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Page No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 76716

FILED

NOV 07 2019

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

ORDER DENYING PETITION FOR REVIEW

Review denied. NRAP 40B.[1]

It is so ORDERED.

Pickering, A.C.J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J
Silver

cc: Hon. Alvin R. Kacin, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 76714

RICKEY TODD MAJOR

Appellant,

v.

RENEE BAKER, et al.,

Respondents.

PETITION FOR REVIEW BY THE NEVADA SUPREME COURT

JURISDICTIONAL STATEMENT

The Nevada Court of Appeals issued a decision on September 20, 2019, affirming the lower court's order dismissing Rickey Todd Major's April 6, 2017, post-conviction petition for a writ of habeas corpus. The decision is attached to this petition for review as Exhibit 1. This petition for review has been timely filed within the 18-day period set forth in Nevada Rule of Appellate Procedure 40B(c).

QUESTIONS PRESENTED

1. Under recently decided United States Supreme Court case law, state courts must give retroactive effect to decisions that narrow the scope of criminal laws. Given that new rule, must the Nevada courts allow Mr. Major the benefit of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), which narrowed the scope of first-degree murder?

2. Should this Court reconsider its prior retroactivity decisions in light of *Welch*, and in light of the emerging nationwide consensus among sister states, many of which grant full retroactive effect to decisions that narrow the scope of a criminal statute?

STATEMENT OF FACTS

This case involves Tina Dell's mysterious death. Ms. Dell was Rickey Todd Major's common law wife; she went missing on or about April 16, 1988. Mr. Major was at work most of the day, and he spent most of the night driving around with his son and a friend. II.App.263-64. Eventually, in early 1990, a woman found Ms. Dell's skull near her home. II.App.253. Although Mr. Major had an alibi for much of the night of Ms. Dell's disappearance, the police nonetheless believed he killed her.

After an initial failed prosecution in Elko County and a second failed prosecution in Eureka County, the State charged Mr. Major a third time in Elko County with murder. I.App.31. The trial court gave the jury what's now referred to as the *Kazalyn* instruction, which purported to define the elements of first-degree murder. IV.App.683. The jury convicted Mr. Major of first-degree murder, and the court sentenced him to life without the possibility of parole. Mr. Major appealed, and this Court affirmed on September 3, 1998. IV.App.725-34.

About a year and a half later, on February 28, 2000, this Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the

Court disapproved of the *Kazalyn* instruction, because it didn't define premeditation and deliberation as separate elements of first-degree murder. *Byford*, 116 Nev. at 234-35, 994 P.2d at 713-14. The *Byford* decision narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. 116 Nev. at 235, 994 P.2d at 714. But soon after, the Court held this error was non-constitutional, so the *Byford* decision applied only prospectively. *Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000).

The Court addressed *Byford* again in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). There, the Court acknowledged *Byford* interpreted the first-degree murder statute by narrowing its terms. 124 Nev. at 1286-87 & nn.72-74, 1301, 198 P.3d at 849-50 & nn.72-74, 859. It also concluded, contrary to *Garner*, that the decision wasn't purely prospective: rather, it applied to any defendants whose trials predated *Byford* but whose convictions weren't final on the date of the decision. *Nika*, 124 Nev. at 1301, 198 P.3d at 859. However, the Court held *Byford* wasn't retroactive to convictions that were final before the date of the opinion,

because *Byford* wasn't a constitutional ruling but instead was a statutory interpretation decision. *Nika*, 124 Nev. at 1288-89, 198 P.3d at 850-51.

The *Nika* Court resolved the retroactivity question by focusing on whether the *Byford* decision reflected a "change," as opposed to a "clarification," in state law. The Court concluded that as matter of federal due process, courts must retroactively apply a "clarification" of a criminal statute that narrows the scope of the statute. By contrast, the Court suggested, a court need not give retroactive effect to a decision that "changes" the meaning of the statute. *Nika*, 124 Nev. at 1287 & nn.72-74, 1301, 198 P.3d at 850 & nn.72-74, 859. This Court concluded *Byford* was a "change" in state law, which meant petitioners like Mr. Major couldn't rely on *Byford* retroactively to request a new trial.

The U.S. Supreme Court has issued two decisions over the past few years that are relevant to this retroactivity issue: *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and *Welch v. United States*, 136 S.Ct. 1257 (2016). In light of these cases, Mr. Major filed a new state post-conviction petition, on April 18, 2017. XII.App.1974-2012. He argued that under these two decisions, *Byford* was now retroactive under federal law.

The lower court rejected this argument and dismissed the petition. XIII.App.2087-113. Mr. Major appealed, and the Court of Appeals affirmed. Exhibit 1. Its reasoning relied primarily on its published decision in *Branham v. Warden*, 134 Nev. Adv. Op. 99, 434 P.3d 313 (Ct. App. 2018), which resolved the same issue in a manner adverse to Mr. Major.

REASONS TO GRANT REVIEW

The U.S. Supreme Court's recent decisions in *Montgomery* and *Welch* require courts to give retroactive effect to all decisions that have a substantive function, including decisions like *Byford*. The Court should grant review so it can resolve this issue and bring its retroactivity jurisprudence in line with the U.S. Supreme Court's binding authority, as well as the majority of our sister states.

I. Under *Montgomery* and *Welch*, courts must give retroactive effect to decisions like *Byford*.

This Court has previously refused to give retroactive effect to statutory interpretation decisions like *Byford*, but that approach is no longer valid after *Montgomery* and *Welch*. In turn, the *Welch* decision provided Mr. Major with good cause to present his new post-conviction petition.

A. The Supreme Court changed its retroactivity rules in *Welch*, and state courts must apply the new rules.

The U.S. Supreme Court's recent decisions in *Montgomery* and *Welch* alter the framework governing retroactivity. To understand why, a brief discussion of the relevant case law may be useful.

1. *Teague*: the U.S. Supreme Court holds substantive decisions apply retroactively.

The U.S. Supreme 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 (2016). The main issue in this case is whether federal law requires the retroactive application of a substantive decision that doesn't turn on a principle of federal constitutional law, for example, a statutory interpretation decision that narrows the scope of a criminal statute.

2. *Fiore* and *Bunkley*: "clarifications" of criminal laws are retroactive, but "changes" might not be.

In the early 2000s, the U.S. Supreme Court decided a pair of decisions that invited confusion about when interpretations of criminal statutes apply retroactively.

The first case that contributed to the ambiguity was *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the state supreme court issued a decision that narrowed the scope of a criminal statute. In the state court's view, its decision "did not announce a new rule of law" but rather "clarified the plain language of the statute" as it existed at the time of the petitioner's conviction. *Id.* at 228.

The U.S. Supreme Court originally granted certiorari in *Fiore* 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 the Court ducked that question. Instead, the Court observed there was no "new interpretation" at issue in the case: rather, according to the state supreme court, the relevant decision simply "clarified" the state of the law at the time the petitioner committed his offense. In that case, the U.S. Supreme Court held, the narrower version of the statute should've applied at the petitioner's trial. *Id.* at 228. Thus, under *Fiore*, "clarifications" must apply retroactively, but the opinion left open the question whether "changes" (or, put another way, "new interpretations") do, too.

The U.S. Supreme Court added to the confusion in *Bunkley v. Florida*, 538 U.S. 835 (2003). There, as in *Fiore*, the Court granted certiorari to decide whether a new interpretation of a criminal statute applies retroactively. But it wasn't clear to the Court whether the new interpretation at issue was a "change," or rather another "clarification" (like the decision at issue in *Fiore*). The Court remanded the case so the state supreme court could answer that question. Thus, the Court once again left the broader question open.

Both *Fiore* and *Bunkley* suggested there might be a difference between *clarifications* on the one hand and *changes* on the other hand. But neither case resolved the question, instead saving it for another day.

3. *Colwell* and *Clem*: this Court adopts the *Fiore/Bunkley* dichotomy for statutory decisions.

After *Fiore* and *Bunkley*, this Court adopted the distinction between retroactive *clarifications* of criminal statutes, and prospective *changes* to criminal statutes, when it comes to retroactivity.

First, in *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002), this Court adopted the *Teague* retroactivity rules in Nevada state courts, but

only with respect to new *constitutional* rules of criminal law. 118 Nev. at 816-20, 59 P.3d at 469-72.

One year later, in *Clem v. State*, 119 Nev. 615, 81 P.3d 521 (2003), this Court reaffirmed the retroactivity rules in *Colwell* and emphasized they apply only to new constitutional rules, not other types of decisions like statutory interpretation decisions. 119 Nev. at 626, 628, 81 P.3d at 529, 531. Instead, the question whether a statutory interpretation decision is retroactive would turn on the supposed *Fiore/Bunkley* dichotomy: a *clarification* would be retroactive, while a *change* would not. 119 Nev. at 625-26, 81 P.3d at 528-29.

As Mr. Major explained above (at pages 4-5), this Court relied on that distinction in *Nika*. That case held *Byford* was a change in the law, not a clarification, so it didn't apply retroactively. *Nika*, 124 Nev. at 1287, 198 P.3d at 850.

4. *Montgomery* and *Welch*: the U.S. Supreme Court erases the change/clarification dichotomy.

The U.S. Supreme Court recently released a pair of decisions that reform retroactivity jurisprudence.

First, in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the Court ruled that federal retroactivity principles are binding on state courts: if a decision would be retroactive under federal law, the state courts must also give it retroactive effect. 136 S.Ct. at 729.

Second, in *Welch v. United States*, 136 S.Ct. 1257 (2016), the Court superseded the *Fiore/Bunkley* dichotomy and held *all* decisions with a substantive effect apply retroactively.

In *Welch*, the Court addressed the retroactivity of its 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). It ultimately concluded *Johnson* was a substantive decision, so it was retroactive. *Welch*, 136 S.Ct. at 1268.

In that process, the Court announced a new test for retroactivity: a decision is substantive so long as it has "a substantive function." 136 S.Ct. at 1266. It said rules with substantive functions include rules that "'alter[] the range of conduct or the class of persons that the law punishes.'" *Id.* at 1264-65 (quoting *Schiro 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 *Schiro*, 542 U.S. at 351-52) (emphasis added). Similarly, the Court stressed a decision is retroactive when it "'hold[s] that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S.Ct. at 1267; *see also id.* (citing *Schriro*, 542 U.S. at 354, and noting in a parenthetical that "[a] decision that modifies the elements of an offense is normally substantive rather than procedural").

B. Under *Welch* and *Montgomery*, this Court's decision in *Byford* is retroactive.

Under *Welch*, a decision is retroactive if it has a substantive function, including if it narrows the scope of a criminal statute. That is true regardless of the nature of the decision: whether it is a constitutional decision, or simply a statutory interpretation decision. And when it comes to statutory interpretation decisions, those decisions are retroactive so long as they narrow the scope of a criminal statute, and regardless of whether the decision is a "change" or a "clarification." Because *Byford*

narrowly interpreted the scope of Nevada's first-degree murder statute, it qualifies as a substantive decision.

Under *Welch*'s "substantive function" test, *Byford* is a substantive decision. *Byford* has a "substantive function" because the decision narrowed "the range of conduct" that Nevada "law punishes" as first-degree murder. *Byford* should therefore be given retroactive effect.

Were there any doubt, *Welch* explicitly stated decisions are substantive when they "narrow the scope of a criminal statute by interpreting its terms." 136 S.Ct. at 1264-65; *see also id.* at 1267 (citing *Schriro*, 542 U.S. at 354, and stating, in a parenthetical, that "[a] decision that modifies the elements of an offense is normally substantive rather than procedural"). It is hard to imagine a plainer statement than that: a decision that interprets a statute narrowly is a substantive decision and is therefore a retroactive decision. *Byford* fits that bill: it is a decision that narrowed the scope of first-degree murder by reinvigorating and giving independent meaning to the element of deliberation.

The *Welch* opinion is also significant because of the way it treated another prior opinion: *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*), which narrowly interpreted a federal criminal statute, would apply to previously final cases. 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 a substantive decision simply because it narrowed the scope of a criminal statute. *Contra Clem*, 119 Nev. at 629, 81 P.3d at 531 (distinguishing *Bousley* and arguing *Bailey* was retroactive because it was a clarification of the law as opposed to a change). Thus, as *Welch* illustrates, it's irrelevant whether a decision rests on constitutional principles. If the decision is substantive, it's retroactive, no matter the basis for the decision.

This Court's contrary jurisprudence (in particular *Colwell* and *Nika*) is no longer good law in light of *Montgomery* and *Welch*. This

Court's prior cases create a dichotomy between statutory interpretation decisions that "change" the law, and decisions that "clarify" the law. After *Welch*, that distinction is no longer tenable. Under *Welch*, retroactivity turns on whether a decision performs "a substantive function." 136 S.Ct. at 1266. If a statutory interpretation decision "narrows the scope of a criminal statute by interpreting its terms," it has a substantive effect, even if it's considered a "change" in the law. Here, *Byford* had a substantive function. Under *Welch*, it should be retroactive, even though this Court considers it to be a "change."

Because *Welch* reformed these retroactivity rules, the decision gave Mr. Major good cause to present his new petition, and he's entitled to relief on the merits.

II. The decision of the Court of Appeals conflicts with the U.S. Supreme Court's decisions.

The Court of Appeals rejected Mr. Major's argument, relying on its prior published decision in *Branham v. Warden*. That decision cannot be reconciled with *Welch* and *Montgomery*, so this Court should grant review in this case. *See* Nev. R. App. P. 40B(a)(2).

In *Branham*, the 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." *Branham*, 434 P.3d at 316. Thus, the court reasoned, *Welch* doesn't govern *Byford*'s retroactivity, since *Byford* wasn't a constitutional decision. *Id.*

This reasoning is contrary to the plain language of *Welch*. As the previous subsection explains, *Welch* applies a "substantive function" analysis to retroactivity: it doesn't matter what the source of the decision is, so long as a decision has a substantive function. 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 1264-65; *see also id.* at 1267. There is no way to square the Court of Appeals' reasoning—that federal retroactivity rules are concerned only with constitutional rules—with *Welch*'s contrary statements.

Were there any doubt, the analysis the Court used in *Welch* undercuts any notion that the formal source of the decision makes a difference. The issue in *Welch* was whether the Court's earlier decision in *Johnson* was retroactive. The argument against retroactivity involved the fact that *Johnson* rested on a *procedural* constitutional provision: the Fifth Amendment right to fair notice of a crime and its associated punishments. *Johnson* was not 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 Court of Appeals' contrary analysis is irreconcilable with *Welch*, and this Court should grant review.

III. This case raises an issue of first impression that is of general statewide significance and public importance.

This case involves a pure legal issue of statewide significance, and the legal issue is also a fundamental issue of statewide public importance. That gives the Court all the more reason to grant review. *See* Nev. R. App. P. 40B(a)(1), (3).

The question of retroactivity in criminal cases is a recurring issue: it's implicated every time the Court issues a new decision that narrowly interprets the terms of a criminal statute. It's also an issue of statewide importance: these issues affect criminal defendants all across the State. Meanwhile, the issue is fundamentally important: it determines whether a petitioner who was convicted of an act that no longer fits the definition of the relevant criminal statute can secure a new trial and a shot at an acquittal under the newly defined statute. Retroactivity is therefore a crucial criminal law issue, and this case is worth this Court's attention.

In addition, this case is worth review because it gives the Court the opportunity to conform its retroactivity jurisprudence to the vast majority of sister states, which apply cases like *Byford* retroactively. *See, e.g.*, *State v. Robertson*, 839 Utah Adv. Rep. 42, 438 P.3d 491, 511-13 & n.137

(2017) (following the federal rule and the majority of state jurisdictions that allow for full retroactivity, and collecting cases). There's an emerging nationwide consensus on this issue: if a state court issues a new decision interpreting a criminal statute, and if a previously convicted defendant might not be guilty of the crime under the new interpretation, the defendant should receive a new trial. The Court should grant review so it can join the other jurisdictions that have adopted *Welch*'s retroactivity principles.

IV. This case in an excellent vehicle to resolve this question.

Mr. Major's appeal presents an ideal opportunity for this Court to resolve this issue because there's no real dispute about prejudice: if *Byford* applies retroactively, then Mr. Major is entitled to relief because the improper jury instruction had a concrete impact on his trial.

At trial, the prosecution maintained someone stabbed Ms. Dell three times, but it presented little if any evidence about the actual circumstances surrounding her death. Given the lack of information, it would've been hard for a properly instructed jury to find premeditation and deliberation. But the prosecution took advantage of the incorrect

Kazalyn instruction in its argument for first-degree murder, essentially telling the jury the only relevant issue was intent to kill. IV.App.617-18. In light of the prosecution's arguments and the uncertainty regarding what actually happened to Ms. Dell, it's overwhelmingly likely the *Kazalyn* instruction prejudiced the defense. Indeed, there's no real dispute on that front. In the proceedings in the district court, the prosecution all but conceded the prejudice issue. V.App.916 (Tr. at 50-51). Similarly, the State's answering brief in this appeal didn't address the issue, which is equivalent to a concession. *See Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010).

In short, if Mr. Major can show good cause to litigate his petition under *Welch*, then he can inevitably show prejudice, and he can also prove the merits. The Court should therefore grant this petition to weigh in on the good cause question.

CONCLUSION

This Court should grant review.

Dated October 8, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/Jeremy C. Baron
JEREMY C. BARON
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

2. I further certify this petition for rehearing complies with the page or type-volume limitations of NRAP 40B because it is proportionately spaced, has a typeface of 14 points, and contains 3,552 words.

Dated October 8, 2019.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/Jeremy C. Baron
JEREMY C. BARON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Tyler J. Ingram, Aaron D. Ford.

I further certify that some of the participants in the case are not registered appellate electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Rickey Major
No. 49984
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

/s/ Richard D. Chavez
An Employee of the
Federal Public Defender,
District of Nevada

EXHIBIT 1

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
RENEE BAKER, WARDEN,
Respondent.

No. 76716-COA

ORDER OF AFFIRMANCE

Rickey Todd Major appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Major filed his petition on April 6, 2017, more than 18 years after issuance of the remittitur on direct appeal on September 23, 1998. *Major v. State*, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998). Thus, Major's petition was untimely filed.[1] *See* NRS 34.726(1). Moreover, Major's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised a claim new and different from those raised

[1]The district court entered a corrected judgment of conviction on June 5, 2005, but Major did not raise any claims concerning the corrected judgment of conviction in the instant petition. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

in his previous petition.[2] *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Major's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3), or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).

Major contends the district court erred by dismissing his petition as procedurally barred. Major claimed the decisions in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). However, this court has previously rejected a good-cause argument similar to Major's, *see Branham v. Warden*, 134 Nev., Adv. Op. 99, *6-7, 434 P.3d 313, 316 (Ct. App. 2018), and Major fails to demonstrate *Branham* was wrongly decided. Therefore, Major is not entitled to relief based upon this good-cause claim.

Major also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because he is actually innocent. A petitioner must allege specific facts that, if true and not belied by the record, would entitle him to relief. *Berry*, 131 Nev. at 967, 363 P.3d at 1154-55. "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Major

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[2]*Major v. Warden*, Docket No. 45012 (Order of Affirmance, October 19, 2006).

argued that "the facts in this case established that [he] only committed a second-degree murder." This is not factual innocence. Major thus failed to demonstrate he was actually innocent. We therefore conclude the district court did not err by dismissing Major's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

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Gibbons

_____, J.
Tao

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Bulla

cc: Hon. Alvin R. Kacin, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Elko County District Attorney
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cc: Hon. Alvin R. Kacin, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

Case No. CV-HC-17-248

Dept. No. 2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

RICKEY TODD MAJOR,

Petitioner,

vs.

RENEE BAKER, Warden, et al,

Respondent.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on August 9, 2018, the court entered an order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court from the order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within 33 days after the date this notice is mailed to you. This notice was mailed on August 9, 2018.

DATED this 9 day of August, 2018.

Clerk of Court.
By: Amanda Peck

Case No. CV-HC-17-248

Dept. No. 2

FILED

2018 AUG -9 AM 11:39

ELKO CO DISTRICT COURT

CLERK____ DEPUTY____

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

RICKEY TODD MAJOR,

Petitioner,

vs.

RENEE BAKER, Warden, et al.

Respondents.

/

ORDER DISMISSING SECOND PETITION FOR WRIT OF HABEAS CORPUS

On April 6, 2017, Petitioner Rickey Todd Major filed his second post-conviction petition for writ of habeas corpus with this court. The Elko County District Attorney has opposed the petition for the director of the Nevada Department of Corrections.

As the parties agreed an evidentiary hearing was not necessary, *see* NRS 34.770, the court heard only oral argument on the petition on October 6, 2017. Now, having carefully considered the matter, the court is making findings of fact, drawing conclusions of law, and dismissing the petition. *See* NRS 34.830.

A. FINDINGS OF FACT

Major seeks relief from a conviction in Case No. CR-MS-95-6218. *See* NRS 34.720(1); NRS 34.724(1). In that case, an Elko County jury found him guilty of first-degree murder with the use of a deadly weapon on March 15, 1996. *See* Exhibit 1, Copy of "Corrected" Judgment of Conviction (Fourth Judicial District Court Case No. CR-MS-95-6218). The court sentenced Major to serve two consecutive terms of life in prison without the possibility of parole. *See* Exhibit 2, Copy of Order of Affirmance (Nevada Supreme Court Docket No. 45427). The Nevada Supreme Court dismissed Major's direct

appeal from the conviction, and issued remittitur on September 23, 1998. Id.

I.

On November 3, 1998, Major filed his first post-conviction petition for habeas relief. *See* Exhibit 3, Copy of Order of Affirmance (Nevada Supreme Court Docket No. 45012). Legal counsel filed supplemental points and authorities on September 25, 2002. Id. The State of Nevada opposed the petition. Id. While the petition was pending, Major filed a January 4, 2004, motion to modify his sentence in the criminal case, arguing that he never waived his right to be sentenced by a jury. *See* Exhibit 2. The court granted Major's motion and set the matter for resentencing. Id. Major subsequently waived his right to sentencing by a jury and agreed to be resentenced by the court. Id. In the meantime, on December 20, 2004, the court dismissed the petition for writ of habeas corpus. *See* Exhibit 3. On February 16, 2005, the court again sentenced Major to serve two consecutive terms of life in prison without the possibility of parole, and entered its "Corrected" Judgment of Conviction. *See* Exhibit 1.

Appeals from the court's order dismissing Major's first petition for habeas relief and the corrected judgment of conviction followed. On July 5, 2006, the Nevada Supreme Court affirmed the corrected judgment of conviction. *See* Exhibit 2. Remittitur issued in that case on August 1, 2006. On October 19, 2006, the Nevada Supreme Court affirmed the order dismissing Major's first post-conviction petition. *See* Exhibit 3. Remittitur issued on November 15, 2006.

II.

The conviction is based on an allegation that Major committed the willful, deliberate and premeditated killing of Tina Dell by stabbing her to death with a knife or "similar weapon" in 1988. *See* Exhibit 4, Copy of Criminal Information (Fourth Judicial District Court Case No. CR-MS-95-6218). Major now claims that his conviction violates his right to due process under the United States Constitution because the jury was not given the *mens rea* instructions adopted by the Nevada Supreme Court in Byford v. State, 116 Nev. 215 (2000). NRS 34.360; NRS 34.724(1).

The court gave two jury instructions on the *mens rea* of murder. Those instructions were Instruction 10 and Instruction 11.

Instruction 10, to which Major refers as a "Kazalyn instruction," Kazalyn v. State, 108 Nev. 67 (1992), reads:

> Premeditation or intent to kill need not be for a day, an hour or even a minute, for if the jury believes from the evidence that there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing, it was willful, deliberate and premeditated.
>
> The intention to kill and the act constituting the killing may be as instantaneous as successive thoughts of the mind. It is only necessary that the act constituting the killing be preceded by and be the result of a concurrence of will, deliberation and premeditation on the part of the accused no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the acts constituting the murder.

See Exhibit 5, Copy of Instruction 10 (Case No. CR-MS-95-6218).

Instruction 11 reads:

> To make a killing deliberate as well as premeditated, it is unnecessary that the intention to kill shall have been entertained for any considerable length of time. It is enough if there is time for the mind to think upon or consider the act, and then determine to do it. If, therefore, the killing is not the instant effect of impulse - if there is hesitation or doubt to be overcome, a choice made as result of thought, however short the struggle between the intention and the act - it is sufficient to characterize the crime as deliberate and premeditated murder. In other words, one may be guilty of murder in the first degree although the intent to commit such a homicide is formed at the very moment the fatal act is committed.

See Exhibit 6, Copy of Instruction 11 (Case No. CR-MS-95-6218).

The first paragraph of Instruction 10 appears to have been drawn from State of Nevada v. Ah Mook, 12 Nev. 369 (1877). It seems the second paragraph was culled from an instruction approved in Scott v. State, 92 Nev. 552 (1976). Instruction 11 was taken nearly verbatim from Payne v. State, 81 Nev. 503 (1965).

III.

In Byford, the Nevada Supreme Court expressed its concern that "[t]he Kazalyn instruction and some of [its] prior opinions . . . underemphasized the element of deliberation." 116 Nev. at 234. The court was concerned that it "went so far as to state that 'the terms premeditated, deliberate and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as the result of the act.'" Byford, 116 Nev. at 235 (quoting Greene v. State, 113 Nev. 157, 168 (1997)). The court found that "[b]y defining only premeditation and failing to provide deliberation with any independent definition, the Kazalyn instruction blurs the distinction between first-[degree] and second-degree

murder." Id. Therefore, the court produced new *mens rea* instructions for district courts to use "in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing." Id. at 236.

Major concedes that his conviction became final before Byford was decided. *See* Nika v. State, 124 Nev. 1274, 1284 n.52 (2008) ("A conviction becomes final when the judgment of conviction has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the United States Supreme Court has been denied or the time for such a petition has expired.") (citations omitted).

B. CONCLUSIONS OF LAW

1. The *mens rea* instructions were correct statements of Nevada law when Major's conviction became final; therefore, he does not have a federal due process claim.

2. Dismissal of Major's latest petition as untimely will not unduly prejudice him; therefore, it must be dismissed.

C. ANALYSIS

1. The *mens rea* instructions were correct statements of Nevada law when Major's conviction became final; therefore, he does not have a federal due process claim.

Major acknowledges that the Nevada Supreme Court affirmed this court's order dismissing his first petition for writ of habeas corpus. *See* Exhibit 3. In that Order of Affirmance, the appellate court found the jury was properly instructed on the *mens rea* of first-degree murder. Id. The doctrine of the law of the case requires this court to accept that determination. *See* Valerio v. State, 112 Nev. 383, 386-87 (1996). Given this law of the case, the question is whether Byford must be applied retroactively as a matter of federal due process. The question is important because if Byford need not be so applied, dismissal under NRS 34.726(1) is mandatory. Pellegrini v. State, 117 Nev. 860, 886 (2001) (acknowledging mandatory application of statutory procedural bars to post-conviction petitions for habeas relief).

I.

In Nika, the Nevada Supreme Court reiterated that Byford announced a change in state law. 124 Nev. at 1286. Thus, the framework announced by the United States Supreme Court in Fiore v. White, 531 U.S. 225 (2001), and Bunkley v. Florida, 538 U.S. 835 (2003), controls the disposition of Major's

second petition. "Taken together, Fiore and Bunkley stand for two propositions." Goosman v. State, 764 N.W.2d 539, 544 (Iowa 2009). "First, where a [state] court announces a new rule of substantive [criminal] law that simply 'clarifies' ambiguities in existing law, federal due process requires that the decision be retroactively applied to all cases, including collateral attacks where all avenues of direct appeal have been exhausted." Id. "Second, where a [state] court announces a 'change' in substantive [criminal] law which does not clarify existing law but overrules prior authoritative precedent on the same substantive issue, federal due process does not require retroactive application of the decision [to "final" convictions]." Id. Because Fiore and Bunkley have not been overruled, they remain good law that state courts must follow. Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (noting that only the Supreme Court can overrule one of its precedents).

Following the holdings of Fiore, Bunkley, and Nika, the court has little difficulty rejecting Major's latest collateral attack. "[A]s a matter of due process, the change effected in Byford applies to convictions that were not yet final at the time of the change." Nika, 124 Nev. at 1287. Major's conviction is not such a conviction. Therefore, it is not a violation of Major's right to federal due process to refrain from applying Byford to his conviction. The bottom line? Major was convicted by a jury properly instructed on our state's then-existing law of *mens rea* for willful, deliberate, and premeditated killing. Pursuant to Fiore and Bunkley, the limitation on retroactivity announced in Nika does not violate Major's federal right to due process.

II.

Although this case requires the straightforward application of Fiore, Bunkley, and Nika, Major contends that his conviction must be vacated because Montgomery v. Louisiana, 136 S. Ct. 718 (2016), and Welch v. United States, 136 S. Ct. 1257 (2016), establish that the "narrowing interpretation of . . . Byford must be applied retroactively."

In Montgomery, the Supreme Court held that "when a new substantive rule of *constitutional* law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. at 729 (emphasis added). In Welch, the Supreme Court considered the retroactivity of Johnson v. United States, 135 S. Ct. 2551 (2015), a case in which the "residual clause" of the federal Armed Career Criminal Act of 1984 was found unconstitutionally void for vagueness. The

Court concluded that Johnson "announced a substantive rule that has retroactive effect in cases on collateral review." Welch, 136 S. Ct. at 1263.

Major basically maintains that this court should conclude Montgomery and Welch have rendered the clarification/change dichotomy of Fiore and Bunkley obsolete. The court is not persuaded. It lacks the power to determine the vitality of the latter two cases. Bosse, 137 S. Ct. at 2. Further, it fails to see how "Montgomery plus Welch [ ] provides Major the basis on which to argue that due process now requires that a change in law that narrows the meaning of a criminal statute must apply retroactively." Unlike Montgomery, this case in no way, shape, or form involves "a new substantive rule of constitutional law." Unlike Welch, this case in no way, shape or form involves a federal criminal statute found void for vagueness, a "doctrine rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments." Carrigan v. Comm'n on Ethics, 129 Nev. 894, 899 (2013).

In Montgomery and Welch, the Supreme Court relied on a Teague v. Lane, 489 U.S. 288 (1989), analysis. "Under Teague, a new *constitutional* rule of criminal procedure does not apply, as a general matter, to convictions that were final when the new rule was announced." Montgomery, 136 S. Ct. at 728 (emphasis added). However, Teague excluded two categories of such rules from its general retroactivity bar. Id. One of those categories is comprised of "new substantive rules of *constitutional* law." Id. (emphasis added).[1] The Court in Welch had to determine whether the new rule produced in Johnson fell "within one of the two categories that have retroactive effect under Teague." 578 U.S. at 1264. In so doing, the Court noted that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Id. (quoting Schriro, 542 U.S. at 353). "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." Id. (quoting Schriro, 542 U.S. at 351-52). Utilizing interpretive principles grounded in *constitutional* doctrine, the Supreme Court produced such a decision in Johnson. The Court simply narrowed the scope of the Armed Career Criminal Act by *interpreting* and finding the residual

[1] Although these rules are described in Teague "as an exception to the bar on retroactive application of procedural rules," the Court "has recognized that substantive rules 'are more accurately characterized as . . . not subject to the bar.'" Id. (quoting Schriro v. Summerlin, 542 U.S. 348, 352 n.4 (2004)).

clause unconstitutionally vague. As a result, people previously sentenced under the clause were subject to punishment the law did not permit.

Major attempts to equate the change in Nevada's law of *mens rea* for willful, premediated, and deliberated killings with a "new substantive rule of constitutional law" subject to a Teague analysis. However, neither Teague nor Colwell v. State, 118 Nev. 807 (2002), "upset the usual rule of nonretroactivity for rules that carry no constitutional significance." Clem v. State, 119 Nev. 615, 628-29 (2003). And, the weakness of Major's argument is especially glaring in light of his reliance on Bousley v. United States, 523 U.S. 614 (1998). "In Bousley, the Court was asked to determine what retroactive effect should be given to its decision in Bailey v. United States, 516 U.S. 137 (1995)." Welch, 136 S. Ct. at 1267. "Bailey considered the 'use' prong of 18 U.S.C. § 924(c)(1), which imposes increased penalties on the use of a firearm in relation to certain crimes." Id. "The Court held as a matter of statutory interpretation that the 'use' prong punishes only 'active employment of the firearm[,]'" and not the mere possession that the federal habeas petitioner claimed he had. Id. (citing Bailey, 516 U.S. at 144). "The Court rejected the argument that [the] claim was barred by Teague, stating that there was no new constitutional principle involved, and that because Teague applies only to procedural rules, 'it is inapplicable to the situation in which [the Supreme] Court decides the meaning of a criminal statute enacted by Congress.'" Clem, 119 Nev. at 629 (citing Bousley, 523 U.S. at 620). In Bousley, the Supreme Court simply recognized as proper in the federal system what this court is doing here–deciding outside the Teague framework whether due process requires a nonconstitutional holding to be applied retroactively to a final conviction.

2. Dismissal of Major's latest petition as untimely will not unduly prejudice him; therefore, it must be dismissed.

"Unless there is good cause shown for delay," a petition that challenges the validity of an appealed judgment or sentence must be filed "within 1 year after the appellate court of competent jurisdiction . . . issues its remittitur." NRS 34.726(1). "[G]ood cause for delay exists if the petitioner demonstrates to the satisfaction of the court: (a) That the delay is not the fault of the petitioner; and (b) That dismissal of the petition as untimely will unduly prejudice the petitioner." Id. (emphasis added).

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There is no doubt that Major filed his second petition after the one-year period required by NRS 34.726(1). Dismissal of this petition as untimely will not prejudice him in any way given the court's assessment of his federal due process claim. *See* Clem v. State, 119 Nev. 615, 629 (2003). Therefore, the court has concluded that the petition must be dismissed.

D. ORDER

"If it appears on the return of the writ of habeas corpus that the petitioner is in custody by virtue of process from any court of this State, or judge or officer thereof, the petitioner may be discharged . . . [w]here the court finds that there has been a specific denial of the petitioner's constitutional rights with respect to the petitioner's conviction or sentence in a criminal case." NRS 34.500(9).

The court having concluded that there has been no such denial in Major's criminal case, habeas relief is DENIED.

DATED this 8 day of August, 2018.

The Honorable Alvin R. Kacin
District Judge/Department 2

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department 2, and that on this 6 day of August, 2018, served by the following method of service:

(X) Regular US Mail
( ) Certified US Mail
( ) Registered US Mail
( ) Overnight US Mail
( ) Personal Service
( ) Overnight UPS
( ) Overnight Federal Express
( ) Fax to # _____
( ) Hand Delivery
(X) Box in Clerk's Office

a true copy of the foregoing document addressed to:

Jonathan Kirshbaum, Esq.
Federal Public Defender's Office
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
[Regular US Mail]

Elko County District Attorney's Office
[Box in Clerk's Office]

The Office of the Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701
[Regular US Mail]

The Office of the Nevada Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
[Regular US Mail]

Renee Baker, Warden
1200 Prison Rd.
Lovelock, Nevada 89419
[Regular US Mail]

Mallorie Goguen

Exhibit 1

Exhibit 1

Case No.: CR-MS-95-6218

Dept. No.: 2

FILED

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

RICKEY TODD MAJOR,

Defendant.

CORRECTED
JUDGMENT OF CONVICTION

On March 15, 1996, the above-named Defendant, **RICKEY TODD MAJOR, (Social Security Number: 265-27-9470; Date of Birth: December 20, 1956; Place of Birth: Cannon City, Colorado),** was found guilty at trial by a jury of **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165** , which crime occurred on or about the 16th day of April, 1988.

As a result of the foregoing, on April 30, 1996, District Judge Retired, Jack B. Ames, found the above-named Defendant, **RICKEY TODD MAJOR,** guilty of the crime of **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165.** The Defendant was subsequently sentenced to life in the Nevada State Prison **without** the

possibility of parole. The Defendant was further sentenced to serve a consecutive sentence of life without the possibility of parole for the use of a deadly weapon. These sentences were ordered to be served consecutive to any sentence the Defendant might be serving at that time. The Defendant was further ordered, in accordance with the provisions of NRS 176.062, to pay the Twenty-five Dollar ($25.00) administrative assessment fee.

At the time said Defendant was found guilty and at the time he was sentenced, he was represented by his attorney Matthew J. Stermitz, Esq.

On May 3, 1996, a Notice of Appeal was filed on behalf of the Defendant by Defense Counsel, Matthew J. Stermitz, Esq. On September 3, 1998, the Supreme Court of the State of Nevada filed its Order Dismissing Appeal.

On March 20, 1997, a Motion for New Trial was filed on behalf of the Defendant by defense counsel, David R. Houston, Esq. The State filed its opposition on March 26, 1997, and on May 16, 1997, this Court entered its Order Denying Motion for New Trial. On May 29, 1997, a Notice of Appeal was filed. On July 28, 1998, the Supreme Court of the State of Nevada filed its Order Dismissing Appeal.

On November 13, 1998, the Defendant, in proper person, filed a Petition for Writ of Habeas Corpus (Post-Conviction). Said petition was initially filed in White Pine County on November 3, 1998, and was subsequently forwarded to the Fourth Judicial District Court. However, the original writ was not delivered to the Court for review until several years later. On April 10, 2000, a First Amended Petition for Writ of Habeas Corpus was filed however, this writ was not verified. On April 13, 2000, this Court prepared an Order for Response. On May 25, 2000, an Answer to First Amended Petition for Writ of Habeas Corpus and Motion to Dismiss Petition was filed. On August 11, 2000, this Court prepared an Order Dismissing Writ based upon the failure to have the writ verified. On August 18, 2000, the Federal Public Defender's Office filed a Motion for Reconsideration of Court's Order Dismissing Petition for Writ of Habeas Corpus. A Response in Opposition was filed by the

State on August 28, 2000. A Reply was filed on September 1, 2000. On August 18, 2000, this Court held a telephonic conference with both counsel, after the conference, the Court prepared an Amended Order Dismissing Writ. The Writ dated April 10, 2000, was again ordered dismissed and the Court also decline to consider the Motion for Reconsideration. The Court did order that it would proceed to address the merits of the writ dated November 13, 1998.

The Court subsequently appointed counsel for Mr. Major in October, 2000. In July, 2001, this Court relieved counsel of this appointment due to counsel's failure to take any action in furtherance of Mr. Major's representation and the Court appointed new counsel. A hearing was subsequently set for December 5, 2003, the Court heard part of the evidence and continued the remainder of the hearing to allow the State to prepare for testimony which was not disclosed by Mr. Major's writ counsel. All claims raised by Mr. Major which relate to the failure to advise of the right to be sentenced by the jury or judge were separated from the writ and a new sentencing was subsequently granted. The writ/motion to correct illegal sentence hearing was concluded on January 13, 2004.

On January 8, 2004, a Motion to Modify Illegal Sentence was filed by defense counsel, Steve E. Evenson, Esq. On January 22, 2004, a Response to Motion to Modify Illegal Sentence was filed on behalf of the State and, on March 17, 2004, a Reply to Opposition to Modify Illegal Sentence filed by the defense. On May 12, 2004, the Court entered its Order Granting Motion to Modify Illegal Sentence and Order Setting Hearing for Re-Sentencing. The matter was subsequently set for trial, before a jury, commencing on Wednesday, December 8, 2004, and continuing through Wednesday, December 15, 2004.

On Wednesday, December 8, 2004, the Defendant appeared before the court for the Re-sentencing Trial. At that time a Stipulation Waiving Sentencing By the Jury (I.E. The Separate Penalty Hearing) As to the Conviction of First Degree Murder Returned In The Above-Entitled Cause On The 15th Day of March, 1996, was filed in open Court and the

prospective jurors released. The Court accepted testimony from Michael Hadley and Richard Hadley, the Defendant's half-brothers; Lori Bartee, the Defendant's half-sister; and, Jesse Dell, the Defendant's son. The Court ordered that a supplemental Presentence Report be completed and continued the re-sentencing hearing to Wednesday, February 16, 2005, at 9:00 o'clock a.m.

The Defendant appeared before the Court for final sentencing on Wednesday, February 16, 2005, at 9:00 o'clock a.m. Present and the hearing were Gary D. Woodbury, Esq., Elko County District Attorney; Steve E. Evenson, Esq., Defense Counsel; and, the Defendant. Also present representing the Division of Parole and Probation was Brett Heard.

As a result of the foregoing, this Court on February 16, 2005, finds the above-named Defendant guilty of the **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165**, for which he was found guilty and hereby sentences said Defendant on this 16th day of February, 2005, as follows:

> **The Defendant is hereby sentenced to serve life in the Nevada Department of Corrections without the possibility of parole pursuant to NRS 200.010, NRS 200.020, NRS 200.030, and NRS 193.165. Further, the Defendant is Ordered to serve a consecutive life sentence without the possibility of parole for the Use of a Deadly Weapon.**

IT IS FURTHER ORDERED, in accordance with the provisions of NRS 176.062, that the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty-five Dollars ($25.00), as an administrative assessment fee, and judgment therefore is hereby entered against the Defendant.

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

DATED this 1st day of June, 2005.

ANDREW J. PUCCINELLI
District Judge / Department II

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Andrew J. Puccinelli, District Judge, Fourth Judicial District Court, Department II, and that on this 15 day of June, 2005, I served by hand delivery by placing a copy of said document in the agency box located in the Elko County Clerk's Office, a true copy of the foregoing document to:

Elko County District Attorney

State of Nevada, Division of Parole & Probation

Elko County Sheriff

Stefanie Pattani
Stefanie Pattani

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Andrew J. Puccinelli, District Judge, Fourth Judicial District Court, Department II, and that on this 15 day of June, 2005, I served by regular U.S. Mail, a true copy of the foregoing document to:

Steve E. Evenson, Esq.
P.O. Box 1023
Lovelock, NV 89419

Nevada Department of Corrections
Offender Management Division,
Sentence Management
P.O. Box 7011
Carson City, NV 89419

Stefanie Pattani
Stefanie Pattani

Exhibit 2

Exhibit 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45427

FILED

JUL 05 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court sentencing appellant Rickey Todd Major to two consecutive terms of life in the Nevada State Prison without the possibility of parole. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 30, 1996, the district court convicted Major, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole.[1] This court dismissed Major's direct appeal from his conviction.[2] The remittitur issued on September 23, 1998.

On January 8, 2004, Major filed a motion to modify illegal sentence in the district court, arguing that he never waived his right to be

[1]Hon. Jack B. Ames, District Judge, heard the trial of this matter and determined the original sentence.

[2]Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998).

sentenced by a jury. The State opposed the motion. The district court granted Major's motion and set the matter for resentencing by a jury. Major subsequently waived his right to be resentenced by a jury and agreed to be resentenced by the district court. The district court held a new sentencing hearing on December 8, 2004, and continued the hearing on February 16, 2005. On June 1, 2005, the district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This appeal followed.

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal."[3] This court will not interfere with a sentencing decision so long as the record does not demonstrate prejudice resulting from consideration in the sentencing proceeding of information or accusations founded on facts supported only by impalpable or highly suspect evidence.[4]

First, Major argues the district court improperly imposed the maximum sentence by relying on the original sentence. We disagree. Our review of the record on appeal reveals that the district court stated on the record its intention to conduct a new hearing and not be bound by the previous sentence. Before determining the sentence, the district court reviewed the entire trial transcript and the pre-sentence investigation

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[3]Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

[4]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

report (PSI) that was prepared on February 10, 2005. At the sentencing hearing, the district court stated it gave "some weight" to a felony conviction for marijuana cultivation that Major received in Colorado after the killing, it had no doubt Major had killed the victim and had premeditated the killing, the killing was "quite violent," and that Major had waited two weeks to report the victim missing, had engaged in deliberate manipulation of the investigation and obstruction of justice after reporting the victim missing, and had evidently begun planning to manipulate the investigation and obstruct justice right after the killing. We therefore conclude that the district court did not rely on the previous sentence in making its sentencing determination.

Second, Major argues the district court improperly imposed the maximum sentence by relying on Major's refusal to admit guilt. This claim is belied by the record.[5] Major admitted guilt and expressed remorse at the sentencing hearing, stating "I'm sorry for what I did to Tina and her family." In light of the district court's express reasons for imposing the sentence, we conclude that the district court's further statement that "had you stood up and been a man with regard to what you had done, I am not certain we would be here," does not establish the district court improperly relied on Major's refusal to admit guilt in imposing sentence. Rather, it merely restates the emphasis the district court placed on Major's manipulation of the investigation and obstruction of justice in determining the sentence.

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[5]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Third, Major argues the district court improperly used a 2005 PSI that was based solely on the PSI prepared when Major was convicted in 1996 and contained no newly obtained information about Major. We disagree. Assuming the district court relied on information contained in Major's initial 1996 PSI, the district court did not err in doing so. When a defendant is resentenced following invalidation of his or her previous sentence, a supplemental PSI is not required.[6] The district court was therefore entitled to rely on any information contained in the initial PSI, whether it was included in the 2005 PSI or not. Further, at the resentencing, Major was given an opportunity to note any errors in the 2005 PSI.

Fourth, Major argues the district court abused its discretion in sentencing Major to consecutive life terms without the possibility of parole. "[A]n abuse of discretion will be found only when the record demonstrates 'prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence . . . .'"[7] Major does not argue the district court relied on impalpable or highly suspect evidence. Rather, he argues his sentence "is disproportionate to the crime in a manner that is shocking to the conscience." We disagree. Major was convicted of killing the victim by stabbing her multiple times in the neck, torso, and legs. Major's sentence,

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[6]Anderson v. State, 90 Nev. 385, 528 P.2d 1023 (1974).

[7]Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978) (quoting Silks, 92 Nev. at 94, 545 P.2d at 1161).

while severe, is within the statutory limits for his crime,[8] is not disproportionate to his crime, and does not shock the conscience.

Having concluded Major's contentions lack merit, we ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Andrew J. Puccinelli, District Judge
Steve E. Evenson
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk

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[8]See 1977 Nev. Stat., ch. 598, § 5, at 1627 (NRS 200.030); 1981 Nev. Stat., ch. 780, § 1, at 2050 (NRS 193.165).

Exhibit 3

Exhibit 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 45012

FILED

OCT 19 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 30, 1996, appellant Rickey Todd Major ("Major") was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon for the April 1988 murder of his girlfriend, Tina Dell.[1] The district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed Major's direct appeal from his conviction.[2] The remittitur issued on September 23, 1998.

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[1]A corrected judgment of conviction was entered on June 1, 2005.

[2]Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998).

On November 3, 1998, Major filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Major's unverified "first amended petition for writ of habeas corpus" was apparently filed on April 10, 2000. Major later obtained counsel to represent him in the proceedings, and counsel filed supplemental points and authorities on September 25, 2002. The State opposed the petition. The district court held a bifurcated evidentiary hearing on December 5, 2003 and January 13, 2004. On December 20, 2004, the district court dismissed Major's petition. This appeal followed.

Major raises three issues in this appeal. First, Major argues the district court held him to an erroneous burden of proof. Second, Major contends the district court erred in ruling that his trial and appellate counsel, Matthew Stermitz, was not ineffective.[3] Third, Major argues Stermitz's cumulative errors deprived him of a fair trial.

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[3]To the extent Major raised them independently of his ineffective assistance of counsel claims, Major's other claims were barred by the law of the case or waived. See Pellegrini v State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); NRS 34.810(1)(b). Major's claims regarding juror misconduct, the State's failure to disclose evidence, the State's participation in defense ex parte motions, insufficient evidence, the district court's abuse of discretion in sentencing and the district court's error in denying appellant's motion to admit polygraph evidence, refusing to give proffered jury instructions and failing to canvass appellant on his right to testify were resolved on their merits in Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998). Appellant's claim that his rights were violated by Stermitz's conflict of interest was also resolved on its merits in Major v. State, Docket No. 30521 (Order

continued on next page . . .

The burden of proof

Major argues the district court erred in requiring him to prove the factual allegations supporting his ineffective assistance of counsel claims by "strong and convincing proof." In Means v. State,[4] this court rejected the "strong and convincing proof" burden that was articulated in Davis v. State[5] in favor of the more lenient "preponderance of the evidence" standard. Means applies to Major because the Means holding related to procedure in post-conviction proceedings, and Major's post-conviction proceedings were pending when Means was decided.[6] We conclude Major failed to prove his allegations under the "preponderance of

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. . . continued

Dismissing Appeal, August 28, 1998). Major's claims regarding the State's expert witness's qualifications and methods, erroneous and/or unfair jury instructions, prosecutorial misconduct and overreaching, inability to seat an impartial jury due to pre-trial publicity, inability to testify on his own behalf due to the pendency of his appeal of a perjury conviction, and coerced and/or involuntary statements to investigators were waived by appellant's failure to present them to the trial court and/or raise them in his direct appeal. Major's claims regarding the propriety of his original sentence are moot, as Major successfully filed a motion to correct illegal sentence, and was resentenced. A corrected judgment of conviction was entered on June 1, 2005.

[4]120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

[5]107 Nev. 600, 817 P.2d 1169 (1991).

[6]See, e.g., Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002).

evidence" standard. Thus, we conclude that even if the district court did err in applying the "strong and convincing" standard of proof, any error was harmless.

Counsel's effectiveness

Major argues the district court erred in rejecting his claims that Stermitz was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.[7] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[8] The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.[9]

First, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to communicate with Major. The district court found that Stermitz had the assistance of Major's former counsel's reports and notes and of Major's statements to and interviews

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[7]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[8]Strickland, 466 U.S. at 697.

[9]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

with investigators. At the evidentiary hearing, Stermitz testified he met at least four times in person with Major, who was living in Colorado while awaiting trial. Stermitz also testified to written communications with Major. Further, Major failed to specify what additional communication with Stermitz would have accomplished or how it would have changed the outcome of his trial. Thus, the district court did not err in rejecting this claim.

Second, Major claims the district court erred in rejecting his claim Stermitz was ineffective for failing to file pre-trial motions. The district court found that Major failed to state any facts to support this contention. We agree. The record before us reveals that Major failed to specify which pre-trial motions Stermitz should have filed or how those motions would have changed the outcome of his case. The district court did not err.

Third, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to testimony regarding statements Major made to investigators or to seek suppression of those statements based on Miranda[10] violations or on Major's inability to make voluntary statements while under the influence of cocaine. Major failed to specify any facts to show that his Miranda rights were violated during any of the statements and interviews he gave to investigators or

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[10]Miranda v. Arizona, 384 U.S. 436 (1966).

that his drug use rendered his statements involuntary. The district court noted that Major initiated most of his contact with investigators, that he was interviewed in his home in Colorado while his wife was in the next room, and that he was interviewed in Elko with his attorney present. Major also failed to state any facts to show his cocaine use rendered his statements involuntary. Further, we note that trial testimony established Major was using cocaine after Dell's disappearance, that people using cocaine can experience so-called cocaine paranoia, but that Major denied experiencing cocaine paranoia during that time. We therefore conclude the district court did not err in rejecting this claim.

Fourth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to argue for lesser included offenses or to attempt to explain Major's statements to police based on Major's cocaine use after Dell's disappearance. At the evidentiary hearing, Stermitz testified that Major told him he was innocent and that he was only interested in an acquittal, not conviction of a lesser included offense. Stermitz further testified that he thought the jury would disbelieve Major's claim of innocence if Stermitz first argued innocence but then argued for conviction of a lesser included offense. This was a tactical decision by Stermitz, and counsel's tactical decisions are "'virtually

unchallengeable absent extraordinary circumstances.'"[11] Major failed to demonstrate extraordinary circumstances or that Stermitz's decision not to argue for lesser included offenses was unreasonable. In addition, Investigator Williams testified at trial that he had asked Major if he was experiencing cocaine paranoia and Major said he was not. Thus, the district court did not err in rejecting this claim.

Fifth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to move for a change of venue before trial. The district court ruled that this claim lacked merit. We agree. At the evidentiary hearing, Stermitz testified he did not believe a motion to change venue would succeed and that no juror during the voir dire indicated he or she could not be impartial.[12] Major failed to demonstrate that Stermitz's performance was deficient in this respect. Major also failed to demonstrate that pre-trial publicity rose to the level from which prejudice would be presumed.[13] Although Major claimed Stermitz failed to properly voir dire the jury pool on pre-trial publicity, he

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[11]See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

[12]See NRS 174.455.

[13]See, e.g., Sonner v. State, 112 Nev. 1328, 1336, 930 P.2d 707, 712-13 (1996) (concluding pre-trial publicity in a high-profile capital murder case involving the murder of a police officer did not rise to the level of publicity for which prejudice would be presumed).

asserted no specific facts to support this claim and did not provide the transcript of the voir dire. "The burden to make a proper appellate record rests on appellant."[14] Major has failed to demonstrate that the district court erred in rejecting this claim.

Sixth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to effectively examine a juror regarding whether she had discussed the case outside the proceedings. The trial court held an in-chambers meeting with the parties and the juror, where the juror related a comment a coworker had made to her and said she questioned the coworker's credibility. The juror also said the statement would have no effect on her ability to serve impartially as a juror. Stermitz objected to the juror's remaining on the jury, but the district court allowed her to remain. Major failed to state how further examination of the juror would have changed the outcome of his trial. The district court did not err in ruling that Major was not entitled to relief on this claim.

Seventh, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to call expert witnesses. Specifically, Major argued Stermitz should have called forensic anthropologist Dr. Walt Birkby, psychologist Frank Hadley (Major's brother), and a DNA expert. The district court found that Stermitz was

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[14]See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).

not ineffective, as Stermitz testified at the evidentiary hearing that Dr. Birkby had told Stermitz that his testimony would not be helpful to the defense. Stermitz further testified that he believed Frank Hadley thought Major had killed Dell, and that expert DNA testimony would not be useful because the blood found at the crime scene could not be matched to either Major or Dell. Stermitz's decisions to call or not call particular witnesses were tactical, and did not fall below an objective standard of reasonableness under the circumstances.[15] We note that, contrary to Major's assertion, Stermitz had the DNA testing report admitted into evidence, and the jury therefore had the report to consider in its deliberations. We further note that the substance of Dr. Birkby's report that was beneficial to Major came into the record, as Stermitz cross-examined Dr. Brooks regarding Dr. Birkby's findings and her discussions with him. Thus, the district court did not err in finding that Major was not entitled to relief in this regard.

Eighth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to call his defense investigator, James Grady. Major claims Grady would have testified that he discovered evidence of Major's innocence as well as the existence of two

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[15]See Doleman, 112 Nev. at 848, 921 P.2d at 280-81 (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).

other suspects.[16] Major has failed on appeal to point to anything in the record that would substantiate this claim or demonstrate that the district court erred in concluding that he was not entitled to relief on this ground. In the proceedings below, Major failed to allege or demonstrate what specific evidence Grady would have testified to discovering, whom Grady would have identified as a suspect, or how such testimony would have altered the outcome of Major's trial.[17] Much to the contrary, during the State's cross-examination at the evidentiary hearing, Major acknowledged that he was not aware of anything specific that Grady had discovered that would have altered the result of Major's trial. The district court did not err in rejecting this claim.

Ninth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to voir dire the State's forensic anthropologist, Dr. Brooks, on her qualifications at the beginning of her testimony. At the beginning of its direct examination, the State established that Dr. Brooks had an M.A. and a Ph.D. in physical anthropology from the University of California, Berkeley, and had been a

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[16]In his evidentiary hearing testimony, Major referred to a State's trial witness who was given a polygraph test and "flunked it." Major failed to state who this person was or to establish that evidence of this person's polygraph test results would have been admissible at trial and would have changed the outcome of the trial. See generally Corbett v. State, 94 Nev. 643, 584 P.2d 704 (1978).

[17]See Hargrove, 100 Nev. at 502, 686 P.2d at 222.

practicing forensic anthropologist for twenty years. After Dr. Brooks had given some testimony, Stermitz questioned her on voir dire as to whether her expertise allowed her to conclude what caused the injuries visible on Dell's skeletal remains beyond "something sharp." On cross-examination, Stermitz established that Dr. Brooks had only done approximately five investigations into potential sharp force trauma to skeletal remains.

In the post-conviction proceedings below, Major did not establish that Dr. Brooks was actually unqualified to give expert testimony in forensic anthropology. Thus, he failed to demonstrate that further or earlier voir dire would have changed the outcome of his trial. The district court did not err in rejecting this claim.

Tenth, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to consult outside experts in preparing to cross-examine Dr. Brooks. Stermitz testified at the evidentiary hearing that he spoke several times with Dr. Birkby. We conclude the district court did not err in determining that Major failed to demonstrate that Stermitz's performance was deficient or that further consultation would have changed the outcome of Major's trial.

Eleventh, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to challenge the chain of evidence or to impeach Dr. Brooks on her methods when Dr. Brooks testified that she had taken the skeletal remains to her home and laid them out on a sheet on her patio. Major also notes that when Dr. Birkby received the remains, some of the labels placed on them had detached.

The district court concluded that the chain of evidence was not broken, as the remains were accompanied by an investigator, the evidence custodian, at all times. We agree. Major failed to demonstrate that a challenge to the chain of evidence or impeachment of Dr. Brooks based on her methods would have changed the outcome of his case. Major's expert at the evidentiary hearing testified that any trauma to the remains that occurred on Dr. Brooks' patio would be identifiably post-mortem. Other than the testimony of Major's expert at the evidentiary hearing, nothing in the record indicates that Dr. Brooks' methods compromised the integrity of her scientific findings. The trial jury was capable of assessing Dr. Brooks' credibility. The district court did not err in rejecting this claim.

Twelfth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to challenge the reasonable doubt, premeditation and deliberation, and malice instructions. The district court found that the reasonable doubt instruction conformed to the language required by NRS 175.211 and that Stermitz was not deficient for failing to object. The district court also found that the premeditation and deliberation instructions tracked Kazalyn v. State, which was the proper instruction at the time of Major's trial.[18]

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[18]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). The so-called "Kazalyn instruction" was later disapproved of in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), but Byford was held not to be retroactive in Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

Although Major has failed to include the jury instructions in his appendix, his first amended petition purportedly quotes one of the instructions as stating: "Malice is implied where an involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent." Major contends this instruction improperly created a presumption of malice in the absence of provocation. We disagree. This instruction had no relation to the absence of provocation; rather, the instruction explained the difference between murder and involuntary manslaughter.[19] We therefore conclude the district court did not err.

Thirteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to testimony by two witnesses about the existence and contents of at least one photograph of Dell's body. No such photographs were ever located or admitted into evidence at trial. James Guisti testified at trial, however, that Major showed him two photographs of Dell's body. A police investigator also testified that Major had claimed the man responsible for Dell's death showed Major a photograph of Dell's body. At the evidentiary hearing, Stermitz testified he did not believe he had grounds to object and that the district court would likely find the testimony about the photographs

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[19]See 1983 Nev. Stat., ch. 409, § 2, at 1014 (NRS 200.070).

relevant and not more prejudicial than probative. Further, Stermitz testified that he did not know where the photographs were and had "no way to get them." Major also maintained that he never had possession of the photographs and did not know where they were.

NRS 52.255 provides in part that an original photograph is not required and "other evidence" of its contents "is admissible, if:"

> 1. All originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent;
>
> 2. No original can be obtained by any available judicial process or procedure;
>
> 3. At the time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
>
> 4. The . . . photograph is not closely related to a controlling issue.

Major failed to establish by a preponderance of the evidence that either he or Stermitz could have obtained or preserved the alleged photographs for admission at trial through any available judicial process or procedure. Therefore, the district court did not err in rejecting this claim.

Fourteenth, Major argues the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to "prosecutorial misconduct and overreaching." Major contended Stermitz should have objected that the prosecution was engaging in "misconduct

and overreaching" by prosecuting him for the third time for this crime. Both prior prosecutions were dismissed without prejudice, and the State was entitled to prosecute Major again. Major failed to demonstrate how objecting on this ground would have changed the outcome of his trial. The district court did not err in rejecting this claim.

Fifteenth, Major claimed Stermitz was ineffective for failing to challenge and object to the manner of the search for Dell's skeletal remains, to discover what had happened to any additional remains, or to test a "thread" that Dr. Brooks reported finding attached to one of the vertebrae that showed a possible cut mark. At the evidentiary hearing, Stermitz testified he thought the lack of additional remains was good for Major's case because it limited the number of potential injuries that could be identified. Stermitz's decision not to risk producing evidence that could implicate Major was tactical, and counsel's tactical decisions are "'virtually unchallengeable absent extraordinary circumstances.'"[20] Moreover, Major failed to demonstrate how the failure to assert any objections on these grounds fell below an objective standard of reasonableness or would have changed the outcome of the trial. Thus, the district court did not err in this regard.

Additionally we note that to the extent Major claims his original counsel, David Lockie, was ineffective for failing to obtain a

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[20]See Doleman, 112 Nev. at 848, 921 P.2d at 280-81 (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).

dismissal with prejudice of the charges or to prevent the release of Dell's remains to her family, Major failed to show how Lockie's performance prejudiced him. Major has asserted no facts establishing he was entitled to dismissal with prejudice, and Dell's remains were examined by at least Dr. Brooks, Dr. Birbky, and the medical examiner before they were released. Accordingly, the district court did not err in rejecting this claim.

Sixteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to request a continuance of the first sentencing proceeding while the appeal of Major's perjury conviction was pending.[21] This issue is moot. Major was subsequently resentenced after filing a successful motion to correct illegal sentence.

Seventeenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to cross-examine James

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[21]Major's brief in this appeal argues for the first time that Stermitz was ineffective for failing to seek a continuance of the trial while the perjury conviction appeal was pending so that Major could testify on his own behalf without being impeached by a perjury conviction. Major is barred from presenting this claim for the first time in this appeal. Further, as a separate and independent ground for denying relief on this claim, Major's perjury conviction was not the only factor weighing against his taking the stand. At the evidentiary hearing, Major and Stermitz both testified that Major had told Stermitz his previous cross-examination by the prosecutor in previous cases had "not gone well." Major also had another felony conviction, with which he could have been impeached. Major failed to state any grounds upon which Stermitz could have sought a trial continuance while the perjury conviction was pending.

Guisti. As noted, Guisti testified Major showed him photographs of a body that looked like Dell's with what appeared to be chest wounds. The record before us reveals, however, that Stermitz did cross-examine Guisti. Major has failed to demonstrate what additional questions Stermitz should have asked Guisti about the photographs or how such questions would have changed the outcome of the trial. Thus, Major failed to demonstrate any entitlement to relief in this respect, and the district court did not err in rejecting this claim.

Eighteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to cross-examine Gary Worthen about whether Worthen was a suspect in Dell's killing, had been questioned by investigators, or had taken a polygraph examination. Stermitz's cross-examination of Worthen at trial elicited that Worthen had helped Major conceal potential evidence and clean up the suspected crime scene and had possession of Dell's ring after her disappearance. Stermitz argued in closing that Worthen might have killed Dell. Major failed to demonstrate that further cross-examination of Worthen would have changed the outcome of the trial. The district court correctly rejected this claim.

Major also claims the district court erred in rejecting Major's claim that appellate counsel was ineffective.[22] To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[23] Appellate counsel is not required to raise every non-frivolous issue on appeal.[24] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[25]

Major claims Stermitz should have argued (a) trial counsel's conflict of interest, (b) Dr. Brooks' qualifications to serve as an expert witness, (c) reasonable doubt instruction, (d) premeditation and deliberation and malice jury instructions, (e) prosecutorial misconduct, (f) change of venue, (g) Miranda violations, and (h) denial of sentencing by jury. As stated above, we conclude issues (a) – (g) did not have a reasonable likelihood of success on appeal, and (h) was rendered moot by

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[22]Major was originally represented during his direct appeal by Matthew Stermitz; David Houston substituted in as counsel of record on January 29, 1997.

[23]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

[24]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[25]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Major's successful motion to correct illegal sentence, which led to his resentencing in 2005. Thus, the district court did not err in concluding that Major failed to demonstrate that Stermitz's appellate representation fell below an objective standard of reasonableness or omitted any issues on appeal that would have had a reasonable probability of success.

Cumulative error

Finally, Major argues that the prejudice from Stermitz's errors, taken cumulatively, rendered his trial unfair.[26] Because we conclude that none of Stermitz's alleged errors at trial were prejudicial, we disagree.

Having concluded Major's contentions lack merit, we ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

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[26]See, e.g., Browning v. State, 120 Nev. 347, 372, 91 P.3d 39, 56 (2004).

cc: Hon. Andrew J. Puccinelli, District Judge
Steve E. Evenson
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk

Exhibit 4

Exhibit 4

NO. 6718
DEPT NO. II

FILED

'95 AUG -2 A9:49

ELKO CO. DISTRICT COURT
CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

THE STATE OF NEVADA,

Plaintiff,

vs.

CRIMINAL

INFORMATION

KICKEY TODD MAJOR,

Defendant(s).

GARY D. WOODBURY Deputy District Attorney for the County of Elko, State of Nevada, in the name and by the authority of the State of Nevada, informs the above-entitled Court that KICKEY TODD MAJOR, Defendant above named, on or about the 10th day of April, 1988, at or near the location of 815 Camp Street in the City of Carlin, County of Elko, State of Nevada, committed a crime or crimes described as follows:

COUNT I

OPEN MURDER, (INCLUDING FIRST DEGREE MURDER AND ALL LESSER INCLUDED OFFENSES) WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033, AND NRS 193.165.

That the Defendant did willfully, unlawfully, feloniously with malice aforethought, and with deliberation and premeditation kill and murder another human being, one Tina Doll, with the use of a deadly weapon, to-wit: a knife or some similar weapon, in the following manner: by stabbing Tina Doll to death. That said crime occurred in the County of Elko, State of Nevada.

89801
ILENE JONAS, 3920 EAST IDAHO ST., ELKO, NV 89801
CHIEF LARRY STOKES, CARLIN PD, P.O. BOX 693, CARLIN, NV 89822
MARK THOMPSON, 90 EAST 2ND, BATTLE MOUNTAIN, NV
DEBORAH VINING, LIFE CODES CORP., OLD SAW MILL RVR RD., VALHALLA, NY 10595
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TOM MOOTS, 555 WRIGHT WAY, CARSON CITY, NV 89711
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OFFICER WILLIAM CALLISTER, CRAIG POLICE DEPT., CRAIG, CO 81625
DEPUTY CHUCK LOWE, WASHOE CO. SHERIFF'S OFC, 911 PARR BLVD, RENO, NV
JANE MATSON, 1445 GUMMOW, FALLON, NV 89406
DR. KEVIN C. MCELFRESH, LIFECODES CORP., OLD SAW MILL RIVER RD, VALHALLA, NY 10595

DA No. F-95-16190-1

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

Dated: AUGUST 1, 1995

GARY D. WOODBURY
District Attorney

Witnesses known to the District Attorney at the time of filing the above Information, if known, are as follows:

CHARLES WARNER, 496 100 EAST, P.O. BOX 187, GEORGETOWN, ID 83239
RICHARD WESTERWELLE, 1601 MUCHLER, CARLIN, NV 89822
ELAINE WESTERWELLE, 1601 MUCHLER, CARLIN, NV 89822
MARK WILLIAMS, C/O TOM MOORE - NDI, 555 WRIGHT WAY, CARSON CITY, NV 89711
GARY WORTHEN, 262 33RD STREET, OGDEN, UT 84401
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JOHN COMPSTON, C/O NDI, 555 WRIGHT WAY, CARSON CITY, NV 89711
JOHN COLEMAN, LIFE CODES CORP., OLD SAW MILL RIVER, VALHALLA, NY 10595
VERNA MOORE, 2508 LACKAGANNA, LAUREL, MT
VICKIE MICHELI, SINCLAIR STATION OR CORNER OF 12TH AND RAILROAD, CARLIN, NV 89822
ANDREA CARR, 4141 GARNET, BOISE, ID 83703
VALERIE POOLEY, 711 RUNYAN AVENUE, ARTESIA, NM 88210
DR. STEPHEN PRICE, 2552 IDAHO STREET, 3176 MIDLAND DRIVE, ELKO, NV

Exhibit 5

Exhibit 5

INSTRUCTION NO. 10

Premeditation or intent to kill need not be for a day, an hour or even a minute, for if the jury believes from the evidence that there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing, it was willful, deliberate and premeditated.

The intention to kill and the act constituting the killing may be as instantaneous as successive thoughts of the mind. It is only necessary that the act constituting the killing be preceded by and be the result of a concurrence of will, deliberation and premeditation on the part of the accused no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the acts constituting the murder.

Exhibit 6

Exhibit 6

INSTRUCTION NO. 11

To make a killing deliberate as well as premeditated, it is unnecessary that the intention to kill shall have been entertained for any considerable length of time. It is enough if there is time for the mind to think upon or consider the act, and then determine to do it. If, therefore, the killing is not the instant effect of impulse - if there is hesitation or doubt to be overcome, a choice made as result of thought, however short the struggle between the intention and the act - it is sufficient to characterize the crime as deliberate and premeditated murder. In other words, one may be guilty of murder in the first degree although the intent to commit such a homicide is formed at the very moment the fatal act is committed.

Case No. CV-HC-17-0248

Dept. II

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

ooOoo

RICKEY TODD MAJOR, :

Petitioner, :

v. : ORAL ARGUMENTS

RENEE BAKER, Warden, et. al. :

Respondents. :

_____/

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on October 6, 2017, at the hour of 9:16 a.m. of said day, in Elko, Nevada, before the HONORABLE ALVIN R. KACIN, District Judge.

Reported by Lisa M. Manley, CCR #271

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Reported by Lisa M. Manley, CCR #271

APPEARANCES

For the Petitioner: JONATHAN M. KIRSHBAUM, ESQ.
Federal Public Defender's Office
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For the Respondent: MARK S. MILLS, ESQ.
Deputy District Attorney
540 Court Street
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PROCEEDINGS

THE COURT: Okay. This is Case CV-HC-2017-248. This is Rickey Todd Major, the petitioner, versus James Dzurenda, Director, Nevada Department of Corrections, respondent.

I guess we have also got Renee Baker, warden, as respondent, whomever respondent.

Today we have Jonathan Kirshbaum here to represent Mr. Major, correct?

MR. KIRSHBAUM: Yes, Your Honor.

THE COURT: All right. Good morning.

MR. KIRSHBAUM: I am also going to waive Mr. Major's appearance since it's just going to be oral argument today.

THE COURT: Thank you very much. We also have Mark Mills, Elko County deputy district attorney, here to represent really I think the real party in interest, right, the State of Nevada.

So anyway, argument on a petition for post-conviction habeas relief. It looks like the -- this is a successive petition filed by Mr. Major, and it has got one claim.

And I have read your briefs with great interest. I took them home last night, kind of perused them again, marked them up a little bit.

It occurred to me before I came in, and I hate to kind of throw a curve ball in your decision to waive Mr. Major's appearance, but I did want to put on the record -- and maybe this doesn't affect it -- but this was a case, actually one of the first cases I worked on as a law clerk in 1994 in the Seventh Judicial District Court. I worked for Judge Dan Papez down there.

And I think this case was brought in Eureka County at some point and the case was dismissed. And I was the law clerk working on that case at the time and Judge Papez dismissed it. And if memory serves, it was because the remains of the deceased were found in Eureka County in Palisade Canyon in a sleeping bag.

We actually had a view out there, as I recall. I think we all went out and viewed the area with the deputy district attorney, who interestingly enough was Gary Woodbury, who ended up becoming the D.A. who prosecuted this case in Elko County.

I think it -- I guess the prosecution occurred in 1996. Anyway, late '90s, I think.

MR. KIRSHBAUM: I think it may have been '93. But yeah, it was within that same time period.

THE COURT: And I think at some point Mr. Woodbury prosecuted Mr. Major in some perjury case down there. And if memory serves, I was the law clerk there

then as well.

I don't think that has anything to do with this case. It might have had something to do with the allegation that he lied in a bail motion in the murder case, something like that.

MR. KIRSHBAUM: Yeah, they -- we were actually discussing it earlier. There was a complicated procedural history. There was the proceedings in the Seventh J.D. and I think it -- he was eventually prosecuted for perjury.

THE COURT: But that was overturned on appeal perhaps? I am not sure.

MR. KIRSHBAUM: I'm not -- I can't say.

So do you -- do you mind if I ask you a question?

THE COURT: Go ahead.

MR. KIRSHBAUM: So you say that you were the law clerk. You were the law clerk to -- you were working at the court, or were you a law clerk to Mr. Woodbury?

THE COURT: No, no. I was working at the court for Judge Papez. I served as his clerk between August -- September of '94 through October of '95. No, wait, August of '95. It was a year clerkship.

Then I came up and I was in private practice with my predecessor, actually, Judge Puccinelli, when he was still in private practice.

Of course I had to take the bar exam in Nevada.

I didn't grow up in this state. I took the bar in another state in 1994, which is when I graduated law school.

MR. KIRSHBAUM: Um-hmm.

THE COURT: Took the Nevada bar exam in 1995. I think I got -- of course, back then it was offered only in July, so that's when I took it.

I got my ticket in October, I believe, and began practicing in Elko in early December.

Then I joined the Elko County D.A.'s office in 1997, which I think is after this case would have been prosecuted -- prosecuted or gone to a jury, gone to verdict. And then I was there until 2006.

And then I became a judge in 2007.

So that's my history.

MR. KIRSHBAUM: Okay.

THE COURT: I don't know if that has any bearing on this or if you feel I should disqualify myself. It's something I should have probably brought up before this, but I didn't think a whole lot of it really.

MR. KIRSHBAUM: Well, I am -- my position is that I don't -- it doesn't sound to me like it would be disqualifying. I mean, what you mentioned, I also agree with you that this is probably a discussion I would have rather had with Mr. Major here.

THE COURT: Okay.

MR. KIRSHBAUM: But -- so in my mind, out of -- I didn't hear anything disqualifying. I would say the closest was maybe when you said that you went to the scene. I don't know if that has an impact on -- it obviously wouldn't have an impact on any of the legal issues we are discussing outside of the potential prejudice.

But I am not sure if that is something -- it wasn't in Your Honor's order for oral argument. It didn't even mention we would be addressing prejudice.

THE COURT: Yeah, and I apologize for that. We get busy and we enter orders.

MR. KIRSHBAUM: Yeah.

THE COURT: I didn't think a whole lot of it until after, really, we started coming up to this argument now.

If you have any questions for me, I'm more than willing to answer them. If you want to take a break, we can do that, and then, you know, you can ask away.

I -- like I said, the case was dismissed down there. I really don't know anything about this case. I have no independent memory other than we went out to Palisade Canyon where allegedly the remains of the victim were found.

I mean, clearly, I guess the idea is this lady's been a victim of a violent crime, murder.

MR. KIRSHBAUM: Um-hmm.

THE COURT: I know what the arguments are in this case, but --

MR. KIRSHBAUM: You know --

THE COURT: I -- I am more than willing to listen to the arguments today. And if you would like to take this issue up with your client and then get back to me, I could wait before I made a decision.

I mean, I'm very busy. It's going to take me awhile to make a decision anyway.

MR. KIRSHBAUM: Honestly, when -- if you were working for the D.A.'s office, it might be a little bit more problematic.

The fact that you were working for the Court isn't as problematic, I don't think, for me because it would be no different as if we had brought this petition actually -- if he had got convicted in the Seventh District and it went back, it would go back before the same judge, if that judge was working there.

THE COURT: Right.

MR. KIRSHBAUM: So I don't think that your connection to the case as working for the Court is disqualifying. That's my initial feeling.

But I -- I like that last proposal that you made. We should do the oral argument and I -- I will talk to Mr.

Major.

THE COURT: You're here from Vegas, right?

MR. KIRSHBAUM: Yeah.

THE COURT: And I apologize for not bringing it up earlier. I think my feeling was, yes, it was not disqualifying, but that I would at least make the record.

MR. KIRSHBAUM: Um-hmm.

THE COURT: So that's what I have done this morning.

But you're here.

MR. KIRSHBAUM: Yeah.

THE COURT: You've obviously taken a lot of time working on these briefs. Mr. Mills had to come from across the way here, but I'm sure he is ready to make his argument as well.

MR. KIRSHBAUM: Yeah.

THE COURT: So I will be more than happy to take the arguments.

Go ahead and talk to Mr. Major, please, Mr. Kirshbaum, and then I will just wait to hear from you.

Like I said, I think it would take a little while for me to get to this decision because I have got a lot of pressing -- actually NRS 432B matters right now and some other things that I need to get to that are more acute than this.

So okay. Anyway, all right. With that, we can go to the arguments, I think.

Go ahead, Mr. Kirshbaum.

MR. KIRSHBAUM: Thank you, Your Honor.

THE COURT: Thank you.

MR. KIRSHBAUM: We are here today on Mr. Major's petition. It is a successive petition. However, Mr. Major can establish good cause and prejudice to overcome the procedural bars.

Good cause is based on a previously unavailable constitutional rule. Last year, in 2016, the United States Supreme Court decided Montgomery versus Louisiana.

And in that case they established the new constitutional rule; namely, that the substantive exception to Teague applies in state courts as a matter of due process.

And what is significant about that is now that it is constitutionalized, now that the substantive exception is constitutionalized by the United States Supreme Court, the state courts are now required to apply the substantive exception in the way that the Supreme Court has interpreted and the way that the Supreme Court has applied it.

And then three months after Montgomery, in April of 2016, the Supreme Court decided Welch versus United States. And in Welch the Supreme Court made abundantly

clear that the substantive exception is not just limited to new constitutional rules, but it also applies to statutory interpretation cases.

And Welch also made clear exactly how the substantive exception should be applied to statutory interpretation cases.

So here's what the Supreme Court stated in Welch. And I'm going to quote from that decision, which would be 136 S. Ct. 1267.

"Decisions that interpret a statute are substantive if and when they meet the normal criteria for substantive rule, when they alter the range of conduct or the class of persons that the law punishes."

What is important about that is that is new. What they said right there is new. The Supreme Court has never stated that before.

The Court had never explicitly linked those two concepts. They did not explain how this substantive exception applies to statutory interpretation cases.

And so this language from Welch has a direct impact both on Nevada's retroactivity rules and Mr. Major's case.

In Nika, which was from 1998, Nika versus State, the Nevada Supreme Court stated that Byford represented a change in the interpretation of the first-degree murder

statute that narrowed the meaning of the statute.

So the Nevada Supreme Court explained that when there is an interpretation of a statute that narrows it, it can either be classified as a clarification or a change.

And they are relying upon these two earlier Supreme Court cases: Bunkley versus Florida and Fiore versus White.

And in those cases the concepts are that due process clause required that a clarification in a statute applied to everybody. It didn't make a difference when the person's conviction became final. A clarification, as a matter of due process, applied to everybody.

If there is a change in law, it only applies to those convictions that had not yet become final. And that's a matter of due process.

So in Nika, and actually the Supreme Court stated this in Fiore and Bunkley, those actually are not considered retroactivity issues. They're considered due process issues.

Due process requires that a clarification applies to everybody; a change applies to those convictions that had not yet become final.

Then the Nevada Supreme Court went one step further and said, "but we are refusing to apply the narrowing interpretation retroactively."

So they said that there is a separate question here of retroactivity.

And they said that a narrowing definition is just a matter of statutory interpretation, so that does not fall under Teague, no retroactivity implications in a statutory interpretation case.

But that concept is now completely contrary to Montgomery and Welch.

As the Supreme Court made clear in those two cases, as a matter of federal due process, the retroactivity rules require retroactive application of a new statutory interpretation that alters the range of conduct or the class of persons that the law punishes.

The narrowing definition set forth in Byford, that's Byford versus State from 2000, by its very nature is a substantive rule. That is exactly what the Nevada Supreme Court said in Nika. It had a narrowing effect on both the range of conduct and the class of persons who can be punished by that law.

Thus, Byford's change in the meaning of the first-degree statute is retroactive under the substantive exceptions of Teague and must be made available to petitioners like Mr. Major whose convictions became final prior to Byford.

And from here I want to get back to this concept

about the newness of Welch, because it was one of the arguments that -- it was the main argument that the State made in their motion to dismiss.

Schriro was -- Schriro versus Summerlin was a case from 2004. And it's an important case because that's actually the first case where the United States Supreme Court defined what the substantive exception actually meant, or at least they put forward a new definition that is now the definition.

But Schriro does not do what Welch does. That decision did not indicate how the substantive exception applied in statutory interpretation cases.

They made clear that the substantive exception does apply, but they don't say, "this is how you take the substantive exception and apply it."

And that's important because in Schriro the Court itself only relied -- or cited to Bousley, Bousley versus United States, which is a decision from 1998 -- or it may be '97, I apologize -- in which the Supreme Court first talked about this clarification idea.

And they said that -- in that case it was a clarification of a prior decision, Bailey versus United States. And I apologize, I am throwing all these cases out, but these are all complicated concepts and interwoven with a lot of different case law.

THE COURT: They are. I'm happy that I read the briefs very carefully again last night.

MR. KIRSHBAUM: Yeah, yeah.

THE COURT: I copy them and then I underline them and highlight them. And there are a lot of cases in play here.

MR. KIRSHBAUM: Mr. Mills, I know, has a flow chart. And I wish I had had the foresight to do something like that actually. Visual probably helps here.

So in Bousley, the United States Supreme Court did find that a clarification like in that -- the decision in Bailey versus United States would apply to convictions that had become final; meaning they had to be made available on collateral review.

But what is very, very interesting about Bousley -- and this isn't something which I went into detail in in my response but I'm going to mention here -- is that Bousley was specifically not a Teague case. In other words, the Supreme Court said we are not using Teague, this does not fall under Teague.

So at the time Bousley was decided, it was not a Teague case.

But Schriro comes along and hints that, well, maybe really what we were saying there was that it was a substantive exception case.

They don't say it, but they cite to Bousley when they talk about their new definition of what a substantive exception means.

But at this point now with Welch we know that the Supreme Court now views Bousley as a substantive exception case.

And that's the import of Welch is that it's not until Welch where they are saying, no, what we did in Bousley, that actually was an application of the substantive exception.

They didn't say that in Schriro. They actually went into an extended discussion in Welch of exactly what they were doing in Bousley or what -- how the substantive exception worked in Bousley.

And that led them to that statement, which, you know, where it -- it is absolutely clear in Welch that decisions that interpret a statute are substantive if they meet the substantive exception, and that's all that matters.

So there is no other interpretation of the language in Welch that any new statutory interpretation, whether it's a clarification, whether it's a change, applies retroactively as long as it meets the substantive exception.

They don't -- in Welch they don't distinguish

between the two. And there is a reason why they don't distinguish between the two is because retroactivity is a different concept than this clarification versus change; it's one step further.

Because in cases like Bunkley and Fiore, the Supreme Court states this specifically in these cases, they originally granted cert in Fiore versus White to determine whether a change in law like Byford applies retroactively.

That was the original ground in which they granted cert. This is an issue that's been on the Supreme Court's mind for many, many years. And that case dates back to 1999.

But in Fiore they ended up certifying the issue to the state court, saying, was this a change, what exactly -- what exactly -- what's the meaning of what you did when you issued this statutory interpretation.

And instead of it being a change, the Pennsylvania Supreme Court said, no, it was just a clarification, it was a clarification, it's what the law always meant.

So that actually took retroactivity off the table. So when it went back up to the Supreme Court after the certification, the Supreme Court said, oh, this is a due process issue, it's different.

Because at that point, you know, Montgomery

wasn't on the books so the substantive exception hadn't been constitutionalized yet. So they just said, no, this is a due process issue, a clarification applies to everybody.

I mean, maybe that was a sort of preview of what they are going to do down the road.

But then Bunkley comes along, and Bunkley was not also -- it was also not a retroactivity issue; it was really a Fiore issue.

What they were saying is, is that when there's a change in law, we're also going to say that this is a similar type of due process concept.

And so they remanded it down to the Florida Supreme Court -- the Florida Supreme Court to determine when the change actually occurred. Because if the change occurred before the conviction became final, then Bunkley was entitled to relief.

But it left that question open. So if it went -- it left the retroactivity question open. So if Bunkley went back down to the Florida Supreme Court and they said, well, no, the change occurred after Bunkley's conviction became final, then that would have reopened the question of whether that change then applied retroactively to Bunkley. And that's just been an open question all of these years.

And I think that there is just no way of reading

Welch in which that question has now been decided.

They have just said that this is what the substantive exception means: It means that anything that meets the substantive exception, a statutory interpretation that meets the substantive exception, must apply retroactively.

And that's exactly what is going on here. Because in Byford the Nevada Supreme Court narrowed the interpretation. It clearly altered the range of conduct of a class of persons that the first-degree murder statute punishes.

So that then --

THE COURT: Which the Court acknowledged in Nika.

MR. KIRSHBAUM: Yes. In Nika they made abundantly clear that they were -- that they had narrowed the definition, which is why the whole change-versus-clarification issue even came up.

So once this decision, Byford, becomes retroactive, then it has a direct impact on Mr. Major's case.

One thing I would note is that -- so I'm going to address the prejudice here. The State in their papers didn't even bring up prejudice. And I think there is a reason for that, is that Mr. Major's case is the quintessential situation where Byford and a -- the

definition of deliberation would have an impact.

The jury instruction, meaning the Kazalyn instruction, lowered the State's burden of proof, meaning they didn't have to prove the element of deliberation.

And that was critically important here because there was essentially no evidence of deliberation on Mr. Major's part. The evidence here was far more consistent, to the extent that there was evidence that Mr. Major actually committed this crime, that it arose as an impulsive act borne out of passion.

The only evidence that was admitted at trial concerning what potentially happened during the incident was a neighbor heard arguing between the two, between Mr. Major and Ms. Dell. But that's it.

There was no evidence that Mr. Major had previously made threats against Ms. Dell. There was no evidence that he had a plan to kill Ms. Dell. There was no evidence that -- that -- there was -- the State threw out some speculative theories about motive, there was money issues maybe.

But for the most part, we are not talking about a situation where -- a domestic violence situation that -- you know, that had all of these sort of threats and prior incidences.

Instead we have the only evidence that there was

an argument. That's it.
THE COURT: Okay. I think I misspoke earlier when I said -- talked about this maybe definitely being a murder.
I mean, obviously, what you are arguing is now is there is prejudice here; this could have been perhaps a second-degree murder conviction if this jury was instructed with a Byford instruction.
MR. KIRSHBAUM: That's correct, Your Honor.
THE COURT: Perhaps even a voluntary manslaughter verdict. I don't know if you wrote that in there.
MR. KIRSHBAUM: No, I said generally second degree. And that's really -- I mean, that's the issue with respect to Byford. I mean, whether it could have been voluntary manslaughter is a different issue. I mean, we're essentially saying that if given the Byford instruction, then --
THE COURT: This could have been a second-degree murder verdict.
MR. KIRSHBAUM: Yeah, I think that -- our argument is that it's -- it's highly likely that a jury would have found that. Because the only evidence was that there was an argument between Mr. Major and Ms. Dell.
THE COURT: Okay. Not that that argument couldn't have been made, of course, for something other

than that. We see that all the time in these cases. At least in my experience. Thank you.
MR. KIRSHBAUM: And then one last aspect to it is that the prosecutor's closing argument exacerbated the harm.
I mean, the -- their argument focused specifically on the Kazalyn instruction, stating that deliberating -- didn't even mention deliberation as an element, said that the jury only had to find premeditation and intent.
And the Kazalyn instruction allowed a jury to find premeditation in an instant, successive thoughts of the mind. There was no room for any cool calculation, for the -- for the consideration of consequences, that the deliberation -- that the meaning of deliberation as set forth in Byford is required.
So the prosecution took advantage of the fact that that instruction didn't require it, specifically argued that to the jury, saying that premeditation can be instantaneous, successive thoughts of the mind. So there was no room in their argument to the jury for a finding of deliberation.
So unless Your Honor has any questions?
THE COURT: No, I think I'm ready to hear the next argument. Thank you very much.

MR. KIRSHBAUM: Thank you, Your Honor.
THE COURT: Okay. Mr. Mills.
MR. MILLS: Thank you, Your Honor.
Counsel, Your Honor, I think you captured my sentiment earlier when you said something about there being lots of different cases to keep straight and lots of different legal analyses.
And what Mr. Kirshbaum talked about was accurate, too. There's a lot of interplay between a lot of different legal concepts and different lines of cases.
So I am a visual person. When I confront these complicated legal issues, I like to draw it out on a flow chart.
So what I have done here is I have basically visually depicted in flow chart form the case law and the legal analytical frameworks that the attorneys have been briefing in their briefs and that I have kind of laid out in written form in my brief.
But I would like to visually depict what we've all been talking about. That certainly helps me to keep things straight.
But I agree with Mr. Kirshbaum's analysis regarding this important distinction between a change in the law and a clarification in the law.
Now, this was all kind of new stuff to me. I am

a trial attorney, as Your Honor knows. And I haven't done a lot of habeas stuff. I have done some. But I have certainly never encountered this particular issue.
So when I dove into this, I was initially confused by this Fiore/Bunkley line of cases and then the Teague retroactivity line of cases.
I couldn't figure out what the difference was for a while, but then I -- then it clicked. I read Fiore and Bunkley pretty closely, and I finally figured this out, that it is what Mr. Kirshbaum said.
I think he accurately -- at least in my view, I agree with his assessment of this, is that when there's a change in the law you've got to make an initial determination. And so that's kind of my starting point on this flow chart. You've got to make an initial determination about whether the change in the law reflects a change versus a mere clarification of the law.
Because what Fiore and Bunkley are saying, this is -- and I agree with Mr. Kirshbaum here -- that this -- that if the change in the law is not a change but rather a clarification of already existing law, it automatically applies retroactively, that clarification does.
It's not even a retroactivity issue, it's a due process issue, as Mr. Kirshbaum says.
So this is kind of -- and you are done. It

applies retroactively and you don't even go down this other path over here on the left side, doing the Teague retroactivity analysis or determining whether it's constitutional or not constitutional. You don't go down that other tree of the flow chart if you make an initial assessment that the change was a clarification versus a change.

And so in this case --

THE COURT: Did the court make that clear in Fiore and Bunkley then?

MR. MILLS: Yes.

THE COURT: Okay.

MR. MILLS: Those are the two Supreme Court cases that I think point to that concept.

Is that your understanding as well?

MR. KIRSHBAUM: I agree.

THE COURT: They say, all right, we are not going to engage in a Teague analysis because this is a clarification?

MR. MILLS: Exactly. If the Court were to make that finding, that this is a clarification rather than a change, then we don't even get to Teague.

And one of the things that threw me for a loop in all of this is because, again, you have got -- in my view, you've got three different lines of cases that I was trying

to piece together and figure out what the interplay between them was.

On the one hand, you have this Fiore/Bunkley line of cases dealing with this due process clarification stuff.

And then you have got the Teague line of cases dealing with not a clarification but rather a change, and a constitutional one at that. Then you've got the Teague case saying, here's what you do when there's a change and it's constitutional in nature.

And then you go down this path here and then -- where Teague basically says that there is a presumption against retroactivity to new constitutional changes.

There is two exceptions to that --

THE COURT: Well, of course -- this is something maybe I meant to ask Mr. Kirshbaum, too -- the Supreme Court is relying on whatever the state courts -- I assume mostly this is state court litigation. Maybe there is some federal cases too.

But, of course, in state court litigation, the Supreme Court is relying on what the state court is characterizing this as.

MR. MILLS: As far as this distinction here?

THE COURT: Correct.

MR. MILLS: Between change and clarification?

THE COURT: Correct. Then I am sure you will get

to the argument Mr. Kirshbaum is making, which is -- and you'll address this -- which is, well, this distinction doesn't matter anymore under Welch. Right?

But I don't want to interrupt where you are going.

That is what you are saying basically?

MR. KIRSHBAUM: Yeah, I am saying that that distinction has become essentially -- irrelevant may be too strong a word. But it's two separate due process questions. One was the Fiore due process issue and now it's the substantive exception.

And in my -- it -- I believe that the substantive exception does essentially nullify this change-versus-clarification concept, because, yes, if it's a narrowing interpretation, then it's going to fall under the substantive exception.

THE COURT: All right. Thank you for restating that.

Okay. I apologize. Mr. Mills.

MR. MILLS: That's fine. So if the -- if the Court makes a determination based on whether -- and I think there is -- there's case law. I can't remember it off the top of my head. But there is a case that gives a definition for making this distinction for determining whether, you know, a change occurs when -- oh, I think it

just came to me -- it's something along the lines of, when it wasn't mandated by existing precedent, or something like that, that's a change.

Anyway, there is a definition that talks about that. And I think Nika might cite to that.

So anyway, if you go down this path, where the Court determines, okay, this is a change rather than a clarification, so now we go into the Teague analysis potentially.

But -- and I say potentially. And this is one of the things that kind of confused me, is in looking at all these Nevada Supreme Court cases, you know, Nika and Byford -- well, I guess probably not Byford -- but the ones following Byford dealing with the retroactivity of Byford, Garner and Nika primarily, and I think there is a couple of others, where they are talking about the retroactivity of Byford, and you'll notice that they do not apply the Teague retroactivity analysis. They didn't even cite to Teague.

And I couldn't figure out why for the longest time. And the more I read these, you know, Nika and Garner, all of these -- this big long line of Nevada Supreme Court cases that looked at Byford and said it's not retroactive, I realized that the reason they didn't get to the Teague analysis is because they went down this path right here.

So after the Court makes a determination that

there was a change in the law versus clarification of the law, the next step is to determine, is the change constitutional or not.

It's only if the change is of constitutional import that you go down the Teague path and apply the Teague analysis.

And the Supreme Court has repeatedly and consistently held that this change in the jury instruction to the Kazalyn instruction, you know, creating a discrete definition for deliberation and premeditation or whatever, that that was a statutory change not a constitutional one.

They held that in Garner, which I believe was decided three months after Byford in 2000. They reiterated that in 2008 in Nika, where they said two things in Nika, which is why Nika is so important. Nika said, in 2008, Byford announced a change not a clarification. So they doubled down on their previous holding -- well -- the change in the jury instruction, or the definition of premeditation and deliberation or whatever, that's a change versus a clarification.

So now you are going down this path. And then when they got to this step, they said, and it's not a constitutional change. They said that in Garner in 2000, and they reiterated that holding in Nika and reaffirmed that in 2008.

So those are the two really important things that we take away from Nika; it's a change not a clarification, and it's a statutory change not a constitutional one.

So all this stuff, going down this path here, all the -- going down the Teague path that brings you to the Schriro definition of substantive and subsequently to Welch, that doesn't even come into play.

And this is one of the State's two main arguments. And the argument being that Welch does nothing to impact Nika's primary holdings here, which is that it was a change, not a clarification; and two, it was statutory, not constitutional.

Welch does not speak to that issue.

But even coming down this path, the Teague path -- so let's just talk about Teague for a little bit. So what Teague said is that there -- if there a change, one, and, two, if that change is constitutional, then there is a presumption against retroactive application.

And they gave a lot of good policy reasons for that in the Teague opinion. I cited -- I quoted some of that language in my brief about, you know, basically about finality of litigation, you know, and forcing the State to marshal resources 25 years later to put a case on, and, you know, district courts continuously being frustrated by, you know, applying the existing law at the time and correctly

applying it as it exists at a certain point in time, and then finding out later that, oh, oops, that was the wrong law that you gave to the jury.

I mean, it just -- there's all sorts of public policy reasons for creating finality in these cases, that Teague talks about.

So in light of those reasons, they say there is a presumption against retroactive application unless one of these two exceptions applies. One of those being -- and I will dismiss with this quickly because it's not applicable -- one of those two exceptions is if it's a watershed rule of criminal procedure. Like, oh, you know, we're holding that you're an indigent and the defendant is entitled to counsel. That's a pretty big deal. And so people who are deprived of that watershed criminal procedure right, constitutional right, might get relief.

But that's not what we're dealing here. We are not talking about a watershed rule of criminal procedure.

So the other exception is when it's a constitutional change -- so there is change, it's constitutional -- if it's substantive, then the person can be entitled to relief. So that's the other exception. And that's the one that's in play in this case.

So what is substantive? You know, what kind of change is substantive? And this gets to the heart of this

case. And this is, I think, the essence of everything that we're arguing, the essence of the State's argument at least, is the newness of the definition of what substantive means.

And Schriro v. Summerlin -- I think Summerlin is the other party in this case -- but in Schriro, the Supreme Court, back in 2004, defined what "substantive" was.

And I am actually, and by design, quoting from Welch here. I'm going to read to you what Schriro had to say about substantive. And I am quoting from Schriro as they quote and cite back to Schriro.

Because the issue here -- again, this gets to the essence of what we're all talking about -- did Welch really articulate a new proposition of law that creates a previously unavailable ground for relief.

And the State's argument is that it does not.

All Welch does is cite back to an already existing definition of what substantive means and they apply it to a totally new context, you know, the residual clause of the Career Armed Criminal Act, you know, that in Johnson, a previous Supreme Court case to Welch, where they held that that was constitutionally void for vagueness.

The retroactivity issue was, well -- in Welch was, well, was that a substantive change and does it apply retroactively to people who were convicted and sentenced

under a constitutionally vague residual clause on that federal statute.

That was the issue in Welch. It was a very specific factual issue there. They are taking -- there was no change in the fundamental underlying definition of what substantive is. They just said, here is what the definition is, in Schriro, and we're applying it to this residual clause situation, in Johnson.

That's all they did in Welch. So I'm going to quote from Welch here, where they quote to Schriro. Quote, "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes," end quote. That is a verbatim quote in Welch.

And then they go on and continue, quote, "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," end quote, "Id.," quoting back to Schriro again.

There has never been any kind of debate or uncertainty or equivocation about this definition of what substantive is. So in 2016, Welch says, here is the definition, we said it back in 2004, there has never been any confusion or debate or uncertainty about that, been

clear about the definition since 2004, here is the definition, we're applying it to the residual clause of the Career Armed Criminal Act, and we are determining that it is substantive under that definition.

That's Welch. And that's it.

There was an amicus brief filed in Welch, that the Court briefly addressed in Welch, you know, urging the Court to adopt some other analytical framework for Teague which would include, you know, a different definition of substantive. But they said, no, the definition is what it's always been. And then they went back and restated it.

So that's the State's position is that the petition is -- is procedurally barred because it's a successive petition, and it's untimely, and there has not been good cause shown because there is not -- there has not been presented a previously unavailable ground for relief.

This is nothing new. This definition of substantive is not new. So that's one.

And then, two, there is nothing in Welch. I don't see Welch speaking to this issue of Fiore and Bunkley. I would invite the Court to read Welch and look for any kind of citation to Fiore and Bunkley saying, hey, to the extent that Fiore and Bunkley held X, we disapprove of that. There is nothing in there.

I think this distinction is still in place.

There is nothing in Welch that would undermine the holding of Nika. Nika is still standing its ground that this was a change not a clarification.

And it's not constitutional.

That constitutional thing is really important, too. Because if it's not constitutional, then it doesn't implicate any of this Teague stuff here.

THE COURT: All right. So the change-versus-clarification dichotomy is still in place according to the State.

MR. MILLS: Yes. I don't see anything in Welch that says otherwise.

THE COURT: Where does Louisiana versus -- I guess it's Montgomery versus Louisiana -- where does that fit into this?

MR. MILLS: The -- yeah, the Louisiana versus Montgomery, that basically said, as Mr. Kirshbaum said, that all this Teague stuff applies to the states as a matter of constitutional law.

And I have got a couple things to say about that. I said them in my brief, but, you know, one, Montgomery versus Louisiana, that decision came out more than a year prior to the filing of this petition.

THE COURT: Correct.

MR. MILLS: So that would be time barred anyway,

even under the case law which gives you a year from the time that the new claim becomes available.

But even more to the point, like, its application -- as I said in my brief, its application to this case isn't particularly clear to me. Because all Louisiana versus Montgomery is saying is that states have to apply Teague. That was my understanding.

Which our --

THE COURT: Well, if the Court went down that road in your decision tree, then really I would have to look at that case, right?

MR. MILLS: No. Okay. Let me clarify what I meant by that. So --

THE COURT: Because it sounds to me like that was the first time that the Court said, well, this is a matter of due process, the states have to understand that.

MR. MILLS: What is a matter of due process?

THE COURT: The Teague analysis. Isn't that what you are saying?

MR. MILLS: Well, my understanding is they said that Teague is binding on the courts, that the courts have to follow Teague.

THE COURT: Right. Because it's a matter of federal due process.

MR. MILLS: Yeah.

THE COURT: All right.
MR. MILLS: And my comeback to that is that Nevada already applies Teague. There's a Colwell case I found where the Court basically adopts Teague and says, yeah, we follow Teague.
But the overall point I make -- so I am not arguing with that. The overall point I'm making is we don't even get to Teague. Even applying Teague, Teague is not applicable because, one, it's a -- well, because it's not constitutional is what Nika says.
THE COURT: I just thought you were making an alternative argument. I understand your first -- you made emphatically clear that in your view, the State's view, Nika is standing its ground; it's good law.
MR. MILLS: Yeah.
THE COURT: And that doesn't involve a Teague analysis.
MR. MILLS: That's correct. Nika does not involve a Teague analysis because of this distinction between constitutional and not constitutional.
THE COURT: And the change versus clarification. And that's because, as you -- in your line of thinking, or argument, change versus clarification still survives.
I mean, you are disagreeing obviously with Mr. Kirshbaum.

MR. MILLS: I disagree with him on that point. Because I don't see anything in Welch that overturns that distinction or undermines Fiore or Bunkley in any way.
And to get back to this Montgomery thing, the way that that would be implicated is if our Court had said, This is a change and it is constitutional but we are not going to apply Teague.
Now Montgomery would have some relevance to this case. Wait, hold on, Montgomery now says that you've got to apply Teague if you find it's constitutional.
But we don't even get to that point, right, because it's not constitutional is what Nika said. So you go down this path.
So that's basically -- I think that sums up the State's arguments.
Do you have any further questions for me?
THE COURT: Well, I was just, I guess, asking, where does it fit into the analysis. Because you did go down that part of your flow chart.
It seemed to me an alternative argument to the primary one you are making, which is change versus clarification still survives, this is not a constitutional rule we're talking about with Byford, and Nika says so, Nika is still good law, don't even go down --
MR. MILLS: Yeah. Okay.

THE COURT: -- the Teague all the way down to the --
MR. MILLS: I gotcha.
THE COURT: -- Welch part of it.
MR. MILLS: I think I see what you're saying, yeah.
So primary argument: It's a change, not a clarification, and, two, it's not constitutional. Therefore, Nika is still good law because Welch doesn't do anything to undermine Fiore and Bunkley and Nika.
But then, yeah, alternatively, even assuming you went down this path, this -- Welch still doesn't provide you grounds to get around the procedural bar. Because all Welch is doing is restating a standard or a definition for what constitutes a substantial change in the law.
THE COURT: That came down with Schriro in 2004.
MR. MILLS: Yeah, that's been -- that argument, that claim, has been available since 2004. There's never been any uncertainty or equivocation about this.
THE COURT: I guess what I am asking is, if the Court went down that road, are you saying -- and that's why I ask, where does the Montgomery case fit in.
Because it seems to me that that would have triggered then -- and I will have to reread the cases -- but if the Court said then that due process applies, this

applies in state court, then maybe that triggers the one-year time line the Supreme Court -- our Supreme Court has said under Rippo we've got to apply when you are deciding whether the time bar applies.
MR. MILLS: And that was one of my arguments, Your Honor. Inasmuch as Montgomery -- and it's probably why I didn't spend a lot of time on it, because I view Montgomery as being time barred even under the case law which says you have got a year from the point in time the decision comes out and the new -- arguably new claim becomes available, one.
And then, two, I just -- again, as I was just describing, I am not -- you know, I -- I think Nevada has already adopted Teague to some degree because of that Colwell case. They just didn't apply it in Nika because they didn't get to it because they deemed that it was not constitutional.
THE COURT: Well, in fact, the Court would have to apply it now under Montgomery and Welch if this -- if you have a case where there is a change that's a constitutional change.
MR. MILLS: Absolutely. And that's what I was saying.
In a situation -- let's say our Supreme Court had said that this is a constitutional change, but they -- for

some reason they are, like -- and there was some case law out there, I think -- and you've been doing this a lot longer than I have -- but my understanding is that there were some cases, I think even some Supreme Court case law, suggesting that states could depart from Teague. This was prior to Montgomery.

So I think maybe some states were kind of going in a different direction from this Teague analysis before Montgomery.

But after Montgomery, I think it's crystal clear that if the Court makes a finding that there was a change and that it's a constitutional change, they are bound by Teague and the Teague -- and its progeny and all that kind of stuff.

So I agree with that, that if the Court gets to that point where they make a finding that it's a constitutional change, then pursuant to Louisiana versus Montgomery, they are bound to follow Teague as a matter of due process.

THE COURT: Okay.

MR. MILLS: So that's the State's argument.

THE COURT: Okay. Thank you very much.

MR. KIRSHBAUM: Your Honor, can I briefly respond?

THE COURT: Of course.

MR. KIRSHBAUM: I don't see the State's position as being entirely logically consistent.

If the substantive exception is now constitutionalized and applies to the State, the State themselves just cited to the concept that really matters here. And that's this quote from Schriro which also appears in Welch, is that "new substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms."

Right. So the substantive exception includes those types of cases.

And then the Court went on to say, "as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."

So here with the change-versus-clarification distinction, that's all well and good with respect to Fiore and Bunkley.

But under Teague, when you have a change, it applies to both constitutional rules as well as what they said in Schriro, "decisions that narrow the scope of a criminal statute by interpreting its terms."

So what needs to be added to this flow chart is another bubble that says, as a change, if it's a statutory interpretation case that narrows its scope, then you do go

down this line.

THE COURT: Okay.

MR. KIRSHBAUM: So the other important issue here is Montgomery plus Schriro versus Montgomery plus Welch.

And I just -- our argument is, is that Montgomery versus Schriro just doesn't get there.

I mean, this language that they have here is in Schriro, where they talk about a decision that narrows the scope of a criminal statute by interpreting its terms, they cite to Bousley.

And in my original argument I mentioned that Bousley wasn't viewed as a substantive exception case. If you look at Bousley, they actually rejected the concept that they're going to use Teague in that case.

But now all of a sudden, in Welch, they are essentially reinterpreting Bousley. And it wasn't until Welch where they actually put all these concepts together.

And yes, Welch itself is not an application of the substantive exception to a narrowing statutory interpretation.

However, the language in Welch cannot be any more clear. I don't think any state court can -- is free to ignore that language from Welch.

It's binding. It's -- it was an essential part of this decision because -- of Welch, because essentially

it was just an application or a discussion on the holding of that case, is that you look at the function of the rule, you look at the function of the new rule. You look at the function of the statutory interpretation that narrows its terms. You look to see whether that has the effect that the substantive exception asked for. You look to see whether it alters the range of conduct or limits the class of persons what can be punished.

And that's exactly -- as the Nevada Supreme Court said in Nika, that's exactly what Byford did. And it's not until Welch, down here, where we actually get clarity on that.

Now, the reason why the Supreme Court wouldn't be talking about Bunkley and Fiore in this change-versus-clarification distinction is because that's a separate issue.

If I may -- I mean, I could -- I do this for -- when I am trying to explain this to people. And this is why I'm so jealous that he made this flow chart, because I usually do a time line. Because that's sort of the best way of doing that.

I see he brought a marker. If I can have a moment, I can show you exactly what I am -- what the retroactivity question here is.

So I'll go down a couple pages.

So retroactively, we're talking about a time line here -- oh, and by the way, I just looked at the -- at my petition, and Mr. Major's conviction was in 1996. You were right about that. I apologize for saying it was different.

So we have Mr. Major here in 1996. This is Major. So I -- on the time line I put a point for Mr. Major's conviction.

And his conviction became final in that year. It may have spilled over a little bit into 1997. But that's when his conviction became final under the rules set forth in Nika, which is at the time when seeking review in the United States Supreme Court expires.

So his conviction becomes final essentially in 1996. Byford is decided right here, 2000. So when the Nevada Supreme Court addresses this tissue in Nika in 2008, they essentially say that clarification applies both directions.

All right. So it goes -- no matter where your conviction becomes final, either after Byford or prior to Byford, everybody gets the benefit of Byford.

Change is just those convictions that had not yet become final, so it's just arrow to the right. As opposed to clarification, arrow to the left and to the right.

But then retroactivity is really what we're talking about here. We're talking about what is the

retroactive effect of a change and does it go back this way.

Now, the Nevada Supreme Court said that a change in the interpretation of a statute has no retroactivity effect. So the answer to that under Nika is no.

And what is important, I'll also point out, is in the middle of these cases is when Schriro was decided. So if the Nevada Supreme Court thinks that Schriro is really telling them what the substantive exception means, well, they are not applying it in Nika.

So I don't think that at that point Montgomery plus Schriro is going to be enough, because the Nevada Supreme Court had Schriro in existence prior to Nika.

Now, Schriro at that point didn't necessarily have to apply to state courts as a matter of due process. That wasn't until -- it wasn't until Montgomery. But Schriro, once again, talking about Bousley, which at that point was mostly considered a clarification case. Not just mostly, it was.

And that's how the Nevada Supreme Court routinely considered Bousley, just as a clarification case, nothing more. Not as an application of a substantive exception. And Bousley itself doesn't talk about -- doesn't apply the substantive exception.

But now, after Welch and Montgomery, the

retroactive question has its answer. The answer is: When you have a new interpretation of a statute, be it a change or a clarification, it doesn't matter.

Because what Schriro and now Welch is saying, is making clear, is that the only question is, is that if there is a statutory interpretation that narrows the terms, then that fits under the substantive exception and it does have to apply retroactively.

And that's really what the import of Welch and Montgomery is, is that this constitutional rule is now saying that when you have a criminal -- a narrowing interpretation of a criminal statute, like they did in Byford, that when we're asking the question of retroactivity, the only thing that you need to answer is: Does it fit under the substantive exception? Does it alter the range of conduct or narrow its terms?

So that is a separate due process violation -- I mean, due process issue from change versus clarification. It's just -- they have moved on to the next question. And that is they have made it clear.

And so what is important about the substantive exception is that the Supreme Court has gone through all these policy questions, it's gone through what types of issues should a defendant or a petitioner get retroactive -- get the retroactive benefit of.

And the substantive exception is the -- essentially what the policy judgment that they made is that if we are -- if we -- if a Court issues this new rule, either a constitutional rule or a statutory interpretation that narrows its terms, that all petitioners should get that benefit because it is having an impact on whether this person should have been convicted of this crime or should have been punished under the statute.

And that's the policy determination that they made and that's what the substantive exception is all about.

And I don't think there is any doubt here that Byford, as the Nevada Supreme Court said in Nika, has that impact, it narrows the terms. And especially for somebody like Major where deliberation was missing from his case.

And I think that's it. That's all that I have unless you have any questions.

THE COURT: Okay. Well, I apologize, I did have one for Mr. Mills again.

You didn't really address the prejudice aspect of this. I mean, of course the Court, to get relief, would have to find prejudice, if it saw it Mr. Kirshbaum's way regarding the retroactivity analysis.

So what is the State's position on that?

Because I haven't combed through the record

I -- I did want to make clear, too, I had nothing to do with this prosecution. I don't know if the appeal was pending by the time I joined that D.A.'s office, but I certainly had nothing to do with the case. I do want to make clear that.

And I have no actual bias or prejudice against Mr. Major.

In my view, the only -- in fact, the only contact I have had with this case is as a judicial employee, a law clerk, way back in 1994, and also when we went out to that -- the site where the remains were allegedly found.

We were there, obviously, with -- I think it was the Nevada State Public Defender's Office lawyers as well as Deputy District Attorney Woodbury.

So I did want to make clear -- obviously, I think it would be improper for Judge Papez to have gone out there on his own without counsel present, and he would never have done that. He was a very admired district court judge for a lot of years. He has been retired since 2012, I think, or '13.

Anyway, I did want to make all of that clear as well. I don't know when the appeal occurred. Obviously, there was a post-conviction petition before. I had nothing to do with that either.

I did want to make that all clear so that Mr.

Kirshbaum, when he talks to Mr. Major, understands all that.

But anyway, there is this prejudice aspect.

Does the State have a -- you had not commented on that because you -- well, you had not commented on that.

So Mr. Mills.

MR. MILLS: And I hadn't because it's the State's position that this case is procedurally barred, so it's not necessary.

THE COURT: We don't have to get there.

MR. MILLS: We don't have to get there.

THE COURT: Still, I mean --

MR. MILLS: And, frankly, it's not my strongest argument.

THE COURT: I thought that's what you were going to say, I still had to ask you.

MR. MILLS: I looked at the record --

THE COURT: If I did see it Mr. Major's way, then obviously I think I have got to get to that analysis. He properly addressed that.

MR. MILLS: All I can say is Mr. Woodbury can be very persuasive to juries apparently.

But really we don't know the circumstances in which this person was killed. We just don't know. We know she was killed, he probably did it under circumstances

that, as Mr. Kirshbaum points out, we don't have a lot of information about what those circumstances were.

There is, you know, some vague testimony about hearing a fight or something going on. But you don't know the point in time she actually dies, so how do you necessarily link the fight up to the murder.

But even if you could, how does that show first-degree versus second-degree murder. You just don't have a lot of information about the circumstances in which he killed her.

And the deadly weapon enhancement was proven up by some expert from Las Vegas that came in and said, "I looked at these bones a couple years later and they had some nicks on them, so therefore, you know, a knife must have been used to kill her." And that was the deadly weapon aspect of the case.

I mean, I am just giving you my honest assessment. It's not the strongest first-degree murder case in the world.

THE COURT: I appreciate your honest assessment.

Mr. Kirshbaum spent a little bit of time -- I mean, we had to get through the muddle of all these cases and the interplay of these cases. That's where he spent most of his time in the briefing.

But he did explain why he felt -- why Major feels

there wasn't -- that there is prejudice here and what the rendition of the facts were, briefly.

I mean, do you agree with the rendition that Mr. Major put in his petition?

MR. MILLS: My recollection is that, yes, mostly. I can't disagree with it.

I mean, Mr. Woodbury's argument to the jury was, you look at the nicks in the bones, there is multiple nicks, chips in the bones, therefore, he must have stabbed her multiple times.

And Mr. Woodbury made the argument to the jury, like, well, if you stab somebody once, you know, maybe that's second degree, but if you stab them multiple times, that shows premeditation and deliberation.

And there is something to be said for the idea that -- I mean, you look at the instructions on premeditation and deliberation, and we all know that the definition of those concepts is not what a lot of the lay public understand premeditation to be. Like, premeditation and deliberation can occur in a very small fraction of time. I think that's probably what Mr. Woodbury emphasized to the jury.

So I guess under that argument, you could -- he could make colorable argument that if you are stabbing someone multiple times, that shows premeditation and

deliberation.

On the other hand, as Mr. Kirshbaum points out, doesn't that show an angry state of mind and, you know, second-degree murder or voluntary manslaughter or whatnot.

And the fact of the matter is we don't know a lot about the circumstances of the murder itself.

So I am just being candid with the Court. That wasn't my strongest argument, and I don't think -- but I kind of set that to the side because I feel so -- I am pretty convinced that we don't even need to get there because this is just flat procedurally barred.

This stuff in Schriro has been there, and it's been intact since 2004. This stuff about the statute that Mr. Kirshbaum keeps bringing up, I mean, every time he cites this, he keeps coming back to this quote from Schriro from 2004.

This has already been in place. This idea that he is talking about, about substantive applying to both constitutional rules and to changes which narrow the scope of statutes and whatnot, that all comes from Schriro.

This has all been there since 2004. These arguments could have been made since then.

So that's -- just to be candid with the Court, that's primarily what the State's argument is, is the procedural bars and the -- all the stuff we have argued.

THE COURT: I saw that in your briefing. That was your primary argument, I understand.

But I had to ask, of course.

MR. MILLS: I understand. I understand why you would ask, Your Honor. That's my honest answer.

THE COURT: Okay. Thank you. It's Mr. Major's petition, so he gets the last word.

We have been a little free flowing here, but that's kind of how argument is sometimes in the Fourth Judicial District Court, Department 2.

So for Mr. Kirshbaum, anything else?

MR. KIRSHBAUM: Your Honor, I think I have covered everything I want to say.

THE COURT: Okay. I appreciate the arguments. I found them very helpful. I will take the matter under consideration.

There is a lot -- a lot -- here. You know, I have been in the judiciary, I have defended cases, prosecuted cases, and I have never seen a research project quite like this, from my side of it.

Mr. Kirshbaum probably deals with this a lot.

But I have to ask, I know they don't have precedential value, but are there other judges looking at this in the state? Are you bringing these elsewhere?

MR. KIRSHBAUM: Yeah, I was telling Mr. Mills

beforehand, we went through our old cases to see if they fit into the category of giving the Kazalyn instruction and conviction final prior to Byford. And of all of our old cases, we were only able to identify 13 of them. And we have -- we worked on probably a thousand cases, so -- which surprised us, we thought there would be more.

THE COURT: I am surprised, too. I would have thought more.

MR. KIRSHBAUM: Yeah, this was the only one in the Fourth J.D.

We have three up in the Second J.D. We haven't received any decisions with the Second J.D.

We had -- so doing the math there -- I guess we had nine that -- nine down in the Eighth J.D. And they -- I think all nine of those have been denied.

THE COURT: Okay. And they are on appeal now, I guess?

MR. KIRSHBAUM: One -- we are still waiting on the orders for most of them. I think one has already been brought up on appeal.

We have not received, as I mentioned, anything from the Second J.D. I have had an argument before Judge Sattler in the Second J.D. a little over two weeks ago, so he is still -- he is going to write his decision. I don't know which way that is going.

THE COURT: Okay.

MR. KIRSHBAUM: Actually that one, it's interesting, has very similar facts to Mr. Major's. So it was a -- it was a woman was murdered, they have no idea under what circumstances, but the petitioner in that case was the most likely candidate, just like Mr. Major.

THE COURT: How old was that case?

MR. KIRSHBAUM: Similar. The -- may have been -- that one may have been from '93. That was -- that may have been what was on my brain before.

THE COURT: Of course, he was in the D.A.'s office over there as well.

MR. KIRSHBAUM: Yeah.

THE COURT: He was the chief deputy, I think, for a lot of years.

MR. KIRSHBAUM: Yeah. And I think that he -- he -- I don't think he had any contact with that case. But generally speaking, he had contacts with these issues, all of the first-degree murder cases and the Nika stuff that came afterwards.

THE COURT: Okay. Thank you very much for your arguments. Have a safe trip home.

MR. KIRSHBAUM: Thank you.

THE COURT: I found them very, very helpful, like I said.

(WHEREUPON, the hearing was concluded at 10:26 a.m.)

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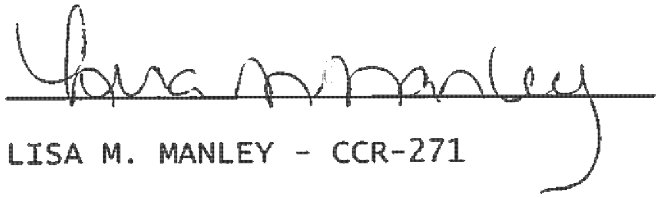
STATE OF NEVADA)
) SS.
COUNTY OF ELKO)

I, LISA M. MANLEY, Official Court Reporter of the Fourth Judicial District Court, Dept. II, of the State of Nevada, in and for the County of Elko, do hereby certify that I was present in court during all the proceedings had in the matter of Rickey Todd Major, Petitioner, versus RENEE BAKER, Warden, et al., Respondents, heard at Elko, Nevada, on October 6, 2017, and took verbatim stenotype notes thereof; and that the foregoing 57 pages contain a full, true and correct transcription of my stenotype notes so taken, and a full, true and correct copy of all proceedings had.

LISA M. MANLEY - CCR-271
OFFICIAL COURT REPORTER

STATE OF NEVADA)
) SS.
COUNTY OF ELKO)

I, LISA M. MANLEY, Official Court Reporter of the Fourth Judicial District Court, Dept. II, of the State of Nevada, in and for the County of Elko, do hereby certify that I was present in court during all the proceedings had in the matter of Rickey Todd Major, Petitioner, versus RENEE BAKER, Warden, et al., Respondents, heard at Elko, Nevada, on October 6, 2017, and took verbatim stenotype notes thereof; and that the foregoing 57 pages contain a full, true and correct transcription of my stenotype notes so taken, and a full, true and correct copy of all proceedings had.



LISA M. MANLEY - CCR-271

OFFICIAL COURT REPORTER

Case No. CV-HC-17-248

Dept. No. 2

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF ELKO

RICKEY TODD MAJOR,

Petitioner,

v.

RENEE BAKER, WARDEN, et al.

Respondents.

RESPONSE TO STATE'S OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Rickey Todd Major, by and through his attorney, Assistant Federal Public Defender Jonathan M. Kirshbaum, hereby files this response to the State's "Opposition to Petition for Writ of Habeas Corpus." This response is based on the attached points and authorities as well as all other pleadings, documents, and exhibits on file. Counsel received the petition through the mail on July 10, 2017.

DATED this 20th day of July, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12908C

POINTS AND AUTHORITIES

I. INTRODUCTION

In their Opposition to Major's post-conviction petition, the State has asked this Court to summarily dismiss the petition. The State makes two main arguments for dismissal: (1) the recent Supreme Court decision in *Welch v. United States*, 136 S. Ct. 1257 (2016), did not offer anything novel; rather, it was restating a rule the Court had previously established in *Schriro v. Summerlin*, 542 U.S. 348 (2004); and (2) the decision in *Nika v. State*, 122 Nev. 1269, 198 P.3d 839 (2008), remains good law because the *Teague* retroactivity rule only applies to constitutional rules and the rule set forth in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), is not constitutional, but a matter of statutory interpretation. Opposition at 7-12.

These arguments have no merit and should be rejected. Preliminarily, *Montgomery* established a new rule of constitutional law that the state courts are required to apply. As a matter of federal due process, the substantive exception to *Teague*—in the manner that the United States Supreme Court has applied it—now applies in state court. The Supreme Court made abundantly clear in *Welch* that the substantive exception applies to statutory interpretation cases. As a result, the substantive exception under the federal due process clause is broader than the substantive exception that previously existed under Nevada law. The Nevada Supreme Court squarely refused to apply the substantive exception to statutory interpretation cases. Nevada courts are now required to apply the broader substantive exception.

Furthermore, *Welch* provides the basis for the claim here because it was not until that decision that the Supreme Court explained *how* the substantive exception is to be applied in statutory interpretation cases. There is nothing in *Schriro* that goes as far as *Welch* in explaining these principles. Put simply, it was not clear that

Major was entitled to relief until *Welch* was decided, making *Welch* the relevant decision to Major's claim and upon which he can establish good cause.

Under *Montgomery* and *Welch*, the Nevada Supreme Court's decision in *Nika* is no longer valid. In *Nika* the court found that *Byford* was a narrowing change in law. Such a conclusion means that *Byford* meets the substantive exception requirement. However, the court in *Nika* refused to apply it retroactively. *Montgomery* and *Welch* now demand that, as a matter of federal due process, petitioners, such as Major, whose convictions became final prior to *Byford*, must be given the benefit of such a narrowing change in the meaning of a criminal statute. The new rule in *Montgomery* and *Welch* invalidates the reasoning in *Nika*.

Accordingly, the State's request in its Opposition to summarily dismiss the petition should be denied. This Court should address the merits of the petition.

II. ARGUMENT

A. The Combination of *Montgomery* plus *Welch* Provides Major with the Basis for Good Cause

Respondents argue that the recent Supreme Court decision in *Welch v. United States*, 136 S. Ct. 1257 (2016), did not offer anything novel; rather, it was restating a rule the Court had previously been established in *Schriro v. Summerlin*, 542 U.S. 348 (2004). Opposition at 8-11.

This argument has no merit. As discussed in more detail below, it was not until *Welch* that the Supreme Court indicated how to apply its new constitutional rule set forth in *Montgomery* in statutory interpretation cases. Unlike *Welch*, *Schriro* provides no guidance on how to apply the substantive exception in such a situation.

The analysis here begins with *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The State discounts the importance of *Montgomery*, suggesting that it is essentially irrelevant because Nevada has adopted the *Teague* framework. Opposition at 8. This is not accurate. As discussed in the petition (the allegations of which are incorporated

herein), *Montgomery* established a new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of due process. "'States may not disregard a controlling constitutional command in their own courts.'" *Montgomery*, 136 S. Ct. at 727 (quoting *Martin v. Hunter's Lessee*, 1 Wheat 304, 340-41 (1816)). The state courts are now required to apply this new federal constitutional rule in the manner that the United States Supreme Court has applied and interpreted it.

That is critically important here because *Welch* shows that the substantive exception as previously applied in Nevada state court is narrower than the one that now exists under the federal Constitution. Specifically, the Court in *Welch* made abundantly clear that the *Teague* substantive exception applies to statutory interpretation cases. *Welch*, 136 S. Ct. at 1267 (discussing its application of the substantive exception in *Bousley v. United States*, 523 U.S. 614 (1998)). The Nevada Supreme Court has specifically refused to apply the substantive exception to statutory interpretation cases.

And there can be no doubt that the Court in *Welch* indicated that the substantive exception applied to statutory interpretation cases. In rejecting an argument that statutory interpretation cases fall outside the general *Teague* analysis, the Court confirmed in *Welch* that its application of the substantive exception *did include* statutory interpretation cases like *Bousley*. It stated that, in *Bousley*, the Court was determining "what retroactive effect" should be given to its prior decision in *Bailey v. United States*, 516 U.S. 137 (1995), which had narrowed the meaning of the term "use" of a firearm in relation to a drug crime under 28 U.S.C. § 924(c). *Bousley*, 523 U.S. at 620. The Court stated in *Welch* that it "had no difficulty concluding [in *Bousley*] 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.

The Court then made clear in *Welch* that the *Bousley* decision demonstrates how the *Teague* substantive exception should be applied. *Id.* It stated: "*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.* More important, the Court explained how the substantive exception should apply in statutory interpretation cases, emphatically concluding that statutory interpretation cases should be treated like any other application of the substantive 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 "alter the range of conduct or the class of persons that the law punishes." *Schriro* at 353.

Id.

As can be seen, the United States Supreme Court in *Welch* has left no doubt that the substantive exception to *Teague* applies to statutory interpretation cases. *See Schriro*, 542 U.S. at 351-52 ("New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms . . . ."). Indeed, the Court in *Welch* used those statutory interpretation cases to define the contours of the substantive exception. *Welch*, 136 U.S. at 1266, 1267.

In light of *Montgomery* and *Welch*, state courts must apply the substantive exception in the manner that the Supreme Court has directed and this includes statutory interpretations that narrow the definition of a criminal statute. It does not matter if those interpretations are classified as a "clarification" or a "change." So long as the interpretation narrows the meaning of the criminal statute, it must apply retroactively. The Nevada Supreme Court has not been applying the substantive exception in this manner. In fact, that court has specifically refused to apply a change

in the statutory interpretation of a criminal statute retroactively.[1] Thus, this new constitutional rule alters the law as it existed in Nevada.

Moreover, contrary to the State's argument, *Welch* provides a basis on which to establish good cause. *Welch* is actually the linchpin to the claim. While it is true that *Montgomery* created the new constitutional rule that provides the foundation for good cause, the Supreme Court did not explain the breadth of that new rule and how that new rule applies to this case until its decision in *Welch*. As shown above, *Welch* not only made clear beyond any doubt that the substantive exception to *Teague* applied to statutory interpretation cases, but that case also explained *how to apply* the exception to statutory interpretation cases.

Schriro simply does not do what *Welch* does. In *Schriro* the Supreme Court concluded that its prior decision in *Ring v. Arizona*, 536 U.S. 584 (2002), did not apply retroactively in state court because it was a procedural rule. *Schriro*, 542 U.S. at 353. At the beginning of its discussion of the *Teague* rules, the Court noted that "decisions that narrow the scope of a criminal statute by interpreting its terms," fall under the substantive exception, citing *Bousley*. *Id.* at 351-52. The true import of *Schriro* was that it appeared to broaden the meaning of the substantive exception. It was the first time the Court defined it in the following way: "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353.

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[1] To note, the Nevada Supreme Court has suggested in dicta on one occasion that a substantive change in law that narrowed the definition of a statute would have retroactive effect. *Mitchell v. State*, 122 Nev. 1269, 1277, n.25, 149 P.3d 33, 38 n.25 (2006). However, as discussed in more detail below, the Nevada Supreme Court has otherwise and repeatedly held that a change in the interpretation of a statute does not have retroactive implications. *Nika v. State*, 122 Nev. 1269, 1288, 198 P.3d 839, 850 (2008) ("We affirm . . . and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in law. . . . [T]he interpretation and definition of the elements of a state criminal statute are purely a matter of state law. . . .").

But there is nothing in *Schriro* that indicated *how* this exception should be applied in statutory interpretation cases. The Supreme Court has never previously stated anything similar to what it stated in *Welch* as to the exact standard and analysis that should be used when determining whether any type of statutory interpretation, including a change in law, should apply retroactively. The State does not point to anything in *Schriro* in which the Court explained how to apply these principles to statutory interpretation cases. In fact, in *Schriro*, the Court's observation that the substantive exception applied in statutory interpretation cases appeared two pages earlier and in a different subsection than the Court's discussion of the meaning of the substantive exception and how it should be applied to *Ring*. *Compare Schriro*, 542 U.S. at 351 (substantive rules include statutory interpretation cases) *with Id.* at 353 (defining substantive exception and applying it to *Ring*). It was not until *Welch* that the Supreme Court actually linked these concepts together and explained how the substantive exception should be applied to statutory interpretation cases. That was new.

This is absolutely crucial here. Prior to *Welch*, the Nevada Supreme Court limited the retroactivity analysis for statutory interpretation cases to the clarification/change dichotomy. If there was a narrowing clarification, then a statutory interpretation case applied retroactively. *Nika*, 122 Nev. at 1287, 198 P.3d at 850; *Colwell*, 119 Nev. at 623-24, 81 P.3d at 527. If there was a narrowing change in law, then a statutory interpretation case did not apply retroactively. It only applied a change in law to those cases that had not yet become final. *Nika*, 122 Nev. at 1287, 198 P.3d at 850. *Schriro* only cited *Bousley*, which was a clarification case. It would be reasonable for a state court to believe that *Schriro* had not altered that clarification/change dichotomy as it solely relied upon a clarification case. That is precisely how the Nevada Supreme Court viewed the import of *Bousley*; it was simply a clarification case. *Clem*, 119 Nev. at 531, 81 P.3d at 629. Even after *Schriro* the

Nevada Supreme Court in *Nika* continued to apply the clarification/change dichotomy as the only relevant retroactivity analysis for statutory interpretation cases. *Nika*, 122 Nev. at 1287-88, 198 P.3d at 850.

But now *Welch* has rendered that dichotomy obsolete, at least with respect to retroactivity analysis. The only factor that matters now is whether the statutory interpretation case meets the normal criteria for a substantive rule, namely whether it altered the range of conduct or the class of persons that the law punishes. Petitioner could not successfully raise this claim until *Welch* was decided.

Respondents read a great deal into *Welch*'s citation of *Schriro*. But it appears that the Court was doing nothing more than quoting language from *Schriro*. *Schriro* itself was not determining whether a statutory interpretation applied retroactively. It was deciding whether a particular aspect of the right to a jury trial applied retroactively. As discussed before, unlike in *Welch*, *Schriro* did not discuss how to apply *Teague*'s substantive exception to statutory interpretation cases; the Court only stated that it did apply. Put simply, *Schriro* plus *Montgomery* does not provide Major with a claim here. Those two cases together, without more, do not do enough to undermine *Nika*. It is *Montgomery* plus *Welch* that provides Major the basis on which to argue that due process now requires that a change in law that narrows the meaning of a criminal statute must apply retroactively.

Respondents argue that *Welch* cannot provide the basis for relief since it was not addressing the retroactivity of a statutory interpretation, but the retroactivity of a prior Supreme Court decision that invalidated a federal statute. Opposition at 10-11. This argument is unpersuasive. To be sure, the new rule at the center of the retroactivity question in *Welch* did not directly concern a statutory interpretation question. But that does not mean the relevant language of *Welch* does not apply here. The Supreme Court's discussion of how the substantive exception applies in statutory interpretation cases was an essential part of its analysis in *Welch*. This discussion

was specifically done to address arguments raised in support of the judgment of the lower court. *Welch*, 136 S.Ct. at 1263. Thus, the Court was engaging in a necessary and essential analysis related directly to the ultimate question of whether or not the lower court's decision should be affirmed. *Welch* specifically explained how the *Teague* substantive exception applies to statutory interpretation cases as part of a central discussion in its opinion as to why the lower court's decision could not be sustained. The situation here falls squarely within that binding analysis.[2]

Finally, it must be noted that, Major does not need to establish that the legal principle on which his claim is based is "novel," as that term was used in *Bousley*. As discussed in the petition, the good cause argument is based on a previously unavailable constitutional claim. *Clem*, 119 Nev. at 621, 81 P.3d 521 at 525-26. *Montgomery* has established a previously unavailable constitutional claim—namely the substantive exception as it has been interpreted by the United States Supreme Court—and *Welch* is the decision in which the Supreme Court demonstrated the relevance of that new rule to the situation here. That establishes good cause under *Clem*.

B. *Montgomery and Welch* Establish that *Nika* Is No Longer Valid

It is clear that, in light of these two recent United States Supreme Court cases, the Nevada Supreme Court's decision in *Nika* is no longer valid. In *Nika* the court acknowledged that *Byford* represented a narrowing interpretation of the first-degree murder statute. However, the Nevada Supreme Court refused to apply the a narrowing change in the interpretation of a statute retroactively. The court specifically stated that in *Nika*: "We affirm our decisions in *Clem* [*v. State*, 119 Nev.

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[2] Even assuming *arguendo* this discussion could somehow be considered dicta, a lower court should "afford considered dicta from the Supreme Court . . . a weight that is greater than ordinary judicial dicta as prophecy of what the court might hold." *Nettles v. Grounds*, 830 F.3d 922, 930-31 (9th Cir. 2016) (internal quotations omitted).

615, 81 P.3d 521 (2003)] and *Cowell* [v. *State*, 118 Nev. 807, 59 P.3d 463 (2002),] and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in law. . . . [T]he interpretation and definition of the elements of a state criminal statute are purely a matter of state law. . . ." *Nika*, 122 Nev. at 1288, 198 P.3d at 850.

That analysis is now contrary to *Welch*. *Welch* makes clear that the substantive exception applies to statutory interpretation cases. There is only one relevant retroactivity factor now. As the Court stated in *Welch*, "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.'" *Welch*, 136 S.Ct. at 1267 (quoting *Schriro*, 542 U.S. at 353). *Byford* falls under the substantive exception as it narrowed the interpretation of a criminal statute. Under the new constitutional rule set forth in *Montgomery* and *Welch*, *Byford* applies retroactively and Major is entitled to the benefit of that ruling.

C. Major Has Established Actual Prejudice

For the reasons discussed in the petition, Major can establish actual prejudice. Beyond arguing that *Nika* remains good law, the State does not argue that Major cannot establish prejudice. Thus, the State has waived such an argument.

In any event, it is clear that the error here was prejudicial. The *Kazalyn* instruction defining premeditation and deliberation given in his case was improper. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004). As the Nevada Supreme Court explained in *Byford*, the *Kazalyn* instruction blurred the distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The State was relieved of its obligation to prove essential elements of the crime, including deliberation. In turn, the jury was not

required to find deliberation as defined in *Byford*. The jury was never required to find whether there was "coolness and reflection." *Byford*, 994 P.2d at 714. The jury was never required to find whether the murder was the result of a "process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action." *Id.*

This error had a prejudicial impact on this case. The evidence against Major was not so great that it precluded a verdict of second-degree murder. The State's theory at trial was that Major stabbed his common-law wife, Tina Dell, to death on April 16, 1988, in their home and then he dumped the body in the woods. His wife's bones were found two years later. However, the State did not provide any evidence that Major intended to kill Dell or that he weighed his options or considered any consequence before acting. There was no evidence presented that would disprove the theory that, if Major did kill Ms. Dell, that the killing arose as an impulsive act borne out of passion. The State presented little evidence about the events that transpired directly before Dell's disappearance. The only testimony the state offered was that a neighbor heard two people arguing. (3/12/96 Trial Transcript ("TT") at 192-94; 3/15/96 TT at 20.) Assuming that this person heard Major arguing with Dell before the murder, this does not support a finding of deliberation, but compels the opposite conclusion that the killing was done as a rash act in the middle of a heated argument. There was no direct or circumstantial evidence presented to support a conclusion that Major had any plans to harm Dell or that he had made any threats to kill her. Overall, this evidence was far more consistent with a second-degree murder.

The remaining evidence against Major was weak. There was no forensic evidence linking Major to Dell's death. To establish that Major murdered his wife with premeditation and deliberation, the State relied primarily on an expert, Dr. Sheila Brooks. She examined the bones and identified possible injuries on the bones.

However, Dr. Brooks' testimony was confusing and cannot be considered reliable. In the first instance, it was impossible to ascertain from her testimony when the damage to the bones occurred, what caused the damage, or if there were any forensic defects involved. She merely testified that certain defects "might" be a cut and that it "could" have been perimortem. This non-definitive testimony went on for 60 pages of trial transcript; however, her testimony routinely changed. (3/12/96 TT at 60-122.) For example, at one point Dr. Brooks was shown a picture of the 12th thoracic vertebra and said that she was not sure if there was an injury to it. However, she described an injury to the 6th thoracic vertebra using the same picture she earlier said was the 12th thoracic vertebra for which she was unsure there was an injury. (*Compare* 3/12/96 TT at 78-79 with *Id.* at 89.) She also testified that she originally believed that a rib was injured, but then acknowledged she became uncertain after speaking to another expert. (3/12/96 TT at 91-92.)

But even if her testimony is credited and there were multiple stab wounds, this evidence does not necessarily establish that the attack occurred with deliberation, *i.e.* that there was a dispassionate weighing process and consideration of consequences before acting. *See Chambers v. McDaniel*, 549 F.3d 1191, 1200-01 (9th Cir. 2008) (seventeen stab wounds did not preclude a finding of second-degree murder). In fact, multiple stab wounds is consistent with a second-degree murder committed while in the throes of a heated argument. *Id.* at 1201.

Beyond the weaknesses in the evidence as to deliberation, the prosecutor's comments in closing exacerbated the harm from the improper instruction. The prosecutor emphasized to the jury that premeditation and intention were the only elements that they needed to find. Deliberation was not mentioned at all. (3/15/96 TT at 10.) And, relying directly on the *Kazalyn* instruction, the prosecutor argued that premeditation could be as instantaneous as "successive thoughts of the mind," leaving no room for any deliberation. (*Id.* at 10-11.)

Accordingly, there can be no doubt that the jury applied the instruction in an unconstitutional manner. This error clearly prejudiced Major.

D. Major Can Establish a Fundamental Miscarriage of Justice

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

As discussed before, the Nevada Supreme Court has previously indicated that *Byford* represented a narrowing of the definition of first-degree murder. Under *Welch* and *Montgomery*, that decision is substantive, retroactive, and allows him to raise a miscarriage of justice argument under *Bousley* and *Mitchell*. For the reasons discussed before, the facts in this case established that petitioner only committed a second-degree murder. As such, in light of the entire evidentiary record in this case, it is more likely than not no reasonable juror would convict him of first-degree murder. Because he can establish that a miscarriage of justice occurred, this Court can address the merits of the claim.

III. CONCLUSION

Accordingly, for the reasons stated in the petition and as supplemented herein, the petition should not be summarily dismissed. Major has demonstrated sufficient

grounds to overcome any purported procedural bars and respectfully requests that this Court:

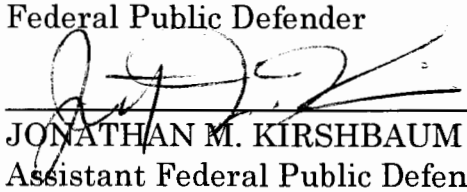
1. Issue a writ of habeas corpus to have Major brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. To the extent any pertinent facts are in dispute, conduct an evidentiary hearing at which proof may be offered concerning such matters; and

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

Dated this 20th day of July, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender



JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12908C

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding **RESPONSE TO OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS** filed in the District Court Case No. CV-HC-17-0248.

☒ Does not contain the social security number of any person.

- OR -

☐ Contains the social security number of a person as required by:

A: A specific state or federal law

B: For the administration of a public program or for an application for a federal or state grant.

DATED this 20th day of July, 2017.

JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12908C

CERTIFICATE OF SERVICE

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

That on July 20, 2017, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Mark S. Mills
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801

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

An Employee of the
Federal Public Defender
District of Nevada

FILED

2017 JUN 30 PM 4:56

ELKO CO DISTRICT COURT

CLERK____ DEPUTY____

CASE NO.: CV-HC-17-0248

DEPT. NO.: 2

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

RICKEY TODD MAJOR,

Petitioner,

vs.

JAMES E. DZURENDA, DIRECTOR,

Nevada Department of Corrections,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, by and through the Elko County District Attorney's Office and MARK S. MILLS Deputy District Attorney, and opposes Petitioner's Petition For Writ Of Habeas Corpus. This Opposition is made and based upon the following Points and Authorities in support hereof, as well as the documents, pleadings and exhibits already on file with this Honorable Court.

Dated this 30 day of June, 2017.

TYLER J. INGRAM
Elko County District Attorney's Office

By: _____

MARK S. MILLS
Deputy District Attorney
State Bar Number: 11660

Affirmation Pursuant to NRS 239B.030
SSN Does Appear
SSN Does Not Appear

POINTS AND AUTHORITIES

I. Introduction and Procedural Posture

In 1996, Petitioner was convicted by a jury of First Degree Murder with the Use of a Deadly Weapon. He was sentenced to consecutive sentences of life without the possibility of parole, and a judgment of conviction was entered on May 1, 1996. Petitioner appealed his conviction to the Nevada Supreme Court and his conviction was affirmed. The Nevada Supreme Court issued its remittitur on September 3, 1998. Petitioner filed a state petition for a writ of habeas corpus with the Nevada Fourth Judicial District Court, and his petition was denied on March 9, 2005. He subsequently filed a federal petition for a writ of habeas corpus in the United States District Court for the District of Nevada. That petition was denied on March 17, 2010. On April 6, 2017, Petitioner filed another state petition for a writ of habeas corpus in the Nevada Fourth Judicial District. For the following reasons, Respondent hereby opposes Petitioner's petition.

II. Analysis and Argument

The instant petition is another in a long line of petitions challenging the *Kazalyn* jury instruction for first degree murder, a jury instruction that had routinely been given by district courts in the state of Nevada until 2000, when the Nevada Supreme Court disapproved of the *Kazalyn* instruction and instructed district courts to cease giving it. *Byford v. State*, 116 Nev. 215 (2000). The Court in *Byford* concluded that the *Kazalyn* instruction was problematic because it failed to independently define the element of deliberation, and the court therefore abandoned its line of cases approving of the instruction. *Id.* at 235. After *Byford*, numerous Nevada Supreme Court cases addressed the issue of whether the *Byford* decision should apply retroactively to defendants convicted of first degree murder whose convictions had become final before *Byford* was decided. Every post-*Byford* Nevada Supreme Court case addressing that issue has concluded that *Byford* has no retroactive application.

In *Garner v. State*, 116 Nev. 770 (2000), decided just a few months after *Byford*, the Nevada Supreme Court addressed the retroactivity issue and concluded that *Byford* had no retroactive application, because giving the *Kazalyn* instruction was not constitutional error.

The court explained,

> *Byford* does not invoke any constitutional mandate in directing that its new instructions be given in future cases, so there is no constitutional requirement that this direction have any retroactive effect.
> On the contrary, this court has generally held that new rules of law apply prospectively unless they are rules of constitutional law, when they apply retroactively only under certain circumstances.

Garner v. State, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000) (overruled on other grounds); *see also Evans v. State,* 117 Nev. 609, 643, 28 P.3d 498, 521 (2001) (with convictions predating *Byford*, neither the use of the *Kazalyn* instruction nor the failure to give instructions equivalent to those set forth in *Byford* provides grounds for relief"*); Rippo v. State*, 122 Nev. 1086, 1097, 146 P.3d 279, 286 (2006) ("*Byford* is not retroactive, and use of the *Kazalyn* instruction in a case predating *Byford* is no ground for relief");

More recently, in *Nika v. State*, 124 Nev. 1272 (2008), the Nevada Supreme Court revisited the *Byford* retroactivity issue yet again. The court rejected the argument that *Byford* announced a change in the law, as opposed to a clarification of the law. *Nika v. State*, 124 Nev. 1272, 1286 (2008). This distinction is important. If a court's interpretation of a law is deemed to be a mere clarification of the law, and if that new interpretation is deemed a correct statement of the law at the time the defendant was convicted, then the defendant may be entitled to relief, not on grounds of retroactivity, but rather on grounds of due process, for "the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-29 (2001); *see also Bunkley v. Florida*, 538 U.S. 835 (2003).

In *Nika*, the court reiterated and affirmed its holding in *Garner* that *Byford* announced a change in, rather than a clarification of, the law. Because *Byford* announced a change in

the law—rather than a clarification of the law—the Due Process Clause was not implicated and Nika was not entitled to relief pursuant to the *Fiore* and *Bunkley* Due Process analysis. The court in *Nika* then applied a retroactivity analysis, and reaffirmed its earlier decisions holding that *Byford* does not apply retroactively to cases which became final before *Byford* was decided. The court emphasized that "if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law." *Nika v. State*, 124 Nev. 1272, 1288 (2008). With respect to *Byford*, the court explained, "Our decision in *Byford* to change Nevada law and distinguish between 'willfulness,' 'premeditation,' and 'deliberation' was a matter of interpreting a state statute, not a matter of constitutional law." *Id.*

Nika would seem to foreclose any argument that *Byford* should apply retroactively. Nevertheless, notwithstanding *Nika*, Petitioner has filed the instant petition urging the court give *Byford* retroactive application. In support of his Petition, Petitioner argues that a couple of recent United States Supreme Court decisions—*Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v. United States*, 136 S. Ct. 1257 (2016)—provide a new, previously unavailable legal basis for challenging his conviction, and thus good cause for filing his petition more than a year after issuance of the remittitur or for filing a second or successive writ. *See Rippo v. State*, 368 P.3d 729, 738-39 (Nev. 2016) (overruled on other grounds) (allowing an otherwise procedurally barred petition to be filed within one year from the point in time a new claim becomes available).

For the following reasons, Respondent disagrees that *Montgomery* and *Welch* provide a previously unavailable legal basis for filing a petition. Because neither *Montgomery* nor *Welch* provides a previously unavailable basis for filing a petition, Petitioner cannot demonstrate good cause to overcome the procedural bars.

a. <u>Petitioner's petition is procedurally barred</u>

Petitioner has previously and unsuccessfully filed a petition for a writ of habeas corpus. Additionally, the instant petition was filed more than one year after the remittitur was issued, or more than one year after Petitioner's claim became available. And Petitioner has not demonstrated good cause for overcoming these procedural bars. Accordingly, Petitioner's petition should be denied.

i. Petitioner's petition is a successive writ

Petitioner's petition must be dismissed because it is a second or successive petition. Second or successive petitions must be dismissed "if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." NRS 34.810(2). In this case, the issue raised by Petitioner in his instant petition was already raised by Petitioner in his previous petition. As Petitioner acknowledges in his petition, "Ground One in this proceeding is the same as Ground Eleven in the prior proceeding." (Petitioner's petition, page 9, lines 18-19). As Respondent will argue below, neither *Montgomery* nor *Welch* provide a novel ground for filing a habeas petition. Accordingly, because Petitioner's instant petition fails to allege new or different grounds for relief, and because this petition is his second or successive petition, the district court must dismiss it.

ii. Petitioner's petition was not timely filed

Absent a showing of good cause, a post-conviction petition for a writ of habeas corpus must be filed within one year after the entry of judgment of conviction or, if an appeal was taken from the judgment of conviction, within one year from the issuance of the remittitur. NRS 34.726(1). In this case, Petitioner appealed his conviction, his conviction was affirmed, and the Nevada Supreme Court issued its remittitur on September 23, 1998. Petitioner filed the instant petition on May 16, 2017, almost nineteen years after the issuance of the remittitur. Accordingly, unless Petitioner can show good cause for failing to timely file his petition, his petition is procedurally barred and must be denied.

iii. Petitioner has not demonstrated good cause to overcome the

procedural bars

In his petition, Petitioner argues that recent U.S. Supreme Court decisions *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v. United States*, 136 S. Ct. 1257 (2016) provide a new, previously unavailable legal ground for relief. In order to understand the possible applicability of *Montgomery* and *Welch* to the instant case, an overview of the U.S. Supreme Court's retroactivity doctrine is in order.

1. Overview of the Teague retroactivity analytical framework

In *Teague v. Lane*, 489 U.S. 288 (1989), the U.S. Supreme Court addressed the issue of whether a Supreme Court decision announcing a new rule should be applied retroactively. In doing so, the Court recognized the importance of finality in criminal convictions, commenting that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074 (1989). The Court further elaborated:

> The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore,..."[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague v. Lane, 489 U.S. 288 (1989) (citations omitted).

In light of this need for finality in the criminal justice system, the *Teague* court held that, as a general principle, a new constitutional rule of criminal procedure should not be applied retroactively to cases which became final before the new rule was announced. *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be

applicable to those cases which have become final before the new rules are announced").

The Court has recognized two categories of decisions that are not subject to this general bar on retroactivity. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). First, if a new rule is deemed "substantive," it will generally be given retroactive effect. *Id.* The Court has previously explained that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Second, new "watershed" rules of criminal procedure (e.g., the decision establishing the right to counsel for indigent defendants) also will be given retroactive effect. *Id.*

In this case, the issue is whether this court's decision in *Byford* should be applied retroactively to Petitioner's case, which had become final prior the *Byford* decision. As explained above, the Nevada Supreme Court has already addressed this issue in *Garner* and *Nika*, and has held that the change in the law announced by *Byford* did not implicate constitutional concerns and therefore did not apply retroactively. Petitioner now argues that *Montgomery* and *Welch* provide a new, previously unavailable legal claim.

2. *Montgomery v. Louisiana* does not establish a new legal basis for filing a petition

In his petition, Petitioner relies heavily on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), a U.S. Supreme Court case that was decided on January 25, 2016. In *Montgomery*, the U.S. Supreme Court considered the issue of whether its recent decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)—in which the Court held that a juvenile offender convicted of murder could not be sentenced to life without parole without consideration of mitigating circumstances—should be retroactively applied to juvenile offenders whose convictions had become final prior to the *Miller v. Alabama* decision. Before ultimately concluding that the *Miller* case did in fact announce a "substantive" rule and should therefore be applied retroactively to juvenile offenders whose convictions had become final prior to the *Miller* decision, the Court first addressed the issue of whether the *Teague* retroactivity analysis is

binding on the states. The Montgomery Court held that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016).

The relevance of *Montgomery* to the instant case is not particularly clear, especially since Nevada has already largely adopted the *Teague* framework. *See Colwell v. State*, 118 Nev. 807, 819 (2002) ("Thus, consistent with the *Teague* framework, we will not apply a new constitutional rule of criminal procedure to finalized cases unless it falls within either of two exceptions").

Nevertheless, regardless of the applicability of *Montgomery* to the instant case, it does not provide a ground for relief in the instant petition. *Montgomery v. Louisiana* was decided on January 25, 2016. Even assuming that Montgomery established a previously unavailable legal claim, Petitioner would have had one year from the time the claim became available (i.e., January 25, 2016) to file his petition. He filed his petition on April 6, 2017, more than one year after *Montgomery* was decided. Accordingly, *Montgomery* does not provide a basis for relief.

///

3. *Welch v. United States* does not establish a new legal basis for filing a petition

The second case which Petitioner contends establishes a previously unavailable legal claim is *Welch v. United States*, 136 S. Ct. 1257 (2016). For the following reasons, Respondent believes that *Welch* does not provide a new, previously unavailable ground for relief.

In *Welch*, the U.S. Supreme Court considered whether its recent decision in *Johnson v. United States*—which held that the residual clause of the federal Armed Career Criminal Act of 1984 was void for vagueness—should be given retroactive application. To decide this

question, the Court applied the *Teague* retroactivity analytical framework. Conducting a *Teague* analysis, the Court had no problem concluding that *Johnson* announced a new rule. *Id.* at 1264. The only issue for the Court, then, was whether the rule announced by *Johnson* was substantive or procedural. *Id.*

In addressing the issue of whether *Johnson* announced a substantive rule, the Court reiterated language from an earlier opinion—*Schriro v. Summerlin*, 542 U.S. 348 (2004)—explaining that "'[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (quoting *Schriro v. Summerlin*, 542 U. S. 348, at 353 (2004). The *Welch* Court further quoted *Schriro* as follows: "'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.* (quoting *Schriro*, 542 U. S. at 351-352).

Applying *Schriro's* test for determining whether a new rule is substantive, the *Welch* Court concluded that the rule articulated by *Johnson* was substantive and should be applied retroactively. In reaching this conclusion, the Court rejected an argument submitted by an *Amicus* urging the Court to alter the way it interpreted and applied the *Teague* analytical framework. *Amicus* argued that courts should apply the *Teague* framework by "asking whether the constitutional right underlying the new rule is substantive or procedural." *Id.* at 1265. *Amicus* further urged the Court to draw a distinction between statutory construction cases—which should be considered substantive—and statutory invalidation cases such as *Johnson*.

The *Welch* Court rejected this argument, reemphasizing, "decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'" *Id.* at 1267. (citing *Schriro, supra*, at 353).

In his petition, Petitioner argues that "[w]hat is critically important, and new, about *Welch* is that it explains, for the very first time, that the only test for determining whether a

decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes." (Petitioner's petition, page 22, lines 13-17).

Petitioner argues that *Welch* states a novel proposition of law which provides the basis for a previously unavailable ground for relief. And it is true that the Supreme Court has held "that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default." *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611 (1998) (quoting *Reed v. Ross*, 468 U.S. 1 (1984)). However, in order to overcome a procedural bar, a claim must in fact be a novel one that was not previously available to counsel. *Id.* (concluding that petitioner's claim "was most surely not a novel one," and that therefore petitioner was not able to show good cause for the procedural default).

Like the petitioner's claim in *Bousley*, Petitioner's claim in this case is "most surely not a novel one." The *Welch* court's definition of when a new rule is substantive hardly broke new ground. Under a *Teague* analysis, the proposition of law that a "rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes" has existed since at least 2004. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

Petitioner contends that what is different about *Welch* is that it establishes, for the first time, that the *Schriro* test for when a new rule is substantive is the *only* test for determining whether a new rule is substantive. But that has never been in question, and the Court has never equivocated on the original test for determining whether a new rule is substantive that it articulated in 2004. Since 2004, there has never been any confusion or debate about that point of law. In *Welch*, *Amicus* urged the Court to adopt a different analytical framework, but the Court quickly and easily rejected *Amicus*'s arguments, reiterating that "decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'" Id. at 1267. (citing *Schriro*, *supra*, at 353).

In short, all *Welch* did was reiterate already existing law and apply it in a new context.

The test for determining when a new rule is substantive was articulated in 2004 in *Schriro*. In *Welch*, the Court simply restated that test and applied it to the new rule enunciated in *Johnson* (i.e., the holding that the residual clause of the Armed Career Criminal Act of 1984 was void for vagueness). If Petitioner in this case had been convicted under the residual clause of the federal Armed Career Criminal Act of 1984, then *Welch* would provide him a legitimate ground for relief. But he was not, and *Johnson/Welch* do not give rise to a novel legal claim that was previously unavailable.

Because Petitioner's claim is "most surely not a novel one," he cannot show good cause to overcome the procedural bars. Accordingly, the district court must dismiss Petitioner's petition. NRS 34.726.

Neither has Petitioner demonstrated that the district court's failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. Sta*te, 117 Nev. 860 (2001). The evidence presented at trial conclusively demonstrated that Petitioner killed the victim in this case. He cannot make a colorable argument of actual innocence. *Id.*

b. <u>The Nevada Supreme Court's holding in *Nika v. State* that *Byford* does not apply retroactively is still good law</u>

Tellingly, in *Garner* and *Nika*, the Nevada Supreme Court never even cited *Teague*, much less conducted a *Teague* analysis. This is due to the fact that the court determined that giving the *Kazalyn* jury instruction did not violate any *constitutional* rights. Id. at 788. The *Teague* retroactivity analysis only applies to new *constitutional* rules; it does not apply to new changes in the law which are not of constitutional import. *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989) ("Unless they fall within an exception to the general rule, new ***<u>constitutional</u>*** rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced") (emphasis added).

As Nika emphasized, "[I]f a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law." *Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008).

Because the Nevada Supreme Court determined that the *Byford* decision did not implicate constitutional concerns, the court concluded that retroactivity analysis was inapplicable. The court explained:

> Nothing in the language of *Byford* suggests that decision was grounded in constitutional concerns, and *Garner* expressly stated that giving the *Kazalyn* instruction did not constitute constitutional error because *"Byford* [did] not invoke any constitutional mandate in directing that its new instructions be given in future cases." Our conclusion that the interpretation and definition of the elements of a state criminal statute are purely a matter of state law is reinforced by the fact that jurisdictions differ in their treatment of the terms "willful," "premeditated," and "deliberate" for first-degree murder. As explained earlier, several jurisdictions treat these terms as synonymous while others, for example California and Tennessee, ascribe distinct meanings to these words. These different decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional law. Because *Byford* announced a new rule and that rule was not required as a matter of constitutional law, it has no retroactive application to convictions, like Nika's, that became final before the new rule was announced.

Nika v. State, 124 Nev. 1272, 1288-89, 198 P.3d 839, 850-51 (2008).

There is no language in *Montgomery* or *Welch* to suggest that *Nika* is no longer good law. Importantly, the Nevada Supreme Court in *Nika* did not even reach the issue of whether *Byford* enunciated a substantive rule. The court did not need to, because it determined that the *Byford* rule did not implicate constitutional concerns. And if the *Teague* analysis (including the inquiry into whether a new rule is substantive or procedural) only applies to constitutional rules, then it does not apply to the *Byford* rule, which the Nevada Supreme Court deemed to not implicate constitutional concerns. *Welch* does not speak to that issue; rather, *Welch* simply reiterates the test for determining whether a rule is substantive as articulated by the Court in *Schriro*, and applies it to the *Johnson* court's determination that the residual clause of the Armed Career Criminal Act of 1984 is void for vagueness.

Because *Nika* is still good law, and *Welch* has done nothing to disturb it, *Welch* does not provide a basis for relief, and *Nika* should still control the outcome of this litigation.

III. Conclusion

Contrary to Petitioner's assertions, neither *Montgomery* nor *Welch* gives rise to any

previously unavailable claims. As a result, they do not provide good cause to overcome the procedural bars. Additionally, *Welch* does nothing to disturb the reasoning in *Nika*, which remains good law. Accordingly to the Nevada Supreme Court, the *Byford* decision did not implicate the constitution. As a result, the *Teague* retroactivity analysis is inapplicable, and *Byford* has no retroactive effect on cases, such as Petitioner's, which became final before the *Byford* decision was issued. For all of the above reasons, Respondent requests that this court summarily deny Petitioner's petition.

Dated this 30 day of June, 2017.

TYLER J. INGRAM
Elko County District Attorney's Office

By: _____
MARK S. MILLS
Deputy District Attorney
State Bar Number: 11660

Unsworn Declaration In Support Of Motion

Pursuant to NRS 53.045

Comes now MARK S. MILLS, who declares the following to the above-entitled Court:

1. That the Declarant is presently serving as a Deputy District Attorney of the Elko County District Attorney's Office.
2. That I have read the assertions of fact set forth in this pleading and incorporate them into this Declaration.
3. This Motion is made in good faith, and not merely for the purposes of delay.
4. I declare under penalty of perjury that the foregoing is true and correct.
Dated this 30 day of June, 2017.

MARK S. MILLS
Deputy District Attorney
State Bar Number: 11660

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 30th day of June, 2017, I served the foregoing OPPOSITION TO WRIT OF HABEAS CORPUS, by delivering or mailing or causing to be delivered or mailed, a copy of said document, to the following:

By delivery to:

THE HONORABLE ALVIN R. KACIN
FOURTH JUDICIAL DISTRICT COURT
ELKO COUNTY COURTHOUSE
ELKO, NV 89801

By mailing:

JONATHAN M. KIRSHBAUM
ATTORNEY AT LAW
411 E. BONNEVILLE AVE. SUITE 250
LAS VEGAS, NV 89101

Carisa Anchondo

CARISA ANCHONDO
CASEWORKER

DA# HC-17-01486

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Attorney for Petitioner Rickey Major

IN THE FOURTH JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF ELKO

CV-HC-248

RICKEY TODD MAJOR,

Petitioner,

v.

RENEE BAKER, WARDEN, etc.

Respondents.

Case No. CR-MS-95-6218
Dept No. 2

Date of Hearing: _____
Time of Hearing: _____

(Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

INSTRUCTIONS:

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

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

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

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

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

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

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

PETITION

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

2. Name and location of court which entered the judgment of conviction under attack: 4th Judicial District, Elko, Nevada

3. Date of judgment of conviction: May 1, 1996

4. Case Number: CR-95-0297

5. (a) Length of Sentence: Life without the possibility of parole consecutive to life without the possibility of parole.

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

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

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

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

8. What was your plea?

(a) Not guilty XX (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

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

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

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

12. Did you appeal from the judgment of conviction? Yes XX No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: 28879

(c) Result: Conviction Affirmed on 9/3/1998; Remittitur Issued on 9/23/1998.

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

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes XX No _____

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

(a) (1) Name of Court: 4th Judicial District

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

(3) Ground raised:

Ground One: Petitioner's Right To Conflict Free Counsel As Guaranteed By The United States Constitution Was Violated When Matthew Stermitz Was Appointed To Represent Major At Trial. U.S. Const. Amend. VI.

Ground Two: Petitioner Was Denied His Right To Due Process And A Fair Trial When His Jury Was Prejudiced By A Juror Whose Co-Worker Remarked That The Prosecution Had Possession Of "The Knife". U.S. Const. Amends. VI & XIV.

Ground Three: Petitioner Was Deprived Of His Rights To Due Process And A Fair Trial When The Prosecution Failed To Disclose

Evidence Regarding The Finding Of Knives. U.S. Const. Amends. VI & XIV.

Ground Four: Petitioner's Conviction And The Resulting Sentence, Is Invalid Under The Constitutional Guarantees Of Due Process, And A Fair Trial Due To The Absence Of Evidence Sufficient To Support, Beyond A Reasonable Doubt, A Factual Basis For The Necessary Element Of Criminal Agency For Culpability For The Offense. U.S. Const. Amends. VI, XIV.

Ground Five: Petitioner's Conviction And Sentence Are Invalid Under The Federal Constitutional Guarantees Of Due Process, Equal Protection, Trial Before An Impartial Jury And A Reliable Sentence Because The Testimony Of The Unqualified State Expert Witness Was Not Reliable And Her Conclusions Were Not Based On Approved Methods That Could Be Tested By Other Experts In Her Field. U.S. Const. Amends. V, VI, VIII & XIV.

Ground Six: Petitioner's Conviction And Sentence Are Invalid Under The Federal Constitutional Guarantees Of Due Process, And A Fair Trial Because The Court Refused To Admit The Results Of Major's Polygraph Test. U.S. Const. Amends. VI, & XIV.

Ground Seven: Petitioner's Conviction And Sentence Are Invalid Under The Federal Constitutional Guarantees Of Due Process, And A Fair Trial Because The Court Refused To Allow The Defenses Proposed Jury Instructions. U.S. Const. Amends. VI, & XIV.

Ground Eight: Petitioner's Sentence Is Invalid Under The Federal Constitutional Guarantees Of Due Process, Equal Protection, And A Reliable Sentence Because The Court Abused Its Discretion In Sentencing Him To A Term Of Two Life Sentences Without Parole. U.S. Const. Amends. V, VI, & VIII.

Ground Nine: Petitioner's Conviction And Sentence Are Invalid Under The Federal Constitutional Guarantees Of Due Process, A Fair Trial And The Right To Testify In His Own Defense

Because The Court Failed To Advise Him Of His Right To Testify At Trial. U.S. Const. Amends. V, VI, & VIII.

Ground Ten: Petitioner's Conviction And Sentence Are Invalid Under The Federal Constitutional Guarantees Of Due Process, Equal Protection, Trial Before An Impartial Jury And A Reliable Sentence Because The Reasonable Doubt Instruction Given During The Trial Improperly Minimized The State's Burden Of Proof. U.S. Const. Amends. V, VI, & VIII.

Ground Eleven: Petitioner's Conviction And Sentence Are Invalid Under The Federal Constitutional Guarantees Of Due Process, Equal Protection, Trial Before An Impartial Jury And A Reliable Sentence Because The Premeditation And Deliberation And Malice Instructions Given During The Trial Improperly Minimized The State's Burden Of Proof. U.S. Const. Amends. V, VI, & VIII.

Ground Twelve: Petitioner's Conviction Is Invalid Under The Federal Constitutional Guarantees Of Due Process, Equal Protection, Trial Before An Impartial Jury And A Reliable Sentence Due To The Substantial And Injurious Effect Of A Consistent Pattern Of Prosecutorial Misconduct And Overreaching Which Distorted The Fact Finding Process And Rendered The Trial And Sentencing Hearing Fundamentally Unfair. U.S. Const. Amends. V, VI, & XIV.

Ground Thirteen: Petitioner's Conviction Is Invalid Under The Federal Constitutional Guarantees Of Due Process And A Fair Trial Due To The Unfairly Prejudicial Atmosphere In Which His Trial Took Place. U.S. Const. Amends. V, VI, & XIV.

Ground Fourteen: Petitioner's Conviction Is Invalid Under The Federal Constitutional Guarantees Of Due Process Right To Counsel And Freedom From Self-Incrimination Because Law Enforcement Officials Obtained Various Statements From Petitioner In The Absence Of A Voluntary, Knowing And Intelligent Waiver Of His Constitutional Rights. U.S. Const. Amends. V, VI, & XIV.

Ground Fifteen: Petitioner's Rights To Equal Protection, Due Process And A Fair Trial Were Violated When The State Was Allowed To Participate In The Ex Parte Application For An Investigator And Expert Fees. U.S. Const. Amends. VI & XIV.

Ground Sixteen: Petitioner Was Denied His Right To Due Process And A Reliable Sentence When He Was Denied His Right To A Penalty Hearing And To Be Sentenced By The Jury That Convicted Him. U.S. Const. Amends. VI, VIII & XIV.

Ground Seventeen: Petitioner's Conviction And Sentence Are Invalid Because He Was Deprived Of His Constitutional Right To Effective Assistance Of Counsel, Due Process Of Law, Equal Protection Of The Laws, Confrontation Of Adverse Witnesses And A Reliable Sentence Due To The Failure Of Trial Counsel To Provide Reasonably Effective Assistance. U.S. Const. Amends. V, VI, VIII & XIV.

Ground Eighteen: Petitioner's Conviction And Sentence Are Invalid Under The Constitutional Guarantees Of Due Process Of Law, Equal Protection Of The Laws, Effective Assistance Of Counsel And A Reliable Sentence Because Petitioner Was Not Afforded Effective Assistance Of Counsel On Appeal. U.S. Const. Amends. VI, VIII & XIV

Ground Nineteen: Petitioner's Conviction And Sentence Are Invalid Under The Constitutional Guarantees Of Due Process Of Law, Equal Protection Of The Laws, Effective Assistance Of Counsel And A Reliable Sentence Because Petitioner Was Not Afforded Effective Assistance Of Counsel On The First Prosecution For Murder. U.S. Const. Amends. V, VI, & VIII.

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

(5) Result: Petition Denied.

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

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Order dated 10/19/2006.

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

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

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

(3) Grounds raised: Same as those presented in first state petition

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

(5) Result: Petition Denied.

(6) Date of result: 3/17/2010.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Judgment entered 3/18/2010.

(c) As to any third petition, application or motion, give the same information: N/A

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

I.

II.

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

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

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

(1) First petition, application or motion?

Yes X No ____

(2) Second petition, application or motion?

Yes X No ____

(3) Third petition, application or motion? N/A

Yes ___ No ____

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

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

a. Which of the grounds is the same: Ground One in this proceeding is the same as Ground Eleven in prior proceeding

b. The proceedings in which these grounds were raised: First State Petition

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

Ground One is based upon a previously unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). A petitioner has one-year to file a petition from the date that the claim has become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*,

2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016). *Montgomery* established a new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of due process. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover, *Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute.

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

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? No. If so, state briefly the reasons for the delay.

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

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

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Matthew Stermitz (trial & direct appeal); David R. Houston (retained for motion for new trial & appeal from that motion)

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes ____ No __XX__

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

GROUND ONE

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

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

In *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by

narrowing its terms. As a result, the court was wrong to only apply *Byford* prospectively. However, relying upon its interpretation of the current state of United States Supreme Court retroactivity rules, it held that, because *Byford* represented only a "change" in state law, not a "clarification," then *Byford* only applied to those convictions that had yet to become final at the time it was decided. The court concluded, as a result, that *Byford* did not apply retroactively to those convictions that had already become final.

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

Montgomery and *Welch* represent a change in law that allows petitioner to obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that means that it must be applied retroactively to convictions that had already become final at the time *Byford* was decided. The Nevada Supreme Court's distinction between "change" and "clarification" is no longer valid in determining retroactivity. And the state courts are required to apply the rules set forth in *Welch* because those retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional principle. Petitioner is entitled to relief because there is a reasonable likelihood that

the jury applied the *Kazalyn* instruction in an unconstitutional manner. Further, the instruction had a prejudicial impact at trial as the State's evidence of deliberation was nearly non-existent and the only evidence that was provided was more consistent with a second-degree murder. Further, the prosecutor's comments in closing exacerbated the harm from the improper instruction.

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

Accordingly, the petition should be granted.

I. BACKGROUND

A. *Kazalyn* First-Degree Murder Instruction

Major was charged with first-degree murder with use of a deadly weapon based on allegations that he stabbed his wife to death. (Information.) The court provided the jury with the following instruction on premeditation:

> Premeditation or intent to kill need not be for a day, an hour or even a minute, for if the jury believes from the evidence that there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing the act constituting the killing, it was willful, deliberate and premeditated murder
>
> The intention to kill and the act constituting the killing may be as instantaneous as successive thoughts of the mind. It is only necessary that the act constituting the killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the accused no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the acts constituting murder.

(Jury Instructions, Instruction No. 10.) This instruction provided the same definition of premeditation as set forth in the *Kazalyn*[1] instruction. (12/20/04 Order Dismissing Writ of Habeas Corpus at 6, ¶ 11 (finding that *Kazalyn* instruction was given in Major's case.)

B. Conviction and Direct Appeal

The jury convicted Major of first-degree murder with use of a deadly weapon. (Verdict.) He was sentenced to consecutive sentences of life without the possibility of parole. (Judgment)

Major appealed the judgment of conviction. The Nevada Supreme Court issued an order dismissing the appeal on September 3, 1998. The conviction became final on December 2, 1998. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 n.52 (Nev. 2008) (conviction becomes final when judgment of conviction is entered and 90-day time period for filing petition for certiorari to Supreme Court has expired).

C. *Byford v. State*

On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* Its prior cases, including *Kazalyn*, had "underemphasized the element of deliberation." *Id.* Cases such as *Kazalyn* and *Powell v. State*, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), had reduced "premeditation" and "deliberation" to synonyms and that, because they were "redundant," no instruction separately defining deliberation was required. *Id.* It pointed out that, in *Greene v. State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997), the court went so far as to state that "the terms premeditated, deliberate, and willful are

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

a single phrase, meaning simply that the actor intended to commit the act and intended death as a result of the act."

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

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

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

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

On August 23, 2000, the NSC decided *Garner v. State*, 116 Nev. 770, 6 P.3d 1013, 1025 (2000). In *Garner*, the NSC held that the use of the *Kazalyn* instruction

at trial was neither constitutional nor plain error. *Id.* at 1025. The NSC rejected the argument that, under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford* had to apply retroactively to Garner's case as his conviction had not yet become final. *Id.* According to the court, *Griffith* only concerned constitutional rules and *Byford* did not concern a constitutional error. *Id.* The jury instructions approved in *Byford* did not have any retroactive effect as they were "a new requirement with prospective force only." *Id.*

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

> This does not mean, however, that the reasoning of *Byford* is unprecedented. Although *Byford* expressly abandons some recent decisions of this court, it also relies on the longstanding statutory language and other prior decisions of this court in doing so. Basically, *Byford interprets and clarifies* the meaning of a preexisting statute by resolving conflict in lines in prior case law. Therefore, its reasoning is not altogether new.
>
> Because the rationale in *Byford* is not new and could have been – and in many cases was – argued in the district courts before *Byford* was decided, it is fair to say that the failure to object at trial means that the issue is not preserved for appeal.

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

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

In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Supreme Court held that due process requires that a clarification of the law apply to all convictions, even a final conviction that has been affirmed on appeal, where the clarification reveals that a defendant was convicted

"for conduct that [the State's] criminal statute, as properly interpreted, does not prohibit." *Id.* at 228.

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

E. First Post-Conviction Petition

In 2000, Major filed a state post-conviction petition, arguing under Ground 11 that the premeditation and deliberation instruction relieved the State of proving the elements of premeditation and deliberation. (Amended Petition at 16-17.)

In December 2004, the district court denied this ground, reasoning:

> Mr. Major argues that the premeditation and deliberation and malice instructions given during trial improperly minimized the State's burden of proof. Mr. Major argues that *Byford* sets for the proper instructions. *Byford* was decided after Mr. Major was sentenced. At the time of his trial and sentencing the controlling authority for these instructions was *Kazalyn v. State*, 109 Nev. 1403. The *Kazalyn* instructions were given at Mr. Major's trial. The Nevada Supreme Court has held repeatedly since *Byford* that the *Byford* decision was not intended to be applied retroactively. *Randolph v. State*, 117 Nev. 970 36 P.3d 424, 434 (2001). As a result the Court finds the argument regarding the jury instructions to be without merit.

(12/20/04 Order Dismissing Writ of Habeas Corpus at 6, ¶ 11.) The Nevada Supreme Court affirmed the denial of the petition. (10/19/06 Order of Affirmance in No. 45012, at 12-13 & 12 n.18.)

F. *Nika v. State*

In 2007, the Ninth Circuit decided *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007). In *Polk*, that court concluded that the *Kazalyn* instruction violated due process

under *In Re* Winship, 397 U.S. 358 (1970), because it relieved the State of its burden of proof as to the element of deliberation. *Polk*, 503 F.3d at 910-12.

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

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

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

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

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

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

The primary question the Court addressed in *Montgomery* was whether it had jurisdiction to review the question. The Court stated that it did, holding "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S. Ct. at 729. "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional command in their own

courts." *Id.* at 727 (citing *Martin v. Hunter's Lessess*, 1 Wheat. 304, 340-41, 344 (1816)).

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

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

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

The Court rejected this argument, pointing out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* The question in *Bousley* was

whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, the Court had "held as a matter of statutory interpretation that the 'use' prong [of 18 U.S.C. § 924(c)(1)] punishes only 'active employment of the firearm' and not mere possession." *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). The Court in *Bousley* had "no difficulty concluding that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Id.* (quoting *Bousley*). The Court also cited *Schriro*, 542 U.S. at 354, using the following parenthetical as further support: "A decision that modifies the elements of an offense is normally substantive rather than procedural." The Court pointed out that *Bousley* did not fit under the *amicus*'s *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

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

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

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

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

II. ANALYSIS

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

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

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

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

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

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

It is reasonably likely that 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

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

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

This error had a prejudicial impact on this case. The evidence against Major was not so great that it precluded a verdict of second-degree murder. The State's theory at trial was that Major stabbed his common-law wife, Tina Dell, to death on April 16, 1988, in their home and then he dumped the body in the woods. His wife's bones were found two years later. However, the State did not provide any evidence that Major intended to kill Dell or that he weighed his options or considered any consequence before acting. There was no evidence presented that would disprove the theory that, if Major did kill Ms. Dell, that the killing arose as an impulsive act borne out of passion. The State presented little evidence about the events that transpired directly before Dell's disappearance. The only testimony the state offered was that a neighbor heard two people arguing. (3/12/96 Trial Transcript ("TT") at 192-94; 3/15/96 TT at 20.) Assuming that this person heard Major arguing with Dell before the murder, this does not support a finding of deliberation, but compels the opposite conclusion that the killing was done as a rash act in the middle of a heated argument. There was no direct or circumstantial evidence presented to support a conclusion that Major had any plans to harm Dell or that he had made any threats to kill her. Overall, this evidence was far more consistent with a second-degree murder.

The remaining evidence against Major was weak. There was no forensic evidence linking Major to Dell's death. To establish that Major murdered his wife with premeditation and deliberation, the State relied primarily on an expert, Dr. Sheila Brooks. She examined the bones and identified possible injuries on the bones. However, Dr. Brooks' testimony was confusing and cannot be considered reliable. In the first instance, it was impossible to ascertain from her testimony when the damage to the bones occurred, what caused the damage, or if there were any forensic defects involved. She merely testified that certain defects "might" be a cut and that it "could" have been perimortem. This non-definitive testimony went on for 60 pages of trial transcript; however, her testimony routinely changed. (3/12/96 TT at 60-122.) For example, at one point Dr. Brooks was shown a picture of the 12th thoracic vertebra and said that she was not sure if there was an injury to it. However, she described an injury to the 6th thoracic vertebra using the same picture she earlier said was the 12th thoracic vertebra for which she was unsure there was an injury. (*Compare* 3/12/96 TT at 78-79 with *Id.* at 89.) She also testified that she originally believed that a rib was injured, but then acknowledged she became uncertain after speaking to another expert. (3/12/96 TT at 91-92.)

But even if her testimony is credited and there were multiple stab wounds, this evidence does not necessarily establish that the attack occurred with deliberation, *i.e.* that there was a dispassionate weighing process and consideration of consequences before acting. *See Chambers v. McDaniel*, 549 F.3d 1191, 1200-01 (9th Cir. 2008) (seventeen stab wounds did not preclude a finding of second-degree murder). In fact, multiple stab wounds is consistent with a second-degree murder committed while in the throes of a heated argument. *Id.* at 1201.

Beyond the weaknesses in the evidence as to deliberation, the prosecutor's comments in closing exacerbated the harm from the improper instruction. The

prosecutor emphasized to the jury that premeditation and intention were the only elements that they needed to find. Deliberation was not mentioned at all. (3/15/96 TT at 10.) And, relying directly on the *Kazalyn* instruction, the prosecutor argued that premeditation could be as instantaneous as "successive thoughts of the mind," leaving no room for any deliberation. (*Id.* at 10-11.)

Accordingly, there can be no doubt that the jury applied the instruction in a unconstitutional manner. This error clearly prejudiced Major.

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

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

The decisions in *Montgomery* and *Welch* provide good cause for overcoming the procedural bars. *Montgomery* established a new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of due process. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover, *Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether the

interpretation narrowed the class of individuals who could be convicted under the statute. These rules were not previously available to petitioner. In fact, this Court previously denied this claim based on reasoning that *Montgomery* and *Welch* have now changed. Finally, petitioner submitted this petition within one year of *Welch*, which was decided on April 18, 2016.

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

As discussed before, the Nevada Supreme Court has previously indicated that *Byford* represented a narrowing of the definition of first-degree murder. Under *Welch* and *Montgomery*, that decision is substantive. In other words, there is a significant risk that petitioner stands convicted of an act that the law does not make criminal. For the reasons discussed before, the facts in this case established that petitioner only committed a second-degree murder. As such, in light of the entire evidentiary record in this case, it is more likely than not no reasonable juror would convict him of first-degree murder.

Law of the case also does not bar this Court from addressing this claim due to the intervening change in law. Under the law of the case doctrine, "the law or ruling of a first appeal must be followed in all subsequent proceedings." *Hsu v. County of*

Clark, 123 Nev. 625, 173 P.3d 724, 728 (2007). However, the Nevada Supreme Court has recognized that equitable considerations justify a departure from this doctrine. *Id.* at 726. That court has noted three exceptions to the doctrine: (1) subsequent proceedings produce substantially new or different evidence; (2) there has been an intervening change in controlling law; or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced. *Id.* at 729.

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

Finally, petitioner can establish actual prejudice for the reasons discussed on pages 23 to 25. It is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. The State was relieved of its obligation to prove essential elements of the crime. In turn, the jury was not required to find deliberation. This error had a prejudicial impact on this case. The evidence against Major was not so great that it precluded a verdict of second-degree murder. Further, the prosecutor's comments in closing exacerbated the harm from the improper instruction.

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III. PRAYER FOR RELIEF

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

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

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

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

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

DATED this 4th day of April, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

VERIFICATION

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

DATED this 4th day of April, 2017..

JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

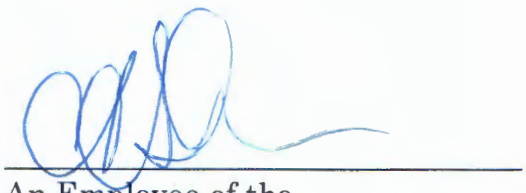
CERTIFICATE OF SERVICE

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

That on April 4, 2017, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801

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



An Employee of the
Federal Public Defender
District of Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL,
Respondent.

No. 45012

FILED

OCT 19 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 30, 1996, appellant Rickey Todd Major ("Major") was convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon for the April 1988 murder of his girlfriend, Tina Dell.[1] The district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court dismissed Major's direct appeal from his conviction.[2] The remittitur issued on September 23, 1998.

[1]A corrected judgment of conviction was entered on June 1, 2005.

[2]Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998).

On November 3, 1998, Major filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Major's unverified "first amended petition for writ of habeas corpus" was apparently filed on April 10, 2000. Major later obtained counsel to represent him in the proceedings, and counsel filed supplemental points and authorities on September 25, 2002. The State opposed the petition. The district court held a bifurcated evidentiary hearing on December 5, 2003 and January 13, 2004. On December 20, 2004, the district court dismissed Major's petition. This appeal followed.

Major raises three issues in this appeal. First, Major argues the district court held him to an erroneous burden of proof. Second, Major contends the district court erred in ruling that his trial and appellate counsel, Matthew Stermitz, was not ineffective.[3] Third, Major argues Stermitz's cumulative errors deprived him of a fair trial.

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[3]To the extent Major raised them independently of his ineffective assistance of counsel claims, Major's other claims were barred by the law of the case or waived. See Pellegrini v State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); NRS 34.810(1)(b). Major's claims regarding juror misconduct, the State's failure to disclose evidence, the State's participation in defense ex parte motions, insufficient evidence, the district court's abuse of discretion in sentencing and the district court's error in denying appellant's motion to admit polygraph evidence, refusing to give proffered jury instructions and failing to canvass appellant on his right to testify were resolved on their merits in Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998). Appellant's claim that his rights were violated by Stermitz's conflict of interest was also resolved on its merits in Major v. State, Docket No. 30521 (Order

continued on next page . . .

The burden of proof

Major argues the district court erred in requiring him to prove the factual allegations supporting his ineffective assistance of counsel claims by "strong and convincing proof." In Means v. State,[4] this court rejected the "strong and convincing proof" burden that was articulated in Davis v. State[5] in favor of the more lenient "preponderance of the evidence" standard. Means applies to Major because the Means holding related to procedure in post-conviction proceedings, and Major's post-conviction proceedings were pending when Means was decided.[6] We conclude Major failed to prove his allegations under the "preponderance of

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Dismissing Appeal, August 28, 1998). Major's claims regarding the State's expert witness's qualifications and methods, erroneous and/or unfair jury instructions, prosecutorial misconduct and overreaching, inability to seat an impartial jury due to pre-trial publicity, inability to testify on his own behalf due to the pendency of his appeal of a perjury conviction, and coerced and/or involuntary statements to investigators were waived by appellant's failure to present them to the trial court and/or raise them in his direct appeal. Major's claims regarding the propriety of his original sentence are moot, as Major successfully filed a motion to correct illegal sentence, and was resentenced. A corrected judgment of conviction was entered on June 1, 2005.

[4]120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

[5]107 Nev. 600, 817 P.2d 1169 (1991).

[6]See, e.g., Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002).

evidence" standard. Thus, we conclude that even if the district court did err in applying the "strong and convincing" standard of proof, any error was harmless.

Counsel's effectiveness

Major argues the district court erred in rejecting his claims that Stermitz was ineffective. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable.[7] The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.[8] The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal.[9]

First, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to communicate with Major. The district court found that Stermitz had the assistance of Major's former counsel's reports and notes and of Major's statements to and interviews

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[7]Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[8]Strickland, 466 U.S. at 697.

[9]Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

with investigators. At the evidentiary hearing, Stermitz testified he met at least four times in person with Major, who was living in Colorado while awaiting trial. Stermitz also testified to written communications with Major. Further, Major failed to specify what additional communication with Stermitz would have accomplished or how it would have changed the outcome of his trial. Thus, the district court did not err in rejecting this claim.

Second, Major claims the district court erred in rejecting his claim Stermitz was ineffective for failing to file pre-trial motions. The district court found that Major failed to state any facts to support this contention. We agree. The record before us reveals that Major failed to specify which pre-trial motions Stermitz should have filed or how those motions would have changed the outcome of his case. The district court did not err.

Third, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to testimony regarding statements Major made to investigators or to seek suppression of those statements based on Miranda[10] violations or on Major's inability to make voluntary statements while under the influence of cocaine. Major failed to specify any facts to show that his Miranda rights were violated during any of the statements and interviews he gave to investigators or

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[10]Miranda v. Arizona, 384 U.S. 436 (1966).

that his drug use rendered his statements involuntary. The district court noted that Major initiated most of his contact with investigators, that he was interviewed in his home in Colorado while his wife was in the next room, and that he was interviewed in Elko with his attorney present. Major also failed to state any facts to show his cocaine use rendered his statements involuntary. Further, we note that trial testimony established Major was using cocaine after Dell's disappearance, that people using cocaine can experience so-called cocaine paranoia, but that Major denied experiencing cocaine paranoia during that time. We therefore conclude the district court did not err in rejecting this claim.

Fourth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to argue for lesser included offenses or to attempt to explain Major's statements to police based on Major's cocaine use after Dell's disappearance. At the evidentiary hearing, Stermitz testified that Major told him he was innocent and that he was only interested in an acquittal, not conviction of a lesser included offense. Stermitz further testified that he thought the jury would disbelieve Major's claim of innocence if Stermitz first argued innocence but then argued for conviction of a lesser included offense. This was a tactical decision by Stermitz, and counsel's tactical decisions are "'virtually

unchallengeable absent extraordinary circumstances.'"[11] Major failed to demonstrate extraordinary circumstances or that Stermitz's decision not to argue for lesser included offenses was unreasonable. In addition, Investigator Williams testified at trial that he had asked Major if he was experiencing cocaine paranoia and Major said he was not. Thus, the district court did not err in rejecting this claim.

Fifth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to move for a change of venue before trial. The district court ruled that this claim lacked merit. We agree. At the evidentiary hearing, Stermitz testified he did not believe a motion to change venue would succeed and that no juror during the voir dire indicated he or she could not be impartial.[12] Major failed to demonstrate that Stermitz's performance was deficient in this respect. Major also failed to demonstrate that pre-trial publicity rose to the level from which prejudice would be presumed.[13] Although Major claimed Stermitz failed to properly voir dire the jury pool on pre-trial publicity, he

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[11]See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (quoting Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)).

[12]See NRS 174.455.

[13]See, e.g., Sonner v. State, 112 Nev. 1328, 1336, 930 P.2d 707, 712-13 (1996) (concluding pre-trial publicity in a high-profile capital murder case involving the murder of a police officer did not rise to the level of publicity for which prejudice would be presumed).

asserted no specific facts to support this claim and did not provide the transcript of the voir dire. "The burden to make a proper appellate record rests on appellant."[14] Major has failed to demonstrate that the district court erred in rejecting this claim.

Sixth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to effectively examine a juror regarding whether she had discussed the case outside the proceedings. The trial court held an in-chambers meeting with the parties and the juror, where the juror related a comment a coworker had made to her and said she questioned the coworker's credibility. The juror also said the statement would have no effect on her ability to serve impartially as a juror. Stermitz objected to the juror's remaining on the jury, but the district court allowed her to remain. Major failed to state how further examination of the juror would have changed the outcome of his trial. The district court did not err in ruling that Major was not entitled to relief on this claim.

Seventh, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to call expert witnesses. Specifically, Major argued Stermitz should have called forensic anthropologist Dr. Walt Birkby, psychologist Frank Hadley (Major's brother), and a DNA expert. The district court found that Stermitz was

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[14]See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).

not ineffective, as Stermitz testified at the evidentiary hearing that Dr. Birkby had told Stermitz that his testimony would not be helpful to the defense. Stermitz further testified that he believed Frank Hadley thought Major had killed Dell, and that expert DNA testimony would not be useful because the blood found at the crime scene could not be matched to either Major or Dell. Stermitz's decisions to call or not call particular witnesses were tactical, and did not fall below an objective standard of reasonableness under the circumstances.[15] We note that, contrary to Major's assertion, Stermitz had the DNA testing report admitted into evidence, and the jury therefore had the report to consider in its deliberations. We further note that the substance of Dr. Birkby's report that was beneficial to Major came into the record, as Stermitz cross-examined Dr. Brooks regarding Dr. Birkby's findings and her discussions with him. Thus, the district court did not err in finding that Major was not entitled to relief in this regard.

Eighth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to call his defense investigator, James Grady. Major claims Grady would have testified that he discovered evidence of Major's innocence as well as the existence of two

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[15]See Doleman, 112 Nev. at 848, 921 P.2d at 280-81 (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).

other suspects.[16] Major has failed on appeal to point to anything in the record that would substantiate this claim or demonstrate that the district court erred in concluding that he was not entitled to relief on this ground. In the proceedings below, Major failed to allege or demonstrate what specific evidence Grady would have testified to discovering, whom Grady would have identified as a suspect, or how such testimony would have altered the outcome of Major's trial.[17] Much to the contrary, during the State's cross-examination at the evidentiary hearing, Major acknowledged that he was not aware of anything specific that Grady had discovered that would have altered the result of Major's trial. The district court did not err in rejecting this claim.

Ninth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to voir dire the State's forensic anthropologist, Dr. Brooks, on her qualifications at the beginning of her testimony. At the beginning of its direct examination, the State established that Dr. Brooks had an M.A. and a Ph.D. in physical anthropology from the University of California, Berkeley, and had been a

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[16]In his evidentiary hearing testimony, Major referred to a State's trial witness who was given a polygraph test and "flunked it." Major failed to state who this person was or to establish that evidence of this person's polygraph test results would have been admissible at trial and would have changed the outcome of the trial. See generally Corbett v. State, 94 Nev. 643, 584 P.2d 704 (1978).

[17]See Hargrove, 100 Nev. at 502, 686 P.2d at 222.

practicing forensic anthropologist for twenty years. After Dr. Brooks had given some testimony, Stermitz questioned her on voir dire as to whether her expertise allowed her to conclude what caused the injuries visible on Dell's skeletal remains beyond "something sharp." On cross-examination, Stermitz established that Dr. Brooks had only done approximately five investigations into potential sharp force trauma to skeletal remains.

In the post-conviction proceedings below, Major did not establish that Dr. Brooks was actually unqualified to give expert testimony in forensic anthropology. Thus, he failed to demonstrate that further or earlier voir dire would have changed the outcome of his trial. The district court did not err in rejecting this claim.

Tenth, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to consult outside experts in preparing to cross-examine Dr. Brooks. Stermitz testified at the evidentiary hearing that he spoke several times with Dr. Birkby. We conclude the district court did not err in determining that Major failed to demonstrate that Stermitz's performance was deficient or that further consultation would have changed the outcome of Major's trial.

Eleventh, Major claims the district court erred in rejecting the claim that Stermitz was ineffective for failing to challenge the chain of evidence or to impeach Dr. Brooks on her methods when Dr. Brooks testified that she had taken the skeletal remains to her home and laid them out on a sheet on her patio. Major also notes that when Dr. Birkby received the remains, some of the labels placed on them had detached.

The district court concluded that the chain of evidence was not broken, as the remains were accompanied by an investigator, the evidence custodian, at all times. We agree. Major failed to demonstrate that a challenge to the chain of evidence or impeachment of Dr. Brooks based on her methods would have changed the outcome of his case. Major's expert at the evidentiary hearing testified that any trauma to the remains that occurred on Dr. Brooks' patio would be identifiably post-mortem. Other than the testimony of Major's expert at the evidentiary hearing, nothing in the record indicates that Dr. Brooks' methods compromised the integrity of her scientific findings. The trial jury was capable of assessing Dr. Brooks' credibility. The district court did not err in rejecting this claim.

Twelfth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to challenge the reasonable doubt, premeditation and deliberation, and malice instructions. The district court found that the reasonable doubt instruction conformed to the language required by NRS 175.211 and that Stermitz was not deficient for failing to object. The district court also found that the premeditation and deliberation instructions tracked Kazalyn v. State, which was the proper instruction at the time of Major's trial.[18]

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[18]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). The so-called "Kazalyn instruction" was later disapproved of in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000), but Byford was held not to be retroactive in Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

Although Major has failed to include the jury instructions in his appendix, his first amended petition purportedly quotes one of the instructions as stating: "Malice is implied where an involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent." Major contends this instruction improperly created a presumption of malice in the absence of provocation. We disagree. This instruction had no relation to the absence of provocation; rather, the instruction explained the difference between murder and involuntary manslaughter.[19] We therefore conclude the district court did not err.

Thirteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to testimony by two witnesses about the existence and contents of at least one photograph of Dell's body. No such photographs were ever located or admitted into evidence at trial. James Guisti testified at trial, however, that Major showed him two photographs of Dell's body. A police investigator also testified that Major had claimed the man responsible for Dell's death showed Major a photograph of Dell's body. At the evidentiary hearing, Stermitz testified he did not believe he had grounds to object and that the district court would likely find the testimony about the photographs

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[19]See 1983 Nev. Stat., ch. 409, § 2, at 1014 (NRS 200.070).

relevant and not more prejudicial than probative. Further, Stermitz testified that he did not know where the photographs were and had "no way to get them." Major also maintained that he never had possession of the photographs and did not know where they were.

NRS 52.255 provides in part that an original photograph is not required and "other evidence" of its contents "is admissible, if:"

> 1. All originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent;
>
> 2. No original can be obtained by any available judicial process or procedure;
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> 3. At the time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
>
> 4. The . . . photograph is not closely related to a controlling issue.

Major failed to establish by a preponderance of the evidence that either he or Stermitz could have obtained or preserved the alleged photographs for admission at trial through any available judicial process or procedure. Therefore, the district court did not err in rejecting this claim.

Fourteenth, Major argues the district court erred in rejecting his claim that Stermitz was ineffective for failing to object to "prosecutorial misconduct and overreaching." Major contended Stermitz should have objected that the prosecution was engaging in "misconduct

and overreaching" by prosecuting him for the third time for this crime. Both prior prosecutions were dismissed without prejudice, and the State was entitled to prosecute Major again. Major failed to demonstrate how objecting on this ground would have changed the outcome of his trial. The district court did not err in rejecting this claim.

Fifteenth, Major claimed Stermitz was ineffective for failing to challenge and object to the manner of the search for Dell's skeletal remains, to discover what had happened to any additional remains, or to test a "thread" that Dr. Brooks reported finding attached to one of the vertebrae that showed a possible cut mark. At the evidentiary hearing, Stermitz testified he thought the lack of additional remains was good for Major's case because it limited the number of potential injuries that could be identified. Stermitz's decision not to risk producing evidence that could implicate Major was tactical, and counsel's tactical decisions are "'virtually unchallengeable absent extraordinary circumstances.'"[20] Moreover, Major failed to demonstrate how the failure to assert any objections on these grounds fell below an objective standard of reasonableness or would have changed the outcome of the trial. Thus, the district court did not err in this regard.

Additionally we note that to the extent Major claims his original counsel, David Lockie, was ineffective for failing to obtain a

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[20]See Doleman, 112 Nev. at 848, 921 P.2d at 280-81 (quoting Howard, 106 Nev. at 722, 800 P.2d at 180).

dismissal with prejudice of the charges or to prevent the release of Dell's remains to her family, Major failed to show how Lockie's performance prejudiced him. Major has asserted no facts establishing he was entitled to dismissal with prejudice, and Dell's remains were examined by at least Dr. Brooks, Dr. Birbky, and the medical examiner before they were released. Accordingly, the district court did not err in rejecting this claim.

Sixteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to request a continuance of the first sentencing proceeding while the appeal of Major's perjury conviction was pending.[21] This issue is moot. Major was subsequently resentenced after filing a successful motion to correct illegal sentence.

Seventeenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to cross-examine James

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[21]Major's brief in this appeal argues for the first time that Stermitz was ineffective for failing to seek a continuance of the trial while the perjury conviction appeal was pending so that Major could testify on his own behalf without being impeached by a perjury conviction. Major is barred from presenting this claim for the first time in this appeal. Further, as a separate and independent ground for denying relief on this claim, Major's perjury conviction was not the only factor weighing against his taking the stand. At the evidentiary hearing, Major and Stermitz both testified that Major had told Stermitz his previous cross-examination by the prosecutor in previous cases had "not gone well." Major also had another felony conviction, with which he could have been impeached. Major failed to state any grounds upon which Stermitz could have sought a trial continuance while the perjury conviction was pending.

Guisti. As noted, Guisti testified Major showed him photographs of a body that looked like Dell's with what appeared to be chest wounds. The record before us reveals, however, that Stermitz did cross-examine Guisti. Major has failed to demonstrate what additional questions Stermitz should have asked Guisti about the photographs or how such questions would have changed the outcome of the trial. Thus, Major failed to demonstrate any entitlement to relief in this respect, and the district court did not err in rejecting this claim.

Eighteenth, Major claims the district court erred in rejecting his claim that Stermitz was ineffective for failing to cross-examine Gary Worthen about whether Worthen was a suspect in Dell's killing, had been questioned by investigators, or had taken a polygraph examination. Stermitz's cross-examination of Worthen at trial elicited that Worthen had helped Major conceal potential evidence and clean up the suspected crime scene and had possession of Dell's ring after her disappearance. Stermitz argued in closing that Worthen might have killed Dell. Major failed to demonstrate that further cross-examination of Worthen would have changed the outcome of the trial. The district court correctly rejected this claim.

Major also claims the district court erred in rejecting Major's claim that appellate counsel was ineffective.[22] To state a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal.[23] Appellate counsel is not required to raise every non-frivolous issue on appeal.[24] This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.[25]

Major claims Stermitz should have argued (a) trial counsel's conflict of interest, (b) Dr. Brooks' qualifications to serve as an expert witness, (c) reasonable doubt instruction, (d) premeditation and deliberation and malice jury instructions, (e) prosecutorial misconduct, (f) change of venue, (g) Miranda violations, and (h) denial of sentencing by jury. As stated above, we conclude issues (a) – (g) did not have a reasonable likelihood of success on appeal, and (h) was rendered moot by

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[22]Major was originally represented during his direct appeal by Matthew Stermitz; David Houston substituted in as counsel of record on January 29, 1997.

[23]Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (citing Strickland, 466 U.S. 668).

[24]Jones v. Barnes, 463 U.S. 745, 751 (1983).

[25]Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Major's successful motion to correct illegal sentence, which led to his resentencing in 2005. Thus, the district court did not err in concluding that Major failed to demonstrate that Stermitz's appellate representation fell below an objective standard of reasonableness or omitted any issues on appeal that would have had a reasonable probability of success.

Cumulative error

Finally, Major argues that the prejudice from Stermitz's errors, taken cumulatively, rendered his trial unfair.[26] Because we conclude that none of Stermitz's alleged errors at trial were prejudicial, we disagree.

Having concluded Major's contentions lack merit, we ORDER the judgment of the district court AFFIRMED.

Douglas, J.

Becker, J.

Parraguirre, J.

[26]See, e.g., Browning v. State, 120 Nev. 347, 372, 91 P.3d 39, 56 (2004).

cc: Hon. Andrew J. Puccinelli, District Judge
Steve E. Evenson
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45427

FILED

JUL 05 2006

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court sentencing appellant Rickey Todd Major to two consecutive terms of life in the Nevada State Prison without the possibility of parole. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 30, 1996, the district court convicted Major, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole.[1] This court dismissed Major's direct appeal from his conviction.[2] The remittitur issued on September 23, 1998.

On January 8, 2004, Major filed a motion to modify illegal sentence in the district court, arguing that he never waived his right to be

[1]Hon. Jack B. Ames, District Judge, heard the trial of this matter and determined the original sentence.

[2]Major v. State, Docket No. 28879 (Order Dismissing Appeal, September 3, 1998).

06-13816

sentenced by a jury. The State opposed the motion. The district court granted Major's motion and set the matter for resentencing by a jury. Major subsequently waived his right to be resentenced by a jury and agreed to be resentenced by the district court. The district court held a new sentencing hearing on December 8, 2004, and continued the hearing on February 16, 2005. On June 1, 2005, the district court sentenced Major to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This appeal followed.

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal."[3] This court will not interfere with a sentencing decision so long as the record does not demonstrate prejudice resulting from consideration in the sentencing proceeding of information or accusations founded on facts supported only by impalpable or highly suspect evidence.[4]

First, Major argues the district court improperly imposed the maximum sentence by relying on the original sentence. We disagree. Our review of the record on appeal reveals that the district court stated on the record its intention to conduct a new hearing and not be bound by the previous sentence. Before determining the sentence, the district court reviewed the entire trial transcript and the pre-sentence investigation

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[3]Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

[4]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

report (PSI) that was prepared on February 10, 2005. At the sentencing hearing, the district court stated it gave "some weight" to a felony conviction for marijuana cultivation that Major received in Colorado after the killing, it had no doubt Major had killed the victim and had premeditated the killing, the killing was "quite violent," and that Major had waited two weeks to report the victim missing, had engaged in deliberate manipulation of the investigation and obstruction of justice after reporting the victim missing, and had evidently begun planning to manipulate the investigation and obstruct justice right after the killing. We therefore conclude that the district court did not rely on the previous sentence in making its sentencing determination.

Second, Major argues the district court improperly imposed the maximum sentence by relying on Major's refusal to admit guilt. This claim is belied by the record.[5] Major admitted guilt and expressed remorse at the sentencing hearing, stating "I'm sorry for what I did to Tina and her family." In light of the district court's express reasons for imposing the sentence, we conclude that the district court's further statement that "had you stood up and been a man with regard to what you had done, I am not certain we would be here," does not establish the district court improperly relied on Major's refusal to admit guilt in imposing sentence. Rather, it merely restates the emphasis the district court placed on Major's manipulation of the investigation and obstruction of justice in determining the sentence.

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[5]See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Third, Major argues the district court improperly used a 2005 PSI that was based solely on the PSI prepared when Major was convicted in 1996 and contained no newly obtained information about Major. We disagree. Assuming the district court relied on information contained in Major's initial 1996 PSI, the district court did not err in doing so. When a defendant is resentenced following invalidation of his or her previous sentence, a supplemental PSI is not required.[6] The district court was therefore entitled to rely on any information contained in the initial PSI, whether it was included in the 2005 PSI or not. Further, at the resentencing, Major was given an opportunity to note any errors in the 2005 PSI.

Fourth, Major argues the district court abused its discretion in sentencing Major to consecutive life terms without the possibility of parole. "[A]n abuse of discretion will be found only when the record demonstrates 'prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence . . . .'"[7] Major does not argue the district court relied on impalpable or highly suspect evidence. Rather, he argues his sentence "is disproportionate to the crime in a manner that is shocking to the conscience." We disagree. Major was convicted of killing the victim by stabbing her multiple times in the neck, torso, and legs. Major's sentence,

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[6]Anderson v. State, 90 Nev. 385, 528 P.2d 1023 (1974).

[7]Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978) (quoting Silks, 92 Nev. at 94, 545 P.2d at 1161).

while severe, is within the statutory limits for his crime,[8] is not disproportionate to his crime, and does not shock the conscience.

Having concluded Major's contentions lack merit, we ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Andrew J. Puccinelli, District Judge
Steve E. Evenson
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk

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[8]See 1977 Nev. Stat., ch. 598, § 5, at 1627 (NRS 200.030); 1981 Nev. Stat., ch. 780, § 1, at 2050 (NRS 193.165).

Case No.: CR-MS-95-6218

Dept: No.: 2

FILED

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

RICKEY TODD MAJOR,

Defendant.

CORRECTED
JUDGMENT OF CONVICTION

On March 15, 1996, the above-named Defendant, **RICKEY TODD MAJOR, (Social Security Number: 265-27-9470; Date of Birth: December 20, 1956; Place of Birth: Cannon City, Colorado),** was found guilty at trial by a jury of **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165** , which crime occurred on or about the 16th day of April, 1988.

As a result of the foregoing, on April 30, 1996, District Judge Retired, Jack B. Ames, found the above-named Defendant, **RICKEY TODD MAJOR,** guilty of the crime of **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165.** The Defendant was subsequently sentenced to life in the Nevada State Prison **without** the

possibility of parole. The Defendant was further sentenced to serve a consecutive sentence of life without the possibility of parole for the use of a deadly weapon. These sentences were ordered to be served consecutive to any sentence the Defendant might be serving at that time. The Defendant was further ordered, in accordance with the provisions of NRS 176.062, to pay the Twenty-five Dollar ($25.00) administrative assessment fee.

At the time said Defendant was found guilty and at the time he was sentenced, he was represented by his attorney Matthew J. Stermitz, Esq.

On May 3, 1996, a Notice of Appeal was filed on behalf of the Defendant by Defense Counsel, Matthew J. Stermitz, Esq. On September 3, 1998, the Supreme Court of the State of Nevada filed its Order Dismissing Appeal.

On March 20, 1997, a Motion for New Trial was filed on behalf of the Defendant by defense counsel, David R. Houston, Esq. The State filed its opposition on March 26, 1997, and on May 16, 1997, this Court entered its Order Denying Motion for New Trial. On May 29, 1997, a Notice of Appeal was filed. On July 28, 1998, the Supreme Court of the State of Nevada filed its Order Dismissing Appeal.

On November 13, 1998, the Defendant, in proper person, filed a Petition for Writ of Habeas Corpus (Post-Conviction). Said petition was initially filed in White Pine County on November 3, 1998, and was subsequently forwarded to the Fourth Judicial District Court. However, the original writ was not delivered to the Court for review until several years later. On April 10, 2000, a First Amended Petition for Writ of Habeas Corpus was filed however, this writ was not verified. On April 13, 2000, this Court prepared an Order for Response. On May 25, 2000, an Answer to First Amended Petition for Writ of Habeas Corpus and Motion to Dismiss Petition was filed. On August 11, 2000, this Court prepared an Order Dismissing Writ based upon the failure to have the writ verified. On August 18, 2000, the Federal Public Defender's Office filed a Motion for Reconsideration of Court's Order Dismissing Petition for Writ of Habeas Corpus. A Response in Opposition was filed by the

State on August 28, 2000. A Reply was filed on September 1, 2000. On August 18, 2000, this Court held a telephonic conference with both counsel, after the conference, the Court prepared an Amended Order Dismissing Writ. The Writ dated April 10, 2000, was again ordered dismissed and the Court also decline to consider the Motion for Reconsideration. The Court did order that it would proceed to address the merits of the writ dated November 13, 1998.

The Court subsequently appointed counsel for Mr. Major in October, 2000. In July, 2001, this Court relieved counsel of this appointment due to counsel's failure to take any action in furtherance of Mr. Major's representation and the Court appointed new counsel. A hearing was subsequently set for December 5, 2003, the Court heard part of the evidence and continued the remainder of the hearing to allow the State to prepare for testimony which was not disclosed by Mr. Major's writ counsel. All claims raised by Mr. Major which relate to the failure to advise of the right to be sentenced by the jury or judge were separated from the writ and a new sentencing was subsequently granted. The writ/motion to correct illegal sentence hearing was concluded on January 13, 2004.

On January 8, 2004, a Motion to Modify Illegal Sentence was filed by defense counsel, Steve E. Evenson, Esq. On January 22, 2004, a Response to Motion to Modify Illegal Sentence was filed on behalf of the State and, on March 17, 2004, a Reply to Opposition to Modify Illegal Sentence filed by the defense. On May 12, 2004, the Court entered its Order Granting Motion to Modify Illegal Sentence and Order Setting Hearing for Re-Sentencing. The matter was subsequently set for trial, before a jury, commencing on Wednesday, December 8, 2004, and continuing through Wednesday, December 15, 2004.

On Wednesday, December 8, 2004, the Defendant appeared before the court for the Re-sentencing Trial. At that time a Stipulation Waiving Sentencing By the Jury (I.E. The Separate Penalty Hearing) As to the Conviction of First Degree Murder Returned In The Above-Entitled Cause On The 15th Day of March, 1996, was filed in open Court and the

prospective jurors released. The Court accepted testimony from Michael Hadley and Richard Hadley, the Defendant's half-brothers; Lori Bartee, the Defendant's half-sister; and, Jesse Dell, the Defendant's son. The Court ordered that a supplemental Presentence Report be completed and continued the re-sentencing hearing to Wednesday, February 16, 2005, at 9:00 o'clock a.m.

The Defendant appeared before the Court for final sentencing on Wednesday, February 16, 2005, at 9:00 o'clock a.m. Present and the hearing were Gary D. Woodbury, Esq., Elko County District Attorney; Steve E. Evenson, Esq., Defense Counsel; and, the Defendant. Also present representing the Division of Parole and Probation was Brett Heard.

As a result of the foregoing, this Court on February 16, 2005, finds the above-named Defendant guilty of the **FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165**, for which he was found guilty and hereby sentences said Defendant on this 16th day of February, 2005, as follows:

> **The Defendant is hereby sentenced to serve life in the Nevada Department of Corrections without the possibility of parole pursuant to NRS 200.010, NRS 200.020, NRS 200.030, and NRS 193.165. Further, the Defendant is Ordered to serve a consecutive life sentence without the possibility of parole for the Use of a Deadly Weapon.**

IT IS FURTHER ORDERED, in accordance with the provisions of NRS 176.062, that the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty-five Dollars ($25.00), as an administrative assessment fee, and judgment therefore is hereby entered against the Defendant.

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

DATED this 1st day of June, 2005.

ANDREW J. PUCCINELLI
District Judge / Department II

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Andrew J. Puccinelli, District Judge, Fourth Judicial District Court, Department II, and that on this 15 day of June, 2005, I served by hand delivery by placing a copy of said document in the agency box located in the Elko County Clerk's Office, a true copy of the foregoing document to:

Elko County District Attorney

State of Nevada, Division of Parole & Probation

Elko County Sheriff

Stefanie Pattani
Stefanie Pattani

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of Andrew J. Puccinelli, District Judge, Fourth Judicial District Court, Department II, and that on this 15 day of June, 2005, I served by regular U.S. Mail, a true copy of the foregoing document to:

Steve E. Evenson, Esq.
P.O. Box 1023
Lovelock, NV 89419

Nevada Department of Corrections
Offender Management Division,
Sentence Management
P.O. Box 7011
Carson City, NV 89419

Stefanie Pattani
Stefanie Pattani

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKEY TODD MAJOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 28879

FILED

SEP 03 1998

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

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction pursuant to a jury trial of one count of first-degree murder.

On April 30, 1996, appellant Rickey Todd Major ("Major") was convicted of one count of first-degree murder with a deadly weapon. The district court sentenced Major to two consecutive life terms without the possibility of parole.

On May 3, 1996, Major timely appealed to this court, arguing that eight alleged trial errors warrant reversal of his conviction, to wit: that the district court erroneously (1) denied two proffered jury instructions; (2) excluded Major's polygraph test evidence; (3) permitted the State to participate in his application for expert and investigator fees; (4) failed to canvass Major regarding his right to testify; (5) imposed two consecutive life sentences; and, further, that (6) insufficient evidence existed to establish the corpus delicti; (7) jury misconduct occurred; and (8) Major was entitled to be notified, pre-trial, that a witness claimed to have located the murder weapon.

Having considered the briefs and the record, we conclude that all of Major's arguments lack merit. Accordingly, we dismiss this appeal.

1. Major argues that the district court's denial of three proffered jury instructions --Proposed Instructions A through C-- constitutes reversible error. Specifically, Major contends that he was entitled to (a) an instruction mandating

that manslaughter was the appropriate verdict if the jury had reasonable doubt as to whether Major was guilty of murder or manslaughter, see People v. Aikin, 97 Cal. Rptr. 251 (Ct. App. 1971) (trial court should, sua sponte, give such instruction if jurors have reasonable doubt whether the offense was manslaughter or murder in second degree); (b) an instruction on the definition of proximate cause, see People v. Bernhardt, 35 Cal. Rptr. 401 (Ct. App. 1963) (failure to instruct on element of proximate cause where that matter is in issue constitutes error); and (c) an instruction on the defense of voluntary intoxication, see People v. Graham, 455 P.2d 153 (Cal. 1969) (in case where accused claimed that he was unconscious at time of offense, failure to give instruction on diminished capacity was error).

We conclude that the district court's denial of Major's three proffered jury instructions does not constitute reversible error. See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (where proffered jury instruction "misstates the law or is adequately covered by other instructions, it need not be given").

First, the district court correctly concluded that Proposed Instruction A with respect to manslaughter was adequately covered by Instruction 12.[1] Id.; see also Ford v. State, 99 Nev. 209, 660 P.2d 992 (1983) (a jury instruction is proper where it merely states the law rather than instructs the jury to find a presumed fact against the accused). In

[1]Instruction 12 provided:

> If you believe from the evidence beyond a reasonable doubt that the Defendant is guilty of Murder, and there is in your minds a reasonable doubt as to which of the two degrees he is guilty, he must be convicted of the lower of such degrees which is Murder of the Second Degree.
>
> Should you find first that the Defendant did not commit Murder of either the First or Second degree but believe beyond a reasonable doubt that he is responsible for the homicide, you must determine if that killing was manslaughter.

addition, the fact that the jury found Major guilty of first-degree murder renders harmless any error with respect to the manslaughter instruction. See NRS 178.598 (any error which does not affect substantial rights shall be deemed harmless).

Second, the district court correctly concluded that Proposed Instruction B with respect to proximate cause was adequately covered by Instruction 14.[2] See Barron, 105 Nev. at 773, 783 P.2d at 448.

Third, the district court correctly denied Proposed Instruction C,[3] based on Graham, 455 P.2d 153,[4] because it does not reflect Nevada law with respect to involuntary intoxication. We conclude that Instruction 16 adequately covers Nevada law on the issue.[5] See NRS 193.220.

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[2]Instruction 14 provided:

> Involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act which probably might produce such a consequence in an unlawful manner; but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

[3]Proposed Instruction C provided:

> If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without intent to kill and without malice aforethought, the crime is involuntary manslaughter.
>
> When a person voluntarily induces his own intoxication to the point of unconsciousness, he assumes the risk that while unconscious he will commit acts inherentlly [sic] dangerous to human life or safety. Under such circumstances, the law implies criminal negligence.

[4]We also note that Major's reliance on Graham is misplaced, as that case has been overruled. See People v. Saille, 820 P.2d 588 (Cal. 1991) (holding that abolition of diminished capacity defense eliminated need for sua sponte instructions relating voluntary intoxication to a required mental state).

[5]Instruction 16 provided:

> No act committed by a person while in the state of voluntary intoxication shall be deemed less criminal by reason of his

Accordingly, Major's first argument fails.

2. Major argues that the district court erred in excluding evidence of his polygraph test. Specifically, Major contends that the parties stipulated to the admission of the polygraph evidence, see Santillanes v. State, 102 Nev. 48, 714 P.2d 184 (1986) (written stipulation of parties is prerequisite to admission of polygraph evidence) or, in the alternative, polygraph evidence is independently admissible, see United States v. Crumby, 895 F. Supp. 1354 (D. Ariz. 1995) (exculpatory polygraph evidence admissible if defendant provides notice to government and government has opportunity to use its own examiner).

We conclude that the district court did not err in excluding Major's polygraph test evidence. First, a review of the record suggests that the district court could have concluded that the parties did not enter into an enforceable stipulation providing for the admission of the polygraph evidence, as is required by Santillanes.

Second, even assuming that a proper stipulation existed herein, we conclude that polygraph evidence, like other scientific evidence, is only admissible at the discretion of the district court. See Corbett v. State, 94 Nev. 643, 584 P.2d 704 (1978); see also United States v. Scheffer, ___ U.S. ___, 118 S. Ct. 1261 (1998) (holding that, given the lack of scientific consensus concerning admissibility and reliability of polygraph evidence, per se exclusion of polygraph evidence offered by an accused to support his credibility does not violate Sixth Amendment). In this case, the record reveals that Major failed to establish the qualifications of the polygraph examiner and the quality of the testing procedures. We conclude, therefore, that the district court did not abuse

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> condition, but, whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may

its discretion in refusing to admit the polygraph evidence. See generally Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (determination of whether to admit evidence is within sound discretion of district court).

Accordingly, Major's second argument fails.

3. Major argues that the district court committed reversible error in allowing the State to participate in his ex parte application for investigator and expert witness fees. See NRS 7.135 (providing for ex parte application for investigative and expert fees and other services). Specifically, Major contends that by allowing the State to participate in his ex parte motion, the district court forced Major to disclose self-incriminating information in violation of his Fifth Amendment rights.

We note that Major's Fifth Amendment argument is devoid of supporting legal authority. Further, because our review of the record reveals no evidence that Major's Fifth Amendment rights were violated, or even implicated, in the ex parte proceeding, this court need not consider the argument. See Moore v. State, 88 Nev. 74, 75, 493 P.2d 1035, 1035 (1972) (if appellant presents no authorities in support of alleged error, this court will not consider the assignment of error unless the error is so unmistakable that it reveals itself by a casual inspection of the record).

Accordingly, Major's third argument fails.

4. Major argues that the district court's failure to advise him of his right to testify on his own behalf mandates reversal. See Phillips v. State, 105 Nev. 631, 782 P.2d 381, (1989).

It is undisputed that Major has a constitutional right to testify on his own behalf. See U.S. Const. Amends. V, VI, and XIV; see also Pertgen v. State, 110 Nev. 554, 558, 875 P.2d 361, 363 (1994). However, in Phillips, this court

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be taken into consideration in determining such purpose, motive or intent.

declined to adopt the minority rule of People v. Curtis, 681 P.2d 504 (Colo. 1984), which mandates the reversal of any conviction if the defendant has not been expressly advised by the court of his right to testify. Per Phillips, therefore, reversal is not mandated even if the district court in this case failed to expressly advise Major of his right to testify. However, we hasten to add that because the record reveals a jury instruction providing that "the decision as to whether he should testify is left to the Defendant," any district court error with respect to advising Major of his right to testify is harmless. See NRS 178.598 (any error which does not affect substantial rights shall be deemed harmless).

Accordingly, Major's fourth argument fails.

5. Major argues that the district court abused its discretion in sentencing him to two consecutive life sentences without the possibility of parole.

As an initial matter, we note that Major's argument with regard to the allegedly improper sentence is devoid of supporting legal authority. See Moore, 88 Nev. at 75, 493 P.2d at 1035. However, because our review of the record reveals that Major's sentence was properly within statutory limits, see NRS 200.030, and given the district court's well-founded concern for Major's future dangerousness, we conclude that the district court did not abuse its discretion at sentencing. See Castillo v. State, 110 Nev. 535, 544, 874 P.2d 1252, 1260, (1994) ("If a sentence is within statutory limits, it will not be considered cruel and unusual punishment unless it is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity.").

Accordingly, Major's fifth argument fails.

6. Major argues that insufficient evidence existed to establish the corpus delicti. See Frutiger v. State, 111 Nev. 1385, 1389, 907 P.2d 158, 161 (1995) (holding that, to establish the corpus delicti, State must prove "'(1) the fact

of death; and (2) the criminal agency of another responsible for that death'") (quoting Azbill v. State, 84 Nev. 345, 350-51, 440 P.2d 1014, 1017 (1968)). Specifically, while Major concedes that the victim died, he maintains that there was insufficient independent evidence to prove criminal agency beyond a reasonable doubt. See id.; see also Hicks v. Sheriff, 86 Nev. 67, 70, 464 P.2d 462, 464 (1970) (the corpus delicti "must be established, independent of any confession or admission by the accused" and death must have resulted from criminal agency and "not from natural causes, accident or suicide").

We conclude that Major's insufficiency of evidence argument is without merit. The record indicates that the State's forensic expert testified about the victim's stab wounds identified post-mortem. The State's expert also testified that even if the blunt trauma did not result in the victim's immediate death, she would have died eventually as a result of her injuries. Thus, based on our review of the record, we conclude that the jury could have determined beyond a reasonable doubt that a criminal agency resulted in the victim's death. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (it is jury's function to assess weight of evidence and determine credibility of witnesses); see generally Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (when sufficiency of evidence is challenged in criminal appeal, the inquiry is whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt).

Accordingly, Major's sixth argument fails.

7. Major argues that the district court's failure to remove Juror Winder from the jury panel warrants reversal and a new trial. See NRS 175.401(1) (jurors cannot converse with anyone on a trial-related subject). Specifically, Major contends that Juror Winder was biased because she received

information from a co-worker, during an evening recess, that the "co-worker's mother's friend's friend" had located the missing knife allegedly used to kill the victim. See Isbell v. State, 97 Nev. 222, 626 P.2d 1274 (1981) (any private communication with jurors in a criminal case is presumptively prejudicial and burden is on the State to show that the communication is not prejudicial).

We conclude that Major's juror misconduct argument lacks merit. As an initial matter, the district court held a hearing outside the presence of the jury, per Isbell, and made a factual determination that the communication at issue was not prejudicial. See Remmer v. United States, 347 U.S. 227 (1954) (holding that remedy for allegations of juror partiality is hearing in which defendant can prove actual bias). The district court's determination is supported by evidence in the record which suggests that Juror Carroll E. Winder did not solicit the information, did not engage in conversation with the co-worker who conveyed the information, and did not think the co-worker was credible. See Conforte v. State, 77 Nev. 269, 362 P.2d 274 (1961) (determining whether the evidence presented rebuts a presumption of prejudice is a factual determination, and if supported by substantial evidence, will not be disturbed). Thus, even if misconduct occurred, it did not result in prejudice to Major. See Barker v. State, 95 Nev. 309, 594 P.2d 719 (1979) (not every incidence of juror misconduct requires the granting of a motion for new trial). We conclude, therefore, that the district court did not abuse its discretion in refusing to dismiss Juror Winder from the jury panel.

Accordingly, Major's seventh argument fails.

8. Major argues that the State's failure to disclose exculpatory evidence, prior to trial, mandates reversal. See generally Brady v. Maryland, 373 U.S. 83 (1963) (due process is violated if prosecutor withholds exculpatory evidence); Roberts

v. State, 110 Nev. 1121, 1127, 881 P.2d 1, 5 (1994) (same); see also Orfield v. State, 105 Nev. 107, 109, 771 P.2d 148, 149 (1989) (same). Specifically, Major contends that the State (1) improperly concealed that a witness, Mary Jean Brockett, claimed to have located two knives near the victim's remains, and (2) improperly withheld the knives from the defense.

We conclude that Major's failure to disclose exculpatory evidence argument lacks merit. As an initial matter, the record reveals conflicting testimony with respect to whether the State actually knew of Brockett's alleged discovery and whether the State actually possessed the allegedly exculpatory evidence. Brockett testified that she found two knives and gave them to Investigating Officer Stokes. By contrast, Officer Stokes testified that he had never received such evidence from Brockett. Given that it is the jury's function, and not that of this court, to "determine the credibility of witnesses," we conclude that the jury could have determined that the State never possessed the knives at issue. See McNair, 108 Nev. at 56, 825 P.2d at 573.

Even assuming the State possessed, but failed to produce, this evidence, Major was required to prove its exculpatory nature in order to mandate production. See State v. Havas, 95 Nev. 706, 601 P.2d 1197 (1979). We conclude that he did not do so at trial and he fails to do so on appeal.

Accordingly, we conclude that Major's eighth argument fails. Thus, we hereby

ORDER this appeal dismissed.

Springer, C.J.

Shearing, J.

Rose, J.

Young, J.

Maupin, J.

cc: Hon. Jack B. Ames, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Gary D. Woodbury, District Attorney
David Houston
Karen Dredge, Clerk

Case No. 6218

Dept. No. 2

FILED

'96 MAY -1 P4:47

ELKO CO. DISTRICT COURT
CLERK

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

THE STATE OF NEVADA,

Plaintiff,

vs.

JUDGMENT OF CONVICTION
(Jury Verdict)

RICKY TODD MAJOR,

Defendant./

On March 15, 1996, the above-named Defendant, RICKY TODD MAJOR, (Social Security Number: 265-27-9470; Date of Birth: December 20, 1956; Place of Birth: Cannon City, Colorado), was found guilty at trial by Jury of the crime of FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165.

Further, that at the time said Defendant was found guilty at trial by said Jury and at the time he was sentenced, he was represented by his attorney Matthew J. Stermitz, Esq.

As a result of the foregoing, this Court finds the above-named Defendant guilty of the crime of FIRST DEGREE MURDER WITH THE USE OF A DEADLY WEAPON, A FELONY AS DEFINED BY NRS 200.010, 200.020, 200.030 and NRS 193.165, for which he was found guilty by said Jury and hereby sentences said Defendant on this

30th day of April, 1996, as follows:

That the defendant is sentenced to serve life without the possibility of parole.

The defendant is sentenced to serve a consecutive sentence of life without the possibility of parole for the use of a deadly weapon.

These two sentences are to be served consecutive to any sentence that the defendant may presently be serving.

IT IS FURTHER ORDERED, in accordance with the provisions of NRS 176.062, that the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty Five Dollars ($25.00), as an administrative assessment, and judgment therefore is hereby entered against the Defendant.

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

DATED this 1ST day of May, 1996.

Jack B. Ross

DISTRICT JUDGE

Copies to:

1. Elko County District Attorney, 575 Court St., Elko, NV 89801
2. Matthew J. Stermitz, Esq., P. O. Box 2966, Elko, NV 89801
3. Division of Parole and Probation, 3920 E. Idaho Street, Elko, NV 89801
4. Elko County Jail, Elko, NV 89801
5. Director Department of Prisons, P. O. Box 5154, Carson City, NV 89701

INSTRUCTION NO. 10

Premeditation or intent to kill need not be for a day, an hour or even a minute, for if the jury believes from the evidence that there was a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing, it was willful, deliberate and premeditated.

The intention to kill and the act constituting the killing may be as instantaneous as successive thoughts of the mind. It is only necessary that the act constituting the killing be preceded by and be the result of a concurrence of will, deliberation and premeditation on the part of the accused no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the acts constituting the murder.

INSTRUCTION NO. 11

To make a killing deliberate as well as premeditated, it is unnecessary that the intention to kill shall have been entertained for any considerable length of time. It is enough if there is time for the mind to think upon or consider the act, and then determine to do it. If, therefore, the killing is not the instant effect of impulse - if there is hesitation or doubt to be overcome, a choice made as result of thought, however short the struggle between the intention and the act - it is sufficient to characterize the crime as deliberate and premeditated murder. In other words, one may be guilty of murder in the first degree although the intent to commit such a homicide is formed at the very moment the fatal act is committed.