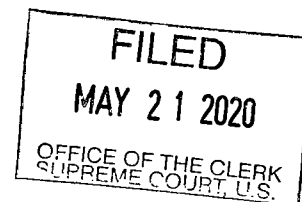


FRANK JOSEPH MATYLINSKY, JR., # 20043
NORTHERN NEVADA CORRECTIONAL CENTER
POIST OFFICE BOX 7000
CARSON CITY, NEVADA 89702-7000

ORIGINAL



CASE NO. 19-8905

IN THE SUPREME COURT OF THE UNITED STATES

IN re FRANK JOSEPH MATYLINSKY, JR.

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. LIST OF PARTIES

The Petitioner hereby identifies that all involved parties do not appear in the caption of the case appearing on the cover page. A listing of the Parties involved are as follows:

1. FRANK JOSEPH MATYLINSKY, Jr.
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Carson City, Nevada 89702-7000
Petitioner, in pro-se
2. The United States Court Of Appeals
For The Ninth Circuit
Post Office Box # 193939
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Respondent.
3. Aaron Ford, ESQ.
Attorney General of the State of Nevada
100 North Carson Street
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PETITION FOR WRIT OF MANDAMUS
II. QUESTIONS PRESENTED FOR REVIEW

1. Do the decisions of the United States Supreme Court, rendered in the cases of Montgomery v. Louisiana, 577 U.S. _____, 136 S. Ct. 718 (2016), and Welch v. United States, 577 U.S. _____, 136 S. Ct. 1257 (2016), function to give retroactive effect to the change in state law effectuated by Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000).

2. Do the decisions of the United States Court of Appeals for the Ninth Circuit, rendered in the cases of Riley v. McDaniel, (“Riley I”) 786 F. 3d 719 (9th Cir. (2015), and Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019), function to give retroactive effect to the change in state law effectuated by Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000).

3. Do the decisions of the United States Court of Appeals for the Ninth Circuit, which had denied the Petitioner’s Application For Leave To File A Second or Successive Petition for Writ of Habeas Corpus, in Matylinsky v. Baca (No. 19-71470); and other such Applications in the cases of Palovich v. Jo Gentry (No. 18-72065), Berry v. Williams (No. 18-70711), and Amati v. Williams (No. 18-72277), etc.; constitute a misapplication of federal law as determined by the United States Supreme Court in the cases of Montgomery v. Louisiana, 577 U.S. _____, 136 S. Ct. 718 (2016), and Welch v. United States, 577 U.S. _____, 136 S. Ct. 1257 (2016).

4. Is the Petitioner entitled to receive federal habeas corpus review of his claims for relief based upon the Nevada Supreme Court’s decision in the case of Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000), in light of the decisions of the United States Supreme Court, rendered in the cases of Montgomery v. Louisiana, 577 U.S. _____, 136 S. Ct. 718 (2016), and Welch v. United States, 577 U.S. 136 S. Ct. 1257 (2016).

5. Is the Petitioner entitled to receive federal habeas corpus review of his claims for relief based upon the Nevada Supreme Court’s decision in the case of Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000), in light of the decisions of the United States Court of Appeals, rendered in the cases of Riley v. McDaniel, (“Riley I”) 786 F. 3d 719 (9th Cir. 2015) and Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019).

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V. RELIEF SOUGHT

1. The Petitioner hereby requests that this Court address his questions of whether this Court's prior decisions in the cases of Montgomery v. Louisiana, 577 U.S. _____, 136 S. Ct. 718 (2016), and Welch v. United States, 577 U.S. _____, 136 S. Ct. 1257 (2016); and the prior decisions of the United States Court of Appeals for the Ninth Circuit in the cases of Riley v. McDaniel, ("Riley I") 786 F. 3d 719 (9th Cir 2015), and Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019), function to give retroactive effect to the change in Nevada State law effectuated pursuant to Byford v. State, 116 Nev. 215 994 P. 2d 700 (2000).

2. The Petitioner hereby requests that this Court issue a Writ of Mandamus to The United States Court of Appeals for the Ninth Circuit, which mandates that said inferior Court issue an Order granting the Petitioner leave to file a second or successive Petition For Writ of Habeas Corpus, challenging his First-Degree Murder Conviction and sentence entered by the State Trial Court in the case No. C84-64. Based upon the change in state law effectuated by Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000), and the Jury-instruction # 28, that functioned to negate the essential (mens rea) element of "deliberation" necessary to establish the crime of First-Degree Murder under Nevada statutory law (NRS 200.030), and resulting in the State's failure to prove their allegation of First-Degree Murder beyond a reasonable doubt as required pursuant to In re Winship, 397 U.S. 358, 364 (1970).

VI. JURISDICTION

This Court has jurisdiction and discretion to consider the instant Petition For Writ Of Mandamus, and to grant the requested relief pursuant to the “All Writs Act “codified as 28 U.S.C. § 1651 (a), and this Court’s “Original Jurisdiction” conferred pursuant to article 3§2, Of the Constitution of The United States (In all cases... in which a state shall be party, the Supreme Court Shall have original Jurisdiction”).

VII. UNAVAILABILITY OF RELIEF IN OTHER COURTS

No other Court State or Federal can grant the relief sought by this Petition For Writ Of Mandamus, because:

1. On August 22, 2017, the Second Judicial District Court of the State of Nevada, In And For The County of Washoe, had entered an Order which had procedurally defaulted the Petitioner’s April 14, 2017 , Pro-Per, State (Post-Conviction) Petition For Writ of Habeas Corpus. See Appendix A, hereto.

2. On April 14, 2017, the Petitioner submitted his Trial Jury Instruction #28, to the State Courts in support of his Writ Of Habeas Corpus (See Appendix A); And on June 10, 2019, Petitioner's Id. Jury Instruction #28, was submitted as Exhibit "13" in support of his Application For leave To File a Second or Successive Petition under 28 U.S.C. § 2254, in the U.S. Court of Appeals For The Ninth Circuit. See Appendix B, hereto.

3. On March 20, 2019, the Court Of Appeals of the State of Nevada, had entered an Order of Affirmance relative to the State District Court's aforementioned August 22, 2017, Order. The Court Of Appeals Remittitur had issued on April 16, 2019, See Appendix C, And Appendix D, hereto.

4. On or about June 10, 2019, the Petitioner had filed an Application For Leave To File A Second or Successive Petition under 28 U.S.C. § 2254, in the United States Court Of Appeals For The Ninth Circuit, Case No. 19-71470. See, Appendix E, hereto.

5. On February 6, 2020, the Court Of Appeals For The Ninth Circuit had entered an Order denying the Petitioner's Application For Leave To File a Second or Successive Petition under 28 U.S.C. § 2254. See Appendix F, hereto Case No. 19-71470.

Therefore, where neither the State Courts nor the United States Court of Appeals are inclined to interpret this Court's prior decisions in the cases of Montgomery v. Louisiana, 577 U.S. _____, 136 S. Ct. 718 (2016), and Welch v. United States, 577 U.S. _____, 136 S. Ct. 1257 (2016), as creating a new rule of federal constitutional law applicable to cases on collateral review. The above cases which function either independently or cumulatively to give retroactive effect to the change in Nevada State law effectuated pursuant to Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000), as redefined in Nika v. State, 124 Nev. 1272, 198 P. 3d 839 (2008). Thus, refusing to permit the petitioner to pursue his instant claims for relief, made available by Montgomery and Welch, through the forum of a Petition For Writ of Habeas Corpus in any court, either state or federal. Thereby, necessitating the Petitioner's filing of the instant Petition For Writ of Mandamus in this court, addressed to the United States Court Of Appeals for the Ninth Circuit. Whereas, such discretionary remedy, is the only speedy and adequate remedy at law available to the Petitioner. Whereby, he might receive federal question review on the merits of his instant claims for relief. Where there exists no right to appeal or to seek certiorari from an Order of the Court of Appeals denying an Application To File A Second Or Successive Petition under 28 U.S.C. § 2254.

However, pursuant to the All Writs Act, codified as 28 U.S.C. § 1651 (a), provides that:

“ The Supreme Court and all courts established by Act of Congress may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

Given the facts of this case as plead and supported by documentary Appendences hereto, the instant **Petition For Writ of Mandamus** is clearly the only procedural vehicle (remedy at law) available to the Petitioner by which he may invoke the federal jurisdiction question of any federal court. Thus, under the jurisdictional impositions involved the Petitioner’s filing of the **Petition For Writ of Mandamus** unequivocally serves as a procedural vehicle in aid of this Court’s jurisdiction to review the Petitioner’s instant claims for relief.

The facts of the instant case clearly demonstrate the existence of exceptional circumstances which warrants this Court’s exercise of it’s discretionary powers conferred pursuant to 28 U.S.C. § 1651 (a); and exactly why no adequate relief can be obtained in any other form or from any other court, State or Federal. Where, given this Court’s prior decisions in the cases of **Montgomery v. Louisiana**, 136 S. Ct. 718 (2016), and **Welch v. United States**, 136 S. Ct. 1257 (2016), combined with the refusals of the State Courts and the United States Court of Appeals to allow habeas corpus review of the instant claims as a new rule of federal constitutional law made applicable to cases on collateral review by the United States Supreme Court.

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article 3 § 2. Said article and section which provides the United States Supreme Court with “Original Jurisdiction”, “ In all cases...in which a state Shall be party...”
2. United States Code, 28 U.S.C. § 1651 (a). Said statute which provides that; “ The Supreme Court and all Courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
3. United States Code, 18 U.S.C. § 924.

IX. STATEMENT OF THE CASE

In the context of the State Trial Proceedings in Second Judicial District Court of the State of Nevada, In And For The County of Washoe, Case No. C84-64, the Petitioner was charged within Count I, with the crime of “ [open] Murder, a violation of NRS 200.030.”

Pursuant to the State of Nevada’s murder statute (NRS 200.030 (3)), the jury in a case Of murder is required to fix the particular degree of murder by their unanimous Verdict after considering the evidence, and law, presented to them. However, in the instant case the Jury was given an erroneous Jury Instruction #28, that had merged the essential (mens rea) Elements of “ premeditation” and “deliberation” into a single element of “premeditation”. Despite the fact that under Nevada State law, controlling at the time of the Petitioner’s Trial, A conviction for First-Degree Murder required a showing of proof beyond a reasonable doubt, that the killing was “willful, deliberate and premeditated”. See, Hern v. State. _____ Nev. _____, 635 P. 2d 278, 280 (1981). Thus, pursuant to Hern “deliberation” was a discreet mens rea element of first-degree murder which must be proven beyond a reasonable doubt to sustain a conviction. Over the years the Nevada Supreme Court has repeatedly reinterpreted the meaning of the three, mens rea, elements of “willfulness”, “deliberation” and “premeditation”, before finally resting upon the court’s present interpretation of such elements, in the Case of Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000).

Wherein, the court recognized that “deliberation” is a separate and distinct element from “premeditation”. However, it was not until the case of Nika v. State, 124 Nev. 1272, 198 P. 3d. 839 (2008), that the Nevada Supreme Court had given even prospective application of Byford, and only to cases that were not yet final on February 28, 2000, when Byford was decided. The Court refusing to give Byford retroactive effect. Despite the Court’s recognition that Byford had effectuated a change in Nevada State law. Thus, neither Byford or Nika at their inception afforded the Petitioner even the prospect of relief. That is, until this Court’s 2016 decisions in the cases of Montgomery v. Louisiana, 577 U.S. ____, 136 S. Ct. 718; and Welch v. United States, 577 U.S. ____, 136 S. Ct. 1257; and Riley v. McDaniel, (“Riley I”) 786 F. 3d 719 (2015).and Riley v. Filson, 933 F. 3d 1068 (2019), by the United States Court of Appeals for the Ninth Circuit.

The Petitioner submits that the effects of Byford must be given retroactive application to his case. Because, the erroneous Jury Instruction #28, given to the jury in his trial violated his right to receive due process under the Fifth and Fourteenth Amendments to the United States Constitution. See, Appendix B, Jury Instruction #28.

Whereas, on January 25, 2016, this court decided Montgomery v. Louisiana, 136 S. Ct. 718. Wherein, this 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.

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 offence”. *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 addressed in Montgomery was whether the court had jurisdiction to review the question. The Court stated that it did. Holding that “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” Montgomery, 136 S. Ct. at 729. Thus “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, 340-341, 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, this court decided Welch v. United States, 136 S. Ct. 1257 (2016). Wherein, this 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 the Johnson decision, Welch, 136 S. Ct. at 1260-1261, 1264. More specifically, the Court determined whether Johnson represented a new substantive rule. Id. At 1264-1265. The Court thus 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 351-352) (emphasis added). Under that framework, the Court concluded that Johnson was substantive.

The Welch 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. But the Court rejected this argument, pointing out that some of the Court's prior "substantive decisions do not impose such restrictions." Id. The "clearest example" was Bousley v. United States, 523 U.S. 614 (1998). Id. Wherein, the question was whether Bailey v. United States, 516 U.S. 137 (1995), was retroactive. Id. In Bailey, the Court " 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 Schiro, 542 U.S. at 354, using the following 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 had amended § 924 (c) (1) in response to Bailey, Welch, 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 sub category 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. However, the Court rejected this argument, stating 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 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.

The Petitioner further submits that the Court of Appeals for the Ninth Circuits decision in the Case of Riley v. McDaniel, (Riley I”) 786 F. 3d 719 (9th Cir. 2015), reaffirmed in Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019), is controlling as well.

The Court in (Riley I) had concluded that:

“ The judgment of the district court is reversed. This case is remanded with instructions to grant the writ unless the State of Nevada elects to pursue a new trial within a reasonable amount of time”. Id. at 727.

At the center of the (Riley I) decision was the Court's finding of fact and law that:

It is clear, however, that at the time Riley was tried in 1990, and at the time his conviction became final in 1991, deliberation was a discrete element of first- degree murder in Nevada. In Hern v. State, 635 P. 2d 278, 280 (Nev. 1981), decided a decade earlier, the Nevada Supreme Court explained that '[i]t is clear from the statute that all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt before an accused can be convicted of first degree murder.'" Id. at 723.

Therefore, ("Riley I's) finding that Hern constituted the controlling rule of law in the State of Nevada relative to the elements, mens rea, from 1981 through 1994, clearly impacts and has direct relevance to the plight of the petitioner. Because the petitioner was tried and convicted of First Degree Murder in 1984, and the Petitioner's Jury, just as Riley's Jury, had received an instruction that had collapsed the element of " deliberation" into the element of "premeditation". The Petitioner's conviction became final on December 13, 1988, by the completion of his direct appeal in Case No. 16222.

Therefore, under " Riley I " it is axiomatic that pursuant to Hern that: "It is [also] clear, that at the time [Petitioner] was tried in [1984], and at the time his conviction became final in [1988], deliberation was, [as a matter of state law] a discrete element of first=degree murder in Nevada."

The Court, citing Polk v. Sandoval, 503 F. 3d 903, 910 (9th Cir. 2007), held that:

“ Because Nevada law treated deliberation as a distinct element of first - degree murder at the time Riley was convicted and at the time his conviction became final, the use of the Kazalyn instruction at his trial constituted a due process violation under the United States Constitution.” “ Riley I, at 724.

Therefore the Petitioner alleges that the giving of Jury Instruction #28, to the Jury in his 1984 Trial, also constituted a due process violation under the United States Constitution.
See, Appendix B, Jury Instruction #28.

The Court then turned to an assessment of whether Riley had been prejudiced by the instructions given. Holding that:

“To obtain relief, Riley must also show that instructional error ‘had a substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619,637 (1993). Id. at 724-725.

Using the Polk decision as guidance, and thereby this Court’s prior decision in California v. Roy, 519 U.S. 2, 4-6, 117 S. Ct. 337 (1996) (per Curiam) (applying harmless error standard to jury instructions that omit an element of the crime). Whereas, the Court stated that:

“ As we held in Polk, if ‘we are left in grave doubt about whether the jury would have

found deliberation on [Riley's] part if it had been properly instructed,' we must conclude that the error was not harmless. 503 F. 3d at 913 (internal quotation marks omitted). We are indeed left in grave doubt..." Id. at 725.

Therefore, the Petitioner contends that pursuant to (Riley I) and this Court's prior ruling in California v. Roy , 519 U.S. at 4-6 (1996), that he too is entitled to receive harmless error analysis of his claim of instructional error.

In the case of Riley v. Filson, 933F. 3d 1068(9th Cir 2019), the Court had determined that intervening Nevada Supreme Court Cases did not change the law to undermine the decision in "Riley I" and the Court held that:

" Because there was no change in Nevada law that affects Riley I's interpretation of the required elements for first-degree murder in Nevada when Riley's conviction became final, the district court did not abuse its discretion by denying the Stat's motion under Rule 60 (b) (6). The judgment of the district court is AFFIRMED." Id. at 1074.

Thus, the Court's decision in ("Riley I") was affirmed by the Court's subsequent decision in Riley v. Filson, 933 F. 3d 1068, (9th Cir. 2019).

It is of particular significance to the instant Petition For Writ Of Mandamus and the relief requested hereby, that the Court in "Riley I" , when determining the proper Standard of Review, had made the following determination:

"Riley's challenge to the premeditation instruction given at his trial was presented

not in his first state habeas petition, which was adjudicated on the merits, but in his second state habeas petition, which was denied on a procedural ground, and not adjudicated on the merits. See Lambert v. Blodgett, 393 F. 3d 943,966 (9th Cir. 2004). Normally, procedural default will preclude consideration of the claim on federal habeas review. However, the procedural ground at issue here, Nev. Rev. Stat. § 34.810, has been held to be inadequate to bar federal review because the rule was not regularly and consistently applied. Valerio v. Crawford, 306 F. 3d 742,778 (9th Cir. 2002).

Because no state court has adjudicated this claim on the merits, and the state has established no procedural bar to its consideration, the strictures of 28 U.S.C. § 2254 (d) do not apply, and our review is de novo. Pirtle v. Morgan, 313 F. 3d 1160, 1167-68 (9th Cir. 2002).”

Therefore, in the instant case, the State Court’s procedural default of the Petitioner’s claims for relief brought pursuant to “Riley I”, Montgomery, and Welch, based upon the application of NRS 34. 810, was clearly erroneous and ineffective to establish an adequate and independent state procedural bar to federal review of the Petitioner’s claims for relief, brought pursuant to 28 U.S.C. § 2254. Notably, the Petitioner’s claims were raised in the State Court via State Habeas Corpus Petitions within a reasonable period of time following the decisions in “Riley I”, Montgomery, and Welch.

That is, the Petitioner's claims were raised in the State Court within a period of one-year of the entry of the decisions which made the claims available. See, Hathaway v. State, 119 Nev. 248, 71 P. 3d 503, 506 (2003) (a new claim must be brought within a reasonable time after it becomes available); and Pellegrini v. State, 117 Nev. 860, 34 P. 3d 519 (2001) (generally a petitioner has a period of one-year to raise a claim once it becomes available).

IX. REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit, when it had considered the Petitioner's Application For Leave To File A Second Or Successive Petition Under 28 U.S.C. § 2254, in case No. 19-71470, and in the cases of numerous other similarly situated Nevada State Prisoners, has failed to give retroactive application of this Court's prior decisions in Montgomery v. Louisiana, 577 U.S. _____, 136 S. Ct. 718 (2016) and Welch v. United States, 577 U.S. _____, 136 S. Ct. 1257 (2016); as well as that Court's prior decisions in Riley v. McDaniel, ("Riley I") 786 F. 3d 719 (9th Cir. 2015), and Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019), in so much as they apply to the change in Nevada State law affected under Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000), as interpreted in Nika v. State, 124 Nev. 1272, 198 P. 3d 839 (2008). Whereas said Court essentially decided an important question of federal law that has not been, but should be; settled by this Court. Regarding whether under Montgomery, Welch, and Riley, the State Court's decision in Byford

requires application to all defendants convicted of First-Degree Murder in the State of Nevada as a matter of due process under the Constitution of the United States. Clearly, the Ninth Circuit, in the context of numerous Applications For Leave To File Second or Successive Petitions under §2254, including the Petitioners in case No. 19-71470, and those of Applicants: Palovich, in case No. 18-72065; Amati, in case No. 18-72277; and Berry, in case No. 18-70711, has: (1) essentially decided the important question of federal law regarding whether the decisions in Montgomery and Welch, require that Byford be given retroactive effect to cases that were final when Byford was decided, and (2) effectively refused to apply its own decision in “Riley I” retroactively to other cases on collateral review.

A. The Petitioner submits that even though this Court has never specifically applied its Montgomery and Welch decisions to Byford, that this Court’s decision in said cases should necessarily be applied to give Byford retroactive effect.

Whereas, Montgomery and Welch function to establish that Byford’s narrowing interpretation of Nevada’s Murder statute (NRS 200.030) relative to the essential elements (mens rea) for a conviction for First-Degree Murder, must be given to all defendants convicted of First-Degree Murder where the Kazalyn Jury Instruction was received by the Jury. Irregardless of whether their First-Degree Murder conviction was final at the time Byford was decided (February 28, 2000).

Because, in Montgomery this Court for the first- time had constitutionalized the “substantive rule exception” to the Teague retroactivity rules. The material collateral consequence of this exception is that State Courts now required to apply the exception in the very same manner in which this Court has applied it. See, Montgomery, 136 S. Ct. at 727 (“States may not disregard a controlling constitutional command in their own courts”). In Welch this Court made clear that the “Substantive Rule Exception” includes “decisions that narrow the scope of a criminal statute by interpreting its terms.”

What is new and critically important 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 a substantive decision, and must be applied 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. Thus, because this new aspect of Teague is now a matter of constitutional law, all courts state and federal are required to apply it to cases on collateral review.

This new aspect of Teague has an immediate and direct impact giving Byford retroactive effect as a matter of federal constitutional law. Because, it is clear and undisputable that the Nevada Supreme Court had decided, as a matter of state law, in the case of Nika v. State, 124 Nev. 1272, 198 P. 3d 839 (2008), that Byford is substantive. That Court specifically held that Byford represented an interpretation of a criminal statute that had narrowed its

meaning. This conclusion is correct as Byford's interpretation of the three essential elements (mens rea) required pursuant to NRS 200.030, that a jury is required to separately find the essential element of "deliberation" separately, had functioned to narrow the range of individuals who could be convicted and punished for First-Degree Murder.

Nevertheless, in Nika The Nevada Supreme Court had concluded that Byford constituted a change in Nevada law, as opposed to a clarification of law, and thus, Byford does not have retroactive effect in regard to cases that were already final when Byford was decided. However, in light of Welch, this distinction between " a change" or "a clarification" of Nevada State law no longer matters. Following Welch, the only relevant question is whether the state's new interpretation of law represents a new "substantive rule" . In fact, a "change in law" fits far more clearly under the Teague "substantive rule" frame work than a "clarification of law," because it is a "new" rule of law. This Court has previously suggested as much. 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; citing Bousley v. United States, 523 U.S. 614 (1998); and Fiore). Critically, in Welch this Court never once used the term "clarification", when it analyzed how the statutory interpretation decisions fit under Teague. Rather, the Court had merely used the term "interpretation" without qualification. Therefore, this Court's critical analysis in Welch clearly reflects that the Nevada Supreme Court's

discrimination in Nika between “a change” or “clarification” of law, is no longer a relevant factor to consider in determining the retroactive affect of a decision that interprets a criminal statute to narrow its application. Thus, a new substantive rule applies to all defendants.

Accordingly, under Montgomery and Welch, the Petitioner is entitled to the retroactive effect of Byford on collateral review.

Given the decisions of the Court of Appeals in the cases of Riley v. McDaniel, , (“Riley I”) 786 F. 3d 719 (9th Cir. 2015), and Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019, the Jury Instruction #28, given in the Petitioner’s trial was not only improper it violated the Fourteenth Amendment’s Due Processes guarantees. Nonetheless, the Petitioner submits that it is reasonably likely that said Jury Instruction #28, had been applied by the jury in a manner that violates the Constitution. See, Middleton v. McNeil, 541 U.S.433, 437 (2004), cited in Polk v. Sandoval, 503 F. 3d 903, 910 (9th Cir. 2007).

B. The Petitioner further submits that the decisions of the Court of Appeals in the cases of Riley v. McDaniel, (“Riley I”) 786 F. 3d 719 (9th Cir. 2015), and Riley v. Filson, 933 F. 3d 1068 (9th Cir. 2019), relative to these important questions of federal law, which have not as yet been settled by this Court, should be settled by this Court as a final arbiter of federal law concerning the Byford retroactivity issue.

X. CONCLUSION

The Petition For Writ Of Mandamus should be granted.

Respectfully submitted

Dated this 20th day of May, 2020

By: Frank J. Matylinsky Jr.
Frank J. Matylinsky, JR.
Petitioner, in pro se.