

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

CASE No. \_\_\_\_\_

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

# APPENDIX A

1

2

3

4

5

6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF WASHOE

8

9 FRANK MATYLINSKY, JR., Case No.: C84-64

10 Petitioner, Dept. No.: 7

11 vs.

12 ISIDRO BACA, WARDEN,

13 Respondent.

14

15 ORDER

16 Currently before the Court is THE STATE OF NEVADA's *Motion to Dismiss*  
17 *Petition for Writ of Habeas Corpus (Post-Conviction)*, filed on May 28, 2017. On July  
18 18, 2017, Petitioner FRANK MATYLINSKY, JR. (hereinafter "Matylinsky") filed  
19 *Opposition to Motion to Dismiss*. This matter was submitted to the Court for decision  
20 on July 12, 2017

21 Discussion

22 As it stands, this is Matylinsky's sixth post-conviction habeas corpus petition  
23 following his conviction for murder in 1984. In reviewing Matylinsky's current  
24 *Petition*, the Court again finds that it is procedurally barred under NRS 34.726(1). In  
25 order to overcome the procedural bar under NRS 34.726(1), a petitioner must show  
26 good cause for the delay.<sup>1</sup> For a petitioner to establish good cause, they "must  
27 demonstrate that an impediment external to the defense prevented him from raising

28 <sup>1</sup> *Pellegrini v. State*, 117 Nev. 860, 872, 34 P.3d 519, 528 (2001).

1 his claims earlier.”<sup>2</sup> This can be demonstrated by showing “that the factual or legal  
2 basis for a claim was not reasonably available.”<sup>3</sup> Matylinsky asserts that the recent  
3 United States Supreme Court decisions in *Montgomery v. Louisiana*, 136 S. Ct. 1257,  
4 1264–65, 194 L. Ed. 2d 387 (2016) and *Welch v. United States*, 136 S. Ct. 1257, 1264–  
5 65, 194 L. Ed. 2d 387 (2016) are sufficient to overcome the procedural bar pursuant  
6 to NRS 34.726(1). Matylinsky argues that the decisions in *Montgomery* and *Welch*  
7 permit the retroactive application of the first degree murder jury instruction set forth  
8 in the Nevada Supreme Court case *Byford v. State*<sup>4</sup>. Matylinksy asserts that the  
9 application of the modified jury instruction could have an effect on the result of his  
10 murder trial.

11 In *Welch*, the United States Supreme Court held that under the *Teague*  
12 framework, which sets forth the retroactive application of substantive law,  
13 substantive changes to the law are to include “decisions that narrow the scope of a  
14 criminal statute by interpreting its terms, as well as constitutional determinations  
15 that place particular conduct or persons covered by the statute beyond the State’s  
16 power to punish.”<sup>6</sup> Matylinsky argues that the Nevada Supreme Court’s  
17 interpretation in *Byford* of the first degree murder statute and proffered jury  
18 instruction should be retroactively applied in his case based on the alleged narrowing  
19 of the class to whom the law would apply. After careful consideration, the Court  
20 disagrees with Matylinsky’s proposition and does not find that the decisions in  
21 *Montgomery* and *Welch* provide a factual or legal basis that were not available prior  
22

23 <sup>2</sup> *Id.* at 872.

24 <sup>3</sup> *Id.*

25 <sup>4</sup> 116 Nev. 215, 236, 994 P.2d 700, 714 (2000).

26 <sup>5</sup> 489 U.S. 288, 305, 109 S. Ct. 1060, 1073, 103 L. Ed. 2d 334 (1989) (Under *Teague*, a new constitutional  
27 rule of criminal procedure does not apply, as a general matter, to convictions that were final when the  
new rule was announced. However, the Supreme Court provide two exceptions: (1) new substantive  
rules generally apply retroactively, and (2) new watershed rules of criminal procedure, which are  
procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will  
have retroactive effect.)

28 <sup>6</sup> *Welch*, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016).

1 to the decisions in order to overcome the procedural bars. Therefore, the Court finds  
2 that Matylinsky's *Petition* are again procedurally barred under NRS 34.726(1).

3 Accordingly, and good cause appearing, THE STATE OF NEVADA's *Motion to*  
4 *Dismiss Petition for Writ of Habeas Corpus (Post-Conviction)* is GRANTED.

5 **IT IS SO ORDERED.**

6 DATED this 22 day of August, 2017.

7   
8 PATRICK FLANAGAN  
9 District Judge

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 12 day of August, 2017, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Terrance P. McCarthy, Esq., attorney for Respondent; and

8 I deposited in the Washoe County mailing system for postage and mailing  
9 with the United States Postal Service in Reno, Nevada, a true copy of the attached  
10 document addressed to:

Frank J. Matylinsky #20043  
Northern Nevada Correctional Center  
P.O. Box 7000  
Carson City, NV 89702

Jacqueline Sisco  
Judicial Assistant

# APPENDIX B

1                   N.R.S. 200.030 provides that Murder of the First Degree  
2 as it applies to this case is murder which is perpetrated by a  
3 willful, deliberate and premeditated killing.

*Peter J. Breen*  
\_\_\_\_\_  
DISTRICT JUDGE

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

Instruction No. 28

# APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK J. MATYLINSKY, JR.,  
Appellant,  
vs.  
ISIDRO BACA, WARDEN,  
Respondent.

No. 74090-COA

FILED

MAR 20 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Frank J. Matylinsky, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 14, 2017.<sup>1</sup> Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Matylinsky filed his petition 28 years after issuance of the remittitur on direct appeal on December 13, 1988, *see Matylinsky v. State*, Docket Nos. 16222, 18547 (Order Dismissing Appeals, November 22, 1988), and 24 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75-76, § 33, at 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. \_\_\_, \_\_\_, 423 P.3d 1084, 1097 n.12 (2018). Matylinsky's petition was therefore untimely filed. *See* NRS 34.726(1). Matylinsky's petition was also

---

<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

successive.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Matylinsky's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Matylinsky claimed the decisions in *Welch v. United States*, 578 U.S. \_\_\_, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 577 U.S. \_\_\_, 136 S. Ct. 718 (2016), provided good cause to excuse the procedural bars to his claim that he is entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). We conclude the district court did not err by concluding the cases did not provide good cause to overcome the procedural bars. See *Branham v. Warden*, 134 Nev. \_\_\_, \_\_\_ 434 P.3d 313, 316 (Ct. App. 2018).

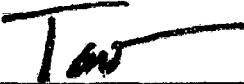
Matylinsky also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars. A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Matylinsky claimed that “[t]he facts in this case established that [he] only committed a second-degree murder.” This is not actual innocence, and Matylinsky thus failed to overcome the procedural bars. See *Bousley v.*

---

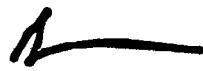
<sup>2</sup>See *Matylinsky v. Warden*, Docket No. 72235 (Order of Affirmance, December 13, 2017); *Matylinsky v. State*, Docket No. 63116 (Order of Affirmance, July 23, 2014); *Matylinsky v. State*, Docket No. 38746 (Order of Affirmance, September 12, 2002); *Matylinsky v. Warden*, Docket No. 20228 (Order Dismissing Appeal, November 2, 1989); *Matylinsky v. State*, Docket Nos. 16222, 18547 (Order Dismissing Appeals, November 22, 1988).

*United States*, 523 U.S. 614, 623 (1998) (“[A]ctual innocence’ means factual innocence, not mere legal insufficiency.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

  
\_\_\_\_\_  
Tao, J.

  
\_\_\_\_\_  
Gibbons, J.

  
\_\_\_\_\_  
Bulla, J.

cc: Chief Judge, Second Judicial District  
Frank J. Matylinsky, Jr.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

---

<sup>3</sup>To the extent Matylinsky argues claims he attempted to raise in his supplemental petition filed on September 6, 2017, those claims are not properly before this court and we do not consider them. The district court declined to consider the supplement, and Matylinsky has failed to demonstrate this was an abuse of discretion. *See* NRS 34.750(5).

# APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK J. MATYLINSKY, JR.,  
Appellant,  
vs.  
ISIDRO BACA, WARDEN,  
Respondent.

Supreme Court No. 74090  
District Court Case No. C8464

REMITTITUR

TO: Jacqueline Bryant, Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: April 16, 2019

Elizabeth A. Brown, Clerk of Court

By: Sandy Young  
Deputy Clerk

cc (without enclosures):

Second Judicial District Court, District Judge, Dept. 7  
Attorney General/Carson City \ Aaron D. Ford, Attorney General  
Washoe County District Attorney \ Jennifer P. Noble  
Frank J. Matylinsky, Jr.

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on \_\_\_\_\_

\_\_\_\_\_  
District Court Clerk

# APPENDIX E

Form 12. Application for Leave to File Second or Successive Petition Under  
28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255

(Rev. 7/1/02; Rev. 7/1/16)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
P.O. Box 193939  
San Francisco, California 94119-3939

Docket Number (to be provided by Court) 19-71470

Applicant Name FRANK JOSEPH MATYLINSKY, JR.

Prisoner Registration Number NV. DEPT. OF CORRECTIONS # 20043

Address NORTHERN NV. CORR. CENTER, P.O. BOX 7000, CARSON CITY, NV. 89702

Name of Respondent (Warden) ISIDRO BACA, WARDEN, N. N. C. C.

**Instructions - Read Carefully**

- (1) This application, whether handwritten or typewritten, must be legible and signed by the applicant under penalty of perjury. An original must be provided to the Clerk of the Ninth Circuit. The application must comply with 9th Circuit Rule 22-3, which is attached to this form.
- (2) All questions must be answered concisely. Add separate sheets if necessary.
- (3) If this is a capital case, the applicant shall serve a copy of this application and any attachments on respondent and must complete and file the proof of service that accompanies this form. If this is not a capital case, service on the respondent is not required.
- (4) The proposed 28 U.S.C. § 2254 petition or 28 U.S.C. § 2255 motion that applicant seeks to file in the district court must be included with this form.
- (5) Applicants seeking authorization to file a second or successive section 2254 habeas corpus petition shall include copies of all relevant state court decisions if reasonably available.

**You Must Answer the Following Questions:**

(1) What conviction(s) are you challenging?

First Degree Murder. ( charged with Open Murder ). Death Penalty Arbitrarily, Prejudicially,

Capaciously Sought, But Not Imposed.

(2) In what court(s) were you convicted of these crime(s)?

Second Judicial District Court, Washoe County, Reno, Nevada.

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

September 25, 1984, Life Without Parole For First Degree Murder;  
And, Manslaughter 10 Year sentence Concurrent-Now Expired.

For questions (4) through (10), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

(4) Has the judgment of your conviction or sentence been modified or amended? If yes, when and by what court?

No.

(5) With respect to each conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under 28 U.S.C. § 2254 or § 2255?

Yes  No

(a) In which federal district court did you file a petition or motion?

U.S. District Court, Reno, Nevada. Two petitions have been filed previously. To avoid confusion, the  
The Petitions are Referred as ( Federal I & Federal II ).

(b) What was the docket number?

Federal I: cv-N-89-0810-ECR

(c) On what date did you file the petition/motion?

December 21, 1989

(6) What grounds were raised in your previous habeas proceeding?

(list all grounds and issues previously raised in that petition/ motion)

Ground 1, Ineffective Assistance of Counsel;

Ground 2, Prosecutorial Misconduct; Ground 3, Trial Court Errors.

(7) Did the district court hold an evidentiary hearing? Yes  No

(8) How did the district court rule on your petition/motion?

District court dismissed petition/motion? If yes, on what grounds?

Federal I: Dismissed Without Prejudice - Mixed Petition.

District court denied petition/motion;

District court granted relief; if yes, on what claims and what was the relief?

(9) On what date did the district court decide your petition/motion?

March 29, 1993

(10) Did you file an appeal from that disposition? Yes  No

(a) What was the docket number of your appeal?

# 93-15824

(b) How did the court of appeals decide your appeal?

Denied Certificate of Probable Cause on June 1,1993

(11) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

Ground 1, Improper 1<sup>st</sup> Degree Murder Instructions under Kazalyn v. State; Byford v. State, Riley v. McDaniel, 786 F.3d 719 (9<sup>th</sup> Cir. 2015); Ground 2, Montgomery v. Louisiana, & Welch v. U.S. ( New U.S. Supreme Ct Cases) makes Byford, & Riley, Retroactive Herein; Ground 3, Newly Discovered Scientific Evidence, Schlup v. Delo 513 U.S. 298 (1995).

(12) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when? (Attach a copy of all relevant state court decisions, if available)

Yes. A timely Writ raising the No Deliberation Jury Instruction in Riley was filed 5/12/16. A timely Writ raising the Application of Montgomery v. Louisiana, & Welch v. U.S. was filed 4/14/17. See Ex's 4,5,6,7, the State District Ct Orders; NV Ct. of Appeals Orders of Affirmance, attached.

(13) For each ground/issue raised, was this claim raised in any prior federal petition/motion? (list each ground separately)

Yes. See p.-3-(a), (5) through (8) herein, to ground1; Yes. A premature Second or Successive Petition & Application filed in the 9<sup>th</sup> Cir., on 10/14/15, raising the Ground 1, Riley, issue, No. 15-73161. Dismissed. Yes. A Second or Successive Protective Petition, filed 4/19/17, No. 17-71125, Denied 8/16/17.

(14) For each ground/issue raised, does this claim rely on a new rule of constitutional law?

(list each ground separately and give case name and citation for each new rule of law) Yes. Ground 1, Riley v. McDaniel, 786 F.3d 719 (9<sup>th</sup> Cir. 2015); Ground 2, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) & Welch v. U.S. 136 S. Ct. 1257 (2016) makes Ground 1 retroactive, see question 18 herein for more info. Ground 3, Scientific Evidence, Schlup v. Delo, 513 U.S. 298, (1995). Organic brain damage, fetal alcohol syndrome, home abuse/ spanking. New Diminished Capacity evidence.

(15) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you? (list each ground separately) Yes. As to Ground 1 & 2, I discovered the cases above in 2015-16. Ground 3, New Scientific Evidence, was discovered by my research, even though I have had several attorneys appointed to my case, none of them investigated this or abandoned the obvious defenses, organic brain damage, fetal alcohol syndrome, home abuse/ spanking, drug/alcohol abuse, brain injuries & criminal behavior, diminished capacity, evidence.

(3) What was the date of each of your conviction(s) and what is the length of each sentence?

September 25, 1984, Life Without Parole For First Degree Murder; And, Manslaughter 10 year sentence

Concurrent - Now Expired.

For questions (4) through (10), provide information separately for each of your previous §§ 2254 or 2255 proceedings. Use additional pages if necessary.

(4) Has the judgment of your conviction or sentence been modified or amended? If yes, when and by what court?

No.

(5) With respect to each conviction and sentence, have you ever filed a petition or motion for habeas corpus relief in federal court under 28 U.S.C. § 2254 or § 2255?

Yes  No

(a) In which federal district court did you file a petition or motion?

U.S. District Court, Reno, Nevada

(b) What was the docket number?

( Federal II ) cv-N-03-0497-LRH ( RAM )

(c) On what date did you file the petition/motion?

September 9, 2003, in pro-se. Federal Public Defender Appointed and they filed a First Amended Writ on 7/07/04.

(6) What grounds were raised in your previous habeas proceeding?

(list all grounds and issues previously raised in that petition/ motion) Grounds 1-13, Trial ct. errors, Ground 14, Insufficient Facts to support 1<sup>st</sup> Degree conv.; Gd. 15, Disproportionate to crime; Gd. 16, A-H, Prosecutorial Misconduct; Gd. 17, Trial Counsel operated under a Conflict of Interest; Gd. 18, Ineffective Trial Counsel, A-EE, Gd. 19, Ineffective Appellate Counsel, A-E; Gd. 20, Ineffective Post-Conviction Counsel, A&B; Gd. 21, Cumulative Errors.

(7) Did the district court hold an evidentiary hearing? Yes  No

(8) How did the district court rule on your petition/motion?

District court dismissed petition/motion? If yes, on what grounds?

1<sup>st</sup> Order ( cr #57 ) Ex 8, p. 15, Ln 20-24, Dismissed some claims; At p. 16, Ln. 1-5, Ordered Answer

District court denied petition/motion; 2<sup>nd</sup> Order ( cr#73 ) denied Gds.14,18,19 and 20. Ex 9,

District court granted relief; if yes, on what claims and what was the relief?

Order (cr # 82 ), Ex 10,Granting In Part & Denying In Part ( cr #76 ) Cert. of Appealability.

(9) On what date did the district court decide your petition/motion?

See Page -3-(a) Answers to question 8, Ex.'s and Exh. 2, p.35, parg. 44; p.39, parg. 48; & p.40, parg. 49.

(10) Did you file an appeal from that disposition?

Yes  No

(a) What was the docket number of your appeal?

#08-15459

(b) How did the court of appeals decide your appeal?

Affirmed. See Exhibit 2, cited above in question 9 and Id., at pp. 30 to 45, Ln. 1-3, for complete history of Mr. Matylnsky's Second Federal Petition and Exhibit 3, Index of Exhibits in support of prior SOS Petition.

(11) State concisely each and every ground or issue you wish to raise in your current petition or motion for habeas relief. Summarize briefly the facts supporting each ground or issue.

See page 3, # (11) Answer.

(12) For each ground raised, was it raised in the state courts? If so, what did the state courts rule and when?  
(Attach a copy of all relevant state court decisions, if available)

Yes. See page 3, # (12 )Answer

(13) For each ground/issue raised, was this claim raised in any prior federal petition/motion?  
(list each ground separately)

See page 3, # (13) Answer.

(14) For each ground/issue raised, does this claim rely on a new rule of constitutional law?  
(list each ground separately and give case name and citation for each new rule of law)

See page 3, # (14) Answer.

(15) For each ground/issue raised, does this claim rely on newly discovered evidence? What is the evidence and when did you discover it? Why has this newly discovered evidence not been previously available to you?  
(list each ground separately)

See page 3, # (15) Answer.

(16) For each ground/issue raised, does the newly discovered evidence establish your innocence? How?

Yes. The jury was not instructed on one of the elements of the crime, separately, deliberation. See Byford v. State, 116 Nev. 215, 994 P. 2d 700 (2000) and Riley v. McDaniel, *supra*. Mr. Matylinsky was of diminished capacity, severely intoxicated and there is new scientific evidence. See p. 3, Question 14, answer.

(17) For each ground/issue raised, does the newly discovered evidence establish a federal constitutional error? Which provision of the Constitution was violated and how?

Grounds 1 & 2, Mr. Matylinsky's 6<sup>th</sup> & 14<sup>th</sup> Amendment Rights to Effective Counsel on Direct Appeal in not raising the jury instruction issue, when Trial Counsel objected to the ailing instruction and offered 2 instructions on premeditation and 1 on deliberation. See Polk v. Sandoval, 503 F. 3d 903, 910 (9<sup>th</sup> Cir. 2007) "relieved the state of the burden of proof on to whether the killing was deliberate as well as premeditated." 14<sup>th</sup> Amendment; Due Process And See Vega v. Ryan, 757 F. 3d 960, 969 (9<sup>th</sup> Cir. 2014) (counsel has a duty to investigate, even if his or her client does not divulge relevant information); Bemore v. Chappell, 788 F. 3d 1151 (9<sup>th</sup> Cir. 2015) (counsel's failure to investigate alibi or mental health defense was constitutionally deficient performance). 6<sup>th</sup> Amendment.

(18) Provide any other basis for your application not previously stated:

**THIS COURT SHOULD GRANT MR. MATYLINSKY'S APPLICATION FOR LEAVE  
TO FILE A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. 2254**

28 U.S.C. 2244 (a) determines that no judge shall be required to entertain a petition for writ of habeas corpus if it appears that the legality of such detention has already been determined by a court on a prior application for a writ of habeas corpus. Pursuant to 28 U.S.C. 2244 (2)(A), a claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless the application shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.

Here Mr. Matylinsky seeks authority for the District Court to review his petition For Writ of Habeas Corpus, Mr. Matylinsky seeks this authority because the claim within the petition relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See two related cases herein; Palovich v. Gentry, #18-72065; Amati v. Williams, #18-72277.

Specifically, two United States Supreme Court decisions, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) and Welch v. United States, 136 S. Ct. 1257 (2016), establish that the narrowing interpretation of the first degree murder statute in Byford v. Nevada, 116 Nev. 215, 994 P. 2d 700 (2000) must be applied retroactively in state court to convictions that were final at the time Byford was decided. The decisions in Montgomery and Welch provide good cause for overcoming the procedural bars because they establish a new rule of constitutional law.

Originally, Mr. Matylinsky filed a Supplemental Petition in the State District Court arguing that he was entitled to a new trial based upon the Ninth Circuit's controlling ruling in Riley v. McDaniel, 786 F. 3d 719 (2015). The State argued that United States Supreme Court law dictated that the Ninth Circuit's holding in Riley was not controlling.

The State further argued that the District Court should rely upon a recent decision from the Nevada Supreme Court wherein the Court expressed disagreement with the Ninth Circuit's ruling, citing Canape v. State, Docket No. 62843, 2016 WL 2957130. See EX. 4, p.2, footnote 3.

The State's application of constitutional law and the District Court's reliance upon Canape is constitutionally flawed under recent United States Supreme Court case law: Montgomery v. Louisiana, 136 S. Ct. 718 (2016) and Welch v. United States, 136 S. Ct. 1257 (2016). Moreover, it is clearly established Federal Law, as determined by the Supreme Court, that a defendant is deprived of Due Process if a jury instruction relieves the State of the burden of proof required regarding the critical question of a petitioner's state of mind. Sandstrom v. Montana, 442 U.S. 510, 521 (1979). As such, Mr. Matylinsky contends the Nevada Supreme Court misapplied clearly established federal law by affirming the State District Court's decision. The Ninth Circuit has held that if a petitioner can make the required *prima facie* showing for at least one claim in a Second or Successive Petition, the Court will certify the entire petition for consideration by the District Court. See Cooper v. Woodford, 358 F. 3d 1117,1123 (9<sup>th</sup> Cir. 200-

### CONCLUSION

Therefore, based on the above, and foregoing, Mr. Matylinsky respectfully requests this Court grant this Application for Leave to File a Successive Petition Under 28 U.S.C. 2254 in Ninth Circuit.

Dated This 10 day of June, 2019

Respectfully submitted by,

  
Frank Joseph Matylinsky # 20043  
P.O. Box 7000 - N.N.C.C.  
Carson City, NV. 89702

---

As required, a copy of the petition and argument in its entirety is attached to this application as Exhibit 1.

Apn. 016

## DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. **I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**  
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at Northern Nevada Correctional Center on June 10, 2019  
Location Date

Frank J. Matylinsky Jr.  
(Signature)

Frank Joseph Matylinsky #20043  
P.O. Box 7000 - N.N.C.C.  
Carson City, NV. 89702

# APPENDIX F

Apn. 018-019

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

FEB 6 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FRANK J. MATYLINSKY, Jr.,

No. 19-71470

Applicant,

v.

ISIDRO BACA, Warden,

ORDER

Respondent.

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

The motion to correct a clerical mistake is granted. The motion for judicial notice is denied.

The applicant seeks authorization to file a second or successive 28 U.S.C. § 2254 habeas petition to present a claim that a jury instruction given during his trial violated his due process rights. As supplemented by Docket Entry Nos. 3 and 5, the application is denied. The applicant has not made a *prima facie* showing under 28 U.S.C. § 2244(b)(2) that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence

that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Specifically, the applicant has not shown that the factual predicate of his claim could not have been discovered previously. *See 28 U.S.C. § 2244(b)(2)(B).* The applicant also has not made a *prima facie* showing that either *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), or *Welch v. United States*, 136 S. Ct. 1257 (2016), is applicable and supports his request for authorization. *See 28 U.S.C. § 2244(b)(2)(A); Henry v. Spearman*, 899 F.3d 703, 705-08 (9th Cir. 2018) (discussing *prima facie* showing necessary under 28 U.S.C. § 2244(b)(2)(A) to “rely on” a new, retroactive rule of Supreme Court law). Contrary to the applicant’s contention, *Montgomery* and *Welch* do not require retroactive application of a change in state law, like that adopted by the Nevada Supreme Court in *Byford v. State*, 994 P.2d 700 (Nev. 2000), to cases on collateral review.

Any pending motions are denied as moot.

No further filings will be entertained in this case.

**DENIED.**