IN THE SUPREME COURT OF THE STATE OF NEVADA

TODD MITCHELL LEAVITT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 69218

MOTION TO REISSUE ORDER AS A PUBLISHED OPINION

Attorney General Adam Paul Laxalt, by and through counsel, Lawrence VanDyke, Solicitor General, and Jeffrey M. Conner, Assistant Solicitor General, moves this Court to reissue its disposition in this case as a published opinion. This timely motion for publication is made under Rule 36(f) of the Nevada Rules of Appellate Procedure and is supported by the accompanying memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court is all too familiar with the back and forth that has occurred between Nevada state courts and the federal courts over the use of the jury instruction at issue in this case, commonly referred to as the *Kazalyn* instruction.[1] *See Nika v. State*, 124 Nev. 1272, 198 P3d 839 (2008). The Attorney General

[1] The instruction took its name from a case where this Court rejected a claim that the instruction conflated the element of premeditation with malice aforethought. *See Kazalyn v. State,* 108 Nev. 67, 825 P.2d 578 (1992).

believed the issues regarding the use of the *Kazalyn* instruction were finally resolved by a recent Ninth Circuit decision recognizing that the federal courts were compelled to follow this Court's statements in *Nika* that the *Kazalyn* instruction constituted a correct statement of Nevada law for purposes of defining willful, deliberate and premeditated murder prior to this Court's decision in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), and to treat its prior decisions to the contrary as "effectively overruled." *See Babb v. Lowzosky*, 719 F.3d 1019, 1029-30 (9th Cir. 2013), *overruled on other grounds by Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2014). However, the Ninth Circuit revived the conflict when it decided *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), giving rise to a number of new challenges to the use of the *Kazalyn* instruction to challenge a number of first-degree murder convictions and reviving such challenges in habeas corpus proceedings that remain pending in federal court.

In rejecting Petitioner Todd Mitchell Leavitt's position that *Riley* serves as cause for his procedural default and expressing its rejection of the *Riley* Court's reading of Nevada law, this Court's disposition of Leavitt's petition clearly satisfies at least two, if not all three, of the criteria this Court considers when deciding whether publication of the disposition is appropriate. First, this Court will publish opinions that address issues of first-impression. NRAP 36(c)(1)(A). There is no published authority from this Court establishing that the Ninth

Circuit's decision in *Riley* does not serve as cause to overcome a procedural default. More importantly, one reason this Court concluded that Leavitt's reliance on *Riley* did not establish cause is that this Court rejected the *Riley* Court's interpretation of Nevada law on first-degree murder. (Order, Sept. 16, 2016.) There is no published authority from this Court establishing its disagreement with the Ninth Circuit's decision in *Riley*, making this Court's rejection of the *Riley* Court's reading of a specific issue of Nevada law an issue of first-impression for this Court.

To the extent this case does not address an issue of first-impression, that is because this Court actually addressed the issue in *Nika*, placing the decision in this case more comfortably within this Court's second criteria for publishing the disposition of a case: whether the decision "[a]lters, modifies, or significantly clarifies a rule of law previously announced by the court…." NRAP 36(c)(1)(B). This Court's decision in *Nika* went to great lengths to discuss the historical background of the relationship between the elements of first-degree murder in Nevada, including acknowledging and discussing the decision in *Hern v. State*, 635 P.2d 278 (Nev. 1981), before concluding that the decision in *Byford* constituted a change in Nevada law on how to define the elements of first-degree murder. *Nika*, 124 Nev. at 1279-89, 198 P.3d at 844-51. However, the Ninth Circuit failed to see that this Court's reading of *Hern* in *Nika* expressly rejected the idea that *Hern*

required premeditation and deliberation to be given separate and distinct definitions within the jury instructions. This Court's decision in this case removes any doubt about whether Nevada law—under *Hern* or otherwise—required jury instructions that provided separate and distinct definitions for premeditation and deliberation at any time prior to this Court's decision in *Byford*.

Finally, and perhaps most convincingly, this Court will publish a decision that "[i]nvolves an issue of public importance that has application beyond the parties." NRAP 36(c)(1)(C). The Attorney General is aware of multiple cases where this Court has already mentioned the issue in footnotes of unpublished dispositions. *See Canape v. State*, No. 62843, 2016 WL 2957130, at *2 n.5 (Nev. May 19, 2016); *Crump v. State*, No. 63346, 2016 WL 1204502, at *2 n.5 (Nev. March 25, 2016); *Adams v. State*, No. 60606, 2016 WL 315171, at *2 n.3 (Nev. Jan. 22, 2016). And the Attorney General has been informed of at least two cases where this issue is currently being litigated in the state district court. *McKenna v. State*, No. C044366 (8th Jud. Dist. Ct. of Nev.); *Luster v. State*, No. C1322314 (8th Jud. Dist. Ct. of Nev.).

Additionally, the Attorney General has filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure in *Riley v. McDaniel*, Case No. 3:01-cv-0096-RCJ-VPC (D. Nev.), citing the aforementioned unpublished dispositions rejecting the Ninth Circuit's interpretation of Nevada law in *Riley* and the Ninth Circuit's

decision from *Babb* for its recognition that the federal courts must treat this Court's intervening decisions on questions of Nevada law as intervening higher authority. And the Attorney General is also aware of multiple other cases pending in federal court where federal habeas petitioners are relying on the Ninth Circuit's decision in *Riley* as a basis to challenge their convictions for first-degree murder. *See*, *e.g.*, *Echavarria v. Baker*, No. 15-99001 (9th Cir.); *Browning v. Baker*, No. 15-9902 (9th Cir.); *Witter v. Baker*, No. 14-99009 (9th Cir.); *Smith v. Cox*, No. 14-15884 (9th Cir.); *Williams v. Godinez*. No. 3:90-cv-00324-HDM-VPC (D. Nev.).

While a recent rule change permits parties to cite this Court's unpublished decisions as persuasive authority, a published disposition that squarely rejects the Ninth Circuit's analysis of Nevada law in *Riley* in the manner this case does will greatly assist the Attorney General in removing the uncertainty and unnecessary expense to Nevada's court system that is created by the Ninth Circuit's misinterpretation of Nevada law in *Riley*. Accordingly, publication of this Court's rejection of the *Riley* Court's analysis of Nevada law is undoubtedly an issue of public importance that warrants publication of the disposition in this case.

In light of the foregoing, this Court's decision in this matter clearly meets at least two, if not all three, of the criteria this Court evaluates in deciding whether to publish a decision. The decision addresses issues of first impression, while clarifying that the Ninth Circuit decision in *Riley* is based upon an incorrect

interpretation of Nevada law addressing a significant matter of public importance. This Court should publish its decision in this case.

RESPECTFULLY SUBMITTED this 30th day of September, 2016.

ADAM PAUL LAXALT
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of September, 2016, I served a copy of the foregoing MOTION TO REISSUE ORDER AS A PUBLISHED OPINION, placing said document in the U.S. Mail, postage prepaid, addressed to:

Todd Mitchell Leavitt
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/s/ Sonya M. Koenig