No. _____

In the Supreme Court of the United States

Rickey Todd Major,

Petitioner,

v.

Renee Baker,

Respondent.

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

Petition for writ of certiorari

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QUESTION PRESENTED

In *Welch* v. *United States*, 136 S.Ct. 1257 (2016), this Court adopted a functional test for retroactivity: courts must retroactively apply decisions with substantive functions, including decisions that narrow the scope of a criminal statute. In *Byford* v. *State*, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court narrowed the scope of first-degree murder. But despite *Welch*, the Nevada courts still refuse to apply *Byford* retroactively. The question presented is:

Following *Welch*, does the federal Constitution require state courts to apply retroactively decisions that narrow the scope of criminal laws?

LIST OF PARTIES

Rickey Todd Major is the petitioner. Renee Baker, the warden of Lovelock Correctional Center, is the respondent. No party is a corporate entity.

LIST OF PRIOR PROCEEDINGS

This is a state habeas case challenging a state court judgment of conviction.

The State unsuccessfully prosecuted Mr. Major twice for murder before taking him to trial. The first unsuccessful prosecution took place in *State* v. *Major*, No. 5159 (Nev. Fourth Jud. Dist. Ct.) (order of dismissal issued Feb. 13, 1992). The second unsuccessful prosecution took place in *State* v. *Major*, No. 875 (Nev. Seventh Jud. Dist. Ct.) (order of dismissal issued Sept. 16, 1994).

The State initiated a related perjury prosecution against Mr. Major in *State* v. *Major*, No. 876 (Nev. Seventh Jud. Dist. Ct.) (judgment of conviction entered June 21, 1995). The Nevada Supreme Court reversed in *Major* v. *Nevada*, Case No. 27414 (Nev. Sup. Ct.) (order issued Aug. 10, 1998).

The trial proceedings in this case took place in *State* v. *Major*, Case No. CR-MS-95-6218 (Nev. Fourth Jud. Dist. Ct.) (original judgment of conviction issued May 1, 1996).

The direct appeal proceedings took place in *Major* v. *Nevada*, Case No. 27414 (Nev. Sup. Ct.) (order issued Sept. 3, 1998).

The state collateral review proceedings took place in *Major* v. *McDaniel*, Case No. CV-HC-98-6218 (Nev. Fourth Jud. Dist. Ct.) (order issued Mar. 9, 2005), and *Major* v. *State*, Case No. 45427 (Nev. Sup. Ct.) (order issued July 5, 2006).

As part of the state collateral review proceedings, the court issued a corrected judgment of conviction in *State* v. *Major*, Case No. CR-MS-95-6218 (Nev. Fourth Jud. Dist. Ct.) (issued June 1, 2005). The Nevada Supreme Court affirmed the amended judgment on appeal in *State* v. *Major*, Case No. 45012 (order issued Oct. 19, 2006).

Mr. Major pursued federal habeas relief in the district court in *Major* v. *McDaniel*, Case No. 3:99-cv-00237-LRH-RAM (D. Nev.) (judgment issued Mar. 18, 2010). The Ninth Circuit affirmed on appeal in *Major* v. *McDaniel*, Case No. 10-15742 (memorandum issued June 8, 2011). This Court denied certiorari in *Major* v. *McDaniel*, No. 11-5961 (order issued Oct. 17, 2011).

There are no other related state or federal proceedings besides the proceedings in the Nevada Fourth Judicial District Court, the Nevada Court of Appeals, and the Nevada Supreme Court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ricky Todd Major respectfully requests the Court issue a writ of certiorari to review the order of affirmance from the Court of Appeals of the State of Nevada. See Appendix C.

OPINIONS BELOW

The Nevada Court of Appeals issued an unpublished memorandum decision affirming the denial of Mr. Major's petition for a writ of habeas corpus on September 20, 2019. Appendix C; *see Major* v. *Baker*, No. 76716-COA, 2019 WL 4610790 (Nev. Ct. App. Sept. 20, 2019). The Nevada Supreme Court issued an unpublished order denying review on November 7, 2019. Appendix A. The Nevada Fourth Judicial District Court issued an unpublished order denying the petition on August 9, 2018. Appendix D.

JURISDICTION

The Nevada Supreme Court issued an order denying discretionary review on November 7, 2019. Appendix A. This petition has been timely filed within 90 days of that order. *See* Sup. Ct. R. 13(1). This petition raises a federal constitutional question, so this Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

NRS 200.030(1) provides: "Murder of the first degree is murder which is: (a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing."

CONSTITUTIONAL PROVISIONS INVOLVED

The Supremacy Clause (Article VI, Clause 2) provides:

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

The Fourteenth Amendment to the U.S. Constitution provides:

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

STATEMENT OF THE CASE

I. Mr. Major's common law wife, Tina Dell, goes missing.

The State prosecuted and ultimately convicted Mr. Major for murdering his common law wife, Tina Dell. But over thirty years after her disappearance, we still know little about her death.

Ms. Dell disappeared on or about Saturday, April 16, 1988. That day, when Mr. Major came home from work at about 6:00 p.m., Ms. Dell

handed him their three-year-old son and asked them to go somewhere else for a while. After that, Ms. Dell went to a nearby laundromat. She stayed there for a couple hours chatting with a friend and left at about 9:00 p.m. Ms. Dell said she was thinking about going to Colorado.

As for Mr. Major, he needed to go back to work that night. He and his son went to pick up a friend to come along for the ride. The three of them wanted to get some pizza; Mr. Major was out of money, so they went to the laundromat, and Mr. Major borrowed $20 from Ms. Dell. After they ate, the trio went to the mine where Mr. Major worked. Next, they took a drive to a nearby city, where Mr. Major might've bought some narcotics from a friend. They got back to town at about 10:00 p.m. Mr. Major told the police that when he came home, Ms. Dell was gone, and her bed was stripped.

Once Ms. Dell disappeared, Mr. Major started using cocaine heavily, which apparently provoked paranoid (and perhaps psychotic) behavior on his part. Eventually, after Ms. Dell had been gone about two weeks, Mr. Major filed a missing person report, on May 2. In the coming days, weeks, months, and years, Mr. Major gave a series of statements to the police (and others) about the events that took place in the weeks

following April 16. It appears he gave many of his initial statements while in the throes of a serious cocaine bender. The police found many of his statements suspicious.

Along with these statements, the State relied at trial on four witnesses who provided weak circumstantial evidence connecting Mr. Major to Ms. Dell's disappearance. First, a neighbor testified she heard an argument between two people at Mr. Major's house during a weekend night at about 5:00 p.m. or 6:00 p.m., and she never saw Ms. Dell after that; the prosecution argued that meant Mr. Major and Ms. Dell had a fight at about 6:00 p.m. on April 16. Second, one of Mr. Major's friends testified Mr. Major asked him about a week after Ms. Dell's disappearance to call one of her friends and say Ms. Dell was still alive. Third, another of Mr. Major's friends testified Mr. Major showed him photos supposedly of Ms. Dell's body with stab wounds; Mr. Major said someone had given him those photos and threatened his life over a debt. Fourth, a jailhouse informant testified Mr. Major said he used Ms. Dell's ATM card after her disappearance; the prosecution insinuated Mr. Major used her card because he wanted to make it look like she was still alive.

In early 1990, a woman living about 45 minutes from town found a human skull along with bones on her property. She called the police, who searched and found more bones, some of which were in a sleeping bag with a picture of the television character Alf on it. In one of his many conversations with the police, Mr. Major mentioned an Alf sleeping bag had gone missing around the time Ms. Dell disappeared. The State sent the skull to a forensic dentist, who concluded it was Ms. Dell's.

II. The State tries repeatedly to prosecute Mr. Major for Ms. Dell's death.

The State went through two failed prosecutions before it brought Mr. Major to trial. The initial prosecution took place in Elko County starting in 1991; the parties agreed to dismiss the case without prejudice.

Next, the District Attorney in Eureka County (Gary Woodbury) initiated charges. The state court the county decided it wasn't the right venue and dismissed the prosecution without prejudice.

Relatedly, Mr. Woodbury charged Mr. Major for perjury based on an allegedly false statement Mr. Major made in a bail-related affidavit. The jury convicted him, but the Nevada Supreme Court reversed.

Soon after, Mr. Woodbury won election as the District Attorney for Elko County, and he again filed open murder charges against Mr. Major in Elko County. These are the charges at issue in this petition.

Trial began on March 11, 1996. The State sought a first-degree murder verdict. But it had little if any evidence of what happened to Ms. Dell on the night of the murder. It had circumstantial evidence Mr. Major had acted strangely or made strange statements about Ms. Dell's disappearance, but it had no direct evidence tying him to the murder. Nor did the prosecution have much evidence about the manner of death. All it presented was dubious testimony from a forensic anthropologist who viewed the bones supposedly belonging to Ms. Dell and concluded she probably received three stab wounds around the time of death.

The trial court instructed the jury on first-degree murder, which under the statute requires proof of premeditation, deliberation, and willfulness. NRS 200.030(1)(a). The instruction stated, "Premeditation or intent to kill need not be for a day, an hour or even a minute." Appendix N at 208. It continued, "if the jury believes from the evidence that there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing, it was willful, deliberate

and premeditated." *Ibid.* It specified, "The intention to kill and the act constituting the killing may be as instantaneous as successive thoughts of the mind." *Ibid.* In conclusion, according to the instruction, "It is only necessary that the act constituting the killing be preceded by and be the result of a concurrence of will, deliberation and premeditation on the part of the accused." *Ibid.* And that was true "no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the acts constituting murder." *Ibid.* A separate instruction purported to give the jury guidance about when a killing is "deliberate as well as premediated." Appendix N at 209.

This instruction was substantially similar to the so-called *Kazalyn* instruction. *See Kazalyn* v. *State*, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992) ("If the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation . . . it is wilful, deliberate, and premediated murder."). As Mr. Major explains below (at pages 10-11), the Nevada Supreme Court eventually repudiated these sorts of instructions.

The jury found Mr. Major guilty of first-degree murder with use of a deadly weapon. The trial court sentenced him to life without the

possibility of parole. Appendix M. The Nevada Supreme Court affirmed on direct appeal on September 3, 1998. Appendix L.

About a year and a half later, on February 28, 2000, the court issued *Byford* v. *State*, 116 Nev. 215, 994 P.2d 700 (2000), which rejected the *Kazalyn* instruction. *See infra* at pages 10-11.

III. Mr. Major attempts to challenge the *Kazalyn* instruction.

Mr. Major filed a post-conviction petition in state court. He ultimately litigated a constitutional claim challenging the *Kazalyn* instruction under the *Byford* decision. During the proceedings, the state court issued an amended judgment (Appendix K), but it denied the petition. The Nevada Supreme Court separately affirmed his amended judgment and the denial of the petition. Appendix I; Appendix J.

Mr. Major pursued a federal habeas petition and raised a claim challenging the *Kazalyn* instruction. The federal district court denied relief; the Ninth Circuit affirmed; and this Court denied certiorari.

IV. Mr. Major files a new state court petition under *Welch*.

Mr. Major filed his second state post-conviction petition—the petition at issue here—on April 6, 2017. Appendix H. He re-raised his

challenge to the *Kazalyn* instruction under *Welch* v. *United States*, 136 S.Ct. 1257 (2016). The state district court dismissed the petition. Appendix D. The Nevada Court of Appeals affirmed, and the Nevada Supreme Court denied discretionary review. Appendix A; Appendix C.

LEGAL BACKGROUND

This case involves the federal constitutional principles governing retroactivity, as well as the *Kazalyn* instruction's lengthy legal history. An overview of both may help clarify the question presented.

I. *Teague*: substantive decisions apply retroactively.

This Court's decision in *Teague* v. *Lane*, 489 U.S. 288 (1989), set the stage for modern retroactivity jurisprudence. Under *Teague*, substantive rules are retroactive. *See Montgomery* v. *Louisiana*, 136 S.Ct. 718, 728 (2016) (explaining *Teague*). That category includes (but is not limited to) "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." *Ibid.* (cleaned up). The specific question here is whether *Teague* and its progeny require retroactive application of *Byford* v. *State*, 116 Nev. 215, 994 P.2d 700 (2000).

II. *Byford* and *Garner*: the Nevada Supreme Court rejects the *Kazalyn* instruction, but only prospectively.

In *Byford*, the Nevada Supreme Court repudiated the *Kazalyn* instruction because it didn't separately define willfulness, premeditation, and deliberation. 116 Nev. at 234-37, 994 P.2d at 713-15. Its prior cases, including *Kazalyn*, had "underemphasized the element of deliberation" by treating premeditation and deliberation as "redundant." 116 Nev. at 234-35, 994 P.2d at 713. Indeed, the court previously took the position "the terms premeditated, deliberate and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as a result of the act." *Ibid.* (cleaned up).

The *Byford* court "abandoned" this "line of authority." 116 Nev. at 235, 994 P.2d at 713. It held "the *Kazalyn* instruction blurs the distinction between first- and second-degree murder," and treating the three elements as synonyms for intent "eras[es]" any difference between the degrees. 116 Nev. at 235, 994 P.2d at 713. The court emphasized "[d]eliberation remains a critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting." 116 Nev. at 235, 994 P.2d at 714. As

the court explained, "*all three elements* . . . must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder." 116 Nev. at 235, 994 P.2d at 713-14 (cleaned up). The court provided corresponding model jury instructions. 116 Nev. at 236-37, 994 P.2d at 714-15.

The instruction in Mr. Major's case, while not a carbon copy of the *Kazalyn* instruction, suffered from the same flaws *Byford* identified. For example, it impermissibly told the jury that so long as Mr. Major had a "design" or a "determination" to kill before the killing—i.e., so long as he had the intent to kill ahead of time—the killing was necessarily "willful, deliberate and premeditated." Appendix N at 208. A separate instruction defined the terms "deliberate" and "premeditated" essentially as synonyms, as opposed to providing specific and independent definitions of both distinct elements. Appendix N at 209.

In *Garner* v. *State*, 116 Nev. 770, 6 P.3d 1013 (2000), the Nevada Supreme Court held the use of the *Kazalyn* instruction didn't create *constitutional* error. 116 Nev. at 788, 6 P.3d at 1025. It therefore concluded *Byford* wasn't retroactive and "applies only prospectively." 116 Nev. at 789, 6 P.3d at 1025.

III. *Fiore* and *Bunkley*: "clarifications" are retroactive; "changes" might not be.

After the Nevada Supreme Court decided *Byford*, this Court issued a pair of decisions that, with respect, invited confusion about when new interpretations of criminal statutes must apply retroactively.

The first case was *Fiore* v. *White*, 531 U.S. 225 (2001). In *Fiore*, the state supreme court issued a decision narrowing the scope of a criminal statute but declined to apply that decision to a petitioner on collateral review. The Court "granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore*, 531 U.S. at 226. But before it reached that question, it certified to the state supreme court another question: whether the state court's decision was "a new interpretation, or whether it was, instead, a correct statement of the law when Fiore's conviction became final." *Ibid.* In turn, the state supreme court said its decision "did not announce a new rule of law" but rather "clarified the plain language of the statute." *Id.* at 228. Given that answer, the Court held the state court had to apply

the decision to the petitioner as a matter of due process, and it saw no need to answer the "retroactivity" question. *Id.* at 228.

Respectfully, the Court added to the confusion in *Bunkley* v. *Florida*, 538 U.S. 835 (2003). After Mr. Bunkley's conviction became final, the state supreme court issued a decision narrowing the scope of the criminal statute. The state supreme court described its decision as a "refinement" that "culminated the [statute's] century-long evolutionary process." *Bunkley*, 538 U.S. at 840 (cleaned up). That statement was ambiguous about when, exactly, the law had changed: before the petitioner's judgment became final, or after. *Id.* at 840-42. The Court remanded for the state court to answer that question, and it therefore declined to resolve the retroactivity question "left open in *Fiore*." *Id.* at 841-42.

Both decisions held *clarifications* of the law apply on collateral review, but they didn't answer the retroactivity question for *changes*.

IV. *Clem*: the Nevada Supreme Court holds changes aren't retroactive.

Around the time of *Fiore* and *Bunkley*, the Nevada Supreme Court drew a distinction between retroactive *clarifications* of criminal statutes, and prospective *changes* to criminal statutes. In *Colwell* v. *State*, 118

Nev. 807, 59 P.3d 463 (2002), the court adopted a slightly modified version of the *Teague* retroactivity rules for Nevada state courts. In *Clem* v. *State*, 119 Nev. 615, 81 P.3d 521 (2003), the court explained those retroactivity rules apply only to new constitutional decisions, not statutory interpretation decisions. *Id.* at 626, 628-29, 81 P.3d at 529, 531. Instead, the retroactivity of statutory interpretation cases would turn on the supposed *Fiore/Bunkley* dichotomy: a *clarification* would be retroactive, while a *change* wouldn't. *Clem*, 119 Nev. at 625-26, 81 P.3d at 528-29.

V. *Nika*: the Nevada Supreme Court holds *Byford* was a change, so it wasn't retroactive.

Matters came to a head in *Nika* v. *State*, 124 Nev. 1272, 198 P.3d 839 (2008). There, the court argued it had the authority to determine whether *Byford* was a retroactive *clarification* of first-degree murder, or a prospective *change* in the law. It held *Byford* was a change, so it wasn't retroactive. 124 Nev. at 1287, 198 P.3d at 850.

VI. *Montgomery*: the states must follow federal retroactivity rules governing substantive decisions.

In *Montgomery* v. *Louisiana*, 136 S.Ct. 718 (2016), the Court held the federal retroactivity rules regarding substantive decisions apply in

state courts. *Id.* at 729. As the Court explained, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon [federal] constitutional premises." *Id.* at 726. And because states "may not disregard a controlling, [federal] constitutional command in their own courts," they're obligated to follow federal retroactivity rules regarding substantive decisions. *Id.* at 727 (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 340-41, 344 (1816)).

VII. *Welch*: this Court adopts a functional test for substantive decisions, erasing the change/clarification distinction.

Shortly following *Montgomery*, the Court issued another critical retroactivity decision in *Welch* v. *United States*, 136 S.Ct. 1257 (2016). *Welch* held *all* decisions with a substantive function apply retroactively, including statutory interpretation decisions that narrow the scope of a criminal statute. This functional analysis supersedes the supposed *Fiore/Bunkley* dichotomy, so states may no longer avoid applying statutory interpretation decisions retroactively by calling them "changes."

In *Welch*, the Court announced a new framework for federal retroactivity rules: a decision is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. According to the Court, rules with

substantive functions include rules that "alter[] the range of conduct or class of persons that the law punishes." *Ibid.* (citing *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004)). As the Court explained, "'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). Similarly, the Court stressed a decision is retroactive when it interprets a "substantive federal criminal statute [to] not reach certain conduct." *Welch*, 136 S.Ct. at 1267 (cleaned up); *see also ibid.* (citing *Schriro*, 542 U.S. at 354, with the parenthetical, "A decision that modifies the elements of an offense is normally substantive rather than procedural").

Thus, under *Welch*, courts must retroactively apply decisions with substantive functions, including decisions that narrow the scope of a criminal statute through statutory interpretation. And under *Montgomery*, state courts are bound to apply that rule, too.

REASONS FOR GRANTING THE PETITION

I. State courts are intractably split over whether decisions that narrow criminal laws must apply retroactively.

State courts of last resort across the country have created a deep split regarding whether and when they must give retroactive effect to new decisions that narrowly interpret the scope of criminal laws. While this Court previously granted certiorari twice on this question and twice declined to answer it, the *Welch* decision resolves the issue: state courts must retroactively apply any decisions that perform a substantive function, including decisions that narrow a criminal law. Despite *Welch*, however, the lower court maintained its position in the split and refused to apply *Byford* retroactively. The Court should grant certiorari.

A. At least four state courts of last resort, and the federal courts, apply these decisions retroactively.

Many state courts of last resort follow the federal rule and give retroactive application to new decisions that narrowly interpret a criminal law, as a matter of federal due process or otherwise.

1. In *State* v. *Robertson*, 438 P.3d 491 (Utah 2017), the Utah Supreme Court interpreted a state statute as precluding state prosecutions

for offenses the federal government had already prosecuted. The court announced its decision would apply retroactively. As it explained, its decision was "a new interpretation of a substantive criminal statute," which necessarily meant it was retroactive. *Id.* at 510.

2. In *Chao* v. *State*, 931 A.2d 1000 (Del. 2007), the Delaware Supreme Court addressed a previous decision, *Williams* v. *State*, 818 A.2d 906 (Del. 2003) (holding the felony murder statute applies only when the murder helps facilitate the underlying felony). The court in *Chao* held *Williams* amounted to a substantive decision and therefore "must be applied retroactively." *Chao*, 931 A.2d at 1002.

3. In *Jacobs* v. *State*, 835 N.E.2d 485 (Ind. 2005), the Indiana Supreme Court addressed a previous decision, *Ross* v. *State*, 729 N.E.2d 113 (Ind. 2000) (holding the habitual offender statute doesn't apply when the prosecution enhances a misdemeanor handgun charge into a felony). The court in *Jacobs* held *Ross* had to apply retroactively because it narrowly interpreted "a material element of [the state's] general habitual offender statute." *Jacobs*, 835 N.E.2d at 490.

4. In *Luke* v. *Battle*, 275 Ga. 370, 565 S.E.2d 816 (2002), the Georgia Supreme Court addressed a previous decision, *Brewster* v. *State*,

271 Ga. 605, 523 S.E.2d 18 (1999) (holding a sodomy conviction requires proof the defendant used force, even if the victim was underage). The court in *Luke* held *Brewster* necessarily applied retroactively because the decision "construed the meaning of a criminal statute so as to place certain conduct—a non-forceful act of sodomy with an underaged victim—beyond its reach." *Luke*, 275 Ga. at 374, 565 S.E.2d at 820.

These decisions are in line with the federal courts' approach, which requires retroactive application of decisions that narrowly interpret a criminal statute's scope. For example, in *Bousley* v. *United States*, 523 U.S. 614 (1998), this Court addressed a previous decision, *Bailey* v. *United States*, 516 U.S. 137 (1995) (narrowing the statutory definition of "using" a firearm). The Court in *Bousley* held *Bailey* applied retroactively. As this Court later explained in *Welch*, "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).

Other state courts of last resort appear to follow the same rule and would require retroactive application of decisions that narrowly interpret a criminal statute. *See Morel* v. *State*, 912 N.W.2d 299, 304 (N.D. 2018)

(noting that under *Welch*, the retroactivity "analysis turns on the function of the rule"); *State* v. *Young*, 162 Idaho 856, 859, 406 P.3d 868, 871 (2017) (stating a "new rule applies retroactively" if it "substantively alters punishable conduct") (cleaned up); *Jones* v. *State*, 122 So. 3d 698, 702 (Miss. 2013) ("Substantive rules include decisions that narrow the scope of a criminal statute by interpreting its terms.") (cleaned up); *State* v. *Cook*, 364 Mont. 161, 166, 272 P.3d 50, 55 (2012) ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."); *State* v. *White*, 182 Vt. 510, 518, 944 A.2d 203, 208 (2007) ("New substantive rules include those that narrow the scope of a criminal statute by interpreting its terms.") (cleaned up); *State* v. *Lagundoye*, 268 Wis. 2d 77, 95, 674 N.W.2d 526, 535 (2004) (stating a rule is substantive if it "change[s] the nature of the crime by altering what acts were proscribed under the statute"); *State* v. *Towery*, 204 Ariz. 386, 390, 64 P.3d 828, 832 (2003) ("Substantive rules determine the meaning of a criminal statute.") (cleaned up).

Various intermediate state appellate courts also adopt the same rule. *See, e.g.*, *People* v. *Edgeston*, 396 Ill. App. 3d 514, 519, 920 N.E.2d 467, 471 (Ct. App. 2009) ("Illinois follows the federal rule that a decision

that narrows a substantive criminal statute must have full retroactive effect in collateral attacks.") (cleaned up).

B. At least seven state courts of last resort reserve the right not to apply narrowing decisions retroactively.

Along with the decision below, many other state high courts have indicated they may not always retroactively apply a new decision that narrowly interprets a criminal statute. Rather than following current federal law, some of these courts (like the Nevada Supreme Court) adopt the change/clarification dichotomy to which *Fiore* and *Bunkley* vaguely alluded. Others adopt a balancing test like the one this Court previously proposed in *Linkletter* v. *Walker*, 381 U.S. 618, 619 (1965), *overruled by Teague*, 489 U.S. at 301-05. Either way, these state courts maintain they're free in certain circumstances to refuse retroactive application of new decisions that narrowly interpret criminal statutes.

1. In *Keen* v. *State*, 398 S.W.3d 594 (Tenn. 2012), the Tennessee Supreme Court discussed a prior decision, *Coleman* v. *State*, 341 S.W.3d 221 (Tenn. 2011) (interpreting the statutory standards regarding intellectual disability in a manner favorable to defendants). But the court concluded *Coleman* wouldn't apply retroactively. As it observed, a

separate state statute barred retroactive application of decisions unless they rested on constitutional grounds. Because *Coleman* involved "the interpretation and application of" the state statutory standards governing intellectual disability and "was not a constitutional ruling," the decision wasn't retroactive. *Keen*, 398 S.W.3d at 609.

2. In *Luurtsema* v. *Comm'r of Correction*, 299 Conn. 740, 12 A.3d 817 (2011), the Connecticut Supreme Court addressed previous decisions precluding a kidnapping conviction when the restraint used was merely incidental to another offense. The court concluded those decisions would apply retroactively "as a matter of state common law." 299 Conn. at 751, 12 A.3d at 825. But it insisted, "As a matter of federal constitutional law, each jurisdiction is free to decide whether, and under what circumstances, it will afford habeas petitioners the retroactive benefit of new judicial interpretations of the substantive criminal law issued after their convictions became final." 299 Conn. at 754, 12 A.3d at 827. It therefore "decline[d] . . . to adopt a per se rule in favor of full retroactivity," since there might be "various situations in which to deny retroactive relief may be neither arbitrary nor unjust." 299 Conn. at 760, 12 A.3d at 830.

3. In *Goosman* v. *State*, 764 N.W.2d 539 (Iowa 2009), the Iowa Supreme Court addressed a prior decision, *State* v. *Heemstra*, 721 N.W.2d 549 (Iowa 2006) (adding a type of merger rule to the felony murder statue). The court read this Court's decisions in *Fiore* and *Bunkley* as holding "federal due process does not require retroactive application of [a] decision" that changes (as opposed to clarifies) the law. *Goosman*, 764 N.W.2d at 544. It determined *Heemstra* was a change, not a clarification, so it denied retroactive application. *Id.* at 545.

4. In *Policano* v. *Herbert*, 7 N.Y.3d 588, 603, 859 N.E.2d 484, 495 (2006), the New York Court of Appeals addressed prior cases that narrowed the definition of "depraved indifference" murder. It concluded those decisions didn't apply retroactively. In making that decision, it relied on various factors, including prosecutors' reliance on the previous case law "when making their charging decisions," and the possibility retroactive application would "flood the criminal justice system with [collateral review] motions." 7 N.Y.3d at 604, 859 N.E.2d at 495-96.

5. In *State* v. *Barnum*, 921 So.2d 513 (Fla. 2005), the Florida Supreme Court addressed a previous decision, *Thompson v. State*, 695 So.2d 691 (Fla. 1997) (interpreting the crime of attempted murder of a law

enforcement officer as requiring knowledge the victim was a law enforcement officer). The court held it would apply decisions retroactively only if the decisions were "constitutional in nature," among other things. *Id.* at 524. Thus, if a decision "utilized principles of statutory construction" as opposed to "a constitutional analysis," the decision wouldn't be retroactive. *Id.* at 525. It distinguished *Fiore* by stating its statutory interpretation decisions were always changes. *Id.* at 524. It therefore held *Thompson* wasn't retroactive. *Id.* at 528.

6. In *Easterwood* v. *State*, 273 Kan. 361, 44 P.3d 1209 (2002), the Kansas Supreme Court addressed two prior decisions interpreting the felony murder statute not to apply when a police officer shoots a fleeing co-felon. It concluded those decisions "should not be retroactively applied as a matter of public policy under all the facts of this case." 273 Kan. at 383, 44 P.3d at 1223. It explained its prior decision "was a new decision and rule of law and not a clarification of the plain language of the felony-murder statute." *Ibid.* It therefore concluded Mr. Easterwood's conviction didn't "violate federal constitutional demands." *Ibid.*

7. In *Rivers* v. *State*, 889 P.2d 288, 292 (Okla. Ct. Crim. App. 1994), the Oklahoma Court of Criminal Appeals addressed *Mitchell* v.

State, 876 P.2d 682 (Okla. Ct. Crim. App. 1993) (interpreting the state presumption-of-innocence statute as precluding a flight instruction in most situations). According to the court, "when questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *Id.* at 291. It observed "law enforcement relied extensively on the old standard," so applying the new decision retroactively "would be incredibly burdensome." *Id.* at 292.

Other state courts of last resort apparently don't always require retroactive application of new narrowing decisions. *See Salinas* v. *State*, 523 S.W.3d 103, 112 (Tex. Ct. Crim. App. 2017) (stating that "[f]or a new construction of a state statute, we have adopted [a] balancing analysis" governing retroactivity); *State* v. *Kennedy*, 229 W.Va. 756, 775 n.16, 735 S.E.2d 905, 924 n.16 (2012) (stating "prospective application will ordinarily be favored" in cases involving "statutory or constitutional interpretations that represent a clear departure from prior precedent"); *State* v. *Jess*, 117 Haw. 381, 401, 184 P.3d 133, 153 (2008) ("[T]he Constitution neither prohibits nor requires retrospective effect.") (cleaned up). Some intermediate state appellate courts also appear in accord. *See, e.g.*, *State* v. *Harwood*, 228 N.C. App. 478, 485, 746 S.E.2d 445, 450 (2013).

C. The split is well recognized and entrenched.

A substantial number of state courts have taken divergent opinions on this question—i.e., whether courts must retroactively apply new decisions that narrowly interpret a criminal law. Some of those courts recognize their views are contrary to other state courts' positions, so those courts are unlikely to change their approaches. Certiorari is therefore warranted to resolve the split.

For example, in *State* v. *Robertson*, 438 P.3d 491 (Utah 2017), the Utah Supreme Court explained, "State courts have generally adopted two different" approaches to the retroactivity of "a new interpretation of a substantive criminal statute." *Id.* at 511. In its view, "A majority of our sister jurisdictions follow *Bousley* in granting [these decisions] full retroactivity." *Id.* at 511; *see also id.* at 512 n.137 (citing cases from eleven different state courts). Meanwhile, one state "presumptively requires retroactivity . . . but will not grant relief when continued incarceration does not represent a gross miscarriage of justice." *Id.* at 512. And "[a] minority of states, in contrast, employ a balancing test to determine whether to retroactively afford defendants the benefit of a new substantive rule." *Id.* at 512; *see also id.* n.139 (citing a cases from two courts).

The court elected to follow "*Bousley* and the majority of our sister jurisdictions" and therefore adopted "a rule of full retroactivity . . . for a new interpretation of a substantive criminal statute." *Id.* at 512.

The Connecticut Supreme Court provided a similar view of the split in *Luurtsema* v. *Comm'r of Correction*, 299 Conn. 740, 12 A.3d 817 (2011). As the court explained, "a majority" of state courts "follows the federal courts in adopting a per se rule in favor of full retroactivity." 299 Conn. at 827-28, 12 A.3d at 755 (citing cases from twelve different state courts). On the other hand, "a handful of jurisdictions [] employ some sort of balancing test to make a case-by-case determination of whether a particular habeas petitioner is entitled to benefit from a new interpretation of a criminal statute." 299 Conn. at 828, 12 A.3d at 756 (citing cases from six different state courts, but suggesting at least two had changed approaches). It ultimately adopted a test that allows it to deny retroactive application in certain situations. 299 Conn. at 760, 12 A.3d at 830.

As these cases and others recognize, the state courts have split into two defined camps: one that follows federal law and necessarily gives retroactive application to defense-friendly statutory interpretation decisions; and a second that reserves the right to deny retroactive application

in at least some circumstances. Given the deep and entrenched nature of the disagreement, it's unlikely additional time or percolation will resolve the split in one direction or the other. Rather, it's appropriate at this stage for the Court to grant certiorari and address this issue.

D. This is a substantial issue warranting certiorari.

The issue raised in this petition—whether federal constitutional law requires state courts to retroactively apply new decisions that narrowly interpret criminal statutes—is a significant issue that is worth this Court's consideration. The Court should therefore grant certiorari.

The Court has previously recognized the issue's importance—indeed, it twice previously granted certiorari on the question, although both times it declined to reach the issue. First, in *Fiore*, the Court granted certiorari to decide "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." 531 U.S. at 226. But it ultimately declined to answer the "retroactivity" question on which it had granted certiorari. *Id.* at 228. Second, the Court granted certiorari on

the same issue in *Bunkley,* but it again failed to resolve the question "left open in *Fiore*." 538 U.S. at 841.

As these two prior grants illustrate, this question warrants certiorari. The issue is exceptionally important, since it affects criminal defendants with final convictions in all fifty states, anytime a state court issues a new statutory interpretation decision with a favorable result. The issue also goes to the heart of the criminal justice system, because if a state court refuses to apply a new interpretation of a statute retroactively, there's "a significant risk that [the] defendant stands convicted of an act that the law does not make criminal." *Bousley*, 523 U.S. at 620 (cleaned up). In Mr. Major's case, the difference is between a first-degree murder conviction and his current sentence of life without the possibility of parole, or a second-degree murder conviction and immediate parole eligibility. *See* NRS 200.030. Defendants like Mr. Major shouldn't be denied the benefit of a new statutory interpretation decision simply because they committed the alleged crime in a state that refuses to follow federal retroactivity law. The Court should therefore grant certiorari on this issue a third time and definitively resolve this question.

II. The decision below is wrong.

For years, the Nevada Supreme Court has refused to acknowledge federal constitutional law requires the retroactive application of decisions like *Byford*, which narrowed the scope of first-degree murder in Nevada. The decision below adheres to this mistaken conclusion, despite this Court's recent, on-point retroactivity case law. This Court should grant certiorari and reverse.

Under the Constitution, state courts must apply the federal rules governing retroactive application of substantive decisions. *See Montgomery*, 136 S.Ct. at 729. The Court recently clarified the federal constitutional analysis courts must use to decide if a decision is substantive. *See Welch*, 136 S.Ct. at 1266. Under that test, a decision is retroactive so long as it has "a substantive function." *Ibid.* One paradigmatic category of substantive functions is decisions that narrow the scope of a criminal statute, whether through statutory interpretation or constitutional analysis. *See id.* at 1265 (stating a decision has a substantive function if it "narrow[s] the scope of a criminal statute by interpreting its terms"); *see also id.* at 1267 (stating, in a parenthetical, "A decision that modifies the elements of an offense is normally substantive rather than procedural")

(quoting *Schriro*, 542 U.S. at 354). *Byford* fits that bill: it's a decision that narrowed the scope of first-degree murder by giving independent meaning to the three elements of premeditation, deliberation, and willfulness. *Byford* is therefore retroactive.

The lower court's decision in this case relied on its prior published decision in *Branham* v. *Warden*, 134 Nev. 814, 434 P.3d 313 (Ct. App. 2018), but that decision can't be reconciled with *Welch* and *Montgomery*. In *Branham*, the Nevada Court of Appeals concluded the federal retroactivity framework applies only to new *constitutional* decisions, as opposed to statutory interpretation decisions. As the court put it, *Welch* didn't alter *Teague's* "threshold requirement that the new rule at issue must be a constitutional rule." 134 Nev. at 817, 434 P.3d at 316. Thus, the court reasoned, *Byford* doesn't implicate federal retroactivity law because *Byford* wasn't a constitutional decision. *Ibid.*

This reasoning is contrary to the plain language of *Welch*. As this Court clarified in *Welch*, the federal retroactivity framework applies a "substantive function" analysis. In other words, it doesn't matter what the source of the decision is—whether the decision relies on a substantive constitutional provision, a procedural constitutional provision, statutory

interpretation, or something else. Rather, so long as a decision has a substantive function, it's retroactive. Indeed, *Welch* explicitly stated the category of decisions with substantive functions "includes decisions that narrow the scope of a criminal statute by interpreting its terms." 136 S.Ct. at 1265; *see also id.* at 1267. There's no way to square the Nevada Court of Appeals' reasoning—that federal retroactivity rules govern only constitutional decisions—with *Welch*'s language.

Were there any doubt, the Court in *Welch* rejected arguments that are similar to the arguments the lower court employed. *Welch* retroactively applied the Court's prior decision in *Johnson* v. *United States*, 135 S.Ct. 2551 (2015) (holding the residual clause in the Armed Career Criminal Act void for vagueness). The argument against retroactivity involved the observation *Johnson* rested on a *procedural* constitutional provision: the Fifth Amendment right to fair notice of a crime and its associated punishments. *Johnson* wasn't a substantive decision, the argument went, because it was a *procedural* constitutional ruling. But the Court rejected that argument. The Court reasoned it didn't matter what the source of the ruling was; so long as the decision performed a substantive

function, such as narrowing the scope of a criminal statute, the decision would be retroactive. 136 S.Ct. at 1265-67.

That logic applies with equal force here. It doesn't matter whether a court grounds its decision on a procedural constitutional provision, a substantive constitutional provision, or a pure exercise of statutory interpretation. Under *Welch*, if the decision has a substantive function, it's retroactive. The Nevada Court of Appeals' contrary analysis is irreconcilable with *Welch*, so this Court should grant review and reverse.

III. This case is an excellent vehicle.

This case provides an ideal opportunity for the Court to answer the question left open in *Fiore* and *Bunkley*.

A. The lower court's procedural decision doesn't bar review because its analysis overlaps with the merits.

The Nevada Court of Appeals below found Mr. Major's petition procedurally barred, but the state law analysis overlaps with the merits of the federal retroactivity issue, so this Court may grant review.

When a state court rejects a federal claim based on independent and adequate state law procedural rules, this Court lacks jurisdiction over an appeal. *See, e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1746 (2016).

But if the state court's supposedly procedural decision "depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Ibid.* (cleaned up); *see also, e.g.*, *Rippo* v. *Baker*, 137 S. Ct. 905, 907 n.* (2017).

In this case, the lower court appeared to issue a procedural decision, but its analysis turned on the underlying federal claim, so its decision doesn't impede this Court's review.

The lower court applied two procedural bars to this case. *See* Appendix C at App.29-30 (citing NRS 34.726(1); NRS 34.810(1)(b)(2) & (2)). However, Nevada law allows a petitioner to show good cause to avoid those procedural bars in certain situations, including if the petitioner's claim relies on a new legal decision. *See Clem*, 119 Nev. at 621, 81 P.3d at 525-26; *see also Bejarano* v. *State*, 122 Nev. 1066, 1073 & n.13, 146 P.3d 265, 270 & n.13 (2006) (finding good cause to present a claim under *McConnell* v. *State*, 120 Nev. 1043, 102 P.3d 606 (2004), in an otherwise untimely and successive petition, and citing *Clem*). A petitioner may file a new petition raising a claim with a new legal basis within one year from the date the claim becomes available. *Cf. Rippo* v. *State*, 134 Nev. 411,

422, 423 P.3d 1084, 1097, *amended on denial of reh'g*, 432 P.3d 167 (2018).

Here, Mr. Major explained he had good cause to raise his federal constitutional claim in an otherwise procedurally barred petition because this Court's decision in *Welch* created a new legal basis for the claim, and because Mr. Major filed his petition within a year of the *Welch* decision. In *Welch*, this Court for the first time adopted a functional analysis regarding whether a decision is substantive, and it clarified the underlying source of the decision is irrelevant. Because this analysis directly contradicted the Nevada Supreme Court's prior case law refusing to apply *Byford* retroactively (*see, e.g.*, *Nika* v. *State*, 124 Nev. 1272, 198 P.3d 839 (2008)), Mr. Major explained he had a new legal basis for this claim and could therefore show good cause.

In concluding otherwise, the lower court relied on its prior decision in *Branham* v. *Warden*, 134 Nev. 814, 434 P.3d 313 (Ct. App. 2018). That decision rejected an identical good cause argument: according to the court in *Branham*, federal retroactivity principles apply only to new *constitutional* decisions, and *Welch*'s analysis didn't suggest otherwise. 134 Nev. at 817, 434 P.3d at 316. To reach that conclusion, the court had to

interpret *Welch* and evaluate the underlying claim for relief, i.e., that under *Welch*, federal constitutional law requires retroactive application of all decisions with substantive functions, including decisions like *Byford*. Because the court's analysis in *Branham* turns on the merits of the constitutional claim, the *Branham* decision isn't independent of federal law. Likewise, the lower court's purportedly procedural decision in this case relies on the same analysis from *Branham*, so it isn't independent of federal law, either. This Court is therefore free to reach the constitutional issue raised in this petition. *See, e.g.*, *Foster*, 136 S. Ct. at 1746.

B. The parties appear to agree the State would be unable to prove first-degree murder at a retrial.

This case is an excellent vehicle in part because it's undisputed Mr. Major suffered prejudice from the erroneous *Kazalyn* instruction. Thus, if *Byford* applies retroactively, Mr. Major would be entitled to a new trial.

In addition to showing good cause, a Nevada petitioner seeking to litigate an untimely or successive petition must also show prejudice, i.e., that the alleged violation "worked to the petitioner's actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." *Pellegrini* v. *State*, 117 Nev. 860, 887, 34 P.2d 519,

537 (2001) (cleaned up). Similarly, Mr. Major's underlying claim involves a challenge to a jury instruction that misstated the Nevada law governing first-degree murder, and in order to prove the claim, he must establish "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *See Middleton* v. *McNeil*, 541 U.S. 433, 437 (2004) (cleaned up).

In this case, it appears neither of these elements is in dispute. In its briefing in the state district court, the State spent no time debating the prejudice issue. *See* Appendix G. During oral arguments, the prosecutor confirmed prejudice was "not my strongest argument." Appendix E at 96 (Tr. at 50). He admitted "we don't know the circumstances in which [Ms. Dell] was killed," and he reiterated it wasn't "the strongest first-degree murder case in the world." Appendix E at 96 (Tr. at 50-51). While these statements might not have been be an explicit concession on prejudice, they came vanishingly close. Similarly, the State's answering brief in the lower court didn't address the issue, which was equivalent to a concession. *See Polk* v. *State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010).

The state court decisions in this case are similar. The district court didn't address these prejudice issues in its written order (Appendix D); the decision below didn't, either (Appendix C).

There's good reason no one maintains Mr. Major committed first-degree murder. Even assuming for the sake of argument the evidence proved Mr. Major killed Ms. Dell, the evidence didn't reveal anything about the circumstances of her death. At most, the State presented flimsy forensic evidence Ms. Dell might've been stabbed three times at the time of her death. The prosecution suggested three stab wounds tended to show premeditation. But multiple stab wounds are just as consistent with an impulsive murder as with a planned murder. Even if the multiple stab wounds helped establish *premeditation*, as the prosecutor argued, they didn't establish *deliberation*, i.e., that Mr. Major committed the murder after a period of "coolness and reflection," and after "weighing the reasons for and against the action and considering the consequences of the action." *Byford*, 116 Nev. at 235-36, 994 P.3d at 714 (cleaned up); *see also Chambers* v. *McDaniel*, 549 F.3d 1191, 1200-01 (9th Cir. 2008).

Because the jury instructions improperly relieved the State from its burden of proving the three separate elements of first-degree murder

(premeditation, deliberation, and willfulness), the prosecutor had a much easier time arguing Mr. Major committed first-degree murder, as opposed to second-degree murder. Thus, as all parties appear to agree, it's reasonably likely the improper instruction impacted the jury's verdict. In turn, if the Court agrees the Nevada courts must now apply *Byford* retroactively, then there's no serious dispute Mr. Major would be entitled to relief. This case is therefore an appropriate vehicle to resolve the question presented.

CONCLUSION

The Court should issue a writ of certiorari.

Dated February 5, 2020.

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