

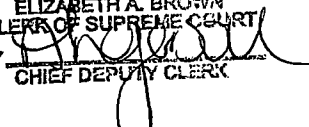
IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY LOPEZ, A/K/A JOSE B. LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73589

FILED

FEB 15 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a pro se appeal from a district court order denying appellant Jerry Lopez's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.¹ The district court denied Lopez's petition as procedurally barred. We agree and affirm.²

Lopez submitted his petition for filing on April 17, 2017, more than one year after remittitur issued from his direct appeal. *Lisle v. State*, 113 Nev. 679, 941 P.2d 459 (1997). Thus, his petition was untimely filed. See NRS 34.726(1). Moreover, the petition was successive because Lopez had previously filed a postconviction petition.³ See NRS 34.810(1)(b); NRS 34.810(2). Accordingly, the petition was procedurally barred absent a

¹Having considered the pro se brief filed by appellant, we conclude that a response is not necessary. NRAP 46A(c). This appeal therefore has been submitted for decision based on the pro se brief and the record. NRAP 34(f)(3).

²We conclude that the district court did not abuse its discretion in declining to appoint counsel. See NRS 34.750.

³*Lopez v. State*, Docket No. 35790 (Order of Affirmance, February 4, 2003).

demonstration of good cause and prejudice. See NRS. 34.726(1); NRS 34.810(1)(b), (2), (3). Further, because the State pleaded laches, Lopez was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

Lopez asserts that the district court erred by denying his petition because he demonstrated good cause and prejudice. He claims that, under *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), this court must apply the holding in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000) (holding that the instruction described in *Kazalyn v. State*, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992), should not be given in future cases and the jury should be separately instructed on the definitions of willful, deliberate, and premeditated when a defendant is charged with first-degree murder), retroactively to him despite this court's holding in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), that *Byford* was not retroactive.⁴

We disagree with Lopez's reading of *Welch*. *Welch* held that a prior United States Supreme Court decision that a clause of a federal statute was void for vagueness applied retroactively because "even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause." *Id.* at ___, 136 S. Ct. at 1265. In contrast, *Byford* involves a Nevada court interpreting a Nevada statute in a manner that has no constitutional implications. *Nika* 124 Nev. at 1288, 198 P.3d at 850. *Welch* announced no new law relevant to Nevada, and nothing in *Welch*

⁴Because Lopez's petition was submitted for filing within one year of *Welch*, the district court erred when it concluded that the petition was not filed within a reasonable time after the *Welch* decision. However, because the petition was filed more than one year after *Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002), any claim regarding *Sharma* was procedurally barred.

undermines this court's decision that *Byford* is not retroactive. Even if *Byford* was retroactive, no relief would be warranted because Lopez's codefendant clearly committed a willful, deliberate, and premeditated killing, and Lopez was liable for that killing as an aider and abettor. See *Byford*, 116 Nev. at 233, 994 P.2d at 712 (concluding that giving the *Kazalyn* instruction was not reversible error when the evidence was "clearly sufficient" to establish all elements of first-degree murder). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

cc: Chief Judge, Eighth Judicial District Court
Hon. James M. Bixler, Senior Judge
Jerry Lopez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Steven D. Grierson

1 NEO

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 JERRY LOPEZ,

5
6 Petitioner,

Case No: 95C129540-2

Dept No: IX

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

10
11 PLEASE TAKE NOTICE that on July 31, 2017, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on August 2, 2017.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 2 day of August 2017, I served a copy of this Notice of Entry on the
21 following:

22 ☒ By e-mail:

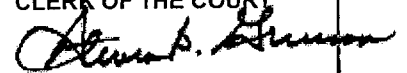
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

23
24 ☒ The United States mail addressed as follows:

25 Jerry Lopez # 50484
26 P.O. Box 7000
27 Carson City, NV 89702

28 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk



1 FCL
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 KRISTA D. BARRIE
6 Chief Deputy District Attorney
7 Nevada Bar #010310
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

9 JERRY LOPEZ,
10 #1210791

Petitioner,

11 -vs-

12 THE STATE OF NEVADA

13 Respondent.

CASE NO: 95C129540-2

DEPT NO: IX

14
15 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

16 DATE OF HEARING: July 11, 2017
17 TIME OF HEARING: 9:00 A.M.

18 This cause having come on for hearing before the HONORABLE JUDGE JAMES
19 BIXLER, Senior Judge, on the 11th day of July, 2017, Petitioner not being present,
20 PROCEEDING IN FORMA PAUPERIS, Respondent being represented by STEVEN B.
21 WOLFSON, Clark County District Attorney, by and through ALICIA ALBRITTON, Chief
22 Deputy District Attorney, and the Court having considered the matter, including briefs,
23 transcripts, no arguments of counsel, and documents on file herein, now therefore, makes the
24 following findings of fact and conclusions of law.

25 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

26 *PROCEDURAL HISTORY*

27 On July 28, 1995, the State charged Jerry Lopez ("Petitioner") by way of Information
28 with Conspiracy to Commit Murder (Felony - NRS 199.480, 200.010, 200.030) and Murder
with Use of a Deadly Weapon (NRS 200.010, 200.030, 193.165). Petitioner's jury trial

1 commenced on April 9, 1996, and on April 18, 1996, the jury returned a verdict finding
2 Petitioner guilty of Conspiracy to Commit Murder and Murder in the First Degree with Use of
3 a Deadly Weapon. On April 22, 1996, Petitioner's penalty hearing commenced and on April
4 25, 1996, returned a verdict imposing a sentence of life in Nevada State Prison with the
5 Possibility of Parole. On June 6, 1996, Petitioner was adjudged guilty and sentenced to the
6 Nevada Department of Prisons as follows: as to Count 1 (Conspiracy to Commit Murder), six
7 years; and as to Count 2 (Murder of the First Degree with Use of a Deadly Weapon), life with
8 the possibility of parole plus a consecutive term of life with the possibility of parole for the
9 use of a deadly weapon. The Judgment of Conviction was entered on June 19, 1996. On June
10 17, 1997, the Nevada Supreme Court affirmed the judgment. *See Lisle v. State*, 113 Nev. 679,
11 941 P.2d 459 (1997). Remittitur issued on November 3, 1998.

12 On November 3, 1999, Petitioner filed his first habeas petition. On January 12, 2000,
13 the Court denied the petition and entered its Findings of Fact, Conclusions of Law and Order
14 to that effect on February 10, 2000. On February 4, 2003, the Nevada Supreme Court issued
15 an Order affirming the denial of Petitioner's first habeas petition. Remittitur issued on March
16 4, 2003.

17 On April 21, 2017, Petitioner filed his Petition for Writ of Habeas Corpus (Post
18 Conviction), which now constitutes his second habeas petition. The State filed its Response
19 on June 9, 2017. On May 10, 2017, Petitioner filed his Motion for Appointment of Counsel.
20 The State filed its Opposition on June 9, 2017.

21 ANALYSIS

22 I. *The Petition Is Procedurally Barred Under Both NRS 34.726(1) And NRS 34. 810(2)* 23 *And Laches Under NRS 34.800(2) Is Applicable Here.*

24 The instant Petition has been filed more than 18 years after the Nevada Supreme Court
25 issued its remittitur on Petitioner's direct appeal from the Judgment of Conviction.
26 Accordingly, it is untimely under NRS 34.726(1). In an attempt to establish good cause to
27 excuse this untimeliness, Petitioner relies on the United States Supreme Court's decisions in
28 *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016), and *Welch v. United States*, __

1 U.S. ___, 136 S. Ct. 1257 (2016). *Montgomery* and *Welch*, however, fail to serve as good cause
2 necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the instant
3 Petition constitutes Petitioner's second habeas petition, it is successive under NRS 34.810(2).
4 And for the same reasons that *Montgomery* and *Welch* fail to constitute good cause to
5 overcome NRS 34.726(1)'s procedural bar, it likewise fails to constitute good cause sufficient
6 to overcome NRS 34.810(2)'s procedural bar. Lastly, because more than 18 years have elapsed
7 between the filing of the Judgment of Conviction and the filing of the instant Petition, the
8 Court finds that laches pursuant to NRS 34.800(2) is applicable here.

9 *A. The Petition Is Untimely Under NRS 34.726(1) And Petitioner Has Failed*
10 *To Establish Good Cause For Delay.*

11 Under NRS 34.726(1), "a petition that challenges the validity of a judgment or sentence
12 must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been
13 taken from the judgment, within 1 year after the appellate court of competent jurisdiction . . .
14 issues its remittitur," absent a showing of good cause for delay. In *State v. Eighth Judicial*
15 *Dist. Court (Riker)*, the Nevada Supreme Court noted that "the statutory rules regarding
16 procedural default are mandatory and cannot be ignored when properly raised by the State."
17 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005)

18 Here, the Judgment of Conviction in Petitioner's case was filed on June 19, 1996.
19 Petitioner filed a Notice of Appeal, and on June 17, 1997, the Nevada Supreme Court issued
20 a published opinion affirming the judgment. Remittitur issued on November 3, 1998.
21 Accordingly, Petitioner had until November 3, 1999, to file a timely Petition. The instant
22 Petition, however, was filed on April 21, 2017—more than 17 years after the one-year deadline
23 had expired. Such untimeliness can be excused if Petitioner can establish good cause for the
24 delay. This, however, he has failed to do.

25 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
26 following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will
27 be "unduly prejudice[d]" if the petition is dismissed as untimely.

28 ///

1 **1. Petitioner Has Failed To Establish That The Delay Is Not His Fault.**

2 To meet NRS 34.726(1)'s first requirement, "a petitioner must show that an impediment
3 external to the defense prevented him or her from complying with the state procedural default
4 rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment
5 external to the defense may be demonstrated by a showing 'that the factual or legal basis for a
6 claim was not reasonably available to counsel, or that some interference by officials, made
7 compliance impracticable.' " *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct.
8 2639 (1986)).

9 Petitioner attempts to meet this first requirement by arguing new case law. Specifically,
10 he argues that *Montgomery* and *Welch* "represent a change in law that allows petitioner to
11 obtain the benefit of *Byford*¹ on collateral review." Petition at 2.² In essence, Petitioner avers
12 that *Montgomery* and *Welch* establish a legal basis for a claim that was not previously
13 available. Petitioner's reliance on *Montgomery* and *Welch* is misguided.

14 As noted by Petitioner, he received the following jury instruction on premeditation and
15 deliberation:

16 Premeditation is a design, a determination to kill, formed in the mind at any
17 moment before or at the time of the killing.

18 Premeditation need not be for a day, an hour or even a minute. It may be as
19 instantaneous as successive thoughts of the mind. If the jury believes from the
20 evidence that the act constituting the killing has been preceded by and has been
21 the result of premeditation, no matter how rapidly the premeditation is followed
22 by the act constituting the killing, it is willful, deliberate and premeditated
23 murder.

24 Premeditation is a question a fact for the jury and may be determined from the
25 facts and circumstances of the killing, such as the use of an instrument calculated
26 to produce death, the manner of the use, and the circumstances surrounding the
27 act.

28

¹ *Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), *cert. denied*, *Byford v. Nevada*, 531 U.S. 1016,
121 S. Ct. 576 (2000).

² The page numbers referred to here are those found in the legal-argument section of the petition.

1 Instructions to the Jury, filed April 17, 1996, Instruction No. 8. The first two paragraphs of
2 this instruction are referred to as the *Kazalyn*³ instruction.

3 The Nevada Supreme Court held in *Byford* that this *Kazalyn* instruction did “not do full
4 justice to the [statutory] phrase ‘willful, deliberate and premeditated.’ ” 116 Nev. at 235, 994
5 P.2d at 713. As explained by the Court in *Byford*, the *Kazalyn* instruction “underemphasized
6 the element of deliberation,” and “[b]y defining only premeditation and failing to provide
7 deliberation with any independent definition, the *Kazalyn* instruction blur[red] the distinction
8 between first- and second-degree murder.” 116 Nev. at 234-35, 994 P.2d at 713. Therefore, in
9 order to make it clear to the jury that “deliberation is a distinct element of *mens rea* for first-
10 degree murder,” the Court directed “the district courts to cease instructing juries that a killing
11 resulting from premeditation is ‘willful, deliberate, and premeditated murder.’ ” *Id.* at 235, 994
12 P.2d at 713. The Court then went on to provide a set of instructions to be used by the district
13 courts “in cases where defendants are charged with first-degree murder based on willful,
14 deliberate, and premeditated killing.” *Id.* at 236-37, 994 P.2d at 713-15.

15 Seven years later, in *Polk v. Sandoval*, the United States Court of Appeals for the Ninth
16 Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held
17 that the use of the *Kazalyn* instruction violated the Due Process Clause of the United States
18 Constitution because the instruction “relieved the state of the burden of proof on whether the
19 killing was deliberate as well as premeditated.” *Id.* at 909. In *Polk*, the Ninth Circuit took issue
20 with the Nevada Supreme Court’s conclusion in cases decided in the wake of *Byford* that
21 “giving the *Kazalyn* instruction in cases predating *Byford* did not constitute constitutional
22 error.”⁴ *Id.* at 911. According to the Ninth Circuit, “the Nevada Supreme Court erred by
23 conceiving of the *Kazalyn* instruction issue as purely a matter of state law” insofar as it “failed
24 to analyze its own observations from *Byford* under the proper lens of *Sandstrom*, *Franklin*,
25 and *Winship* and thus ignored the law the Supreme Court clearly established in those

26
27 ³ *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

28 ⁴ See, e.g., *Garner v. State*, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002).

1 decisions—that an instruction omitting an element of the crime and relieving the state of its
2 burden of proof violates the federal Constitution.” *Id.*

3 A little more than a year after *Polk* was decided, the Nevada Supreme Court addressed
4 that decision in *Nika v. State*, 124 Nev. 1272, 1286, 198 P.3d 839, 849 (2008). In commenting
5 on the Ninth Circuit’s decision in *Polk*, the Court in *Nika* pointed out that “[t]he fundamental
6 flaw . . . in *Polk*’s analysis is the underlying assumption that *Byford* merely reaffirmed a
7 distinction between ‘willfulness,’ ‘deliberation’ and ‘premeditation.’” *Id.* Rather than being
8 simply a clarification of existing law, the Nevada Supreme Court in *Nika* took the “opportunity
9 to reiterate that *Byford* announced a change in state law.” *Id.* (emphasis added). In rejecting
10 the Ninth Circuit’s reasoning in *Polk*, the Nevada Supreme Court noted that “[u]ntil *Byford*,
11 we had not required separate definitions for ‘willfulness,’ ‘premeditation’ and ‘deliberation’
12 when the jury was instructed on any one of those terms.” *Id.* Indeed, *Nika* explicitly held that
13 “the *Kazalyn* instruction correctly reflected Nevada law before *Byford*.” *Id.* at 1287, 198 P.3d
14 at 850.

15 The Court in *Nika* then went on to affirm its previous holding that *Byford* is not
16 retroactive. 124 Nev. at 1287, 198 P.3d at 850 (citing *Rippo v. State*, 122 Nev. 1086, 1097,
17 146 P.3d 279, 286 (2006)). For purposes here, *Nika*’s discussion on retroactivity merits close
18 analysis. The Court in *Nika* commenced its retroactivity analysis with *Colwell v. State*, 118
19 Nev. 807, 59 P.3d 463 (2002). In *Colwell*, the Nevada Supreme Court “detailed the rules of
20 retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if
21 those rules fell within one of two narrow exceptions.” *Nika*, 124 Nev. at 1288, 198 P.3d at 850
22 (citing *Colwell*, 118 Nev. at 820, 59 P.3d at 531). *Colwell*, in turn, was premised on the United
23 States Supreme Court’s decision in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). A
24 brief digression on *Teague* is therefore in order.

25 In *Teague*, the United States Supreme Court did away with its previous retroactivity
26 analysis in *Linkletter*,⁵ replacing it with “a general requirement of nonretroactivity of new rules
27 in federal collateral review.” *Colwell*, 118 Nev. at 816, 59 P.3d at 469-70 (citing *Teague*, 489

28 ⁵ *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965).

1 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Court in *Teague* held that “new
2 *constitutional* rules of criminal procedure will not be applicable to those cases which have
3 become final before the new rules are announced.” 489 U.S. at 310, 109 S. Ct. at 1075
4 (emphasis added). This holding, however, was subject to two exceptions: first, “a new rule
5 should be applied retroactively if it places ‘certain kinds of primary, private individual conduct
6 beyond the power of the criminal law-making authority to proscribe,’” *Id.* at 311, 109 S. Ct.
7 at 1075 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971)
8 (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new
9 constitutional rule of criminal procedure should be applied retroactively if it is a “watershed
10 rule[] of criminal procedure.” *Id.* at 311, 109 S. Ct. at 1076 (citing *Mackey*, 401 U.S. at 693-
11 94, 91 S. Ct. at 1165).

12 That *Teague* was concerned exclusively with new *constitutional* rules of criminal
13 procedure is reinforced by reference to the very opinion from Justice Harlan relied on by the
14 Court in *Teague*. See *Mackey*, 401 U.S. at 675-702, 91 S. Ct. at 1165-67. Justice Harlan’s
15 opinion in *Mackey* starts off acknowledging the nature of the issue facing the Court. See *id.* at
16 675, 91 S. Ct. at 1165 (“These three cases have one question in common: the extent to which
17 new *constitutional* rules prescribed by this Court for the conduct of criminal cases are
18 applicable to other such cases which were litigated under different but then-prevailing
19 *constitutional* rules.” (emphasis added)). And when outlining the two exceptions that were
20 ultimately adopted by the Court in *Teague*, Justice Harlan explicitly acknowledged the
21 constitutional nature of these exceptions. See *id.* at 692, 91 S. Ct. at 1165 (“New ‘substantive
22 due process’ rules, that is, those that place, *as a matter of constitutional interpretation*, certain
23 kinds of primary, private individual conduct beyond the power of the criminal law-making
24 authority to proscribe, must, in my view, be placed on a different footing.” (emphasis added));
25 *id.* at 693, 91 S. Ct. at 1165 (“Typically, it should be the case that any conviction free from
26 federal *constitutional* error at the time it became final, will be found, upon reflection, to have
27 been fundamentally fair and conducted under those procedures essential to the substance of a
28 full hearing. However, in some situations it might be that time and growth in social capacity,

1 as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will
2 properly alter our understanding of the bedrock procedural elements that must be found to
3 vitiate the fairness of a particular conviction.” (emphasis added)).

4 The Nevada Supreme Court’s decision in *Colwell* further reinforces the notion that
5 *Teague*’s exceptions were concerned exclusively with new *constitutional* rules. See 118 Nev.
6 at 817, 59 P.3d at 470. In *Colwell*, the Court provided examples of “new rules” that fall into
7 either exception. As to the first exception, the Nevada Supreme Court explained that “the
8 Supreme Court’s holding that the *Fourteenth Amendment* prohibits states from criminalizing
9 marriages between persons of different races” is an example of a new substantive rule of law
10 that should be applied retroactively on collateral review. *Id.* (citing *Mackey*, 401 U.S. at 692
11 n.7, 91 S. Ct at 1165 n.7) (emphasis added). Noting that this first exception “also covers ‘rules
12 prohibiting a certain category of punishment for a class of defendants because of their status,’
13 ” *id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 329-30, 109 S. Ct. 2934, 2952-53 (1989),
14 *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)), the
15 Nevada Supreme Court cited “the Supreme Court’s [] holding that the *Eighth Amendment*
16 prohibits the execution of mentally retarded criminals” as another example of a new
17 substantive rule of law that should be applied retroactively on collateral review. *Id.* (citing
18 *Penry*, 492 U.S. at 329-30, 109 S. Ct. at 2952-53) (emphasis added). As to the second
19 exception, the Nevada Supreme Court cited “the right to counsel at trial”⁶ as an example of a
20 watershed rule of criminal procedure that should be applied retroactively on collateral review.
21 *Id.* (citing *Mackey*, 401 U.S. at 694, 91 S. Ct. at 1165).

22 The Court in *Colwell*, however, found *Teague*’s retroactivity analysis too restrictive
23 and, therefore, while adopting its general framework, chose “to provide broader retroactive
24 application of new constitutional rules of criminal procedure than *Teague* and its progeny
25 require.” *Id.* at 818, 59 P.3d at 470; *see also id.* at 818, 59 P.3d at 471 (“Though we consider
26

27 ⁶ As per *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963), whose holding was premised the Sixth and
28 Fourteenth Amendments—i.e., *constitutional* principles.

1 the approach to retroactivity set forth in *Teague* to be sound in principle, the Supreme Court
2 has applied it so strictly in practice that decisions defining a constitutional safeguard rarely
3 merit application on collateral review.”⁷ First, the Court in *Colwell* narrowed *Teague*’s
4 definition of a “new rule,” which it had found too expansive.⁸ *Id.* at 819-20, 59 P.3d. at 472
5 (“We consider too sweeping the proposition, noted above, that a rule is new whenever any
6 other reasonable interpretation or prior law was possible. However, a rule is new, for example,
7 when the decision announcing it overrules precedent, or ‘disapproves a practice this Court had
8 arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had
9 uniformly approved.’ ” (quoting *Griffith v. Kentucky*, 479 U.S. 314, 325, 107 S. Ct. 708, 714
10 (1987)). And second, the Court in *Colwell* expanded on *Teague*’s two exceptions, which it had
11 found too “narrowly drawn”:

12 When a rule is new, it will still apply retroactively in two instances: (1) if the
13 rule establishes that it is unconstitutional to proscribe certain conduct as criminal
14 or to impose a type of punishment on certain defendants because of their status
15 or offense; or (2) if it establishes a procedure without which the likelihood of an
16 accurate conviction is seriously diminished. These are basically the exceptions
17 defined by the Supreme Court. But we do not limit the first exception to
18 ‘primary, private individual’ conduct, allowing the possibility that other conduct
19 may be constitutionally protected from criminalization and warrant retroactive
relief. And with the second exception, we do not distinguish a separate
requirement of ‘bedrock’ or ‘watershed’ significance: if accuracy is seriously
diminished without the rule, the rule is significant enough to warrant retroactive
application.

20 *Id.* at 820, 59 P.3d at 472. Notwithstanding this expansion of the protections afforded in
21 *Teague*, the Court in *Colwell* never lost sight of the fact that *Teague*’s retroactivity analysis
22 focuses on new rules of *constitutional* concern. If the new rule of criminal procedure is not

23
24 ⁷ As the Nevada Supreme Court explained in *Colwell*, it was free to deviate from the standard laid out in *Teague*
25 so long as it observed the minimum protections afforded by *Teague*. See 118 Nev. at 817-18, 59 P.3d at 470-
71; see also *Johnson v. New Jersey*, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

26 ⁸ This has the effect of affording greater protection than *Teague* insofar as defendants seeking collateral review
27 here in Nevada will be able to avail themselves more frequently of the principle that “[i]f a rule is not new, then
28 it applies even on collateral review of final cases.” *Colwell*, 118 Nev. at 820, 59 P.3d at 472. Under *Teague*’s
expansive definition for “new rule,” most rules would be considered new by *Teague*’s standards and, thus,
“given only prospective effect, absent an exception.” *Id.* at 819, 59 P.3d at 471.

1 constitutional in nature, *Teague*'s retroactivity analysis has no bearing.

2 One year later in *Clem v. State*, the Nevada Supreme Court reaffirmed the modified
3 *Teague* retroactivity analysis set out in *Colwell*. 119 Nev. 615, 626-30, 81 P.3d 521, 529-32
4 (2008). Notably, the Court in *Clem* explained that it is "not required to make retroactive its
5 new rules of state law that do not implicate constitutional rights." *Id.* at 626, 81 P.3d at 529.
6 The Court further noted that "[t]his is true even where [its] decisions overrule or reverse prior
7 decisions to narrow the reach of a substantive criminal statute." *Id.* The Court then provided
8 the following concise overview of the modified *Teague* retroactivity analysis set out in
9 *Colwell*:

10 Therefore, on collateral review under *Colwell*, if a rule is not new, it applies
11 retroactively; if it is new, but not a constitutional rule, it does not apply
12 retroactively; and if it is new and constitutional, then it applies retroactively only
13 if it falls within one of *Colwell*'s delineated exceptions.

14 *Id.* at 628, 81 P.3d at 531. Thus, *Clem* reiterated that if the new rule of criminal procedure is
15 not constitutional in nature, *Teague*'s retroactivity analysis has no relevance. *Id.* at 628-29, 81
16 P.3d at 531 ("Both *Teague* and *Colwell* require limited retroactivity on collateral review, but
17 neither upset the usual rule of nonretroactivity for rules that carry no constitutional
18 significance.").⁹

19 It is on the basis of *Colwell* and *Clem* that the Court in *Nika* affirmed its previous
20 holding¹⁰ that *Byford* is not retroactive. 119 Nev. at 1288, 198 P.3d at 850 ("We reaffirm our
21 decisions in *Clem* and *Colwell* and maintain our course respecting retroactivity analysis—if a
22 rule is new but not a constitutional rule, it has no retroactive application to convictions that are

23 ⁹ Petitioner omits any mention of *Colwell* or *Clem*, which were central to *Nika*'s retroactivity analysis regarding
24 convictions that were final at the time of the change in the law. Instead, Petitioner cites *Nika*'s preceding
25 analysis of why "the change effected by *Byford* properly applied to [the defendant in *Polk*, 503 F.3d at 910] as
26 a matter of due process." *Nika*, 124 Nev. at 1287, 198 P.3d at 850; see Petition at 1. To be sure, the Court in
27 *Nika*, in conducting this analysis, did rely on the retroactivity rules set out in *Bunkley v. Florida*, 538 U.S. 835,
28 123 S. Ct. 2020 (2003), and *Fiore v. White*, 531 U.S. 225, 121 S. Ct. 712 (2001), which, according to Petitioner
were "drastically changed," Petition at 1, by the United States Supreme Court's decisions in *Montgomery* and
Welch. Whether or not this is true is of no moment. The analysis in *Nika* regarding retroactivity in *Polk* had
absolutely no bearing on *Nika*'s later analysis of the rules of retroactivity respecting convictions that were final
at the time of the change in the law.

¹⁰ See *Rippo*, 122 Nev. at 1097, 146 P.3d at 286.

1 final at the time of the change in the law.”). The Court in *Nika* then explained how the change
2 in the law made by *Byford* “was a matter of interpreting a state statute, not a matter of
3 constitutional law.” *Id.* Accordingly, because it was not a new *constitutional* rule of criminal
4 procedure of the type contemplated by *Teague* and *Colwell*, the change wrought in *Byford* was
5 not to have retroactive effect on collateral review to convictions that were final before the
6 change in the law.

7 Neither *Montgomery* nor *Welch* alter *Teague*’s—and, by extension, *Colwell*’s—
8 underlying premise that the two exceptions to the general rule of nonretroactivity must
9 implicate constitutional concerns before coming into play. In *Montgomery*, the United States
10 Supreme Court had to consider whether *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455
11 (2012), which held that a mandatory sentence of life without parole for juvenile homicide
12 offenders violates the Eighth Amendment’s prohibition on “cruel and unusual punishment,”
13 had to be applied retroactively to juvenile offenders whose convictions and sentences were
14 final at the time when *Miller* was decided. ___ U.S. at ___, 136 S. Ct. at 725. To answer this
15 question, the Court in *Montgomery* employed the retroactivity analysis set out in *Teague*. *Id.*
16 at ___, 136 S. Ct. at 728-36. As to whether *Miller* announced a new “substantive rule of
17 constitutional law,” *id.* at ___, 136 S. Ct. at 734, such that it fell within the first of the two
18 exceptions announced in *Teague*, the Court in *Montgomery* commenced its analysis by noting
19 that “the ‘foundation stone’ for *Miller*’s analysis was [the] Court’s line of precedent holding
20 certain punishments disproportionate when applied to juveniles.” *Id.* at ___, 136 S. Ct. at 732.
21 This “line of precedent” included the Court’s previous decision in *Graham v. Florida*, 560
22 U.S. 48, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005),
23 the holdings of which were premised on constitutional concerns—namely, the Eighth
24 Amendment. ___ U.S. at ___, 136 S. Ct. at 723 (explaining how *Graham* “held that the Eighth
25 Amendment bars life without parole for juvenile nonhomicide offenders” and how *Roper* “held
26 that the Eighth Amendment prohibits capital punishment for those under the age of 18 at the
27 time of their crimes”). After elaborating further on the considerations discussed in *Roper* and
28 *Graham* that underlay the Court’s holding in *Miller*, *id.* at ___, 136 S. Ct. at 733-34, the Court

1 went on to conclude the following:

2 Because *Miller* determined that sentencing a child to life without parole is
3 excessive for all but the rare juvenile offender whose crime reflects irreparable
4 corruption, [] it rendered life without parole *an unconstitutional penalty* for a
5 class of defendants because of their status—that is, juvenile offenders whose
6 crimes reflect the transient immaturity of youth. As a result, *Miller* announced a
7 substantive rule of *constitutional* law. Like other substantive rules, *Miller* is
retroactive because it necessarily carr[ies] a significant risk that a defendant—
here, the vast majority of juvenile offenders—faces a punishment that the law
cannot impose upon him.

8 *Id.* at ___, 136 S. Ct. at 734 (internal citations omitted) (quotation marks omitted) (alteration in
9 original) (emphasis added).

10 Petitioner, however, gets caught up in *Montgomery*'s preceding jurisdictional analysis
11 in which it had to decide, as a preliminary matter, whether a State is under an "obligation to
12 give a new rule of constitutional law retroactive effect in its own collateral review
13 proceedings." *Id.* at ___, 136 S. Ct. at 727; *see* Petition at 1, 7, 12. Petitioner makes much ado
14 about *Montgomery*'s discussion on this front, arguing that the Court in *Montgomery*
15 "established a new rule of constitutional law, namely that the 'substantive' exception to the
16 *Teague* rule applies in state courts as a matter of due process." Petition at 12. This assertion,
17 while true, shortchanges the Court's jurisdictional analysis. In addressing the jurisdictional
18 question and discussing *Teague*'s first exception to the general rule of nonretroactivity in
19 collateral review proceedings, *Montgomery* actually reinforces the notion that *Teague*'s
20 retroactivity analysis is relevant only when considering a new *constitutional* rule. *See, e.g., id.*
21 at ___, 136 S. Ct. at 727 ("States may not disregard a controlling, *constitutional* command in
22 their own courts." (emphasis added)); *id.* at ___, 136 S. Ct. at 728 (explaining that under the
23 first exception to the general rule of nonretroactivity discussed in *Teague*, "courts must give
24 retroactive effect to new substantive rules of *constitutional* law" (emphasis added)); *id.* at ___,
25 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of *constitutional*
26 law controls the outcome of a case, the Constitution requires state collateral review courts to
27 give retroactive effect to that rule." (emphasis added)); *id.* at ___, 136 S. Ct. at 729-30
28 ("Substantive rules, then, set forth categorical *constitutional* guarantees that place certain

1 criminal laws and punishments altogether beyond the State's power to impose. It follows that
2 when a State enforces a proscription or penalty barred *by the Constitution*, the resulting
3 conviction or sentence is, by definition, unlawful." (emphasis added)); *id.* at ___, 136 S. Ct. at
4 730 ("By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long
5 tradition of giving retroactive effect to *constitutional* rights that go beyond procedural
6 guarantees." (emphasis added)); *id.* at ___, 136 S. Ct. at 731 ("A penalty imposed pursuant to
7 an *unconstitutional* law is no less void because the prisoner's sentence became final before the
8 law was held unconstitutional. There is no grandfather clause that permits States to enforce
9 punishments the *Constitution* forbids." (emphasis added)); *id.* at ___, 136 S. Ct. at 731-32
10 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of
11 their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional*
12 right that determines the outcome of that challenge." (emphasis added)). *Montgomery's*
13 holding that State courts are to give retroactive effect to new substantive rules of constitutional
14 law simply makes universal what has already been accepted as common practice in Nevada
15 for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in
16 State collateral review proceedings. *See Colwell*, 118 Nev. at 818-21, 59 P.3d at 471-72; *Clem*,
17 119 Nev. at 628-29, 81 P.3d at 530-31.

18 Petitioner, however, really just uses *Montgomery* as a bridge to explain why he believes
19 that the United States Supreme Court's more recent decision in *Welch* mandates that *Byford* is
20 retroactive even as to those convictions that were final at the time that it was decided. Thus,
21 the focal point is not so much *Montgomery*—which, again, made constitutional (i.e., that State
22 courts must give retroactive effect to new substantive rules of constitutional law) what the
23 Nevada Supreme Court has already accepted in practice—but rather *Welch*, which according
24 to Petitioner, "indicated that the *only* requirement for determining whether an interpretation of
25 a criminal statute applies retroactivity is whether the interpretation narrows the class of
26 individuals who can be convicted of the crime." Petition at 1-2 (emphasis in original). Once
27 again Petitioner shortchanges the Supreme Court's analysis by making such an unqualified
28 assertion—this time to the point of misrepresenting the Court's holding in *Welch*.

1 In *Welch*, the Court had to consider whether *Johnson v. United States*, 576 U.S. ___, 135
2 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act
3 (“ACCA”) of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally void for vagueness,
4 is retroactive in cases on collateral review. ___ U.S. at ___, 136 S. Ct. at 1260-61. Not
5 surprisingly, to answer this question, the Court resorted to the retroactivity analysis set out in
6 *Teague*. *Id.* at ___, 136 S. Ct. at 1264-65. The Court commenced its application of the *Teague*
7 retroactivity analysis by recognizing that “[u]nder *Teague*, as a general matter, ‘new
8 constitutional rules of criminal procedure will not be applicable to those cases which have
9 become final before the new rules are announced,’ ” *id.* at ___, 136 S. Ct. at 1264 (quoting
10 *Teague*, 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added)), and that this general rule was
11 subject to the two exceptions that have already been discussed at great length above. Finding
12 it “undisputed that *Johnson* announced a new rule,” the Court explained that the specific
13 question at issue was whether this new rule was “substantive.” *Id.*¹¹ Then, upon concluding
14 that “*Johnson* changed the substantive reach of the [ACCA]” by “ ‘altering the range of
15 conduct or the class of persons that the [Act] punishes,’ ” the Court held that “the rule
16 announced in *Johnson* is substantive.” *Id.* at ___, 136 S. Ct. at 1265 (quoting *Schriro v.*
17 *Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)).

18 Salient in the Court’s analysis was the principle announced in *Schriro*, that “[a] rule is
19 substantive rather than procedural if it alters the range of conduct or the class of persons that
20 the law punishes.” 542 U.S. at 353, 124 S. Ct. at 2523; *see Welch*, ___ U.S. at ___, 136 S. Ct. at
21 1264-65 (citing *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523). In setting out this principle, the
22 Court in *Schriro* relied upon *Bousley v. United States*, which, in turn, relied upon *Teague* in
23 explaining the “distinction between substance and procedure” as far as new rules of
24 constitutional law are concerned. *See* 523 U.S. 614, 620-621, 118 S. Ct. 1604, 1610 (1998)
25 (citing *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075). The upshot of this is that the key principle
26

27 ¹¹ The parties agreed that the second *Teague* exception was not applicable. *Welch*, ___ U.S. at ___, 136 S. Ct. at
28 1264.

1 relied on by the Court in *Welch* in holding that *Johnson* was a new substantive rule is ultimately
2 rooted in *Teague*, which, as discussed above, is concerned exclusively with new rules of
3 constitutional import. That is to say, if the rule is new, but not constitutional in nature, there is
4 no need to resort to either of the *Teague* exceptions.

5 Juxtaposing the invalidation of the residual clause of the ACCA by *Johnson* with the
6 change in Nevada law on first-degree murder¹² effected by *Byford* will help drive home the
7 point that the former was premised on constitutional concerns not present in the latter. This, in
8 turn, will help illustrate why *Teague*'s retroactivity analysis has relevance only to the former.
9 In *Johnson*, the United States Supreme Court considered whether the residual clause of the
10 ACCA violated "the Constitution's prohibition of vague criminal laws." 576 U.S. at ___, 135
11 S. Ct. at 2555. The "residual clause" is part of the ACCA's definition of the term "violent
12 felony":

13 the term 'violent felony' means any crime punishable by imprisonment for a
14 term exceeding one year . . . that—

15 (i) has as an element the use, attempted use, or threatened use of physical force
16 against the person of another; or

17 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise*
18 *involves conduct that presents a serious potential risk of physical injury to*
another;

19 18 U.S.C. § 924(e)(2)(B) (emphasis added). It is the italicized portion in clause (ii) of §
20 924(e)(2)(B) that came to be known as the "residual clause." *Johnson*, 576 U.S. at ___, 135 S.
21 Ct. at 2556. Pursuant to the ACCA, a felon who possesses a firearm after three or more
22 convictions for a "violent felony" (defined above) is subject to a minimum term of
23 imprisonment of 15 years to a maximum term of life. § 924(e)(1); *Johnson*, 576 U.S. at ___,
24 135 S. Ct. at 2556. Thus, a conviction for a felony that "involves conduct that presents a serious
25 potential risk of physical injury"—i.e., a felony that fell under the residual clause—could very
26 well have made the difference between serving a maximum of 10 years in prison versus a

27
28 ¹² Specially, where the first-degree murder is premised on a theory of willfulness, deliberation, and
premeditation. NRS 200.030(1)(a).

1 maximum of life in prison. *See Johnson*, 576 U.S. at ___, 135 S. Ct. at 2555 (“In general, the
2 law punishes violation of this ban by up to 10 years’ imprisonment. [] But if the violator has
3 three or more earlier convictions for . . . a ‘violent felony,’ the [ACCA] increases his prison
4 term to a minimum of 15 years and a maximum of life.” (internal citation omitted)).

5 To understand the issue that arose with the residual clause, it helps to understand the
6 context in which it was applied. *See Welch*, __ U.S. at ___, 136 S. Ct. at 1262 (“The vagueness
7 of the residual clause rests in large part on its operation under the categorical approach.”). The
8 United States Supreme Court employs what is known as the categorical approach in deciding
9 whether an offense qualifies as a violent felony under § 924(e)(2)(B). *Id.* at ___, 136 S. Ct. at
10 1262 (citing *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2557). Under the categorical approach, “a
11 court assesses whether a crime qualifies as a violent felony ‘in terms of how the law defines
12 the offense and not in terms of how an individual offender might have committed it on a
13 particular occasion.’ ” *Johnson*, 576 U.S. at ___, 135 S. Ct. at 2557 (quoting *Begay v. United*
14 *States*, 553 U.S. 137, 141, 128 S. Ct. 1581, 1584 (2008)). The issue with the residual clause
15 was that it required “a court to picture the kind of conduct that the crime involves in ‘the
16 ordinary case,’ and to judge whether that abstraction presents a serious potential risk of
17 physical injury.” *Id.* (quoting *James v. United States*, 550 U.S. 192, 208, 127 S. Ct. 1586, 1597
18 (2007)).

19 The Court in *Johnson* found that “[t]wo features of the residual clause conspire[d] to
20 make it unconstitutionally vague.” *Id.* First, that the residual clause left “grave uncertainty
21 about how to estimate the risk posed by a crime”; and second, that it left “uncertainty about
22 how much risk it takes for a crime to qualify as a violent felony.” *Id.* at ___, 135 S. Ct. at 2557-
23 58. Because of these uncertainties, the Court in *Johnson* explained that “[i]nvoking so
24 shapeless a provision to condemn someone to prison for 15 years to life does not comport with
25 the Constitution’s guarantee of due process.” *Id.* at ___, 135 S. Ct. at 2560. Accordingly, “[t]he
26 *Johnson* Court held the residual clause unconstitutional under the void-for-vagueness doctrine,
27 a doctrine that is mandated by the Due Process Clauses of the *Fifth Amendment* (with respect
28 to the Federal Government) and the *Fourteenth Amendment* (with respect to the States).”

1 *Welch*, __ U.S. __, 136 S. Ct. at 1261-62 (emphasis added).

2 Unlike the invalidation of the residual clause of the ACCA on constitutional grounds,
3 the change in the law on first-degree murder effected by *Byford* implicated no constitutional
4 concerns. The Nevada Supreme Court in *Nika* explained in very clear terms that its “decision
5 in *Byford* to change Nevada law and distinguish between ‘willfulness,’ ‘premeditation,’ and
6 ‘deliberation’ was a matter of interpreting a state statute, *not a matter of constitutional law.*”
7 124 Nev. at 1288, 198 P.3d at 850 (emphasis added). To reinforce this point, the Court in *Nika*
8 noted how other jurisdictions “differ in their treatment of the terms ‘willful,’ ‘premeditated,’
9 and ‘deliberate’ for first-degree murder.” *Id.*; *see id.* at 1288-89, 198 P.3d at 850-51 (“As
10 explained earlier, several jurisdictions treat these terms as synonymous while others, for
11 example California and Tennessee, ascribe distinct meanings to these words. These different
12 decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional
13 law.”).

14 Conflating the change effected by *Johnson* with that effected by *Byford* ignores a
15 fundamental legal distinction between the two. Because the residual clause was found
16 unconstitutionally void for vagueness, defendants whose sentences were increased on the basis
17 of this clause were sentenced on the basis of an unconstitutional provision and, thus, were
18 unconstitutionally sentenced. Such a sentence is, as the Court in *Montgomery* would put it,
19 “not just erroneous but contrary to law and, as a result, void.” *See* __ U.S. at __, 136 S. Ct. at
20 731 (citing *Ex parte Siebold*, 100 U.S. 371, 375, 25 L. Ed. 717, 719 (1880)). Not so with the
21 change effected by *Byford*. At no point has Nevada’s law on first-degree murder been found
22 unconstitutional. Defendants who were convicted of first-degree murder under NRS
23 200.030(1)(a) prior to *Byford* were nonetheless convicted under a constitutionally valid statute
24 and, thus, were lawfully convicted. *See Nika*, 124 Nev. at 1287, 198 P.3d at 850 (explaining
25 that “the *Kazalyn* instruction correctly reflected Nevada law before *Byford*”).

26 It was the constitutional rights that underlay *Johnson*’s invalidation of the residual
27 clause that made it a “substantive rule of constitutional law.” *See Montgomery*, __ U.S. at __,
28 136 S. Ct. at 729. And as a “new” substantive rule of constitutional law, it fell within the first

1 of the two exceptions to *Teague*'s general rule of nonretroactivity. Because *no* constitutional
2 rights underlay the Nevada Supreme Court's change in Nevada's law on first-degree murder,
3 the new rule announced in *Byford* does not fall within *Teague*'s "substantive rule" exception.
4 The constitutional underpinnings of *Johnson*'s invalidation of the residual clause and the legal
5 ramifications stemming from this (i.e., that those whose sentences were increased pursuant to
6 an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to
7 *Welch*'s holding that the change effected by *Johnson* is retroactive under the *Teague*
8 framework.

9 Petitioner's reliance on *Welch*, however, goes beyond the Court's holding and *ratio*
10 *decidendi*. In his exposition of *Welch*, Petitioner goes on to describe the Court's treatment of
11 the arguments raised by *Amicus*. See Petition at 8-9; *Welch*, __ U.S. at __, 136 S. Ct. at 1265-
12 68. Among the arguments raised by *Amicus* were (1) that the Court should adopt a different
13 understanding of the *Teague* framework, "apply[ing] that framework by asking whether the
14 constitutional right underlying the new rule is substantive or procedural"; (2) that a rule is only
15 substantive if it limits Congress' power to legislate; and (3) that only "statutory construction
16 cases are substantive because they define what Congress always intended the law to mean" as
17 opposed to cases invalidating statutes (or parts thereof). *Welch*, __ U.S. at __, 136 S. Ct. at
18 1265-68. It was in addressing this third argument that the Court set out the "test" for
19 determining when a rule is substantive that Petitioner's argument hinges on:

20 Her argument is that statutory construction cases are substantive because they
21 define what Congress always intended the law to mean—unlike *Johnson*, which
22 struck down the residual clause regardless of Congress' intent.

23 That argument is not persuasive. Neither *Bousley* nor any other case from this
24 Court treats statutory interpretation cases as a special class of decisions that are
25 substantive because they implement the intent of Congress. Instead, decisions
26 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.'

27 *Id.* at __, 136 S. Ct. at 1267 (quoting *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523). On the
28 basis of this language, Petitioner comes to the following conclusion:

1 What is critically important, and new, about *Welch* is that it explains, for the
2 very first time, that the *only* test for determining whether a decision that
3 interprets the meaning of a statute is substantive, and must apply retroactively to
4 all cases, is whether the new interpretation meets the criteria for a substantive
5 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*.

6 Petition at 10 (emphasis in original).

7 Petitioner, however, fails to grasp that this “test” he relies so heavily on is nothing more
8 than judicial dictum. *Judicial Dictum*, Black’s Law Dictionary 519 (9th Ed. 2009) (defining
9 “judicial dictum” as “[a] opinion by a court on a question that is directly involved, briefed, and
10 argued by counsel, and even passed on by the court, but that is not essential to the decision”).
11 This “test” set out by the Court was in response to an argument made by *Amicus* and was not
12 essential to *Welch*’s holding regarding *Johnson*’s retroactivity. As judicial dictum, this “test”
13 is not binding on Nevada courts as Petitioner argues. *See Black v. Colvin*, 142 F. Supp. 3d 390,
14 395 (E.D. Pa. 2015) (“Lower courts are not bound by dicta.” (citing *United States v. Warren*,
15 338 F.3d 258, 265 (3d Cir. 2003)))

16 Interestingly, though, in setting out this test, the Court quoted verbatim from the very
17 portion of its decision in *Schriro* that has been cited above, *see supra* at 14, for the proposition
18 that the key principle relied on by the *Welch* Court—in holding that *Johnson* was a new
19 substantive rule—is ultimately rooted in *Teague*, which, again, is concerned exclusively with
20 new rules of constitutional import. Thus, to the extent the “test” relied on by Petitioner is
21 grounded on this text from *Schriro*, Petitioner takes it out of context by ignoring the fact that
22 this statement in *Schriro* was based on *Bousley*’s discussion of the substance/procedure
23 distinction respecting new rules of constitutional law, which was, in turn, premised largely on
24 *Teague*. *See Bousley*, 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing *Teague*, 489 U.S. at 311,
25 109 S. Ct. at 1075). But, to the extent that this “test” is unmoored from the constitutional
26 underpinnings of *Teague*’s retroactivity analysis, it is, after all, nothing more than dictum.
27 Either way, Petitioner’s reliance on this language from *Welch* is misguided.

28 ///

1 Because neither *Montgomery* nor *Welch* alter *Teague*'s retroactivity analysis, the
2 Nevada Supreme Court's decision in *Colwell*, which adopted *Teague*'s framework, remains
3 valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in
4 *Nika*, *Byford* has no retroactive application on collateral review to convictions, like
5 Petitioner's, that became final before the new rule was announced. 124 Nev. at 1287-89, 198
6 P.3d at 850-51. Consequently, Petitioner's reliance on *Montgomery* and *Welch* to meet NRS
7 34.726(1)(a)'s criterion fails.

8 Moreover, Petitioner has filed the instant petition more than one year after *Welch* was
9 published. The United States Supreme Court issued its decision in *Welch* on April 18, 2016.
10 The instant Petition was filed on April 21, 2017. As Petitioner himself writes in his habeas
11 petition, "[a] petitioner has one-year to file a petition from the date the claim has become
12 available." Petition at 12 (citing *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 730-40
13 (2016), rev'd on other grounds, *Rippo v. Baker*, 2017 WL 855913 (Marc. 6, 2017)). Thus,
14 Petitioner's claim that *Welch* constitutes good cause to overcome NRS 34.726(1)'s procedural
15 bar is itself procedurally defaulted.

16 **2. Petitioner Has Failed To Establish That Dismissal Of The Petition As**
17 **Untimely Will Unduly Prejudice Him.**

18 To meet NRS 34.726(1)(b)'s criterion, "a petitioner must show that errors in the
19 proceedings underlying the judgment worked to the petitioner's actual and substantial
20 disadvantage." *State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012) (citing *Hogan v.*
21 *Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993)).

22 First, this Court notes that Petitioner has failed to provide any cogent argument in
23 support of his allegation that he was actually prejudiced by use of the *Kazalyn* instruction.
24 Petitioner makes the following conclusory statement in support of his allegation that he was
25 actually prejudiced by use of the *Kazalyn* instruction: "It is reasonably likely that the jury
26 applied the challenged instruction in a way that violates the Constitution. *See Middleton v.*
27 *McNeil*, 541 U.S. 433, 437 (2004). The *Kazalyn* instruction had an impact on his case." Petition
28 at 11. Then, in closing, Petitioner makes the following conclusory allegation: "Finally,

1 petitioner can establish actual prejudice. The *Kazalyn* instruction had an impact on his case.”
2 Petition at 14. Petitioner fails to provide any facts to support either of these conclusory
3 allegations.

4 But, in any event, Petitioner cannot show that he was unduly prejudiced by the use of
5 the *Kazalyn* instruction because there was substantial evidence of premeditation, deliberation,
6 and willfulness. The following are the facts set out by the Nevada Supreme Court in its
7 published opinion affirming the judgment:

8 In early July 1994, Justin began living with a friend, Eric Resma (“Resma”) in
9 Resma’s converted garage, which was a known “drug house.” About August 8,
10 1994, two weeks prior to Justin’s death, Lisle and Lopez visited Resma’s garage
11 for the first time, looking for their friend, Jason Sullivan (“Sullivan”), who had
12 recently lived there, but had since moved out. Resma talked with Lisle and Lopez
13 and invited them inside to ingest drugs. From that day forward, Lisle and Lopez
14 continued to frequent Resma’s residence. At some point thereafter, Resma found
15 a .380 caliber automatic gun between his couch cushions. When Resma asked
16 the occupants of the garage where it came from, either Lisle or Lopez took the
17 gun from Resma and put it in his own pants waistband.

18 On August 17, 1994, Lisle and Sullivan participated in a drug transaction at
19 Resma’s house. Lisle sold Sullivan ten grams of methamphetamine with the
20 understanding that Sullivan would pay Lisle for the narcotics within a few days.
21 Sullivan then sold Justin 1.75 grams for which Justin would pay later. Sullivan
22 took his portion of the drugs, along with five or six rifles he also presumably
23 received from Lisle, to the house of his girlfriend, Nicole Catherina
24 (“Catherina”), where Sullivan was then living. Later that day, Sullivan was
25 arrested on unrelated charges.

26 The next day, on August 18, 1994, Catherina contacted Resma so that she could
27 return the drugs and guns to Lisle. Resma and Justin went to Catherina’s
28 residence to pick up the items and took them to Resma’s house where Lisle and
Lopez were waiting. Resma gave the drugs to Lisle, but put the rifles, wrapped
in a blanket, on the couch. Justin told Lisle that Sullivan had given him a portion
of the drugs, and Lisle demanded to know their location. Justin replied that the
drugs were locked away and he did not have them in his possession at the
moment. Lisle continued to demand to see the drugs. He appeared very upset
and seemed to disbelieve Justin. Resma then stated that he had the drugs and
asked Lisle if he wanted to see them. Lisle calmed down once Resma interjected;
Lisle stated that he did not need to see the drugs.

Throughout this conversation, Lisle was “fiddling” with his .380 caliber weapon.
He was cleaning it, and the clip containing ammunition was not in the gun.

1 Nevertheless, Justin asked Lisle if he was threatening him with the gun. Lisle
2 said he was not; if he had a problem with Justin, he would take him outside and
they would box.

3 Later that day, Justin separately told his friends, Ryan Cizl ("Cizl") and Jeff
4 Kurtz ("Kurtz"), that Lisle had held a gun to his head. He also told them that
5 later Lisle apologized to Justin. Both Kurtz and Cizl testified at trial that
6 although Justin was prone to exaggerate, this time they did not detect any
hyperbole from him.

7 Sometime between August 18, 1994, and August 21, 1994, Justin found the rifles
8 that were returned at Resma's residence. He thought they were stolen and stated
9 that he wanted the guns removed from the residence or else he would turn them
10 over to his father, the chief of police for North Las Vegas. Thereafter, another
resident at Resma's garage, T. J. Willis ("Willis"), told Lisle what Justin had
said about the guns. Lisle apparently stated to Willis that he advised Justin not
to do that.

11 On August 21, 1994, in the late evening hours, Lisle, Lopez, and some other
12 friends, including Adam Evans ("Evans"), were at the house of Anthony Vanella
13 ("Vanella"). Lisle stated, in Evans' presence, that he was going to kill a "snitch"
named Justin. Lopez was not present at this conversation.

14 In the meantime, at approximately 10:30 p.m., Kurtz telephoned Justin to request
15 that Justin procure some drugs for him. Between 11 p.m. to midnight, Justin gave
16 another friend a ride home from Resma's garage. While Justin was out, Kurtz
called back again and left a message. When Justin returned home, he did not call
Kurtz back right away.

17 At approximately 2 a.m. on August 22, 1994, Lisle and Lopez left Vanella's
18 house. Either Lopez or Lisle had a .380 caliber gun tucked into his waistband.

19 At approximately 2:30 a.m., Justin returned Kurtz's phone call to inform him
20 that he was going out to get the drugs. Justin stated that he was on his way out
21 the door at that moment and he would contact Kurtz in fifteen minutes. He stated
22 he was getting the drugs from some people known as "Vatos" and that they were
at the door right now. Lisle and Lopez were known as "Vatos," and Justin, in
particular, enjoyed calling them by that nickname. Kurtz, who was anxiously
awaiting his delivery, called Justin again at 3 a.m. and received no answer.

24 Between approximately 4:00 to 4:30 a.m., Justin's body was found at an area in
25 the desert known as Lone Mountain. It was later determined that this was an area
26 that Lisle and Lopez were known to frequent for shooting practice. Justin was
shot three times: once in the upper chest, once in the right side of his back, and
once in his lower back.

27 Meanwhile, between 4:00 to 4:30 a.m., Lisle and Lopez returned to Vanella's
28 house. Lisle had the gun in his possession. Evans testified that Lisle told Vanella,

1 "I smoked him. I got him. I killed a snitch. We took him to where we used to
2 shoot and he ran and I shot him in the back." In addition, Vanella's mother
3 overheard Lisle say, "I took him to the desert and I did him. I shot him four times
4 and I think I hit him three. He was a rat. I knew he was a rat and I'm glad I did
5 it." Lisle also mentioned the "snitch's" name was Justin. Lopez then stated, "We
6 did it clean and we did it good. Nobody is going to find out that we did it. You
7 don't have to worry."

8 Vanella then suggested to Lisle and Lopez to get rid of the gun, whereupon Lisle
9 stated that he would go out and sell it. Lisle and Lopez then left Vanella's house
10 and returned about one hour later. Lisle stated he sold the gun for \$50.00.

11 Later on August 22, 1994, between 9 or 10 p.m., Vanella brought Lisle and
12 Lopez to the house of Larry Prince ("Prince") for the first time. Lisle, Vanella,
13 and Prince discussed a drug transaction. At the conclusion of this conversation,
14 Lisle asked Vanella to leave the room. When Prince and Lisle were alone, Lisle
15 stated, "There's something I have to let you know. I killed a snake. I mean I offed
16 a snitch, I offed someone. I offed a human being. I killed someone." He then
17 stated the victim was a son of a police officer, but did not name him. Lisle did,
18 however, state that it would be on the news that evening. At 11 p.m., they all
19 watched the news. Upon seeing a story of a body found in the desert, Lisle
20 seemed to display a sense of satisfaction, while Lopez portrayed no reaction at
21 all.

22 The next day, August 23, 1994, Prince assisted Lisle and Lopez in disposing of
23 a trash bag that purportedly contained two pairs of tennis shoes. Evans testified
24 that within a couple days after the murder, he noticed that Lisle and Lopez wore
25 different tennis shoes than they had worn prior to Justin's death.

26 Sometime between August 22, 1994, and August 25, 1994, Lisle showed Prince
27 a .380 caliber automatic gun, but explained that this was not the weapon used to
28 kill Justin. Lisle stated, "Don't worry about that one. That one's long gone."

On August 25, 1994, the police arrested Prince at his home for possession of a
controlled substance with intent to sell. While there, the police observed Lisle
sitting in a certain armchair. Later that day, upon searching Prince's house
pursuant to a search warrant, the police found a .380 caliber gun tucked into the
seat cushions of the very chair on which Lisle had been sitting. Although this
gun was later determined not to be the same weapon that killed Justin, it was
discovered that the brand of bullets found in the gun was the same brand used to
shoot Justin.

In late August 1994, Lisle informed his friend, John Melcher ("Melcher"), that
he was "laying low" because the police were trying to "get" him for the murder
of the North Las Vegas police chief's son, but that the police did not have enough
evidence on him.

1 Lisle introduced Melcher to Lopez. Lopez told Melcher that he and Lisle picked
2 up Justin and took him to the desert. Lopez stopped the car, and Lisle and Justin
3 got out and went to the back of the car, whereupon Lopez observed Lisle shoot
4 Justin. Lopez was able to witness this incident by looking at the rear-view mirror.

5 *Lislie*, 113 Nev. at 684-87, 941 P.2d at 463-65. In his appeal from the judgment of conviction,
6 Petitioner raised, among other arguments, an argument that the evidence did not support a
7 conviction for first-degree murder. In rejecting this argument, the Nevada Supreme Court
8 stated the following:

9 Evidence admissible against Lopez regarding the first degree murder charge
10 includes: (1) Lopez's statement in the presence of Evans, "We did it clean and
11 we did it good. Nobody is going to find out that we did it." (Emphasis added);
12 (2) Lopez's statement to Melcher that he and Lisle picked up Justin and took
13 him to the desert and that Lopez observed Lisle shoot Justin; (3) Justin's
14 statement to Kurtz that he was going out with "Vatos," also known as Lisle and
15 Lopez, shortly before he was killed; (4) Lopez left Vanella's house with Lisle at
16 2 a.m. on August 22, 1994, and returned with Lisle at about 4 a.m., which was
17 the two-hour period within which Justin was killed; (5) Lopez accompanied
18 Lisle to sell the gun; (6) Justin's body was found in a desert area that Lopez was
19 known to frequent; and (7) Lopez wore different tennis shoes after Justin was
20 killed than he did before Justin's death, and Prince assisted Lopez in disposing
21 of tennis shoes the day after the murder.

22 Accordingly, we conclude that the evidence is sufficient for "any rational trier
23 of fact [to find] the essential elements of the crime beyond a reasonable doubt."
24 *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

25 *Id.* at 691-92, 941 P.2d at 467-68.

26 To be sure, as regards Petitioner, the charge of murder and subsequent conviction for
27 first-degree murder was premised on a theory of aiding and abetting and/or conspiring with
28 the co-defendant (i.e., Lisle), who was the individual who actually fired the gun and killed
Justin. *See* Transcript of Jury Trial, Volume XIII, April 17, 1996, at 26-32. As is clear from
the facts set out by the Nevada Supreme Court, Petitioner conspired with the co-defendant to
kill Justin. Moreover, by providing the means of transportation out to the desert and facilitating
the killing of Justin (although he was not the trigger-puller), Petitioner aided and abetted the
co-defendant in killing Justin. Thus, the evidence is clearly sufficient to establish that

1 Petitioner engaged in a “process of determining upon a course of action to kill as a result of
2 thought” prior to the killing of Justin. *See Byford*, 116 Nev. at 236, 994 P.2d at 714 (defining
3 “deliberation”—the element underemphasized by the *Kazalyn* instruction—as “the process of
4 determining upon a course of action to kill as a result of thought, including weighing the
5 reasons for and against the action and considering the consequences of the action”).

6 Based on the foregoing, this Court finds that the instant Petition is untimely pursuant to
7 NRS 34.726(1) and that Petitioner has failed to establish “good cause for delay.” The United
8 States Supreme Court’s decisions in *Montgomery* and *Welch* do not provide a new legal basis
9 to satisfy NRS 34.726(1)(a)’s criterion that the delay not be the fault of the petitioner. And
10 Petitioner has also failed to establish NRS 34.726(1)(b)’s criterion inasmuch as he has failed
11 to establish that he was unduly prejudiced by the use of the *Kazalyn* instruction. That being
12 the case, this Court denies the Petition on the basis that it is procedurally barred under NRS
13 34.726(1).

14 **B. The Petition Is Successive Under NRS 34.810(2), And Petitioner Has**
15 **Failed To Establish Good Cause And Actual Prejudice.**

16 NRS 34.810(2) requires the district court to dismiss “[a] second or successive petition
17 if the judge or justice determines that it fails to allege new or different grounds for relief and
18 that the prior determination was on the merits or, if new and different grounds are alleged, the
19 judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition
20 constituted an abuse of the writ.” And as with NRS 34.726(1), the procedural bar described in
21 NRS 34.810(2) is mandatory. *See Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001)
22 (“[A] court *must dismiss* a habeas petition if it presents claims that either were or could have
23 been presented in an earlier proceeding, unless the court finds both cause for failing to present
24 the claims earlier or for raising them again and actual prejudice to the petitioner.” (emphasis
25 added)).

26 As noted above, the instant Petition constitutes the second habeas petition that
27 Petitioner has filed. Petitioner filed his first habeas petition on November 3, 1999. On January
28

1 12, 2000, the Court denied the petition on the merits and entered an Order to that effect on
2 February 10, 2000.

3 To be sure, this is the first time that Petitioner has raised a claim in a State collateral
4 review proceeding claim attacking the *Kazalyn* instruction. As a “new and different” ground
5 for relief, this Court finds that Petitioner’s failure to raise it in a prior petition constitutes an
6 abuse of the writ. And while NRS 34.810(3) affords Petitioner the opportunity to overcome
7 the procedural bar described in subsection (2), Petitioner fails to establish either good cause or
8 actual prejudice for the very same reasons that he failed to establish good cause for delay under
9 NRS 34.726(1). *See supra* at 4-25. That being the case, this Court denies the Petition on the
10 basis that it is procedurally barred under NRS 34.810(2).

11 **C. Laches Under NRS 34.800(2) Is Applicable Here Because More Than 18**
12 **Years Have Elapsed Between The Nevada Supreme Court’s Decision On**
13 **Petitioner’s Direct Appeal Of The Judgment Of Conviction And The**
Filing Of The Instant Petition.

14 NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if “[a] period
15 exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing
16 a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the
17 filing of a petition challenging the validity of a judgment of conviction.” The Nevada Supreme
18 Court observed in *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how
19 “petitions that are filed many years after conviction are an unreasonable burden on the criminal
20 justice system” and that “[t]he necessity for a workable system dictates that there must exist a
21 time when a criminal conviction is final.” To invoke NRS 34.800(2)’s presumption of
22 prejudice, the statute requires that the State specifically plead laches.

23 The State affirmatively pleads laches in this case. In order to overcome the presumption
24 of prejudice to the State, Petitioner has the heavy burden of proving a fundamental miscarriage
25 of justice. *See Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on
26 Petitioner’s representations and on what he has filed with this Court thus far, Petitioner has
27 failed to meet that burden. That being the case, this Court dismisses the Petition pursuant to
28 NRS 34.800(2).

1 II. *Petitioner Is Not Entitled To Counsel In This Matter And, Furthermore, Counsel Is*
2 *Unnecessary As There Is No Meritorious Proceeding Pending.*

3 In *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991), the United States
4 Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction
5 proceedings. In *McKague v. Warden*, 112 Nev. 159, 163, 912 P.2d 255, 257 (1996), the
6 Nevada Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not
7 guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada
8 Constitution's right to counsel provision as being coextensive with the Sixth Amendment to
9 the United States Constitution." *McKague* specifically held that with the exception of NRS
10 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does
11 not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction
12 proceedings. *Id.* at 164, 912 P.2d at 258.

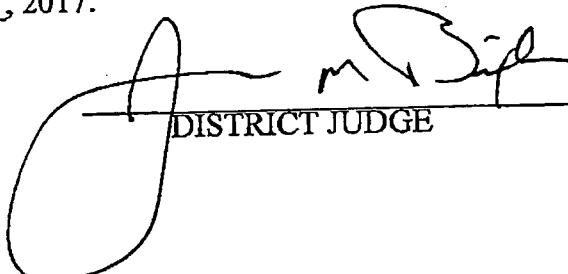
13 While NRS 34.750 permits the district court to appoint counsel in certain circumstances,
14 Petitioner has failed meet any of the criteria set out in that statute. Moreover, given that
15 Petitioner's claim is procedurally barred, the appointment of counsel would be futile.

16 **ORDERS**

17 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
18 is denied.

19 IT IS FURTHER ORDERED that the Motion for Appointment of Counsel is denied.

20 DATED this 28th day of July, 2017.

21
22 
DISTRICT JUDGE P

23 STEVEN B. WOLFSON
24 Clark County District Attorney
Nevada Bar #001565

25
26 BY


27 KRISTA D. BARRIE
Chief Deputy District Attorney
28 Nevada Bar #010310