IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74743

WILLIAM BRANHAM

Appellant,

v.

ISIDRO BACA, WARDEN,

Respondent.

Appeal From Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Second Judicial District Court, Washoe County
The Honorable Elliott Sattler, District Judge

APPELLANT'S OPENING BRIEF

RENE L. VALLADARES
Federal Public Defender
Nevada State Bar No. 11479
*JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
Nevada State Bar No. 12908C
411 E. Bonneville, Suite 250
Las Vegas, Nevada 89101
Telephone: (702) 388-6577
Fax: (702) 388-6419

*Counsel for Appellant William Branham

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74743

WILLIAM BRANHAM,

Appellant,

v.

ISIDRO BACA, WARDEN,

Respondent.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Mary Lou Wilson
2. Scott Edwards
3. Jane McKenna

/s/ Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Attorney of record for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

JURISDICTIONAL STATEMENT

This is an appeal from an Order filed on December 5, 2017, with notice of entry of order filed on December 5, 2017. The notice of appeal was timely filed on December 15, 2017. This Court has jurisdiction under N.R.A.P. 4(b) & 4(c), N.R.S. 34.575(1), 34.710, 34.815, 177.015(2).

ROUTING STATEMENT

This is an appeal from the denial of a post-conviction petition for a writ of habeas corpus that involves a conviction for a category A felony, first-degree murder, where the petitioner was sentenced to life in prison without the possibility of parole. This case is not presumptively assigned to the Court of Appeals.

The primary issue concerns a new constitutional rule, namely that the "substantive rule" exception to the *Teague* retroactivity principle applies in state post-conviction proceedings as a matter of federal constitutional law. Recent United States Supreme Court opinions make clear that a narrowing interpretation of a criminal statute must apply retroactively under the constitutional substantive rule exception. This constitutional issue presents a matter of statewide importance because it

affects numerous petitioners throughout the State. This issue is being litigated in several other appeals currently before this Court (*see* Case Nos. 74457, 74459, 74513, 74552, 74554, 74159), as well as at least five other petitions still pending at the district court level.

STATEMENT OF THE ISSUES

Under recently decided United States Supreme Court cases, Branham must be given the benefit of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), as a matter of federal constitutional law, because *Byford* was a substantive change in law that now must be applied retroactively to all cases, including those that became final prior to *Byford*.

STATEMENT OF THE CASE

This appeal concerns the denial of a second state post-conviction petition arguing that a new constitutional rule allowed Branham to overcome the procedural defaults and obtain relief on the merits. (VII.App.1190.)

Branham was charged in an information with open murder. (I.App.1.) He proceeded to a jury trial that took place in March 1993. (I.App.11.) The jury convicted him of first-degree murder. (VII.App.1159.) He was sentenced to life without the possibility of parole.

(VI.App.1156.) The Nevada Supreme Court affirmed the conviction on December 18, 1996. (VII.App.1183.)

Branham filed a first state post-conviction petition on December 12, 1997, which was denied. (VII.App.1186.) The Nevada Supreme Court affirmed the denial of the petition on November 10, 2005. (*Id.*)

On April 7, 2017, Branham filed a second state post-conviction petition raising the issue presented in this appeal. (VII.App.1190.) On May 16, 2017, the district court ordered the State to respond to the petition. (VII.App.1220.) On June 1, 2017, the State filed an Answer and a Motion to Dismiss. (VII.App.1222-43.) Branham opposed the motion and the State filed a reply. (VII.App.1231-47.)

The district court ordered oral argument on the petition and motion to dismiss. (VII.App.1248-49.) On September 20, 2017, oral argument was held. (VII.App.1251.) On December 5, 2017, the district court issued an order dismissing the petition. (VII.App.1286-94.) Notice of entry was filed that same day. (*Id.*) Branham filed a timely notice of appeal on December 15, 2017. (VII.App.1295.)

STATEMENT OF THE FACTS

A. Jury Trial and *Kazalyn* Instruction

The State's theory at trial was that Branham strangled and/or suffocated his former roommate, Beverly Fetherston, to death sometime between February 6 and February 9, 1992.

The evidence at trial established that Fetherston and Branham were good friends, but not involved romantically. (II.App.209, 230, 295; III.App.326.) Fetherston allowed Branham to stay in her apartment and use her car. She also gave him financial support after he lost his job. (II.App.209, 260-61, 304-05, III.App.495-97.) Nevertheless, they had a tumultuous relationship. (II.App.211-12, 229-30, 261-66; III.App.376-78, 400-01; VI.App.959-60, 1025-27, 1045-46.) They both drank heavily and often argued. (II.App.229-30, 261-62, 311-12; III.App.377-78, 400-02, 423; VI.App.959-60, 985-89; VI.App.1025-27, 1045-46.)

No one ever saw Branham physically hurt Fetherston. (II.App.229-30; III.App.342-43, 438-39, 481-82; VI.App.959-60, 972-76, 985-89, 1050-51.) However, some of Fetherston's friends testified that Fetherston was fearful of Branham, they had heard him threaten her, and they saw him grab her arm on one occasion. (III.App.342-43, 349-50, 377-78, 402, 410-

12, 422-23; VI.App.1025-27, 1034-36.) Fetherston's close friend, Marilyn Mackay, claimed that she saw Fetherston with a black eye and split lip, which Branham allegedly inflicted. (III.App.402-04, 423-24.) However, no other person who knew them saw these injuries. (VI.App.969-76; 1050-51.)

Fetherston kicked Branham out of her apartment in early February 1992. (VI.App.1047-50.) At the time, Fetherston had begun a romantic relationship with John Bell. (II.App.267, 271-73.)

In early 1992, Fetherston worked as a bartender at the Swiss Chalet in Reno. (II.App.210-11, 258-59.) Her home was down the street from the bar. (III.App.345-46.)

On the morning of Thursday February 6, 1992, Fetherston was off duty but hanging out in the bar. (III.App.332-333, 337-38, 439-41.) She received a call from Branham. (III.App.337-38, 439-41.) She was upset and indicated that she did not want to talk to him, but the bartender gave her the phone. (*Id.*) After the call, she left the bar to meet Branham at her home. (III.App.339-40, 439-41.)

Dudley Poorman, who was a good friend of Fetherston, went to the Swiss Chalet on the morning of February 6 after he finished his graveyard shift at work and hung out with Fetherston before she met up with Branham. (III.App.439-41.) Sometime after Fetherston left, he went to Fetherston's apartment. (III.App.441.) Fetherston and Branham were at the apartment when Poorman got there. (III.App.444.) Both of them had been drinking and appeared intoxicated. (III.App.445-46, 501-02.) At around 1:00 p.m., Fetherston gave Poorman some money to go buy beer. (III.App.441-43.) Poorman later fell asleep on the sofa. (III.App.450-51.)

When Poorman woke up, Fetherston was sitting on Branham's lap in a chair in the corner of the room. (III.App.457, 493.) They appeared friendly, not romantic. (III.App.493.) He left her apartment around 4:00 p.m. (III.App.452, 457, 485-87.)

At around 4:45 p.m. on February 6, Branham cashed one of Fetherston's checks at a bank around the corner from her home. (IV.App.592-96.) The State presented evidence it was a forged check, as were other checks of Fetherston's that Branham had cashed over the

previous weeks (IV.App.572-76, 579-82, 584-90, 644-51.) When Branham was in the bank on February 6, he was upset that Fetherston had not received new checks (IV.App.572-76, 592-96, 612-14). The bank agreed to order more checks because they would be sent to Fetherston's address. It takes seven to 10 business days for checks to arrive. (*Id.*)

Bonnie Guggenbickler, a defense witness, testified that she saw Branham at around 6:30 p.m. to 7:00 p.m. towards the end of cocktail hour at the Keystone bar in Reno (VI.App.960-63.) He was in a "jovial" mood and told her that he was on his way to California to see his daughter. (*Id.*) A witness observed Branham sleeping in Fetherston's car outside a bar in the Bay Area in California at around 5:30 a.m. on February 7, 1992. (IV.App.683-90; VI.App.932-37.)

On the morning of Friday, February 7, around 8:30 or 9:00 a.m., Poorman went to Fetherston's apartment, but her car was not there. (III.App.453-54.) Ted Rice, another bartender at the Swiss Chalet, testified that he saw Fetherston at the Swiss Chalet on Friday morning, the day after she had received the call from Branham in the bar. (III.App.364-66.)

On February 9, 1992, Fetherston's body was discovered in her apartment. (I.App.55-56; IV.App.555-59.) She was lying on her back on the couch with her legs bent at the knee in what appeared to be an awkwardly staged position. (I.App.66-67; IV.App.555-59; V.App.799-805.) There was a pillow covering her head and an afghan covering her trunk; her legs were exposed. (I.App.66-67; V.App.799-805.) She had a beer can in her hand, but the opening was turned away from her. (I.App.66-67, 81-82; V.App.799-805.) She was wearing a sweatshirt and a pair of pink leggings were stuffed into the couch. (I.App.85-86; V.App.845, 847-48.) When Poorman last saw her, Fetherston was wearing jeans and a sweater. (III.App.482-83.)

Dr. James Neal O'Donnell was the pathologist who performed the autopsy. He concluded that the cause of death was undetermined, but consistent with asphyxia. (I.App.105.) There was a bruise-like injury of the low anterior neck, hemorrhage in the soft tissue in the front of the low trachea in the neck, and a separate area of hemorrhage in the pharynx area. (I.App.106-07.)

With regard to the "bruise-like area" on her neck, there was no hemorrhage on the underside soft tissue when he opened her up. (I.App.132-33.) The hemorrhage in the trachea area he attributed to blunt force trauma. (I.App.109-11.) Although a strangulation or suffocation typically shows evidence of a fight, there was no skin or blood under the fingernails, no contusions, split lip or black eye. (I.App.153.) He could think of no reason for her death other than asphyxia. (I.App.118.)

Dr. Ellen Clark, a co-worker of Dr. O'Donnell, opined this was a homicide with the cause of death being blunt trauma to the neck. (IV.App.725-27.) She could not say how the trauma would have occurred and could have been from an accident. (IV.App.741-43.)

Dr. Joseph H. Masters, a pathologist, testified as a defense expert (V.App.862-65.) He opined that the cause of death was undetermined. (V.App.865-67, 892.) The bruise two inches below the larynx, about at the jugular notch, was probably caused by blunt force. (V.App.880-83.) However, he stated that the bruise was not consistent with strangulation. (*Id.*) Further, he did not believe it could have caused her death.

(V.App.915-23.) It takes about 33 pounds of pressure to block off the airway to the trachea. Significant bruising would indicate a lot of pressure, but this bruise, only present in the fat tissue, is the size of a dime and gave no indication of damage. (V.App.923-25.) Other than congestion of the lungs, none of the other classical signs of asphyxiation were present. (V.App.886-87.) He did not see facts which supported a conclusion of death by a combination of strangulation and suffocation. (V.App.915-23.)

On February 11, 1992, Branham was arrested at the bank around the corner from Fetherston's home when he tried to cash another check. (IV.App.597-601, 614-17.)

B. *Kazalyn* Instruction and Closing Argument

The court provided the jury with the following instruction on premeditation and deliberation, known as the *Kazalyn* instruction:

> 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.

(VI.App.1149.)

In their rebuttal argument, the State relied on the *Kazalyn* instruction:

> Murder. "In order to establish Murder, the State must show that the unlawful killing must be accompanied with deliberate and clear intent to take the life in order to constitute Murder of the First Degree. The intent to kill must be the result of deliberate premeditation."
>
> If you recall, premeditation can be successive thoughts in the mind. Doesn't have to plan it for a week, for a month, for a year. When he put his hand around her neck, thumb over her throat, pillow over her face as the facts suggest, the intent was there. That was deliberate premeditation.
>
> There's no other reason for him to take those actions. Clearly when you put your hand over somebody's neck and choke them out, death is a likely result. Deliberate premeditation has been met. Obviously that's a determination to kill.
>
> And again, I get back to it doesn't have to be for a day, an hour, or even a minute. As instantaneous as successive thoughts of the mind.

> You want to keep that in mind, ladies and gentlemen, during your deliberation.

(VI.App.1104-05 (emphasis added).)

C. Conviction and Direct Appeal

Branham was convicted of first-degree murder. (VII.App.1159.) He was sentenced to life without the possibility of parole. (VI.App.1156.)

The Nevada Supreme Court issued an order dismissing the appeal on December 18, 1996. (VII.App.1183.) The conviction became final on March, 18 1997. *See Nika v. State*, 124 Nev. 1272, 1284 n.52, 198 P.3d 839, 848 n.52 (2008) (conviction becomes final when 90-day time period for filing petition for certiorari to Supreme Court has expired).

D. *Byford v. State*

On February 28, 2000, the Nevada Supreme Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, the court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* at 234-35, 994 P.2d at 713-14. Its prior cases, including *Kazalyn*, had "underemphasized the element of deliberation." *Id.* at 234, 994 P.2d at 713. These cases had reduced "premeditation" and

"deliberation" to synonyms and that, because they were "redundant," no instruction separately defining deliberation was required. *Id.* at 235, 994 P.2d at 714. It pointed out that the court went so far as to state that "the terms premeditated, deliberate, and willful are a single phrase, meaning simply that the actor intended to commit the act and intended death as a result of the act." *Id.*

The *Byford* court specifically "abandon[ed]" this line of authority. *Byford*, 116 Nev. at 234, 994 P.2d at 713. It held:

> By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second- degree murder. [This Court's] further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

Id. at 235, 994 P.2d at 713. The court emphasized that deliberation remains a "critical element of the mens rea necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting." *Id.*, 994 P.2d at 714. It is an element that "'must be proven beyond a reasonable doubt before an accused can be

convicted or first degree murder.'" *Id.* at 235, 994 P.2d at 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

The court directed the state district courts in the future to separately define deliberation in jury instructions as set forth in the opinion. *Byford*, 116 Nev. at 235-37, 994 P.2d at 714-15.

In *Garner v. State*, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000), the Nevada Supreme Court held that the use of the *Kazalyn* instruction was not constitutional error. *Id.* at 788-89, 6 P.3d at 1025. It concluded *Byford* had no retroactive effect and only applied prospectively." *Id.*

E. *Fiore v. White* and *Bunkley v. Florida*

In 2001, the United States Supreme Court decided *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Court held that due process requires that a clarification of a criminal statute apply to all convictions, even a conviction that had become final, where the clarification reveals that a defendant was convicted "for conduct that [the State's] criminal statute, as properly interpreted, does not prohibit." *Id.* at 228.

In 2003, the United States Supreme Court decided *Bunkley v. Florida*, 538 U.S. 835 (2003). In *Bunkley*, the Court held that, as a matter

of due process, a change in state law that narrows the category of conduct that can be considered criminal, had to be applied to convictions that had yet to become final. *Id.* at 840-42.

F. *Colwell v. State* and *Clem v. State*

In *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002), the Nevada Supreme Court adopted the *Teague* retroactivity rules in Nevada state courts. Under *Teague v. Lane*, 489 U.S. 288 (1989), new rules do not apply retroactively unless they fall within two exceptions: (1) they are substantive; or (2) they establish a watershed procedural rule. The Nevada Supreme Court held that these retroactivity rules, with some liberalizations, would apply only to new constitutional rules of criminal law. *Colwell*, 118 Nev. at 819-20, 59 P.3d at 470-72.

One year later, in *Clem v. State*, 119 Nev. 615, 628, 81 P.3d 521, 531 (2003), the Nevada Supreme Court reaffirmed the retroactivity rules in *Colwell*, emphasizing that they only apply to new constitutional rules and not to a decision that narrows the reach of a substantive criminal statute. *Id.* at 626, 628, 81 P.3d at 529, 531. It explained that the clarification/change dichotomy from *Fiore* and *Bunkley* dictated when a

statutory interpretation decision needs to be applied to convictions that had become final. *Id.* at 625-26, 81 P.3d at 528-29.

G. *Nika v. State*

In 2007, the Ninth Circuit decided in *Polk v. Sandoval*, 503 F.3d 903, 910-12 (9th Cir. 2007), that the *Kazalyn* instruction violated due process under *In Re Winship*, 397 U.S. 358 (1970), because it relieved the State of its burden of proving the element of deliberation.

In response to *Polk*, the Nevada Supreme Court in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). In *Nika*, the court disagreed with *Polk*'s conclusion that a *Winship* violation could occur with respect to the *Kazalyn* instruction. *Id.* at 1286, 198 P.3d at 1286. The court stated, rather than implicate *Winship* concerns, the only due process issue was whether *Byford*'s interpretation of the first-degree murder statute was a clarification or a change in the law. *Id.* at 1286-87, 198 P.3d 849-50. The court held that *Byford* was a change in state law. *Id.*

The court acknowledged, because *Byford* had changed the law to "narrow the scope of a criminal statute," due process required *Byford* be applied to those convictions that had not yet become final at the time it

was decided, citing *Bunkley* and *Fiore*. *Id.* at 1287, 1287 n.72-74, 1301, 198 P.3d at 850, 850 n.72-74, 859.

The court emphasized that *Byford* was a matter of statutory interpretation and not a matter of constitutional law. *Id.* at 1288, 198 P.3d at 850. The court stated, "[T]he interpretation and definition of a state criminal statute are merely a matter of state law." *Id.* The court reaffirmed the principle set forth in *Clem* and *Colwell*—"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." *Id.* It concluded, "Because *Byford* announced a new rule and that rule was not required as a matter of constitutional law, it has no retroactive application to convictions, like Nika's, that became final before the new rule was announced." *Id.* at 1289, 198 P.3d at 851.

H. *Montgomery v. Louisiana* and *Welch v. United States*

On January 25, 2016, the United States Supreme Court decided *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). In *Montgomery*, the Court addressed the question of whether *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which prohibited mandatory life sentences for juvenile

offenders under the Eighth Amendment, applied retroactively to cases that had already become final by the time of Miller. *Montgomery*, 136 S. Ct. at 725.

The initial question the Court addressed in *Montgomery* was whether it had jurisdiction to review the question. The Court stated that it did, holding "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S. Ct. at 729. "Teague's conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." *Id.* "States may not disregard a controlling constitutional command in their own courts." *Id.* at 727 (citing *Martin v. Hunter's Lessess*, 1 Wheat. 304, 340-41, 344 (1816)). "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." *Id.* at 731-32.

The Court concluded that *Miller* was a new substantive rule; the states, therefore, had to apply it retroactively on collateral review. *Montgomery*, 136 S. Ct. at 732.

On April 18, 2016, the United States Supreme Court decided *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Welch*, the Court addressed the question of whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause in the Armed Career Criminal Act was void for vagueness under the Due Process Clause, applied retroactively to convictions that had already become final at the time of *Johnson*. *Welch*, 136 S. Ct. at 1260-61, 1264.

More specifically, the Court determined whether Johnson represented a new substantive rule. *Id.* at 1264-65. The Court defined a substantive rule as one that "'alters the range of conduct or the class of persons that the law punishes.'" *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). "'This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the

statute beyond the State's power to punish.'" *Id.* at 1265 (quoting *Schriro*, 542 U.S. at 351-52) (emphasis added).

The Court explained determining retroactivity under *Teague* "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive. It depends instead on whether the new rule itself has a procedural function or a substantive function—that is, whether it alters only the procedures used to obtain the conviction or alters instead the range of conduct or class of persons that the law punishes." *Welch*, 136 U.S. at 1266 (emphasis added).

Under that framework, the Court concluded that *Johnson* was substantive. *Id.* at 1265-66.

Because both parties agreed that the lower court had been wrong on this issue, the Supreme Court appointed *amicus* counsel to argue that the lower court decision should be upheld. Amicus argued that the Court's prior cases set forth a different framework for the *Teague* analysis. *Welch*, 136 S. Ct. at 1265. Among the arguments that amicus advanced was that a rule is only substantive when it limits Congress's power to act. *Id.* at 1267.

The Court rejected this argument, pointing out that some of the Court's "substantive decisions do not impose such restrictions." *Id.* The "clearest example" was *Bousley v. United States*, 523 U.S. 614 (1998). *Id.* It confirmed that its application of the substantive rule exception to *Teague* did include statutory interpretation cases like *Bousley*. *Id.*

The Court then explained how a statutory interpretation decision like *Bousley* fits under the substantive rule exception. In *Bousley*, the Court was determining what retroactive effect should be given to its prior decision in *Bailey v. United States*, 516 U.S. 137 (1995), which had narrowed the meaning of the term "use" of a firearm in relation to a drug crime under 28 U.S.C. § 924(c). *Bousley*, 523 U.S. at 620. The Court explained in *Welch* that it "had no difficulty concluding [in *Bousley*] that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S. Ct. at 1267. The Court also cited *Schriro*, 542 U.S. at 354, using the following parenthetical as further support: "A decision that modifies the elements of an offense is normally substantive rather than procedural."

The Court made clear in *Welch* that the *Bousley* decision demonstrates how the Teague substantive exception should be applied. *Id.* It stated: "*Bousley* thus contradicts the contention that the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power." *Id.* The Court explained that statutory interpretation cases are treated like any other application of the substantive rule exception:

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

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

I. Second State Petition

On April 9, 2017, within one year of *Welch*, Branham filed a second state petition arguing that he was now entitled to the benefit of *Byford* as a result of *Montgomery* and *Welch*. (VII.App.1190-1219.) He argued that *Montgomery* established a new constitutional rule, namely the

Teague substantive exception was now a federal constitutional rule, and *Welch* established that this substantive exception included narrowing interpretations of a statute, such as *Byford*. (*Id.*) The State moved to dismiss arguing that the petition was procedurally barred. (VII.App.1225-30.)

After hearing oral argument, the district court dismissed the petition. (VII.App.1286-94.) It concluded that *Byford* was not a substantive rule, but was only of "procedural significance" concerning how to define elements in jury instructions. (VII.App.1292-93.)

SUMMARY OF ARGUMENT

In *Byford*, the Nevada Supreme Court concluded that the jury instruction defining premeditation and deliberation improperly blurred the line between these two elements. The court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. However, the Nevada Supreme Court stated that this error was not of constitutional magnitude and did not need to apply retroactively.

In *Nika*, the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by narrowing its terms. However, under the Nevada retroactivity rules, the statutory interpretation issue in *Byford* had no retroactive effect because it was not a new constitutional rule. Rather as a "change" in state law, it only had to be applied to those convictions that had yet to become final at the time it was decided.

However, in 2016, the United States Supreme Court issued two opinions that have a direct impact on the retroactivity of *Byford*. First, in *Montgomery*, the Supreme Court held that the question of whether a new rule falls under the "substantive rule" exception to the *Teague* retroactivity framework is now a federal constitutional rule.

Second, in *Welch* the Supreme Court clarified that the "substantive rule" exception is not limited to just new constitutional rules, but also includes narrowing interpretations of criminal statutes. It further indicated in *Welch* that the only requirement for determining whether an interpretation of a criminal statute applies retroactively is whether

the interpretation meets the definition of a "substantive rule," namely it alters the range of conduct or the class of persons that the law punishes.

Welch also announced a broad new rule for how to determine if a new rule is substantive. It held that a new rule is substantive so long as it has "a substantive function." In light of this new rule, whether a statutory interpretation is designated a "clarification" or a "change" is irrelevant. It only matters whether the interpretation serves a "substantive function."

Montgomery and *Welch* represent a new constitutional rule that allows petitioner to obtain the benefit of *Byford* on collateral review in a second petition. The substantive exception to *Teague* is now a federal constitutional rule. The state courts are required to apply that constitutional rule in the manner that the United States Supreme Court has indicated. In *Welch* the Supreme Court made abundantly clear that the substantive rule exception applies to statutory interpretation decisions. Those decisions are substantive, and apply retroactively, so long as the interpretation alters the range of conduct or the class of persons that the law punishes.

The Nevada Supreme Court has already acknowledged in *Nika* that *Byford* represented such a substantive change. Under *Montgomery* and *Welch*, *Byford* must be applied retroactively to convictions that had already become final at the time *Byford* was decided. Branham falls into that category of petitioners.

Branham can also establish good cause and actual prejudice to overcome the procedural bars. The new constitutional arguments based upon *Montgomery* and *Welch* were not previously available. Branham timely filed the petition within one year of *Welch*, the key decision here. Branham can also show actual prejudice. Under *Byford*, there is a reasonable likelihood that the jury applied the *Kazalyn* instruction in an unconstitutional manner. Further, the instruction had a prejudicial impact at trial as the State's evidence of deliberation was nearly non-existent and the only evidence that was provided was more consistent with a second-degree murder. Further, the prosecutor's comments in closing exacerbated the harm from the improper instruction.

ARGUMENT

MONTGOMERY AND *WELCH* ESTABLISH THAT THE NARROWING INTERPRETATION OF THE FIRST-DEGREE MURDER STATUTE IN *BYFORD* MUST BE APPLIED RETROACTIVELY TO CONVICTIONS THAT WERE FINAL AT THE TIME *BYFORD* WAS DECIDED

A. *Montgomery* and *Welch* Created a New Constitutional Rule that Changes Retroactivity Law in Nevada

In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court set forth a framework for retroactivity in cases on collateral review. Under *Teague*, a new rule does not apply, as a general matter, to convictions that were final when the new rule was announced. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.*

Second, and the exception at issue in this case, courts must give retroactive effect to new substantive rules. *Id.* "'A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Under the federal retroactivity framework, the substantive exception "'includes decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" *Id.* (quoting *Schriro*, 542 U.S. at 351-52).

The Nevada Supreme Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Colwell v. State*, 118 Nev. 807, 819-20, 59 P.3d 463, 471-72 (2002). While the court adopted the basic framework, it liberalized some of the rules: it more strictly construed the meaning of what constituted a "new rule" and more broadly defined the two exceptions. *Id.*; *see Clem v. State*, 119 Nev. 615, 621, 628, 81 P.3d 521, 530-31 (2003)

Despite the liberalization of the exceptions, the Nevada Supreme Court has clearly indicated that these retroactivity rules apply only to new constitutional rules. *Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008). The court has maintained that decisions that interpret a criminal statute to narrow its scope have no retroactive effect as they

are not constitutional rules, but solely matters of state law. *Id.* at 1288-89, 1301, 198 P.3d at 850-51, 859. Rather, according to the court, the application of a narrowing statutory interpretation to cases that have become final depends solely on whether the interpretation represents a "clarification" versus a "change" in the law. *Id.* at 1287, 198 P.3d at 850. As a matter of due process, a "clarification" applies to all cases while a "change" applies to only those cases in which the judgment has yet to become final. *Id.*

The Supreme Court's recent decisions in *Montgomery* and *Welch* have invalidated the Nevada Supreme Court's approach to statutory interpretation cases. As a result of *Montgomery* and *Welch*, state courts are now constitutionally required to retroactively apply a narrowing interpretation of a criminal statute under the "substantive rule" exception to *Teague*.

In *Montgomery*, the United States Supreme Court, for the first time, constitutionalized the "substantive rule" exception to the *Teague* retroactivity rules. The consequence of this step is that state courts are now required to apply the "substantive rule" exception in the manner in

which the United States Supreme Court applies it. *See Montgomery*, 136 U.S. at 727 ("States may not disregard a controlling constitutional command in their own courts."); *Colwell v. State*, 118 Nev. 807, 818, 59 P.3d 463, 471 (2002) (state courts must "give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."). Thus, the United States Supreme Court's interpretation of the substantive rule exception provides the constitutional floor for how this new constitutional rule must be applied in state courts.

In *Welch*, the United States Supreme Court made absolutely clear that the federal constitutional "substantive rule" exception applies to statutory interpretation cases. *Welch* stated this explicitly. It stated that the substantive rule *Teague* exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Welch*, 136 S. Ct. at 1264-65 (emphasis added); *accord Id.* at 1267 ("A decision that modifies the elements of an offense is normally substantive rather than procedural." (quoting *Schriro*, 542 U.S. at 354)).

In fact, the Court in *Welch* not only stated that the exception applies to statutory interpretation cases, it explained how to apply that

exception in those cases. It stated, "decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alter the range of conduct or the class of persons that the law punishes.'" *Id.* at 1267 (quoting *Schriro*, 542 U.S. at 353).

This conclusion is also readily apparent in *Welch*'s discussion of its previous decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137 (1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review. As *Welch* put it, "The Court in *Bousley* had no difficulty concluding that *Bailey* was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*, 523 U.S. at 620).

But *Bailey* did not turn on constitutional principles; like *Byford*, it was a statutory interpretation decision, not a constitutional decision. Nonetheless, the Court in *Welch* classified *Bailey* as substantive. Thus, as *Welch* illustrates, it is irrelevant whether a decision rests on

constitutional principles. If the decision is substantive, it is retroactive under the "substantive rule" exception as defined by the Supreme Court, no matter the basis for the decision.

Welch also renders irrelevant the Nevada Supreme Court's prior reliance upon the clarification/change dichotomy for statutory interpretation cases. What is critically important, and new, about *Welch* is that it explains, for the very first time, how the substantive exception applies in statutory interpretation cases. It explained 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.

Welch's broader holdings bolster that conclusion. *Welch* announced a new test for how to determine if a new rule is substantive. The Court held, for the first time, that a new rule is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. It explained a rule has a "substantive function" when it "alters the range of conduct or class of

persons that the law punishes." *Id.* As the Court indicated in *Welch*, when a decision narrows the scope of a criminal statute, it has such a substantive function, and is therefore retroactive. *Id.* at 1265-67.

In light of *Welch*, the distinction between a "change" and "clarification" is no longer operative for retroactivity concerns. *Welch* made clear that the *only* relevant question with respect to the retroactivity of a statutory interpretation decision is whether the new interpretation meets the definition of a substantive rule. If it meets the definition of a substantive rule, it does not matter whether that narrowing statutory interpretation is labeled a "change" or a "clarification," because both types of decisions have "a substantive function." *Welch*, 136 S.Ct. at 1266.

In sum, *Welch* holds that *all* statutory interpretation cases that narrow the scope of a criminal statute—and not just those that are based on a constitutional rule—qualify as "substantive" rules for the purpose of retroactivity analysis. That rule is binding in state courts, just the same as in federal courts. *See Montgomery*, 136 S.Ct. at 727; *Colwell*, 118 Nev. at 818, 59 P.3d at 471. Thus, after *Montgomery* and *Welch*, state courts

are now required to give retroactive effect to any of their decisions that narrow the scope of a criminal statute. The Nevada Supreme Court's prior refusal to give full retroactive effect to narrowing statutory interpretations is no longer valid.

B. The Changes to the Retroactivity Rules Require *Byford* to be Applied Retroactively to Branham's case

As a result of *Montgomery* and *Welch*, the Nevada Supreme Court's decision in *Byford* applies retroactively. The analysis here is straightforward as the Nevada Supreme Court has already concluded that *Byford* is substantive.

In *Byford*, the Nevada Supreme Court interpreted the terms of the first-degree murder statute and disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Byford*, 116 Nev. at 234-35, 994 P.2d at 713-14. The court in *Byford* set forth the appropriate jury instructions providing the new definitions of these two separate elements. *Id.* at 235-37, 994 P.2d at 714-15.

Later, in *Nika*, the Nevada Supreme Court held that *Byford* represented an interpretation of a criminal statute that narrowed its

scope. *Nika*, 124 Nev. at 1287, 1301, 198 P.3d at 850, 859. This was the basis for the Court concluding that *Byford* was a "change" in law that had to be applied to all conviction that had not yet become final as a matter of due process. *Id.*

Because *Byford* represents a narrowing interpretation of the terms of the first-degree murder statute, *Byford* falls squarely under *Welch*'s definition for a substantive rule. *See Welch*, 136 S. Ct. at 1265 (substantive rule "includes decisions that narrow the scope of a criminal statute by interpreting its terms"); *Id* at 1267 ("A decision that modifies the elements of an offense is normally substantive rather than procedural." (quoting *Schriro*, 542 U.S. at 354)). *Byford* had a "substantive function" because it altered the range of conduct or the class of persons that the law punishes. *Id.* at 1266, 1267. It placed "particular conduct or persons covered by the statue beyond the State's power to punish." *Id.* at 1265.

What is equally clear is the district court's analysis was wrong. The court concluded that *Byford* was procedural. The court did not provide much reasoning, only that it concerned the content of jury instructions.

(VII.App.1292-93.) But *Nika* contradicts this conclusion. That decision specifically held that *Byford* was a statutory interpretation decision that narrowed the scope of the first-degree murder statute. *Nika*, 124 Nev. at 1287, 1287 n.72-74, 1301, 198 P.3d at 850, 850 n.72-74, 859. Under *Welch*, that is a substantive decision. The district court was bound by *Nika.*

In any event, there really can be no doubt that *Byford* is substantive even if viewed as a matter of jury instructions. Those instructions, which are based upon a narrowing interpretation of the first-degree murder statute, "place particular . . . persons . . . beyond the State's power to punish." *Welch*, 136 S.Ct. at 1265. They serve a substantive function. *Id.* at 1265, 1267.

Accordingly, under *Welch* and *Montgomery*, Branham, whose conviction became final prior to *Byford*, is entitled to the retroactive application of *Byford* to his case.

C. Under *Byford*, There Was Constitutional Error in Branham's Case

The jury instruction on first-degree murder in Branham's case did not comport with *Byford*. The *Kazalyn* instruction defining

premeditation and deliberation did not define deliberation as a separate element. As a result, it is reasonably likely that the jury applied the challenged instruction in a way that violates the Constitution. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

As the Nevada Supreme Court explained in *Byford*, the *Kazalyn* instruction blurred the distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The jury instruction violated due process as it relieved the State of its obligation to prove essential elements of the crime, including deliberation. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). In turn, the jury was not required to find deliberation as defined in *Byford*. The jury was never required to find whether there was "coolness and reflection". *Byford*, 116 Nev. at 235, 994 P.2d at 714. The jury was never required to find whether the murder was the result of a "process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action." *Id.*

This error had a prejudicial impact on this case. The evidence against Branham was not so great that it precluded a verdict of second-degree murder. The State did not provide any direct evidence that Branham had the intent to kill Fetherston or that, before acting to kill the victim, Branham "weighed the reasons for and against his action, considered its consequences, distinctly formed a design to kill, and did not act simply from a rash, unconsidered impulse." *See Byford*, 116 Nev. at 234, 944 P.2d at 712-13.

In fact, the State presented little evidence about the events that transpired on February 6, the last time anyone reported seeing Branham and Fetherston together. The last person who saw Branham with Fetherston testified that Fetherston and Branham were acting friendly towards each other and had been together for hours. (III.App.457, 493.) There was simply no evidence presented that would disprove the theory that, if Branham did kill Fetherston, that the killing arose as an impulsive act borne out of passion, particularly in light of the fact that they had a stormy friendship that would often lead to heated arguments

when they were intoxicated. (II.App.229-30, 261-62, 311-12; III.App.377-78, 400-02, 423; VI.App.959-60, 985-89; VI.App.1025-27, 1045-46.)

Just as important, the medical evidence did not support a conclusion that there was deliberation. Critically, the State could not definitively prove the cause of death. The State's pathologist himself testified that the cause of death was undetermined. (I.App.105.) While he testified the death was consistent with asphyxia, asphyxia is a broad term simply meaning that the body was deprived of oxygen. The conclusion does not indicate a specific manner in which Fetherston may have been killed. And O'Donnell did not offer one. The remaining medical evidence was not consistent with strangulation or suffocation. (I.App.132-33, 153; *see also* IV.App.712-18; V.App.880-83, 886-87, 915-23, 923-25.)

Furthermore, the other experts had different opinions about the medical evidence. Dr. Masters testified, without equivocation, that the cause of death could not be determined. (V.App.865-67, 892.) Dr. Clark opined that Fetherston died from blunt trauma to the neck. However, she could not say how the trauma occurred. (IV.App.725-27, 741-43.)

These competing opinions are critically important. If the State could not even definitively establish how Fetherston was killed, it is nearly impossible to conclude that the person who killed her acted with the requisite deliberation.

Further, even assuming the jury accepted the State's theory that Branham killed Fetherston,[1] the remaining circumstantial evidence does not establish deliberation, *i.e.* that there was a dispassionate weighing process and consideration of consequences before acting. The State presented evidence from Fetherston's friends that Fetherston was fearful of Branham, that Branham had injured her, and that he had threatened her. (III.App.342-43, 349-50, 377-78, 402, 410-12, 422-23; VI.App.1025-27, 1034-36.) However, there was just as much, if not more, evidence at

---

[1] There were good reasons to question whether Branham was the one who killed Fetherston. There were other suspects, such as John Bell, who was in a romantic relationship with Fetherston at the time. He provided conspicuously incorrect testimony at trial that he hadn't seen Fetherston after February 1, 1992. (II.App.287-88, 303-04, 311.) Another witness, Mark Rode, testified that he and Bell had actually spent the night at Fetherston's home on February 5, 1992. (VI.App.1028-32.) In addition, Fetherston was wearing different clothing at the time her body was found than when she was last seen with Branham (*compare* I.App.85-86; V.App.845, 847-48 *with* III.App.482-83), suggesting the murder happened at a later time. Also, a Swiss Chalet bartender claimed to have seen Fetherston on Friday, February 7, after Branham was in California. (III.App.364-66.)

trial that Branham had never been violent towards Fetherston and had never harmed her. (*See, e.g.*, III.App.342-43, 349-50, 377-78, 402, 410-12, 422-23; VI.App.969-76, 1025-27, 1034-36, 1050-51.) Most witnesses who knew them said that all they did was argue when they were intoxicated. Bell, who was Fetherston's love interest at the time of her death, agreed that Branham "was more talk than action." (II.App.315.)

In fact, as discussed before, the last person to see Branham and Fetherston together stated they were happy and getting along (III.App.457, 493). There was simply no evidence that Branham had any plans to kill Fetherston that day or any other day. To the contrary, Branham ordered checks on February 6, 1992, to be sent to Fetherston's home (IV.App.572-76, 592-96, 612-14), which indicates a plan to have further contact with her in the future. The awkward arrangement of Fetherston's body on the couch with the beer can in her hand facing the wrong direction does not suggest someone who had coolly considered beforehand a course of action and the consequences of killing Fetherston. Rather, it suggests someone who had acted rashly on impulse and had given no thought to consequences.

At bottom, the State presented nothing to disprove the theory that something occurred to spark a heated argument between Branham and Fetherston, who were both intoxicated, leading to a killing done in the heat of passion. The improper *Kazalyn* instruction left no room for a finding of deliberation or "coolness and reflection" and permitted the jury to convict Branham even if the determination to kill was a "mere unconsidered and rash impulse" or "formed in passion." *Byford*, 116 Nev. at 236, 994 P.2d at 714.

Beyond the weaknesses in the evidence, the prosecutor's comments in closing exacerbated the harm from the improper instruction. In rebuttal, the prosecutor emphasized the improper *Kazalyn* instruction, at one point equating "premeditation and deliberation" with a "determination to kill." (VI.App.1104-05.) That is one of the precise evils in the *Kazalyn* instruction that the *Byford* decision was meant to rectify. *Byford*, 116 Nev. at 235, 994 P.2d at 713 ("By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second degree murder. *Greene*'s further reduction of premeditation and

deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.").

Accordingly, it is clear that the jury applied the instruction in an unconstitutional manner. This error prejudiced Branham.

D. Branham Can Establish Good Cause and Actual Prejudice to Overcome the Procedural Bars in Chapter 34

To overcome the procedural bars of NRS 34.726 and NRS 34.810, a petitioner has the burden to show "good cause" for delay in bringing his claim or for presenting the same claims again.[2] *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.2d 519, 537 (2001). One manner in which a petitioner can establish good cause is to show that the legal basis for the claim was not reasonably available at the time of the default. *Id.* A claim based on newly available legal basis must rest on a previously unavailable constitutional rule. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d

---

[2] At the hearing on the petition, the district court indicated that the State had not properly pled a laches defense under NRS 34.800. (VII.App.1282.) As a result, laches played no part in the court's order. (VII.App.1286-94.) This was appropriate as the State's motion to dismiss did not make an affirmative assertion of a laches defense. To the contrary, the State did not mention the word "laches" until the last sentence of the entire motion. (VII.App.1229.) There were no allegations to support the defense. That is insufficient under N.R.S. 34.800(2).

521, 525-26 (2003). A petitioner has one-year to file a petition from the date that the claim has become available. *Rippo v. State*, 132 Nev. Adv. Op. 11, 368 P.3d 729, 739-40 (2016), *rev'd on other grounds*, *Rippo v. Baker*, 137 S. Ct. 905 (2017).

The decisions in *Montgomery* and *Welch* provide good cause for overcoming the procedural bars. *Montgomery* established a previously unavailable new rule of constitutional law, namely that the "substantive rule" exception to the *Teague* rule applies in state courts as a matter of federal constitutional law.

While *Montgomery* established the new constitutional rule, it is *Welch*'s expansion of this new rule that is the key decision and dictates the outcome here. *Welch* made clear that this new constitutional "substantive rule" exception to *Teague* includes decisions that interpret a criminal statute by narrowing its terms. *Welch* also announced a broad new rule for how to determine if a decision is substantive, namely the "substantive function" test. *Id.* at 1266. Utilizing that test, *Welch* established, for the first time, *how* the "substantive rule" exception

should be applied in statutory interpretation cases.[3] *Welch*, 136 S. Ct. at 1267.

The petition was also timely. Branham filed his petition on April 9, 2017, within one year of April 18, 2016, the date on which *Welch* was decided. *See Welch*, 136 S. Ct. at 1257.

Alternatively, petitioner can overcome the procedural bars based upon a fundamental miscarriage of justice. A fundamental miscarriage of justice occurs when a court fails to review a constitutional claim of a petitioner who can demonstrate that he is actually innocent. *See Bousley v. United States*, 523 U.S. 614, 623 (1998); *Berry v. State*, 131 Nev. Adv. Op. 96, 363 P.3d 1148, 1154 (2015). Actual innocence is shown when "in light of all evidence, it is more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995); *Berry*, 363 P.3d at 1154. One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that narrows the

---

[3] *Welch* also explained that *Bousley* was an application of the "substantive rule" exception. *Welch*, 136 S.Ct. at 1267. This is the first time the Court has viewed *Bousley* in this manner. Its treatment of *Bousley* now contradicts the Nevada Supreme Court's prior reading of *Bousley* as a "clarification" case akin to *Fiore*. *Clem*, 119 Nev. at 629, 81 P.3d at 531.

definition of a crime, he could not have been convicted of the crime. *See Bousley*, 523 U.S. at 620, 623-24; *Mitchell v. State*, 122 Nev. 1269, 1276-77, 149 P.3d 33, 37-38 (2006).

As discussed before, the Nevada Supreme Court has previously indicated that *Byford* represented a narrowing of the definition of first-degree murder. Under *Welch*, that decision is substantive and, under *Bousley* and *Mitchell*, provides the basis for an actual innocence argument. Under *Byford*, there is a significant risk that Branham stands convicted of an act that the law does not make criminal because the evidence does not establish deliberation. For the reasons discussed before on pages ___, the facts in this case established that Branham should only have been convicted of a second-degree murder. As such, in light of the entire evidentiary record in this case, it is more likely than not no reasonable juror would convict him of first-degree murder under *Byford*.

Finally, Branham can establish actual prejudice for the same reasons discussed on pages 36 to 42. It is reasonably likely that the jury

applied the *Kazalyn* instruction in a way that violates the Constitution. That constitutional error prejudiced Branham.

CONCLUSION

Branham has established that, under new constitutional principles, the decision in *Byford* must apply retroactively to his case pursuant to the new constitutional rule set forth in *Montgomery* and *Welch*. Under *Byford*, it is clear that the jury instruction on first-degree murder was improper. As a result, this Court should find that he has established both cause and prejudice to overcome the procedural defaults. For these same reasons, this Court should grant the petition for a writ of habeas corpus and remand this case to the district court with directions to vacate Branham's judgment of conviction and to provide Branham with a new trial.

Dated this 4th day of April, 2018.

Respectfully submitted,

RENE L. VALLADARES
Federal Public Defender

/s/Jonathan M. Kirshbaum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 8,681 words; or

[ ] Does not exceed pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate

Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/s/ *Jonathan M. Kirshbaum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE AND MAILING

I hereby certify that this document was filed electronically with the Nevada Supreme Court on April 4, 2018. Electronic Service of the foregoing **Appellant's Opening Brief s**hall be made in accordance with the Master Service

List as follows:

Terrance P. McCarthy, Deputy District Attorney

/s/ Adam Dunn
An Employee of the
Federal Public Defender, District of Nevada