EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

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Steven D. Grierson
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October 11, 2017

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: STATE OF NEVADA vs. CLYDE LEWIS
S.C. CASE: 73706
D.C. CASE: 94C120857-2

Dear Ms. Brown:

In response to the e-mail dated October 11, 2017, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed September 1, 2017 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LOUIS RANDOLPH, aka,
Clyde Lewis, #1356378

Defendant.

CASE NO: 94C120857-2

DEPT NO: XXIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: July 10, 2017
TIME OF HEARING: 9:30 AM

THIS CAUSE having come on for hearing before the Honorable STEFANY MILEY, District Judge, on the 10th day of July, 2017, the Petitioner not being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through ELANA L. GRAHAM, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, no arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On October 5, 1994, the State filed an Information charging LOUIS RANDOLPH, aka, Clyde Lewis (hereinafter "Defendant") with: COUNT 1 – Burglary (Felony – NRS 205.060, 200.380); COUNT 2 – Robbery with Use of a Deadly Weapon (Felony – NRS 200.380,

193.165); COUNT 3 – Battery with Use of a Deadly Weapon (Felony – NRS 200.481) and COUNT 4 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165) and Aiding and Abetting (NRS 195.020). On July 5, 1995, the State filed an Amended Information clarifying the language within the document but not otherwise modifying the charges.

Defendant's jury trial commenced on August 23, 1995. On September 5, 1995, the jury returned a verdict of guilty as to COUNT 3 – Battery with Use of a Deadly Weapon. The jury did not reach a verdict as to COUNTS 1, 2 & 4, and the court declared a mistrial as to those counts.

On November 30, 1995, Defendant appeared in court with counsel for sentencing. The court sentenced Defendant as to COUNT 3 to the Nevada Department of Prisons (Corrections) for 8 years with 481 days credit for time served. The Judgment of Conviction was filed on December 14, 1995. Defendant did not file a direct appeal.

On March 3, 1997, Defendant's jury trial in reference to COUNTS 1, 2 & 4 commenced. On March 10, 1997, the jury found Defendant guilty of the three remaining counts as follows: COUNT 1 – Burglary; COUNT 2 – Robbery with Use of a Deadly Weapon; and COUNT 4 – Murder of the First Degree with Use of a Deadly Weapon.

On April 29, 1997, Defendant appeared in court with counsel for sentencing. The court sentenced defendant to the Nevada Department of Corrections as follows: COUNT 1 – 10 years, consecutive to COUNT 3; COUNT 2 –15 years, plus an equal and consecutive sentence of 15 years for the Use of a Deadly Weapon, consecutive to COUNTS 1 & 3; COUNT 4 – Life with the possibility of parole, plus an equal and consecutive sentence of Life with the possibility of parole for the Use of a Deadly Weapon, consecutive to COUNTS 1, 2 & 3, with 1,023 days credit for time served. A Judgment of Conviction was filed on May 23, 1997.

Defendant filed a Notice of Appeal on June 9, 1997 (Docket No. 30567). On July 10, 1998, Defendant filed his first Petition for Writ of Habeas Corpus (Post-Conviction) challenging his December, 14, 1995, Judgment of Conviction. The State filed its Opposition on July 27, 1998. On September 4, 1998, Defendant filed a Reply to the State's Opposition.

On October 5, 1998, the District Court denied Defendant's Petition. On the same day, Defendant filed a Notice of Appeal to the Nevada Supreme Court from the denial of his Petition (Docket No. 33145). On November 17, 1998, the District Court filed a Findings of Fact, Conclusions of Law, and Order and a Notice of Entry of Decision and Order.

On March 31, 2000, the Nevada Supreme Court ordered Defendant's two appeals consolidated. On February 7, 2001, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Petition as well as Defendant's May 23, 1997, Judgment of Conviction. Defendant filed a Petition for Rehearing on March 12, 2001. On January 24, 2002, the Nevada Supreme Court denied Defendant's Petition for Rehearing. Remittitur issued on February 11, 2002.

On November 22, 2011, Defendant filed a second Petition for Writ of Habeas Corpus (Post-Conviction), challenging the judgments rendered at both of his trials. On January 31, 2012, the State filed its Response to and Motion to Dismiss Defendant's Petition. On February 15, 2012, Defendant filed his Reply to the State's Response and Motion to Dismiss. On March 5, 2012, the District Court denied Defendant's Petition. On March 23, 2012, the District Court filed a Notice of Entry of Decision and Order.

On March 22, 2012, Defendant filed a Notice of Appeal from the denial of his Petition. On December 12, 2012, the Nevada Supreme Court affirmed the District Court's denial of Defendant's Petition. Remittitur issued on January 8, 2013.

On December 2, 2013, Defendant filed a third Petition for Writ of Habeas Corpus (Post-Conviction), Request for Evidentiary Hearing and Motion to Appoint Counsel. The State responded on January 15, 2014. On March 12, 2014, the Court entered its Findings of Fact, Conclusions of Law and Order denying Defendant's Petition for Writ of Habeas Corpus and Motion to Appoint Counsel. On August 26, 2014, the Nevada Supreme Court affirmed the denial of Defendant's Petition.

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On April 22, 2017, Defendant filed the instant fourth Petition for Writ of Habeas Corpus ("Petition"). The State responded on June 19, 2017. On July 10, 2017, the Court denied Defendant's Petition as follows:

I. The Petition Is Procedurally Barred Under Both NRS 34.726(1) And NRS 34.810(2).

The instant Petition has been filed more than 15 years after remittitur issued following Defendant's direct appeal. Accordingly, it is untimely under NRS 34.726(1). In an attempt to establish good cause to excuse this untimeliness, Defendant relies on the United States Supreme Court's decisions in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), and Welch v. United States, 136 S. Ct. 1257 (2016). Montgomery and Welch, however, fail to serve as good cause necessary to overcome NRS 34.726(1)'s procedural bar. Moreover, because the instant Petition constitutes Defendant's second habeas petition, it is successive under NRS 34.810(2). And for the same reasons that Montgomery and Welch fail to constitute good cause to overcome NRS 34.726(1)'s procedural bar, they likewise fail to constitute good cause sufficient to overcome NRS 34.810(2)'s procedural bar.

A. The Petition Is Untimely.

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

The Judgment of Conviction in this case was filed on May 23, 1997. Following the Nevada Supreme Court's denial of Defendant's direct appeal, remittitur issued on February 11, 2002. Accordingly, Defendant had until February 11, 2003, to file a timely Petition. The instant Petition, however, was filed on May 3, 2017—more than 14 years after the one-year deadline had expired. Therefore, the Petition is dismissed.

B. The Petition Is Successive.

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

As noted above, the instant Petition is the fourth habeas petition that Defendant has filed. Defendant filed his first habeas petition on July 10, 1998. On November 17, 1998, the Court entered its Findings of Fact, Conclusions of Law and Order denying Defendant's first petition. Additionally, to the extent that Defendant's claim challenging the validity of his conviction based on the holdings in Montgomery v. Louisiana, 136 S. Ct. 718 (2016), and Welch v. United States, 136 S. Ct. 1257 (2016), constitute a "new and different" ground for relief, the holdings of these cases are based on law that has been available for years; thus, this Court finds that Defendant's failure to raise it in a prior petition constitutes an abuse of the writ.

The instant Petition is successive pursuant to NRS 34.810. Therefore, the Petition is dismissed.

C. Defendant Fails To Establish Good Cause And Prejudice To Overcome The Procedural Bars To His Petition.

1. Defendant Has Not Established Good Cause.

A showing of good cause and prejudice may overcome the procedural bars. In order to demonstrate good cause, a petitioner must show that an impediment external to the defense

prevented him or her from complying with the state procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). An impediment external to the defense may be demonstrated by a showing "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials,' made compliance impracticable." Id. (citing Murray v. Carrier, 477 U.S. 478, 488, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986) (internal citations omitted)). A claim or allegation that was reasonably available to the petitioner during the statutory time period would not constitute good cause to excuse the delay. Id. at 253, 71 P.3d at 506. Moreover, an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner during the statutory time period. Id. at 253, 71 P.3d at 507.

Defendant attempts to meet this first requirement by arguing new case law. Specifically, he argues that Montgomery and Welch represent a change in law that allows Defendant to obtain the benefit of Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000), on collateral review. Petition at 5(k)-(l). In essence, Defendant avers that Montgomery and Welch establish a legal basis for a claim that was not previously available. Defendant's reliance on Montgomery and Welch is misguided.

As noted by Defendant, he received the following jury instruction on premeditation and deliberation:

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

Instructions to the Jury, filed November 3, 1995, Instruction No. 8. This instruction is known as the Kazalyn[1] instruction.

[1] Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

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

Seven years later, in Polk v. Sandoval, the United States Court of Appeals for the Ninth Circuit weighed in on the issue. 503 F.3d 903 (9th Cir. 2007). There, the Ninth Circuit held that the use of the Kazalyn instruction violated the Due Process Clause of the United States Constitution because the instruction "relieved the state of the burden of proof on whether the killing was deliberate as well as premeditated." Id. at 909. In Polk, the Ninth Circuit took issue with the Nevada Supreme Court's conclusion in cases decided in the wake of Byford that "giving the Kazalyn instruction in cases predating Byford did not constitute constitutional error."[2] Id. at 911. According to the Ninth Circuit, "the Nevada Supreme Court erred by conceiving of the Kazalyn instruction issue as purely a matter of state law" insofar as it "failed to analyze its own observations from Byford under the proper lens of Sandstrom, Franklin, and Winship and thus ignored the law the Supreme Court clearly established in those decisions—that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution." Id.

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[2] See, e.g., Garner v. State, 6 P.3d 1013, 1025, 116 Nev. 770, 789 (2000), overruled on other ground by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

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

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

In Teague, the United States Supreme Court did away with its previous retroactivity analysis in Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965), replacing it with "a general requirement of nonretroactivity of new rules in federal collateral review." Colwell, 118 Nev. at 816, 59 P.3d at 469-70 (citing Teague, 489 U.S. at 299-310, 109 S. Ct. at 1069-76). In short, the Teague Court held that "new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075 (emphasis added). This holding, however, was subject to

two exceptions: first, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" Id. at 311, 109 S. Ct. at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)); and second, a new constitutional rule of criminal procedure should be applied retroactively if it is a "watershed rule[ ] of criminal procedure." Id. at 311, 109 S. Ct. at 1076 (citing Mackey, 401 U.S. at 693-94, 91 S. Ct. at 1165).[3]

The Nevada Supreme Court's decision in Colwell reinforced the notion that Teague's exceptions were concerned exclusively with new *constitutional* rules. *See* 118 Nev. at 817, 59 P.3d at 470. In Colwell, the Nevada Supreme Court provided examples of "new rules" that fall into either exception. As to the first exception, the Nevada Supreme Court explained that "the Supreme Court's holding that the *Fourteenth Amendment* prohibits states from criminalizing marriages between persons of different races" is an example of a new substantive rule of law that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 692

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[3] That Teague was concerned exclusively with new *constitutional* rules of criminal procedure is reinforced by reference to Mackey, 401 U.S. at 675-702, 91 S. Ct. at 1165-67, relied on by the Court in Teague. Justice Harlan's opinion in Mackey begins by acknowledging the nature of the issue facing the Court. See id. at 675, 91 S. Ct. at 1165 ("These three cases have one question in common: the extent to which new *constitutional* rules prescribed by this Court for the conduct of criminal cases are applicable to other such cases which were litigated under different but then-prevailing *constitutional* rules." (emphasis added)). And when outlining the two exceptions that were ultimately adopted by the Court in Teague, Justice Harlan explicitly acknowledged the constitutional nature of these exceptions. See id. at 692, 91 S. Ct. at 1165 ("New 'substantive due process' rules, that is, those that place, *as a matter of constitutional interpretation*, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing." (emphasis added)); id. at 693, 91 S. Ct. at 1165 ("Typically, it should be the case that any conviction free from federal *constitutional* error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." (emphasis added)).

n.7, 91 S. Ct at 1165 n.7) (emphasis added). As to the second exception, the Nevada Supreme Court cited "the right to counsel at trial"—a right premised on the Sixth and Fourteenth Amendments—as an example of a watershed rule of criminal procedure that should be applied retroactively on collateral review. Id. (citing Mackey, 401 U.S. at 694, 91 S. Ct. at 1165); see also Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963).

The Nevada Supreme Court, however, found Teague's retroactivity analysis too restrictive; thus, while adopting Teague's general framework, the Colwell Court chose "to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require." Id. at 818, 59 P.3d at 470; see also id. at 818, 59 P.3d at 471. Accordingly, Nevada law, as applied by the Court in Colwell, provides greater retroactivity protections than Teague.[4] Nevertheless, notwithstanding this expansion of the protections afforded in Teague, the Court in Colwell never lost sight of the fact that Teague's retroactivity analysis focuses on new rules of *constitutional* concern. If the new rule of criminal procedure is not constitutional in nature, Teague's retroactivity analysis has no bearing.

One year later, in Clem v. State, the Nevada Supreme Court reaffirmed the modified Teague retroactivity analysis set out in Colwell. Clem v. State, 119 Nev. 615, 626-30, 81 P.3d 521, 529-32 (2008) (holding that the Court is "not required to make retroactive its new rules of state law that do not implicate constitutional rights."). *Clem* provided a concise overview of the modified Teague retroactivity analysis:

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

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[4] As the Nevada Supreme Court explained in Colwell, it was free to deviate from the standard laid out in Teague 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)).

Id. at 628, 81 P.3d at 531. Thus, Clem reiterated that if the new rule of criminal procedure is not constitutional in nature, Teague's retroactivity analysis has no relevance. Id. at 628-629, 81 P.3d at 531.

It is on the basis of Colwell and Clem that the Court in Nika affirmed its previous holding[5] that Byford is not retroactive. Nika, 119 Nev. at 1288, 198 P.3d at 850 ("We reaffirm our decisions in Clem and Colwell and maintain our course respecting retroactivity analysis—if a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law."). Nika explained how the change in the law made by Byford "was a matter of interpreting a state statute, not a matter of constitutional law." Id. Accordingly, because it was not a new *constitutional* rule of criminal procedure of the type contemplated by Teague and Colwell, Byford was not to have retroactive effect on collateral review to convictions that were final before the change in the law.

Neither Montgomery nor Welch alter Teague's—and, by extension, Colwell's—underlying premise that the two exceptions to the general rule of nonretroactivity must implicate constitutional concerns before coming into play. In Montgomery, the United States Supreme Court considered whether Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (2012),[6] could be applied retroactively. To answer this question, the Montgomery Court employed the retroactivity analysis set out in Teague. Montgomery, 136 S. Ct. at 728-36. As to whether Miller announced a new substantive rule of constitutional law such that it fell within the first of the two exceptions announced in Teague, the Court commenced its analysis by noting that "the 'foundation stone' for Miller's analysis was [the] Court's line of precedent holding certain punishments disproportionate when applied to juveniles." Montgomery at 732. This "line of precedent" discussing disproportionate punishment was premised on constitutional concerns. Id. (noting that "the Eighth Amendment bars life without parole for juvenile nonhomicide offenders" and that "the Eighth Amendment prohibits capital punishment for those under the

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[5] See Rippo, 122 Nev. at 1097, 146 P.3d at 286.

[6] In Miller, the Supreme Court held that a mandatory sentence of life without parole for juvenile homicide offenders violated the Eighth Amendment's prohibition on "cruel and unusual punishment."

age of 18 at the time of their crimes"). The Court went on to conclude the following:

> Because Miller determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, [ ] it rendered life without parole *an unconstitutional penalty* for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. As a result, Miller announced a 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.

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

Defendant argues that Montgomery "established a new rule of constitutional law, namely that the 'substantive rule' exception to the Teague rule applies in state courts as a matter of due process." Petition at 5(m). This assertion, while true, shortchanges the Court's analysis in Montgomery. Indeed, Montgomery reinforces the notion that Teague's retroactivity analysis is relevant only when considering a new *constitutional* rule. See, e.g., Montgomery at __, 136 S. Ct. at 727 ("States may not disregard a controlling, *constitutional* command in their own courts." (emphasis added)); Montgomery at __, 136 S. Ct. at 728 (explaining that under the first exception to the general rule of nonretroactivity discussed in Teague, "courts must give retroactive effect to new substantive rules of *constitutional* law" (emphasis added)); Montgomery at __, 136 S. Ct. at 729 ("The Court now holds that when a new substantive rule of *constitutional* law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." (emphasis added)); Montgomery at __, 136 S. Ct. at 729-30 ("Substantive rules, then, set forth categorical *constitutional* guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose. It follows that when a State enforces a proscription or penalty barred *by the Constitution*, the resulting conviction or sentence is, by definition, unlawful." (emphasis added)); Montgomery at __, 136 S. Ct. at 730 ("By holding that new substantive rules are, indeed, retroactive, Teague continued a long tradition of giving retroactive effect to

constitutional rights that go beyond procedural guarantees." (emphasis added)); Montgomery at __, 136 S. Ct. at 731 ("A penalty imposed pursuant to an *unconstitutional* law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the *Constitution* forbids." (emphasis added)); Montgomery at __, 136 S. Ct. at 731-32 ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive *constitutional* right that determines the outcome of that challenge." (emphasis added)). Montgomery's holding that State courts are to give retroactive effect to new substantive rules of constitutional law simply makes universal what has already been accepted as common practice in Nevada for almost 15 years—i.e., that new rules of constitutional law are to have retroactive effect in State collateral review proceedings. See Colwell, 118 Nev. at 818-21, 59 P.3d at 471-72; Clem, 119 Nev. at 628-29, 81 P.3d at 530-31.

Despite this well-established rule, Defendant uses Montgomery as a bridge to explain why he believes that the United States Supreme Court's more recent decision in Welch mandates that Byford is retroactive even as to those convictions that were final at the time that Byford was decided. Thus, the focal point of Defendant's argument is not so much Montgomery—which addressed a rule that the Nevada Supreme Court has already accepted in practice for over a decade—but rather Welch, which, according to Defendant, "indicated that the *only* requirement for determining whether an interpretation of a criminal statute applies retroactively is whether the interpretation narrows the class of individuals who can be convicted of the crime." Petition at 5(b) (emphasis in original). However, Defendant misunderstands the Court's holding in Welch.

In Welch, the Court considered whether Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015),[7] may be applied retroactively to cases on collateral review. Welch, __ U.S.

[7] In Johnson, the United States Supreme Court considered whether the residual clause of the Armed Career Criminal Act ("ACCA") of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), violated "the Constitution's prohibition of vague criminal laws." 576 U.S. at __, 135 S. Ct. at 2555. The Court held that the residual clause was unconstitutionally vague, and "[i]nvoking so shapeless

at __, 136 S. Ct. at 1260-61. The Court commenced its application of the Teague retroactivity analysis by recognizing that "[u]nder Teague, as a general matter, 'new *constitutional* rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,'" and that this general rule was subject only to the two exceptions discussed *supra* at 7-8. Welch at __, 136 S. Ct. at 1264 (emphasis added). Finding it "undisputed that Johnson announced a new rule," the Court explained that the specific question at issue was whether this new rule was "substantive." Id. Then, upon concluding that "Johnson changed the substantive reach of the [ACCA]" by "'altering the range of conduct or the class of persons that the [Act] punishes,'" the Court held that "the rule announced in Johnson is substantive." Welch at __, 136 S. Ct. at 1265 (quoting Schriro v. Summerlin, 542 U.S. 348, 353, 124 S. Ct. 2519, 2523 (2004)). In reaching this decision, the Welch Court was clear that the new rule could be applied retroactively because the basis of the Johnson Court's ruling was clearly constitutional—the vagueness of the residual clause violated "the Due Process Clauses of the *Fifth Amendment* (with respect to the Federal Government) and the *Fourteenth Amendment* (with respect to the States)." Welch, 136 S. Ct. at 1261 (emphasis added).

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

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a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." Id. at __, 135 S. Ct. at 2560.

is not a matter of constitutional law.").

Conflating the change effected by Johnson with that effected by Byford ignores a fundamental legal distinction between the two. It was the constitutional rights that underlay Johnson's invalidation of the residual clause that made it a "substantive rule of constitutional law." See Montgomery, 136 S. Ct. at 729. And as a "new" substantive rule of constitutional law, it fell within the first of the two exceptions to Teague's general rule of nonretroactivity. The constitutional underpinnings of Johnson's invalidation of the residual clause and the legal ramifications stemming from this (i.e., that those whose sentences were increased pursuant to an *unconstitutional* provision were, in effect, *unconstitutionally* sentenced) were key to Welch's holding that the change effected by Johnson is retroactive under the Teague framework.

In contrast, at no point has Nevada's law on first-degree murder been found unconstitutional. Defendants who were convicted of first-degree murder under NRS 200.030(1)(a) prior to Byford were convicted under a constitutionally valid statute and, thus, were lawfully convicted. See Nika, 124 Nev. at 1287, 198 P.3d at 850 (explaining that "the *Kazalyn* instruction correctly reflected Nevada law before Byford"). Because *no* constitutional rights underlay the Nevada Supreme Court's change in Nevada's law on first-degree murder, the new rule announced in Byford does not fall within Teague's "substantive rule" exception.

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

substantive that Defendant's argument hinges on:

> Her argument is that statutory construction cases are substantive because they define what Congress always intended the law to mean—unlike Johnson, which struck down the residual clause regardless of Congress' intent.
>
> That argument is not persuasive. Neither Bousley nor any other case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'

Id. at 1267 (quoting Schriro, 542 U.S. at 353, 124 S. Ct. at 2523). On the basis of this language, Defendant comes to the following conclusion:

> What is critically important, and new, about Welch is that it explains, for the very first time, that the *only* test for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes. Because this aspect of Teague is now a matter of constitutional law, state courts are required to apply this rule from Welch.

Petition at 5(j)-(k) (emphasis in original).

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

To the extent that the "test" relied on by Defendant is based on the Welch Court's quote from Schriro, Defendant takes it out of context by ignoring that this statement in Schriro was based on Bousley's discussion of the substance/procedure distinction respecting new rules of

constitutional law. The Bousley discussion was, in turn, premised largely on Teague. See Bousley, 523 U.S. at 620-621, 118 S. Ct. at 1610 (citing Teague, 489 U.S. at 311, 109 S. Ct. at 1075). Defendant conveniently ignores that Teague is concerned exclusively with new rules of constitutional import. But, to the extent that this "test" is unmoored from the constitutional underpinnings of Teague's retroactivity analysis, it is nothing more than dictum. Either way, Defendant's reliance on this language from Welch is misguided.

Because neither Montgomery nor Welch alter Teague's retroactivity analysis, the Nevada Supreme Court's decision in Colwell, which adopted Teague's framework, remains valid and, thus, controlling in this matter. And as reaffirmed by the Nevada Supreme Court in Nika, Byford has no retroactive application on collateral review.[8] 124 Nev. at 1287-89, 198 P.3d at 850-51. Consequently, Defendant's reliance on Montgomery and Welch fails.

Defendant attacks his conviction on the basis of the United States Supreme Court's decisions in Montgomery and Welch. However, this claim is without merit, and these cases do not provide good cause to excuse the untimely, successive filing of the Petition in this case. Therefore, the Petition is dismissed.

2. Defendant Has Failed To Establish That Dismissal Of The Petition As Procedurally Barred Will Prejudice Him.

Although the Kazalyn instruction was given at Defendant's trial, Defendant cannot show that he would be prejudiced by dismissal of the instant Petition because the evidence introduced at trial clearly established first-degree murder on a theory of felony murder. See, e.g., Moore v. State, 2017 Nev. Unpub. LEXIS 224, *2, 2017 WL 1397380 (Nev. Apr. 14,

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[8] To the extent that Defendant's argument is that he is entitled to relief because his conviction was not yet final when Byford was decided, the Petition is nonetheless dismissed. This issue was addressed by the Nevada Supreme Court on appeal following denial of Defendant's second petition for writ of habeas corpus. The Court held that "[c]laims stemming from appellate counsel's failure to raise claims pursuant to Byford were reasonably available to be raised in a timely post-conviction petition and appellant failed to explain the ten-year delay in raising those claims." Lewis v. State, Docket No. 60522, at 3 (Order of Affirmance, Dec. 12, 2012). Because this claim was available and was raised earlier, it constitutes an abuse of the writ, and the Court will not consider it now.

2017) (explaining that appellant could not establish that he was prejudiced by the Kazalyn instruction "because he did not demonstrate that the result of trial would have been different considering that the evidence clearly establish[ed] first-degree murder based on felony murder").

Here, Defendant was convicted of Robbery with Use of a Deadly Weapon, which is among the enumerated felonies that can serve as predicates to felony murder. See NRS 200.030(1)(b) (1989) (defining first-degree murder as murder "[c]ommitted in the perpetration or attempted perpetration of sexual assault, kidnaping, arson, *robbery*, burglary, sexual abuse of a child or sexual molestation of a child under the age of 14 years" (emphasis added)). At trial, the jury learned that Defendant was not the one who shot and killed security guard Paul Moden. Indeed, during closing arguments, the State reiterated that Defendant did not pull the trigger of the gun that shot Paul:

> Now we know the defendant here is not the one who pulled the trigger. We know he is not the one that did the shooting, but the law and the legislature has determined that certain individuals are just as responsible.

Reporter's Transcript of Jury Trial, 3/10/97 (Morning Session), at 118-19. Rather, Defendant was one of a group of four men who committed the robbery during which Paul was shot. Nevertheless, although the killing shot was fired by co-defendant Fredrick Stratton, the jury convicted Defendant of first-degree murder. On appeal, the Nevada Supreme Court held that "[t]he jury could reasonably infer from the evidence presented that appellant entered the apartment with the intent to commit a robbery, that he participated in the robbery, and that he was responsible for the victim's death under a felony-murder theory." Lewis v. State, Docket No. 30567/33145, at 4 (Order of Affirmance, Feb. 7, 2001).

Because the evidence established that Defendant was guilty of first-degree murder under a felony-murder theory, he cannot establish that the error in giving the Kazalyn instruction worked to his "*actual* and substantial disadvantage." See State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012) (emphasis added). Accordingly, this Court finds that the instant Petition is untimely pursuant to NRS 34.726(1) and successive pursuant to NRS 34.810,

and that Defendant has failed to establish "good cause for delay." The United States Supreme Court's decisions in Montgomery and Welch do not provide a new legal basis for filing a procedurally barred petition, and Defendant has also failed to establish that he was prejudiced by the use of the Kazalyn instruction. Therefore, the Petition is dismissed on the basis that it is procedurally barred.

II. Defendant Fails To Overcome The Presumption Of Prejudice To the State.

Because nearly two decades have elapsed between the filing of the Judgment of Conviction and the filing of the instant Petition, the State affirmatively pleads laches pursuant to NRS 34.800(2). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period exceeding 5 years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." The Nevada Supreme Court observed in Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984), how "petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system" and that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." To invoke NRS 34.800(2)'s presumption of prejudice, the statute requires that the State specifically plead laches.

The State has affirmatively pleaded laches in this case. In order to overcome the presumption of prejudice to the State, Defendant has the heavy burden of proving a fundamental miscarriage of justice. See Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). Based on Defendant's representations and on what he has filed with this Court thus far, Defendant has failed to meet that burden. Accordingly, the Petition is dismissed pursuant to NRS 34.800(2).

III. Defendant Is Not Entitled To Counsel In This Matter And, Furthermore, Counsel Is Unnecessary As There Is No Meritorious Proceeding Pending.

In Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction

proceedings. In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

NRS 34.750 provides, in pertinent part:

> "[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery."

(emphasis added).

Defendant has filed an untimely, successive Petition, without a showing of good cause or prejudice that would allow him to overcome the procedural bars to his Petition. Additionally, he has failed to establish the fundamental miscarriage of justice that would overcome the presumption of prejudice to the State due to the nearly two decades that have passed since Defendant was convicted. Accordingly, the Petition is dismissed by the Court. Thus, while NRS 34.750 permits the district court to appoint counsel in certain circumstances, Defendant has failed meet any of the criteria set out in that statute. Therefore, Defendant's request for the appointment of counsel is denied.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 31st day of August, 2017.

DISTRICT JUDGE

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

JUDGE STEFANY A. MILEY

BY _____ (for)
CHARLES W. THOMAN
Deputy District Attorney
Nevada Bar #012649

CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2017, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

Louis Randolph, aka, Clyde Lewis # 48875
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, Nevada 89070-0208

BY /s/ Stephanie Johnson
Secretary for the District Attorney's Office

93F09838B/NA/saj/MVU

Clerk of the Courts
Steven D. Grierson

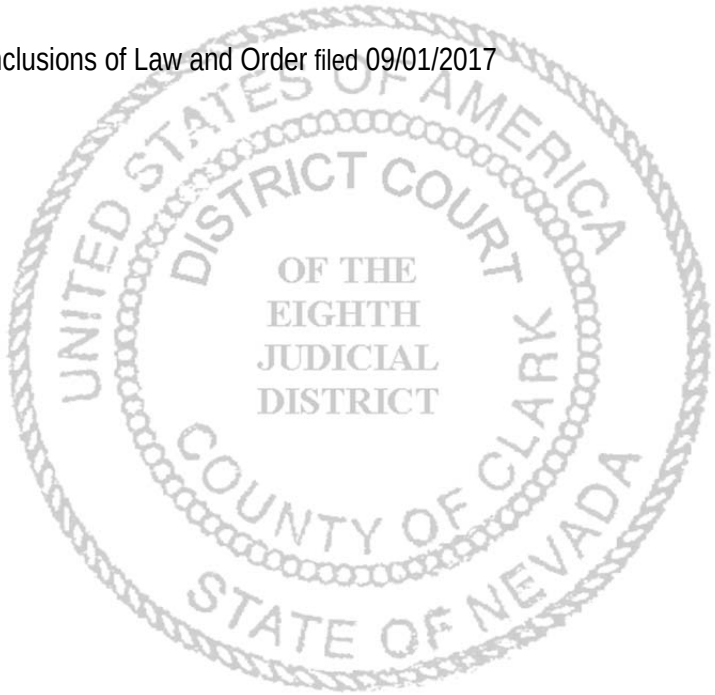
200 Lewis Avenue
Las Vegas, NV 89155-1160
(702) 671-4554

October 11, 2017 Case No.: 94C120857-2

CERTIFICATION OF COPY

Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full, and correct copy of the hereinafter stated original document(s):

Findings of Fact, Conclusions of Law and Order filed 09/01/2017



now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 11:01 AM on October 11, 2017.

STEVEN D. GRIERSON, CLERK OF THE COURT