

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

\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

Jerry Lopez — PETITIONER  
(Your Name)

vs.

The State of Nevada — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Nevada Supreme Court  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jerry Lopez, # 50484  
(Your Name)

PO Box 7000 - NNCC  
(Address)

Carson City, NV 89702  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

Whether the Court's decision in Welch v. United States demands retroactive application of the Nevada Supreme Court's decision in Byford v. State?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

|                                                        |    |
|--------------------------------------------------------|----|
| OPINIONS BELOW .....                                   | 1  |
| JURISDICTION.....                                      | 2  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 3  |
| STATEMENT OF THE CASE .....                            | 4  |
| REASONS FOR GRANTING THE WRIT .....                    | 6  |
| CONCLUSION.....                                        | 10 |

## INDEX TO APPENDICES

### APPENDIX A

Order of Affirmance, Nevada Supreme Court, Feb. 15, 2018

### APPENDIX B

Notice of Entry of Findings of Fact, Conclusions of Law and Order, Eighth  
Judicial District Court, Aug. 2, 2017

### APPENDIX C

### APPENDIX D

### APPENDIX E

### APPENDIX F

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

BABB V. LOZOWSKY

704 F.3d 1246 (9<sup>th</sup> Cir. 2013) - - - - - 7,8

BYFORD V. STATE

994 P.2d 700 (NEV. 2000) - - - - - All

KAZALYN V. STATE

825 P.2d 578 (NEV. 1992) - - - - - All

LISLE V. STATE

941 P.2d 459 (NEV. 1997) - - - - - 4

NIKA V. STATE

198 P.3d 839 (NEV. 2008) - - - - - 7,8

POLK V. SANDOVAL

503 F.3d 903 (9<sup>th</sup> Cir. 2007) - - - - - All

RILEY V. MCDANIEL

748 F.3d 719 (9<sup>th</sup> Cir. 2015) - - - - - 7,8

SHARMA V. STATE

56 P.3d 868 (NEV. 2002) - - - - - 4,6

## TABLE OF AUTHORITIES (CONT.)

### CASES

### PAGE NUMBER

TEAGUE V. LANE

109 S.Ct. 1060 (1989) \_ \_ \_ \_ \_ 8

WELCH V. UNITED STATES

136 S.Ct. 718 (2016) \_ \_ \_ \_ \_ All

### STATUTES AND RULES

#### NEVADA REVISED STATUTES ("NRS")

NRS 200.010 \_ \_ \_ \_ \_ 4,6

NRS 200.030 \_ \_ \_ \_ \_ 6.

### OTHER

FIFTH AMENDMENT. \_ \_ \_ \_ \_ 3

FOURTEENTH AMENDMENT \_ \_ \_ \_ \_ 3

IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the Eighth Judicial District Court court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 2/15/18.  
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Fourteenth Amendments of the U.S. Constitution -  
Due Process of Law

## STATEMENT OF THE CASE

On or about April 18, 1996 a jury convicted Jerry Lopez ("Petitioner") and his co-defendant, Mr. Lisle, for the killing of Justin Lusch. Petitioner was tried as an "aider or abettor", and Mr. Lisle was the actual shooter. (See Lisle v. State, 941 P.2d 459 (1997)). Petitioner was sentenced to two (2) consecutive terms of Life in prison for Murder with use of a deadly weapon.

The trial court used two (2) sets of defective jury instructions that failed to properly define the elements of the offenses. The first set of jury instructions defining "aider/abettor" was found to be defective by the Nevada Supreme Court in Sharma v. State 56 P.3d 868 (2002).

The second set of jury instructions were found to be defective by the Nevada Supreme Court in Byford v. State, 994 P.2d 700 (2000), as they failed to properly define all elements of murder as outlined in Nevada Revised Statute ("NRS") 200.010. The Nevada Supreme Court has failed to apply its Byford decision retroactively.

Petitioner asserts this Court's recent holding in Welch v. United States 136 S.Ct. 718 (2016), demands retroactive application of the Byford decision to Petitioner and all similarly situated persons in Nevada.

Petitioner sought review of this claim in the State Courts by filing a Petition for Writ of Habeas Corpus (Post-conviction) in the Eighth Judicial District Court of Nevada, timely filed within one (1) year of the Welch decision. The State District Court

denied the petition on August 2, 2017 in an unpublished order, Notice of Entry of Findings of Fact, Conclusions of Law and order. (Appendix B). In the order, the State District Court held numerous reasons for the denial of the petition, including non-retroactive application of the Byford decision to the Nevada Supreme Court. On February 15, 2018 the Nevada Supreme Court entered an unpublished Order of Affirmance. (Appendix A.) The Nevada Supreme Court held that "Byford involves a Nevada Court interpreting a Nevada Statute in a manner that has no constitutional implications." Id, pg 2, last paragraph.

Petitioner asserts this holding is erroneous and the Byford decision did have Constitutional implications and it should be applied in light of this Court's decision in Welch.

## REASONS FOR GRANTING THE PETITION

Petitioner was tried before a jury for being an aider/abetter to a murder. Nevada Revised Statute ("NRS") 200.010 defined murder as "The unlawful killing of a human being with malice aforethought, either express or implied." Murder of the first-degree is "murder perpetrated by means of poison, lying in wait or torture, or by any other kind of willfull, deliberate, and premeditated killing." NRS 200.030 (1)(a).

The jury instructions defining first degree murder used at petitioner's trial were called the Kazalyn instructions. Kazalyn v. State, 825 P.2d 578 (1992). In Byford v. State, 994 P.2d 700 (2000), the Nevada Supreme Court found the Kazalyn jury instructions were defective in that they failed to properly define murder. The State High Court ordered the State District Courts to cease using the defective jury instructions.

In 2002 the Nevada Supreme Court held in Sharma v. State, 56 P.3d 868 (2002) that the jury instructions used at Petitioner's trial defining an "aider/abetter" were defective in that they allowed a conviction of a non-shooter without the non-shooter knowing of the intentions of a co-defendant shooter.

In 2007 the Ninth Circuit Court of Appeals held in Polk v. Sandoval, 503 F.3d 903 (9<sup>th</sup> Cir. 2007) that the use of the Kazalyn jury instructions violated Polk's Federal Constitutional Rights to due process "because it relieved the State of its burden of proving every element of first degree murder beyond a reasonable doubt. The Nevada Supreme Court's decision to the contrary was" contrary to clearly established federal law, as determined by the Supreme Court."

In Nika v. State, 198 P.3d 839 (2008), the Nevada Supreme Court took issue with the Ninth Circuit's holding in Polk, claiming that the Byford decision was not a clarification of the murder statute... Rather, the Nika Court explained that Byford announced a new interpretation of Nevada's murder statute."

The Nike decision forced the Ninth Circuit to re-visit its Polk decision in Babb v. Lozowsky, 704 F.3d 1246 (2013), wherein it appears the Ninth Circuit reversed a portion of the Polk holding stating:

The Nike decision explaining that Byford represented a change in, rather than a clarification of, law undermines the basis of this court's holding in Polk with regard to the constitutionality of the Kazalyn instruction

...  
Because the Nevada Supreme Court which is the ultimate authority in interpreting and deciding questions of Nevada State Law, explained in Nika that Byford was a change in, rather than a clarification of, the law concerning premeditated murder, Polk's holding has been disapproved...

However, to confuse the issue further, the Ninth Circuit held two (2) years later in Riley v. McDaniel, 748 F.3d 719 (9<sup>th</sup> Cir. 2015).

that the Kazalyn jury instructions used at Riley's trial "Constituted a due process violation under the United States Constitution."

Here as, in Riley, the use of the defective jury instructions at Petitioner's trial had a substantial, injurious effect on the verdict. Petitioner would not have been convicted of an aider & abettor to first degree murder if it were not for the use of the defective jury instructions.

Petitioner asserts this Honorable Court should grant Certiorari to decide whether the decision by the Nevada Supreme Court in Byford, Supra, should be applied retroactively to Petitioner's case and all similarly situated persons.

In Welch, this Court made clear that the "substantive rule" exception includes decisions that narrow the scope of a criminal statute by interpreting its terms, (Referring to the substantive exception announced in Teague v. Lane, 109 S.Ct 1060 (1989)).

This new holding in Welch, where this Court used the term "interpretation" settles the clarification made by the Ninth Circuit in Polk and Babb wherein the Court takes note of distinctions in "clarification of law" vs. "change of law." Either way they are both "interpretations" of a law, specifically, Nevada's continued "interpretations" of murder as held in Kazalyn, Byford, and Nika.

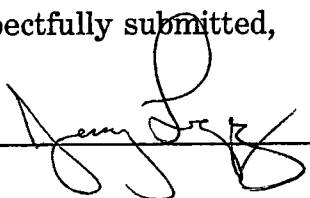
Petitioner urges this Honorable Court to grant Certiorari in this case to once and for all put to rest the question of Nevada's and the Ninth Circuit's decisions concerning the definition of murder in Nevada, and their retroactive

applications as can be seen by the decisions of the aforementioned Courts during the past twenty (20) years, the instant claim of constitutional magnitude, effects numerous murder convictions in Nevada, and possibly elsewhere, that demands intervention by this Court in the granting of Certiorari.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
\_\_\_\_\_

Date: March 28<sup>th</sup>, 2018