of Nevada, appropriate?

of a substantive criminal statute. After conducting oral arguments, a three-judge court of appeals panel denied authorization, concluding that the Supreme Court cases on which Berry relies, Montgomery and Welch, do not require retroactive application of a change in state law, like that adopted by the Nevada Supreme Court in Byford v. State, to cases on collateral review. The en banc court denied Berry's request for reconsideration. This case thus presents the following important questions.

1. Did the Ninth Circuit err in concluding that the Supreme Court cases on which Berry relies, Montgomery and Welch, do not require retroactive application of a change in state law, like that adopted by the Nevada Supreme Court in Byford v. State, to cases on collateral review? and

2. If so, do exceptional circumstances warrant the exercise of this Court's discretionary power to grant a writ of habeas corpus, since adequate relief cannot be obtained in any other form or from any other court? or

3. Is order of transfer to district court appropriate?

QUESTION(S) PRESENTED (SEE RESTATEMENT)

Mc Berry filed a petition for a writ of habeas corpus in state court pursuant to 28 U.S.C. section 2254 arguing that the jury instruction given in his trial defining first-degree murder was unconstitutional, relying on the Nevada decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), the Ninth Circuit decision in Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015), and the new constitutional rule of retroactivity established by the United States Supreme Court in Montgomery v. Louisiana, 136 S. Ct. 718 (2016) and Welch v. United States, 136 S Ct. 1257 (2016). The state district court summarily denied relief on procedural grounds. The Nevada Supreme Court and Nevada Court of Appeals declined to consider the retroactivity decisions by the United States Supreme Court as providing good cause to overcome the procedural defects; and therefore affirmed the lower court's denial of relief. Berry then filed a pro se application in the Ninth Circuit Court of Appeals seeking authorization to file a second or successive habeas petition. Berry filed a counseled supplemental application arguing that the Ninth Circuit should grant him permission to file a second or successive petition raising the new constitutional rule of retroactivity set forth by the Supreme Court in Montgomery and Welch, that requires the state courts, as a matter of federal constitutional law, to retroactively apply decisions, like Byford v. State, that narrowed the interpretation

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The State of Nevada, Plaintiff-Respondent;

Aaron D. Ford, Attorney General, Attorney for Plaintiff-Respondent;

Steven B. Wolfson, District Attorney, Attorney for Plaintiff-Respondent

REASONS FOR NOT MAKING APPLICATION TO DISTRICT COURT

Berry has made previous applications for habeas relief to the U.S. District Court, District of Nevada. None of those petitions was granted. Under Title 28 U.S.C. section 2244(b)(2) a petitioner can file a second or successive habeas petition only after obtaining an authorization order from a three-judge panel in the appropriate federal court of appeals. 28 U.S.C. sect. 2244(b)(3). The grant or denial of authorization by the court of appeals is not appealable and is not subject to rehearing nor certiorari. 28 U.S.C. sect. 2244(b)(3)(E). Once the circuit court has issued its authorization, the petitioner may file a second or successive habeas petition in the district court. Berry was denied

authorization by the Ninth Circuit to file a second or successive habeas petition in the district court. He therefore files the instant "original" petition for a writ of habeas corpus pursuant to 28 U.S.C. sects. 2241 and 2242, since section 2244 does not preclude such application. See Felker v. Turpin, 518 U.S. 651 (1996).

EXHAUSTION OF STATE COURT REMEDIES

Berry presses one claim for relief: the jury instruction given in his trial for first-degree murder which defined the element of premeditation relieved the State of its burden to prove beyond a reasonable doubt the essential element of deliberation, in violation of the Due Process Clause.

On October 4, 2016, Berry filed a second or successive petition for a writ of habeas corpus in the Eighth Judicial District Court, Dept. 23, Case No. 86C015095, Clark County, Nevada.

On February 13, 2017, the state habeas court entered its Findings of Fact, Conclusions of Law and Order denying relief.

Appeal was brought in the Supreme Court of Nevada, Docket No. 72277.

On September 26, 2017, the Supreme Court of Nevada entered its Notice of Transfer to the Nevada Court of Appeals.

On December 14, 2017 the Nevada Court of Appeals issued its Order of Affirmance. Dkt. No. 72277.

EXCEPTIONAL CIRCUMSTANCES THAT WARRANT THE EXERCISE OF THE COURT'S DISCRETIONARY POWERS

This section will be prefaced by the following affidavit sworn to by petitioner, William V. Berry.

No.

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE WILLIAM JAMES BERRY, SR., PETITIONER

On Petition For Writ Of Habeas Corpus

STATE OF NEVADA	AFFIDAVIT OF WILLIAM J. BERRY, SR.
COUNTY OF CARSON CITY	

William J. Berry, Sr., being first duly sworn, deposes as follows:

1. That I am the petitioner named herein, appearing pro se without the assistance of counsel.

2. That I make this affidavit in support of my petition for an original writ of habeas corpus.

3. That the statements made herein are true based on my own personal knowledge, except those based on information and belief which I also believe to be true.

4. That in 1986 I was charged on information by the State of Nevada with the capital offense of open murder with the use of a deadly weapon, to wit: a firearm, against the person of Ricky Wayne Dunlap; a charge to which I pleaded not guilty.

5. That after jury trial I was convicted of first-degree murder with use of a deadly weapon.

6. That by virtue of said jury verdict I was adjudged guilty and therefor sentenced to a term in the Nevada Department of Corrections of double life without the possibility of parole.

7. That I am actually innocent of the willful, deliberate and premeditated murder of Ricky Wayne Dunlap.

8. That what actually occurred on the Saturday evening of May 10, 1986 was an act of self-defense, or involuntary manslaughter at worst.

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9. That for the 4 or 5 nights and days just prior to the alleged offense, I had intravenously injected Heroin mixed with Cocaine (known in street parlance as "speedball"), drank immeasurable amounts of alcohol, and had gone totally without sleep and with very little food — causing me to be confused, disoriented and unable to exercise better judgement.

10. Additionally, for many months prior to the alleged offense, I had ceased taking the Lithium medication which had been prescribed for my Manic-Depressive \ Bipolar mental disorder — which, according to my doctors, in combination with the rapidly-successive and multiple injections of "speedballs" and countless shots of alcohol, cast me into a wild and maniacal state of mind.

11. That while I was in the midst of this extreme psychosis, at around 8 p.m. on May 10, 1986, Joseph Mazza and his wife Michelle came to my apartment located in southwest Las Vegas asking that I "score" some Heroin for them — something that I frequently did for the Mazzas and others as a means of supporting my own drug addictions; being African-American, I was the "connect" between my Caucasian clients and the Black drug dealers who were reluctant to sell directly to "suspicious" White customers.

12. That when arriving at my apartment, Joseph Mazza and his wife Michelle – both being Caucasian – had in their possession a 9 mm. handgun and a pearl-handled .25 caliber semi-automatic pistol, respectively; while I neither owned nor possessed any weapons at all as I was unaccustomed to and unfamiliar with guns and had never felt a need for them.

13. I vehemently objected to the guns the Mazzas possessed and I refused to do a drug purchase unless they got rid of the weapons.

14. As a compromise, Joseph Mazza finally agreed to leave the 9 mm. behind but insisted on keeping the .25 semi-automatic as "protection for [his] wife since we were headed to a black neighborhood on a Saturday night"; I therefore acquiesced – Joe's 9 mm. was hidden in some bushes outside my apartment building while Michelle's semi-automatic was concealed beneath the front passenger seat of my car; I possessed no weapons at all.

15. The three of us then headed to the predominantly black "Westside" area of Las Vegas; I was the driver of the car, Joe sat in the front passenger seat, while Michelle sat behind Joe in the rear passenger seat.

16. Upon arrival, I parked in an out-of-the-way area and proceeded to the drug dealer's door, at which point he informed me that he had run out of Heroin but was about to "re-cop" and I was to return in about an hour.

17. I then returned to my car and reported this information to the waiting Mazzas; I initiated conversation concerning what we were to do in the interim while remaining on the Westside, since driving way back across town was not a wise option given the gun and drug paraphernalia contained in the car.

18. At which point Joe asked if I could score some "rock" (crack) Cocaine and I replied I'm not sure since I was more familiar with powdered Cocaine; however I thought I could try at the Nearby Gerson housing project area where a group of "gangbangers" were known to hang out and often sold drugs from a particular street corner.

19. I then instructed Joe to drive while I sat in the front passenger seat to better facilitate a drug buy from the less-suspicious and decidedly more rambunctious young gang members; Michelle remained as she had been but was then seated behind me.

20. Now being about 10 p.m., the three of us then drove over to the Gerson Park housing project area where we spotted about 25 male gang members milling about on the street corner and running back and forth from cars as they pulled up and stopped — what appeared to me to be drug transactions; I told Doe to pull up to the curb and stop the car.

21. Seeing us pull up and stop, three or four gangbangers rushed out and approached my car where I sat at the passenger window, so I asked if they had rocks for sell; each of them then began thrusting items into my hands purporting to be rock Cocaine, each frantically claiming "Mine is the best!", "No, mine is!"

22. I then turned to Doe and told him to pick which ones he wanted; with my head being thus turned from them, the four gangbangers began aggressively reaching inside the car attempting to snatch and grab the $200.00 they saw I had placed on the seat between my legs; a confused and frenzied struggle between the four gang members and me ensued.

23. Trying to hold on to my money, I shouted to the 'bangers to "Back off!", but they instead continued to pounce on me.

24. Being in a psychotic state due to the drugs and alcohol I had previously and earlier consumed, I felt threatened and feared for my life as I was being brutally attacked by several very aggressive individuals — while I was also very much aware of the other 20 or so gang members who readily lurked nearby.

25. It was at this point that I thought of Michelle's gun that she had earlier concealed beneath the seat where I now sat under attack; I instinctively and quickly reached down, pulled out the gun and only brandished it in an attempt to thwart my attackers; however they were not dissuaded but continued their attack on me and their attempts to snatch and grab my money.

26. It was then that I thought to fire a warning shot, thinking the sound of the shot would scare off my attackers — I pointed the gun up and into the air, NOT POINTING IT TOWARDS ANYONE, and pulled the trigger with the intent on firing ONLY ONE SHOT IN THE AIR.

27. Nevertheless and for reasons still not totally clear, the gun continued to fire; three or four shots unintentionally escaped the barrel of the unfamiliar semi-automatic pistol — when I had intended to fire only one shot in the air.

28. Unfortunately one of the errant bullets struck Ricky Dunlap in the chest, causing his regretful demise.

29. I am not a killer at all – and I am certainly not a cold-blooded one!

30. Having been raised in a Christian home by Christian parents, I was steeped in the concept of the SANCTITY of life.

31. Based on information and belief as well as the benefit of hindsight, the following facts have emerged:

(a) Joseph Mazza had stolen several guns from a local pawn shop prior to the instant offense, including the two weapons he and Michelle brought with them to my apartment on the night in question;

(b) Joseph Mazza had altered the firing mechanism on the .25 caliber semi-automatic pistol in order to give the gun a "hair trigger" pull;

(c) Joseph Mazza then gave the altered gun to Michelle Mazza for her personal protection.

(d) I did not know and was not made aware of the gun's hair-trigger alteration;

(e) I was not proficient in the use of guns nor was I familiar with guns in general as to their design and fire power;

(f) When I was attacked by the Gerson Park gang members my perception and judgement were clouded by the important fact that I had not taken my psych meds for six months or longer prior to the night of the alleged offense;

(g) Additionally, I was many days and nights without food and sleep as I had gone on a Heroin \ Cocaine \ Alcohol binge, which further obviated my ability to think clearly or to make rational decisions;

(h) When I was attacked by the Gerson Park gang, I felt physically threatened and in total fear for my life — as the Gerson Park Knights ("GPK") gang was reputed to be extremely violent and was considered the "badest 'bangers" in the Las Vegas Westside area;

(i) Although I was in fear for my life, I never once intended to kill or even harm my attackers; I simply meant to stop their attack which is the only reason I grabbed and brandished the weapon in the first place;

(j) After Ricky was accidentally shot, we quickly drove away from the scene to avoid further attack by the remaining gang members;

(k) Because drugs were involved and according to the so-called "street code" within the black neighborhood, i.e., never involve the unfriendly cops — we handle our own business, no one called the police; especially not the gang members because they all knew that the only reason Ricky got "hit" was because they were attacking and robbing someone (me);

(l) That's why many of the GPK gang members never positively identified me to police as the shooter; those who were subpoenaed were reluctant to testify and made no absolute in-court identification of me; only Joseph Mazza and those he convinced to support his FABRICATED version of events pointed accusatory fingers at me; and

(m) Even more telling is the fact that NOT ONE GPK member gang has ever approached me during my more than 30 years in prison; ...

32. Joseph Mazza was the initiator and facilitator of the events that led to Ricky Dunlap's death: he stole the guns, he altered the weapon to make it even more deadly, he insisted over my objections on maintaining possession of that particular weapon, and both he and Michelle denied knowledge, ownership and possession of a .25 caliber semi-automatic pistol.

33. A month later when Joseph Mazza was arrested in West Covina, California, he twisted the facts and FABRICATED a story of murder against me in order to avoid going to jail on a simple charge of shoplifting.

34. A dopefiend like Joseph Mazza typically will say or do almost anything necessary to avoid jail and having to go "cold turkey" withdrawal from a Heroin addiction.

35. Joseph Mazza's testimony that I pulled a gun, held it directly to the victim's chest and "popped" him for no reason at all — was FALSE TESTIMONY designed to procure a "sweetheart" deal with the authorities so that he could continue his relentless pursuit of Heroin, Cocaine and/or any other available drug or substance.

36. Joseph Mazza is a self-confessed long-time abuser of illicit substances including the aforementioned Heroin, Cocaine, Alchol, Pills, and Hallucinogens; and is primarily responsible for "turning out" his own wife and causing her addiction to drugs.

37. Joseph Mazza is a sociopathic, pathological liar who was more than willing to subject me to the DEATH PENALTY for something he fully KNEW I had not done!

38. The Mazzas were given complete immunity in this case in exchange for their testimony against me; however Joe subsequently appeared in prison on unrelated charges; although he was housed in protective custody and I was housed in the general population, I made direct contact with Joe at which time he admitted to me that he had lied on the stand in my trial, but excused it away by stating that it was a "bad dopefiend move" that he made because he was "strung out" on drugs at the time and because the prosecutor had "pressured" him into testifying against me or else be charged with murder along with me; Joe then voluntarily promised that he would submit an affidavit detailing the truth about what actually had transpired when Ricky was shot and how the prosecutor had repeatedly threatened him into testifying in order to "make sure" I got convicted because I was a "threat to the community"; however Joe got cold feet, refused to swear out a statement against Deputy District Attorney Mel Harmon, and he reneged on his promise to submit an affidavit outlining these facts.

39. Prior to trial my court-appointed attorneys did little or no investigation into putting on a defense; no state's witnesses, including the Mazzas and gang members, were ever interviewed by counsel; when my attorneys asked if I would enter into a plea deal, I immediately refused stating that what happened that night was an act of self-defense as I was being attacked by a gang; my attorneys flatly refused to even consider a self-defense plea, and even dissuaded me from testifying in my own defense under threats that if I insisted on taking the stand my attorneys would resign from my case; I explained to counsel that I was extremely high off drugs and alcohol at the time of the alleged offense, that I had previously been hospitalized, diagnosed, and treated for various mental disorders; however my attorneys failed to obtain my medical records and failed to interview my former doctors; although a pretrial defense motion was made seeking a thorough psychiatric examination on me, counsel failed to object when my newly-appointed judge commenced trial even though the original judge's order to submit me to an "extensive" sanity and competence evaluation was never carried out, and no judicial determination has ever been made concerning my

mental state both at the time of the alleged offense and at the time of trial — doubt as expressed by my original trial judge; I was instead tried for a capital offense under a judicial suspicion of insanity and incompetence which — even to this day — has not been cleared up.

40. Additionally, charges were brought against me by an unscrupulous and overzealous prosecutor who stacked the deck against me from the very start by installing a death-qualified jury in order to more easily obtain a guilty verdict; a prosecutor who responded to the defense Batson challenge by conceding that he removed all black potential female jurors not because of their race but because he [improperly] wished to seat an all-male jury; as a black defendant I was tried in front of an all-white jury that took less than an hour to convict me for murder; a case that was brought by a prosecutor who suborned the perjury of several chief state witnesses — not the least of whom being Joseph and Michelle Mazza.

41. I am willing to submit to polygraph examination - even at my own expense - in order to substantiate the statements I have made herein.

FURTHER AFFIANT SAYTH NAUGHT.

Dated this 2nd day of January, 2020.

William J. Berry Sr.

WILLIAM J. BERRY, SR.
ID No. 23739
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702

The above and foregoing affidavit was sworn to before a Notary public on this the 2 day of January, 2020.

Jennifer McCain Dunbar
NOTARY PUBLIC

JENNIFER S. MCCAIN-DUNBAR
NOTARY PUBLIC
STATE OF NEVADA
No. 18-3236-12 My Appt. Exp. Aug. 1, 2022

If Berry's affidavit is taken as true, he has made a prima facie showing of actual innocence of the first-degree murder of Ricky Wayne Dunlap. He does this by demonstrating that four of the state's witnesses — key witnesses — gave false testimony at trial; that the prosecutor suborned perjury; that counsel for the defense rendered ineffective assistance; and that the state trial judge committed reversible error in failing to make a determination of Berry's doubtful mental state. No court, state or federal, has ever conducted a hearing to assess the reliability of the state's key witnesses which, if found unreliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence; along with the unconstitutional jury instruction on premeditation which relieved the state of its burden of proving every essential element of murder beyond a reasonable doubt. Moreover, the Ninth Circuit. in denying Berry leave to file a second or successive habeas petition, denied him the benefit of the recent decisions of this Court in Montgomery and Welch, which if properly applied, would serve not only as good cause to overcome procedural defects

but would also provide adequate relief in a clear case of fundamental miscarriage of justice. The substantial risk of banishing an innocent man to prison for the rest of his natural life provides adequate justification for the determination that this case is sufficiently "exceptional" to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. section 2241(b), and its original habeas jurisdiction. See Byrnes v. Walker, 371 U.S. 937, 83 S. Ct. 322, 9 L. Ed 2d 277 (1962); Chappel v. Cochran, 369 U.S. 869, 82 S. Ct. 1143, 8 L. Ed. 2d 284 (1962).

Alternatively, transfer of this case to the District Court, District of Nevada, would be appropriate for holding an evidentiary hearing. If the District Court were to be persuaded by Berry's affidavit and other evidentiary presentment, the District Court may conclude that section 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See Felker v. Turpin, 518 U.S. 651, 663, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The

court may also find it relevant to the AEDPA analysis that Berry is bringing an "actual innocence" claim. See, e.g., Triestman v. United States, 124 F.3d 361, 377-380 (CA2 1997) (discussing "serious" constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims). Cf. In re Davis, 557 U.S. 952, 130 S.Ct. 1, 174 L.Ed.2d 614 (2009).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (CONT.)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a writ of habeas corpus issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was November 14, 2019

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 5, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. §2241.

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was December 14, 2017
A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. §2241.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case.

U. S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. sect. 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. sects. 2241 and 2242

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. State trial court proceedings

William Berry was charged in an information with open murder based on allegations that, on May 10, 1986, he shot and killed Ricky Wayne Dunlap with malice aforethought. Ex. 3 (info). The State sought the death penalty.

The jury trial occurred in December 1986. Exs. 5-8, 11. The jury convicted Berry of first-degree murder. Ex. 10. After a penalty phase hearing, Ex. 15, the jury imposed a sentence of life without the possibility of parole, Ex. 14.

B. Direct appeal

ON APPEAL, BERRY ARGUED:

1. THE STATE'S USE OF ITS PEREMPTORY CHALLENGES TO EXCLUDE ALL [AFRICAN-AMERICANS] FROM THE JURY WHICH WAS TRYING AN [AFRICAN-AMERICAN] DEFENDANT CONSTITUTED PURPOSEFUL DISCRIMINATION, AND THUS, VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

2. THE DISTRICT COURT ERRED IN ALLOWING THE STATE TO PRESENT INADMISSIBLE HEARSAY TESTIMONY OVER THE OBJECTION OF DEFENSE COUNSEL

3. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO RE-OPEN ITS CASE-IN-CHIEF, AND THUS, PROHIBITED THE TESTIMONY OF AN ESSENTIAL WITNESS TO THE DEFENSE

4. THE DISTRICT COURT ERRED IN FAILING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTION "A", OR IN THE ALTERNATIVE, THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO THE TRIER OF FACT TO CONVICT APPELLANT OF THE CRIME CHARGED

5. THE APPELLANT WAS DENIED A FAIR PENALTY HEARING DUE TO THE PROSECUTOR'S IMPROPER COMMENTS DURING CLOSING ARGUMENT OF APPELLANT'S TRIAL

Ex. 18. The Nevada Supreme Court affirmed the conviction on June 23, 1988. Ex. 19.

C. First § 2254 petition

In May 1989, Berry filed his first 28 U.S.C. § 2254 petition. Ex. 20. He raised three claims:

> PETITIONER WAS CONVICTED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.
>
> PETITIONER WAS DEPRIVED OF A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT PERMITTED THE TESTIMONY OF THE MAZZAS TO BE VOUCHED FOR BY RECEPTION OF PRIOR OUT-OF-COURT STATEMENTS BY JOSEPH MAZZA MADE LONG AFTER THE COMMISSION OF THE OFFENSE AND MADE AFTER MAZZA HAD A CLEAR MOTIVE TO FABRICATE THE ROLE OF THE MAZZAS IN THE EVENT. THERE ARE NO INTERNAL INDICIA OF RELIABILITY IN THE OUT-OF-COURT STATEMENTS WRONGFULLY PERMITTED IN EVIDENCE.
>
> PETITIONER WAS DEPRIVED OF A FAIR TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OF HIS RIGHT TO A FULL JURY TRIAL IN VIOLATION OF THE SIXTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL JUDGE REFUSED TO SUBMIT TO THE JURY A FACT QUESTION WHETHER OR NOT THE MAZZAS WERE ACCOMPLICES. THE RESULT WAS A REDUCTION IN THE PROSECUTION'S BURDEN OF PROOF UNDER NRS 175.291 AS WELL AS THE FAILURE TO INSTRUCT THE JURY ON THE WEIGHT AND CREDIBILITY OF ACCOMPLICE TESTIMONY.

Id. On January 3, 1990, the district court denied the petition on the merits, Ex. 21, and the Ninth Circuit affirmed, Ex. 22.

D. Second § 2254 petition

In August 1994, Berry filed a second § 2254 petition. Ex. 23. He raised ten grounds:

1. Trial court failed to make legal determination as to petitioner's competence to stand trial, violative of due process clause of the Fourteenth Amendment.

2. Trial court failed to suspend proceedings and order competency hearing in light of substantial evidence creating reasonable doubt as to petitioner's competence, violative of Due Process Clause of Fourteenth Amendment.

3. Prosecutor denied petitioner effective assistance of counsel violative of Sixth and Fourteenth Amendments, by failing to provide defense counsel with petitioner's psychiatric records.

4. PROSECUTOR DENIED PETITIONER HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS BY PEREMPTORILY CHALLENGING PROSPECTIVE JURORS BASED ON THEIR GENDER AND NOT THEIR QUALIFICATIONS TO SERVE AS JURORS.

5. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS, BECAUSE HIS COURT-APPOINTED COUNSEL FAILED TO CONDUCT AN ADEQUATE PRETRIAL INVESTIGATION WHICH PRECLUDED COUNSEL FROM PETITIONING THE TRIAL COURT FOR *AKE* ASSISTANCE IN PREPARING AND PRESENTING PETITIONER'S DEFENSE.

6. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS, BECAUSE HIS COURT-APPOINTED COUNSEL FAILED TO CONDUCT AN ADEQUATE PRETRIAL INVESTIGATION WHICH PREVENTED COUNSEL FROM DEVELOPING THE INSANITY DEFENSE.

7. PETITIONER WAS DENIED A FAIR SENTENCING PROCEEDING, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, BECAUSE HIS COURT-APPOINTED TRIAL COUNSEL FAILED TO CONDUCT AN ADEQUATE PRETRIAL INVESTIGATION, THEREBY FAILING TO PROPERLY PREPARE AND PRESENT MITIGATING EVIDENCE.

8. NEVADA REVISED STATUTES CHAPTER 175.291, WHICH THE TRIAL COURT USED AS A BASIS TO HOLD THAT STATE'S WITNESSES WERE NOT ACCOMPLICES AND THEREFORE DENIED PETITIONER'S REQUEST FOR A CAUTIONARY INSTRUCTION, IS VAGUE, AMBIGUOUS, OVERBROAD THUS RENDERING THE TRIAL COURT'S IMPOSITION OF PETITIONER'S JUDGMENT OF CONVICTION A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE CONVICTION WAS BASED ON EVIDENCE FROM WHICH NO RATIONAL TRIER OF FACT COULD HAVE FOUND PETITIONER GUILTY BEYOND A REASONABLE DOUBT.

9. THE TRIAL COURT DENIED PETITIONER HIS FOURTEENTH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY DENYING THE DEFENSE MOTION TO DISMISS JUROR PAUL LOPEZ, BASED ON LOPEZ' MISREPRESENTATIONS TO THE COURT DURING VOIR DIRE EXAMINATION.

10. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS, BECAUSE HIS COURT-APPOINTED COUNSEL FAILED TO PRESENT GROUNDS ONE THROUGH NINE ABOVE TO THE NEVADA SUPREME COURT UNDER THE PLAIN ERROR DOCTRINE.

In July 1996, the district court dismissed the petition on procedural grounds, Ex. 24, and the Ninth Circuit denied a certificate of probable cause, Ex. 25.

E. 2016 state petition

On October 4, 2016, Berry filed a state petition, arguing that he was entitled to relief under this Court's decision in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015). Ex. 26. The state court dismissed the petition as procedurally barred. Ex. 28. On appeal, Berry argued he could establish cause to overcome the procedural bars under *Montgomery* and *Welch*. Ex. 29. On December 14, 2017, the Nevada Court of Appeals affirmed the dismissal of the petition, refusing to address the *Montgomery* and *Welch* argument because it had been raised for the first time on appeal. Ex. 30.

F. Current federal petition

On March 12, 2018, Berry filed a *pro se* request for authorization to file a second or successive § 2254 petition. He argued that the jury instruction defining first-degree murder was unconstitutional, relying upon the new constitutional rule of retroactivity established in *Montgomery* and *Welch*.

On January 7, 2019, the Federal Public Defender moved to be appointed to Berry's application. On January 14, 2019, the Ninth Circuit granted the request, lifted the stay, and ordered a supplemental application.

REASONS FOR GRANTING THE PETITION

II. GROUNDS FOR RELIEF

Ground One: **The recent United States Supreme Court decisions in *Montgomery v. Louisiana* and *Welch v. United States* requires as a matter of federal constitutional law the retroactive application of decisions, like *Byford v. State,* that narrowed the interpretation of a substantive criminal statute**

In *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court concluded that the jury instruction defining premeditation and deliberation improperly blurred the line between these two elements. The court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. The Nevada Supreme Court later said this error was not of constitutional magnitude and did not need to apply retroactively. *Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000).

Eight years later, in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by narrowing its terms. But, it said, the statutory interpretation issue in *Byford* had no retroactive effect to convictions that had become final prior to *Byford* because it was not a new constitutional rule. *Id.* at 1288-89, 198 P.3d at 850-51. Rather, the court held, as a "change" in state law, it only had to be applied to those convictions that had yet to become final at the time it was decided. *Id.* at 1287, 1287 n.72-74, 1301, 198 P.3d at 850, 850 n.72-74, 859.

In 2016 the United States Supreme Court issued two major retroactivity decisions that have a direct impact on the retroactivity of *Byford.* These two decisions—*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v. United States*, 136 S. Ct. 1257 (2016)—have invalidated the Nevada Supreme Court's

approach to statutory interpretation cases. As a result of *Montgomery* and *Welch*, state courts are now constitutionally required to retroactively apply a narrowing interpretation of a criminal statute under the "substantive rule" exception to *Teague*. In *Montgomery*, the Supreme Court held that the question of whether a new rule falls under the "substantive rule" exception to the *Teague* retroactivity framework is now a federal constitutional rule. *Montgomery*, 136 S. Ct. at 727-29, 731-32.

In *Welch*, the Supreme Court clarified that the "substantive rule" exception is not limited to just new constitutional rules, but also includes narrowing interpretations of criminal statutes. *Welch*, 136 S. Ct. at 1265, 1267. *Welch* also announced a broad new rule for how to determine if a new rule is substantive. It held that a new rule is substantive so long as it has "a substantive function," namely it alters the range of conduct or the class of persons that the law punishes. *Id.* at 1266. In light of this new rule, whether a statutory interpretation is designated a "clarification" or a "change"—the dichotomy the Nevada Supreme Court used—is irrelevant. It only matters whether the interpretation serves a "substantive function."

Montgomery and *Welch* represent a new constitutional rule that allows petitioners such as Berry to obtain the benefit of *Byford* on collateral review. The "substantive rule" exception to Teague is now a federal constitutional rule. The state courts are required to apply that constitutional rule in the manner that the United States Supreme Court has interpreted it. In *Welch* the Supreme Court made abundantly clear that the substantive rule exception applies to statutory

interpretation decisions. Those decisions are substantive, and apply retroactively, so long as the interpretation alters the range of conduct or the class of persons that the law punishes.

The Nevada Supreme Court has already acknowledged in *Nika* that *Byford* represented such a substantive change. Under Montgomery and Welch, Byford must be applied retroactively to convictions, such as Berry's, that had already become final at the time *Byford* was decided. Once *Byford* is applied to Berry's case, his conviction is unconstitutional. Any state court decision to the contrary is contrary to, and an unreasonable application of, clearly established Supreme Court law.

A. Background

William Berry was charged in an information with open murder based on allegations that, on May 10, 1986, he shot and killed Ricky Wayne Dunlap with malice aforethought. Ex. 3 (info). The State sought the death penalty.

The jury trial occurred in December 1986. The State's evidence established that, at approximately 10:00 p.m. on May 10, 1986, Berry and Joseph and Michelle Mazza drove up to a housing project in Las Vegas looking to buy crack cocaine. Ex. 7 at 138. Joseph was driving, Berry was in the front passenger seat, and Michelle was in the back seat. *Id.*

Three men, including the victim Ricky Dunlap, approached the front passenger-side window. Berry asked to see some crack. Berry was visibly holding cash in his left hand. The three men placed four rocks of cocaine in Berry's right hand. Berry turned to Joseph and asked if he wanted to get them. Joseph told Berry it was up to him. Ex. 7 at 139.

At this point, one of the three men outside the car said, "one of those are mine" and tried to grab the money out of Berry's hand. Ex. 7 at 139-40, 141-42. In response, Berry pulled out a silver colored gun with a pearl handle.[1] He told the three men to back up off the car and then told Joseph to start driving. As the car was pulling away, Berry fired three or four shots close in time in the general vicinity of the three men. *Id.* at 143-44. One of the shots struck Dunlap in the chest and killed him. 2

Jury Instruction Defining First-Degree Murder

The court instructed the jury on only one theory of first-degree murder—a premeditated, deliberate, and willful killing. Ex. 9, Instruction No. 7. It provided the jury with the following instruction defining the elements of premeditation and deliberation, known as the *Kazalyn* instruction:

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

Id., Instruction No. 8.

Closing argument

In his closing argument, the prosecutor relied heavily on the *Kazalyn* instruction. Tracking the language of the instruction, the prosecutor told the jurors they only needed to find premeditation as defined in the *Kazalyn* instruction. Ex. 11 at 35-36; *accord id.* at 41 ("Murder of the second degree is anything besides murder

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[1] Berry presented evidence at trial that this gun belonged to Michelle. Ex. 8 at 22.

2 This background rendition is inaccurate. See affidavit of Berry submitted herewith for a more accurate statement of facts.

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of the first degree. And if there's evidence of premeditation, which I say there is, then that is not a valid consideration.").

The prosecutor argued the shooting was a "startling event," which occurred as a result of a "hair trigger temper." Ex. 11 at 37, 40, 103. He acknowledged there was no plan to kill; rather, the shooting happened on "an impulse":

> I'm certainly not telling you this is a case where a murder was planned a day ahead of time, not an hour ahead of time, not five minutes ahead of time. Time isn't the element in establishing a case of premeditation. This is a killing **on an impulse.** And I can't tell you why Ricky Dunlap is dead, except that somebody he was trying to sell dope **decided on an impulse, in an instant,** to pull out a gun and start to shoot.

Id. at 93 (emphasis added).

The jury convicted Berry of first-degree murder. Ex. 14.

Penalty phase hearing

At the penalty phase hearing, the State presented evidence that Berry had a history as a drug addict. Ex. 15 at 18-19, 54. They also admitted medical records showing that he had been hospitalized for mental health issues. Ex. 1.

In its special verdict, the jury found, "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." Ex. 13. The jury imposed a sentence of life without the possibility of parole. Ex. 14.

Direct appeal

On appeal, Berry did not raise any challenges to the *Kazalyn* instruction or the definition of the elements of first-degree murder. Ex. 19. The Nevada Supreme Court affirmed the conviction on June 23, 1988. *Id.* The conviction became final on September 21, 1988. *See Jimenez v. Quarterman*, 555 U.S. 113, 199 (2009).

First § 2254 petition

In May 1989, Berry filed his first 28 U.S.C. § 2254 petition. Ex. 20. He raised three of the claims he had raised on direct appeal. *Id.* On January 3, 1990, the

district court denied the petition on the merits, Ex. 21, and this Ninth Circuit Court affirmed, Ex. 22.

Second § 2254 petition

In August 1994, Berry filed a second § 2254 petition. Ex. 23. He did not raise any challenges to the *Kazalyn* instruction or the definition of the elements of first-degree murder. *Id.* In July 1996, the district court dismissed the petition on procedural grounds, Ex. 24, and this Court denied a certificate of probable cause, Ex. 25.

Nevada Supreme Court narrows the interpretation of the first-degree murder statute, but declines to apply it retroactively

Over three years later, on February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* at 234-35, 994 P.2d at 713-14. It reasoned:

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

Byford, 994 P.2d at 713.

The court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. *Id.* at 235, 994 P.2d at 714. The court emphasized that deliberation remains a "critical element of the *mens rea* necessary for first-degree murder," which requires the jurors to find, "before acting to kill the victim, [the defendant] weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and *did not act simply from a rash, unconsidered impulse.*" *Id.* at 713-14 (emphasis added).

A few months after the *Byford* decision, the Nevada Supreme Court held any error with respect to the *Kazalyn* instruction was not of constitutional magnitude and only applied prospectively. *Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000).

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

In response to *Polk*, the Nevada Supreme Court in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (Nev. 2008). In *Nika*, the court disagreed with *Polk*'s conclusion that a *Winship* violation occurred. It believed that the *Kazalyn* instruction provided the proper definition of the meaning of first-degree murder at that time. In the court's eyes, *Byford* was a statutory interpretation case. Because *Byford* had interpreted the first-degree murder statute by narrowing its terms, the only question was whether that narrowing interpretation was a "clarification" or a "change." *Nika*, 124 Nev. at 1286-87, 1287 n.72-74, 1301, 198 P.3d at 849-50, 850 n.72-74, 859.

Relying upon *Fiore v. White*, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003), the court explained, as a matter of due process, a clarification applied to all convictions while a change applied only to those convictions that had yet to become final. *Id.* at 849-50. It decided *Byford* was a change, so petitioners, like Berry whose convictions had become final before *Byford*, were barred from obtaining the benefit of *Byford*.

The court further emphasized that this statutory interpretation issue had no retroactive effect to convictions that had already become final because the statutory interpretation in *Byford* was solely a matter of state law and not a new constitutional rule. *Id.* at 1288-89, 198 P.3d at 850-51.

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

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

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

The initial question the Court addressed in *Montgomery* was whether it had jurisdiction to review the retroactivity question. It concluded it did. The Court had previously "le[ft] open the question whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." *Montgomery*, 136 S. Ct. at 729. It held that the Constitution required state collateral review courts to give retroactive effect to new substantive constitutional rules. *Montgomery*, 136 S. Ct. at 729. It stated, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional command in their own courts." *Id.* at 727 (citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 340-41, 344 (1816)).

The Court concluded that *Miller* was a new substantive rule; the states, therefore, had to apply it retroactively on collateral review. *Montgomery*, 136 S. Ct. at 732. It concluded that Montgomery must be given the benefit of *Miller*. *Id.* at 736-37.

On April 18, 2016, the United States Supreme Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), applied retroactively. *Welch*, 136 S. Ct. at 1260-61, 1264. More specifically, the Court determined whether *Johnson* fell under the substantive rule exception to *Teague*. *Id.* at 1264-65.

The Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). "'**This includes decisions that narrow the scope of a criminal statute by interpreting its terms**, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" *Id.* at 1265 (quoting *Schriro*, 542 U.S. at 351-52) (emphasis added).

Under that framework, the Court concluded that *Johnson* was substantive. *Id.* The Court explained that the determination of whether a new rule is substance, as opposed to procedural, depends on whether the new rule has a "substantive function"—it alters the range of conduct or class of persons that the law punishes. *Id.* at 1266.

After deciding *Johnson* was retroactive under the substantive exception to *Teague*, the Court turned to a claim from amicus that the Court should adopt a different framework for the *Teague* analysis.[2] *Welch*, 136 S. Ct. at 1265. Among the

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[2] Amicus had been appointed to argue in support of the lower court decision as both sides agreed that *Johnson* was retroactive. *Welch*, 136 S.Ct. at 1263.

arguments that amicus advanced was that a rule is only substantive when it limits Congress' power to act. *Id.* at 1267.

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

The Court pointed out that *Bousley* did not fit under the amicus' *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267. It concluded, "*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power." *Id.*

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

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

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

2016 state petition

On October 4, 2016, Berry filed a state petition, arguing that he was entitled to relief under this Court's decision in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015). Ex. 26. In *Riley* this Court held the use of the *Kazalyn* instruction violated the petitioner's due process rights because the defendant's conviction became final prior to when the Nevada Supreme Court sanctioned the *Kazalyn* instruction. *Id.* Prior to that time, the Nevada Supreme Court had interpreted the first-degree murder statute to require a finding of deliberation. Because deliberation was a required element at the time of his trial, *Riley* was entitled to relief because *Polk* had already concluded the *Kazalyn* instruction had removed the element of deliberation.[3] *Id.*

The state court dismissed the petition as procedurally barred. Ex. 28. On appeal, Berry argued he could establish cause to overcome the procedural bars under *Montgomery* and *Welch*. Ex. 29. On December 14, 2017, the Nevada Court of Appeals

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[3] The *Kazalyn* instruction has a long and complicated history in federal court. After the Nevada Supreme Court disagreed with *Polk* in *Nika*, this Court limited *Polk*, holding that only those convictions that became final after *Byford* could establish a due process violation, accepting the state court's conclusion that *Byford* was a change in law. *Babb v. Lozowski*, 719 F.3d 1019 (9th Cir. 2013). This Court then overruled that part of *Babb* because its due process analysis concerning the effects of a change in law was not based on clearly established law. *Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2014). *Riley* then created an exception to *Babb* and *Moore*.

affirmed the dismissal of the petition, refusing to address the *Montgomery* and *Welch* argument because it had been raised for the first time on appeal. Ex. 30.

B. Argument

1. *Montgomery* and *Welch* Establish That the Narrowing Interpretation Of The First-Degree Murder Statute In *Byford* Must Be Applied Retroactively To Convictions That Were Final At The Time *Byford* Was Decided

a. *Montgomery* and *Welch* Created a New Constitutional Rule that Changes Retroactivity Law in Nevada

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

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

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

"substantive rule" exception to *Teague*. Further, *Welch* establishes that the "change" vs. "clarification dichotomy is no longer valid. As *Welch* explains, if a new statutory interpretation is substantive, a state court is required to apply it retroactively.

In *Montgomery*, the United States Supreme Court, for the first time, constitutionalized the "substantive rule" exception to the *Teague* retroactivity rules. The consequence of this step is that state courts are now required to apply the "substantive rule" exception in the manner in which the United States Supreme Court applies it. *See Montgomery*, 136 U.S. at 727 ("States may not disregard a controlling constitutional command in their own courts."); *Colwell v. State*, 118 Nev. 807, 818, 59 P.3d 463, 471 (2002) (state courts must "give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."). Thus, the United States Supreme Court's interpretation of the substantive rule exception provides the constitutional floor for how this new constitutional rule must be applied in state courts.

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

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

This conclusion is also readily apparent in *Welch*'s discussion of its previous decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137 (1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review. As *Welch* put it, "The Court in *Bousley* had no difficulty concluding that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*, 523 U.S. at 620).

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

Welch also renders irrelevant the Nevada Supreme Court's prior reliance upon the clarification/change dichotomy for statutory interpretation cases. What is critically important, and new, about *Welch* is that it explains, for the very first time, how the substantive exception applies in statutory interpretation cases. It explained that the only test for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes.

Welch's broader holdings bolster that conclusion. *Welch* announced a new test for how to determine if a new rule is substantive. The Court held, for the first time, that a new rule is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. It explained a rule has a "substantive function" when it "alters the range of conduct or class of persons that the law punishes." *Id.* As the Court indicated

in *Welch*, when a decision narrows the scope of a criminal statute, it has such a substantive function, and is therefore retroactive. *Id.* at 1265-67.

In light of *Welch*, the distinction between a "change" and "clarification" is no longer operative for retroactivity concerns. *Welch* made clear that the *only* relevant question with respect to the retroactivity of a statutory interpretation decision is whether the new interpretation meets the definition of a substantive rule. If it meets the definition of a substantive rule, it does not matter whether that narrowing statutory interpretation is labeled a "change" or a "clarification," because both types of decisions have "a substantive function." *Welch*, 136 S.Ct. at 1266.

In sum, *Welch* holds that *all* statutory interpretation cases that narrow the scope of a criminal statute—and not just those that are based on a constitutional rule—qualify as "substantive" rules for the purpose of retroactivity analysis. That rule is binding in state courts, just the same as in federal courts. *See Montgomery*, 136 S.Ct. at 727; *Colwell*, 118 Nev. at 818, 59 P.3d at 471. Thus, after *Montgomery* and *Welch*, state courts are now required to give retroactive effect to any of their decisions that narrow the scope of a criminal statute. The Nevada Supreme Court's prior refusal to give full retroactive effect to narrowing statutory interpretations is no longer valid.

The changes to the retroactivity rules require *Byford* to be applied retroactively to Berry's case

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

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

jury instructions providing the new definitions of these two separate elements. *Id.* at 235-37, 994 P.2d at 714-15.

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

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

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

Once given the benefit of *Byford*, Berry's conviction violates due process

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

As the Nevada Supreme Court explained in *Byford*, the *Kazalyn* instruction blurred the distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The jury instruction violated due process as it relieved the State of its obligation to prove an essential element of the crime, namely deliberation. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). In turn, the jury was not required to find deliberation as defined in *Byford*. The jury was never required to find whether there was "coolness and reflection." *Byford*, 116 Nev. at 235, 994 P.2d at 714. The jury was never required to find whether the murder was the result of a "process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action." *Id.*

This error had a prejudicial impact on this case. In fact, the State acknowledged at trial that there was no deliberation as defined under *Byford*. In their closing argument, the State argued that the evidence showed that Berry did not deliberate, but acted "on impulse." This is precisely the type of killing that is excluded from the definition of deliberation under *Byford*. *See Byford*, 116 Nev. at 234, 944 P.2d at 712-13 (deliberation occurs when defendant "weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and **did not act simply from a rash, unconsidered impulse**" (emphasis added)).

Further, the evidence showed that this was an instantaneous "startling event," which occurred as a result of Berry's "hair trigger temper." Under those circumstances, there was no time for cool reflection or for Berry to weigh the consequences of his actions. The jury also concluded that the murder was committed while Berry, who had a history of drug use and mental health issues, was under the influence of extreme mental or emotional disturbance. Such a finding has an impact on whether Berry could have formed the requisite intent. *See Riley*, 786 F.3d at 725 (Riley's emotional state and his drug use "could easily have led the jury to have a

reasonable doubt whether Riley acted with 'coolness and reflection or undertaken a 'dispassionate weighing process.'").

The prosecutor's comments in closing exacerbated the harm from the improper instruction. The prosecutor relied heavily on the *Kazalyn* instruction. Ex. 11 at 35-36. After referencing "Instruction Number 8," *i.e.* the *Kazalyn* instruction, he argued, "[P]remeditation need not be for a day, an hour or even a minute. It can be as instantaneous as successive thoughts of the mind. So that if a person has decided to kill, he can form that opinion immediately before or **at the moment he fires the fatal shot.**" *Id.* (emphasis added). There is no room for a finding of deliberation in that argument. He further told the jury that premeditation was the only element separating first from second-degree murder, rendering a finding of deliberation unnecessary.

Apart from the unconstitutional jury instruction, Berry's conviction on its own fails to satisfy due process under *Byford*. Due process forbids the State from convicting a person of a crime without proving the elements of that crime beyond a reasonable doubt. *Fiore*, 531 U.S. at 228-29. However, the State admitted at trial that it did not, and could not, prove the element of deliberation. As shown above, there was a distinct lack of evidence of deliberation at trial. Once Berry is given the benefit of *Byford*, "the simple, inevitable conclusion is that [Berry's] conviction fails to satisfy the Federal Constitution's demands." *Id.* at 229.

Any contrary decision from the state court was contrary to, or an unreasonable application of, clearly established federal law, or based upon an unreasonable finding of fact. The petition should be granted and the conviction and sentence vacated.

III. PRAYER FOR RELIEF

Accordingly, William J. Berry respectfully requests that this Court:

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

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

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

Dated 1/07/2020

Respectfully submitted,

William J. Berry Sr.

WILLIAM J. BERRY, SR.
ID No. 23739
Petitioner In Pro Se

CONCLUSION

The petition for writ of habeas corpus should be granted.

Respectfully submitted,

Willie J Berry Sr.

Date: 1/07/2020

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel's knowledge, information, and belief.

Dated 1/07/2020.

Respectfully submitted,

William J Berry Sr

William J. Berry, Sr.

#23739

Petitioner In Pro Se