No.

October Term, 2020

In the

Supreme Court of the United States

Dennis K. Kieren, Jr.,
Petitioners,

v.

The State of Nevada, Attorney General et al.,
Respondents.

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Ninth Circuit should have granted a Certificate of Appealability on the district court's denial of Kieren's motion to amend his petition with an exhausted claim allowing him to obtain the benefit of *Byford v. State*, 994 P.2d 700, 713 (Nev. 2000) on collateral review?

LIST OF PARTIES

There are no parties to this proceeding other than those listed in the caption.

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Dennis K. Kieren, Jr. respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying a Certificate of Appealability. *See* Appendix "App." 001.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit filed an unpublished order on May 7, 2020, denying Kieren's request for a Certificate of Appealability. *See* Appendix 001.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court denied a Certificate of Appealability. The Ninth Circuit denied Kieren's request for a Certificate of Appealability. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See* also Sup. Ct. R. 13(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI, Clause 2, provides, in pertinent part:

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

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

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

Nevada Revised Statute § 200.30, Degrees of Murder, provides, in pertinent part:

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing.

STATEMENT OF THE CASE

A. Kieren was convicted of first-degree murder without a finding of deliberation.

Nevada Revised Statutes § 200.030(1) enumerates the different ways a person can commit first-degree murder in Nevada. One of these methods is through a "willful, deliberate and premeditated killing." Nev. Rev. Stat. § 200.030(1)(a) (2018). Second-degree murder consists of "all other kinds of murder." Nev. Rev. Stat. § 200.30(2) (2018). For anyone charged with murder, the jury must decide between first or second-degree murder. Nev. Rev. Stat. § 200.030(3) (2018).

The difference in degree of murder carries tremendous significance with respect to punishment. A first-degree conviction can result in a sentence of death or life without parole. Nev. Rev. Stat. § 200.30(4)(a)-(b) (2018). The current maximum sentence for a second-degree murder conviction is 10 to life. *See* Nev. Rev. Stat. § 200.30(5) (2018). Prior to a

1995 amendment changing the range of punishment, the maximum sentence for second-degree murder was 5 to life. Nev. Rev. Stat. § 200.30(5) (1994).

Kieren was convicted of first-degree murder on the theory he committed the willful, deliberate and premeditated killing of the victim. At his trial, the jury was given the following problematic instruction defining first-degree murder, known as the *Kazalyn* instruction,[1] which did not define deliberation as a separate element:

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

In 1992, the Nevada Supreme Court had upheld this instruction as an accurate definition of the intent element of first-degree murder. *Powell v. State*, 838 P.2d 921, 926-27 (Nev. 1992), *vacated on other grounds*, 511 U.S. 79 (1994); *Kazalyn v. State*, 825 P.2d at 583-84.

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[1] *See Kazalyn v. State*, 825 P.2d 578, 583–84 (Nev. 1992).

Based upon his conviction for first-degree murder, Kieren was sentenced to two consecutive sentences of life without the possibility of parole.[2] App. 170. Based on the date on which the Nevada Supreme Court affirmed the conviction on direct appeal, Kieren's conviction became final after February 28, 2000, the date on which the Nevada Supreme Court narrowed the interpretation of the first degree murder statute. App. 166. *See Nika v. State*, 198 P.3d 839, 848 n.52 (Nev. 2008) (defining when convictions become final under state law).

B. The Nevada Supreme Court narrows the definition of first-degree murder, applying it prospectively.

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

> By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second- degree

[2] Kieren's sentence means precisely that - he will spend his life in prison without any possibility of parole. As his conviction was entered in October of 1999, pursuant to Nev. Rev. Stat. 213.085, he is not eligible for pardons consideration. Kieren was offered a plea of voluntary manslaughter with use of a deadly weapon (carrying two potential sentences of one to ten years, with the possibility of probation), which he turned down due to his unwaivering belief and testimony that he acted in self-defense, and also upon the issue of intent when shooting David Allan Broyles.

> murder. [Our] further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. at 713.

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

A few months later, the Nevada Supreme Court held any error with respect to the *Kazalyn* instruction was not of constitutional magnitude that must be retroactively applied. *Garner v. State*, 6 P.3d 1013, 1025 (Nev. 2000).

C. This Court agrees to decide whether the federal constitution requires a new statutory interpretation to apply retroactively, but then leaves the question open.

Right before the decision in *Byford*, this Court granted certiorari in *Fiore v. White* to determine "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 v. White*, 531 U.S. 225, 226 (2001). However, while the case was being litigated in this

Court, the Pennsylvania Supreme Court indicated that it had clarified, not changed, the meaning of the criminal statute. This "clarification" made the retroactivity question "disappear[ ]." *Bunkley v. Florida*, 538 U.S. 835, 840 (2003). This Court explained a clarification is available to any defendant as it merely clarified the law in existence at the time of the defendant's conviction. *Fiore*, 531 U.S. at 228. As a result, a clarification "presents no issue of retroactivity." *Id.* Instead, *Fiore* concerned a different due process violation, namely whether the State had presented enough evidence to prove all elements of the crime beyond a reasonable doubt. *Fiore*, 531 U.S. at 228–29 (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979); and *In re Winship*, 397 U.S. 358, 363 (1970)).

Two years later, in *Bunkley v. Florida*, this Court considered the implications of a new, or changed, interpretation of a criminal statute narrowing its scope. Once again, this Court did not reach the question of retroactivity. *Bunkley*, 538 U.S. at 841. Rather, it concluded that such a change in law would establish the same due process violation at issue in *Fiore* if the change occurred prior to the conviction becoming final. *Id.* at 840–42. The problem in *Bunkley* was the Florida Supreme Court had not indicated precisely when that change occurred. *Id.* at 841–42. This Court remanded the case to the state court to determine whether a *Fiore* error occurred. *Id.*

D. Nevada limits the retroactivity of statutory interpretation decisions to "clarifications" of the law and not "changes."

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court established a retroactivity framework for cases on collateral review in federal court. This framework replaced the retroactivity standard established in *Linkletter v. Walker*, 381 U.S. 618 (1965), which analyzed the retroactivity of a new rule on a case by case basis by examining the purpose of the new rule, the reliance of the states on prior law, and the effect on the administration of justice of a retroactive application. *Id.* at 636–40. This standard did not lead to consistent results. *Teague*, 489 U.S. at 302.

Teague established a uniform approach for retroactivity on collateral review. Under *Teague*, a new rule does not, as a general matter, apply to convictions that were final when the new rule was announced. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). However, *Teague* recognized two categories of rules not subject to its general retroactivity bar. First, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.* Second, and the exception at issue here, courts must give retroactive effect to new substantive rules. *Id.* "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).

Under the federal retroactivity framework, the substantive rule exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro*, 542 U.S. at 351–52 (citing *Bousley v. United States*, 523 U.S. 614, 620–21 (1998)). "New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa." *Id.* at 354. When a decision narrows an interpretation, it "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620–21 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). This Court has emphasized, "it is only Congress, and not the courts, which can make conduct criminal." *Id.* at 621.

The Nevada Supreme Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Clem v. State*, 81 P.3d 521, 530–31 (Nev. 2003); *Colwell v. State*, 59 P.3d 463, 471–72 (Nev. 2002).

However, there is one significant difference between the Nevada retroactivity rules and those adopted by this Court. Kieren initiated federal habeas proceedings in August, 2017. In September of 2017, the Ninth Circuit held in *Polk v. Sandoval*, 503 F.3d 903, 909-911 (9th Cir. 2007), that the giving of a *Kazalyn* instruction deprived a defendant of due process, subject to a harmless error analysis, granting the petitioner's writ. After *Polk*, and in contrast to the federal rule, the

Nevada Supreme Court has imposed a complete bar on the retroactive application of new, narrowing interpretations of a substantive criminal statute. *Nika v. State*, 198 P.3d 839, 850–51, 859 (Nev. 2008); *Clem*, 81 P.3d at 52-29. It has reasoned that only constitutional rules raise retroactivity concerns while decisions interpreting a criminal statute are matters of state law without retroactivity implications. *Nika*, 198 P.3d at 850–51; *Clem*, 81 P.3d at 529, 531. According to the court, the only question with respect to who gets the benefit of a narrowing statutory interpretation is whether it represents a "clarification" or a "change" in state law. *Nika*, 198 P.3d at 850; *Clem*, 81 P.3d at 529, 531. Relying upon *Fiore* and *Bunkley*, it has held, as a matter of due process, a "clarification" applies to all cases while a "change" applies to only those cases in which the judgment has yet to become final. *Id.*

The Nevada Supreme Court eventually applied these concepts to *Byford*'s narrowing interpretation of the first-degree murder statute. It characterized the *Byford* decision as a change, as opposed to a clarification, of the statute. *Nika*, 198 P.3d at 849–50. The court emphasized *Byford* involved a matter of statutory interpretation and not a matter of constitutional law. *Nika*, 198 P.3d at 850. The court reaffirmed its retroactivity rules—"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." *Id.*

Acknowledging the new interpretation narrowed the scope of the crime, the court concluded, as a matter of due process, those defendants whose convictions had yet to become final at the time of *Byford* should have been allowed to obtain the benefit of *Byford*. *Id.* at 850, 859 (overruling its prior decision in *Garner* that *Byford* applied only prospectively).

E. Kieren is briefly given *Kazalyn* relief, only to have it taken away after this Court decides *White v. Woodall*, 134 S. Ct. 1667 (2015).

Kieren was conditionally granted relief on one ground "Ground 5" of his 28 U.S.C. § 2254 habeas petition by the district court in 2011. App. 141. The district court, and in 2014, the Ninth Circuit initially found that Kieren was denied due process based upon the unconstitutional *Byford* jury instruction. App. 141, 136. Also in 2014, this Court held in *White v. Woodall*, 134 S. Ct. 1697 (2014) that federal courts may extend its rulings to new sets of facts on habeas review only if it is "beyond doubt" that the ruling applies to a new set of facts, or only where there can be no "fair-minded disagreement" on the question. *Id.* at 1707 (citing *Yarborough v. Alvarado* , 541 U.S. 652, 666 (2004)).

Respondents appealed, the Ninth Circuit affirmed on March 25, 2014, but later withdrew its memorandum disposition, reversing its grant of relief, given this Court's intervening decision in *White v. Woodall*. App. 127. The court determined that at least before 2003, it

was not an unreasonable application of clearly established federal law to not apply *Byford* to convictions that where not final at the time that *Byford* was decided. "Therefore,…the Nevada Supreme Court did not unreasonably apply clearly established federal law when it declined to apply *Byford* in Kieren's case." App. 129. *See also Moore v. Helling*, 763 F.3d 1011, 1021 (9th Circ. 2014).

Kieren immediately returned to state court, filing a successive state petition raising the *Nika/Bunkley* claim. The petition and claim were found untimely and procedurally barred by the state courts, rejecting his demonstration of cause and prejudice. App. 050.

F. This Court creates the new constitutional rule of retroactivity in *Montgomery v. Louisiana* and clarifies its scope and application in *Welch v. United States*.

Meanwhile, on January 25, 2016, this Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The issue in *Montgomery* was whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited mandatory life sentences for juvenile offenders under the Eighth Amendment, applied retroactively. *Montgomery*, 136 S. Ct. at 725.

The initial question this Court addressed was whether it had jurisdiction to review the retroactivity question. It concluded it did. This Court had previously "le[ft] open the question whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." *Montgomery*, 136 S. Ct. at 729. It now held that the Constitution

required state collateral review courts to give retroactive effect to new substantive constitutional rules. *Id.* It stated, "*Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional command in their own courts." *Id.* at 727 (citing *Martin v. Hunter's Lessess*, 1 Wheat. 304, 340–41, 344 (1816)).

This Court concluded *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). The primary issue in *Welch* was whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause in the ACCA as unconstitutionally vague, applied retroactively. *Welch*, 136 S. Ct. at 1260–61, 1264. More specifically, this Court considered whether *Johnson* fell under the substantive rule exception to *Teague*. *Id.* at 1264–65.

This Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schriro*, 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.* at 1265 (quoting *Schriro*,

542 U.S. at 351–52) (emphasis added)); *see also Welch,* 136 S. Ct. at 1267 (stating, in a parenthetical, "A decision that modifies the elements of an offense is normally substantive rather than procedural') (quoting *Schriro*, 542 U.S. at 354).

This Court concluded that *Johnson* was substantive. *Id.* In concluding this, this Court adopted the new "substantive function" test for determining whether a new rule is substantive, as opposed to procedural. *Id.* at 1266. It explained the *Teague* balance did not depend on the characterization of the underlying constitutional guarantee as procedural or substantive. "It depends instead on whether the new rule itself has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.*

This Court also rejected an argument to adopt a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265-67. Relevant to statutory interpretation cases, this Court disagreed with the claim that a rule is only substantive when it limits Congress' power to act. It pointed out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* at 1267.

The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Welch*, 136 S. Ct. at 1267. The question in *Bousley* was whether

Bailey v. United States, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, this 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*). This 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 *Welch* Court stated that *Bousley* did not fit under the proposed *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267. It concluded, "*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power." *Id.*

Rejecting the suggestion that statutory construction cases are substantive because they define what Congress always intended the law to mean, this Court stated that statutory interpretation cases are substantive solely because they meet the criteria of the substantive rule exception to *Teague*:

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

> **the range of conduct or the class of persons that the law punishes."**

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

G. Kieren moves for leave to file an amended petition including the *Nika/Bunkley* claim.

Kieren's habeas petition had been remanded by the Ninth Circuit for consideration of the remaining claims. Supplemental briefing ensued, and Kieren moved to amend his petition simultaneously with his reply, specifically asking the court to allow him to present a new claim based upon Ground 5, challenging the same jury instruction but basing the claim upon *Nika v. State*, 198 P.3d 839 (Nev. 2008). App. 071. After briefing, the court denied the motion to amend in September 2016, and found the petition briefed for a final disposition on the merits. App. 054.

Kieren had filed his second state post-conviction petition within one year of *Montgomery* and *Welch,* arguing he was now entitled to the benefit of *Byford*. He argued *Montgomery* established a new constitutional rule, namely the *Teague* substantive rule exception was now a federal constitutional rule the states must apply. Kieren further argued *Welch* clarified that this substantive exception included narrowing interpretations of a statute, which would include the Nevada Supreme Court's decision in *Byford* (holding deliberation was a separate and distinct element of first-degree murder). The State argued Kieren was procedurally barred and *Montgomery* and *Welch* do not establish

good cause to overcome the procedural default. Kieren opposed, repeating his argument that the procedural bars could be overcome by showing good cause based on a new constitutional rule.

The state district court dismissed Kieren's petition and the Nevada Supreme Court affirmed on July 18, 2016. App. 59, 050 The courts concluded that Kieren could not overcome the procedural bars through a showing of good cause based on a new constitutional rule. *Id.*

Kieren quickly filed a motion in the district court under Local Rule 59-1, requesting the court reconsider the order denying his request to amend Ground 5 based upon changes in factual and legal circumstances. App. 038. Kieren argued that circumstances had changed as the new claim was exhausted and there were significant changes in legal circumstances based upon *Montgomery* and *Welch*. The district court denied Kieren's motion for reconsideration after briefing in March, 2018. App. 034. On September 27, 2019, the district court denied the remaining claims on their merits and declined to issue a certificate of appealability "COA". App. 002. Kieren petitioned the Ninth Circuit for a COA, which was denied on March 7, 2020. App. 001.

REASONS FOR GRANTING THE PETITION

In *Slack v. McDaniel* this Court construed the language of § 2253 through a post-AEDPA lens and concluded that Congress intended to employ the same test used in *Barefoot v. Estelle*, 463 U.S. 880 (1983). 529 U.S. 473, 483-84 (2000). The *Slack* Court concluded:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Barefoot supra*, at 893, and n. 4. 103 S.Ct. 3383 (sum[ming] up" 'substantial showing' standard).

Id.

Several years later the Court, in *Miller-El v. Cockrell*, provided additional guidance to the lower federal courts about the proper standards to be applied when reviewing a COA application:

> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot, supra*, at 893, n. 4, 103 S.Ct. 3383.

537 U.S. 322, 338 (2003) (emphasis added).

Finally, the COA inquiry was recently affirmed, with the Court holding:

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims."

Buck v. Davis, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327, 336.

This Court's stance is clear -- a COA request does not require that the applicant must demonstrate a strong case. In fact, the bar is set quite low. A Petitioner need only present good reasons for allowing him to continue his challenge to an appellate court. Kieren has met this standard. Jurists of reason could debate the district court's decision on the denial of the motion to amend and the merits of the *Nika/Bunkley* constitutional claim.

A. The Ninth Circuit should have granted a Certificate of Appealability on whether the district court erred by not allowing Kieren to amend Ground Five and assert a Nika/Bunkley claim in his habeas petition.

"The court should freely give leave [to amend] when justice so requires." *See* Fed. Rule Civil Procedure 15(a)(2). Permission to amend should be granted with "extreme liberality." *Eminence Capital, LLC v.*

Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir., 2003). As this Court has stated:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment. futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Ground Five of the 2008 amended petition challenged a jury instruction for first-degree murder provided at Kieren's trial. Ground Five in the proposed amended petition also challenges this instruction, but specifically bases the claim upon *Nika v. State*, 198 P.3d 839 (Nev. 2008), a case decided after Kieren filed the amended federal petition on September 19, 2008. The amended claim contains the following language:

> Pursuant to the Nevada Supreme Court's decision in *Nika v. State*, 198 P.3d 839, 850 Nev. (2008), "the change effected in *Byford* applies to convictions that were not yet final at the time of the change." Because Kieren's conviction was still on direct appeal, and not yet final, *Byford* applied to him as a matter of law per the *Nika* decision. *See also Bunkley v. Florida*, 538 U.S. 835 (2003),

> *Fiore v. White* (Fiore II), 531 U.S. 225 (2001), *Fiore v. White* (Fiore I), 528 U.S. 23 (1999).
>
> *Nika* also recognized that the instruction at Kieren's trial had effectively eliminated the difference between first and second degree murder by conflating the distinguishing element of first-degree murder with the "intent" sufficient to prove second-degree murder. *Nika*, 198 P.3d at 846-47. As such, the instruction provided at Kieren's trial was unconstitutionally vague, and violated the due process guarantee of the United States Constitution, because it failed to narrow or meaningfully distinguish first-degree from second-degree murder. And because the change recognized in *Nika* constituted a substantive narrowing of the offense of first-degree murder, and because *Nika*'s re-characterization of *Byford* as a "change" in the law cannot validly be used to evade consideration of a federal issue, *Byford*'s definition must be applied retroactively under due process principles.

App. 155-116.

The proposed amendment in Ground Five was necessary because of the convoluted history of the state and federal caselaw about Nevada's first-degree murder instruction described above, as it intertwined with Kieren's proceedings in state and federal court.

This meritorious amendment is not barred by law of the case and was sought in good faith. Absent factors such as "undue delay, bad faith

or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed" and "undue prejudice to the opposing party," a court should allow an amendment to a petition. The *Foman* factors are not present here. *Foman*, 371 U.S. at 182. Although the prior amended petition was filed some time ago, the district court had only recently resumed jurisdiction over Kieren's case following the issuance of the mandate in 2015. When the district court had jurisdiction, until the final order issued in 2011 (App. 141), there was no need to amend the petition to include a post-*Nika* claim, because Kieren could have relief on Ground Five as a matter of established precedent. An amendment was properly sought to cure a deficiency that arose following the Ninth Circuit's overruling of precedent that the prior petition had relied upon.

Nor was the State unfairly prejudiced by Kieren's amendment as the petition was pending throughout the pendency of his state exhaustion petition of the claim. From the original motion to dismiss, well through the appeal of the district court's original judgment, Appellee's position has been that Kieren's federal challenge to the *Kazalyn* instruction could not be heard on the merits because it was never properly presented and

exhausted in the state courts. Had the Appellee been correct in this argument, Kieren would have sought a stay, and could have presented his meritorious challenge to the state courts, given *Nika* and *Bunkley*.

Ironically, had Kieren been less diligent in pressing his federal challenge on his direct appeal, and had failed to exhaust the claim there, the district court would have ruled the claim unexhausted, and Kieren could have fixed this problem much earlier. Kieren should not now be punished for diligently presenting his claim to the state courts, when those courts, by their own subsequent admission, were incorrectly failing to apply the *Byford* decision.

Kieren moved for reconsideration of the motion to amend in December 2017, after the Nevada Supreme Court refused to hear Kieren's amended claim. App. 050. Review of the decision regarding the new claim would not have been subject to 28 U.S.C. § 2254(d)(1) regarding error determination, as there is no "adjudication on the merits." Although the district court denied him the opportunity to present his claim, Kieren is confident that he can establish cause and prejudice for not complying with state rules. *See Harris v. Reed,* 489 U.S. 255, 262 (1989).

The federal inquiry would initially focus on whether (1) the claimed state bar is "adequate" to bar federal review, *see Koerner v. Grigas*, 328 F.3d 1039, 1049 (9th Cir. 2003) (quoting *Valerio_v. Crawford*, 306 F.3d 742, 775 (9th Cir. 2002) (en banc) (internal citations omitted), and if so, (2) whether Kieren could establish "cause" and "prejudice" for not complying with the state rules. *See Harris v. Reed*, 489 U.S. 255, 262 (1989).

Kieren contends that he can meet either prong of this federal inquiry. The Nevada Supreme Court has yet to "firmly establish[]," in *Nika* itself or any other post-*Nika* authority, any rule for the presentation of *Nika* claims. *Beard v. Kindler*, 130 S. Ct. 612, at 617 (2009) (state procedural rule must be "firmly established and regularly followed" to bar federal review). Unpublished decisions have suggested different rules for the presentation of post-*Nika* claims. *Compare Bagley v. State*, 2010 WL 3489675 at *1 (Nev. 2010) (agreeing that *Nika* claim in petitioner's untimely and successive petition could be heard on its merits because "*Byford* should have applied to his case as a matter of due process" and thus petitioner had established good cause, without requiring the petition to be filed within any particular time) and *Escobar*

v. State, 2010 WL 3855231 at *1 (Nev. 2010) (*Nika* claim could be presented despite failure to raise issue on direct appeal because *Byford* decision constituted good cause) with *Burriola v. State*, 2010 WL 3492123 at *2 (Nev. 2010) (holding that decisions in *Polk* and *Byford* "provide the marker for filing timely claims and not a later case," and holding post-*Nika* claim untimely because it "was filed more than two years after entry of *Polk* and almost nine years after this court's decision in *Byford*.") and *Randolph v. State*, 2014 WL 495267 at *2 (Nev. 2014) (suggesting that *Nika* claim must be filed "within a reasonable time after it became available.")

Even if there were an adequate basis to bar the claim in state court, Kieren could establish "cause" for his inability to present the claim in state court. Kieren obviously could not have presented a *Nika* claim during his direct appeal and post-conviction proceedings, which finished before *Nika* was decided. By the time *Nika* was decided, Kieren's federal proceedings were well under way. In those proceedings, he had a clear basis for relief under this Court's guiding precedent in *Polk* (and later, *Babb*), from the time his petition was filed, until well after the State's appeal was filed. It would not be reasonable to require Kieren to seek

relief from the state courts under *Nika*, on the assumption that Ninth Circuit governing precedent would be overruled, or to fault him for not seeking to stay the mandate and seek further review of the Ninth Circuit's decision in his case before initiating such proceedings.

The prejudice inquiry would concern the merits of the underlying claim, which would be reviewed de novo by a federal court. *See Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005) (claim reviewed de novo in federal court when state court denied relief due to purported procedural default). As explained supra, neither Moore nor Kieren's mandate purported to decide, as a de novo matter, whether a failure to apply *Byford* to cases still pending on direct review at the time of the decision violated the federal constitution, particularly when the Nevada Supreme Court's own governing precedent eventually required as much. *See Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) ("an *unreasonable* application of federal law is different from an *incorrect* application of federal law."). At the very least, the ultimate merits of the amended claim presents a "substantial" issue that is not barred by the law of the case. *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) (petitioner is prejudiced by default if

it would prevent the court from hearing a "substantial" claim on the merits).

B. Jurists of reason would find it debatable that the district court erred in not granting Kieren's motion to amend his petition.

Reasonable jurists could disagree with the lower court at each step of its analysis. Reasonable jurists could also disagree with the lower court about its final decision to not allow Kieren to amend his petition. A reasonable jurist could take the view that none of the lower court's arguments against granting his motion were persuasive. A reasonable jurist could also take the view that even if some of those arguments were persuasive, Kieren has nonetheless demonstrated that it was appropriate to allow him to amend his petition and include an amended Ground Five. Thus, reasonable jurists could disagree about the outcome of the motion.

Both standards at issue consistently urge a low standard to allow for the amendment of a habeas petition and consideration of a constitutional claim on appeal. Jurists of reason could debate the district court's decision on the denial of the motion to amend and the merits of Kieren's claim. This Court should grant the petition, vacate the order denying a Certificate of Appealability, and remand to the Court of Appeals with an order that that court grant a Certificate of Appealability.

CONCLUSION

For the foregoing reasons, Dennis K. Kieren, Jr., respectfully requests this Court grant the petition, vacate the order of the Ninth Circuit, and remand the case to the Court of appeals and order that Court to grant a Certificate of Appealability.

Dated this 5th day of August, 2020.

Respectfully submitted,

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Federal Public Defender of Nevada

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INDEX TO APPENDIX

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APP. 001

FILED

MAY 7 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS K. KIEREN, Jr., Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF NEVADA, Respondent-Appellee.	No. 19-17132 D.C. No. 3:07-cv-00341-LRH-WGC District of Nevada, Reno ORDER

Before: M. SMITH and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APP. 002

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DENNIS K. KIEREN, JR., Petitioner, v. STATE OF NEVADA ATTORNEY GENERAL, et al., Respondents.	Case No. 3:07-cv-00341-LRH-WGC ORDER

Dennis K. Kieren, Jr.'s 28 U.S.C. § 2254 habeas petition is before the court for final adjudication on the merits. In 2011, this court conditionally granted habeas relief (ECF No. 44). The court reached only ground 5, in which petitioner alleged that he was denied due process during his jury trial for murder in violation of the Fifth and Fourteenth Amendments because the trial court's jury instructions failed to adequately distinguish between the elements of malice aforethought, premeditation, and deliberation. *Id*. at 19. Judgment was entered (ECF No. 45).

Respondents appealed, and the Ninth Circuit Court of Appeals affirmed this court's decision on March 25, 2014 (ECF Nos. 46, 52). Subsequently, the Ninth Circuit withdrew its memorandum disposition affirming, reversed the grant of habeas relief as to ground 5 in light of an intervening U.S. Supreme Court decision and remanded for consideration of the remaining claims (ECF No. 59). Petitioner and respondents filed supplemental briefing with respect to grounds 2, 6, 7, 8, and 9 (ECF Nos. 71, 76).

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I. Background

The court recounts the background set forth in its previous order that conditionally granted habeas relief on ground 5.

Kieren seeks to set aside his 1999 Nevada state conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. He is serving two consecutive life sentences without the possibility of parole.

Kieren was convicted of the March 7, 1996, murder of David Allan Broyles. It was undisputed that Kieren shot Broyles multiple times with a 9 mm semiautomatic handgun. The factual dispute at trial focused upon the circumstances leading up to the shooting and Kieren's state of mind at the time of the shooting. The State and the defense presented markedly different evidence as to what occurred. The jury instructions at issue went to the heart of the dispute as to intent, under either account of the event. The question at trial was not whether Kieren killed Broyles but instead was his state of mind at the critical time, which bore not only on his defense of self-defense but also upon, among other things, the issue of whether he was guilty of second-degree murder rather than first-degree murder.[1]

Dennis Kieren had known David Broyles and Michael Woods, separately, for approximately three years prior to the incident.[2] Kieren had interacted socially and

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[1] This court previously conditionally granted habeas relief with respect to the so-called *Kazalyn* instruction on the elements of murder. The Ninth Circuit reversed in light of intervening U.S. Supreme Court case law that dictated that the Nevada Supreme Court's decision regarding the *Kazalyn* instruction in Kieren's case was not an unreasonable application of clearly established federal law at the time of the decision.

In *Byford v. State*, 994 P.2d 700, 713 (Nev. 2000), the Supreme Court of Nevada concluded that the "*Kazalyn* instruction" "blur[red] the distinction between first- and second-degree murder" by not sufficiently distinguishing between the distinct elements of deliberation and premeditation. In *White v. Woodall*, 134 S.Ct. 1697 (2014) – the United States Supreme Court held that federal courts may extend Supreme Court rulings to new sets of facts on habeas review only if it is "beyond doubt" that the ruling applies to a new set of facts. It is beyond doubt that a ruling applies to a new set of facts only if there can be no "fairminded disagreement" on the question. In *Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014), the Ninth Circuit determined that *White v. Woodall* effectively overruled *Babb. v. Lozowsky*, 719 F.3d 1019, 1032-1033 (9th Cir. 2013), and held that, at least before *Bunkley v. Florida* was decided in 2003, it was not an unreasonable application of clearly established federal law not to apply *Byford* to convictions that were not final at the time that *Byford* was decided. Kieren's conviction became final in 2002. Exhs. 51, 53.

[2] The following summary in the text is intended only as an overview of the basic factual particulars of the case in order to provide context for the discussion of the issues. Any lack of mention of specific evidence

professionally with Broyles and Woods, again separately, in one fashion or another over this time. Broyles and Woods also had known each other for about four years, but each did not know that the other also knew Kieren. Woods and Kieren each had some background, to one extent or another, in fugitive retrieval ("bounty hunting") and/or armed security work.[3]

At the relevant time, Broyles was renting from Kieren and staying at his house. In or around December 1995, Woods returned to Las Vegas from out of state. Woods contacted Kieren, although they had had a falling out a year or so prior to that over money that Kieren allegedly owed Woods. They arranged for Woods to also rent space in Kieren's house, with Woods sleeping on Kieren's sofa.[4]

As of the first part of March 1996, Broyles was planning to move out or was in the process of moving out of Kieren's place. However, as of the date of the incident he was not fully moved out. There was friction at that time over money between Kieren and Woods; and there was friction separately between Kieren and Broyles, for one reason or another.[5]

On the evening of March 6, 1996, Woods and Broyles, who had been working together on a painting job, were in and out of Kieren's house. Kieren was there. Woods

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in this overview does not signify that the court has overlooked or ignored that evidence in considering a particular issue.

In its summary, the court makes no credibility findings regarding the truth or falsity of statements of fact in the state court. The court summarizes same solely as background to the issues presented in this case. No statement of fact made in describing statements, testimony or other evidence in the state court, whether in this overview or in the discussion of a particular issue, constitutes a finding by this court.

[2] Exhibits 1-77 referenced in this order are found at ECF Nos. 21-24. Exhibits 78-96 are found at ECF Nos. 77, 80, 87.

[3]Exh. 12, pp. 150-159, 189-193 (Woods); exh. 13, pp. 241-244, 277-287 (Kieren).

[4] Exh. 12, pp. 153-156 (Woods); exh. 13, pp. 241-245 (Kieren).

[5] Exh. 12, pp. 156-157, 165-167, 190-195, 204-205 (Woods); exh. 13, pp. 242-245, 291 (Kieren). Woods testified that he also was still living at Kieren's house but was in the process of moving out. Kieren maintained that Woods no longer was living at his house by that time. The distinction is not critical to the resolution of this case.

and Broyles eventually picked up Kristi Telles, who was dating Broyles, after she got off work and headed back to Kieren's house.[6]

After returning to Kieren's house, Woods, Broyles, and Telles sat around in the garage with the garage outer door closed or nearly fully closed, drinking and also smoking some marijuana.[7]

Kieren came into the garage from the house a number of times. He was having words with Broyles about one household complaint or another, such as the three allegedly drinking all of his beer, eating all of his pizza, and not cleaning up after themselves. He would complain about one thing or another and then go back into the house.[8]

At some point, Broyles slipped away into the house without Michael Woods noticing. Woods testified that he "heard something sound like a thump" and noticed that Broyles was no longer in the garage.[9]

Woods went into the house looking for Broyles, either with Telles or followed shortly thereafter by Telles. Inside, the only lights showing were the aquarium lights and the light coming from underneath Kieren's closed master bedroom door. Woods listened through the door but could not hear anything. Woods knocked but got no response. Woods grabbed the doorknob to enter. When Woods was at the door and before he did anything further, Telles went back to the garage.[10]

When Woods opened the bedroom door, he saw the closet sliding doors laying on the floor with glass and blood on the carpet. A trail of blood led into the bathroom. When Woods entered the bathroom, he saw Broyles standing over the clothed Kieren in

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[6] Exh. 12, pp. 158-163 (Woods); exh. 13, pp. 245-250 (Kieren); exh. 11, pp. 99-103 (Telles).

[7] Exh. 12, pp. 163-164, 192-193, 205-206 (Woods); exh. 13, pp. 246-247, 249-250 (Kieren); exh. 11, pp. 103-105, 112-113 (Telles).

[8] Exh. 12, pp. 164-165, 197-199 (Woods); exh. 13, pp. 250-255 (Kieren); exh. 11, pp. 104, 113 (Telles).

[9] Exh. 12, pp. 167-168, 198-199 (Woods); exh. 11, pp. 105 (Telles).

[10] Exh. 12, pp. 168-170, 199-200 (Woods); exh. 11, pp. 106-107, 114-15 (Telles).

the empty tub. According to Woods' testimony, the left-handed Broyles was holding Kieren's ponytail with his right hand and had his left hand over the top of the blade of a knife which was in Kieren's hand. Kieren kept the knife on the window ledge in the shower. Although Woods maintained that Kieren's hand was on the handle of the knife, he testified that Broyles had the knife pushed up against the left side of Kieren's face, with his hand over the top of the knife. Broyles further had his head up against the left side of Kieren's face.[11]

Notwithstanding his testimony that it was Kieren's hand on the handle of the knife, Woods testified that he went up to Broyles and said: "David, what the f___ are you doing?" Woods acknowledged on cross-examination that he stated to the police in his initial written statement that he thought Broyles was going to kill Kieren when he first saw them in the bathroom.[12]

Broyles then bit Kieren's ear off, pulled it off, and spit it out in the tub. Kieren let go of the knife, and Broyles took full control of the knife.[13]

Woods testified that Broyles then said to him: "Get the f___ away from me, I will stab you too."[14]

Woods tried to calm Broyles down, defuse the situation, and get the knife from him. According to Woods, Broyles stated that Woods did not understand, that Kieren had been going for his gun, and that "[n]obody is leaving here alive." He would not let go of the knife, saying that "no, he was going to kill me." Woods ultimately was able to get the knife from Broyles, with Broyles asking Woods to hold Kieren down and give him a couple of minutes to get out of the house. Woods took hold of Kieren's ponytail in

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[11] Exh. 12, pp. 170-172, 201-03. *See also* exh. 13, p. 285 (Kieren testimony as to usual location of knife).

[12] *Id*. at 172, 201-202, 206.

[13] *Id*. at 172-173.

[14] *Id*. at 172.

place of Broyles, and Broyles released the knife to him. Broyles then left the bathroom, and Woods heard the bedroom door close behind him.[15]

According to Kieren's testimony, the events that occurred in his room up to that point, including those that occurred prior to Woods arriving, transpired as follows.

According to Kieren, Broyles came into his room, and the two had a tense verbal exchange. Broyles then grabbed him by his hair and struck him repeatedly with his drink glass, while kneeing him and calling him a "punk" and a "bitch." Kieren struggled to break free, and the two men crashed through the closet doors. Broyles continued hitting him with the glass three or four more times until the glass started to shatter. Kieren testified that from this point "it is like a strobe light going on and off" and that "I remember bits and pieces of it." The struggle carried on into the bathroom, where Broyles struck Kieren several times in the head with a cologne bottle until the bottle broke, with Kieren recalling that he could smell the cologne after the bottle broke.[16]

According to Kieren, he fell back into the tub, and Broyles continued to attack him, holding him by the hair and calling him names throughout. Kieren was unable to get any leverage to push his way back out of the tub. Broyles told him that he was going to bite his ear off, and then he did so, spitting Kieren's ear back at him. Broyles then reached up and grabbed Kieren's knife from the window ledge and started thumping him on the head with it. Broyles then "took a hold" of Kieren's nose with his mouth, at which point Woods walked in.[17]

According to Kieren, Woods said to Broyles: "What the f___ are you doing?" Broyles responded that he was sick of Kieren's mouth, that he was done with him, and that he was going to kill Kieren. Woods asked for the knife and then tried to grab Broyles' hand. Broyles jerked his hand away and held the knife up against Kieren's

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[15] *Id*. at 173-176.

[16] Exh. 13, pp. 255-257.

[17] *Id*. at 257-260.

throat. Kieren held his hands up to protect himself, and the knife would cut his hand every time that Woods tried to grab it. Similar to Woods' account, Woods ultimately was able to get Broyles to give him the knife, and Broyles asked Woods to hold Kieren down until Broyles left the room. According to Kieren, Broyles leaned down to him, said "now you are going to die," and ran from the room.[18]

According to Woods' testimony, after Broyles left the room, Kieren immediately tried to get out of the tub. Woods told him to stay in the tub. Kieren said: "No, you don't understand, Mike. He bit my f___in ear off. I am going to kill him." Kieren got up out of the tub. Woods still had the knife that he had obtained from Broyles in his hand. Kieren pushed past him and said: "I am going to kill him. He bit my f___ing ear off." Woods urged Kieren to let the police handle the situation. Kieren went over to his desk, retrieved his Ruger 9mm handgun, chambered a round, and put the gun to Woods' forehead. He told Woods, who still had the knife, to get back.[19]

According to Woods, Kieren then exited the bedroom while keeping the gun pointed at him. He then started "sweeping the hall," meaning that he kept the weapon in front of him sweeping the area in "combat mode" from a military stance. He did so while keeping an eye on Woods, who kept pace with him about three to four feet away, with the knife still in his hand. Kieren moved down the hallway, keeping his back to the wall and his weapon in front of him, pointing alternately at Woods and then down the hallway.[20]

Woods testified that Kieren swung open the door to Broyles' bedroom and swept the bedroom with his weapon in combat mode. He similarly swept the hall bathroom, the living or dining room, and the kitchen. The dogs were standing at the sliding glass

[18] *Id*. at 261-264, 288-289, 292.

[19] Exh. 12, pp. 176-177.

[20] *Id*. at 177-180.

patio door, so it did not appear that anyone had gone that way. Throughout, Kieren would sweep the weapon back to Woods, who still had the knife in his hand.[21]

Woods testified that Kieren then headed for the door to the garage, which opened inward into the house. Woods kept pace with him, three to four feet away, with the knife still in his hand, although he maintained at trial that he did not realize at the time that he still was holding the knife. Woods urged Kieren again to let the police handle the situation and "don't do this." Kieren then swung the door open with his left hand while holding the gun in his right.[22]

According to Woods' testimony, Broyles was standing in the garage reaching for the switch that opened the garage outer door. Kieren raised his weapon, and Broyles stepped back with his arms raised above his head saying "no, don't shoot . . . ." Kieren then fired, with the shots being "real rapid." Woods believed that the first shot hit Broyles in the shoulder, turning him. Another shot hit him in the hip, and he started going down, with the door from the house to the garage swinging shut at the same time. According to Woods, who was inside the house, he was able to tell that Broyles was going to the ground because Kieren's shots were following him to the ground as he kept firing. Kieren kept firing until the door swung closed to about an inch from being fully shut.[23]

Woods testified that Kieren then spun toward him, pointing the gun directly at him again. Kieren then flipped the door open again. Broyles was lying face down on the concrete, with his head laying on the threshold. Woods continued:

> And David was laying down there. He spun down, put the gun down towards him point blank and pulling the trigger. He shot him four or five times.

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[21] *Id*. at 178-180.

[22] *Id*. at 179-180.

[23] Exh. 12, pp. 180-182.

According to Woods, Kieren went "pow, pow, pow, pow, pow like that" and then turned around and pointed the gun at him again. Woods just stood there. Kieren walked around Woods into the kitchen with the gun pointed on him and called 911.[24]

According to Kristi Telles' testimony, Broyles came back to the garage covered in blood but with no injuries that were apparent to her on that quick view. He said to her: "Get your stuff. Let's get out of here." Kieren of course was inside the house at the time of any such statement. Telles testified that Kieren opened the inside garage door, came into the garage, pointed the gun at them, "and just started firing." Broyles was standing "just a couple of feet" from the door. The outer garage door was closed. Telles testified that Broyles said "no, don't" before Kieren fired. According to Telles, Broyles fell to the ground, Kieren stood there and stared at him "for about a second," and he "then started firing again at him when he was laying down on the ground." Telles ran across the garage trying to get away from the line of fire. She testified that "I guess when he ran out of bullets," Kieren stood there staring at Broyles. Michael Woods then entered the garage.[25]

According to Kieren's testimony, after Broyles left the master bedroom, he tried to get out of the tub a couple of times, but Woods slammed him back down each time. Woods was telling him that he needed to let Broyles cool down and that if he got up, he "would end up dead." Kieren was scared. He did not want to be caught in the tub, because he believed that Broyles would come back. He had heard the home's alarm system beep when Broyles had gone out through the door leading into the garage.[26]

Kieren testified that he ultimately was able to get up, and he then "took off running" and grabbed his handgun. He could hear things being moved in the garage "like the weights," and he knew that Broyles kept some camping gear out there. He

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[24] *Id*. at 182-183.

[25] Exh. 11, pp. 108-111, 113-115, 117-118.

[26] Exh. 13, pp. 264-266, 285.

assumed that Broyles was going through that gear. At that point, Woods was standing behind Kieren with the knife. Kieren turned and looked at him, and he then took off running. He stated that "I was trying to get distance between" Woods and Broyles. Kieren ran to the garage.[27]

According to Kieren, when he opened the inside garage door, Broyles was by his weight bench digging in his denim jacket and a bag. Kieren stepped into the garage onto the step between the house and garage. Broyles looked up, said "what's up? You want some more?" and started running at him. Broyles was starting to pull something black out of a jacket or a shirt. Kieren knew that Broyles kept several hunting knives in the garage, and he believed that Broyles was pulling a knife "or something." He felt like he was in danger. According to Kieren, Kristi Telles was saying to Broyles: "David, David, don't do it."[28]

Kieren testified that he "just started back pedaling and shooting." He testified that he shot until the door closed, shooting "one through the door or something." He stated that "I could have swore it was like three or four" shots. Kieren maintained that one of the bullets "spun him around like a circle and then I kept firing until the door closed." According to Kieren, he did not see Broyles hit the ground. When either Kieren or Woods opened the door again, Broyles was laying on the floor with his head "real close to the door."[29]

According to Kieren, Woods was saying to him: "What the f___ did you just do?" Woods pushed by him out into the garage. Kieren went to the kitchen and called 911.[30]

According to Woods' testimony, after the shooting, when he went into the garage, he told Telles: "Get the f___ out of the house. No one is leaving here alive." She just

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[27] *Id*. at 266-269, 286-287.

[28] *Id*. at 267-272.

[29] Exh. 13, pp. 271-274, 289.

[30] Exh. 13, pp. 272-275-4.

stood there. He hit the door switch to the outer garage door "because I couldn't understand why the garage door was still down." Telles still was standing there as the door started going up, perhaps in shock, and he told her again: "Get the f___ out of here now." Telles then turned and ran out of the garage. According to Woods, Kieren pointed the gun at Telles as she was going out under the door. Woods turned around to face Kieren, with the knife still in his hand, and Kieren stepped back and pointed the gun at him.[31]

Telles testified that she ran next door after Woods told her to leave and opened the garage door. According to her testimony, she saw Kieren going in and out of the house as she was running. She rang the neighbor's doorbell frantically. When a woman answered, she told her what happened and asked her to call 911. She stayed at the house thereafter. She had been grazed by a bullet on her left leg.[32]

Woods testified that after Telles left and Kieren had the gun pointed at him, he then pointed it down at Broyles again. Woods thought that Kieren was going to shoot Broyles again. Kieren was saying something on the phone about it being self-defense. Woods, who still had the knife in his hand, said "you lying son-of-a-bitch" and shoved Kieren hard back towards the kitchen. They shoved back and forth, with Kieren saying that it was self-defense and Woods saying, "you didn't have to shoot David like that, you son of a bitch."[33]

Although it would have seemed from Woods' testimony that the above exchange occurred in the garage, Woods testified that he then opened the door, stepped back out into the garage, and grabbed Broyles and turned him over. Broyles was so close to the

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[31] Exh. 12, pp. 183-184.

[32] Exh. 11, pp. 111-112. The neighbor, Patricia Barbieri, testified that she "heard a couple of pops," "[k]ind of like a cap gun," but she was not sure what it was. Less than a minute later, a young woman was pounding on her door. When she answered the door, the young woman said, "he shot him, he shot him" and asked her to call the police. The young woman thereafter cowered in her hallway, "on the floor curled in a ball." She kept repeating: "He shot him. He shot him." She said that the "he" was "Dennis." Exh. 10, pp. 56-60.

[33] Exh. 12, pp. 184-185.

door that when the inside garage door kept closing back, it would strike Broyles in the head.[34]

Woods testified that it was at this point that he realized that he still had the knife in his hand, and he threw it to the other side of the garage.[35]

After rolling Broyles over, Woods attempted CPR, but there did not appear to be much that Woods could do for him. According to Woods, Broyles "gasped for air and turned his head and gasped again." Kieren looked out again and pointed the weapon at Woods' head and then at Broyles again. Woods grabbed Broyles by the hand and pleaded with him "please, don't die David," stating: "You are not going to die in this f___ing pig's house."[36]

Woods then dragged Broyles out of the garage – away from the scene of the shooting – out onto the driveway.[37]

James Hawes lived three houses west of Kieren's house. He was getting his mail from his box in the neighborhood's cluster mailboxes a couple of homes away from Kieren's house when he heard three gunshots. He testified that one of the shots "whizzed" by his ear. He jumped to the ground, then ran to his house to get his cell phone, and then called 911 while standing behind his jeep. He looked toward Kieren's house, as he believed that he had heard the sound of the shots come from there. By this point, the garage door was open, and a man was standing over a body lying in the garage. Hawes had seen a figure run from the house before that. Hawes then saw Kieren come to the inside garage door, and the man said: "You hunted him down and shot him like a dog, you mother f___er." The man then ran toward Kieren and they began fighting in the door frame to the house. Kieren left and then the man dragged the body out into the street. Hawes testified that he was thirty yards from the house and

[34] Exh. 12, p. 185.

[35] *Id*.

[36] *Id*. at 185-186.

[37] *Id*. at 186.

that the body was ten feet from the garage door when the body was inside the garage. He did not see anything on the floor of the garage from his vantage point.[38]

Ronald Allen lived "kitty-corner" from Kieren's house. Allen was awakened by a neighbor knocking on his door and ringing his doorbell. When he went outside after answering the door, he saw a body lying on the ground with a man who he believed to be called "Mike" holding the body. The man appeared to be "very scared, agitated, crying," "real nervous," and "shaking." Allen asked him what happened, and he said: "Dennis shot David. Dennis killed David." Although Allen responded affirmatively that he was awakened by the knocking neighbor, he also testified that he thought that he heard some shots, but he thought that they possibly were coming from a nearby outdoor shooting range.[39]

There was no testimony by any of the neighbor witnesses who testified at trial of hearing specifically multiple gunshots followed by a sustained pause and then more multiple gunshots coming from Kieren's house.

Forensic examination of the scene and physical evidence reflected the following.

Consistent with the testimony as to an extremely violent fight in Kieren's master bedroom, there was apparent human blood throughout the carpet; on top of the papers on the work desk in the office area in the corner; on top of the sliding closet doors that had been knocked down; on the doorway leading into the master bath, as if someone had been bounced into it; smeared over the shower stall, tub area and the window sill; and also on the toilet.[40]

Consistent with Kieren's testimony that Broyles hit him repeatedly in the head with a drink glass during the violent struggle, there were shards of broken glass

[38] Exh. 10, pp. 17-27.

[39] *Id*. at 27-35.

[40] Id. at 77-81, 87 (Detective Bigham).

apparently from a drinking glass throughout the master bedroom, even on the bed, intermixed with blood.[41]

Consistent with Kieren's testimony that Broyles hit him repeatedly in the head with a cologne bottle, there were shards of glass in the master bath from an apparent cologne or aftershave bottle with apparent blood mixed in, with the detective testifying that the bottle "really broke apart."[42]

An empty sheath for a knife was found lying on the rug in the master bath.[43]

An empty holster with a magazine with a few cartridges for Kieren's 9mm Ruger was found under the sliding closet doors on the floor.[44]

Kieren was examined at the trauma center at University Medical Center a short time after the incident. Examination reflected that the top third of his right ear had been torn or cut off. He additionally had multiple lacerations on his forehead and scalp, and he had superficial lacerations on his hands from a sharp instrument. The trauma center physician could not provide an opinion at the time of trial -- relying upon his notes rather than an independent recollection of the examination – as to whether or not these injuries were consistent with Kieren having been hit on the head with both a drinking glass and a cologne bottle that shattered and attempting to shield himself from having a knife held up against him.[45]

In Broyles' bedroom, there was blood on the door entering the room. The police found a gun box for a .45 caliber Para-Ordnance semiautomatic handgun, without the gun, laying open on the futon, with a few spatterings of apparent blood on the box, as well as an empty leather holster. It appeared that someone who had been involved in

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[41] *Id*. at 78.

[42] *Id*. at 87.

[43] Exh. 10, pp. 78-79 (Bigham).

[44] *Id*. at 79-80.

[45] Exh. 13, pp. 218-230.

the struggle in the master bedroom had gone into Broyles' bedroom and transferred some blood to that location. The police did not find any live .45 rounds there.[46]

The parties stipulated that the 9mm Ruger was registered to Kieren and that the .45 Para-Ordnance was registered to Broyles.[47]

The court can find an explicit reference in the trial testimony to only seven spent shell casings being recovered from inside the house in the general vicinity of the door to the garage. The State referred to nine casings in its closing, perhaps per the exhibits. One bullet had gone through the doorknob to the garage door. One bullet jacket (the usually copper cladding enveloping an otherwise usually lead bullet) was found in the garage. The detective testified that the jacketing often would become detached when a bullet struck an object. Two exit holes were found in the garage door after the detectives had it lowered, which potentially would explain why James Hawes heard a round "whiz" by his ear even though the testimony was that the garage door was down when the shots were fired.[48]

On the floor of the garage, the police found Broyles' .45 Para-Ordnance handgun, an ammo box with .45 ammunition, and nine unfired .45 cartridges on the floor by the gun. These items were by the threshold of the inner garage door leading to the house. The .45 was holstered and unloaded, and there was no magazine either in the weapon or nearby on the floor. Woods and Telles each testified that they did not see Broyles' .45 or the .45 ammunition in the garage prior to the shooting. The State postulated during closing that Kieren may have placed the .45 there after the shooting and before the police arrived. The State presented no evidence tending to establish

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[46] Exh. 10, pp. 75-77, 82-85, 90-91.

[47] Exh. 12, pp. 213.

[48] Exh. 10, pp. 70-71, 74 (Bigham); exh. 12, pp. 209-210 (Bigham second testimony); exh. 14, p. 325 (closing argument). The "bullet" technically is only the projectile that is fired from the gun. The "casing" or "case" is the usually brass shell that holds the primer and into which the bullet is seated during manufacture. This casing is ejected through a separate port during the firing of each round from a semiautomatic weapon. A "cartridge" is the preassembled unfired combination of the bullet and the casing that is loaded into the gun in preparation for firing. *See, e.g.*, exh. 10, pp. 71-72. Only seven ejected casings specifically were referred to in the transcript (as items L, M, N, O, P, Q and S, at 74).

that he did so, however. If Kieren had done so, he would have been placing a holstered gun in the garage.[49]

As noted, the .45 Para-Ordnance was unloaded and there was no magazine nearby when the police investigated the scene. However, the police found a loaded .45 magazine for the gun in Broyles' denim jacket that apparently also had been dragged out onto the driveway when Woods dragged Broyles out of the garage. There was no evidence, or suggestion made, that Kieren placed the loaded .45 magazine for the Para-Ordnance in Broyles' jacket pocket out in the driveway.[50]

The police also found a knife in the garage. The State maintained that this knife was the knife that was in Woods' hand until after the shooting, at least according to Woods' testimony that he had a knife up to that point.[51]

Broyles was hit with a total of seven bullets, five of which were recovered from his body and two of which produced exit wounds. The medical examiner could not identify with any medical certainty the order in which the bullets struck Broyles. In no given order, he was struck once in the front left shoulder, twice in the left upper arm passing through into the upper body, once through and through in the left hip, once in the back of the left shoulder over the shoulder blade, once in the back of the right shoulder medial to the shoulder blade, and once through and through in the front of the right thigh. The bullet that hit the front of the left shoulder and the two that hit initially the left upper arm all created considerable damage to the left lung, diaphragm, liver, stomach and colon. The two bullets that hit the back left and right shoulder respectively both struck the heart and each one struck a lung.[52]

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[49] Exh. 10, pp. 71, 72-73, 83-92 (Bigham); exh. 12, pp. 159-60,195-97 (Woods); exh. 11, pp. 115-17 (Telles); exh. 14, p. 354 (rebuttal argument).

[50] Exh. 10, pp. 86, 92 (Bigham).

[51] Exh. 10, p. 73 (Bigham); Exh. 14, p. 335 (closing).

[52] Exh. 10, pp. 44-49.

The shots struck the body at "roughly the same time," but the medical examiner was contrasting that measure to longer periods of hours or days. When asked whether the wound tracks were consistent with Broyles being shot while laying horizontal, the medical examiner responded: "I can't say for sure, but I cannot rule it out. I would have to say that it is possible." He acknowledged that there would be other scenarios that would create the wound tracks, stating that "I would not want to get real dogmatic about any one of them." He testified that there were no powder burns reflecting a contact or close-range shot, but he would have to examine the clothing being worn and the characteristics of the weapon and ammunition to provide a definitive opinion in that regard. The medical examiner's testimony thus did not establish with any degree of medical certainty the sequence of the shots, the time interval between shots, the range from which shots were fired, or the position of Broyles' body when he was struck by any of the various shots.[53]

The parties stipulated that the bullets recovered from Broyles' body and the 9 mm casings recovered at the scene came from Kieren's Ruger.[54]

The State suggested in closing argument that the fact that all of the 9 mm casings were recovered inside the house rather than in the garage contradicted Kieren's testimony that he had stepped onto the threshold step of the garage before then firing as he backed away from Broyles.[55] However, the State presented no forensic firearms examiner expert testimony tending to support such an inference.[56]

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[53] *Id*. at 49-50, 53-54.

[54] Exh. 12, pp. 213.

[55] Exh. 14, pp. 325-326.

[56] The court notes this because a firearm and toolmark examiner generally will not opine as to the specific directionality of ejected casings from a weapon, particularly a weapon that has not been tested as to same, given the wide range of factors that can affect the final location of an ejected casing. *See, e.g.*, *Barbara A. Pinkston v. Sheryl Foster*, No. 2:07-cv-01305-KJD-LRL, ECF No. 17, exh. 36, pp. 201-02, 225-27. If the State were correct that the position of the casings established that Kieren fired all of the rounds from inside the house, then that would tend to undercut Woods' testimony that Kieren fired a second volley of four or five shots from point blank range while Broyles lay on the garage floor.

The State further presented no evidence identifying the source of the blood on the gun box for Broyles' .45 Para-Ordnance in his bedroom. Of course, such evidence would have been inconclusive given that, even if Broyles was the one to retrieve the .45 from the box, he could have transferred Kieren's blood to the box that had been transferred to him during the violent fight.

The physical evidence, specifically blood pooling, tended to establish that Broyles was lying on the threshold of the inner garage door leading into the house.[57] While Woods' testimony has Broyles stepping back before Kieren started firing, both Woods' later testimony and the physical evidence has Broyles in close proximity to the door when he fell. The neighbor Hawes' recollection that Broyles' body was ten feet from the inside garage door was not supported by the physical evidence.

A jailhouse informant, Andrew Rutberg, testified that Kieren said to him that he was claiming self-defense "but in effect what happened is he had a fight with someone." According to Rutberg, Kieren said that someone had bitten his ear off, and he chased them out through the garage and shot them. Kieren stated that he did this "[b]ecause he was angry his ear was bitten off." During cross, it was revealed that Rutberg had worked either for or with Kieren. Rutberg denied that Kieren had fired him for impropriety, and he denied that Kieren had aided a criminal investigation against him. Rutberg previously had written the district attorney's office stating that he did not recall anything. He stated that he wrote the letter because he did not want to be transported to the county jail again.[58]

Cheryl Ogletree was called by the defense. Ogletree and Kieren had a child together. Her testimony began in a disjointed fashion because defense counsel and the witness referred to Broyles when they clearly meant Woods. Ogletree knew Woods through Kieren. According to Ogletree, Woods visited her after the shooting shortly

[57] Exh. 10, pp. 91-92 (Bigham).

[58] Exh. 11, pp. 120-127.

after Easter 1996. Ogletree testified that Woods said to her that "he was going to get Dennis."[59]

II. Antiterrorism and Effective Death Penalty Act

28 U.S.C. § 2254(d), a provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), provides the legal standards for this court's consideration of the petition in this case:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). This Court's ability to grant a writ is limited to cases where "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Supreme Court has emphasized "that even a strong case for relief does not mean the

[59] Exh. 13, pp. 230-35. After trial, the defense filed a motion for a new trial on the basis of newly discovered evidence. Ogletree attested in a supporting affidavit: (1) that at the time of trial, she felt hostility toward and a desire for revenge as to Kieren because he had injured their child; (2) that Woods stayed with her for a few days after April 4, 2006; (3) that Woods told her that Kieren had made fun of her and told people that she was unattractive, which increased her anger at Kieren; (4) that Woods told her that Broyles had physically charged Kieren at the time of the shooting, that Broyles had closed the garage door to load his gun, and that Broyles did not intend to leave the property but instead intended to kill Kieren; (5) that Woods told her that it was his intention to see that Kieren was convicted of murder; (6) that Woods stated that he moved Broyles' body from the garage in order to prevent the crime scene evidence from showing self-defense by Kieren; (7) that Woods told her that it was her duty to lie at trial to help Woods convict Kieren, because of what he had done to their child; (8) that Ogletree did not tell the defense any of this; and (9) that she had remorse after Kieren was convicted for not coming forward with the truth. Ex. 21. Petitioner alleged in Ground 1 of the amended petition that he was denied due process when the state district court denied the motion for new trial. Ground 1 was dismissed as unexhausted following upon the court's holding that petitioner did not present a federal due process claim in connection with same in the state courts.

state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Lockyer*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694.

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer*, 538 U.S. at 74 (quoting *Williams*, 529 U.S. at 413). The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; the state court's application of clearly established law must be objectively unreasonable. *Id*. (quoting *Williams*, 529 U.S. at 409).

To the extent that the state court's factual findings are challenged, the "unreasonable determination of fact" clause of § 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id*. The governing standard is not satisfied by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

> .... [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir.2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence. The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*, 563 U.S. at 181.

III. Instant Petition

a. Claims raised on direct appeal

i. Ground 2

Kieren contends that two of the self-defense jury instructions given were confusing and improperly shifted the State's burden of proof, in violation of his Fifth and Fourteenth Amendment due process rights (ECF No. 20, pp. 14-15).

To obtain relief based on an error in instructing the jury, a habeas petitioner must show the "'instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Where the defect is the failure to give an instruction, the inquiry is the same, but the burden is even heavier because an omitted or incomplete instruction is less likely to be prejudicial than an instruction that misstates the law. *See Henderson v. Kibbe*, 431 U.S. 145, 155-157 (1977); *see also Estelle*, 502 U.S. at 72.

The jury was instructed regarding self defense:

> Homicide is justifiable when committed by a person in the lawful defense of oneself when he has reasonable ground to apprehend that he is in danger of great bodily injury or death and that there is imminent danger of such a design being accomplished and that the killing of the other was absolutely necessary.

> A bare fear that the person is in danger of great bodily injury or death is insufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the person killing really acted under the influence of those fears and not in the spirit of revenge.

Exh. 15, jury instruction No. 23.

The jury was also instructed:

> Actual danger is not necessary to justify self defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer great bodily injury, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self defense upon such appearances and from such fear and honest convictions, his right of self defense is the same whether such danger is real or apparent.
>
> The law does not justify the use of a greater degree of force than is reasonably necessary and the burden is on the State to prove beyond reasonable doubt that the degree of force used was greater than reasonably necessary.

Exh. 15, jury instruction No. 30.

The Nevada Supreme Court rejected this claim on direct appeal:

> Kieren argues that the district court committed reversible error by giving self defense jury instructions that were confusing, ambiguous, and which both shifted and reduced the State's burden of proof. We disagree. We conclude that this argument lacks merit because Kieren did not object to the instructions during trial and we find that there was no plain error affecting substantial rights belonging to Kieren.

Exh. 51, p. 3. Respondents point out that 8 jury instructions were give on self defense. Exh. 15, jury instruction nos. 23-30. Instruction No. 28 also stated that, because Kieren offered evidence of self defense, the burden was on the State to prove beyond a reasonable doubt that the alleged justification for self defense did not exist. Taken as a whole, and particularly in light of instruction no. 28, this court does not view the self defense instructions as improperly shifting the burden of proof. Kieren has not demonstrated that the Nevada Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or was based on an unreasonable determination of the facts in light of the evidence presented

in the state court proceeding. 28 U.S.C. § 2254(d). Accordingly, federal habeas relief is denied as to ground 2.

ii. Ground 6

Kieren claims that the jury was improperly instructed on reasonable doubt, in violation of his Fifth and Fourteenth Amendment due process rights (ECF No. 20, pp. 19).

The jury instruction on reasonable doubt set forth the Nevada statutory definition:[60]

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Exh. 15, jury instruction no. 32.

The Nevada Supreme Court ruled that this claim lacked merit. Exh. 51, pp. 3-4.

Kieren acknowledges that the Ninth Circuit Court of Appeals has upheld the Nevada reasonable doubt instruction at issue. *Ramirez v. Hatcher*, 136 F.3d 1209, 1214-1215 (9th Cir. 1998). Kieren thus has not shown that the Nevada Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 6 is denied.

iii. Ground 9

Kieren contends that the State failed to disclose exculpatory evidence in violation of his Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and a reliable sentence (ECF No. 20, pp. 26-27).

The State has a duty to turn over evidence that is favorable to the defense. *See Strickler v. Green*, 527 U.S. 263, 280 (1999). The State violates due process if it fails to

[60] NRS 175.211.

turn over evidence that is "favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued, [that is, it must have been reasonably probable that the outcome of trial would have been different if the suppressed evidence had been disclosed to the defense]." *Id*. at 281-82; 289. If the evidence has no impeachment or exculpatory value it is not *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963); *Morris v. Ylst*, 447 F.3d 735, 740-742 (9th Cir. 2006).

Kieren alleges that in a taped statement to someone in the district attorney's office, Woods stated that Broyles had bragged to him about committing murders in California (ECF No. 20, pp. 26-27; *see also* exh. 29). At the time the defense sought the tape in 2000, the State was unable to locate to original tape recording from 1997. Kieren claims there is a missing portion of the interview that would have enabled the defense to impeach Woods' trial testimony that Broyles was nonviolent (ECF No. 20, pp. 26-27).

Respondents point out that the State gave the defense a copy of the transcript, which references Broyles telling Woods about having to kill someone in California. *See* exh. 31. Thus, Kieren actually had the information.

The Nevada Supreme Court affirmed the denial of this claim in his postconviction proceedings:

> Kieren also argues that the district court erred by denying his claim that the State violated *Brady v. Maryland* by losing, destroying, or concealing exculpatory evidence, specifically the final portion of the tape of Michael Woods' police interview. Woods allegedly told police in this interview that the victim had bragged to him about committing murders in California. Kieren argues that this evidence would have enabled him to impeach Woods' testimony that the victim was nonviolent. However, Kieren fails to cite to any part of the record where Woods so testified, and our review of the record does not reveal any such testimony. In fact, Woods testified that he saw the victim bite off part of Kieren's ear and that when he found Kieren and the victim in the bathroom he was afraid the victim would kill Kieren. Thus, the district court did not err in denying this claim.

Exh. 73, pp. 3-4.

In his federal petition Kieren again has not pointed to where in Woods' trial testimony he states that Broyles was nonviolent. As set forth at the outset of this order, the evidence adduced at trial was that Broyles bit off a portion of Kieren's ear and threatened to kill Woods. Ground 9 lacks merit. Kieren has not shown that the Nevada Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 9 is denied.

iv. Ground 7

Kieren asserts that the cumulative effect of trial errors violated his Fifth and Fourteenth Amendment due process and fair trial rights (ECF No. 20, p. 20).

The cumulative effect of multiple errors can violate due process and warrant habeas relief where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007).

The Nevada Supreme Court ruled that this claim lacked merit. Exh. 51, pp. 3-4. As Kieren has not demonstrated that any alleged trial errors violated his constitutional rights and has not shown that the Nevada Supreme Court's decision was contrary to, or involved an unreasonable application of, clearly established U.S. Supreme Court law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Relief is denied as to ground 7.

b. Ineffective assistance of counsel claims

Kieren contends that trial and appellate counsel rendered ineffective assistance. Ineffective assistance of counsel (IAC) claims are governed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the attorney made errors so serious that he or she was

not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams*, 529 U.S. at 390-91 (citing *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id*. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. A reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id*. Additionally, any review of the attorney's performance must be "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's burden to overcome the presumption that counsel's actions might be considered sound trial strategy. *Id*.

Ineffective assistance of counsel under *Strickland* requires a showing of deficient performance of counsel resulting in prejudice, "with performance being measured against an objective standard of reasonableness, . . . under prevailing professional norms." *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (internal quotations and citations omitted). When the ineffective assistance of counsel claim is based on a challenge to a guilty plea, the *Strickland* prejudice prong requires a petitioner to demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

If the state court has already rejected an ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary to, or an unreasonable application of, the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id*.

The United States Supreme Court has described federal review of a state supreme court's decision on a claim of ineffective assistance of counsel as "doubly deferential."

Cullen, 563 U.S. at 190 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). The Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403 (internal citations omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim is limited to the record before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 181-84. The United States Supreme Court has specifically reaffirmed the extensive deference owed to a state court's decision regarding claims of ineffective assistance of counsel:

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id*. at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S. at ——, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at ——, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington, 562 U.S. at 105. "A court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Id*. at 104 (quoting *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id*. (internal quotations and citations omitted).

i. Ground 8(a)

Kieren argues that counsel failed to properly present evidence establishing his state of mind, specifically with respect to an alleged San Bernadino murder committed by the victim as well as two bar fights (ECF No. 20, pp. 21-24).

Kieren testified at the evidentiary hearing on his state postconviction petition that Broyles had mentioned more than once that he had "killed two dudes" in San

Bernadino. Exh. 64, pp. 59-98. Kieren stated that Broyles showed him a Polaroid of Broyles standing in a ditch and holding a shovel and a skull. He testified that he had witnessed one bar fight in which Broyles seriously injured someone, and he was in a bar during another incident when Broyles allegedly seriously injured someone in the restroom. He stated that he had asked his defense counsel to look into the matters.

Defense counsel testified that he did not recall introducing any evidence about a San Bernadino incident but that he would have done so if it had been pertinent. *Id*. at 11.

At the close of the hearing, the court explained that it was unpersuaded:

> Let's look at what Mr. Kieren testified to today. Let's look at these alleged bar fights. One he allegedly witnesses himself, and then had nothing to do with the guy. He had so much nothing to do with him that he let the guy come live with him six months, a year later, took him in, had him living in his house for months before this incident.
>
> The other incident he doesn't have any personal knowledge of all. All he knows is that his buddy left, went to the bathroom and sometime later a bunch of guys hustled his buddy out of the bathroom and then the ambulance was called. That's firsthand knowledge of nothing.
>
> So, the deal down in San Bernardino is a big nothing. It's a wild goose chase. It was a total waste of everyone's time to get these reports. Whatever we, the taxpayers paid, to have Mr. Schieck's investigator go get that report is a big nothing. . . .
>
> Your client didn't believe him the first time he told him. He didn't believe him the second time. The uncle [Raymond Kieren] didn't believe him. It was just hot air. Perhaps Mr. Broyles [the victim] is just a man who's full of hot air
>
> . …if your client was truly afraid of him, that would have been the first thing that he said when he called on 911. That would have been when he told the police he was scared to death of this guy, and that he had to shoot him in self-defense, and he certainly would have said that when he testified on cross-examination instead of telling the jury what he told them.
>
> . . . And even if it turns out that your attorney didn't run down this California incident to the depth and extent that Mr. Reifer did, it's a big so what. It's nothing. It would not have helped you. It would not have helped you at trial, and it would not have resulted in a different trial result. And the reason I say that is because the jury has to take a look at what your thought process was and what you – and that's best determined by what you did right after it, within 24 to 48 hours after this event. And not once in that 24 to 48-hour period did you tell anybody that you were scared to death of this guy and that that's why you wanted him out of your house.
>
> And when you came to this decision that you were scared to death of the guy and when you believed all this stuff, it's simply not there, and

> because it's not there it would appear that it's simply a defense created months or years after the event to try to give yourself a better shot at defending a murder trial.

Id. at 112-18.

Consistent with her findings at the evidentiary hearing, the state district court denied Kieren's claim of ineffective assistance of counsel. The Nevada Supreme Court affirmed the decision noting Kieren failed to demonstrate prejudice pursuant to *Strickland*.

> The testimony established that the victim was the initial aggressor, that he bit off a portion of Kieren's ear, and that he threatened to stab a witness, Michael Woods, who tried to break up the incident. However, the jury also heard testimony that the victim gave Woods the knife he was holding and asked Woods to restrain Kieren while he left. Woods then took the knife and restrained Kieren; Kieren told Woods, 'You don't understand, Mike, he bit my [f—ing] ear off, I am going to kill him.' Kieren got away from Woods, retrieved a pistol from his bag, and went to the garage, where he found the victim and pointed the gun at him. The victim said 'No, don't.' Kieren shot the victim several times and then stood over him and shot him again. The victim had a total of seven gunshot wounds. Kieren testified that he was mad at the victim before the killing. Accordingly, we conclude the district court did not err in denying this claim.

Exh. 73, pp. 2-3.

Kieren's testimony about Broyles' alleged prior violent behavior lacks credibility. But even assuming that Kieren feared Broyles, the jury heard the testimony of Kieren, Woods, and Broyles' girlfriend Telles, as well as the forensic evidence. It cannot be said that Kieren has demonstrated that the Nevada Supreme Court's decision affirming the denial of this claim was contrary to, or involved an unreasonable application of, *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Ground 8(a) is denied.

ii. **Ground 8(b)**

Kieren claims trial counsel IAC for failing to call an expert to testify regarding the effects of Kieren's injuries sustained when the victim attacked him (ECF No. 20, pp. 25-26).

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///

Trial counsel Peter LaPorta testified at the postconviction evidentiary hearing. Exh. 64, pp. 9-38. He stated that he did not call an expert to testify about the effects that Kieren's injuries would have had on him because Kieren

> was adamant it was self defense. He never expressed to me or demonstrated to me that he had any diminished capacity, mental capacity, at that point in time. He seemed to be very in control on what he was relating to me, and as a result I was not going to present competing defenses to a jury.

Id. at 16.

The Nevada Supreme Court affirmed the denial of this claim, reasoning:

> At the evidentiary hearing, counsel testified that he decided such evidence would not be helpful because it could "compete with" the self-defense theory. Counsel's tactical decisions are "'virtually unchallengeable absent extraordinary circumstances,'" which we do not perceive here. Thus, the district court did not err in denying this claim.

Exh. 73, p. 3. Kieren has not shown that the Nevada Supreme Court's decision affirming the denial of this claim was contrary to, or involved an unreasonable application of, *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Federal habeas relief is denied as to ground 8(c).

iii. Ground 8(c)

Kieren asserts that his trial counsel was ineffective for failing to fully examine Cheryl Ogletree regarding her knowledge of Woods, Broyles, and the case (ECF No. 20, p. 6).

Ogletree testified briefly at trial, stating that she and Kieren had a child together. Exh. 13, pp. 231-235. She stated that after the killing, Woods came to see her and during their conversation Woods said that "he was going to get Dennis [Kieren]. He was going to make sure that -- . . . . He was going to get Dennis." *Id*. at 234-235.

In closing, Kieren's attorney invoked that testimony to try to discredit the State's witnesses: "Now, their testimony is their feeble and pathetic attempt to make good on Mr. Woods threat he made to Ms. Ogletree 'I am going to get Dennis.'" *Id*. at 342.

Kieren was specifically given the opportunity to develop this claim at the state postconviction hearing; however, he failed to do so:

> THE COURT: Now another thing that I said we were going to talk about today, which I didn't hear anything at all about, was Ogletree, the lady…. Now, she was called as a defense witness, and he's complaining about a witness that he called at trial?
>
> MR ORAM: Yes, Your Honor, and she was here today. I spoke with her and made the determination that we would be better suited without her.

Exh. 64, p. 116.

Rejecting this claim, the Nevada Supreme Court observed that Kieren provided no legal support or cogent argument and failed to demonstrate a reasonable probability of a different outcome. Exh. 73, p. 4.

This court concludes that the record belies Kieren's IAC claim. Defense counsel examined Ogletree and presented the defense theory that Woods lied to get Kieren convicted. Kieren has not demonstrated that the Nevada Supreme Court's decision affirming the denial of this claim was contrary to, or involved an unreasonable application of, *Strickland*, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The court accordingly denies federal ground 8(c).

The petition, therefore, is denied in its entirety.

IV. Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id*.

Having reviewed its determinations and rulings in adjudicating Kieren's petition, the court finds that none of those rulings meets the *Slack* standard. The court therefore declines to issue a certificate of appealability for its resolution of any of Kieren's claims.

V. **Conclusion**

IT IS THEREFORE ORDERED that the amended petition (ECF No. 20) is **DENIED** in its entirety.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk shall enter judgment accordingly and close this case.

DATED this 27th day of September, 2019.

LARRY H. HICKS
UNITED STATES DISTRICT JUDGE

APP. 034

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DENNIS K. KIEREN, JR., Petitioner, v. STATE OF NEVADA ATTORNEY GENERAL, et al., Respondents.	Case No. 3:07-cv-00341-LRH-WGC ORDER

This court denied petitioner Dennis K. Kieren, Jr.'s counseled motion for leave to file an amended 28 U.S.C. § 2254 habeas petition (ECF No. 83). Almost a year later, petitioner filed a motion for district court to reconsider its order denying the motion for leave to amend the petition (ECF No. 86). Respondents opposed (ECF No. 90), and Kieren replied (ECF No. 94).

In 2011, this court—only reaching ground 5, the *Kazalyn* instruction claim — conditionally granted Kieren's habeas petition (ECF No. 44). Ultimately, in September 2014, the Ninth Circuit reversed (ECF No. 59). In its order reversing the grant of habeas relief as to ground 5 and remanding for consideration of the remaining claims, the Ninth Circuit discussed how *White v. Woodall* effectively overruled *Babb* and explained:

> …at least before 2003, it was not an unreasonable application of clearly established federal law to not apply *Byford v. State* . . . to convictions pending at the time that *Byford* was decided. Kieren's conviction was pending at the time *Byford* was decided, but his conviction became final –

> and the Nevada Supreme Court issued its relevant decision – in 2002. We, therefore, hold that the Nevada Supreme Court did not unreasonably apply clearly established federal law when it declined to apply *Byford* in Kieren's case.
>
> (ECF No. 59).[1]

Upon remand, Kieren moved for leave to file an amended petition in order to assert a "*Nika/Bunkley*" claim in his federal habeas proceedings (ECF No. 75). This court denied leave to amend as futile: "[b]ecause the court of appeals reversed the grant of habeas relief in light of the current state—both at the time it issued its order and the date of this order—of the law regarding the *Kazalyn* instruction and federal habeas review." Citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *see also Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (ECF No. 83, p. 4).

A year after the denial of leave to amend, petitioner moves for reconsideration of the interlocutory order under Local Rule 59-1. The Local Rule provides that a movant may be entitled to relief where, among other things, there has been a change in legal or factual circumstances or an intervening change in controlling law.

Kieren argues that his factual circumstances have changed because the Nevada Supreme Court affirmed the denial of his most recent state postconviction petition on June 15, 2017 (ECF No. 86, p. 4; exhibit 105).[2] He also argues that legal circumstances have changed because *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016),

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[1] *See also*, timeline of state, circuit and Supreme Court caselaw relevant to the *Kazalyn* instruction in this court's order dated September 27, 2016 (ECF No. 83).
In *Byford v. State*, 994 P.2d 700, 713 (Nev. 2000), the Supreme Court of Nevada concluded that the "*Kazalyn* instruction" "blur[red] the distinction between first- and second-degree murder" by not sufficiently distinguishing between the distinct elements of deliberation and premeditation.
In *White v. Woodall*, 134 S.Ct. 1697 (2014) – the United States Supreme Court held that federal courts may extend Supreme Court rulings to new sets of facts on habeas review only if it is "beyond doubt" that the ruling applies to a new set of facts. It is beyond doubt that a ruling applies to a new set of facts only if there can be no "fairminded disagreement" on the question.
In *Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014), the Ninth Circuit determined that *White v. Woodall* effectively overruled *Babb. v. Lozowsky*, 719 F.3d 1019, 1032-1033 (9th Cir. 2013), and held that, at least before *Bunkley v. Florida* was decided in 2003, it was not an unreasonable application of clearly established federal law not to apply *Byford* to convictions that were not final at the time that *Byford* was decided.

[2] Exhibits referenced in this order are exhibits to Kieren's motion for reconsideration, ECF No. 86, and are found at ECF No. 87.

and *Welch v. U.S.*, 136 S. Ct. 1257 (2016) represent a change in the law that must allow Kieren to obtain the benefit of *Byford* on collateral review.

In *Montgomery*, the Supreme Court concluded that *Miller v. Alabama*,[3] which held that mandatory life without parole for juveniles violates the Eighth Amendment, announced a substantive rule of constitutional law, and therefore, must be applied retroactively by state and federal courts. 136 S. Ct. at 736, 727; *see also, Welch*, 136 S. Ct. at 1265 (holding that its decision in *Johnson*[4] that the residual clause of the federal Armed Career Criminal Act of 1984 was void for vagueness, announced a new substantive rule of constitutional law which, therefore, must be applied retroactively).[5] Kieren now argues that, under *Montgomery*, the Nevada Supreme Court must apply *Nika/Byford* retroactively.[6]

But respondents are correct that Kieren conflates new Supreme Court rules with new State court rules and conflates *Teague* with *Bunkley*. In fact, recognizing the problem that *Nika/Byford* constitutes a new state rule, not a new constitutional rule, Kieren frames the claim he wants to add to his petition as a *Nika/Bunkley* claim. In *Bunkley v. Florida*,[7] the Supreme Court held that a change in state law must be applied retroactively in order to satisfy due process. Kieren tries to bootstrap a new constitutional rule onto his analysis by invoking *Bunkley*. But the new rule at issue for Kieren's purposes, is *Nika/Byford*, a state rule or change of state law. *Montgomery* simply does not dictate that the Nevada Supreme Court is required to apply *Nika/Byford*

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[3] 567 U.S. 460, 465 (2012).

[4] *Johnson v. United States*, 135 S.Ct. 2551 (2015).

[5] *Montgomery* and *Welch* follow the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, generally, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. New substantive rules generally apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004); *Teague*, 489 U.S. at 307, 311. Also, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *see Teague*, 489 U.S. at 311–313.

[6] In *Nika v. State*, 198 P.3d 839, 848-850 (Nev. 2008), the Supreme Court of Nevada held that *Byford* announced a change in state law that applies to cases that were not final when Byford was decided.

[7] 538 U.S. 835 (2003),

retroactively for petitioners whose convictions became final before the *Bunkley* decision issued. Kieren's argument is, therefore, unavailing.

Kieren's *Kazalyn*-instruction claim has been adjudicated on the merits several times, and *White v. Woodall* and *Moore v. Helling* continue to apply to such claims that pre-date *Bunkley*. Petitioner has not demonstrated that a change in legal or factual circumstances or an intervening change in controlling law warrant reconsideration of the denial of the motion to amend. Kieren's motion for reconsideration is, therefore, denied.

IT IS THEREFORE ORDERED that petitioner's motion for reconsideration (ECF No. 86) is **DENIED**.

DATED this 5th day of March, 2018.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

APP. 038

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DENNIS K. KIEREN, JR.,

Petitioner,

v.

STATE OF NEVADA ATTORNEY GENERAL ET AL.,

Respondents.

Case No. 3:07-cv-00341-LRH-WGC

LR 59-1 MOTION FOR RECONSIDERATION OF INTERLOCUTORY ORDER ECF NO. 83

The Petitioner, Dennis K. Kieren, Jr., by and though his attorney of record, Lori C. Teicher, First Assistant Federal Public Defender, moves this Court pursuant to Local Rule 59-1 for reconsideration of Interlocutory Order ECF No. 83 dated September 27, 2016, to allow Kieren to amend his petition. This motion is based upon the attached points and authorities as well as all other pleadings, documents, and exhibits on file.

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/ / /

Dated this 2nd day of August, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Lori C. Teicher
LORI C. TEICHER
First Assistant Federal Public Defender

POINTS AND AUTHORITIES

I. INTRODUCTION

The Ninth Circuit Court of Appeals reversed the grant of relief in this case, issuing a mandate on May 20, 2015. ECF No. 59.[1] This Court resumed jurisdiction and entered an order directing supplemental briefing on claims addressed in the State's Answer and Kieren's Reply, namely Grounds 2, 6, 7 (in part), 8 and 9. This Court noted that Kieren had previously abandoned Grounds 1, 3, 4 and 7 (in part). ECF No. 67 n.1. The State filed a Supplemental Answer (ECF No. 71) and Kieren filed a Supplemental Reply (ECF No. 76). Kieren also filed a Motion for Leave to Amend his Petition, requesting that Ground 5, which presents a plainly meritorious claim that should compel relief in this Court and is not barred by the Ninth Circuit's mandate, as well as requesting that previously abandoned unexhausted claims be reincorporated into Kieren's petition. ECF No. 75. The State opposed (ECF No. 78), Kieren replied (ECF No. 79), and on September 27, 2016, this Court denied Kieren's motion. ECF No. 83. Kieren, through undersigned counsel, now respectfully requests that pursuant to Local Rule 59-1, this Court reconsider interlocutory order ECF No. 83, which denied Kieren's request.

II. ARGUMENT

Local Rule 59-1 allows for reconsideration of interlocutory orders. Kieren respectfully requests that this Court reconsider his Motion to Amend Petition, filed January 15, 2016, as changes in both the legal and factual circumstances entitle him to relief. Reconsideration is also appropriate here as there has been an intervening change in controlling law.

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[1] "ECF No." refers to the record in this Court. "Ex." refers to the consecutively numbered exhibits filed with the original petition, as well as supplemental exhibits filed with this case and Motion.

A. Changes in Factual Circumstances

Since this Court's denial of Kieren's motion to amend (ECF No. 83), additional state court proceedings have occurred. On January 25, 2016, Kieren filed a reply (Ex. 99), to which the State responded on February 3, 2016 (Ex. 100). Argument was heard on March 17, 2006, with the state district court entering a decision and order on June 3, 2016. Ex. 101. Kieren appealed and after briefing without oral argument, the Nevada Supreme Court affirmed on June 15, 2017. Ex. 102-105. The court held that Kieren's petition was untimely and successive, that he failed to demonstrate good cause, and failed to show that failure to consider his *Nika* claim would amount to a fundamental miscarriage of justice.[2] Ex. 105 at 1-3. Amended Ground Five is exhausted.

B. Changes in Legal Circumstances

1. *Background*

Ground Five of Kieren's 2008 amended petition challenged the first degree murder jury instruction (the *Kazalyn* instruction) provided at his trial. ECF No. 20. Ground Five in Kieren's proposed amended petition also challenges this instruction, but specifically bases the claim upon *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), a case decided after Kieren filed his amended federal petition on September 19, 2008.

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[2] The Nevada Supreme Court incorrectly analyzed Kieren's assertion that a fundamental miscarriage of justice overcomes any procedural bar here. 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. Denno*, 513 U.S. 398, 327-328 (1995). The court is inconsistent in the manner in which it applies this bar. *Compare Kieren v. State*, Case No. 70801, Ex. 105 at 3, *with Nasby v. State*, Case No. 70626 Ex. 106 at 3. The Nevada Supreme Court in Kieren's case inappropriately focused upon the existence of "new" evidence, when the proper inquiry is "had the jury not received the *Kazalyn* instruction and been properly instructed regarding the meaning of premeditation and the meaning of deliberation, 'it is more likely than not that no reasonable juror would have convicted him.'" Ex. 106 at 3 (citations omitted).

Kieren moved for amendment of his petition, extensively detailing the protracted litigation of the state and federal courts in litigating this claim. ECF No. 75. Kieren also appropriately argued application of the January 25, 2016 Supreme Court decision of *Montgomery v. Lousisiana*, 136 S. Ct. 718, in his February 1, 2016, Reply to Opposition to Motion to Amend Petition. ECF No. 79 at 6-8. Kieren proposed that *Montgomery* held that when a "substantive rule has eliminated a State's power to prosecute the defendant's conduct or impose a given punishment", *Montgomery*, 136 S. Ct. at 730, the rule must have "retroactive effect regardless of when a conviction became final" in a state's collateral review proceedings. *Montgomery*, 136 S. Ct. at 739. Thus, where Montgomery was able to obtain the benefit of a Supreme Court decision nearly fifty years after he was imprisoned, and long after his conviction became final, Kieren's amended Ground Five should be heard now. ECF No. 79 at 6.

This Court disagreed, issuing an order that holding that Kieren's motion for leave to amend was futile and the ground resolved, as "the court of appeals reversed the grant of habeas relief in light of the current state--- both at the time it issued its order and the date of this order---of the law regarding the *Kazalyn* instruction and federal habeas review." ECF. No. 83 at 4-5. Kieren respectfully disagrees and files for reconsideration pursuant to changed legal circumstances which resulted in an intervening change in controlling law.

2. New Supreme Court Caselaw

a. Montgomery v. Louisiana

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)).

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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.

b. *Welch v. United States*

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.

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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).

3. *Montgomery* and *Welch v. United States* represent a change in law that must allow Kieren to obtain the benefit of *Byford* on collateral review.

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. In light of *Welch*, 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*).[3] 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*, Kieren is entitled to the benefit of having *Byford* apply to his case, which became final prior to *Byford*. The *Kazalyn* instruction defining premeditation and deliberation given in his case was improper. As outlined in *Welch*, the "new" rule of *Nika*, as pled in amended Ground Five, should be applied to Kieren.

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

[3] In contrast, the United States Supreme Court has never cited *Bunkley* in any subsequent case.

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" 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 Kieren was not so great that it precluded a verdict of second degree murder. ECF No. 44 at 22-25.

III. CONCLUSION

For all these reasons, Kieren respectfully requests that this Court reconsider ECF No. 83, and allow him to file an Amended Petition containing amended Ground Five.

Dated this 2nd day of August, 2017.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/ Lori C. Teicher
LORI C. TEICHER
First Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and include: Dennis C. Wilson

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing 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 non-CM/ECF participants:

Dennis Kieren
NDOC #51697
Lovelock Correctional Center
1200 Prison Road
P.O. Box 359
Lovelock, NV 89419

/s/ Dayron Rodriguez
An Employee of the
Federal Public Defender

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS K. KIEREN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70801

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying, as procedurally barred, appellant Dennis Kieren's December 17, 2015, postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge. Kieren argues that he demonstrated good cause and actual prejudice to excuse the procedural bars to his untimely and successive petition. We disagree and affirm.

Kieren's postconviction habeas petition was untimely because it was filed more than thirteen years after remittitur issued on direct appeal on March 5, 2002. *See* NRS 34.726(1); *Kieren v. State*, Docket No. 36345 (Order of Affirmance, February 8, 2002). Kieren's petition was also successive because he had previously filed a postconviction for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition. *See* NRS 34.810(2); *Kieren v. State*, Docket No. 47039 (Order of Affirmance, June 26, 2007). Thus, his petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Kieren could show good cause if the basis for a claim was

not reasonably available when he filed his first, timely petition and that he filed the instant petition within a reasonable time of discovering the factual or legal basis for the claim. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further, because the State specifically pleaded laches, Kieren was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Kieren fails to demonstrate good cause. He argues that this court's decision in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), provided good cause for his untimely filing. Even assuming he would be entitled to relief under *Nika*, Kieren did not file his petition until approximately seven years after *Nika*. That seven-year delay is not reasonable. As he failed to file within a reasonable time, he has failed to demonstrate good cause. His argument that his intervening federal litigation excuses the delay is unavailing. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (holding that pursuit of federal habeas relief did not constitute good cause to excuse an untimely state habeas petition), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 197-98 n.2, 275 P.3d 91, 95 n.2 (2012). His argument from federal caselaw on retroactivity is similarly misplaced because those federal authorities do not curtail the application of this state's procedural bar, which precludes Kieren's challenge. *See generally Montgomery v. Louisiana*, 136 S. Ct. 718, 729-33 (2016) (discussing when a rule applies retroactively and holding that states cannot refuse to give retroactive effect to a right *where the petitioner has a right under state collateral review proceedings to invoke that rule*). As Kieren failed to show good cause, we conclude that the district court correctly determined that his petition was procedurally barred, as the application of the procedural

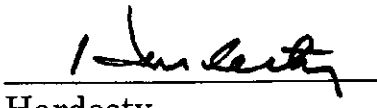
bar is mandatory. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

To the extent that Kieren argues that failing to consider his *Nika* claim would amount to a fundamental miscarriage of justice, we disagree, Kieren must demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence," *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), but has failed to identify any new evidence. Further, Kieren does not deny that he killed the victim but only that the jury was improperly instructed on the intent element of first-degree murder, but "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *accord Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006). Accordingly, Kieren failed to demonstrate actual innocence to warrant reaching his *Nika* claim.

Kieren's remaining claims—that the district court erred in denying his new-trial motion on the basis of new evidence, that the district court erroneously excluded evidence of the victim's violent character, that the State committed misconduct in referring to a criminal charge against Kieren for which he was not convicted, and cumulative error at trial—were denied on direct appeal, *Kieren*, Docket No. 36345 (Order of Affirmance, February 8, 2002), and may not be relitigated pursuant to the law-of-the-case doctrine, *see Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Lastly, Kieren has failed to demonstrate a fundamental miscarriage of justice to overcome the presumption of prejudice to the State based on laches. *See Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001).

Having considered Kieren's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.



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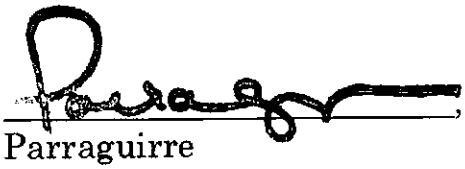

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Stefany Miley, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

APP. 054

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

DENNIS K. KIEREN, JR., Petitioner, v. STATE OF NEVADA ATTORNEY GENERAL, et al., Respondents.	Case No. 3:07-cv-00341-LRH-WGC ORDER

This counseled habeas matter under 28 U.S.C. § 2254 comes before the court on petitioner Dennis K. Kieren, Jr.'s motion for leave to file an amended complaint (ECF No. 75).

I. Procedural History

In March 2010, this court granted in part respondents' motion to dismiss, concluding that grounds 1, 3, 4 and ground 7–to the extent that it was based upon the alleged errors in grounds 1, 3 and 4—were subject to dismissal as unexhausted (ECF No. 31). Kieren then filed a counseled declaration of abandonment of those grounds (ECF No. 33).

On November 14, 2011, in the merits disposition, this court conditionally granted Kieren's petition (ECF No. 44). The court reached only ground 5, in which Kieren alleged that he was denied due process in violation of the Fifth and Fourteenth Amendments because the trial court's "*Kazalyn*" jury instructions on murder allegedly

failed to adequately distinguish between the elements of malice aforethought, premeditation, and deliberation.

The Ninth Circuit affirmed this court's grant of habeas relief in March 2014 (ECF No. 52). In July 2014, the Ninth Circuit granted reconsideration and withdrew the memorandum disposition (ECF No. 56). On September 22, 2014, the Ninth Circuit reversed and remanded in light of an intervening United States Supreme Court opinion (ECF No. 59).

After the case was remanded, this court issued an order directing the parties to file their supplemental briefing, if any, with respect to the remaining grounds for relief (ECF No. 67). Respondents filed a supplement to their answer (ECF No. 71). Kieren filed a motion for leave to file an amended petition (ECF No. 75). He also filed a supplement to the reply (ECF No. 76). Respondents oppose the motion for leave to file an amended petition (ECF No. 78); Kieren filed a reply (ECF No. 79).

II. Analysis

The development of the state, circuit and Supreme Court case law relevant to the *Kazalyn* instruction in Nevada is described in depth by the parties and the court in various filings and orders in this case. For the purposes of considering Kieren's motion for leave to file an amended petition, the court provides the following timeline.

1999: A jury convicts Kieren of first-degree murder in state district court; judgment of conviction is entered.

February 2000: *Byford v. State*, 994 P.2d 700, 713 (Nev. 2000) -- the Supreme Court of Nevada concluded that the "*Kazalyn* instruction" "blur[red] the distinction between first- and second-degree murder" by not sufficiently distinguishing between the distinct elements of deliberation and premeditation.

June 2000: Kieren files a notice of appeal.

August 2000: *Garner v. State*, 6 P.3d 1013, 1025 (Nev. 2000) overruled on other grounds by *Sharma v. State*, 56 P.3d 868 (2002) -- The Nevada Supreme Court

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determined that *Byford* did not signify that the giving of the *Kazalyn* instruction violated any constitutional rights, such that the *Byford* holding was not a holding of constitutional dimension that must be retroactively applied.

May 2002: Kieren's conviction became final.

May 2003: *Bunkley v. Florida*, 538 U.S. 835 (2003) – the United States Supreme Court held that federal due process requires that a state court apply a potentially exonerating change in state law that occurred before a defendant's conviction became final.

August 2007: Kieren initiated the current federal habeas proceedings.

September 2007: *Polk v. Sandoval*, 503 F.3d 903, 909-911 (9th Cir. 2007) -- the Ninth Circuit held that the giving of a *Kazalyn* instruction deprived a defendant of due process, subject to harmless error analysis.

2008: *Nika v. State*, 198 P.3d 839, 848-850 (Nev. 2008) -- the Supreme Court of Nevada held that the 2000 *Byford* decision announced a change in state law that applies to cases that were not final when *Byford* was decided.

2011: This court conditionally granted Kieren's petition for writ of habeas corpus as to ground 5, the *Kazalyn* instruction claim (ECF No. 44).

2013: *Babb. v. Lozowsky*, 719 F.3d 1019, 1032-1033 (9th Cir. 2013) – the Ninth Circuit concluded that the failure to apply the new *Byford* instruction in cases that were not final when *Byford* was decided was an unreasonable application of clearly established federal law. 28 U.S.C. §2254 (d)(1).

March 2014: The Ninth Circuit affirmed this court's order granting federal habeas relief as to ground 5 (ECF No. 52).

April 2014: *White v. Woodall*, 134 S.Ct. 1697 (2014) – the United States Supreme Court held that federal courts may extend Supreme Court rulings to new sets of facts on habeas review only if it is "beyond doubt" that the ruling applies to a new set

of facts. It is beyond doubt that a ruling applies to a new set of facts only if there can be no "fairminded disagreement" on the question.

July 2014: The Ninth Circuit grants appellants'/respondents' motion for reconsideration and withdraws the memorandum of disposition (ECF No. 56).

August 2014: *Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014) – the Ninth Circuit determined that *White v. Woodall* effectively overruled *Babb* and held that, at least before *Bunkley* was decided in 2003, it was not an unreasonable application of clearly established federal law not to apply *Byford* to convictions that were not final at the time that *Byford* was decided.

September 2014: The Ninth Circuit reverses this court's grant of habeas relief in this case (ECF No. 59).

In its order reversing and remanding, the Ninth Circuit noted that *White v. Woodall* effectively overruled *Babb* and explained:

> …at least before 2003, it was not an unreasonable application of clearly established federal law to not apply *Byford v. State* . . . to convictions pending at the time that *Byford* was decided. Kieren's conviction was pending at the time Byford was decided, but his conviction became final – and the Nevada Supreme Court issued its relevant decision – in 2002. We, therefore, hold that the Nevada Supreme Court did not unreasonably apply clearly established federal law when it declined to apply *Byford* in Kieren's case."

(ECF No. 59).

Kieren now moves for leave to file an amended petition in order to assert a "*Nika/Bunkley*" claim in his federal habeas proceedings (ECF No. 75); Fed. R. Civ. P. 15(a). However, this court need not grant leave to amend if amendment is futile. *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *see also Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). The court of appeals reversed the grant of habeas relief in light of the current state—both at the time it issued its order and the date of this order—of the law regarding the *Kazalyn* instruction and federal habeas review. Kieren

APP. 058

may have a remedy in state collateral proceedings, but with respect to federal habeas relief, respondents are correct that this ground has been resolved. As amendment would be futile, Kieren's motion for leave to file an amended petition is denied. The court also declines to permit Kieren to reassert claims that this court previously determined were unexhausted and which Kieren has already formally abandoned. As both respondents and Kieren have supplemented their answer and reply (ECF Nos. 71, 77), this petition stands fully briefed for a disposition on the merits.

III. Conclusion

IT IS THEREFORE ORDERED that petitioner's motion to amend the petition (ECF No. 75) is **DENIED**.

DATED this 27th day of September, 2016.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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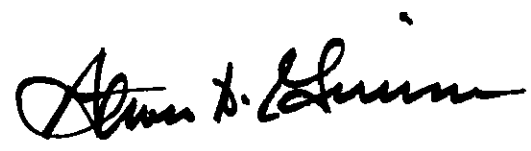

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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THE STATE OF NEVADA, Plaintiff, v. DENNIS KIEREN, Defendant.	CASE NO.: C137463 DEPARTMENT XXIII DECISION & ORDER

This matter came before the Court by way of Defendant's Post-Conviction Petition for Writ of Habeas Corpus, filed December 17, 2015. The State filed a response to the petition on January 13, 2016. Thereafter, the Defendant filed a reply on January 25, 2016, and the State filed a response to the Defendant's reply on February 3, 2016. The matter was heard on March 17, 2016, and at the hearing the parties appeared and primarily argued concerning whether the petition was procedurally barred. Having considered the filings and oral argument of the parties, the Court hereby makes the following decision and order.

I. PROCEDURAL HISTORY

On August 25, 1999, a jury found Defendant Dennis Kieren guilty of First Degree Murder with Use of a Deadly Weapon. On October 19, 1999, the Defendant was sentenced to life without parole plus an equal and consecutive term for the Use of a Deadly Weapon. Defendant's Judgment of Conviction was filed on October 27, 1999. On June 22, 2000, Defendant appealed his conviction, arguing error in 1) denying Defendant's motion for new trial, 2) giving a particular instruction on self-defense, 3) prohibiting Defendant from presenting evidence of the victim's character for violence, 4) denying Defendant's motion

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DISTRICT JUDGE
DEPARTMENT TWENTY THREE
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for mistrial based on prosecutorial misconduct in asking a particular question, 5) not properly instructing the jury on the element of deliberation in First Degree Murder, 6) giving the statutory reasonable doubt instruction, which Defendant argued was unconstitutional; and 7) the prosecutor improperly questioning Defendant when Defendant was precluded from presenting evidence of the victim's violent nature, and where the jury instructions shifted and lessened the State's burden of proof. The Nevada Supreme Court affirmed Defendant's conviction and remittitur issued March 7, 2002.

Defendant then filed a *pro per* Post-Conviction Petition for Habeas Corpus on September 24, 2002, claiming ineffective assistance of trial and appellate counsel. On November 26, 2002, the Court continued the hearing on the petition and appointed post-conviction counsel for Defendant, who filed a supplement to Defendant's *pro per* petition on July 26, 2004. That supplement added a claim for denial of due process and the right to a fair trial based on the State's alleged concealment of exculpatory evidence. On November 28, 2005, the Court denied that petition. Defendant appealed on March 31, 2006, and the denial was affirmed with remittitur issuing September 27, 2007.

Thereafter, on September 19, 2008, Defendant filed a federal Petition for Writ of Habeas Corpus, which was initially granted. The 9th Circuit affirmed the granting of the petition, but later granted the State's Motion for Reconsideration. During the pendency of the rehearing, federal law changed and the Defendant was then no longer entitled to federal relief. On May 20, 2015, the federal mandate issued denying the Defendant's petition, his motion for reconsideration, and a petition for certiorari in the United States Supreme Court.

In the meantime, however, on December 31, 2008, the Nevada Supreme Court had decided the case *Nika v. State*, 124 Nev. 1272 (2008). According to Defendant, that case changed Nevada law such that had the decision been announced before the Defendant's

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DISTRICT JUDGE
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initial appeal, he would have had a meritorious claim for relief. Seven years later, in response to *Nika* and the denial of his federal petition, Defendant filed the instant petition on December 17, 2015.

II. DISCUSSION

In the instant petition Defendant makes the following five claims: 1) The jury was not properly instructed on the element of deliberation in First Degree Murder; 2) the District Court erred in denying Defendant's motion for a new trial; 3) the District Court erroneously did not allow evidence of the victim's violent character; 4) the Prosecutor committed misconduct when it sought to question Defendant regarding a prior bad act; and 5) the cumulative effect of all errors at Defendant's trial violated his right to Due Process and right to a fair trial.

The State in its opposition and response to Defendant's reply did not address the petition on the merits. Rather, the State argued the Defendant's petition was procedurally barred for being successive and untimely. Procedural bars were the primary point of contention at the March 17, 2016, hearing.

A. Nevada Procedural Bars on Post-Conviction Petitions for Writ of Habeas

Nevada's statutory habeas scheme includes a number of procedural bars which act to preclude certain petitions. "[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." *State v. Eighth Judicial Dist. Ct. (Riker)*, 121 Nev. 225, 233 (2005).

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STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

NRS 34.810 provides as follows:

1. The court shall dismiss a petition if the court determines that:

. . .

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence,

unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

2. A second or successive petition 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.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

Additionally, NRS 34.726(1) provides as follows:

1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its remittitur. For the purposes of this subsection, good 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.

"Good cause" to excuse procedural default under these statutes is limited to "an impediment external to the defense [which] prevented their compliance with the applicable procedural rule." *Clem v. State*, 119 Nev. 615, 621 (2003). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default," but in accordance with "proper respect for the finality of convictions," that ground is valid only for previously-unavailable *constitutional* claims. *Id.* In the absence

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DISTRICT JUDGE

DEPARTMENT TWENTY THREE
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of good cause, a petitioner must show a "fundamental miscarriage of justice," whereby "constitutional error has resulted in the conviction of one who is actually innocent." *Id.*

B. Claims 2-5

Claims 2-5 were previously asserted in Defendant's direct appeal and subsequently denied by the Nevada Supreme Court. As such, their inclusion in the instant petition renders them successive. Moreover, the instant petition itself is successive because Defendant has brought a petition in the past. Finally, the one year time limit after remittitur on Defendant's direct appeal from his conviction, set by NRS 34.726(1), expired on March 7, 2002. Thus, the procedural bars of both NRS 34.810 and NRS 34.726(1) apply to these claims.

Defendant's petition does not address good cause for failure to file a timely petition as to Claims 2-5. Accordingly, COURT FINDS no good cause has been presented to the Court as to Claims 2-5 and they are barred as successive under NRS 34.810. Therefore,

COURT HEREBY ORDERS Claims 2-5, DENIED.

C. Claim One

The State in its responses does not dispute that *Nika* could entitle Defendant to relief on Claim One. However, the State argues the claim is barred under the above statutes for being successive and untimely. Defendant argues he does have good cause to overcome both procedural bars because the legal basis for Claim One was not available to the Defendant at the time of his direct appeal and his first petition for post-conviction relief. Due to an intervening change in the law, Defendant argues, the claim is now available and meritorious.

As explained above, good cause to overcome a procedural bar may be found when a constitutional claim was previously unavailable at the time of procedural default. Here, Claim One was previously brought on appeal, and again, the instant petition was not brought within one year of the filing of his judgment of conviction. However, Claim One was not

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

actually available before the holding in *Nika* established that *Byford* applied to Defendant's case because his conviction was not yet final (having been pending on appeal) at the time *Byford* was decided. *Nika v. State*, 124 Nev. 1272, 1287 (2008).

Even if the intervening change in law did create good cause for bringing a successive petition and for failing to bring the claim within one year of the filing of the judgment of conviction, the claims are still barred as untimely. When a claim was previously unavailable at the time of procedural default, the claim "must be filed within 'a reasonable time' after the basis for the claim becomes available." *Rippo v. State*, --- P.3d ----, 132 Nev. Adv. Op. 11, *7 (2016). In the context of a post-conviction Petition for Writ of Habeas Corpus claiming ineffective assistance of post-conviction counsel with regard to a prior petition, a "reasonable time" after the claim becomes available was within one year after the denial of the first petition, or the remittitur of an appeal of that denial. *Id.* at *9. The Supreme Court reasoned that the legislature has determined that one year provides sufficient time within which to raise post-conviction claims such as ineffective assistance of counsel. *Id.* Because claim one of the instant petition became available when *Nika* was decided, the one-year time limit to bring a claim under *Nika* began running at that time (December 31, 2008) and lasted for one year.

Applied to the instant case, even if Defendant's failure to file Claim One within the initial one-year time limit can be excused, it took Defendant *seven years* after *Nika* to file the instant petition. Defendant argues that the delay in bringing the instant petition can be excused because he was pursuing federal relief. However, a petitioner's pursuit of federal habeas relief does not constitute good cause for failing to file a state petition within the statutory time bar. *See Colley v. Warden*, 105 Nev. 235, 236 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 275 P.3d 91, 95 n.2 (Nev 2012).

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DISTRICT JUDGE

DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

Defendant offers no justification for the seven-year delay except pursuit of federal relief. However, because pursuit of federal relief does not amount to good cause, Defendant is simply left with a seven-year period in which he could have filed a petition in state court, but failed to do so. This is an unreasonable delay and clearly beyond the one year allowed under *Rippo*, which expired one year after *Nika* was decided (i.e., the date the claim became available). Applying the reasoning set forth in *Rippo*, that places the deadline at December 31, 2009. However, the instant petition was not filed until December 17, 2015, almost six years later. As a result, Defendant has not made a sufficient showing of good cause.

Defendant also has not made a showing of any "fundamental miscarriage of justice." There is no claim of actual innocence. Defendant asserted in Claim One that the jury instruction on first degree murder blurred the line between first and second degree murder, not that it blurred the line between first degree murder and legal conduct. Accordingly,

COURT FINDS no good cause presented to overcome the procedural bars with regard to Claim One, as well as no showing of the existence of a fundamental miscarriage of justice. Therefore,

COURT HEREBY ORDERS Defendant's Post-Conviction Petition for Writ of Habeas Corpus, filed December 17, 2015, and heard on March 17, 2016, DENIED.

Dated this 24th day of May, 2016.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

STEFANY A. MILEY
DISTRICT JUDGE

DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Decision and Order was electronically served and/or placed in the attorney's folders maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows: Ryan J. MacDonald, Esq.; and Ryan Norwood, Esq.

By: _____
Carmen Alper
Judicial Executive Assistant

STEFANY A. MILEY
DISTRICT JUDGE

DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

APP. 067

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DENNIS KIEREN,

Petitioner,

v.

STATE OF NEVADA ATTORNEY GENERAL, ET AL.,

Respondents.

Case No. 3:07-cv-00341-LRH-WGC

SUPPLEMENTAL INDEX OF EXHIBITS IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Dennis Kieren, by and through his counsel, Ryan Norwood, Assistant Federal Public Defender, submits the following Supplemental Index of Exhibits in Support of the Amended Petition for Writ of Habeas Corpus.

No.	DATE	DOCUMENT	COURT	CASE #
78.	04/08/2014	Appellant's Petition for Panel Rehearing	Ninth Circuit Court of Appeals	11-17915

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79.	04/14/2014	Order	Ninth Circuit Court of Appeals	11-17915
80.	04/17/2014	Order	Ninth Circuit Court of Appeals	11-17915
81.	04/23/2014	Appellants' Motion for Reconsideration	Ninth Circuit Court of Appeals	11-17915
82.	04/23/2014	Appellants' Motion for Leave to File a Late Petition for Rehearing	Ninth Circuit Court of Appeals	11-17915
83.	07/03/2014	Order	Ninth Circuit Court of Appeals	11-17915
84.	09/22/2014	Amended Memorandum	Ninth Circuit Court of Appeals	11-17915
85.	10/03/2014	Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc	Ninth Circuit Court of Appeals	11-17915
86.	12/30/2014	Order	Ninth Circuit Court of Appeals	11-17915
87.	01/06/2015	Motion to Stay Mandate	Ninth Circuit Court of Appeals	11-17915
88.	01/07/2015	Order	Ninth Circuit Court of Appeals	11-17915
89.	05/20/2015	Memo regarding denying petition for writ of certiorari	Ninth Circuit Court of Appeals	11-17915
90.	05/20/2015	Mandate	Ninth Circuit Court of Appeals	11-17915
91.	12/17/2015	Petition for Writ of Habeas Corpus (Post-Conviction)	Eighth Judicial District Court	C1347463
92.	01/13/2016	State's Response and Motion to Dismiss Defendant's Post-	Eighth Judicial District Court	C1347463

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		Conviction Petition for Writ of Habeas Corpus		
93.	09/24/2013	Motion for Leave to Amend Petition; Pinkston v. Foster	United States District Court, District of Nevada	2:07-cv-01305-KJD(LRL)
94.	10/09/2013	Respondents' Opposition to Petitioner's Motion to Amend Petition; Pinkston v. Foster	United States District Court, District of Nevada	2:07-cv-01305-KJD(LRL)
95.	11/27/2013	Reply to Opposition to Motion for Leave to Amend Petition; Pinkston v. Foster	United States District Court, District of Nevada	2:07-cv-01305-KJD(LRL)
96.	09/19/2014	Order; Pinkston v. Foster	United States District Court, District of Nevada	2:07-cv-01305-KJD(LRL)

DATED this 15th day of January, 2016.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Ryan Norwood

RYAN NORWOOD
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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 January 15, 2016, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
Senior Deputy Attorney General
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/s/ Jineen DeAngelis
An employee of the Federal Public Defender's Office

APP. 071

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DENNIS J. KIEREN,

Petitioner,

v.

STATE OF NEVADA ATTORNEY GENERAL, et al.,

Respondents.

Case No. 3:07-cv-00341-LHR-WGC

MOTION TO AMEND PETITION

The Petitioner, Dennis Kieren, by and through his attorney of record, Ryan Norwood, Assistant Federal Public Defender, moves this Court to grant this motion to amend his petition. This motion is based upon the attached points and

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authorities and all pleadings and papers on file herein.

DATED this 15th day of January, 2016.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Ryan Norwood
RYAN NORWOOD
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I. INTRODUCTION

Following the reversal of a grant of relief in this case by the Ninth Circuit Court of Appeals, the mandate issued on May 20, 2015, and this Court resumed jurisdiction over the case. On June 3, 2015, this Court entered an order directing supplemental briefing on the claims previously addressed in an Answer and Reply – that is, grounds 2, 6, 7 (in part), 8, and 9. The Court noted that Kieren had previously abandoned Grounds 1, 3, and 4 and 7 (in part). CR 67, fn. 1.[1] After seeking an extension, the State filed a Supplemental Answer addressing these grounds on September 23, 2015. Kieren's counsel has requested additional time for his own pleading, noting inter alia that he had not represented Kieren in the prior proceedings in this Court. See CR 72.

Kieren, through undersigned counsel, now respectfully requests that the Court grant a motion to amend his pleading. The amendment concerns Ground Five of the petition, which now presents a claim that is plainly meritorious, that should compel relief in state court and/or this court, and that is not barred by the Ninth Circuit's mandate. Kieren also seeks to reincorporate the claims he previously abandoned following the Court's ruling that they were not exhausted. Kieren would further seek to stay the federal proceedings pending the exhaustion of the claims in the state courts.

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[1] "CR" refers to the record in this Court. "Ex." refers to the consecutively numbered exhibits filed with the original petition, and in the supplement filed with this Motion.

II. LEGAL STANDARD

"The court should freely give leave [to amend] when justice so requires." See Fed. Rule Civil Procedure 15(a)(2). Permission to amend should be granted with "extreme liberality." Eminence Capital, LLC v. Aspeon, Inc. 316 F.3d 1048, 1051 (9th Cir., 2003). As the Supreme Court has stated:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment. futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). See also Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038-39 (9th Cir. 2002) ("It is not unreasonable that plaintiffs may seek amendment after an adverse ruling, and in the normal course district courts should freely grant leave to amend when a viable case may be presented."); Moss v. U.S. Secret Service, 675 F.3d 1213, 1232 (9th Cir. 2012) (remanding case so that plaintiff could seek amendment to cure his insufficient allegations when it was "possible . . . that the complaint could be saved by amendment"); New York City Employees' Retirement System v. Jobs, 593 F.3d 1018, 1025 (9th Cir. 2010) ("We have never held . . . that a plaintiff who omits previously dismissed claims from an amended complaint waives his right to re-allege these claims in further amendments at the district court level."); Fryer v. MacDougall, 462 F.2d 1093 (9th Cir. 1972) (remanding case and allowing petitioner leave to amend because of the "confused state of the record.")

III. THE AMENDMENT SHOULD BE GRANTED

Ground Five of the 2008 amended petition (CR 20) challenged a jury instruction for first-degree murder provided at Kieren's trial. Ground Five in the proposed amended petition also challenges this instruction, but specifically bases

the claim upon Nika v. State, 198 P.3d 839 (2008), a case decided after Kieren filed the amended federal petition on September 19, 2008. The amended claim contains the following language:

> Pursuant to the Nevada Supreme Court's decision in Nika v. State, 198 P.3d 839, 850 (2008), "the change effected in Byford applies to convictions that were not yet final at the time of the change." Because Kieren's conviction was still on direct appeal, and not yet final, Byford applied to him as a matter of law per the Nika decision. See also Bunkley v. Florida, 538 U.S. 83 (2003), Fiore v. White (Fiore II), 531 U.S. 225 (2001), Fiore v. White (Fiore I), 528 U.S. 23 (1999).
>
> Nika also recognized that the instruction at Kieren's trial had effectively eliminated the difference between first and second degree murder by conflating the distinguishing element of first-degree murder with the "intent" sufficient to prove second-degree murder. Nika, 198 P.3d at 846-47. As such, the instruction provided at Kieren's trial was unconstitutionally vague, and violated the due process guarantee of the United States Constitution, because it failed to narrow or meaningfully distinguish first-degree from second-degree murder. And because the change recognized in Nika constituted a substantive narrowing of the offense of first-degree murder, and because Nika's re-characterization of Byford as a "change" in the law cannot validly be used to evade consideration of a federal issue, Byford's definition must be applied retroactively under due process principles.

The proposed amended petition also reincorporates Ground 1, 3, 4, and 7, which Kieren had previously abandoned following this Court's ruling that they were unexhausted (CR 31).

A. Amended Ground Five presents a meritorious claim that is not barred by the law of the case

1. Background

The proposed amendment in Ground Five is necessary because of the convoluted history of the state and federal caselaw concerning Nevada's first-degree murder instruction, as it intertwined with Kieren's proceedings in state and federal court over the past 8 years.

a. The claim and governing caselaw on Kieren's direct appeal

Ground Five of the first amended petition presented a challenge to a jury instruction provided at Kieren's first-degree murder trial in 1999. CR 20, pg. 17; Ex. 15, Instruction 8. This instruction is often referred to as the "Kazalyn" instruction, after the case that had approved it, Kazalyn v. State, 825 P.2d 578 (1992). Kieren had unsuccessfully objected to this instruction at his trial. Ex. 14, pp. 297-98.

Nevada's long-standing, primary statutory definition of first-degree murder requires proof that the killing was "willful deliberate, and premeditated." NRS 200.030(1)(a). The Kazalyn instruction, however, did not separately define deliberation and willfulness, but rather conflated these terms with a broad definition of premeditation, informing the jury that a killing "is willful, deliberate and premeditated" if was "preceded by and has been the result of premeditation," which could be "instantaneous" and "formed in the mind at any moment before or at the time of the killing." Kazalyn, 108 Nev. at 75, 825 P.2d at 583. Explaining this definition in Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992), the NSC stated that "deliberate, premeditated and willful are a single phrase, meaning simply that the actor to commit the act and intended death to result." Riley, 786 F.3d at 724, citing Powell, 838 P.2d at 927. Powell held that the three elements were "redundant." Riley at 724, citing Powell at 927. See also Greene v. State, 113 Nev. 157, 931 P.2d 54, 61 (Nev. 1997) (re-affirming Powell and holding that intent for first-degree murder meant "simply that the actor intended to commit the act and intended death as the result of the act.").

While Kieren's direct appeal was pending, the Nevada Supreme Court issued an opinion in Byford v. State, 994 P.2d 700 (Nev. 2000). Byford concluded that the

Kazalyn instruction failed to convey the statutory elements of first-degree murder – in particular, the "critical element" of deliberation. Id. at 714. The instruction "confus[ed] . . . premeditation and deliberation" and "underemphasized the element of deliberation." Id at 713. The instruction "'blur[red the distinction between first and second degree murder" and subsequent case law's "further reduction of premeditation and deliberation to simply 'intent' unacceptably carrie[d] this blurring to a complete erasure." Id. Trial courts were instructed to cease using the Kazalyn instruction and instead provided instructions that made clear deliberation was a separate element, requiring proof that the defendant committed the murder with "coolness and reflection," and that it "not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur." Id. at 714.

Shortly thereafter, the NSC issued another opinion in Garner v. State, 6 P.3d 1013. Garner reached two conclusions about Byford. First, Garner noted that Byford's reasoning was not "unprecedented." Id. at 1025, fn. 9. Rather, it "relie[d] on longstanding statutory language and other prior decisions of the court." Id. "Basically, Byford interprets and clarifies the meaning of an existing statute by resolving conflicting lines in prior case law. Therefore, its reasoning is not altogether new." Id. Noting that the Byford rationale "could have been – and in many cases was – argued in district courts before Byford decided," the NSC ruled that a petitioner who had not preserved the issue at his trial could not raise it on appeal or in a post-conviction petition. Id.

Second, the NSC held that even if a petitioner had preserved a challenge in his pre-Byford trial (as Kieren had done), he was still out of luck. The NSC held that Byford's corrected instructions "appl[y] only prospectively," and that the failure

to provide the instruction in a pre-Byford trial did not constitute error that could be corrected on appeal. Garner, 6 P.3d at 1025.

Thus when Kieren briefed his appeal in 2001, his challenge to the Byford instruction was futile in the NSC. Nevertheless, he continued to challenge the Kazalyn instruction, while acknowledging Garner. Ex. 47, pp. 37-38. The State's Answering Brief, of course, argued that Garner foreclosed the claim. Ex. 48, pp. 24-25. The NSC's final order of affirmance described Kieren's challenge as one of several claims that "lack merit." Ex. 51, pg. 4.

b. Subsequent developments in Polk and Nika

Garner remained the law throughout Kieren;'s lengthy state post-conviction proceedings, which ended in 2007, and at the time he filed the amended federal petition in 2008. By that time, however, the Ninth Circuit had weighed upon the issue. In Polk v. Sandoval, 503 F.3d 903, 909-911 (9th Cir. 2007), the Circuit ruled that the failure to provide the Byford instruction violated clearly established principles of due process. Polk was based on assumption – well-supported by Byford and Garner – that Byford was not a "change" in the law, but rather a "reaffirm[ation] that [Nevada's] first-degree murder statute contained three mens rea elements." Riley v. State, 786 F.3d 719 (9th Cir. 2015), citing Polk at 910.

Polk did not base its grant of relief on the timing of the Byford decision with respect to the defendant's trial, or when his appeal became final. Polk, like Kieren, was pending on direct appeal when Byford was decided. See Polk at 906, fn.2 (noting that Byford was decided after Polk's conviction, but before his case was decided on appeal). In a subsequent case, Chambers v. McDaniel, 549 F.3d 1191, 1199 (9th Cir. 2008), the petitioner's conviction had become final *before* Byford was decided in 2000. See Id. 549 F.3d at 1193-94, Chambers v. State, 113 Nev. 974, 944

P.2d 805 (Nev. 1997). The Court did not attribute any significance to this fact, and granted relief on the claim. See Chambers at 1199 ("As the parties acknowledge, we are bound by Polk"). At the time the amended petition was pled, Ground Five thus alleged an error that plainly entitled Kieren to habeas corpus relief, so long as it could not be deemed harmless.

Not long after the amended petition was pled, the NSC decided Nika v. State, 198 P.3d 839 (2008). Nika reconsidered both prongs of its ruling in Garner, described supra. First, rather than describing Byford as a clarification of conflicting lines of precedent that could and should have been preserved in pre-Byford trials, Nika ruled that Byford was an unforeseeable "change" in the law.[2] Nika at 849. The NSC held that Kazalyn was "correct" before Byford was decided. Nika at 842.

Second, the NSC recognized that "our decision in Garner erroneously afforded Byford complete prospectivity because as 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 v. State, 198 at 850. Nika specifically relied upon the United States Supreme Court's due process rulings in Bunkley v. Florida, 538 U.S. 83 (2003) and Fiore v. White (Fiore II), 531 U.S. 225 (2001). Id, & fns. 72-74. As such, the NSC acknowledged that petitioners such as Kieren should have obtained relief.

c. Initial proceedings in this Court, and on appeal

In opposing Kieren's petition, the State contended that Ground Five was not exhausted because he had failed to present it as a federal constitutional claim in his direct appeal. CR 27, pp. 7-8. This Court found the issue to be close, but ultimately

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[2] Nika insisted that Garner, contrary to the interpretation of the Ninth Circuit, supported the notion that Byford was a "change" in the law – but at the time, felt it necessary to "disavow" and "language in Garner" that "could be interpreted otherwise." Nika at 849-50.

concluded Kieren's appellate presentation was sufficient to exhaust the federal issue. CR 31, pp. 11-12. The Court ordered the State to Answer Ground Five, specifically requesting that the State address whether the error alleged in that Ground was harmless. CR 26, 34.

The Court ultimately granted relief on Ground 5. CR 44. The Court ruled that it was bound by Polk, and that the decision in Nika did not change this result. Id, pp. 20-22. The Court further concluded that the error could not be deemed harmless under the standard in Brecht v. Abramson, 507 U.S. 619 (1993), and granted relief. CR 44, pp. 22-25.

During the pendency of the State's appeal, the Ninth Circuit issued a decision in Babb v. Lozowsky, 719 F.3d 1019 (9th Cir. 2013), where it reconsidered Polk in light of Nika. Accepting Nika's characterization of Byford as a change in the law, Babb held that the Kazalyn instruction did not necessarily violate due process if it was "correct" when it was given. Babb, 719 F.3d at 1028-30. But Babb (just as Nika itself had ruled) stated that clearly established principles of due process required the NSC to apply the Byford change to cases not yet final on direct review. Babb, 719 F.3d at 1030-33. As such, Babb continued to recognize that petitioners such as Kieren were entitled to relief.

When the Circuit initially decided Kieren's case in March 2014, it recognized that Babb compelled a finding that the NSC's failure to apply Byford to Kieren's case was an unreasonable application of clearly established federal law. CR 52, pg. 3. The Circuit also agreed with this court that Ground 5 was exhausted, and that the error could not be deemed harmless. It accordingly affirmed the grant of relief. CR 52.

d. Developments after the initial affirmance

The State filed a petition for reconsideration, challenging only the ruling that Ground 5 was exhausted. Ex. 78. The Circuit denied the Motion. Ex. 79. It later agreed to stay the mandate, however, pending a petition for certiorari. Ex. 80.

On April 23, 2014, with the mandate stayed, the State filed a successive request to reconsider the Circuit's decision. Exs. 81, 82. The State argued that a Supreme Court case decided that day, White v. Woodall, 134 S.Ct. 1697 (2014), changed the standard of review in 28 U.S.C. 2254(d)(1) in a way that conflicted with Babb. On July 3, 2014, the Circuit withdrew its initial memorandum, but did not immediately issue a new decision. Ex. 83.

On August 15, 2014, the Circuit published an opinion in Moore v. Helling, 763 F.3d 1011 (9th Cir. 2014), a case involving petitioner similarly situated to Kieren, in that his trial took place before Byford, but his appeal was decided in 2001, after Byford and Garner. Id. 1012-13. In light of White v. Woodall, Moore reconsidered and reversed Babb's holding that such petitioners were entitled to relief as a matter of clearly established law.

Moore expressly limited its holding in two ways that are relevant to the instant proposed amendment. First, Moore did not hold that the NSC was *correct* to deny relief to petitioners such as Kieren and Moore in 2001-2002, when the NSC was still applying Garner to such cases, and holding that Byford need not be applied to cases still pending on direct review. It only held that the governing Supreme Court authority at that time – including Griffith v. Kentucky, 479 U.S. 314 (1987) and Fiore v. White (Fiore II), 531 U.S. 225 (2001) -- was open to differences in "fair-minded interpretation," and thus that a state court could reasonably refuse to apply Byford to such cases, as the NSC did in its pre-Nika jurisprudence. See Moore, 763

F.3d at 1021 ("nor do we comment on what we believe to be the correct interpretation of these cases."). Moore only decided that the NSC's pre-Nika denials of such claims survived the 2254(d)(1) standard of review. Second, Moore expressly reserved the question of whether a state court – even with the benefit of 2254(d)(1) deference – could reasonably refuse to apply Byford to cases not yet final when Byford was decided in light of the Supreme Court's decision in Bunkley v. Florida, 538 U.S. 835 (2003) – a decision that did not exist at the time of the state court rulings being challenged in both Kieren and Moore. See Moore at 1021.

On September 22, 2014, the Circuit issued an amended memorandum in Kieren's case. Ex. 84. The Circuit continued to hold that Ground Five was exhausted. In light of Moore, however, the Circuit ruled that "at least before 2003," it was not unreasonable for the NSC to refuse to apply Byford to cases still pending on appeal. Id., 3. It accordingly held that "the Nevada Supreme Court did not unreasonably apply clearly established federal law when it declined to apply Byford in Kieren's case." Id. It accordingly did not reach the question of harmless error.

Kieren filed a timely petition for reconsideration (Ex. 85), which was denied on December 30, 2014 (Ex. 86). The Circuit granted Kieren's motion to stay the mandate pending a petition for certiorari. (Ex. 87, 88). Kieren filed a timely certiorari petition, which was denied on May 18, 2015. Ex. 89. The Circuit issued its mandate on May 20, 2015. Ex. 90.

2. The amended Ground Five presents a plainly meritorious basis for relief

For purposes of this motion, Kieren accepts that the decision in Moore and the amended memorandum and mandate in his case constitute the law of the case. These decisions hold that the NSC was not unreasonable in denying his challenge to the Kazalyn instruction in his 2002, when it decided his direct appeal. These

decisions, however, do not govern the question of whether Kieren should prevail on and/or obtain habeas corpus relief on the Nika/Bunkley claim alleged in the proposed amended petition.

If the NSC were to hear the proposed amended claim on the merits today, it is clear that it would recognize constitutional error. The NSC's now-governing decision in Nika v. State, 198 P.3d at 850,holds that "the change effected in Byford applies to convictions that were not yet final at the time of the change." The NSC recognized that its prior decision to the contrary in Garner -- which everyone in Kieren's case agreed applied when the pre-Nika claim in Ground Five was presented on direct appeal – was wrong.

In any event, the amended petition requests that the NSC pass upon the merits of the claim in light of Bunkley v. Florida, 538 U.S. 835 (2003) - a case that was not and could not be considered when the NSC denied the original claim in 2002. Moore expressly reserves the question of whether a state court could reasonably deny a Byford claim in light of Bunkley. Moore, 763 F.3d at 1021. Even if the NSC somehow denied the claim on the merits by concluding there was no constitutional error, such a denial would present a different issue for federal review that was left open by Moore.

A state court finding of constitutional error would lead an analysis of the whether the error was harmless, under the "beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967). If the NSC were to deny the claim by concluding that it was harmless under this standard, the federal inquiry would concern the reasonableness of the harmlessness determination. See Davis v. Ayala, 135 S.Ct. 2187 2198-99 (2015) (state court ruling that an error is harmless is a

decision on the merits that invokes the 2254(d)(1) standard of review).[3] This Court, has previously determined that the error could not be deemed harmless even under the more demanding Brecht standard. CR 44, pp. 22-25, CR 52. Because the "Brecht test subsumes the limitation imposed by AEDPA," Ayala at 2199, citing Fry v. Pliler, 551 U.S. 112, 119-20 (2007), this Court should continue to hold that the error was not harmless. See also Mays v. Clark, ___ F.3d ___, 2015 WL 8117079 at *10 (9th Cir. 2015) (holding, in light of Ayala and Fry, that a finding that an error resulted in "actual prejudice" under Brecht "necessarily means that the state court's harmlessness determination was not merely incorrect, but objectively unreasonable."). Even if the Court's prior rulings did not compel a finding of harmfulness, the Court's Brecht inquiry would not be foreclosed by the mandate, as the Ninth Circuit did not reach the issue of harmlessness in reversing the grant of relief on Ground 5.

Finally, if the NSC refused to hear the amended claim altogether, federal review of the claim would not be subject to 2254(d)(1) at all, as there would be no "adjudication on the merits." In this situation, the federal inquiry would initially focus on whether (1) the claimed state bar is "adequate" to bar federal review, see

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[3] Ayala's inquiry solely concerned the merits of the state court's harmlessness determination, and not the merits of the underlying claim of error. See Ayala at 2197 (assuming that Ayala's rights were violated for purposes of its inquiry). Ayala noted, and did not question, the lower court's conclusion that *de novo* review of the error question was appropriate because the state court "either did not decide" the issue or "silently decided that question in Ayala's favor." Id., 2197 at fn.1. The Supreme Court has never required a habeas petitioner to show that all fairminded jurists would agree that he prevails on a legal issue when the state court reviewing the claim failed to reach it, much less when the state court agrees with the petitioner on the question. See e.g. Porter v. McCollum, 130 S.Ct. 447, 452 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's Strickland claim de novo."). As explained *supra*, neither Moore nor the final memorandum in Kieren's case ruled on whether Kieren's claim would succeed on a de novo basis.

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Koerner v. Grigas, 328 F.3d 1039, 1049 (9th Cir. 2003) (quoting Valerio v. Crawford, 306 F.3d 742, 775 (9th Cir. 2002) (en banc) (internal citations omitted).and if so, (2) whether Kieren could establish "cause" and "prejudice" for not complying with the state rules. See Harris v. Reed, 489 U.S. 255, 262 (1989).

Although a full discussion of such issues is premature, Kieren contends that he could meet either prong of this federal inquiry. The Nevada Supreme Court has yet to "firmly establish[]," in Nika itself or any other post-Nika authority, any rule for the presentation of Nika claims. Beard v. Kindler, 130 S.Ct. 612, at 617 (2009) (state procedural rule must be "firmly established and regularly followed" to bar federal review). Unpublished decisions have suggested different rules for the presentation of post-Nika claims. *Compare* Bagley v. State, 2010 WL 3489675 at *1 (Nev. 2010) (agreeing that Nika claim in petitioner's untimely and successive petition could be heard on its merits because "Byford should have applied to his case as a matter of due process" and thus petitioner had established good cause, without requiring the petition to be filed within any particular time) *and* Escobar v. State, 2010 WL 3855231 at *1 (Nev. 2010) (Nika claim could be presented despite failure to raise issue on direct appeal because Byford decision constituted good cause) *with* Burriola v. State, 2010 WL 3492123 at *2 (Nev. 2010) (holding that decisions in Polk and Byford "provide the marker for filing timely claims and not a later case," and holding post-Nika claim untimely because it "was filed more than two years after entry of Polk and almost nine years after this court's decision in Byford.") and Randolph v. State, 2014 WL 495267 at *2 (Nev. 2014) (suggesting that Nika claim must be filed "within a reasonable time after it became available.")

Even if there were an adequate basis to bar the claim in state court, Kieren could establish "cause" for his inability to present the claim in state court. Kieren

obviously could not have presented a Nika claim during his direct appeal and post-conviction proceedings, which finished before Nika was decided. By the time Nika was decided, Kieren's federal proceedings were well under way. In those proceedings, he had a clear basis for relief under the Ninth Circuit's guiding precedent, from the time his petition was filed, until well after the State's appeal was filed. It would not be reasonable to require Kieren to seek relief from the state courts under Nika, on the assumption that the Ninth Circuit's governing precedent in Polk (and later, Babb) would be overruled by the Moore case, or to fault him for staying the mandate and seeking further review of the Ninth Circuit's decision in his case before initiating such proceedings.

The prejudice inquiry would concern the merits of the underlying claim, which would be reviewed de novo by a federal court. See Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005) (claim reviewed de novo in federal court when state court denied relief due to purported procedural default). As explained supra, neither Moore nor Kieren's mandate purported to decide, as a de novo matter, whether a failure to apply Byford to cases still pending on direct review at the time of the decision violated the federal constitution, particularly when the NSC's own governing precedent eventually required as much. See Renico v. Lett, 130 S.Ct. 1855, 1862 (2010) ("an *unreasonable* application of federal law is different from an *incorrect* application of federal law."). At the very least, the ultimate merits of the amended claim presents a "substantial" issue that is not barred by the law of the case. Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012) (petitioner is prejudiced by default if it would prevent the court from hearing a "substantial" claim on the merits.

3. The amendment should be granted

This meritorious amendment is sought in good faith. Absent factors such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed" and "undue prejudice to the opposing party," a court should allow an amendment to a petition. Foman v. Davis, 371 U.S. 178, 182 (1962). These factors are not present. Although the prior amended petition was filed some time ago, this Court has only recently resumed jurisdiction over Kieren's case following the issuance of the mandate in 2015. When this Court previously had jurisdiction over this case, up until the final order issued in 2011 (CR 44), there was no need to amend the petition to include a post-Nika claim, because Kieren was entitled to relief on Ground Five as a matter of established precedent. An amendment is now properly sought to cure a deficiency that arose following the Ninth Circuit's overruling of precedent that the prior petition had relied upon.

Nor is the State unfairly prejudiced by Kieren's amendment, and accompanying request to exhaust the new claim in state court. From the original motion to dismiss, well through the appeal of this Court' original judgment, the State's position has been that Kieren's federal challenge to the Kazalyn instruction could not be heard on the merits because it was never properly presented and exhausted in the state courts. See CR 44 & Ex. 81. Had the state been correct in this argument, Kieren would have sought a stay, and would have been able to present his meritorious challenge to the state courts in light of Nika and Bunkley. This is all that Kieren is seeking to do now.

Ironically, if Kieren had been less diligent in pressing his federal challenge on his direct appeal, and had failed to exhaust the claim there, this Court would have

ruled the claim unexhausted, and Kieren would have been able to fix this problem much earlier. Kieren should not now be punished for diligently presenting his claim to the state courts, at a time when those courts, by their own subsequent admission, were incorrectly failing to apply the Byford decision.

The Supplemental Answer that the State has already filed (CR 71) concerns other claims in the petition, claims which Kieren is not seeking to amend. As such, Kieren is not taking any unfair advantage by virtue of this request to amend. *But see* Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1038-39 (9th Cir. 2002) ("It is not unreasonable that plaintiffs may seek amendment after an adverse ruling, and in the normal course district courts should freely grant leave to amend when a viable case may be presented.");

4. This Court has allowed a similar amendment in Pinkston v. Foster

In Pinkston v. Foster, 2:07-cv-01305-KJD(LRL), the petitioner sought and this Court granted an amendment similar to what Kieren is seeking here. Although Pinkston's procedural situation differed in some respects, her basic circumstances were the same as Kieren. Like Kieren, she had presented a claim based on the Kazalyn instruction, which was originally granted by this Court, reversed by the Circuit, and then remanded for a consideration of the remaining claims. Like Kieren, she sought on remand to amend her petition to include a claim in light of Nika and Bunkley, and then to present that claim in the state courts. See Exs. 93, 94, 95.

This Court granted leave for Pinkston to file an amended petition in a 2014 order. Ex. 96. In doing so, the Court did not purport to rule that the proposed amended claim was viable or that it would ultimately prevail. Id., pp. 3-4. Nor did

it rule upon whether a stay should be granted, deferring such ruling to the filing of a motion to dismiss. Id., 4-5.

The Court should do the same thing here. While Kieren submits that his proposed amended Ground Five is meritorious and should ultimately compel relief, the Court does not need to resolve this issue now. The Court need only recognize that the proposed petition presents a potentially meritorious claim, and particularly given the unusual circumstances of this case, an amendment is properly sought under Foman v. Davis, 371 U.S. 178, 182 (1962) and other cases setting forth the liberal requirements of Fed. Rule Civil Procedure 15(a)(2). The amendment can and should be granted, allowing the State to raise any procedural or merits issues to the amended claims via a motion to dismiss and/or an Answer.

B. Kieren should be allowed to reincorporate Grounds 1,3, 4, and 7 via amendment

1. Background

Kieren's initial, pro se federal petition for habeas corpus relief was timely filed on August 1, 2007. Including Ground Five, the Amended Petition presented nine grounds for relief. The first seven of these grounds are based on the first seven arguments that Kieren presented on his direct appeal from his conviction to the Nevada Supreme Court. See Ex. 47, pg. i. Kieren contended that he presented Ground One through Seven on direct appeal. CR 20, pg. 7.

In a Motion to Dismiss filed on March 11, 2009, the State contended that Grounds One through Five, and Ground Seven, were not exhausted in state court. CR 27. While acknowledging that Kieren had raised similar grounds on direct appeal, the State argued, in the main, that Kieren had presented these issues only as questions of state law. See CR 27, pp. 4-8. Kieren opposed the motion, arguing

in the main that the authority cited in Kieren's brief sufficiently apprised the state courts of the federal nature of the Grounds. See CR 30, pp. 4-21.

This Court resolved the issue in an order dated March 18, 2010. Carefully reviewing the appellate pleadings, the Court concluded that Grounds Two and Five were exhausted,[4] but Grounds One, Three, Four and Seven (except to the extent it involved only Grounds 2 and 5) were not. CR 31, pp. 2-14. The Court also rejected arguments that the presentation of the unexhausted grounds would be futile, or that state remedies were ineffective and unavailable, noting inter alia that Kieren had not conceded that he could not obtain relief in the state courts. CR 31, pp. 15-18, Id. pg. 16 (noting that petitioner "expressly declares that he can overcome the procedural bars . . ."). The Court instructed Kieren to either dismiss his entire petition, or to partially dismiss the grounds that the Court had deemed unexhausted, or to seek "other appropriate relief." CR 31, pg. 19.

The other "appropriate relief" that Kieren might have sought was a stay of his federal proceedings, pursuant to Rhines v. Weber, 544 U.S. 269 (2005). As matters stood in 2010, however, a stay of the federal proceedings made little sense. As discussed, *supra*, the claim in Ground 5 of Kieren's petition that the Court found fully exhausted on direct appeal concerned the "Kazalyn" instruction for first degree-murder, which was provided over Kieren's objection at his trial, and then abrogated during the pendency of Kieren's direct appeal in Byford v. State, 994 P.2d 700 (Nev. 2000). CR 20, pp. 17-18. Under the Ninth Circuit's then-governing authority in Polk v. Sandoval, 503 F.3d 903, 909-911 (9th Cir. 2007), the Kazalyn instruction violated clearly established principles of due process because it failed to

[4] With respect to Ground Five, the Court noted that the exhaustion "issue remains a close one." CR 31, pg. 12.

convey the necessary elements of first-degree murder, as those elements were recognized in the Byford decision. Kieren was identically situated to the petitioner in Polk, and as such Ground Five presented a ready basis for federal belief. This remained true at all points in the litigation, through this Court's initial grant of relief, the State's appeal, and the Circuit panel's original decision in 2014, until the Circuit decided Moore v. Helling, 763 F.3d 1011 (9th Cir. 2014), and then applied that decision to Kieren's case.

2. The Ninth Circuit's change in law justifies the amendment

In addition to the amended Ground 5, Kieren should be permitted to amend his petition to reincorporate Grounds 1, 3, 4 and 7. Kieren elected to abandon these Grounds in the prior proceedings in this Court for the same reason (described *supra*) he did not seek to amend Ground 5 in light of Nika and Bunkley during those proceedings: there was no need to do so. Ground 5, as originally pled, was a plainly meritorious basis for relief. Every federal court that reviewed the claim agreed as much, until the Circuit unexpectedly changed its mind about the 2254(d) standard in Moore v. Helling, 763 F.3d 1011 (9th Cir. 2014). In light of this legal situation, retaining the other claims that were deemed unexhausted -- which would have required Kieren to return to state court and seek a stay in this Court -- would have accomplished nothing other than delaying Kieren's ability to obtain relief.

If the law had changed during the initial proceedings in this Court – or if Kieren had been less diligent in presenting a federal challenge to the instruction on direct appeal, rending Ground 5 unexhausted, as the State has always maintained is the case – Kieren would have sought to preserve all of the claims in his petition, and would not have elected to abandon any claims. Kieren would seek to exhaust all

such claims in the state court, and stay the proceedings in this Court in the interim. This is all he is seeking to do now.

Under these circumstances, an amendment is proper despite Kieren's previous abandonment of Grounds 1, 3, 4 and 7. *See* New York City Employees' Retirement System v. Jobs, 593 F.3d 1018, 1025 (9th Cir. 2010) ("We have never held . . . that a plaintiff who omits previously dismissed claims from an amended complaint waives his right to re-allege these claims in further amendments at the district court level."). The amendment is not the product of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed." Foman v. Davis, 371 U.S. 178, 182. Nor would the reincorporation of these claims unfairly prejudice the State, who received notice of them via Kieren's Amended Petition filed in 2008. CR 20.

C. A stay should be granted

This Court has already ruled that Grounds 1, 3, 4, and 7 are unexhausted, and Kieren concedes that amended Ground 5 is unexhausted. As such, the Court would not be able to reach the merits of the proposed amended petition, because it is mixed. Cf. Rose v. Lundy, 455 U.S. 509, 522 (1982) (requiring exhaustion of all claims before a petition can be heard on its merits). Kieren would seek to remedy this issue by exhausting his claims in state court. He has already filed a state petition that raises the unexhausted claims in the state petition, which is currently being litigated in the 8th Judicial District Court. Ex. 91. "[T]he total exhaustion requirement was not intended to 'unreasonably impair the prisoner's right to relief . . .'" Rhines v. Weber, 544 U.S. 369 at 278 (2005), quoting from Rose v. Lundy, 455 U.S. at 522. As such, the Supreme Court has recognized a petitioner may seek to stay his federal petition pending the exhaustion of claims in state court. Id.

Although Kieren believes the issue is premature at this point, he would note (to the extent the question is relevant to whether the amendment should be granted) that he should meet the criteria for a stay. In order to allow for exhaustion of state remedies while preventing unnecessary delay in litigating post-conviction actions, Rhines set three standards for issuance of stay relief: (1) that the petitioner has good cause for the failure to exhaust; (2) that the unexhausted claims are not plainly meritless; and (3) that there is no indication that the petitioner engaged in "intentionally dilatory litigation tactics." Rhines v. Weber, 544 U.S. 369 at 278. Kieren can meet all three criteria.

Kieren has good cause for his prior failure to exhaust the relevant claims. The Ninth Circuit has held that the "good cause" standard does not require the petitioner to show that his failure to exhaust was due to "extraordinary circumstances." See Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005); see also Riner v. Crawford, 415 F.Supp.2d 1207, 1210 (D.Nev. 2006) ("Thus, it would appear that good cause under Rhines, at least in this Circuit, should not be so strict a standard as to require a showing of some extreme and unusual event beyond the control of the defendant"). Most recently, the Ninth Circuit has emphasized that "good cause" for a Rhines stay is governed by a liberal standard. The petitioner need only demonstrate a "legitimate reason for failing to exhaust a claim in state court." Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014). "While a bald assertion cannot amount to a showing of good cause, a reasonable excuse, supported by evidence to justify a petitioner's failure to exhaust, will." Id.

As noted *supra*, it would have been impossible for Kieren to raise a claim in light of Nika at the time of his direct appeal, or in his initial post-conviction proceedings, because Nika was not decided until these proceedings concluded. Nor, as explained

supra, was it reasonable to expect him to return to state court when the Circuit's controlling precedent entitled him to relief under the claim as it was originally pled. The Ninth Circuit's recent change in law provides at least a "legitimate reason" and/or a "reasonable excuse" for Kieren's failure/inability to exhaust the amended Ground 5. Blake v. Baker, 745 F.3d 977, 982.

With respect to the other grounds, Kieren had maintained that they were in fact raised in his direct appeal. See CR 30, pp. 4-21. The State acknowledged that Kieren had raised similar claims in those proceedings, but had failed to sufficiently federalize them. CR 27, pp. 4-8. This Court agreed that Grounds 1, 3, 4 and 7 were not sufficiently federalized and thus unexhausted. CR 31, pp. 2-14. Kieren does not quarrel with this ruling in this Motion. Under the circumstances, however, where Kieren presented factually similar claims in state court, and where the exhaustion analysis hinged on detailed review of the authority cited in his pleadings, Kieren was at least "reasonable confused" as to whether these claims were exhausted when he filed the Amended Petition in 2008. See Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005) (petitioner's "reasonable confusion" as to whether state petition would be timely constitutes "good cause" for filing a protective petition in federal court); Rhines v. Weber, 408 F.Supp2d 844, 848 (D.S.D. 2005) (petitioner's "reasonable confusion" about whether his claims had been properly exhausted in state court constituted good cause for failure to exhaust claims).

Rhines held that:

> [E]ven if a petitioner had good cause . . . the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. §2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.")

Rhines, 544 U.S. at 277.

As this passage demonstrates, the "plainly meritless" prong of the Rhines inquiry derives from the court's statutory authority to dismiss unexhausted claims. This authority is limited to situations "when it is perfectly clear that the applicant does not raise even a colorable federal claim." Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005). If a claim can be dismissed under this standard, the court should do so rather than grant a Rhines stay. Conversely, if a claim cannot be dismissed under this standard, it should not be considered "plainly meritless" for Rhines purposes. Rhines at 277; see also, id. at. 278 (holding that stay should be granted if, among other factors, claims are "potentially meritorious").

Kieren's claims are at least no so obviously meritless that they should fail this prong of the Rhines inquiry. As explained supra, amended Ground Five presents a clear and meritorious basis for relief. Likewise, this Court has already implicitly determined that the well-plead claims in Grounds 1, 3, 4 and 7 present at least colorable claims for relief, as it has ruled on the exhaustion issue concerning these grounds without summarily dismissing them.

Finally, a primary concern expressed by the Supreme Court in Rhines was that the granting of stays has the potential to undermine the statutory purpose behind the AEDPA of reducing delays and encouraging finality. 544 U.S. at 276. Rhines itself was a capital case, where the petitioner had a clear incentive for delay. Kieren is serving multiple sentences of life without the possibility of parole, and has no incentive to delay her case or engage in any dilatory litigation tactics. To the contrary, Kieren would seek to have claims in the proposed amended petition adjudicated in federal court as soon as possible so that he may obtain effective relief. However, he cannot do this until her meritorious claims are first presented to the state courts, a process which he has already initiated. The purpose of a stay

would be to advance the progress of the post-conviction litigation, not to delay it. As such, Kieren would meet the third prong of the Rhines inquiry.

IV. CONCLUSION

For all these reasons, the Court should allow the filing of the Proposed Amended Petition, and direct the State to respond to it within a reasonable amount of time.

DATED this 15th day of January, 2016.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Ryan Norwood
RYAN NORWOOD
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she 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 January 15, 2016, she served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
Senior Deputy Attorney General
Criminal Justice Division
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

/s/ Jineen DeAngelis
An Employee of the Federal Public Defender, District of Nevada

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DENNIS K. KIEREN, JR.,, Petitioner, vs. STATE OF NEVADA ATTORNEY GENERAL, et al., Respondents.	Case No.: 03:07-cv-00341-LRH-RAM **SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254**

Petitioner, Dennis K. Kieren, Jr., through his attorney of record, Ryan Norwood, Assistant Federal Public Defender, files this Second Amended Petition for Writ of Habeas Corpus by a Person in State Custody Pursuant to 28 U.S.C. § 2254.[1]

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[1] The Exhibits referenced in this First Amended Petition are identified as "Ex." Petitioner reserves the right to file supplemental exhibits as needed and relevant.

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FIRST AMENDED PETITION[2]

I.

PROCEDURAL BACKGROUND

Mr. Kieren is serving a life sentence without the possibility of parole consecutive to life without the possibility of parole for use of a deadly weapon. The judgment of conviction under the case entitled The State of Nevada v. Dennis Keith Kieren, Case No. C137463 was entered on October 27, 1999. (Ex.20.)

A. PRE-TRIAL AND PLEA

Mr. Kieren was charged by way of a Clark County Grand Jury Indictment with Murder (Open) With Use of A Deadly Weapon for the murder of David Allan Broyles on August 2, 1996. (Ex. 3.) Kieren appeared before the Honorable Joseph Pavlikowski on November 5, 1996. He pled Not Guilty to the charges and waived his speedy trial rights. He was represented by Howard Brooks at this hearing. (Ex.4.)

On March 24, 1998, Howard Brooks, Deputy Clark County Public Defender advised the trial court that his office had a conflict between Mr. Kieren and a witness in the case (Andrew Rutberg) and asked to withdraw from the case. (See, Ex.1, p. 4)

At Calendar Call on December 10, 1998, Mr. Peter LaPorta, counsel for the defendant requested that the trial be continued. The defendant objected to the length of time it was taking to get the case to trial. Mr. Kieren, was also serving a prison sentence on a different charge. Additionally, both defense and prosecution counsel were scheduled to begin a trial in another department. The court allowed a continuance to April 12, 1999. (See, Ex.1, p. 5)

After another continuance in April, the case proceeded to jury trial on August 18-25,1999. (Ex. 10, 11, 12, 13 & 14.) The jury returned verdicts of guilty to Murder in the First Degree with Use of a Deadly Weapon. (Ex. 16.) A formal penalty hearing was waived by Mr. Kieren on August 26, 1999. (Ex. 17.) Sentencing was held on October 19, 1999 in front of the Honorable Mark Gibbons, newly assigned to the case and not the trial judge. Additionally, Kieren was represented by Lee E. McMahon

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[2] Counsel has sent Petitioner a Verification and Acknowledgment of the First Amended Petition for Petitioner's signature and will file that pleading with this Court upon receipt from Petitioner.

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from the Special Public Defender's Office, who was not the trial attorney.

On November 18, 1999, a hearing was held on the Motion for New Trial. Darren Richards from the Special Public Defender's Office informed the court that new evidence existed in the case. (Ex. 24.) The court was not certain as to whether it could retain jurisdiction of the case since the time to file a Notice of Appeal was running. Id.

On December 1, 1999, a hearing was held during which it was decided that a Motion for New Trial tolls the time to file the Notice of Appeal. (Ex. 25.) A hearing on the Motion for New Trial was held on May 18, 2000. (Ex.42.) On May 24, 2000, the court denied the Motion for New Trial. (Ex.43.)

B. DIRECT APPEAL FROM JUDGMENT OF CONVICTION

A Notice of Appeal from the Judgment and from the Decision and Order denying Defendant's Motion for New Trial was filed on June 22, 2000. (Ex. 44.) The Nevada Supreme Court docketed the appeal as Case No. 36345. Mr. Kieren's counsel, Lee Elizabeth McMahon, raised the following claims on direct appeal:

1. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED MATERIAL EVIDENCE

2. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN THE GIVING OF SELF-DEFENSE JURY INSTRUCTIONS THAT WERE CONFUSING, AMBIGUOUS AND WHICH BOTH SHIFTED AND REDUCED THE STATE'S BURDEN OF PROOF.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING APPELLANT FOR PRESENTING EVIDENCE OF THE VICTIM'S CHARACTER FOR VIOLENCE

4. THE MISCONDUCT OF THE PROSECUTOR IN ASKING APPELLANT ON CROSS EXAMINATION A QUESTION THAT HE HAD BEEN CLEARLY DIRECTED NOT TO ASK REQUIRED A GRANTING OF APPELLANT'S MOTION FOR MISTRIAL AND THE COURT ABUSED ITS DISCRETION IN DENYING IT.

5. APPELLANT WAS DENIED A FAIR TRIAL WHEN THE JURY WAS NOT INSTRUCTED ON THE ELEMENT OF DELIBERATION IN FIRST DEGREE MURDER

6. THE STATUTORY REASONABLE DOUBT INSTRUCTION IS UNCONSTITUTIONAL.

7. KIEREN'S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE PROSECUTOR IMPROPERLY AND PREJUDICIALLY QUESTIONED APPELLANT WHEN APPELLANT WAS PRECLUDED FROM ADDUCING EVIDENCE OF THE VICTIM'S VIOLENT NATURE AND PROPENSITIES, AND WHERE THE JURY INSTRUCTIONS SHIFTED AND LESSEN THE PROSECUTION'S BURDEN OF PROOF.

(Ex. 47.)

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An Order of Affirmance was filed by the Nevada Supreme Court on February 8, 2002. (Ex. 51.) Remittitur issued on March 5, 2002. (Ex. 53.)

C. POST-CONVICTION LITIGATION

On September 24, 2002, Mr. Kieren filed a pro se Petition for Writ of Habeas Corpus (Post-Conviction) (Ex. 54.) The following issues were raised in his state petition:

CLAIM ONE: THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. TRIAL COUNSEL SHOULD HAVE INVESTIGATED THE BACKGROUND OF DAVID BROYLES AND PRESENTED EVIDENCE OF BROYLES' PROPENSITY TOWARDS VIOLENCE.

2. TRIAL COUNSEL SHOULD HAVE DISCOVERED THE APPARENT ILLEGAL SUPPRESSION OF POTENTIALLY EXCULPATORY EVIDENCE AND APPRISED THE TRIAL COURT OF SUCH.

3. TRIAL COUNSEL FAILED TO PRESENT EXPERT WITNESS TO SUPPORT KIEREN'S ASSERTED CLAIM OF SELF-DEFENSE AT TRIAL.

4. TRIAL COUNSEL SHOULD HAVE EXERCISED DUE DILIGENCE AND PRESENTED EVIDENCE OF WOOD'S BIAS, MOTIVE TO PRESENT FALSE TESTIMONY AND, WOOD'S KNOWLEDGE OF BROYLES' STATE OF MIND.

5. TRIAL COUNSEL FAILED TO EXERCISE DUE DILIGENCE REGARDING CHERYL OGLETREE, A MATERIAL WITNESS FOR KIEREN'S DEFENSE.

6. TRIAL COUNSEL SHOULD HAVE EXERCISED DUE DILIGENCE AND INTERVIEWED KRISTI TELLIS PRIOR TO THE TRIAL.

7. TRIAL COUNSEL SHOULD HAVE PRESENTED EVIDENCE DEMONSTRATING THE BIAS AND LACK OF RELIABILITY OF ANDREW RUTBERG'S TESTIMONY AT TRIAL.

8. TRIAL COUNSEL SHOULD HAVE OBJECTED TO INADMISSIBLE HEARSAY EVIDENCE.

9. TRIAL COUNSEL SHOULD HAVE PRESENTED CHARACTER WITNESSES ON BEHALF OF KIEREN'S DEFENSE AT TRIAL.

10. TRIAL COUNSEL SHOULD HAVE OBJECTED TO SPECIFIC JURY INSTRUCTIONS AND THE OMISSION OF OTHER INSTRUCTIONS.

11. THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S DEFICIENT REPRESENTATION WAS PREJUDICIAL AND DEPRIVED KIEREN OF A FAIR TRIAL.

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CLAIM TWO: THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING POST CONVICTION AND DIRECT APPEAL PROCEEDINGS IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. MCMAHON FAILED TO DEVELOP THROUGH DUE DILIGENCE THE APPROPRIATE CONSTITUTIONAL PERSPECTIVE AND LEGAL ARGUMENTS REGARDING THE APPARENT DUE PROCESS VIOLATION AT KIEREN'S TRIAL.

2. MCMAHON SHOULD HAVE EXERCISED DUE DILIGENCE BY RESEARCHING THE CONSTITUTIONAL DIMENSIONS OF ERRORS THAT WERE NOT PRESERVED AT TRIAL.

(Id.)

On December 5, 2002, David Schieck was appointed by the court to represent Mr. Kieren in his Post-Conviciton action. (Ex. 59.) On June 28, 2004, Mr. Schieck alerted the court of a possible conflict because he was taking employment as the Clark County Special Public Defender. The court ruled there was not a conflict and ordered that the Supplemental Petition be filed in two weeks time or on July 12, 2002. (See, Ex. 1.)

The Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus was filed on July 26, 2004, containing the following claims:

CLAIM ONE: PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL FAILING TO INVESTIGATE.

(1) KIEREN IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION AND SUPPLEMENTAL PETITION

(2) KIEREN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

1. COUNSEL FAILED TO INVESTIGATE AND PRESENT TESTIMONY THAT DAVID BROYLES HAD BRAGGED TO A NUMBER OF WITNESSES ABOUT KILLING PEOPLE IN CALIFORNIA AND THAT IN FACT CALIFORNIA HOMICIDE DETECTIVES HAD BEEN IN TOUCH WITH KIEREN TRYING TO LOCATE BROYLES.

2. COUNSEL FAILED TO OBTAIN DISCOVERY FROM THE DISTRICT ATTORNEY'S OFFICE TO SHOW THAT BROYLES HAD TOLD WOODS THAT HE HAD PREVIOUSLY MURDERED SOMEONE WHICH WOULD HAVE GREATLY CORROBORATED KIEREN'S TESTIMONY.

3. COUNSEL FAILED TO INTERVIEW AND FULLY EXAMINE CHERYL OGLETREE CONCERNING HER KNOWLEDGE OF WOODS, BROYLES AND THE CASE.

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4. COUNSEL FAILED TO INVESTIGATE AND UTILIZE THE SERVICES OF AN EXPERT ON THE EFFECTS OF THE BEATING INFLICTED ON KIEREN BY BROYLES AND THE RESULTING SHOCK AND/OR POST TRAUMATIC STRESS THAT WOULD HAVE MITIGATED AGAINST THE FORMATION OF MALICE OR NECESSARY MENS REA TO COMMIT FIRST-DEGREE MURDER. SUCH TESTIMONY WOULD ALSO HAVE EXPLAINED KIEREN'S INABILITY TO REMEMBER PORTIONS OF THE EVENTS THAT OCCURRED AFTER A HEAVY GLASS AND A COLOGNE BOTTLE WERE BROKEN OVER THE TOP OF HIS HEAD BY BROYLES.

5. COUNSEL FAILED TO INVESTIGATE AND PRESENT THE VIDEOTAPE MADE BY KIERAN'S FATHER AND UNCLE SHOWING VANDALISM AND ROBBERY FROM KIEREN'S HOUSE AFTER THE INCIDENT. THIS EVIDENCE WOULD HAVE BEEN INVALUABLE IN IMPEACHING THE TESTIMONY OF WOODS AND TELLIS AT TRIAL. SUCH TESTIMONY WOULD HAVE NOT ONLY SHOWN BIAS BUT ALSO LACK OF VERACITY.

6. COUNSEL FAILED TO PREPARE FOR TRIAL IR INVESTIGATE NUMEROUS DEFENSES AND THEN FAILED TO EFFECTIVELY ADVOCATE VIABLE DEFENSES DURING THE COUNSEL OF THE TRIAL SPECIFICALLY INCLUDING LESSER INCLUDED DEFENSES DUE TO DIMINISHED CAPACITY AFTER BEING STRUCK OVER THE HEAD, BEATEN AND HAVING HIS EAR BITTEN OFF BY BROYLES.

7. COUNSEL CONVINCED KIEREN TO WAIVE A PENALTY HEARING BEFORE THE JURY BASED ON HIS REPRESENTATION OF CONVERSATIONS WITH THE TRIAL JUDGE AND THEN DISAPPEARED AFTER THE VERDICT AND WAS NOT PRESENT AT SENTENCING.

8. COUNSEL FAILED TO OBTAIN AND PRESENT TESTIMONY FROM EXPERT ON CRIME SCENE ANALYSIS AND RECONSTRUCTION TO RE-CREATE THE INCIDENT SHOWING THAT KIEREN DID NOT FIRE ANY SHOTS INTO BROYLES AFTER HE WAS ON THE GROUND BUT RATHER THAT THE FIRST SHOTS SPUN BROYLES AROUND ACCOUNTING FOR VARIOUS GUNSHOT ENTRY LOCATIONS.

CLAIM THREE: KIEREN WAS DENIED DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL BY THE CONCEALMENT OF EXCULPATORY EVIDENCE BY THE STATE.

(EX. 60.) On August 4, 2004, the court appointed Chris Oram as new counsel for the remainder of the action. An evidentiary hearing was held on November 28, 2005, with further proceedings on January 4, 2006 and February 8, 2006. (Ex. 64, 66, & Ex. 1, p. 37.)

On March 24, 2006, Findings of Fact, Conclusions of Law and Order denying the petition were filed by the Court. (Ex.67.) Notice of Entry of Order was filed by the Court on March 27, 2006. (Ex.68.) A Notice of Appeal from the denial was filed on March 31, 2006. (Ex. 69.) The Nevada Supreme Court docketed the appeal as number 47039.

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An Opening Brief was filed by Kieren's appointed post-conviction counsel, Christopher Oram, raising the following claims:

CLAIM I: MR. KIEREN RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

CLAIM II: MR. KIEREN IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE TO PROPERLY PRESENT EVIDENCE ESTABLISHING THAT MR. KIEREN'S STATE OF MIND, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM III: KIEREN WAS DENIED DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL BY THE CONCEALMENT OF EXCULPATORY EVIDENCE BY THE STATE.

CLAIM IV: MR. KIEREN WAS DENIED DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL BY THE CONCEALMENT OF EXCULPATORY EVIDENCE BY THE STATE.

CLAIM V: MR. KIEREN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE FAILURE OF TRIAL COUNSEL TO CALL AN EXPERT TO TESTIFY OF THE EFFECTS OF THE DEFENDANT'S INJURIES HE SUSTAINED WHILE THE VICTIM ATTACHED HIM.

CLAIM VI: KIEREN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON THE FAILURE TO INVESTIGATE NUMEROUS ASPECTS OF THE CASE IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(EX. 70.) An Order of Affirmance was filed by the Nevada Supreme Court on June 26, 2007. (Ex. 73.) Kieren filed a Petition for Rehearing on August 20, 2007. (Ex. 75.) Rehearing was denied on August 31, 2007, (Ex. 76) and Remittitur issued on September 25, 2007. (Ex. 77.)

Mr. Kieren filed the instant Petition for Writ of Habeas Corpus by a Person in State Custody in this Court on August 1, 2007. CR 4. This Amended Petition follows.

II.

STATEMENT OF EXHAUSTION

Ground Five is not exhausted. This Court has ruled that Grounds One, Three, Four, and Seven are not exhausted, and that the remaining claims are exhausted. CR 31.

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III.

GROUNDS FOR RELIEF

GROUND ONE

The District Court Erred in Denying Mr. Kieren's Motion for a New Trial. As a Result, Mr. Kieren Was Denied his Right to Due Process Under the Fifth and Fourteenth Amendment to the United States Constitution.

Mr. Kieren filed a timely motion for a new trial on November 4, 1999. (Ex. 21.) The basis for the motion was newly discovered evidence that the key prosecution witness, Raymond Michael Woods, had such animosity to Mr. Kieren that he stated, prior to trial, that it was his intention to testify falsely to ensure Mr. Kieren's conviction. (Id. at 6.)

Cheryl Ogletree's affidavit was prepared on November 2, 1999, approximately one week after the conclusion of Mr. Kieren's trial. (Id.) Mr. Kieren's counsel was told by Ms. Ogletree after sentencing had occurred that prior to trial, Raymond Michael Woods told her that it was his intention to lie at trial regarding the shooting incident. (Id.) Ms. Ogletree is the mother of Anthony, Dennis Kieren's son. Mr. Kieren and Ms. Ogletree's relationship was limited to the contact necessitated by child visitation transport. Ms. Ogletree affirms that Mr. Woods stated to her that:

1. That David Broyles physically charged Mr. Kieren at the time of the shooting;
2. That Mr. Broyles closed the garage door while in the garage loading his gun;
3. That Mr. Broyles was not attempting to leave the property, but in fact intended to kill Mr. Kieren;
4. That is was his, Mr. Woods' intention to see that Mr. Kieren was convicted of murder;
5. That he, Mr. Woods, moved the victim from the garage in order to prevent the crime scene from demonstrating self defense by Mr. Kieren;
6. That Mr. Woods told Ms. Ogletree that it was her duty to testify against Mr. Kieren in the murder case by lying, in order to help convict him as he planned to do. Mr. Woods said she had this duty because of what Mr. Kieren had done to their child.

(Id. at Ex. A & A-1.) Prior to trial, Ms. Ogletree spoke to trial counsel and Mr. Kieren's investigator. She did not tell them that Mr. Woods had told her the information stated above. (Ex. 23 at D-1-2.)

This evidence is pivotal as Mr. Woods was a critical witness for the State during Mr. Kieren's trial. He witnessed most of the events that transpired during the struggle between Mr. Kieren and Mr.

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Broyles, therefore making his testimony crucial as this was a self-defense case.

Mr. Wood's different recollections of the events occurring on the evening of March 6, 1996, varied widely. Mr. Woods' voluntary statement to Detective T. Thowsen, given on March 7, 1996, stated:

> ...I ran into the bathroom, and David Broyles was standing over Dennis, with Dennis' knife off the ledge of the shower, bathroom shower ledge where the window is. That's where it's always been for a long time. And I thought David was gonna kill him. I said, David, no don't, don't hurt him.
>
> Q. So –
>
> A. He goes, you don't fuckin' understand, Mike, he goes, he was going for his fuckin' gun, man. And I says, well, let him go, let him up. Dennis was hollering, you bit my fuckin' ear off, you son of a bitch. I'll kill you. _____ David's no, you mother fucker, I'll kill you right now. And I'm beggin' David to let go of the knife. He goes, Mike, now get back_____. Mean it man, just get back. This fucker, he's gonna go for his gun. I said, David, give me the fuckin' knife. Just let, let him up please. David gave me the knife. . . .

(Ex. 23 at 3-4.)

In contrast, Mr. Woods gave the following testimony to the Grand Jury:

> When I opened the door up the rest of the way there was glass and blood and a path going over to the master bedroom bathroom. There's an archway. It's not a door. It's an archway. There was blood on the corner wall to that. I was concerned I saw that. I followed it straight into the bathroom and when I went into the bathroom—
>
> Q. The master bathroom?
>
> A. The master bathroom. David Broyles was leaning over the bathtub and had Dennis by his ponytail. . . . David - when I looked around I thought he was whispering something in Dennis' ear, and he had the knife in his left hand up against Dennis' right cheek. . . . The buck knife, the diver's knife. . . .
>
> At that point I was like, "David, what the fuck are you doing, man?" And I approached him on his side and he – Dennis kind of like started to come up out of the tub, and David pulled his right to that. I believe that's when he ripped off the top of Dennis' ear—
>
> . . .
>
> I guess he had a hold of Dennis with his teeth. . . . What I saw was him pulling the top of Dennis' ear off, holding him back down in the tub. Dennis was trying to get up.
>
> Q. When David Broyles pulled the top of Dennis Kieren's ear, you said he was pulling. What was he pulling with? What was David pulling with?
>
> A. I guess he had the ponytail in his right hand, the knife to Dennis' cheek with his left hand, and he just pulled like that. Turned his head and pulled the ear loose.
>
> Q. What part of Dennis' body?

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A. His head. . . I guess when he had his ponytail like that he pulled it loose like to the right. If he had a hold of it like this and had Dennis by the ponytail, I thought he was whispering in his ear. He had the knife, and he pulled it like that.

Q. What did you see about David - excuse me - David Broyles when he pulled away from the head of Dennis Kieren?

A. All I could see is the right hand side of David's face. He bit the tip of Dennis' ear. He said, "Get the fuck away from us, Mike. I'll stab you too." I said, "What are you doing?" He said, "You don't understand. He was going for his gun. No one is going to leave the house alive."

Q. Who told you that?

A. David Broyles. . . I said, "Now, come on, David. Please just give me the knife." I leaned over David and I grabbed the knife. I was trying to pull it away from Dennis. David goes Mike -

Q. I hate to keep interrupting, but we've got to slow down a little. When you say you were reaching for the knife, you were trying to pull it away from Dennis?

A. Against Dennis' face. David had it in his hand. I wanted to take the knife out of David's hand and him to give it to me and let Dennis up because at that point I didn't understand what was going on. . . . When I asked him to give me the knife he said that - "Okay, Mike. I'll give you the knife, but you've got to give me a few minutes to get out of the house."

. . .

I said, "No problem, David. I'll give you a couple minutes, no problem. Please give me the knife." I was pulling his fingers off the knife. He didn't want to turn loose of it, and he didn't want to turn loose of Dennis.

Dennis at that point hadn't said anything yet other than the fact that he had bit my fucking ear off. David says, "All right, Mike. Hold him and give me a couple of minutes. All I need is a couple of minutes." I said, "No problem, Brother. Give me the knife."

He gave me the knife. He said, "You got him?" I said, "I've got him." He said, "You sure?" I said, "I'm sure. Okay, Mike." He patted me on the back and took off.

(Ex. 2 at 97-102.)

In contrast, Mr. Woods told the jury that Mr. Kieren's right hand was on the knife and Mr. Broyles left hand was on top of Mr. Kieren's hand; and that Broyles had pushed the knife against the side of Mr. Kieren's face. Mr. Broyles had his head up against the left side of Mr. Kieren's face. Mr. Broyles bit Mr. Kieren's ear off, pulled it off and spit it out in the tub and said to Mr. Woods, "get the fuck away from me, I will stab you too." According to Mr. Woods, Mr. Kieren let go of the knife as Mr. Broyles pulled his ear off. Mr. Broyles then had control of the knife. (Ex. 12, TT at 172.)

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Mr. Woods testified that he asked Mr. Broyles to give him the knife. Mr. Broyles told Mr. Woods, "you don't understand, Mike. He was going for his gun. Nobody is leaving here alive." Finally, Mr. Broyles said, "okay Mike, I will give you the knife, but you have got to give me enough time to get out of the house. Give me a couple of minutes to get out of the house." Mr. Woods grabbed Mr. Kieren by the ponytail, Mr. Broyles let go of it. Mr. Woods had the knife, Mr. Broyles patted him on the back twice and took off. (Id. at 173-75.)

According to Mr. Woods' trial testimony, as soon as Mr. Broyles took off, Mr. Kieren started to get out of the tub. Mr. Woods told him, "no, stay in the tub." Mr. Woods said Mr. Kieren told him. "No, you don't understand, Mike. He bit my fucking ear off, I am going to kill him." Mr. Kieren got out of the tub, pushed past Mr. Woods , exited the bathroom and headed for the door. (Id. at 176-77.)

Mr. Woods said that as Mr. Kieren reached for the doorknob of the bedroom door he reached down into a black bag next to the door and drew out his weapon. Mr. Kieren pulled it out of the holster, jacked the slide back and turned around and put the gun to Mr. Wood's forehead. Mr. Kieren backed up, grabbed the doorknob, swung the door open while keeping the gun pointed at Mr. Woods. (Id. at 177.)

Mr. Woods claimed that Mr. Kieren turned around, started sweeping into the hall, military stance, keeping the weapon in front, combat mode. Mr. Woods was a little more than an arm length, about three feet from Mr. Kieren. According to Mr. Woods, Mr. Kieren started down the hallway keeping his back to the wall pointing the gun alternately at Mr. Woods and down the hall. He said that Mr. Kieren swung Mr. Broyles' bedroom door open and pointed the weapon in the room. Mr. Woods said that Mr. Kieren swept the gun back up towards him, spun around and pointed the weapon toward the living room and looked at the front toor. The bolt on the front door was locked. Mr. Kieren then went straight for the door that entered the garage from the house. Mr. Kieren grabbed the doorknob with his left hand, holding the weapon in his right. Mr. Kieren swung the door open. Mr. Broyles was standing there with his left hand reaching for the automatic door switch that raises the car entrance garage door. Mr. Woods was three or four feet from Mr. Kieren. He still had the knife. (Id. at 178-80.)

In contrast to his trial testimony, Mr. Woods' March 7, 1996 statement to LVMPD Detective Townsen made no mention of Mr. Kieren going through the house, room by room, commando style,

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looking for Mr. Broyles:

> Dennis knew Goddamn I wouldn't stab him. I wouldn't hold him down there. Pushed his way up. Says look, he bit my fuckin' ear. I'm gonna kill the son of a bitch. I tried to stop him, and he ran and he reached for his bag down by the door. I didn't see it 'till then. He reached in and pulled his gun out, jerked back from me, pulled his gun outta the holster, cocked the fuckin' slide back. And I was standing there holding the fuckin' knife now, and he goes, get back or I'll fuckin' shoot you too. And he backed down the hall, and I followed him. I was going no, De–, just let him outta the hous man, let him go. He ran around through the living room. He wouldn't take the gun ___, and when he opened up the garage door, the inside garage door, Dave was standing there. I think he was standing there protecting Kristi. I don't know. Cause Dave should been able to get out by then, but the garage door was closed.

(Ex. 23 at A-3.)

Mr. Woods informed the jury that Mr. Kieren raised his gun up and Mr. Broyles stepped back, saying no, don't shoot and that Mr. Kieren started firing. (Ex. 12, TT at 181.)

This testimony changed from what Mr. Woods told the Grand Jury. There, his testimony was:

> As the door came open David Broyles was like this reaching on the inside. Facing the door is a garage door switch that you hit and in turn the automatic garage door rolls up. He was reaching for it like this. I don't know if he hada coat in his left hand. He had something in his left hand.... David had his left hand extended out. He was leaning with his feet toward the switch on the wall to the left, and he was left handed. And he was holding, I guess, something on his right on his shoulder. . . . I couldn't see that exactly. . . . He moved back and raised both his hands up almost like this so I knew he had nothing in his hand at that point. . . if he had anything in his hand he dropped it.

(Ex. 2 at 115.)

At trial, Mr. Woods said the first shot seemed to hit Mr. Broyles in the shoulder because he seemed to turn. The shots were rapid. Mr. Broyles turned again, back the other way. Mr. Woods thought another shot hit Mr. Broyles in the hip and he started to go down. The door into the house was swinging shut. The automobile entrance to the garage was down. (Ex. 12, TT at 181-82.)

The house entrance door from the garage closed about an inch. The light was still showing through it. Mr. Woods said that Mr. Kieren grabbed the doorknob, swung the door open, started firing at Mr. Broyles and shot him four or five times. Mr. Woods said he just stood there in shock and Mr. Kieren walked around behind him. went into the kitchen, while keeping the gun pointed at Woods, picked up the telephone and dialed 9-1-1.

Mr. Woods said Mr. Kieren opened the house entrance door to the garage, stepped over Mr. Broyles and told Kristi Tellis, "get the fuck out of the house. No one is leaving here alive." and hit the

switch opening the automobile entrance to the garage which was closed. (Id. at 544.)

The automobile door started opening and Ms. Tellis was still standing there. Mr. Woods told her, "get the fuck out of here now," Ms. Tellis turned and ran out. He said that the house entrance door to the garage opened behind him and that Mr. Kieren pointed the gun at Ms. Tellis as she was going under the automotive door. Mr. Woods said he turned around to face Mr. Kieren and Mr. Kieren stepped back and pointed the gun at him. Mr. Woods, who still had the knife, shoved Mr. Kieren as hard as he could. Mr. Kieren shoved Mr. Woods back. Mr. Woods shoved him hard again. Mr. Kieren said something like it was self-defense that he had to shoot Mr. Broyles. Mr. Woods said he told Mr. Kieren that he didn't have to shoot Mr. Broyles like that and called him a son of a bitch. (Id. at 545-56.)

Mr. Woods testified that he threw the knife over in the corner on the other side of the garage. He then rolled Mr. Broyles over to do CPR on him. There did not seem like a whole lot he could do for Mr. Broyles, who had been shot so many times and who gasped for air, turned his head and gasped again. Mr. Woods, despite the fact that he knew something about the law, dragged Mr. Broyles' body out to the driveway. He said he did not want Mr. Broyles to die in "this fucking pig's house." (Id. at 185-87.)

The state prepared an opposition to Mr. Kieren's motion, which was filed on November 10, 1999, to which Mr. Kieren replied on November 17, 1999. (Ex. 22, 23.) Additional motions were filed, including a motion for discovery and various supplemental exhibits from both Mr. Kieren and the State. (Ex. 28, 29, 31, 32, 33, 34, 35, 36, 42.) Argument was held on the motion for a new trial on May 18, 2000, and the district court filed a Decision and Order on May 24, 2000. (Ex. 42, 43.)

The district court abused its discretion by denying Mr. Kieren's motion for a new trial. The district court did not hear the trial, therefore was unable to determine witness credibility by reading the trial transcripts. This testimony could have been easily accomplished, where the court could have heard the crucial evidence presented in the motion. The jury is the trier of fact, and when the state's key witness tells another witness that he was going to lie during his testimony at trial, Mr. Kieren is entitled to have the jury hear the entire story. Mr. Kieren's right to due process was violated by the trial court's denial of the motion for a new trial.

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GROUND TWO

The Self-Defense Instructions Given During the Trial Were Improper, Confusing and Improperly Shifted the State's Burden of Proof. As a Result of the Erroneous Instruction, Mr. Kieren's Conviction and Sentence Are Invalid under the Federal Constitutional Guarantees of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

Mr. Kieren's theory of the case was self-defense. He testified at trial that Mr. Broyles was the initial aggressor, that he was scared and frightened of Mr. Broyles and that when Mr. Broyles charged Mr. Kieren, Mr. Broyles had something in his hand which Mr. Kieren believed to be a hunting knife. (Ex. 13, TT at 270-72.) The jury was instructed regarding self-defense as follows:

> Homicide is justifiable when committed by a person in the lawful defense of oneself when he has reasonable ground to apprehend that he is in danger of great bodily injury or death and that there is imminent danger of such a design being accomplished and that the killing of the other was absolutely necessary.
>
> A bare fear that the person is in danger of great bodily injury or death is insufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the person killing really acted under the influence of those fears and not in the spirit of revenge.

(Ex. 15, Instruction No. 23.)

The phrase "and that the killing of the other was absolutely necessary" is language taken directly from Nev. Rev. Stat. 200.200(1). This language impermissibly shifts the burden of proof on the issue of self-defense to the defendant.

The jury was further instructed as follows:

> Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer great bodily injury, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether such danger is real or apparent.
>
> The law does not justify the use of a greater degree of force than is reasonably necessary and the burden is on the State to prove beyond reasonable doubt that the degree of force used was greater than reasonably necessary.

(Ex. 15, Instruction No. 30.)

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Nevada law is well-settled that if evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense.[3] Instruction No. 30 impermissibly reduces the State's burden from proving beyond a reasonable doubt that Mr. Kieren did not act in self-defense to merely having to prove that he used a greater degree of force than was necessary. These instructions were not clear and unambiguous and impermissibly changed the burden of proof. Mr. Kieren's constitutional right to due process was violated and his petition should be granted.

GROUND THREE

The District Court Erroneously Did Not Allow Evidence at Trial of Mr. Broyles' Violent Character. As a Result, Mr. Kieren's Due Process Rights under the Fifth and Fourteenth Amendments to the United States Constitution Were Violated.

Nevada precedent is clear that a defendant is permitted to present evidence of the character of a crime victim when it is necessary to show the state of mind of the defendant at the time of the commission of the offense for the purpose of establishing self-defense. Specific acts which tend to show the victim was violent and dangerous person may be admitted provided they were known to the accused. See Nev. Rev. Stat. 48.055; Petty v. State, 997 P.2d 800 (Nev. 2000); Burgeon v. State, 714 P.2d 576 (Nev. 1986).

Mr. Broyles alleged while attacking Mr. Kieren that Mr. Kieren had gone to the police about a murder Mr. Broyles had committed in San Bernadino. (Ex. 13, TT at 259.) This statement demonstrates that Mr. Broyles acknowledged that he had committed a murder; that Mr. Kieren knew this because Mr. Broyles had told him previously that he had committed the murder; and that Mr. Broyles was the likely aggressor as he had motive.

Mr. Kieren testified in support of his self-defense theory of the case. He testified that after Mr. Broyles bit his ear off, he grabbed Mr. Kieren's knife from the windowsill in the bathroom and was "thumping [him] in the head with it." (Id.) Mr. Kieren testified that after Mr. Broyles had grabbed the knife, "[h]e made some off-hand comment about me going to the police about a murder he committed in San Bernadino." (Id. at 260.) Defense counsel was unable to develop this line of questioning due to the trial court sustaining the objection of the prosecutor to this line of questioning. (Id.) Mr. Kieren

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[3] See Barone v. State, 858 P.2d 27 (Nev. 1993); Hill v. State, 647 P.2d 370 (Nev. 1982).

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further testified that when Mr. Woods entered the bathroom and had Mr. Broyles surrender the knife to him, Mr. Broyles leaned down and told Mr. Kieren, "now you are going to die" and took off running. (Id. at 263.) Mr. Kieren testified that he had been scared, he did not want to get caught in the bathtub and figured that Mr. Broyles would come back. (Id. at 265.)

Mr. Kieren wished to present testimony evidence to support his self-defense theory. This defense placed Mr. Broyles' character at issue. Mr. Kieren's testimony regarding his knowledge of Mr. Broyles' admission of a prior murder was admissible under Nev. Rev. Stat. 48.055.[4] The district court abused its discretion in excluding this evidence and violated Mr. Kieren's right to due process and a fair trial. The exclusion of this evidence necessarily had a substantial and injurious effect or influence on the jury's verdict. The writ should be granted.

GROUND FOUR

Mr. Kieren Was Denied His Right to Due Process and a Fair Trial under the Fifth and Fourteenth Amendments to the United States Constitution When the Prosecution Committed Misconduct.

During the course of Mr. Kieren's trial, the prosecutor engaged in improper behavior and tactics. This misconduct deprived Mr. Kieren of a fundamentally fair trial as guaranteed by the United States Constitution. The prosecution improperly sought to question Mr. Kieren regarding whether he had previously been arrested on January 21, 1993, for impersonating a police officer. (Ex. 13, TT at 284.) Defense counsel objected and the trial court sustained the objection, but the damage had been done. (Id.) Defense counsel moved for a mistrial, stating that the prosecutor asked the question despite the fact that the trial court had "clearly given him direction that he wasn't to get into that area." (Id. at 301.) The trial court denied the motion for a mistrial. (Id. at 301-2.)

This questioning is clear misconduct and inappropriate, with the sole purpose of prejudicing the jury against Mr. Kieren by implying that he was untruthful. The prosecutor knew that it was improper to ask the question, yet he did it anyway and put forth this evidence to the jury. The prosecution knew,

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[4] Nev. Rev. Stat. 48.055 states: 1.) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct; 2.) In all cases in which character or a trait of a character of a person is an essential element of a charge, claim or defense, proof of specific instances of his conduct may be made on direct or cross-examination.

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or should have known, that this questioning was improper. There is a reasonable likelihood that the questioning affected the judgment of the jury as to whether Mr. Kieren acted in self-defense. The prosecutorial misconduct violated Mr. Kieren's right to due process and a fair trial. The writ should be granted and Mr. Kieren's conviction vacated.

GROUND FIVE

The Jury Was Not Properly Instructed on the Element of Deliberation in First Degree Murder. As a Result of the Erroneous Instruction, Mr. Kieren's Conviction and Sentence Are Invalid under the Federal Constitutional Guarantees of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

The court provided the jury in Mr. Kieren's trial with the following instruction on premeditation and deliberation:[5]

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

(Ex. 15; Instruction No. 8.)

Counsel for Mr. Kieren objected to the instruction, and proposed an instruction which included a definition of deliberate.[6] (Ex. 14, TT. at 297-98.)

Following Mr. Kieren's trial, the Nevada Supreme Court found in Byford that the instruction on premeditation and deliberation – the same jury instruction given in Mr. Kieren's trial – "blurs the distinction between first and second degree murder." Byford v. State, 994 P.2d 700, 713 (Nev. 2000).

The Byford decision set forth the following jury instruction:

> Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements – willfulness, deliberation, and premeditation – must be proven beyond

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[5] Premeditation and deliberation are necessary elements in the State of Nevada for a finding of first degree murder. Nevada Revised Statute 200.010(1).

[6] The definition stated: "Deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of action." (Ex. 15, Proposed Instruction D-1.)

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> a reasonable doubt before an accused can be convicted of first-degree murder.
>
> Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.
>
> Deliberation is the 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.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> . . . . .
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberate and premeditation as will fix an unlawful killing as murder of the first degree.

Pursuant to the Nevada Supreme Court's decision in Nika v. State, 198 P.3d 839, 850 (2008), "the change effected in Byford applies to convictions that were not yet final at the time of the change." Because Kieren's conviction was still on direct appeal, and not yet final, Byford applied to him as a matter of law per the Nika decision. See also Bunkley v. Florida, 538 U.S. 83 (2003), Fiore v. White (Fiore II) 531 U.S. 225 (2001), Fiore v. White (Fiore I), 528 U.S. 23 (1999).

Nika also recognized that the instruction at Kieren's trial had effectively eliminated the difference between first and second degree murder by conflating the distinguishing element of first-degree murder with the "intent" sufficient to prove second-degree murder. Nika, 198 P.3d at 846-47. As such, the instruction provided at Kieren's trial was unconstitutionally vague, and violated the due process

guarantee of the United States Constitution, because it failed to narrow or meaningfully distinguish first-degree from second-degree murder. And because the change recognized in Nika constituted a substantive narrowing of the offense of first-degree murder, and because Nika's re-characterization of Byford as a "change" in the law cannot validly be used to evade consideration of a federal issue, Byford's definition must be applied retroactively under due process principles.

While the court in Byford found that the erroneous jury instructions were harmless given the circumstances of Byford's offense, the circumstances in Mr. Kieren's case suggest an entirely different result may have occurred had the jury been apprized of the requirement that deliberation had to be proven to establish first degree murder .

Defense counsel moved for a new trial after sentencing based upon the new ruling in Byford. (Ex. 37, 39.) The State opposed (Ex. 74) and the district court denied the motion (Ex. 43 at 11.) Mr. Kieren respectfully submits that giving the improper premeditation and deliberation instruction in his case was an error of constitutional magnitude. But for the improper instruction, there is a reasonable probability that the jury would have returned a different verdict.

GROUND SIX

The Instruction on Reasonable Doubt Given During the Trial Was Improper. As a Result of the Erroneous Instruction, Mr. Kieren's Conviction and Sentence Are Invalid under the Federal Constitutional Guarantees of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

The court provided the jury in Mr. Kieren's trial with the following instruction on reasonable doubt:[7]

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

(Ex. 15; Instruction No. 32.)

Counsel for Mr. Kieren objected to the instruction, and sought to introduce the following

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[7] This is the statutory definition of reasonable doubt in the State of Nevada. Nev. Rev. Stat. 175.211(1).

language as a clarifying jury instruction as follows:

> The reasonable doubt standard requires the jury to reach a subjective state of near certitude on the facts in issue.

(Ex. 14, TT. at 297-98; Ex. 15, Proposed Instruction D-2.)

The prosecutor objected to the instruction on the ground that the Nevada statute[8] does not allow any other instruction to be given. The court then denied the proffered instruction. (Id. at 5-6.)

The proffered instruction was not a definition of reasonable doubt. Rather, it was a clarifying instruction. Denial by the court was erroneous, as it would not have misled the jury from their duties but clarified them. But for the failure of the court to give this instruction, there is a reasonable probability that the jury would have returned a different verdict.

GROUND SEVEN

The Cumulative Effect of All Errors that Transpired at Mr. Kieren's Trial Violated his right to Due Process and a Fair Trial. As A Result, Mr. Kieren Was Denied His Right to Due Process under the Fifth and Fourteenth Amendment to the United States Constitution.

The doctrine of cumulative error mandates relief in this matter. The combination of all grounds pleaded above, including prosecutorial misconduct (Ground Three), judicial error (Ground Four) and improper jury instructions (Grounds Five, Six and Seven), when viewed in light of the state court record, constitutes cumulative error warranting relief from the numerous violation of constitutional rights suffered by Mr. Kieren in this matter.

GROUND EIGHT

Mr. Kieren Was Denied His Right to Effective Assistance of Trial and Appellate Counsel under the Sixth and Fourteenth Amendment to the United States Constitution.

Mr. Kieren was represented by special deputy county public defender Peter La Porta throughout the trial and special deputy county public defender Lee McMahon at sentencing and on direct appeal. (Ex. 1.)

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[8] Nev. Rev. Stat. 175.211(2) states in pertinent part that "[n]o other definitions of reasonable doubt may be given by the court to juries in criminal actions in this state."

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Mr. Kieren has a constitutional right to be represented by competent counsel. Counsel's lack of effective representation substantially and injuriously affected the process to such an extent as to render Mr. Kieren's conviction and sentence fundamentally unfair and unconstitutional. No strategic or tactical reason existed for counsel's failure to raise these significant and obvious issues during Mr. Kieren's proceedings. Counsel's failure to raise these significant errors in this case fell below objective standards of reasonableness and thereby deprived Mr. Kieren of effective representation guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

Mr. Kieren was represented on direct appeal by deputy special county public defender Lee McMahon. The failure of his attorney to properly prepare for and handle Mr. Kieren's appeal resulted in a breach of his constitutional right to effective counsel.

Counsel had no tactical or strategic justification within the range of reasonable competence for his failure to properly represent Mr. Kieren as further alleged in this claim. The ineffectiveness of his counsel undoubtedly undermined the confidence in the fairness of the proceedings. Mr. Kieren was severely prejudiced on appeal by his lawyer's performance. A reasonable likelihood exists that but for his lawyers deficient performances, Mr. Kieren would have had a more favorable outcome at trial and on his appeal. The State accordingly cannot show, beyond a reasonable doubt, that these failures did not affect the disposition, conviction or the sentence in this case. Counsels' representation of Mr. Kieren fell below the minimum standard of reasonably competent counsel on the basis of the following interrelated grounds:

A. Counsel Failed to Properly Present Evidence Establishing that Mr. Kieren's State of Mind.

Mr. Kieren testified in support of his self-defense theory of the case. He testified that after Mr. Broyles bit his ear off, he grabbed Mr. Kieren's knife from the windowsill in the bathroom and was "thumping [him] in the head with it." (Ex. 13, TT at 259.) Mr. Kieren testified that after Mr. Broyles had grabbed the knife, "[h]e made some off-hand comment about me going to the police about a murder he committed in San Bernadino." (Id. at 260.) Defense counsel was unable to develop this line of questioning due to the trial court sustaining the objection of the prosecutor to this line of questioning. (Id.) Mr. Kieren further testified that when Mr. Woods entered the bathroom and had Mr.

Broyles surrender the knife to him, Mr. Broyles leaned down and told Mr. Kieren, "now you are going to die" and took off running. (Id. at 263.) Mr. Kieren testified that he had been scared, he did not want to get caught in the bathtub and figured that Mr. Broyles would come back. (Id. at 265.)

Mr. Kieren filed a timely pro se post-conviction petition. (Ex. 54.) In this petition, Mr. Kieren specifically noted that Mr. Broyles had made several statements to him and to others regarding the San Bernadino incident. Mr. Kieren raised the issue before the district court and the issue was developed during the evidentiary hearing.

Mr. Kieren explained that prior to trial he discussed the San Bernadino incident with trial counsel. (Ex. 64 at 60.) Mr. Kieren specifically requested investigation of this incident in a letter to counsel dated July 12, 1999. (Id. at 61.) Mr. Kieren explained that when Mr. Broyles first talked about the incident, Mr. Kieren did not believe him and thought that he was "simply bragging." (Id.) Mr. Kieren explained that Mr. Broyles had made these statements several months prior to Mr. Broyles moving into Mr. Kieren's residence, the first time at a bar, where Mr. Broyles showed him a picture of himself inside a ditch, holding up a skull. (Id. at 61-63.) Mr. Broyles told Mr. Kieren that he wanted him to go to San Bernadino with him to show him some of the evidence. (Id. at 63.) Prior to the shooting, at the Hard Rock Café, Broyles' told Mr. Kieren that detectives suspected him in the crime. (Id. at 64.) Approximately three to four days prior to the shooting, Mr. Kieren told Mr. Broyles that the San Bernadino detectives had contacted him regarding Mr. Broyles' whereabouts. (Id. at 65-68.) Mr. Kieren testified that this was their last conversation concerning the matter.

While in the bathroom, Mr. Broyles was attacking Mr. Kieren, and he made mention of the San Bernadino incident again. Mr. Kieren explained:

> I was struggling trying to get away. He had a hold of my hair and he had a knife and he was thumping me in the head about it, and he said something to the fact of if you think you're going to go to the police about the people that I killed in San Bernadino then you're mistaken, or whatever.

(Id. at 68-69)

Mr. Kieren testified at trial that this caused him fear and concern regarding Mr. Broyles' violent tendencies. Mr. Kieren told police within hours of the shooting that he was fearful of Mr. Broyles based on this information. He stated during this recorded statement that:

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> And he, he said something and what are you gonna do then, huh, you think your gonna go to the police? He said something about you – there's no way your going to ever go to the police, and if you ever think about telling him about the guy I killed – he told me a long time he killed somebody in San Bernadino, in the desert. He showed a picture of a skull, cause he helped a homicide detective dig it up. And he said that I'll kill you. I'm gonna just kill you. And he started telling me that if I ever thought I was gonna go to the police for that – I don't know where that came from, he just started yelling at me.

(Ex.62 at 6.)

Additionally, Mr. Kieren testified that he was aware of the two alleged bar room assaults by Mr. Broyles. (Id. at 75-76.) Mr. Kieren testified on redirect that he was not raising the bar room incidents for the first time as he had written his trial counsel specifically requesting that these incidents be investigated. (Id. at 95-97.) Specifically, Mr. Kieren related two bar room incidents wherein Mr. Broyles was involved: one when Mr. Broyles hit a gentleman in the head with a beer bottle and kept kicking the man, and on another occasion where Mr. Broyles assaulted another man in the bathroom. (Id. at 75-76.) Mr. Kieren stated that there would be police reports on these matters. Mr. Kieren sent letter to counsel on June 16, 1999, and another on July 12, 1999, where he states:

> [A]s an attempt has been made to show David's past violence. I have found out – found out all by myself that he was arrested for domestic violence weeks prior to our fight. This is also the reason for his divorce. I can also give you addresses to the bars where he almost killed two people. Surely there is a police report.

Another letter was sent August 5, 1999. (Ex. 60 at 43.) Mr. Kieren was not permitted to testify to any of this information based upon the failure of trial counsel and the investigator to unearth this information.

Mr. Kieren testified at the evidentiary hearing that he was frustrated that his trial attorney and investigator would not investigate these matters. Mr. Kieren told his trial counsel well before trial that he had a significant fear of Mr. Broyles based upon his violent nature. (Ex. 64 at 70-71.)

Mr. Dennis Reefer was hired as an investigator for Mr. Kieren's state post-conviction relief. (Id. at 39-40.) Mr. Reefer explained that he had been requested to investigate the San Bernadino incident by Mr. Kieren's post-conviction attorney, David Schieck. (Id. at 40.) Mr. Reefer testified that he contacted several California authorities to determine whether there was any information regarding Mr. Broyles and the murders. (Id. at 40-41.) After a limited investigation, Mr. Reefer obtained a report that listed Mr.

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Broyles as a "possible involved witness" in a murder.[9] (Id. at 41-42.)

> Mr. Reefer testified:
>
> On March 27th of '03, I telephoned the San Bernadino County Sheriff's homicide section. I asked them about Mr. Broyles. They said he was basically an informant in an homicide in March 19th of 95. They would provide no more information to me. They asked me to call the Victorville Division that handled this case.
>
> I then telephoned the Victorville Division. He was listed in Report No. 079501287, and he was listed as a possible involved party in a homicide. They said that an Officer Stark, who was now a detective at the Twin Peaks substation, handled the case. They referred me to him.
>
> I then telephoned the Twin Peaks substation. I talked to Detective Stark. He didn't recall the case at all. He said he would check and get back to me. He called me back fifteen minutes later and stated that the report was available at the records section at the sheriff's office and asked me to contact them.

(Id. at 40-41.)

Mr. Reefer explained that he received a copy of the sheriff's department's report on April 13, 2003. Mr. Reefer testified that the report demonstrated that Mr. Broyles was listed "as a possible involved witness." (Id.) Mr. Reefer was asked whether San Bernadino authorities had previously been contacted by any attorney or investigator regarding this incident. Mr. Reefer explained that Detective Stark had not been contacted and the record section had no record of it. (Id. at 43.)

Based on Mr. Reefer's investigation, it is clear that there was some connection between a homicide investigation and Mr. Broyles. The information obtained by the investigator did not establish that Mr. Broyles was in fact guilty of murder, however, the information does establish that Mr. Broyles may well have been bragging about a murder in order to establish some type of bravado.

Mr. Kieren's uncle, Raymond Kieren, testified at the evidentiary hearing that he had also heard Mr. Broyles's claim to be involved in the San Bernadino incident. (Id. at 47-48.) Raymond Kieren testified that during one of the times that he met Broyles, "[h]e just briefly told me, like in passing and I was kind of dumbfounded because I didn't even know him that well, that he had buried a couple of guys in Barstow." (Id. at 48.) Mr. Raymond Kieren testified that he was never called as a witness to establish that the alleged victim was boasting about being involved in the murder and that he took Mr. Broyles'

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[9] It is not important for the purposes of this argument whether Mr. Broyles was in fact guilty of murder but only that he was claiming that he had been involved in a murder, which placed Mr. Kieren in a fearful state of mind at the time of the attack.

statement seriously. (Id. at 48-49.) This testimony would have been admissible to establish that Mr. Broyles was the likely aggressor.

Trial counsel testified during the evidentiary hearing that he did not have a significant recollection of interviewing witnesses. His testimony was vague based upon lack of memory. (Id. at 10.) However, defense trial investigator Reefer testified that he believed that no one had been in contact with California authorities to obtain this information. (Id. at 48-49.) Further, trial counsel was unable to establish proof that any attempt was made to investigate the violent past of Mr. Broyles. None of this was developed on direct appeal and unavailable to the Nevada Supreme Court.

Mr. Kieren should have been permitted to testify regarding Mr. Broyles' violent tendencies. Mr. Kieren received ineffective assistance of counsel for failure to investigate these matters and present this admissible evidence to the jury. Sufficient investigation of these facts and their admission at trial would have bolstered Mr. Kieren's claim of self-defense. This ineffectiveness of counsel prejudiced Mr. Kieren as its admission would have changed the outcome at trial, and its exclusion rendered the jury's verdict unreliable.

///

B. Counsel Failed to Call an Expert to Testify to the Effects of the Defendant's Injuries He Sustained While the Victim Attacked Him.

Mr. Kieren's trial counsel was ineffective in not seeking an expert to testify regarding the effects of the savage beating that he endured at the hands of Mr. Broyles. Mr. Kieren testified at trial and explained on several occasions that he did not remember everything about that evening based upon the violent beating. Mr. Kieren stated, "[W]ell, when he started hitting me, he hit me like three or four times until the glass started to shatter. And I only – from this point is like a strobe light going on and off. I remember bits and pieces of it." (Ex. 13, TT at 256.) Mr. Kieren further explained, "I thought I was going to go into the toilet, I don't remember what happened after that." (Id. at 257.) Mr. Kieren stated when questioned what names Broyles was calling him, "[M]an, I – it's hard for me to remember a lot of that stuff. It was like coming in and out, fading in and out –" (Id.) Mr. Kieren testified, "Yeah. I – as soon as he grabbed the knife – I don't recall anything until he had the knife and he was thumping me in the head with it." (Id. at 259.) Mr. Kieren finally explained, "I don't – you know, I barely recall that

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conversation. Like I said, the whole time I was going in and out. I got on the phone and I says – I said something about there being a shooting and that – she asked me what happened or if I was involved or something like that." (Id. at 274.)

Trial counsel was asked during the state post-conviction evidentiary hearing whether he attempted to retain an expert from Mr. Kieren. He responded, "No. I had trouble getting experts on this case because we were short of money and I had to present that to my boss, who I believe might have been Judge Cherry at the time." (Ex. 64 at 15.) Counsel testified that he "remembered times we had to go to him to discuss that, and I don't have any independent recollection, that if I didn't use an expert it was because we just didn't have the money." (Id.)

Mr. Kieren should have had the opportunity to have an expert explain the ramifications of a human being who has had one ear almost ripped off, another ear partially bitten off and suffered severe blows to the head at the hands of the alleged victim just prior to the shooting. Mr. Kieren had been severely injured as well as having knowledge that his attacker was a confessed murderer. Mr. Kieren clearly had a basis for a psychological evaluation and it was ineffective for counsel not to seek it. Counsel failed to adequately review the record and potential defenses in this case and move for a psychological examination. Failure to do so fell below the minimum standard required for effective assistance of counsel. Mr. Kieren suffered prejudice as the jury did not have the opportunity to hear the whole story.

C. Counsel Failed to Fully Examine Cheryl Ogletree Prior to Trial.

Mr. Kieren's trial counsel was ineffective in not fully examining Cheryl Ogletree regarding her knowledge of Mr. Woods, Mr. Broyles and the case. Mr. Kieren repeats and incorporates the facts as asserted above in Ground One. Ms. Ogletree did not tell Mr. Kieren's trial counsel and investigator that Mr. Woods planned to lie in order to convict Mr. Kieren of murder - statements made by Woods to her that would indicate his bias. She did not fully discuss the case with defense counsel prior to trial, and remembers being interviewed by defense counsel and simply asked whether she would leave her son with Mr. Kieren, to which she answered "no". (Ex. 60 at 42.) Her recollection is that she wanted to tell defense counsel more, but he appeared totally disinterested in what she had to say. (Id.) Ms. Ogletree's assertions should have been used at trial to impeach Mr. Woods, yet a complete lack of effort did not

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allow this to happen as it should have. Failure to fully examine Ms. Ogletree fell below the minimum standard required for effective assistance of counsel. Mr. Kieren suffered prejudice as the jury did not have the opportunity to hear the whole story.

GROUND NINE

Mr. Kieren Was Denied his Fifth, Eighth and Fourteenth Amendment Right to Due Process, Equal Protection and a Reliable Sentence Due to the State's Failure to Disclose Exculpatory Evidence.

The State possessed evidence which, had it been disclosed, would have produced a different result at trial. Mr. Woods gave a voluntary taped statement to Joel Moskowitz of the Clark County District Attorney's Office on July 14, 1997. (Ex. 29 at "A".) The final portion of the tape was either lost, destroyed or concealed by the State. Mr. Woods told the State during that interview that Mr. Broyles bragged to him about committing murders in California. The interview abruptly ends with the statement: "he [Broyles] says, that, when I killed the guy, I put him my trunk. I drove around for hours." (Id.) The State's opposition to the defense's post-trial motion for discovery and a new trial asserted that it was Moskowitz's practice to "close" a statement by noting his identity and time, and stating that the statement was ended. (Ex. 31 at 4.) Further, he would not have done so if the tape had ended and it was possible that the transcriber did not type the closing. (Id.) Moskowitz was unable to locate the original tape recording. This evidence would have enabled defense counsel to impeach Mr. Woods's trial testimony that Mr. Broyles was nonviolent. But for the failure of the State to turn over this exculpatory evidence, Mr.Kieren would have received a more favorable outcome at trial. As such, this Court should grant habeas relief and Mr. Kieren a new trial.

IV.

PRAYER FOR RELIEF

Accordingly, Dennis K. Kieren respectfully requests that this Court:

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

2. Conduct a hearing at which proof may be offered concerning the allegations in this petition and any affirmative defenses raised by Respondents; and

3. Grant any such further relief the Court deems just and proper.

DATED this 15th day of January, 2016.

Respectfully submitted,

LAW OFFICES OF THE
FEDERAL PUBLIC DEFENDER

By: 

RYAN NORWOOD
Assistant Federal Public Defender

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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 January 15, 2016 he served a true and accurate copy of the foregoing to the United States District Court, who will e-serve the following addressee:

Thom Gover
Senior Deputy Attorney General
Criminal Justice Division
555 E. Washington Ave. Suite 3900
Las Vegas, NV 89101

/s/ Adam R. Dunn
An Employee of the Federal Public Defender's Office

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 22 2014

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

DENNIS K. KIEREN, JR.,

Petitioner - Appellee,

v.

STATE OF NEVADA ATTORNEY GENERAL; ROBERT LeGRAND, Warden,

Respondents - Appellants.

No. 11-17915

D.C. No. 3:07 cv-0341- LRH

AMENDED MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted March 14, 2014
San Francisco, California
Memorandum Disposition Filed: March 25, 2014
Motion for Reconsideration Granted and
Memorandum Disposition Withdrawn: July 3, 2014
Amended Memorandum Disposition Filed: September 22, 2014

Before: FARRIS, TASHIMA, and McKEOWN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The State of Nevada appeals the judgment of the district court granting Dennis Kieren's petition for a writ of habeas corpus. Reviewing the district court's grant of the petition *de novo*, *see McMurtrey v. Ryan*, 539 F.3d 1112, 1118 (9th Cir. 2008), we reverse and remand.

1. Kieren exhausted his Fifth and Fourteenth Amendments due process claim. Neither of the State's arguments to the contrary convinces us otherwise. First, a claim may be exhausted even if it is cited in only a reply brief. *Cf. Scott v. Schriro*, 567 F.3d 573, 582-83 (9th Cir. 2009) (per curiam) (holding exhausted a claim raised only in an appendix to a petition for review). Although the state court could have deemed Kieren's claim waived under Nevada Rules of Appellate Procedure 28(c), it did not. Second, Kieren fairly presented his fair trial due process claim by citing "his right to a fair trial guaranteed by the Sixth Amendment." The due process fair trial right and the Sixth Amendment fair trial right are closely intertwined. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). And, under the facts of this case, due process and Sixth Amendment fair trial challenges are "substantial[ly] equivalent." *Picard v. Connor*, 404 U.S. 270, 278 (1971). Kieren's "fair trial" claim therefore allowed the state court an adequate "opportunity to pass upon and correct" the constitutionally erroneous use

of the *Kazalyn* first degree murder jury instruction at Kieren's trial. *Id.* at 275 (internal quotation marks omitted).

2. We filed our original Memorandum Disposition on March 25, 2014. *See Kieren v. Nev. Att'y Gen.*, 2014 WL 1202582 (9th Cir. Mar. 25, 2014). In that Disposition, we affirmed the district court's grant of Kieren's petition, relying substantially on our earlier decision in *Babb v. Lozowsky*, 719 F.3d 1019 (9th Cir. 2013). On July 3, 2014, we granted the State's Motion for Reconsideration of our denial of the State's Petition for Panel Rehearing to consider the effect of the Supreme Court's intervening decision in *White v. Woodall*, 134 S. Ct. 1697 (2014). We recently held that *Woodall* effectively overruled *Babb*. *See Moore v. Helling*, No. 12-15795, 2014 WL 3973407, at *10 (9th Cir. Aug. 15, 2014). We further held that, at least before 2003, it was not an unreasonable application of clearly established federal law not to apply *Byford v. State*, 994 P.2d 700 (Nev. 2000), to convictions pending at the time that *Byford* was decided. *See Moore*, 2014 WL 3973407, at *9-*10. Kieren's conviction was pending at the time *Byford* was decded, but his conviction became final – and the Nevada Supreme Court issued its relevant decision – in 2002. We, therefore, hold that the Nevada Supreme Court did not unreasonably apply clearly established federal law when it declined to apply *Byford* in Kieren's case. *See id.* The district court erred in relying on both

Nika v. State, 198 P.3d 839 (Nev. 2008), and *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), to grant Kieren relief.[1] *See Woodall*, 134 S. Ct. 1697; *Moore*, 2014 WL 3973407, at *10.

• ● •

For the reasons set forth above, we reverse the district court's grant of Kieren's petition for a writ of habeas corpus and remand for consideration of Kieren's remaining claims.

REVERSED and REMANDED.

Future petitions for rehearing will be entertained from this amended memorandum.

[1] As we noted in *Moore*, 2014 WL 3973407, at *10, *Babb* remains good law in all respects, other than its holding that clearly established federal law required *Byford*'s application to pending cases in which the conviction became final before *Bunkley* was decided.

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United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

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- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... APP. 134 ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

APP. 136

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 25 2014

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

DENNIS K. KIEREN, JR.,

Petitioner - Appellee,

v.

STATE OF NEVADA ATTORNEY GENERAL; ROBERT LeGRAND, Warden,

Respondents - Appellants.

No. 11-17915

D.C. No. 3:07 cv-0341-LRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted March 14, 2014
San Francisco, California

Before: FARRIS, TASHIMA, and McKEOWN, Circuit Judges.

The State of Nevada appeals the judgment of the district court granting Dennis Kieren's petition for a writ of habeas corpus. Reviewing the district court's

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

grant of the petition *de novo*, *McMurtrey v. Ryan*, 539 F.3d 1112, 1118 (9th Cir. 2008), we affirm.

1. Kieren exhausted his Fifth and Fourteenth Amendments due process claim. Neither of the State's arguments to the contrary convinces us otherwise. First, a claim may be exhausted even if it is cited in only a reply brief. *Cf. Scott v. Schriro*, 567 F.3d 573, 582-83 (9th Cir. 2009) (per curiam) (holding exhausted a claim raised only in an appendix to a petition for review). Although the state court could have deemed Kieren's claim waived under Nevada Rules of Appellate Procedure 28(c), it did not. Second, Kieren fairly presented his fair trial due process claim by citing "his right to a fair trial guaranteed by the Sixth Amendment." The due process fair trial right and the Sixth Amendment fair trial right are closely intertwined. *See Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). And, under the facts of this case, due process and Sixth Amendment fair trial challenges are "substantial[ly] equivalent." *Picard v. Connor*, 404 U.S. 270, 278 (1971). Kieren's "fair trial" claim therefore allowed the state court an adequate "opportunity to pass upon and correct" the constitutionally erroneous use of the *Kazalyn* first degree murder jury instruction at Kieren's trial. *Id.* at 275 (internal quotation marks omitted).

2. *Babb v. Lozowsky*, 719 F.3d 1019 (9th Cir. 2013), decided while this appeal was pending, resolves the bulk of Kieren's appeal. *Cf. Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). Kieren's case was still pending on direct appeal when the Nevada Supreme Court decided *Byford v. State*, 994 P.2d 700 (Nev. 2000). Therefore, under *Babb*, the failure to apply the new *Byford* instruction in Kieren's case was an unreasonable application of clearly established federal law. *Babb*, 719 F.3d at 1032-33; *see also* 28 U.S.C. § 2254(d)(1).

3. We cannot say that the error was harmless. Kieren argued two theories at trial – provocation and self-defense – that plausibly undermine the conclusion that Kieren acted "with coolness and reflection" after "a dispassionate weighing process." *Byford*, 994 P.2d at 714 (internal quotation marks omitted); *see also id.* ("[A deliberate] determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur."). As to provocation, we have declined to hold *Kazalyn* errors to be harmless where killings followed "heated" arguments or physical confrontations. *Chambers v. McDaniel*, 549 F.3d 1191, 1193, 1200-01 (9th Cir. 2008); *see also Polk v. Sandoval*, 503 F.3d 903, 912 (9th Cir. 2007), *abrogated on*

other grounds as recognized in Babb, 719 F.3d at 1028-30. The evidence of deliberation in this case is generally weaker than in other cases in which *Kazalyn* errors were found harmless. *See, e.g.*, *Winfrey v. McDaniel*, 487 F. App'x 331, 333 (9th Cir. 2012); *Buchanan v. Foster*, 388 F. App'x 723, 725 (9th Cir. 2010); *Evans v. State*, 28 P.3d 498, 521 (Nev. 2001). And the violence of the Kieren/Broyles confrontation, as well as evidence of Kieren's continued passion, suggests that Kieren had insufficient time to cool before killing Broyles. *Cf. Valdez v. State*, 196 P.3d 465, 481 (Nev. 2008) (en banc); *Allen v. State*, 647 P.2d 389, 391 (Nev. 1982). As to self-defense, the jury could have plausibly credited Kieren's (albeit disputed) testimony that he acted in self-defense. Although the jury rejected a *complete* self-defense theory, the theory could have negated or mitigated elements of the first degree murder *mens rea* requirement, reducing the degree of Kieren's conviction. *See Martin v. Ohio*, 480 U.S. 228, 234 (1987); *Leonard v. State*, 958 P.2d 1220, 1228 (Nev. 1998).

The *Kazalyn* error "went to the very heart of the case," because Kieren's state of mind was the main issue at trial. *Chambers*, 549 F.3d at 1200. Under these facts, we, like the district court, are left in "grave doubt" as to the harmless of the instructional error. *Babb*, 719 F.3d at 1033 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995)). There is a "reasonable probability" that the trial court's use

of the *Kazalyn* instruction "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)) (internal quotation marks omitted).

The judgment of the district court is **AFFIRMED**.

APP. 141

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DENNIS K. KIEREN, JR.,

Petitioner,

vs.

STATE OF NEVADA ATTORNEY GENERAL , *et al.*,

Respondents.

3:07-cv-00341-LRH-WGC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on the merits of the remaining claims. The Court reaches only Ground 5 of the amended petition, which alleges that petitioner was denied due process of law because the jury instructions failed to correctly instruct the jury as to the elements required for a conviction for first degree murder under Nevada law.

Background

Petitioner Dennis Kieren seeks to set aside his 1999 Nevada state conviction, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon. He is serving two consecutive life sentences without the possibility of parole.

Kieren was convicted of the March 7, 1996, murder of David Allan Broyles. It was undisputed that Kieren shot Broyles multiple times with a 9 mm semiautomatic handgun. The factual dispute at trial focused upon the circumstances leading up to the shooting and Kieren's state of mind at the time of the shooting. The State and the defense presented markedly different evidence as to what occurred. The jury instructions at issue went to the heart of the dispute as to intent, under either account of the event. The question at trial was not whether Kieren killed Broyles but instead was his state of mind at

the critical time, which bore not only on his defense of self-defense but also upon, among other things, the issue of whether he was guilty of second degree murder rather than first degree murder.[1]

Dennis Kieren had known David Broyles and Michael Woods, separately, for approximately three years prior to the incident. Kieren had interacted socially and professionally with Broyles and Woods, again separately, in one fashion or another over this time. Broyles and Woods also had known each other for about four years, but each did not know that the other also knew Kieren. Woods and Kieren each had some background, to one extent or another, in fugitive retrieval ("bounty hunting") and/or armed security work.[2]

At the relevant time, Broyles was renting from Kieren and staying at his house. In or around December 1995, Woods returned to Las Vegas from out of state. Woods contacted Kieren, although they had had a falling out a year or so prior to that over money that Kieren allegedly owed Woods. They arranged for Woods to also rent space in Kieren's house, with Woods sleeping on Kieren's sofa.[3]

As of the first part of March 1996, Broyles was planning to move out or was in the process of moving out of Kieren's place. However, as of the date of the incident he was not fully moved out. There was friction at that time over money between Kieren and Woods; and there was friction separately between Kieren and Broyles, for one reason or another.[4]

On the evening of March 6, 1996, Woods and Broyles, who had been working together on a painting job, were in and out of Kieren's house. Kieren was there. Woods and Broyles eventually

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[1] The following summary in the text is intended only as an overview of the basic factual particulars of the case in order to provide context for the discussion of the issues. Any lack of mention of specific evidence in this overview does not signify that the Court has overlooked or ignored that evidence in considering a particular issue.

The Court makes no credibility findings or other factual findings regarding the truth or falsity of evidence or statements of fact in the state court. The Court summarizes same solely as background to the issues presented in this case. No statement of fact made in describing statements, testimony or other evidence in the state court, whether in this overview or in the discussion of a particular issue, constitutes a finding by this Court.

[2] #22, Ex. 12, at 150-59 & 189-93 (Woods); *id.*, Ex. 13, at 241-44 & 277-78 (Kieren).

[3] #22, Ex. 12, at 153-56 (Woods); *id.*, Ex. 13, at 241-45 (Kieren).

[4] #22, Ex. 12, at 156-57, 165-67, 190-95 & 204-05 (Woods); *id.*, Ex. 13, at 242-45 & 291 (Kieren). Woods testified that he also was still living at Kieren's house but also was in the process of moving out. Kieren maintained that Woods no longer was living at his house by that time. The distinction is not critical to resolution of the case.

picked up Kristi Telles, who was dating Broyles, after she got off work and headed back to Kieren's house.[5]

After returning to Kieren's house, Woods, Broyles, and Telles sat around in the garage with the garage outer door closed or nearly fully closed, drinking and also smoking some marijuana.[6]

Kieren came into the garage from the house a number of times. He was having words with Broyles about one household complaint or another, such as the three allegedly drinking all of his beer, eating all of his pizza, and not cleaning up after themselves. He would complain about one thing or another and then go back into the house.[7]

At some point, Broyles slipped away into the house without Michael Woods noticing. Woods testified that he "heard something sound like a thump" and noticed that Broyles was no longer in the garage.[8]

Woods went into the house looking for Broyles, either with Telles or followed shortly thereafter by Telles. Inside, the only lights showing were the aquarium lights and the light coming from underneath Kieren's closed master bedroom door. Woods listened through the door but could not hear anything. Woods knocked but got no response. Woods grabbed the door knob to enter. When Woods was at the door and before he did anything further, Telles went back to the garage.[9]

When Woods opened the bedroom door, he saw the closet sliding doors laying on the floor with glass and blood on the carpet. A trail of blood led into the bathroom. When Woods entered the bathroom, he saw Broyles standing over the clothed Kieren in the empty tub. According to Woods' testimony, the left-handed Broyles was holding Kieren's ponytail with his right hand and had his left hand over the top of the blade of a knife which was in Kieren's hand. Kieren kept the knife on the

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[5] #22, Ex. 12 at 158-63 (Woods); *id.*, Ex. 13, at 245-50 (Kieren); #21, Ex. 11, at 99-103 (Telles).

[6] #22, Ex. 12, at 163-64, 192-93 & 205-06 (Woods); *id.*, Ex. 13, at 246-47 & 249-50 (Kieren); #21, Ex. 11, at 103-05 & 112-13 (Telles).

[7] #22, Ex. 12, at 164-65 & 197-99 (Woods); *id.*, Ex. 13, at 250-55 (Kieren); #21, Ex. 11, at 104 & 113(Telles).

[8] #22, Ex. 12, at 167-68 & 198-99 (Woods); #21, Ex. 11, at 105 (Telles).

[9] #22, Ex. 12, at 168-70 & 199-200 (Woods); #21, Ex. 11, at 106-07 & 114-15 (Telles).

window ledge in the shower. Although Woods maintained that Kieren's hand was on the handle of the knife, he testified that Broyles had the knife pushed up against the left side of Kieren's face, with his hand over the top of the knife. Broyles further had his head up against the left side of Kieren's face.[10]

Notwithstanding his testimony that it was Kieren's hand on the handle of the knife, Woods testified that he went up to Broyles and said: "David, what the f___ are you doing?" Woods acknowledged on cross-examination that he stated to the police in his initial written statement that he thought Broyles was going to kill Kieren when he first saw them in the bathroom.[11]

Broyles then bit Kieren's ear off, pulled it off, and spit it out in the tub. Kieren let go of the knife, and Broyles took full control of the knife.[12]

Woods testified that Broyles then said to him: "Get the f___ away from me, I will stab you too."[13]

Woods tried to calm Broyles down, defuse the situation, and get the knife from him. According to Woods, Broyles stated that Woods did not understand, that Kieren had been going for his gun, and that "[n]obody is leaving here alive." He would not let go of the knife, saying that "no, he was going to kill me." Woods ultimately was able to get the knife from Broyles, with Broyles asking Woods to hold Kieren down and give him a couple of minutes to get out of the house. Woods took hold of Kieren's ponytail in place of Broyles, and Broyles released the knife to him. Broyles then left the bathroom, and Woods heard the bedroom door close behind him.[14]

According to Kieren's testimony, the events that occurred in his room up to that point, including those that occurred prior to Woods arriving, transpired as follows.

According to Kieren, Broyles came into his room, and the two had a tense verbal exchange. Broyles then grabbed him by his hair and struck him repeatedly with his drink glass, while kneeing him

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[10] #22, Ex. 12, at 170-72 & 201-03. See also *id.*, Ex. 13, at 285 (Kieren testimony as to usual location of knife).

[11] *Id.*, at 172, 201-02 & 206.

[12] *Id.*, at 172-73.

[13] *Id.*, at 172.

[14] *Id.*, at 173-76.

and calling him a "punk" and a "bitch." Kieren struggled to break free, and the two men crashed through the closet doors. Broyles continued hitting him with the glass three or four more times until the glass started to shatter. Kieren testified that from this point "it is like a strobe light going on and off" and that "I remember bits and pieces of it." The struggle carried on into the bathroom, where Broyles struck Kieren several times in the head with a cologne bottle until the bottle broke, with Kieren recalling that he could smell the cologne after the bottle broke.[15]

According to Kieren, he fell back into the tub, and Broyles continued to attack him, holding him by the hair and calling him names throughout. Kieren was unable to get any leverage to push his way back out of the tub. Broyles told him that he was going to bite his ear off, and then he did so, spitting Kieren's ear back at him. Broyles then reached up and grabbed Kieren's knife from the window ledge and started thumping him on the head with it. Broyles then "took a hold" of Kieren's nose with his mouth, at which point Woods walked in.[16]

According to Kieren, Woods said to Broyles: "What the f___ are you doing?" Broyles responded that he was sick of Kieren's mouth, that he was done with him, and that he was going to kill Kieren. Woods asked for the knife and then tried to grab Broyles' hand. Broyles jerked his hand away and held the knife up against Kieren's throat. Kieren held his hands up to protect himself, and the knife would cut his hand every time that Woods tried to grab it. Similar to Woods' account, Woods ultimately was able to get Broyles to give him the knife, and Broyles asked Woods to hold Kieren down until Broyles left the room. According to Kieren, Broyles leaned down to him, said "now you are going to die," and ran from the room.[17]

According to Woods' testimony, after Broyles left the room, Kieren immediately tried to get out of the tub. Woods told him to stay in the tub. Kieren said: "No, you don't understand, Mike. He bit my f___in ear off. I am going to kill him." Kieren got up out of the tub. Woods still had the knife that he had obtained from Broyles in his hand. Kieren pushed past him and said: "I am going to kill him.

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[15] #22, Ex. 13, at 255-57.

[16] *Id.*, at 257-60.

[17] *Id.*, at 261-64, 288-89 & 292.

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He bit my f___ing ear off." Woods urged Kieren to let the police handle the situation. Kieren went over to his desk, retrieved his Ruger 9mm handgun, chambered a round, and put the gun to Woods' forehead. He told Woods, who still had the knife, to get back.[18]

According to Woods, Kieren then exited the bedroom while keeping the gun pointed at him. He then started "sweeping the hall," meaning that he kept the weapon in front of him sweeping the area in "combat mode" from a military stance. He did so while keeping an eye on Woods, who kept pace with him about three to four feet away, with the knife still in his hand. Kieren moved down the hallway, keeping his back to the wall and his weapon in front of him, pointing alternately at Woods and then down the hallway.[19]

Woods testified that Kieren swung open the door to Broyles' bedroom and swept the bedroom with his weapon in combat mode. He similarly swept the hall bathroom, the living or dining room, and the kitchen. The dogs were standing at the sliding glass patio door, so it did not appear that anyone had gone that way. Throughout, Kieren would sweep the weapon back to Woods, who still had the knife in his hand.[20]

Woods testified that Kieren then headed for the door to the garage, which opened inward into the house. Woods kept pace with him, three to four feet away, with the knife still in his hand, although he maintained at trial that he did not realize at the time that he still was holding the knife. Woods urged Kieren again to let the police handle the situation and "don't do this." Kieren then swung the door open with his left hand while holding the gun in his right.[21]

According to Woods' testimony, Broyles was standing in the garage reaching for the switch that opened the garage outer door. Kieren raised his weapon, and Broyles stepped back with his arms raised above his head saying "no, don't shoot . . . ." Kieren then fired, with the shots being "real rapid." Woods believed that the first shot hit Broyles in the shoulder, turning him. Another shot hit him in the

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[18] #22, Ex. 12, at 176- 77.

[19] *Id.*, at 177-80.

[20] *Id.*, at 178-80.

[21] *Id.*, at 179-80.

hip, and he started going down, with the door from the house to the garage swinging shut at the same time. According to Woods, who was inside the house, he was able to tell that Broyles was going to the ground because Kieren's shots were following him to the ground as he kept firing. Kieren kept firing until the door swung closed to about an inch from being fully shut.[22]

Woods testified that Kieren then spun toward him, pointing the gun directly at him again. Kieren then flipped the door open again. Broyles was laying face down on the concrete, with his head laying on the threshold. Woods continued:

> And David was laying down there. He spun down, put the gun down towards him point blank and pulling the trigger. He shot him four or five times.

According to Woods, Kieren went "pow, pow, pow, pow, pow like that" and then turned around and pointed the gun at him again. Woods just stood there. Kieren walked around Woods into the kitchen with the gun pointed on him and called 911.[23]

According to Kristi Telles' testimony, Broyles came back to the garage covered in blood but with no injuries that were apparent to her on that quick view. He said to her: "Get your stuff. Let's get out of here." Kieren of course was inside the house at the time of any such statement. Telles testified that Kieren opened the inside garage door, came into the garage, pointed the gun at them, "and just started firing." Broyles was standing "just a couple of feet" from the door. The outer garage door was closed. Telles testified that Broyles said "no, don't" before Kieren fired. According to Telles, Broyles fell to the ground, Kieren stood there and stared at him "for about a second," and he "then started firing again at him when he was laying down on the ground." Telles ran across the garage trying to get away from the line of fire. She testified that "I guess when he ran out of bullets," Kieren stood there staring at Broyles. Michael Woods then entered the garage.[24]

According to Kieren's testimony, after Broyles left the master bedroom, he tried to get out of the tub a couple of times but Woods slammed him back down each time. Woods was telling him that

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[22] #22, Ex. 12, at 180-82.

[23] *Id.*, at 182-83.

[24] #21, Ex. 11, at 108-111, 113-15 & 117-18.

he needed to let Broyles cool down and that if he got up he "would end up dead." Kieren was scared. He did not want to be caught in the tub, because he believed that Broyles would come back. He had heard the home's alarm system beep when Broyles had gone out through the door leading into the garage.[25]

Kieren testified that he ultimately was able to get up, and he then "took off running" and grabbed his handgun. He could hear things being moved in the garage "like the weights," and he knew that Broyles kept some camping gear out there. He assumed that Broyles was going through that gear. At that point, Woods was standing behind Kieren with the knife. Kieren turned and looked at him, and he then took off running. He stated that "I was trying to get distance between" Woods and Broyles. Kieren ran to the garage.[26]

According to Kieren, when he opened the inside garage door, Broyles was by his weight bench digging in his denim jacket and a bag. Kieren stepped into the garage onto the step between the house and garage. Broyles looked up, said "what's up? You want some more?," and started running at him. Broyles was starting to pull something black out of a jacket or a shirt. Kieren knew that Broyles kept several hunting knives in the garage, and he believed that Broyles was pulling a knife "or something." He felt like he was in danger. According to Kieren, Kristi Telles was saying to Broyles: "David, David, don't do it."[27]

Kieren testified that he "just started back peddling and shooting." He testified that he shot until the door closed, shooting "one through the door or something." He stated that "I could have swore it was like three or four" shots. Kieren maintained that one of the bullets "spun him around like a circle and then I kept firing until the door closed." According to Kieren, he did not see Broyles hit the ground. When either Kieren or Woods opened the door again, Broyles was laying on the floor with his head "real close to the door." #22, Ex. 13, at 271-74 & 289.

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[25] #22, Ex. 13, at 264-66 & 285.

[26] *Id.*, at 266-69 & 286-87.

[27] *Id.*, at 267-72.

According to Kieren, Woods was saying to him: "What the f___ did you just do?" Woods pushed by him out into the garage. Kieren went to the kitchen and called 911.[28]

According to Woods' testimony, after the shooting, when he went into the garage, he told Telles: "Get the f___ out of the house. No one is leaving here alive." She just stood there. He hit the door switch to the outer garage door "because I couldn't understand why the garage door was still down." Telles still was standing there as the door started going up, perhaps in shock, and he told her again: "Get the f___ out of here now." Telles then turned and ran out of the garage. According to Woods, Kieren pointed the gun at Telles as she was going out under the door. Woods turned around to face Kieren, with the knife still in his hand, and Kieren stepped back and pointed the gun at him.[29]

Telles testified that she ran next door after Woods told her to leave and opened the garage door. According to her testimony, she saw Kieren going in and out of the house as she was running. She rang the neighbor's doorbell frantically. When a woman answered, she told her what happened and asked her to call 911. She stayed at the house thereafter. She had been grazed by a bullet on her left leg.[30]

Woods testified that after Telles left and Kieren had the gun pointed at him, he then pointed it down at Broyles again. Woods thought that Kieren was going to shoot Broyles again. Kieren was saying something on the phone about it being self defense. Woods, who still had the knife in his hand, said "you lying son-of-a-bitch" and shoved Kieren hard back towards the kitchen. They shoved back and forth, with Kieren saying that it was self defense and Woods saying "you didn't have to shoot David like that, you son of a bitch."[31]

Although it would have seemed from Woods' testimony that the above exchange occurred in the garage, Woods testified that he then opened the door, stepped back out into the garage, and grabbed

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[28] #22, Ex. 13, at 272-74.

[29] #22, Ex. 12, at 183-84.

[30] #21, Ex. 11, at 111-12. The neighbor, Patricia Barbieri, testified that she "heard a couple of pops," "[k]ind of like a cap gun," but she was not sure what it was. Less than a minute later, a young woman was pounding on her door. When she answered the door, the young woman said "he shot him, he shot him" and asked her to call the police. The young woman thereafter cowered in her hallway, "on the floor curled in a ball." She kept repeating: "He shot him. He shot him." She said that the "he" was "Dennis." #21, Ex. 10, at 56-60.

[31] #22, Ex. 12, at 184-85.

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Broyles and turned him over. Broyles was so close to the door that when the inside garage door kept closing back, it would strike Broyles in the head.[32]

Woods testified that it was at this point that he realized that he still had the knife in his hand, and he threw it to the other side of the garage.[33]

After rolling Broyles over, Woods attempted CPR, but there did not appear to be much that Woods could do for him. According to Woods, Broyles "gasped for air and turned his head and gasped again." Kieren looked out again and pointed the weapon at Woods' head and then at Broyles again. Woods grabbed Broyles by the hand and pleaded with him "please, don't die David," stating: "You are not going to die in this f___ing pig's house."[34]

Woods then dragged Broyles out of the garage – away from the scene of the shooting – out onto the driveway.[35]

James Hawes lived three houses west of Kieren's house. He was getting his mail from his box in the neighborhood's cluster mailboxes a couple of homes away from Kieren's house when he heard three gunshots. He testified that one of the shots "whizzed" by his ear. He jumped to the ground, then ran to his house to get his cell phone, and then called 911 while standing behind his jeep. He looked toward Kieren's house, as he believed that he had heard the sound of the shots come from there. By this point, the garage door was open, and a man was standing over a body laying in the garage. Hawes had seen a figure run from the house before that. Hawes then saw Kieren come to the inside garage door, and the man said: "You hunted him down and shot him like a dog, you mother f___er." The man then ran toward Kieren and they began fighting in the door frame to the house. Kieren left and then the man dragged the body out into the street. Hawes testified that he was thirty yards from the house and that the body was ten feet from the garage door when the body was inside the garage. He did not see anything on the floor of the garage from his vantage point. #21, Ex. 10, at 17-27.

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[32] #22, Ex. 12, at 185.

[33] *Id.*

[34] *Id.*, at 185-86.

[35] *Id.*, at 186.

Ronald Allen lived "kitty- corner" from Kieren's house. Allen was awakened by a neighbor knocking on his door and ringing his doorbell. When he went outside after answering the door, he saw a body laying on the ground with a man who he believed to be called "Mike" holding the body. The man appeared to be "very scared, agitated, crying," "real nervous," and "shaking." Allen asked him what happened and he said: "Dennis shot David. Dennis killed David." Although Allen responded affirmatively that he was awakened by the knocking neighbor, he also testified that he thought that he heard some shots but he thought that they possibly were coming from a nearby outdoor shooting range.[36]

There was no testimony by any of the neighbor witnesses who testified at trial of hearing specifically multiple gunshots followed by a sustained pause and then more multiple gunshots coming from Kieren's house.

Forensic examination of the scene and physical evidence reflected the following.

Consistent with the testimony as to an extremely violent fight in Kieren's master bedroom, there was apparent human blood throughout the carpet; on top of the papers on the work desk in the office area in the corner; on top of the sliding closet doors that had been knocked down; on the doorway leading into the master bath, as if someone had been bounced into it; smeared over the shower stall, tub area and the window sill; and also on the toilet.[37]

Consistent with Kieren's testimony that Broyles hit him repeatedly in the head with a drink glass during the violent struggle, there were shards of broken glass apparently from a drinking glass throughout the master bedroom, even on the bed, intermixed with blood.[38]

Consistent with Kieren's testimony that Broyles hit him repeatedly in the head with a cologne bottle, there were shards of glass in the master bath from an apparent cologne or aftershave bottle with apparent blood mixed in, with the detective testifying that the bottle "really broke apart."[39]

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[36] #21, Ex. 10, at 27-35.

[37] *Id.*, at 77-81 & 87 (Detective Bigham).

[38] *Id.*, at 78.

[39] *Id.*, at 87.

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An empty sheath for a knife was found laying on the rug in the master bath.[40]

An empty holster with a magazine with a few cartridges for Kieren's 9mm Ruger was found under the sliding closet doors on the floor.[41]

Kieren was examined at the trauma center at University Medical Center a short time after the incident. Examination reflected that the top third of his right ear had been torn or cut off. He additionally had multiple lacerations on his forehead and scalp, and he had superficial lacerations on his hands from a sharp instrument. The trauma center physician could not provide an opinion at the time of trial -- relying upon his notes rather than an independent recollection of the examination – as to whether, or not, these injuries were consistent with Kieren having been hit on the head with both a drinking glass and a cologne bottle that shattered and attempting to shield himself from having a knife held up against him.[42]

In Broyles' bedroom, there was blood on the door entering the room. The police found a gun box for a .45 caliber Para-Ordnance semiautomatic handgun, without the gun, laying open on the futon, with a few spatterings of apparent blood on the box, as well as an empty leather holster. It appeared that someone who had been involved in the struggle in the master bedroom had gone into Broyles' bedroom and transferred some blood to that location. The police did not find any live .45 rounds there.[43]

The parties stipulated that the 9mm Ruger was registered to Kieren and that the .45 Para-Ordnance was registered to Broyles.[44]

The Court can find an explicit reference in the trial testimony to only seven spent shell casings being recovered from inside the house in the general vicinity of the door to the garage. The State referred to nine casings in its closing, perhaps per the exhibits. One bullet had gone through the doorknob to the garage door. One bullet jacket (the usually copper cladding enveloping an otherwise

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[40] #21, Ex. 10, at 78-79 (Bigham).

[41] *Id.*, at 79-80.

[42] #22, Ex. 13, at 218-30.

[43] #21, Ex. 10, at 75-77, 82-85 & 90-91.

[44] #22, Ex. 12, at 213.

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usually lead bullet) was found in the garage. The detective testified that the jacketing often would become detached when a bullet struck an object. Two exit holes were found in the garage door after the detectives had it lowered, which potentially would explain why James Hawes heard a round "whiz" by his ear even though the testimony was that the garage door was down when the shots were fired.[45]

On the floor of the garage, the police found Broyles' .45 Para-Ordnance handgun, an ammo box with .45 ammunition, and nine unfired .45 cartridges on the floor by the gun. These items were by the threshold of the inner garage door leading to the house. The .45 was holstered and unloaded, and there was no magazine either in the weapon or nearby on the floor. Woods and Telles each testified that they did not see Broyles' .45 or the .45 ammunition in the garage prior to the shooting. The State postulated during closing that Kieren may have placed the .45 there after the shooting and before the police arrived. The State presented no evidence tending to establish that he did so, however. If Kieren had done so, he would have been placing a holstered gun in the garage.[46]

As noted, the .45 Para-Ordnance was unloaded and there was no magazine nearby when the police investigated the scene. However, the police found a loaded .45 magazine for the gun in Broyles' denim jacket that apparently also had been dragged out onto the driveway when Woods dragged Broyles out of the garage. There was no evidence, or suggestion made, that Kieren placed the loaded .45 magazine for the Para-Ordnance in Broyles' jacket pocket out in the driveway.[47]

The police also found a knife in the garage. The State maintained that this knife was the knife that was in Woods' hand until after the shooting, at least according to Woods' testimony that he had a knife up to that point. #21, Ex. 10, at 73 (Bigham); #23, Ex. 14, at 335 (closing).

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[45] #21, Ex. 10, at 70-71 & 74-74 (Bigham); #22, Ex. 12, at 209-10 (Bigham second testimony); *id.*, Ex. 14, at 325 (closing argument). The "bullet" technically is only the projectile that is fired from the gun. The "casing" or "case" is the usually brass shell that holds the primer and into which the bullet is seated during manufacture. This casing is ejected through a separate port during the firing of each round from a semiautomatic weapon. A "cartridge" is the preassembled unfired combination of the bullet and the casing that is loaded into the gun in preparation for firing. See,e.g., #21, Ex. 10, at 71-72. Only seven ejected casings specifically were referred to in the transcript (as items L, M, N, O, P, Q and S, at 74).

[46] #21, Ex. 10, at 71, 72-73 & 83-92 (Bigham); #22, Ex. 12, at 159-60 & 195-97 (Woods); #21, Ex. 11, at 115-17 (Telles); #22, Ex. 14, at 354 (rebuttal argument).

[47] #21, Ex. 10, at 86 & 92 (Bigham).

Broyles was hit with a total of seven bullets, five of which were recovered from his body and two of which produced exit wounds. The medical examiner could not identify with any medical certainty the order in which the bullets struck Broyles. In no given order, he was struck once in the front left shoulder, twice in the left upper arm passing through into the upper body, once through and through in the left hip, once in the back of the left shoulder over the shoulder blade, once in the back of the right shoulder medial to the shoulder blade, and once through and through in the front of the right thigh. The bullet that hit the front of the left shoulder and the two that hit initially the left upper arm all created considerable damage to the left lung, diaphragm, liver, stomach and colon. The two bullets that hit the back left and right shoulder respectively both struck the heart and each one struck a lung.[48]

The shots struck the body at "roughly the same time," but the medical examiner was contrasting that measure to longer periods of hours or days. When asked whether the wound tracks were consistent with Broyles being shot while laying horizontal, the medical examiner responded: "I can't say for sure, but I cannot rule it out. I would have to say that it is possible." He acknowledged that there would be other scenarios that would create the wound tracks, stating that "I would not want to get real dogmatic about any one of them." He testified that there were no powder burns reflecting a contact or close range shot, but he would have to examine the clothing being worn and the characteristics of the weapon and ammunition to provide a definitive opinion in that regard. The medical examiner's testimony thus did not establish with any degree of medical certainty the sequence of the shots, the time interval between shots, the range from which shots were fired, or the position of Broyles' body when he was struck by any of the various shots.[49]

The parties stipulated that the bullets recovered from Broyles' body and the 9 mm casings recovered at the scene came from Kieren's Ruger.[50]

The State suggested in closing argument that the fact that all of the 9 mm casings were recovered inside the house rather than in the garage contradicted Kieren's testimony that he had stepped onto the

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[48] #21, Ex. 10, at 44-49.

[49] *Id.*, at 49-50 & 53-54.

[50] #22, Ex. 12, at 213.

threshold step of the garage before then firing as he backed away from Broyles.[51] However, the State presented no forensic firearms examiner expert testimony tending to support such an inference.[52]

The State further presented no evidence identifying the source of the blood on the gun box for Broyles' .45 Para-Ordnance in his bedroom. Of course, such evidence would have been inconclusive given that, even if Broyles was the one to retrieve the .45 from the box, he could have transferred Kieren's blood to the box that had been transferred to him during the violent fight.

The physical evidence, specifically blood pooling, tended to establish that Broyles was laying on the threshold of the inner garage door leading into the house.[53] While Woods' testimony has Broyles stepping back before Kieren started firing, both Woods' later testimony and the physical evidence has Broyles in close proximity to the door when he fell. The neighbor Hawes' recollection that Broyles' body was ten feet from the inside garage door was not supported by the physical evidence.

A jailhouse informant, Andrew Rutberg, testified that Kieren said to him that he was claiming self defense "but in effect what happened is he had a fight with someone." According to Rutberg, Kieren said that someone had bitten his ear off and he chased them out through the garage and shot them. Kieren stated that he did this "[b]ecause he was angry his ear was bitten off." During cross, it was revealed that Rutberg had worked either for or with Kieren. Rutberg denied that Kieren had fired him for impropriety, and he denied that Kieren had aided a criminal investigation against him. Rutberg previously had written the district attorney's office stating that he did not recall anything. He stated that he wrote the letter because he did not want to be transported to the county jail again.[54]

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[51] #22, Ex. 14, at 325-26.

[52] The Court notes this because a firearm and toolmark examiner generally will not opine as to the specific directionality of ejected casings from a weapon, particularly a weapon that has not been tested as to same, given the wide range of factors that can affect the final location of an ejected casing. See,e.g., *Barbara A. Pinkston v. Sheryl Foster*, No. 2:07-cv-01305-KJD-LRL, #17, Ex. 36, at 201-02 & 225-27. If the State were correct that the position of the casings established that Kieren fired all of the rounds from inside the house, then that would tend to undercut Woods' testimony that Kieren fired a second volley of four or five shots from point blank range while Broyles lay on the garage floor.

[53] #21, Ex. 10, at 91-92 (Bigham).

[54] #21, Ex. 11, at 120-27.

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Cheryl Ogletree was called by the defense. Ogletree and Kieren had a child together. Her testimony began in a disjointed fashion because defense counsel and the witness referred to Broyles when they clearly meant Woods. Ogletree knew Woods through Kieren. According to Ogletree, Woods visited her after the shooting shortly after Easter 1996. Ogletree testified that Woods said to her that "he was going to get Dennis."[55]

Instruction Numbers 7 and 8 stated the entirety of the definition specifically of first degree murder in the instructions to the jury:

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

#22, Ex. 15, Instruction Nos. 7 and 8. These instructions, again, constituted the entirety of the definition specifically of first degree murder in the jury instructions. There were no instructions distinguishing "deliberate" from "premeditated."

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[55]#22, Ex. 13, at 230-35. After trial, the defense filed a motion for a new trial on the basis of newly discovered evidence. Ogletree attested in a supporting affidavit: (1) that at the time of trial, she felt hostility toward and a desire for revenge as to Kieren because he had injured their child; (2) that Woods stayed with her for a few days after April 4, 2006; (3) that Woods told her that Kieren had made fun of her and told people that she was unattractive, which increased her anger at Kieren; (4) that Woods told her that Broyles had physically charged Kieren at the time of the shooting, that Broyles had closed the garage door to load his gun, and that Broyles did not intend to leave the property but instead intended to kill Kieren; (5) that Woods told her that it was his intention to see that Kieren was convicted of murder; (6) that Woods stated that he moved Broyles' body from the garage in order to prevent the crime scene evidence from showing self defense by Kieren; (7) that Woods told her that it was her duty to lie at trial to help Woods convict Kieren, because of what he had done to their child; (8) that Ogletree did not tell the defense any of this; and (9) that she had remorse after Kieren was convicted for not coming forward with the truth. #22, Ex. 21. Petitioner alleged in Ground 1 of the amended petition that he was denied due process when the state district court denied the motion for new trial. Ground 1 was dismissed as unexhausted following upon the Court's holding that petitioner did not present a federal due process claim in connection with same in the state courts.

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The defense objected and requested a charge defining deliberate as a separate element. The state trial court overruled the objection and rejected the defense charge.[56]

The State's closing argument, consistent with the jury instructions given, similarly conflated deliberation and premeditation:

> The word [sic] deliberation comes in is whether it is premeditated or not. And that is the difference between first degree murder and second degree murder.
>
> First degree murder is premeditated murder. Second degree murder is not premeditated murder.
>
> But premeditation again, does not mean that you sit and stew about it, that you planned it out. It can be as instantaneous as two thoughts of the mind.
>
> As one thought follows the other, the premeditation can be at any moment up to or at the time of killing as his Honor has instructed you. That's murder.

#22, Ex. 14, at 309.

The State three times thereafter equated a "spiteful" or "vengeful" murder with a deliberate or premeditated murder.[57]

The Nevada Supreme Court's February 8, 2002, decision on direct appeal summarily rejected the claim now presented in Ground 5, holding that Kieren's claim "that he was denied a fair trial when the jury was not instructed on the element of deliberation in first degree murder . . . lack[s] merit."[58]

Standard of Review on the Merits

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly deferential" standard for evaluating state-court rulings that is "difficult to meet" and "which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). Under this highly deferential standard of review, a federal court may not grant habeas relief merely because it might conclude that the state court decision was incorrect. 131 S.Ct. at 1411. Instead, under 28

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[56] #22, Ex. 14, at 297-98; *id.*, Ex. 15, Proposed Instruction D-1.

[57] *Id.*, at 312, 324 & 361.

[58] #23, Ex. 51, at 3-4.

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U.S.C. § 2254(d), the court may grant relief only if the state court decision: (1) was either contrary to or involved an unreasonable application of clearly established law as determined by the United States Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 131 S.Ct. at 1398-1401.

A state court decision is "contrary to" law clearly established by the Supreme Court only if it applies a rule that contradicts the governing law set forth in Supreme Court case law or if the decision confronts a set of facts that are materially indistinguishable from a Supreme Court decision and nevertheless arrives at a different result. *E.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15-16, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003). A state court decision is not contrary to established federal law merely because it does not cite the Supreme Court's opinions. *Id.* Indeed, the Supreme Court has held that a state court need not even be aware of its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.* Moreover, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." 540 U.S. at 16, 124 S.Ct. at 11. For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to clearly established federal law.

A state court decision constitutes an "unreasonable application" of clearly established federal law only if it is demonstrated that the state court's application of Supreme Court precedent to the facts of the case was not only incorrect but "objectively unreasonable." *E.g., Mitchell*, 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

To the extent that the state court's factual findings are challenged, the "unreasonable determination of fact" clause of Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal courts "must be particularly deferential" to state court factual determinations. *Id*. The governing standard is not satisfied by a showing merely that the state court finding was "clearly erroneous." 393 F.3d at 973. Rather, AEDPA requires substantially more deference:

> . . . . [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not

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reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence.

The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Pinholster*, 131 S.Ct. at 1398.

Discussion

The Court reaches only Ground 5 of the amended petition.

In Ground 5, petitioner alleges that he was denied due process in violation of the Fifth and Fourteenth Amendments because the trial court's jury instructions allegedly failed to adequately distinguish between the elements of malice aforethought, premeditation, and deliberation. Petitioner maintains, *inter alia*, that the premeditation instruction used at his 1999 trial constituted what is referred to under Nevada state practice as a *Kazalyn* instruction, as a substantially similar instruction first appeared in a published decision in *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).[59] The Supreme Court of Nevada later concluded in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), prior to Kieren's appeal, that the *Kazalyn* instruction "blur[red] the distinction between first- and second-degree murder" by not sufficiently distinguishing between the distinct elements of deliberation and premeditation. *See* 116 Nev. at 235, 994 P.2d at 713. The state supreme court subsequently held, however, during Kieren's direct appeal, that *Byford* did not signify that the giving of the *Kazalyn* instruction violated any constitutional rights, such that the *Byford* holding was not a holding of constitutional dimension that must be retroactively applied. *Garner v. State*, 116 Nev. 770, 6 P.3d 1013, 1025 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002). The Ninth Circuit has held, however, that the giving of a *Kazalyn* instruction deprives a defendant of due process, subject to harmless error analysis. *Polk v. Sandoval*, 503 F.3d 903, 909-11 (9th Cir. 2007).

The Supreme Court of Nevada concluded in *Byford* that the *Kazalyn* instruction erroneously "blur[red] the distinction between first- and second-degree murder" by failing to adequately distinguish

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[59] *Compare* #22, Ex. 15, Instruction No. 8, *with Kazalyn*, 108 Nev. at 75, 825 P.2d at 583.

between the distinct elements of deliberation and premeditation required for a conviction for first-degree murder as opposed to lesser homicide offenses. 116 Nev. at 234-36 & n.4, 994 P.2d at 713-14 & n.4. The state supreme court approved a jury instruction in lieu of the *Kazalyn* instruction that expressly and specifically distinguished between the three separate elements of willfulness, deliberation and premeditation. The instruction approved in *Byford*, *inter alia*, carried forward the concept that premeditation "may be as instantaneous as successive thoughts of the mind." The instruction further stated, however, that "[a] mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill." The approved instruction concluded: "A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree." 116 Nev. at 236-37, 994 P.2d at 714-15.

At Kieren's trial, the state district court gave the *Kazalyn* instruction. That instruction included no language precluding a conviction for first-degree murder for a killing committed following "a mere unconsidered and rash impulse." The charge instead instructed the jury that if it believed "that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is wilful, deliberate and premeditated murder." There were no charges distinguishing the element of deliberation from premeditation.

As noted, the Supreme Court of Nevada held during Kieren's appeal that the giving of a *Kazalyn* instruction does not give rise to a federal due process violation. *Garner, supra*. The Ninth Circuit has held, however, that the state supreme court's holding rejecting the federal due process claim was contrary to clearly established federal law, based upon controlling United States Supreme Court precedent decided prior to Kieren's trial and appeal. *See Polk*, 503 F.3d at 909-11. The role that the *Kazalyn* charge played in the charge as a whole and the exacerbating effect of the State's reliance upon the *Kazalyn* instruction in closing argument make this case virtually indistinguishable from *Polk* in this regard. *See id.* This Court of course is bound by the Ninth Circuit's holding that the state supreme court's conclusion that there is no federal due process violation is contrary to clearly established federal law as determined by the United States Supreme Court.

In the answer, respondents do not mention, much less address, *Polk*. Respondents instead rely upon the 2008 Supreme Court of Nevada decision in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). In *Nika*, the Supreme Court of Nevada held that the 2000 *Byford* decision did not reflect a clarification of Nevada law but instead represented a change in Nevada state law that changed the intent element required for first degree murder. *Nika* held that, accordingly, *Kazalyn* represented a correct statement of Nevada law prior to *Byford*. The Supreme Court of Nevada sharply disagreed with *Polk*'s analysis of the constitutional issue. 124 Nev. at 1285-87, 198 P.3d at 848-50. Respondents accordingly urge that the *Kazalyn* instruction represented the correct statement of the law for Kieren's case.

To the extent that the Nevada Supreme Court disagrees with *Polk*'s analysis of the constitutional issue in *Nika, supra,* this Court remains bound by the Ninth Circuit's *Polk* decision as to the application of clearly established federal law rather than the constitutional analysis in the Nevada Supreme Court's *Nika* decision. While the Nevada Supreme Court has sought to recast the *Kazalyn* issue as – in one fashion or another – a purely state law issue in *Garner* and then in *Nika*, the Ninth Circuit to date has been unpersuaded, at least following upon *Garner*. *See,e.g., Polk*, 503 F.3d at 911 ("Instead of acknowledging the violation of Polk's due process right, the Nevada Supreme Court concluded that giving the *Kazalyn* instruction in cases predating *Byford* did not constitute constitutional error. In doing so, the Nevada Supreme Court erred by conceiving of the *Kazalyn* instruction issue as purely a matter of state law."); *see also Chambers v. McDaniel*, 549 F.3d 1191, 1190 & n.1 (9th Cir. 2008)(declining to reach respondents' argument that *Polk* was wrongly decided because the subsequent panel was bound by the prior panel opinion in *Polk*).

In all events, however, even on its face, *Nika* compels the application of *Byford*, not *Kazalyn*, to Kieren's case:

> Despite our disagreement with the assumption underlying the decision in *Polk*, we acknowledge that the change effected by *Byford* properly applied to that case as a matter of due process. The United States Supreme Court has indicated that for purposes of due process, the relevant consideration "is not just whether the law changed" but also " when the law changed."[FN72] Thus, if the law changed to narrow the scope of a criminal statute before a defendant's conviction became final, then due process requires that the change be applied to that defendant.[FN73] In such cases, retroactivity is not at issue; rather, due process requires that the conviction be set aside if required by the change in the law.[FN74] In this respect, our decision in *Garner* erroneously

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> afforded *Byford* complete prospectivity because as a matter of due process, the change effected in *Byford* applies to convictions that were not yet final at the time of the change. *Polk* involved such a conviction. This case, however, does not.
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> [FN72] *Bunkley v. Florida*, 538 U.S. 835, 841–42, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003).
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> [FN73] *Id.*
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> [FN74] *Fiore v. White*, 531 U.S. 225, 228–29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001); *Bunkley*, 538 U.S. at 840–41, 123 S.Ct. 2020.

124 Nev. at 1287, 198 P.3d at 850.

As *Nika* recognizes, "[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." 124 Nev. at 1284 n.52, 198 P.3d at 848 n.52 (citing prior United States Supreme Court authority).

Kieren's conviction was not final on February 28, 2000, when *Byford* was decided. His judgment of conviction was filed on October 27, 1999, and then a motion for new trial was filed. His notice of appeal was not filed until June 22, 2000, after *Byford*; and his appeal was decided on February 8, 2002. The time for filing a *certiorari* petition thus did not expire until on or about May 9, 2002.[60]

The sole authority relied upon by respondents accordingly compels the conclusion that *Byford* rather than *Kazalyn* should have been applied to Kieren's case under the precedent of the Supreme Court of Nevada. Both *Polk* and *Nika* confirm that Kieren was denied due process because the *Kazalyn* instruction conflating the elements of deliberation and premeditation was given at his trial.

Such a federal due process violation, however, is subject to harmless error analysis. *Polk*, 503 F.3d at 911. A petitioner will be entitled to relief only if "'the error had a substantial and injurious effect or influence in determining the jury's verdict.'" *Polk*, 503 F.3d at 911 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). If the record leaves the reviewing court in "grave doubt" as to whether the error had such an effect, the petitioner is entitled to relief. *Id.*

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[60] #22, Ex. 20, #23, Exhs. 44 & 51.

For example, in *Polk*, the evidence of deliberation consisted of the following: (1) Polk had threatened and fought with the victim two months before, (2) there was a loud argument shortly before gunshots were heard; and (3) Polk wore a bulletproof vest on the evening of the murder. The Ninth Circuit concluded that this evidence "was not so great that it precluded a verdict of second-degree murder." The court noted that prior statements made as a result of agitation or emotional distress do not always connote an intent to actually commit violence, that an argument prior to the homicide actually tended to support a conclusion that the killing was not done with "coolness and reflection," and that donning a bulletproof vest potentially reflected a defensive step as opposed to deliberation to commit murder. When these competing inferences were coupled with a jury instruction and prosecutorial argument positing that only successive thoughts of the mind were required, the court stated that "we simply cannot conclude that the *Kazalyn* error was harmless." 503 F.3d at 912-13.

In the subsequent decision in *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008), the Ninth Circuit addressed the issue of harmless error as to a *Kazalyn* error in a case where the State relied upon evidence "that Chambers stabbed Chacon seventeen times; that the wounds penetrated three inches into the body and were located in two separate clusters of wounds; and that Chambers was not mentally disturbed, but at the most merely drunk." The court concluded that this evidence did "not demonstrate the key feature of the element of deliberation" as the evidence "[i]f anything . . . seems to weigh in favor of second-degree murder committed while in the throes of a heated argument." The court noted the state supreme court's description of the evidence that "'Chambers murdered the victim in a drunken state, which indicated no advanced planning, during an emotionally charged confrontation in which Chambers was wounded and his professional tools were being ruined.'" The Ninth Circuit concluded that "'[s]ince we are left 'in grave doubt' about whether the jury would have found deliberation on [Chambers'] part if it had been properly instructed, we conclude that the error had a substantial and injurious effect or influence on the jury's verdict.'" 549 F.3d at 1200-01.

In the present case, the trial record similarly gives rise to grave doubt for a reviewing court in considering whether the *Kazalyn* error had a substantial and injurious effect on the jury's verdict. To be sure, a jury potentially could infer deliberation from the facts presented. Yet, as in *Polk* and *Chambers*, this evidence did not preclude a verdict of second degree murder. Under the jury

instructions given and closing arguments made, the jury could have convicted Kieren of first degree murder even if the jurors believed his account that he had formed no plan to kill Broyles prior to the point that he saw him in the garage. Nor did the evidence presented by the State, if believed by the jury, necessarily preclude a verdict of second degree murder. The shooting followed almost immediately upon what by all accounts was an extremely violent confrontation during which, *inter alia*, indisputably, Broyles bit off Kieren's right ear. Similar to *Chambers*, the evidence weighed in favor of a second degree murder committed in connection with a heated and violent confrontation in which the victim literally mutilated the defendant. While the State's closing sought to equate a "vengeful and spiteful" killing with a premeditated and deliberate killing, that very same immediately reactive vengefulness and spitefulness spoke more to second degree murder than first degree murder. As in *Chambers*, the Court is left with grave doubt as to whether the jury would have found deliberation on Kieren's part if it had been properly instructed.

In this regard, the fact that Kieren fired multiple times is not in and of itself determinative. The defendant in *Polk* fired multiple times, hitting the victim twice, and the prosecution relied upon the multiple shots to establish the requisite state of mind for first degree murder. *See* 503 F.3d at 905. And, as noted above, the defendant in *Chambers* stabbed the victim seventeen times with a knife. In neither case was the fact of multiple shots or knife strikes determinative of the harmless error issue.

The *Kazalyn* error accordingly was not harmless error in Kieren's case under the *Brecht* standard. While a first degree murder verdict by a properly-instructed jury perhaps might have withstood a challenge to the sufficiency of the evidence, that is not the standard for determining harmless error. Given the highly debatable and hotly contested issue of state of mind in the case and the arguable competing inferences that could be drawn from the evidence relied upon by the State to establish that state of mind, the *Kazalyn* error was not harmless under the *Brecht* standard.

The Ninth Circuit has held that the state supreme court's failure to recognize the federal due process error is contrary to clearly established federal law, based upon United States Supreme Court precedent that was on the books at the time of Kieren's trial. The jury instructions could not eliminate the State's burden of proof on an element that must be proved to establish first degree murder, and the *Kazalyn* instruction did so as to deliberation. *Polk*, 503 F.3d at 911.

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For the reasons discussed above, the Court concludes on review of Ground 5 that the use of the *Kazalyn* charge in Kieren's case deprived petitioner of due process of law and did not constitute harmless error.

The Court therefore will grant a conditional writ of habeas corpus as further specified below. The Court thus does not reach the remaining claims presented.[61]

IT THEREFORE IS ORDERED that the petition for a writ of habeas corpus is conditionally GRANTED and that, accordingly, the state court judgment of conviction hereby is VACATED and petitioner shall be released from custody within thirty (30) days of the later of the conclusion of any proceedings seeking appellate or *certiorari* review of the Court's judgment, if affirmed, or the expiration of the delays for seeking such appeal or review, unless the State files in this matter a written notice of election to retry petitioner within the thirty day period to retry petitioner and thereafter commences jury selection in the retrial within one hundred twenty (120) days following the filing of the notice of election to retry petitioner, subject to request for reasonable modification of the time periods in the judgment by either party pursuant to Rules 59 or 60.

The Clerk of Court shall enter final judgment accordingly in favor of petitioner and against respondents, conditionally granting the petition for a writ of habeas corpus as provided above.

The Clerk further shall provide a copy of this order and the judgment to the Clerk of the Eighth Judicial District Court, in connection with that court's No. C137463.

DATED this 14th day of November, 2011.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

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[61] The Court's alternative dispute resolution resources are available to the parties at any time, subject to any provisions for same in the Court of Appeals in the event of an appeal.

If an appeal is taken, the parties may wish to advise the Court of Appeals that at least the following pending appeals present potentially related issues: (a) No. 11-16784 (District Court No. 2:05-cv-00061-PMP-RJJ); (b) No. 11-15993 (District Court No. 2:07-cv-01305-KJD-LRL); (c) No. 10-17650 (District Court No. 3:07-cv-00290-RCJ-RAM); and (d) No. 11-99004 (death penalty appeal)(District Court No. 3:01-cv-00096-RCJ-VPC). *See also Elliot v. Williams*, 2011 WL 4436648, No. 2:08-cv-00829-GMN-RJJ (D. Nev., Sept. 23, 2011).

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KEITH KIEREN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36345

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction of first degree murder with the use of a deadly weapon and from a district court order denying a motion for a new trial. The district court sentenced appellant Kieren to serve two consecutive terms of life in prison without the possibility of parole. On appeal, Kieren makes several arguments.

First, Kieren argues that the trial court abused its discretion by prohibiting him from presenting character evidence of Broyles' propensity for violence. We disagree.

At trial, during direct examination of Kieren, the following testimony was solicited:

> Q What occurred next after [Broyles] grabbed the knife?
>
> A [Broyles] made some off hand comment about me going to the police about a murder that he committed in San Bernardino.

Upon hearing Kieren's response, the State objected to the comment as self-serving and totally improper. The court sustained the objection. The parties approached the bench, and an off-the-record discussion was held. After the discussion, the district court struck Kieren's last statement and admonished the jury to disregard it in its entirety.

In Petty v. State,[1] this court stated it "will overturn a district court's decision to admit or exclude evidence only when there has been an abuse of discretion." This court has also observed that

> [w]hen it is necessary to show the state of mind of the accused at the time of the commission of the offense for the purpose of establishing self-defense, specific acts which tend to show that the deceased was a violent and dangerous person may be admitted, provided that the specific acts of violence of the deceased were known to the accused or had been communicated to him.[2]

We find that Kieren's characterization of the statement as an "off-hand comment" profoundly undermines his assertion that the statement was to be offered to show that he was afraid of Broyles and thus acted in self-defense at the time of the shooting. On the contrary and unlike Petty, the evidence showed that Kieren was not afraid of Broyles as he retrieved his gun, began looking through the rooms, commando style, in search of Broyles until he found Broyles in the garage, and shot him multiple times at close range. Thus, we conclude that the district court did not abuse its discretion in excluding the evidence because the statement was not offered to show that Kieren was in fear of Broyles at the time of the shooting.

Second, Kieren argues that misconduct of the prosecutor in improperly referencing Kieren's prior arrest for impersonating a police officer prejudiced him and the district court abused its discretion by denying his motion for a mistrial. We disagree. Although the prosecutor's

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[1]116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

[2]Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986).

reference to the prior arrest was improper, Kieren was not prejudiced due to the overwhelming evidence proffered against him.[3] We, therefore, conclude that the district court did not abuse its discretion by denying Kieren's motion for a mistrial.

Third, Kieren argues that the district court committed reversible error by giving self-defense jury instructions that were confusing, ambiguous, and which both shifted and reduced the State's burden of proof. We disagree. We conclude that this argument lacks merit because Kieren did not object to the instructions during trial and we find that there was no plain error affecting substantial rights belonging to Kieren.[4]

Fourth, Kieren argues that the district court erred by denying his motion for a new trial based upon newly-discovered evidence. We disagree. We conclude that the district court did not err because Kieren knew about the alleged conversation between Woods and Ogletree prior to trial and solicited testimony concerning the contents of the conversation at trial. Moreover, we find that a different result is not probable on retrial, and the proffered evidence would simply be an attempt to contradict or impeach Woods.[5]

Finally, after careful consideration, we conclude that Kieren's remaining arguments that the statutory reasonable doubt instruction is unconstitutional, that he was denied a fair trial when the jury was not

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[3]State v. Carroll, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993).

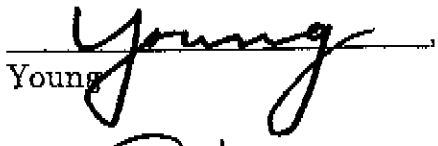
[4]Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000).

[5]Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998).

instructed on the element of deliberation in first degree murder, and that the cumulative effect of errors denied him a fair trial lack merit.

Having considered Kieren's contentions, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

ORIGINAL

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Shirley B. Parraguirre
CLERK

JOC
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(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DENNIS KEITH KIEREN,
#0451617

Defendant.

Case No. C137463
Dept. No. VII
Docket P

JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 5th day of November, 1996, the Defendant DENNIS KEITH KIEREN, entered a plea of not guilty to the crime of MURDER WITH USE OF A DEADLY WEAPON (Felony), committed on the 7th day of March, 1996, in violation of NRS 200.010, 200.030, 193.165, and the matter having been tried before a jury, and the Defendant being represented by counsel and having been found guilty of the crime of FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Felony); and

WHEREAS, thereafter, on the 19th day of October, 1999, the Defendant being present in Court with his counsel LEE ELIZABETH MCMAHON, Deputy Special Public Defender, and L. J. O'NEALE, Deputy District Attorney also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, sentenced Defendant to LIFE in the Nevada Department of Prisons WITHOUT THE POSSIBILITY OF PAROLE plus an EQUAL and CONSECUTIVE term of LIFE in Nevada Department of Prisons WITHOUT THE POSSIBILITY OF PAROLE

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for USE OF A DEADLY WEAPON with no Credit for Time Served.

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

DATED this 25 day of October, 1999, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

DA#96-137463X/kjh
LVMPD EV#9603070001
1° MURDER W/WPN
(TK3)

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