# IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74743



WILLIAM BRANHAM

Appellant,

v.

ISIDRO BACA, WARDEN, et al.,

Respondent.

Appeal From Order Denying a Post-Conviction Petition for Writ of Habeas Corpus
Second Judicial District Court, Washoe County

The Honorable Elliott A. Sattler, District Judge

## APPELLANT'S APPENDIX TO THE OPENING BRIEF VOLUME VII OF VII

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# ALPHABETICAL INDEX

## CHRONOLOGICAL INDEX

## VOLUME VI



## VOLUME VII

DATED this 4th Day of April, 2018.

Respectfully submitted,

*/s/ Jonathan M. Kirshbaum*

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## 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 Appendix to The Opening Brief (Volumes I-VII)** shall 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

# ORIGINAL

No. CR92-0546 and CR92-1048

Dept. No. 5

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE MARK HANDELSMAN, DISTRICT JUDGE

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| | |
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| THE STATE OF NEVADA,<br>Plaintiff,<br>vs.<br>WILLIAM E. BRANHAM,<br>Defendant. | TRANSCRIPT OF PROCEEDINGS<br>Sentencing<br>April 14, 1993<br>Reno, Nevada |

APPEARANCES:

For the Plaintiff: KARL S. HALL, ESQ.
Deputy District Attorney
Washoe County Courthouse
Reno, Nevada

For the Defendant: MARY LOU WILSON, ESQ.
Deputy Public Defender
195 South Sierra Street
Reno, Nevada

The Defendant: WILLIAM E. BRANHAM

Reported by: RICHARD L. MOLEZZO, CSR40, CP, CM, RPR
Computer-Aided Transcription

RENO, NEVADA; WEDNESDAY, APRIL 14, 1993; 9:15 A.M.

--oOo--

THE COURT: Ladies and gentlemen, things went a little quicker this morning than we had anticipated. We have one case left to complete. That case will involve another Deputy District Attorney.

I told him that I would give him a five- to ten-minute recess at the conclusion of this morning's matters and prior to the State of Nevada versus William Branham so that he could file appropriate documentation. So we'll stand in recess for five to ten minutes, and we'll come back and take care of State of Nevada versus William Branham.

(Recess.)

THE COURT: Thank you. Be seated, please.

This would be State of Nevada versus William Edward Branham, CR92-0546. Mr. Branham is present in court, represented by Miss Wilson. Mr. Hall is representing the State. Ms. Ewald is present, representing the Department of Parole & Probation. Actually, this is CR92-0546, and for purposes of this sentencing, CR92-1048.

The record would indicate that on the 9th of May-- excuse me, the 9th of March, 1993, William Edward

Branham was found guilty by way of a jury verdict of the felonies of both the charges of Murder and several charges of Forgery.

A pre-sentence report was ordered on March 9th of 1993. The pre-sentence report with respect to the Forgery counts and the Murder count have been received and reviewed. There's also been an addendum--or let me give you a specific title--a memorandum from Ms. Wilson delineating certain differences of opinion, both factually and in form of opinion, with regard to the pre-sentence report. I've also received a motion for a new trial, and opposition to the motion for new trial.

With all of that to be addressed this morning, this would be the time set for sentencing. How would you wish to proceed, with motion for a new trial at this time, Ms. Wilson?

MS. WILSON: Your Honor, I would. And the defense is prepared to submit the matter to you. I've had an opportunity to review the opposition by the State. I would rely on the motion and the attached document and submit it to you.

THE COURT: All right. Mr. Hall?

MR. HALL: The State would also stand on its authorities and authorities submitted in opposition to the

defendant's motion.

THE COURT: All right. I have had a chance in the last few minutes to review the opposition. I've had a chance to review the motion previously. It would appear to me that for the reasons set forth in Mr. Hall's opposition that I think a new trial would not be warranted. So I will deny the motion based on these pleadings.

Ready to proceed now to sentencing?

MS. WILSON: I am, your Honor. Thank you.

Your Honor, Mr. Branham has been provided copies of Miss Ewald's pre-sentence report, both in the Forgery counts as well as the Murder count. He and I have reviewed it together, and that is how you came upon the memorandum regarding the corrections and my personal evaluation, which differs from the Department.

Also, I would ask that the Court refer to the last page, which shows a document from the Washoe County Sheriff's Office indicating Mr. Branham winning several prizes for his art work while in custody.

Your Honor, the defense takes exception to Miss Ewald's recommendation of life in the Nevada State Prison without the possibility of parole. It is the defense's view that the memorandum sets out certain elements of Mr. Branham's background that we believe shows him to be amenable to

rehabilitation.

I think before the Court is really a two-prong question: whether Mr. Branham is not worthy of ever getting out of prison, or whether he is.

The aspect of the case itself, guilt or innocence, will not be discussed by me, nor is it appropriate. I do want to indicate to the Court however that at all times after the jury verdict came back guilty, Mr. Branham has always asserted his innocence to me and has always asserted his desire for appeal.

I think Miss Ewald may have gotten the impression from Mr. Branham that he was not full of remorse, and that perhaps because of his personality with her in the short period of time that she interviewed him--which probably encompassed a little more than an hour--that she got a personality which was viewed as cold and chilling, and hence you have before you a recommendation of life without the possibility of parole.

The defense asserts that Mr. Branham has always maintained this not-guilty attitude. And certainly the Court is aware, as well as State, that we took great pains to suppress statements that were taken in violation of his Constitutional rights. At all times Mr. Branham has been advised by me that his statement, especially now after the

suppression, can be used against him and will be used against him.

So that brief interview where Mr. Branham may have denied any culpability, may have not shown any remorse to her, and may have come across as chilling, I would assert to you is based on his assertion for appeal and his maintenance of a not-guilty personality. That is not enough, your Honor, to sentence Mr. Branham to life without the possibility of parole.

As the Court is aware through the pre-sentence investigation, Mr. Branham has only been to prison one other time. That was for a theft of a vehicle, and he maintained an honorable discharge from parole. This should indicate to the Court that Mr. Branham can maintain himself in a prison setting, that he is a good inmate, and that he can function and rehabilitate himself.

Also for the Court's consideration is that he was honorably discharged from the Armed Services. He spent two years in Vietnam and successfully completed that term.

Your Honor, Miss Ewald believes that Mr. Branham has an extensive criminal history. However, the defense views this as an inappropriate assessment. Mr. Branham has a host of misdemeanor offenses that involve drinking and theft. He is not a violent person with regard to his past criminal

history. He has one prior felony, and that's theft-related.

I think the Department could assess him in a more favorable light. They could have said he has some misdemeanors and he has a prior felony; but they certainly can't say he has an extensive criminal history, because he doesn't, and he doesn't have the violent past that one would want to see for a recommendation of life without the possibility of parole.

Such a person you would want to see having armed robberies, having mayhem, having prior attempted murders, having a prior murder. This is certainly someone that you would never want to give the possibility of parole to.

Additionally, your Honor, in my experience, the person that receives life without the possibility of parole is someone that has a host of mental problems, including a sociopathic personality, one that is not amenable to ever being rehabilitated. Someone that lacks social conscience, that has a history of lacking social conscience, that has a history back in their juvenile days of showing very devious, mean conduct. This is not the case for Mr. Branham.

Additionally, let's talk about the homicide itself. The homicide involved the alleged strangulation, suffocation, although the defense of course you know went on in trial, we believe that it was undetermined. However, the

jury found a homicide, and let's assume it was a homicide.

Even assuming that it was a homicide, this death could reasonably be inferred as possibly a domestic struggle, one that maybe was not as callous as the Department would like to view, maybe could even rise to the level of accidental.

Certainly this is a lot of inference on my part, but I'm sure the State will get up and have their opportunity to tell you what a cold and calculating suffocation this must have been. But on the same part, it is just as reasonable to believe that this was alcohol-related, this was domestic-related, and perhaps not as cold and calculating as the State and the Department may want to view it.

Additionally, your Honor, you don't have the aggravation that you may see in a life-without case, such as torture, mutilation, mayhem, kidnaping, sexual assault, a robbery, any of those types of aggravation.

So I would assert to you that Mr. Branham stands before you as someone that is amenable to rehabilitation, has shown himself as a person that can maintain himself in a custody status in a very favorable way. He has, as indicated, done some fine things while in custody.

And by the way, he has been in custody for a very long length of time, that being 427 days. You notice that there are no write-ups for him for misconduct or for violence

while in custody. This is very telling of someone that is amenable to rehabilitation.

There is no way that the defense can deny in any way, shape or form the incredible sorrow of the remaining children of Beverly Fetherston and her friends. However, your Honor, it is our feeling that the focus should be on Mr. Branham today and whether he is someone that the Court feels could be let out at some period of time on parole.

Court's indulgence.

With regard to Mr. Johnny Wade, this was a witness who I talked to and who indicated to me that at times he viewed Mr. Branham write checks on Beverly Fetherston's account while in the presence of Beverly Fetherston. This was not brought out at trial because, according to me, I did not want to open the door as to Mr. Branham's statements. But it shows the kind of relationship that he and Beverly had. It was sharing a household, as well as accounts. So I think that needs to be taken into consideration.

Mr. Branham has many friends that have contacted me in support of him. Bonnie Guggenbickler, Caroline Frost, Bonnie's daughter, Wrell Cook, Johnny Wade. These are people that care about Mr. Branham and have not seen the violence that the State would like to indicate he is capable of. And I know Mr. Branham could be a fair person for life in prison

with the possibility of parole.

I'd ask that you consider that, and I'd also ask that you consider that the forgeries run concurrent with a life sentence with the possibility of parole. Thank you.

THE COURT: Thank you. Mr. Hall?

MR. HALL: Your Honor, the State would ask you to follow the recommendation of the Department of Parole & Probation. And I have noted that there are a couple of discrepancies between the report. I think they're typos. I have discussed those with Miss Ewald briefly.

Specifically directing your attention to the pre-sentence investigation report on the forgeries. It lists six forgeries in there. You'll notice that Roman Numeral V is not listed, and that should also be listed as another one of the forgeries. So there are actually seven counts. I just wanted to bring that to the Court's attention.

The reason I'm asking you to follow the recommendation of the Department of Parole & Probation is because it is our position that there is no more serious crime than murder. Certainly there are some other aggravating factors in other cases, and I would suggest that were those other factors present in this case, such as mayhem, sexual assault, kidnaping, we would not be here requesting life in prison without the possibility of parole, we would be seeking

the death penalty because of those aggravating factors.

However, there are several aggravating factors in this particular case. First of all, we have the continued thievery of Mr. Branham over an extended period of time. As you will recall, Mr. Branham began his forgery spree back in January of 1992. That spree continued up until and after Miss Fetherston was found.

The defendant took advantage of Miss Fetherston, who was a caring person, a loving person, someone who would extend her money, her car, her house, her time, her efforts in helping other people. She helped Mr. Branham.

And when I noticed that he had a tattoo of a shark on one arm and the tattoo of a road runner on the other arm, that indicates to me that it's reflective of the defendant's character. Mr. Branham is the type of person who feeds and preys on the people in this community, just as he fed and preyed off Beverly Fetherston.

The defendant has failed to show any remorse for this crime. And that's not only indicative of the statements that he has made to Miss Ewald, but it also shows up in his conduct after the death and demise of Miss Fetherston.

After he left her house on February 6th, he states, "Well, I didn't see Miss Fetherston after that. I left 10 seconds after Mr. Poorman left her house."

He goes right over to First Interstate Bank, a hundred yards away from Miss Fetherston's house, and cashes a check for some $250. Thereafter, he takes her car, her checkbook and goes to California, allegedly to visit his daughter. When he runs out of money, he comes back.

He doesn't go to ask Miss Fetherston for the money, as he would have this Court believe in his innocence. He goes right back over to the bank and again tries to cash another check. This indicates that the defendant has absolutely no remorse for the crimes that he has committed.

We can go one step further with that line of thinking. The statements that the defendant made to Miss Ewald, "I didn't forge any checks on Miss Fetherston's account." Obviously, this is contradicted by the evidence. There's no question that he forged those checks on Miss Fetherston's account.

And to stand here today and say, "Well, Mr. Wade, Johnny Wade, saw me cash some checks or write some checks with Miss Fetherston", well, as we went through during the course of the trial, all of those checks which Miss Fetherston wrote at least in the last month of her life were entered on her register. Some thousand dollars worth of checks that Mr. Branham cashed, none of those were entered into the register. Clearly the jury had no problem with that issue.

But the point I'm trying to make is the defendant shows no remorse at this point in time. That's one of the reasons why life in prison without the possibility of parole is appropriate.

Your Honor, there is a matter of restitution that the State would like to bring up. Not that there's a strong likelihood that anybody's ever going to get restitution; however, we would ask that restitution be ordered in the amount of $1,035 for the checks that were written on Miss Fetherston's account.

I believe that the pre-sentence investigation reports that the bank did not take a loss on that. However, I believe it is appropriate in light of the financial loss that Miss Fetherston and her estate lost as a result of those forgeries.

Cremation costs in the amount of $513. We would ask that those costs be ordered as part of restitution, as well.

And finally, travel expenses in the amount of $907.96 for the travel expenses involved in Mr. Kately, the Katelys' boys and Barbara Kately, who you recall testified during the course of the trial.

Total amount, your Honor, would be $2,455.96.

THE COURT: I'm sorry. Would you repeat that,

please?

MR. HALL: Yes. $2,455.96.

If I may address some of the arguments that were set forth by defense counsel.

One argument was that the defendant does not present himself as some kind of a sociopathic person who would typically be sentenced to a term of life in prison without the possibility of parole.

I do not recall seeing any medical reports from any doctor, either a psychologist or sociologist or anybody who interviewed the defendant and indicated he was not sociopathic or that he was sociopathic.

We stand on the premise that the defendant was found guilty of Murder in the First Degree, premeditated Murder. And those facts surrounding that murder and the death of Miss Fetherston are sufficient in and of themselves with respect to the rest of the facts and circumstances surrounding this case for this Court to order that the defendant be sent to prison without possibility of parole.

There's another argument that the defendant does not lack social consciousness, and that he is amenable to rehabilitation.

The Court will note that the defendant was sentenced to prison for two years on a prior offense. If the

defendant was so amenable to rehabilitation, then why is he out committing multiple forgeries and murder? Clearly, he is not that amenable to rehabilitation.

As I stated before, this man is a parasite. He preys off people like Beverly Fetherston. He did it in this case and caused her death.

Your Honor, I would ask you to sentence the defendant to life in prison without the possibility of parole. With respect to the Forgery charges, I would ask that you follow the Department's recommendation, and I believe that is five years on each count concurrent to each other, consecutive to the Murder sentence. Thank you.

THE COURT: Thank you. Miss Ewald?

PROBATION OFFICER: I would just point out, your Honor, with regard to the defendant's prior criminal history, I think it's significant that he has involved himself in prior theft offenses, the last one being Unlawful Taking of a Motor Vehicle, for which he spent two years in prison. He supposedly was rehabilitated, and then went out and murdered and stole the victim's vehicle, tried to sell it, and forged checks.

This again, as the prosecutor has pointed out, I think precludes the argument that this was just a domestic kind of emotional struggle that ended-- that resulted, perhaps

even accidentally, in death. I think that his actions subsequent to the murder, his callous stealing her vehicle and checks, trying to sell the vehicle, coming back and trying to cash another check, shows just what kind of a person this is.

And for those reasons, and because Murder is the most serious offense, the Department feels that life without possibility of parole is the appropriate sentence.

MR. HALL: Your Honor, there's one matter I would like to bring up before the Court. Mr. Kately is here, and I'd ask that you give him an opportunity to address the Court.

THE COURT: All right. Mr. Kately.

(Witness sworn.)

DEAN M. KATELY,

called as a witness by the State herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q Sir, would you please state your name, and spell your last name.

A My name is Dean M. Kately. Spelled K-a-t-e-l-y.

Q Who is your mother?

A Beverly Ann Fetherston.

Q And you testified during the course of the trial of Mr. Branham; isn't that correct?

A Briefly.

Q Now, obviously you have an opportunity to address the Court, and Judge Handelsman has graciously given you an opportunity to do so. And that if you would express what feelings you have with respect to the sentencing, I'd ask you to do that at this time.

A Your Honor, we wrote--

MS. WILSON: Your Honor, may I approach for a minute with counsel?

THE COURT: Yes.

(Discussion at the bench.)

THE COURT: Mr. Kately, I've had a chance to speak with counsel, as you have observed. I am not clear frankly on the specifics of a particular law which Mr. Hall has told me has very recently been changed, that there is a recent case which would have an effect on prior case law of which I am aware.

Let me explain to you what I know the rule was. And I certainly respect Mr. Hall, and I'm sure he endeavors always to be as accurate as he can in his representations to me. But call me a little bit conservative, if you will, I'd

like to read those cases and make sure I have the same interpretation.

So the law used to say that a Judge could allow someone such as yourself to speak to the Court and explain how this crime has affected your life, if you wish to go into that area, how serious you feel the crime to be, if you wish to go into that area, but the law said that it would be improper for me to allow you to recommend to me a specific sentence.

So I'm going to have to ask you to refrain from doing that. Don't tell me, "I think you ought to give this sentence to Bill Branham." We can discuss a lot of other things, but we really can't get into that area. Okay?

THE WITNESS: I understood that. I never intended to presume anything like that, your Honor.

THE COURT: Well, I wasn't saying that you were. But I didn't know what your thoughts might be, and I wanted to clear this up before we go forward.

THE WITNESS: I'll tell you what I would do is just state how this has impacted my family.

THE COURT: Terrific. I'm very anxious to hear that.

THE WITNESS: Okay. My mother lived in Reno, and we didn't see each other as much as we probably should. She left behind three children and five grandchildren. Two of

those grandchildren will never meet their grandmother. Ever meet their grandmother.

One of the special times that my family had when my mother was alive was Christmas. It was very special to our mother, and very special to our family. We always tried to get together. Last year was the first year Mom ever missed coming to my house for Christmas.

I don't-- My father-in-law died three or four days before I was notified of my mother's murder. I had to explain to my children--

THE COURT: Take your time.

THE DEFENDANT: I had to explain to my children their grandfather's death, which was from natural causes. I mean, it happens. Then I had to-- I had to three days later explain to my children that their grandmother had been killed and it was a suspected homicide.

I was lucky in that my children are old enough that they understood what had happened. As to how it hurt them, I think only my children can tell you how they feel about it. I know explaining it to them was rather close to impossible. But we did it, and we made it through it.

That's the impact on my family, your Honor. It's not financial. It-- It-- It's the emotional. He took away from my family, he took my mother away from me, he took the

last link to a period in our family's history, because my father died eight, nine years ago, that from her grandchildren.

They'll never hear about a period of our family's life that I wasn't there for before I was born, 'cause I don't know about it. I have aunts and uncles, but I don't know what happened between my mother and father before they were married for sure. I have stories that they've told me, but they'll never get that firsthand.

They'll never understand the-- the special times we had at Christmas when she was there, and the way she tried to make things special for us when we were kids. And even as we grew older, trying to keep the family together during that time so that we didn't drift too far apart. Because families drift. All families do. And we get our own lives.

My personal feeling is that if Mr. Branham had any remorse for his crime, he would have at least written a letter and expressed some remorse to the family, and he hasn't done that. I don't--

I don't know what else to say, your Honor. I can't even begin to explain to you the emotional trauma he's put me, my brother, my sister and the grandchildren through. I think you'd have to experience it to understand it. That's really all I have to say, your Honor.

THE COURT: Anything else, Mr. Hall?

MR. HALL: I have nothing further, your Honor.

THE COURT: Ms. Wilson?

MS. WILSON: No, your Honor.

THE COURT: You may step down, please. Thank you very much.

Anything else that the State would wish to offer at this time?

MR. HALL: That's all I have to offer at this time, your Honor.

THE COURT: Miss Wilson, anything that you would wish to add?

MS. WILSON: Your Honor, I would be repetitive in my arguments. I expected to have to really put on boxing gloves, but I think everything that I've asserted during the initial presentation was presented. And I appreciate Miss Ewald's thoroughness in her report. I just disagree with her recommendation. I disagree with the State. I think Mr. Branham is capable of rehabilitation. I think he's shown that, and I don't think this is a life-without case. Thank you.

THE COURT: Mr. Branham, is there anything that you would wish to say at this time?

THE DEFENDANT: No, your Honor.

THE COURT: Any legal cause why judgment should not enter at this time, Miss Wilson?

MS. WILSON: No, your Honor.

THE COURT: Based on the jury's verdict in this case, it is the judgment of the Court that you, William Edward Branham, are guilty of Murder and seven counts of Forgery, all felonies, violations of NRS 205.040 as to the Forgery counts, and NRS 200.010 and NRS 200.030 as to the Murder. Judgment will be entered accordingly on the minutes of the Court at this time.

You'll be required to pay a 25-dollar administrative assessment fee, Mr. Branham, with regard to both Case Number CR92-1048 and CR92-0546.

With respect to CR92-1408, which is the charge of Murder, there really isn't a whole lot that can be said. In so many other types of crimes you hope to communicate with someone, perhaps on a level that has not yet occurred in their lives. With a charge such as this, there is really very little communication that can take place. The crime is charged, the jury has spoken, and I respect the jury verdict as I am obligated to do.

This is a very serious, horrible crime. And obviously Miss Ewald, based on her written report, believes that it is such that it is not one that warrants a great deal

of mercy, and does in fact warrant the most serious punishment available under the law for the crime.

We went through the trial together. I know we have different perspectives, but I hope that you were listening as attentively as I under the circumstances. I don't know, frankly, if you were able from your perspective to be able to listen in the same way that I was. But I hope you were.

And this is the kind of a situation and the kind of facts that really makes a person sick, just makes-- it just eats away at you, and I regret that it ever happened. Regardless of your innocence or guilt, as you state it, I'm sure that you regret it ever happened, too, as do most of the people who were directly involved or peripherally involved.

Because of the nature of this crime, because of the circumstances surrounding the crime, because of all the evidence that was presented at the trial, you, William Edward Branham, will be sentenced to life in the Nevada State Prison without possibility of parole.

You'll be required to effect restitution to the victims in this case in the amount of $2,455.96.

With respect to Case Number CR92-04546, all seven counts of Forgery, you will be sentenced to a term of one year on each of the seven Forgery counts. Those will run

concurrent with each other, and will run consecutive to the term which you are obligated to serve in CR92-1048.

You are entitled to credit of 427 days for time which you've already served as a result of this case.

Anything further from the State?

MR. HALL: That's all I have, your Honor.

THE COURT: Anything further at this time, Ms. Wilson?

MS. WILSON: No, your Honor.

THE COURT: Court will stand in recess.

(Proceedings Concluded)

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STATE OF NEVADA )
) ss.
COUNTY OF WASHOE )

I, RICHARD L. MOLEZZO, official reporter of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify:

That as such reporter I was present in Department No. 5 of the above court on Wednesday, April 14, 1993, at the hour of 9:15 a.m. of said day, and I then and there took verbatim stenotype notes of the proceedings had and testimony given therein upon the Sentencing of the case of THE STATE OF NEVADA, Plaintiff, vs. WILLIAM E. BRANHAM, Defendant, Case No. CR92-0546 and CR92-1048.

That the foregoing transcript, consisting of pages numbered 1 to 24, both inclusive, is a full, true and correct transcript of my said stenotype notes, so taken as aforesaid, and is a full, true and correct statement of the proceedings had and testimony given upon the Sentencing of the above-entitled action to the best of my knowledge, skill and ability.

DATED: At Reno, Nevada, this 26th day of April, 1993.

/bb

RICHARD L. MOLEZZO, CSR #40

CASE NO. CR92-1048 STATE OF NEVADA VS. WILLIAM EDWARD BRANHAM

| DATE, JUDGE OFFICERS OF COURT PRESENT | APPEARANCES-HEARING | CONT'D TO |
|---|---|---|
| 4/14/93<br>HONORABLE<br>MARK<br>HANDELSMAN<br>DEPT. NO. 5<br>B. Walker<br>(Clerk)<br>R. Molezzo<br>(Reporter) | ENTRY OF JUDGMENT AND IMPOSITION OF SENTENCE<br>Deputy D.A. Karl Hall was present for the State. The Defendant was present with counsel, Deputy P.D. Mary Lou Wilson. Joan Ewald was present on behalf of the Probation Dept.<br>Counsel Wilson presented a motion for a new trial; response by Counsel Hall.<br>COURT ORDERED: Motion denied.<br>Respective counsel addressed the Court. Probation Officer addressed the Court.<br>Dean M. Kateley, son of the deceased, was sworn and addressed the Court.<br>COURT ORDERED: Judgment entered; Deft sentenced to Life in the Nevada State Prison Without The Possibility Of Parole and payment of restitution in the amount of Two Thousand Four Hundred Fifty-Five Dollars and Ninety-Six Cents ($2,455.96). The Defendant is ordered to pay the Twenty Five Dollar ($25.00) administrative assessment fee.<br>Defendant remanded to the custody of the Sheriff. | |

IN THE SUPREME COURT OF THE STATE OF NEVADA

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| WILLIAM EDWARD BRANHAM,<br>Appellant,<br>vs.<br>THE STATE OF NEVADA,<br>Respondent. | No. 24478 |
| WILLIAM EDWARD BRANHAM,<br>Appellant,<br>vs.<br>THE STATE OF NEVADA,<br>Respondent. | No. 24648 |

FILED

DEC 18 1996

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEALS

These are consolidated appeals from judgments of conviction, pursuant to jury verdicts, of one count of first degree murder and seven counts of forgery. The district court sentenced appellant to serve in the Nevada State Prison a term of life without the possibility of parole for the murder and a term of one year for each of the seven counts of forgery, and to pay restitution in the amount of $2,455.96. The seven one-year terms run concurrently with each other and consecutive to the term of life imprisonment.

Appellant contends that insufficient evidence was presented at his trial to prove the corpus delicti of the crime of murder. To establish the corpus delicti of murder, the state must show (1) the fact of death, and (2) that the criminal agency of another is responsible for that death. Frutiger v. State, 111 Nev. 1385, 1389, 907 P.2d 158, 160 (1995). The fact of death is uncontroverted, but appellant contends that insufficient evidence was presented to prove that a criminal agency was responsible for that death. Specifically, appellant points out that pathologists could not determine a cause of death.

To sustain a homicide conviction, "the proper standard is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have concluded beyond a reasonable doubt that [the] death was caused by a criminal agency." Frutiger, 111 Nev. at 1391, 907 P.2d at 161 (citing Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) and Jackson v. Virginia, 443 U.S. 307, 319 (1979)). After reviewing the record on appeal, we conclude that sufficient evidence was presented for the jury to reasonably find that the victim's death was caused by a criminal agency. Specifically, the victim's body was found on a couch in her home, nude and on her back, partially covered by an afghan, with a pillow over her face. An empty beer can was in the victim's right hand, with the opening on the side away from her head, opposite the normal drinking position. There was evidence of trauma to her neck. Although pathologists could not rule out natural causes of death, the death was termed "consistent with asphyxia." The victim was not known to have any medical problem likely to cause sudden death. Cf. Frutiger, 111 Nev. at 1391, 907 P.2d at 162 (medical expert testified that the most likely cause of death was chronic and acute alcoholism). Sufficient evidence was presented for a reasonable jury to find that the victim died from a criminal agency.

Appellant further contends that his conviction of forgery is not supported by sufficient evidence. Appellant points to evidence that he and the victim had enjoyed a close personal relationship, that the victim had lent him her car and her ATM card, that he knew the PIN number for her ATM card, and that he had cashed checks on her account before her death. Appellant further points out that he offered the victim's telephone number to a bank official when the bank questioned him regarding a check drawn on the victim's account, and that he did not flee when the

police came to arrest him. Appellant contends that this indicates that he had permission to withdraw money from the victim's checking account and negates the "intent to defraud" element of the crime of forgery. See NRS 205.090. Although appellant and the victim were roommates, testimony presented at trial indicated that the victim had never allowed appellant to draw checks on her account. The victim was dead when appellant was apprehended cashing a check on her account. The jury could reasonably infer from appellant's lack of fear when the bank challenged the check drawn on the victim's account that appellant knew the victim was dead and could not respond to the bank's inquiries. Further, appellant had tracings of the victim's signature in his possession when he was apprehended. Under these facts and circumstances, the jury could reasonably find that appellant had the intent to defraud when he signed the victim's name to her checks. The jury's verdict will not be disturbed where, as here, it is supported by sufficient evidence. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981). Accordingly, appellant's contentions lacking merit, we dismiss these appeals.

It is so ORDERED.

Steffen, C.J.

Young, J.

Springer, J.

Shearing, J.

Rose, J.

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EDWARD BRANHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45532

FILED

NOV 10 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 14, 1993, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction.[1] The remittitur issued on January 6, 1997.

On December 12, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant. On February 23, 1999, the district court denied the petition. This court dismissed the subsequent appeal.[2]

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[1]Branham v. State, Docket Nos. 24478, 24648 (Order Dismissing Appeals, December 18, 1996).

[2]Branham v. State, Docket Nos. 33830, 33831 (Order Dismissing Appeals, February 15, 2000).

In July of 2000, appellant submitted a petition for a writ of habeas corpus in federal court. On September 26, 2002, the federal district court dismissed the petition with prejudice due to the petition being untimely filed. The Court of Appeals for the Ninth Circuit affirmed the federal district court's order. The United States Supreme Court denied a petition for a writ of certiorari.

On February 14, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On June 17, 2005, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than eight years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.[3] Moreover, appellant's petition was successive because he had previously filed and had considered on the merits a post-conviction petition for a writ of habeas corpus.[4] Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.[5]

In an attempt to excuse his procedural defects, appellant argued that his post-conviction counsel was ineffective. Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. Appellant did not have the right to counsel at the time he filed his first petition, and therefore he did not have

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[3]See NRS 34.726(1).

[4]See NRS 34.810(1)(b)(2); NRS 34.810(2).

[5]See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

the right to the effective assistance of counsel in that proceeding.[6] "[H]ence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim."[7] Therefore, we affirm the order of the district court denying appellant's petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[8] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[9]

Douglas, J.
Douglas

Rose, J.
Rose

Parraguirre, J.
Parraguirre

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[6]See NRS 34.750; McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996); see also Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).

[7]McKague, 112 Nev. at 165, 912 P.2d at 258.

[8]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[9]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Steven P. Elliott, District Judge
William Edward Branham
Attorney General
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

3585
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Attorney for Petitioner William Branham

IN THE SECOND JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

WILLIAM EDWARD BRANHAM,

Petitioner,

v.

ISIDRO BACA, WARDEN, etc.

Respondents.

Case No. CR92-1048
Dept. No. ____

**PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)**

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Northern Nevada Correctional Center, Carson City, Nevada

2. Name and location of court which entered the judgment of conviction under attack: 2nd Judicial District, Washoe County

3. Date of judgment of conviction: April 14, 1993

4. Case Number: CR-92-1048

5. (a) Length of Sentence: Life without the possibility of parole

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes [ ] No [X ]

If "yes", list crime, case number and sentence being served at this time: Nature of offense involved in conviction being challenged:

7. Nature of offense involved in conviction being challenged: First Degree Murder

8. What was your plea?

(a) Not guilty XX (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

10. If you were found guilty after a plea of not guilty, was the finding made by: (a) Jury XX (b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No XX

12. Did you appeal from the judgment of conviction? Yes XX No __

13. If you did appeal, answer the following:

(a) Name of Court: Nevada Supreme Court

(b) Case number or citation: 24648

(c) Result: Conviction Affirmed on 12/18/96; Remittitur issued on 1/6/97.

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes XX No _____

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of Court: 2nd Judicial District

(2) Nature of proceeding: Post-conviction Petition for a Writ of Habeas Corpus.

(3) Ground raised:

Ground One: Whether ineffective assistance of counsel for failure to object to NRS 175.211, reasonable doubt instruction.

Ground Two: Ineffective assistance of counsel, for failure to object to malice instruction.

Ground Three: Ineffective assistance of counsel, for failure to advise defendant of his right to be sentenced by jury.

Ground Four: Trial counsel failed to fully investigate by forensic autopsy and failure to hold inquest.

Ground Five: Whether the petitioner was provided with his constitutional right to notice of charges against him, because the information was insufficient.

Ground Six: Whether the petitioner was denied his federal constitutional to effective assistance of counsel both prior to and during trial.

Ground Seven: Whether counsel was ineffective on first direct appeal.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes XX No _____

(5) Result: Petition Denied.

(6) Date of Result: 2/23/1999

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Nevada Supreme Court Order dated 2/15/2000.

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: United States District Court for the District of Nevada

(2) Nature of proceeding: Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254

(3) Grounds raised:

Ground One: Branham's conviction and resulting sentence are invalid under constitutional guarantees of due process and a fair trial due to the absence of evidence sufficient to support, beyond a reasonable doubt, a factual basis for the necessary element of criminal agency for culpability for the offense. U.S. Const. Amends. V, XIV.

Ground Two: The jury instruction on malice was improper as it allowed the jury to presume malice without proof beyond a reasonable doubt in violation of NRS 47.230, thus violating Branham's Fifth, Sixth, and Fourteenth Amendment rights to due process.

Ground Three: Branham's constitutional right to due process was violated because the jury instruction on reasonable doubt was improper.

Ground Four: Branham's right to be sentenced by his jury was denied in violation of right to due process.

Ground Five: Branham's right to due process was violated when no coroner's inquest was held pursuant to NRS 259.050.

Ground Six: Branham was denied effective assistance of counsel prior to and during trial in violation of the Sixth Amendment to the United States Constitution.

a) Trial counsel's failure to object to the jury instruction on implied malice was improper and violated NRS 47.2340.

b) Trial counsel's failure to object to the jury instruction on reasonable doubt was improper.

c) Trial counsel's failure to assert Branham's right to be sentenced by the jury was improper.

d) Trial counsel's failure to assert Branham's right to a coroner's inquest.

Ground Seven: Branham was denied effective assistance of counsel on direct appeal in violation of the United States Constitution.

a) Appellate counsel's failure to challenge the jury instruction on implied malice was improper and violated NRS 47.2340.

b) Appellate counsel's failure to challenge the jury instruction on reasonable doubt was improper.

c) Appellate counsel's failure to challenge Branham's right to be sentenced by the jury was improper.

d) Appellate counsel's failure to challenge Branham's right to a coroner's inquest.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No __XX__

(5) Result: Petition Dismissed.

(6) Date of result: 9/26/2002.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: Judgment entered 9/26/2002.

(c) As to any third petition, application or motion, give the same information: N/A

(1) Name of court:

(2) Nature of proceeding:

(3) Grounds raised:

I.

II.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No _____

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes _X_ No _____

(2) Second petition, application or motion?

Yes _X_ No _____

(3) Third petition, application or motion? N/A

Yes ___ No _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. N/A.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? No ___ If so, identify:

a. Which of the grounds is the same:

b. The proceedings in which these grounds were raised:

c. Briefly explain why you are again raising these grounds.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them.

Ground One is based upon a previously unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 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*, 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016). *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. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover, *Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule"

exception to *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? No.

Ground One is based upon a previously unavailable constitutional claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 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*, 2017 WL 855913 (Mar. 6, 2017). Ground One is based upon the recent Supreme Court decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016), which established a new constitutional rule applicable to this case. This petition was filed within one year of *Welch*, which was decided on April 18, 2016.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No __XX__

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Mary Lou Wilson (trial); Jane McKenna (direct appeal).

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack: Yes ____ No __XX__

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

GROUND ONE

UNDER RECENTLY DECIDED SUPREME COURT CASES, PETITIONER MUST BE GIVEN THE BENEFIT OF *BYFORD V. STATE*, AS A MATTER OF DUE PROCESS 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*.

In *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), the Nevada Supreme Court concluded that the jury instruction defining premeditation and deliberation improperly blurred the line between these two elements. The court interpreted the first-degree murder statute to require that the jury find deliberation as a separate element. However, the Nevada Supreme Court stated that this error was not of constitutional magnitude and that it only applied prospectively.

In *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), the Nevada Supreme Court acknowledged that *Byford* interpreted the first-degree murder statute by narrowing its terms. As a result, the court was wrong to only apply *Byford* prospectively. However, relying upon its interpretation of the current state of United States Supreme Court retroactivity rules, it held that, because *Byford* represented only a "change" in state law, not a "clarification," then *Byford* only applied to those convictions that had yet to become final at the time it was decided. The court concluded, as a result, that *Byford* did not apply retroactively to those convictions that had already become final.

However, in 2016, the United States Supreme Court drastically changed these retroactivity rules. First, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Supreme Court held that the question of whether a new constitutional rule falls under the "substantive exception" to the *Teague* retroactivity rules is a matter of due process. Second, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme

Court clarified that the "substantive exception" of the *Teague* rules includes "interpretations" of criminal statutes. It further 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.

*Montgomery* and *Welch* represent a change in law that allows petitioner to obtain the benefit of *Byford* on collateral review. The Nevada Supreme Court has acknowledged that *Byford* represented a substantive new rule. Under *Welch*, that means that it must be applied retroactively to convictions that had already become final at the time *Byford* was decided. The Nevada Supreme Court's distinction between "change" and "clarification" is no longer valid in determining retroactivity. And the state courts are required to apply the rules set forth in *Welch* because those retroactivity rules are now, as a result of *Montgomery*, a matter of constitutional principle. Petitioner is entitled to relief because 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.

Petitioner can also establish good cause to overcome the procedural bars. The new constitutional arguments based upon *Montgomery* and *Welch* were not previously available. Petitioner has filed the petition within one year of *Welch*. Petitioner can also show actual prejudice.

Accordingly, the petition should be granted.

## I. BACKGROUND

### A. *Kazalyn* First-Degree Murder Instruction

Branham was charged with first-degree murder based on allegations that he killed his former roommate, Beverly Fetherston, by asphyxiation, strangulation, or suffocation. (Information.) The court provided the jury with the following instruction on premeditation and deliberation, known as the *Kazalyn*[1] 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.

(Jury Instructions, Instruction No. 23.)

### B. Conviction and Direct Appeal

The jury convicted Branham of first-degree murder. (Verdict.) He was sentenced to life without the possibility of parole. (Judgment.)

Branham appealed the judgment of conviction. The Nevada Supreme Court issued an order dismissing the appeal on December 18, 1996. The conviction became final on March, 18 1997. *See Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 n.52 (Nev. 2008) (conviction becomes final when judgment of conviction is entered and 90-day time period for filing petition for certiorari to Supreme Court has expired).

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

C. *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.* Its prior cases, including *Kazalyn*, had "underemphasized the element of deliberation." *Id.* Cases such as *Kazalyn* and *Powell v. State*, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992), had reduced "premeditation" and "deliberation" to synonyms and that, because they were "redundant," no instruction separately defining deliberation was required. *Id.* It pointed out that, in *Greene v. State*, 113 Nev. 157, 168, 931 P.2d 54, 61 (1997), 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."

The *Byford* court specifically "abandoned" this line of authority. *Byford*, 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. *Greene*'s further reduction of premeditation and deliberation to simply "intent" unacceptably carries this blurring to a complete erasure.

*Id.* The court emphasized that deliberation remains a "critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighting process and consideration of consequences before acting." *Id.* 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 713-14 (quoting *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981)).

The court held that, "[b]ecause deliberation is a distinct element of *mens rea* for first-degree murder, we direct the district courts to cease instructing juries that a killing resulting from premeditation is "willful, deliberate, and premeditated murder." *Byford*, 994 P.2d at 714. The court directed the state district courts in the future to separately define deliberation in jury instructions and provided model instructions for the lower courts to use. *Id.* The court did not grant relief in *Byford*'s case because the evidence was "sufficient for the jurors to reasonably find that before acting to kill the victim Byford 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." *Id.* at 712-13.

On August 23, 2000, the NSC decided *Garner v. State*, 116 Nev. 770, 6 P.3d 1013, 1025 (2000). In *Garner*, the NSC held that the use of the *Kazalyn* instruction at trial was neither constitutional nor plain error. *Id.* at 1025. The NSC rejected the argument that, under *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Byford* had to apply retroactively to Garner's case as his conviction had not yet become final. *Id.* According to the court, *Griffith* only concerned constitutional rules and *Byford* did not concern a constitutional error. *Id.* The jury instructions approved in *Byford* did not have any retroactive effect as they were "a new requirement with prospective force only." *Id.*

The NSC explained that the decision in *Byford* was a clarification of the law as it existed prior to *Byford* because the case law prior to *Byford* was "divided on the issue":

> This does not mean, however, that the reasoning of *Byford* is unprecedented. Although *Byford* expressly abandons some recent decisions of this court, it also relies on the longstanding statutory language and other prior decisions of this court in doing so. Basically, *Byford interprets and clarifies* the meaning of a preexisting

> statute by resolving conflict in lines in prior case law. Therefore, its reasoning is not altogether new.
>
> Because the rationale in *Byford* is not new and could have been – and in many cases was – argued in the district courts before *Byford* was decided, it is fair to say that the failure to object at trial means that the issue is not preserved for appeal.

*Id.* at 1025 n.9 (emphasis added).

D. ***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 Supreme Court held that due process requires that a clarification of the law apply to all convictions, even a final conviction that has been affirmed on appeal, 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.

E. ***Nika v. State***

In 2007, the Ninth Circuit decided *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007). In *Polk*, that court concluded 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 proof as to the element of deliberation. *Polk*, 503 F.3d at 910-12.

In response to *Polk*, the NSC in 2008 issued *Nika v. State*, 124 Nev. 1272, 198 P.3d 839, 849 (Nev. 2008). In *Nika*, the Nevada Supreme Court disagreed with *Polk*'s conclusion that a *Winship* violation occurred. The court stated that, rather than implicate *Winship* concerns, the only due process issue was the retroactivity of

*Byford*. It reasoned that it was within the court's power to determine whether *Byford* represented a clarification of the interpretation of a statute, which would apply to everybody, or a change in the interpretation of a statute, which would only apply to those convictions that had yet to become final. *Id.* at 849-50. The court held that *Byford* represented a change in the law as to the interpretation of the first-degree murder statute. *Id.* at 849-50. The court specifically "disavow[ed]" any language in *Garner* indicating that *Byford* was anything other than a change in the law, stating that language in *Garner* indicating that *Byford* was a clarification was dicta. *Id.* at 849-50.

The court acknowledged that because *Byford* had changed the meaning of the first-degree murder statute by narrowing its scope, due process required that *Byford* had to be applied to those convictions that had not yet become final at the time it was decided, citing *Bunkley* and *Fiore*. *Id.* at 850, 850 n.7, 859. In this regard, the court also overruled *Garner* to the extent that it had held that *Byford* relief could only be prospective. *Id.* at 859.

The court emphasized that *Byford* was a matter of statutory interpretation and not a matter of constitutional law. *Id.* at 850. That decision was solely addressing what the court considered to be a state law issue, namely "the interpretation and definition of the elements of a state criminal statute." *Id.*

### F. *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 under the Eighth Amendment mandatory life sentences for juvenile offenders, applied retroactively to cases that had already become final by the time of *Miller*. *Montgomery*, 136 S. Ct. at 725.

To answer this question, the Court applied the retroactivity rules set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a new constitutional rule of criminal procedure does not apply, as a general matter, to convictions that were final when the rule was announced. *Montgomery*, 136 S. Ct. at 728. However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. *Id.* First, courts must give retroactive effect to new substantive rules of constitutional law. *Id.* Substantive rules include "rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (internal quotations omitted). Second, courts must give retroactive effect to new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (internal quotations omitted).

The primary 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)).

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*, 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 *Schiro 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 *Schiro*, 542 U.S. at 351-52) (emphasis added). Under that framework, the Court concluded that *Johnson* was substantive. *Id.*

The Court then turned to the *amicus* arguments, which asked the court to adopt 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.* The question in *Bousley* was whether *Bailey v. United States*, 516 U.S. 137 (1995), was retroactive. *Id.* In *Bailey*, the Court had "held as a matter of statutory interpretation that the 'use' prong [of 18 U.S.C. § 924(c)(1)] punishes only 'active employment of the firearm' and not mere possession." *Welch*, 136 S. Ct. at 1267 (quoting *Bailey*). 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.'" *Id.* (quoting *Bousley*). 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 pointed out that *Bousley* did not fit under the *amicus*'s *Teague* framework as Congress amended § 924(c)(1) in response to *Bailey*. *Welch*, 136 S. Ct. at 1267.

Recognizing that *Bousley* did not fit, *amicus* argued that *Bousley* was simply an exception to the proposed framework because, according to *amicus*, "*Bousley* 'recognized a separate subcategory of substantive rules for decisions that interpret statutes (but not those, like *Johnson*, that invalidate statutes).'" *Welch*, 136 S. Ct. at 1267 (quoting *Amicus* brief). *Amicus* argued that statutory construction cases are substantive because they define what Congress always intended the law to mean. *Id.*

The Court rejected this argument. It stated that statutory interpretation cases are substantive solely because they meet the criteria for a substantive rule:

> 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).

## II. ANALYSIS

### A. *Welch* And *Montgomery* Establish That the Narrowing Interpretation Of The First-Degree Murder Statute In *Byford* Must Be Applied Retroactively in State Court To Convictions That Were Final At The Time *Byford* Was Decided

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.").

In *Welch*, the Supreme Court made clear that the "substantive rule" exception includes "*decisions that narrow the scope of a criminal statute by interpreting its terms*." 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*.

This new rule from *Welch* has a direct and immediate impact on the retroactive effect of *Byford*. In *Nika*, the Nevada Supreme Court concluded that *Byford* was substantive. The court held specifically that *Byford* represented an interpretation of a criminal statute that narrowed its meaning. This was correct as *Byford*'s interpretation of the first-degree murder statute, in which the court stated that a jury is required to separately find the element of deliberation, narrowed the range of individuals who could be convicted of first-degree murder.

Nevertheless, the court concluded that, because *Byford* was a change in law, as opposed to a clarification, it did not need to apply retroactively. In light of *Welch*, this distinction between a "change" and "clarification" no longer matters. The *only* relevant question is whether the new interpretation represents a new substantive rule. In fact, a "change in law" fits far more clearly under the *Teague* substantive rule framework than a clarification because it is a "new" rule. The Supreme Court has suggested as much previously. *See Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9 (2005) ("A *change* in the interpretation of a *substantive* statute may have

consequences for cases that have already reached final judgment, particularly in the criminal context." (emphasis added); citing *Bousley v. United States*, 523 U.S. 614 (1998); and *Fiore*).[2] Critically, in *Welch*, the Supreme Court never used the word "clarification" once when it analyzed how the statutory interpretation decisions fit under *Teague*. Rather, it only used the term "interpretation" without qualification. The analysis in *Welch* shows that the Nevada Supreme Court's distinction between "change" and "clarification" is no longer a relevant factor in determining the retroactive effect of a decision that interprets a criminal statute by narrowing its meaning.

Accordingly, under *Welch* and *Montgomery*, petitioner is entitled to the benefit of having *Byford* apply retroactively to his case, which became final prior to *Byford*. The *Kazalyn* instruction defining premeditation and deliberation given in his case was improper.

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 instruction blurred the distinction between first and second degree murder. It reduced premeditation and deliberation down to intent to kill. The State was relieved of its obligation to prove essential elements of the crime, including deliberation. 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" as required under *Byford*. *Byford*, 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,

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[2] In contrast, the United States Supreme Court has never cited *Bunkley* in any subsequent case.

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 prosecution's theory at trial was that Branham strangled or suffocated his former roommate, Beverly Fetherston, to death sometime between February 6 and February 9, 1992. The State provided no direct forensic evidence linking Branham to Fetherston's death. The State did not provide any 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,* 944 P.2d at 712-13. 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. The evidence against Branham was not so great that it precluded a verdict of second-degree murder.

The State presented little evidence about the events that transpired before February 6, the last time anyone reported seeing Branham and Fetherston together. The State presented testimony through Fetherston's good friend, Dudley Poorman. (3/3/93 Trial Transcript ("TT") at 111-114.) That day, Fetherston and Branham were at her house when Poorman got there. (3/3/93 TT at 123.) Both of them had been drinking. (3/3/93 TT at 124-125.) Fetherston appeared intoxicated; her words were slurred. Poorman and Branham were also intoxicated. (3/3/93 TT at 180-181.) Fetherston gave Poorman some money to go buy beer. (3/3/93 TT at 120-121.) Poorman later fell asleep on the sofa. (3/3/93 TT at 129-130.) When he woke up, Fetherston was sitting on Branham's lap in a chair in the corner of the room. (3/3/93 TT at 136.) They appeared friendly, not romantic. (3/3/93 TT at 172.) He left her house around 4:00 p.m. (3/3/93 TT at 131, 136.) On Friday morning, around 8:30 or

9:00 a.m., he went to Fetherston's house, but her car was not there, nor was it there when he walked by on Saturday. (3/3/93 TT at 132-133.)

To establish that Branham murdered Fetherston with premeditation and deliberation, the State relied primarily on Dr. James Neal O'Donnell, the pathologist who performed the autopsy. However, Dr. O'Donnell's testimony was inconsistent and cannot be considered reliable. In the first instance, Dr. O'Donnell, stated the cause of death was undetermined, but consistent with asphyxia. (3/1/93 TT at 94.) He testified that he could not tell if Fetherston simply passed away or was killed. (3/1/93 TT at 104-106.) 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. (3/1/93 TT at 95-96.) He could not say that the areas he believed to be hemorrhages were caused at the same time. (3/2/93 TT at 32.) There can be a small amount of hemorrhaging after death, and mishandling of the body can cause bruising after death. (3/2/93 TT at 34.) With regard to the "bruise-like area" on her neck, there was no hemorrhage on the underside soft tissue when he opened her up. (3/2/93 TT at 12-13.) The hemorrhage in the trachea area he attributed to blunt force trauma. (3/1/93 TT at 98-100.) Although a majority of strangulations show evidence of a fight, there was no skin or blood under the fingernails, no contusions, split lip or black eye. (3/2/93 TT at 33.) He could think of no other reason for Fetherston's death than asphyxia. (3/1/93 TT at 107.)

Dr. O'Donnell's testimony on critical issues changed between his testimony at the preliminary hearing and at trial. At the preliminary hearing, he testified that he was unaware of any way to determine whether a hand was responsible for the bruise-like injury he saw. (3/2/93 TT at 18-19.) At the autopsy he classified the mark at the exterior source of the anterior neck as bruise-like, at the preliminary hearing he

characterized it as an apparent bruise, and at trial the same mark became a clear-cut bruise. (3/2/93 TT at 62.)

Dr. Ellen Clark of Sierra Pathology Associates, a co-worker of Dr. O'Donnell, testified that the body was in a moderate degree of decomposition. (3/5/93 TT at 9-11.) In her opinion, this was a homicide with the cause of death being blunt trauma to the neck. (3/5/93 TT at 29-31.) She could not say how the trauma occurred. (3/5/93 TT at 45-47.)

Dr. Joseph H. Masters, a pathologist, had previously testified for the State about 98 percent of the time. (3/8/93 TT at 3-6.) He formed the opinion that he could not identify Fetherston's cause of death. (3/8/93 TT at 6-8.) The bruise two inches below the larynx, about at the jugular notch, was probably a bruise caused by blunt force. (3/8/93 TT at 21-24.) A bruise by definition is blunt force trauma. (3/8/93 TT at 48-52.) However, he stated that the bruise was not consistent with strangulation. (3/8/93 TT at 48.) Further, he did not believe it could have caused her death. (3/8/93 TT at 56-64.) 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. (3/8/93 TT at 64-66.) Other than congestion of the lungs, none of the other classical signs were present. (3/8/93 TT at 27-28.) He believed the cause of death was undetermined, without equivocation. (3/8/93 TT at 33.)

The State simply failed to present any direct or circumstantial evidence to support a conclusion that Branham had any plans to harm Fetherston. Although Marilyn MacKay, a former co-worker testified she once saw Fetherston with a black eye and split lip which Branham had given her (3/3/93 TT at 81-83), no one else was able to testify to Fetherston ever having a black eye or split lip. Furthermore, testimony that Fetherston was afraid of Branham at some point in time (3/3/93 TT at

80-81) is not evidence of the premeditation and deliberation necessary to convict Branham of First Degree Murder.

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, arguing:

> 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.

(3/9/93 TT at 83-84 (emphasis added).)

Even assuming the jury believed the prosecutor's version of the events leading up to Fetherston's death, this evidence does not necessarily establish that the attack occurred with deliberation, *i.e.* that there was a dispassionate weighing process and consideration of consequences before acting. The State presented testimony that Branham and Fetherston got into an argument over car keys and he allegedly stated she was a "dead bitch." (3/3/93 TT at 56-57.) This was, however, days before the last time they were seen together and, Branham was very drunk. (3/3/93 TT at 55-57.) The last person to see Branham and Fetherston together stated they were happy and getting along (3/3/93 TT at 172) and there was simply no evidence that Branham had

any plans to harm Fetherston that day. Furthermore, 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*, 994 P.2d at 714.

Accordingly, there can be no doubt that the jury applied the instruction in an unconstitutional manner. This error clearly prejudiced Branham.

### B. Petitioner Has Good Cause to Raise this Claim in a Second or Successive Petition

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. *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 claim. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 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*, 2017 WL 855913 (Mar. 6, 2017).

The decisions in *Montgomery* and *Welch* provide good cause for overcoming the procedural bars. *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. Furthermore, *Welch* clarified that this constitutional rule includes the Supreme Court's prior statutory interpretation decisions. Moreover,

*Welch* established that the only requirement for an interpretation of a statute to apply retroactively under the "substantive rule" exception to *Teague* is whether the interpretation narrowed the class of individuals who could be convicted under the statute. These rules were not previously available to petitioner. Finally, petitioner submitted this petition within one year of *Welch*, which was decided on April 18, 2016.

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). 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). One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that narrows the 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* and *Montgomery*, that decision is substantive. In other words, there is a significant risk that petitioner stands convicted of an act that the law does not make criminal. For the reasons discussed before, the facts in this case established that petitioner only committed 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.

Finally, petitioner can establish actual prejudice for the same reasons discussed on pages 22 to 26. It is reasonably likely that the jury applied the

challenged instruction in a way that violates the Constitution. That error cannot be considered harmless.

## II. PRAYER FOR RELIEF

Based on the grounds presented in this petition, Petitioner, William Edward Branham, respectfully requests that this honorable Court:

1. Issue a writ of habeas corpus to have Mr. Branhan brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this Petition and any defenses that may be raised by Respondents and;

3. Grant such other and further relief as, in the interests of justice, may be appropriate.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

DATED this 7th day of April, 2017.

/s/Jonathan M. Kirshabum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

VERIFICATION

Under penalty of perjury, the undersigned declares that she is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of her own knowledge except as to those matters stated on information and belief and as to such matters she believes them to be true. Petitioner personally authorized undersigned counsel to commence this action.

DATED this 7th day of April, 2017.

/s/Jonathan M. Kirshabum
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on April 7, 2017, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Washoe County District Attorney
Mills B. Lane Justice Center
1 South Sierra Street
South Tower, 4th Floor, Reno, NV, 89501

Adam P. Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

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

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CR92-1048
2017-05-16 10:27:04 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6101977

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

WILLIAM EDWARD BRANHAM,

Petitioner,

vs.

ISIDRO BACA, WARDEN, etc.

Respondents,

_____/

Case No.: CR92-1048

Dept. No. 10

**ORDER TO RESPOND**

Presently before the Court is a Petition for Writ of Habeas Corpus (Post Conviction) filed by William Edward Branham (hereinafter "the Petitioner") on April 7, 2017. Petitioner submitted this matter for the Court's consideration on May 8, 2017. The STATE OF NEVADA (hereinafter "the State") has not filed an opposition to the Petition for Writ of Habeas Corpus (Post Conviction).

**IT IS ORDERED** that the District Attorney will file an opposition to the Petition for Writ Habeas (Post Conviction) no later than twenty (20) days from the date of this Order. Thereafter, any reply shall be filed and this matter resubmitted to the Court.

**DATED** this 16 day of May, 2017.

ELLIOTT A. SATTLER
District Judge

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of May, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 16 day of May, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JONATHAN M. KIRSHBAUM, ESQ.

TERRENCE McCARTHY, ESQ.

Sheila Mansfield
Judicial Assistant

CODE No. 1130
CHRISTOPHER J. HICKS
#7747
P. O. Box 11130
Reno, Nevada 89520-0027
(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

WILLIAM EDWARD BRANHAM,

Petitioner,

v. Case No. CR92-1048

ISIDRO BACA, WARDEN, Dept. No. 10

Respondent.

_____/

ANSWER TO PETITION FOR WRIT OF HABEAS COPRUS (POST-CONVICTION)

COMES NOW, Respondent, by and through counsel, to answer the petition, filed on April 7, 2017, as follows:

1. That Respondent admits any and all allegations contained in paragraphs 1-15, 20 and 22 of the petition.

2. That Respondent denies any and all allegations contained in paragraphs 16-19, 21 and 23 of the petition.

3. That your affiant cannot determine if all relevant pleadings and transcripts necessary to resolve the petition are currently available.

/ / /

/ / /

4. That Respondent is informed and does believe that petitioner has launched several appeals and collateral attacks on his conviction, but cannot determine if the list of prior actions in the petition is a complete list.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: June 1, 2017.

CHRISTOPHER J. HICKS
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Chief Appellate Deputy

**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Second Judicial District Court on June 1, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jonathan M. Kirshbaum
Assistant Federal Public Defender

/s/ DESTINEE ALLEN
DESTINEE ALLEN

CODE No. 2300
CHRISTOPHER J. HICKS
#7747
P. O. Box 11130
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(775) 328-3200
Attorney for Respondent

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

WILLIAM EDWARD BRANHAM,

Petitioner,

v.

Case No. CR92-1048

ISIDRO BACA, WARDEN,

Dept. No. 10

Respondent.

_____/

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Respondent and moves this Honorable Court to dismiss the petition for writ of habeas corpus (post-conviction). This motion is based upon the records of this court and of the Supreme Court, and the following points and authorities.

POINTS AND AUTHORITIES

Petitioner Branham was convicted of murder on April 14, 1993. He appealed but the judgment was affirmed. *Branham v. State*, Docket Number 24648, Order Dismissing Appeals (December 18, 1996). Branham then filed a post-conviction habeas corpus petition in this court on December 12, 1997. That petition was denied after a

hearing on February 23, 1999. He again appealed but the order denying the petition was affirmed. *Branham v. Warden*, Docket No. 33830 and 33831, Order Dismissing Appeals (February 15, 2000).

Branham filed a federal habeas corpus petition in 2000. That was dismissed and he appealed to the Ninth Circuit. That Court affirmed and then the U.S. Supreme Court denied Certiorari.

In 2005 he filed another state petition, this time alleging that post-conviction counsel was negligent. That petition was dismissed on June 17, 2005. Branham appealed but the order dismissing was affirmed. *Branham v. State*, Docket No. 45532, Order of Affirmance (November 10, 2005). Among other things, the Supreme Court noted that the petition was untimely, abusive and successive.

Branham filed his most recent petition on April 7, 2017. This court has ordered a response.

The instant petition is untimely, abusive and successive, just as was the last one. Those procedural bars can sometimes be overcome where the claim was not legally available but only recently became available due to an intervening change in the law. "However, . . . proper respect for the finality of convictions demands that this ground for good cause be limited to previously unavailable *constitutional* claims." *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525–26 (2003)(emphasis added). Branham seems to now contend that a couple decisions of the U.S. Supreme Court changed that model and now there can never be a final judgment because all changes in the law, from any source, must be retroactive to all convicted persons. He is incorrect.

At issue is what has come to be known as the *Kazylan* instruction concerning the *mens rea* for murder. The instruction was commonly given until 2000 when the Court

ruled in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), that the various terms of intent to kill, premeditation and deliberation are each different in some ways and that future juries should be instructed on the proper definitions of each. There next came the question of whether *Byford* would be retroactively applied. The Nevada Supreme Court finally addressed that in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008). The Court ruled that the *Byford* definitions were not to be applied retroactively.

The *Nika* decision, in part, boiled down to the question of whether the Court in *Byford* had discovered the law as it had always existed, or if it had changed the law. The ruling in *Nika,* after a fairly extensive discussion, was that the Court has changed the law. The Court went on to rule that the change in the law announced in *Byford* would not be applied retroactively to those whose convictions were final before *Byford* was announced. That would include Branham.

Among other things, the *Nika* Court mentioned that *Byford* had not invoked any constitutional mandate, but instead was a regular exercise of appellate jurisdiction, interpreting state statutes.

The argument in the petition has several faults. First, it depends on the notion that the Supreme Court in *Welch v. United States*, 136 S.Ct. 1257 (2016) has implicitly overruled an earlier decision of the Supreme Court, *Bunkley v. Florida*, 538 U.S. 835, 123 S.Ct, 2020 (2003). The Supreme Court has recently reminded state courts, in somewhat curt language, that the Supreme Court alone is empowered to overrule its own precedents and that if the Court intends to overrule a prior decision, it will do so explicitly. *Bosse v. Oklahoma*, ___, U.S.___, 137 S.Ct. 1 (2016). In *Nika, supra*, the prior decision at issue was *Bunkley v. Florida, supra.* There, the Court held that where a state court interpretation of a statute is a change in the interpretation of a state statue

(not constitutionally required) then state law determines the effective date of that new interpretation.[1] In Nevada, in *Nika*, the Court clearly and explicitly ruled that the state law announced in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000)(concerning the mental states involved in a murder prosecution), represented a change in the law, not a mere discovery of the law as it always existed. Nothing in *Welch v. United States* changed that. *Welch* dealt with the retroactive application of a ruling that a certain clause of the Armed Career Criminal Act was unconstitutionally vague. The Court made several comments that reveal that this case has nothing to do with that analysis. Among them, issues of retroactivity are determined by federal law only where the new rule of law is based on a "constitutional rule." *See e.g.*, 136 S.Ct. at 1264. As this court noted in the Order of April 1, 2017, dismissing the last petition, the *Byford* decision was purely a matter of state law and there were no constitutional issues involved in the relevant part of the decision.

The *Welch* decision noted several times that the question of the retroactivity applies only with new "constitutional" rules. There was no constitutional component to the decisions in *Byford* and *Nika*. The state court was simply exercising its appellate authority to determine the meaning of statutes, which it does with great frequency, even when the Constitution does not demand that the court do so.

Finally, the court might note that the *Welch* Court noted several times that the general rules regarding retroactivity apply when the new constitutional rule narrows the

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[1] In *Bunkley,* the statute at issue referred to a "common pocket knife." The Florida Supreme Court had changed its interpretation of that term, but not on any constitutional grounds, and the U.S. Supreme Court ruled that the Florida Supreme Court must determine when that change was effective. That is, the Florida Court would have to determine if it had discovered the law as it always existed, or if it had changed the law.

"conduct" regulated by the criminal statute. *See e.g.*, 136 S.Ct. at 1265, In *Nika*, the Court noted that distinction and pointed out that the *Byford* decision, concerning the elements of willfulness, premeditation, malice and intent to kill, concerned only the *mens rea* of the crime of murder, not the *actus reus*. Thus, the elements of the crime of murder that concern the conduct, have not been expanded or narrowed by *Byford*. It seems clear enough that *Welch*, if it applied at all, would apply only if the *Byford* Court had narrowed the "conduct" that was at issue. The Supreme Court used that term, "conduct," quite a few times and it appears to be deliberate.

Because *Welch* has no application to the instant case, as the change of the law announced in *Byford* had no constitutional component and did not narrow the "conduct" that was prohibited, there is nothing that overcomes the procedural bars and the instant petition is untimely, abusive, successive and barred by laches and should be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: June 1, 2017.

CHRISTOPHER J. HICKS
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Chief Appellate Deputy

**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Second Judicial District Court on June 1, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

| | |
|---|---|
| WILLIAM EDWARD BRANHAM,<br>Petitioner,<br>v.<br>ISIDRO BACA, WARDEN, et al.,<br>Respondents. | Case No. CR92-1048<br>Dept. No. 10 |

**OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

Petitioner William Edward Branham, by and through his attorney, Assistant Federal Public Defender Jonathan M. Kirshbaum, hereby files this Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction). This opposition is based on the attached points and authorities as well as all other pleadings, documents, and exhibits on file.

## POINTS AND AUTHORITIES

## I. INTRODUCTION

In his post-conviction habeas petition, Branham argued that, under the recent United States Supreme Court decisions in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016), he was entitled to have *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), retroactively applied to his case as it falls under the *Teague* substantive exception.

Respondents have moved to dismiss Branham's petition, arguing that the petition is untimely and successive. They argue Branham's claim should be rejected because (1) the *Teague* retroactivity rules only apply to a new constitutional rule; (2) the narrowing interpretation in *Byford* does not fall under the substantive exception to *Teague* because it does not limit the "conduct" that is considered criminal under the statute; and (3) this Court cannot assume that *Welch* overruled *Bunkley v. Florida*, 538 U.S. 835 (2003), the case on which the Nevada Supreme Court relied to limit the application of *Byford* only to those cases that had not become final at the time it was decided.

Respondents' arguments have no merit and should be rejected. First, the United States Supreme Court made it abundantly clear in *Welch* that the substantive exception in *Teague* applies to narrowing interpretations of criminal statutes. Second, the substantive exception in *Teague* applies when the interpretation alters the range of conduct or the class of persons the law punishes. The narrowing interpretation of *Byford* does both. Finally, the question here is not whether or not *Montgomery* and *Welch* overruled *Bunkley*. Federal law now requires that state courts apply a substantive narrowing of a criminal statute retroactively, regardless of how it is characterized. That is a different question than the one decided in *Bunkley*. The Court in *Bunkley* was not addressing retroactivity concerns, but a different due process question. In fact, the Court was specifically not addressing the

question of whether a change in law had to apply retroactively to convictions that had already become final. That answer is now provided in *Welch*. That decision says that, if there is a substantive change in law, it must be given retroactive effect.

For the reasons discussed herein, the motion to dismiss should be denied and the petition should be granted.

## II. ARGUMENT

### A. The Substantive Exception to *Teague* Applies to Interpretations of Criminal Statutes That are Substantive

Respondents argue that the *Teague* substantive exception only applies to new constitutional rules. Motion to Dismiss ("MTD") at 2, 3-4. They claim that *Welch* "noted several times" that the exception applies "only with new 'constitutional' rules." *Id.* at 4.

This is simply wrong. Not once in *Welch* did the Supreme Court state that the substantive exception to *Teague* "only" applies to new constitutional rules. In fact, the opposite is true. The Court often times simply used the term "new rule." *Welch*, 136 S. Ct. at 1264-65. More important, the Court specifically stated that it has applied the *Teague* substantive exception in statutory interpretation cases. *Welch*, 136 S. Ct. at 1267 (discussing its application of the substantive exception in *Bousley v. United States*, 523 U.S. 614 (1998)).

More specifically, the Court in *Welch* explained precisely how a statutory interpretation decision like *Bousley* fits under *Teague*. First, it confirmed that its application of the substantive exception to *Teague* did include statutory interpretation cases like *Bousley*. It stated that, 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 stated 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 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.* More important, the Court emphatically concluded that statutory interpretation cases are treated like any other application of the substantive exception to *Teague*:

> 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 "alter the range of conduct or the class of persons that the law punishes." *Schriro*[ v. *Summerlin*], [542 U.S. 348] at 353 [2004].

*Id.*

As can be seen, the United States Supreme Court in *Welch* has left no doubt that the substantive exception to *Teague* applies to statutory interpretation cases. Indeed, the Court in *Welch* used those statutory interpretation cases to define the contours of the substantive exception. *Welch*, 136 U.S. at 1266, 1267. "'States may not disregard a controlling constitutional command in their own courts.'" *Montgomery*, 136 S. Ct. at 727 (quoting *Martin v. Hunter's Lessee*, 1 Wheat 304, 340-41 (1816)). The Supreme Court has now held that the substantive exception applies to state courts as a matter of constitutional law. The Court has applied that substantive exception to statutory interpretation cases that narrow the definition of a criminal statute. The state courts are now required to apply the substantive exception in the manner that the United States Supreme Court has indicated. *Byford* falls under the substantive exception as it narrowed the interpretation of a criminal

statute. That is no different than what the Supreme Court described as occurring in *Bousley*.[1] It is the end of the inquiry here.

### B. The Substantive Exception to *Teague* Applies Because *Byford* Alters Both the Range Of Conduct and the Class of Persons the Law Punishes

Respondents argue that the substantive exception to *Teague* does not apply here because *Byford* narrowed the *mens rea* element. MTD at 4-5. As such, *Byford* did not alter the range of "conduct" that the statute made criminal. *Id.* at 5.

This argument has no merit. In the first instance, Respondents left out one of the categories of the substantive exception. The substantive exception has two categories and includes rules that alter either "the range of conduct" or the "class of persons" that the law punishes. *Welch*, 136 S. Ct. at 1264-65. The narrowing interpretation of *Byford* applies to both. Intent in a criminal case is proven through conduct, as a jury cannot get inside the mind of the defendant. *See Larsen v. State*, 86 Nev. 451, 453, 470 P.2d 417,418 (1970) ("intent need not be proved by positive or direct evidence, but may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence"). *Byford* limits the range of conduct that is criminal to conduct from which it can be inferred that a defendant acted with deliberation as that term is defined in *Byford* when committing a murder.

Moreover, *Byford* most certainly limits the "class of persons" who the law punishes. *Byford* limits the class of persons to only those people who act with

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[1] To note, the Nevada Supreme Court has suggested in dicta on one occasion that a substantive change in law that narrowed the definition of a statute would have retroactive effect. *Mitchell v. State*, 122 Nev. 1269, 1277, n.25, 149 P.3d 33, 38 n.25 (2006). However, the Nevada Supreme Court has otherwise and repeatedly held that a change in the interpretation of a statute does not have retroactive implications. *Nika v. State*, 122 Nev. 1269, 1288, 198 P.3d 839, 850 (2008) ("We affirm our decisions in *Clem* and *Cowell* 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 law. . . . [T]he interpretation and definition of the elements of a state criminal statute are purely a matter of state law. . . .").

premeditation *and* deliberation as defined in *Byford* when committing a murder. It falls squarely within the substantive exception.

### C. *Montgomery* and *Welch* Created a New Rule that Must Be Applied in State Court that Goes Beyond What Was Decided in *Bunkley*

Respondents argue that Branham cannot obtain relief here because this Court would need to conclude that *Montgomery* and *Welch* overruled *Bunkley*. MTD at 3. According to Respondents, only the Supreme Court can overrule its own prior precedent. *Id.*

This argument has no merit. Branham is not contending that *Welch* and *Montgomery* overruled *Bunkley*. Rather, the argument here is that the Nevada Supreme Court's interpretation and application of *Bunkley* is no longer valid in light of these new cases. Essentially, *Welch* answers the retroactivity question that was left open in *Bunkley* and demonstrates that the clarification/change dichotomy the Nevada Supreme Court used does not answer the relevant retroactivity question here.

In the first instance, *Bunkley* did not address the retroactivity question at issue here. *Bunkley* actually concerned whether or not the state courts had properly applied *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Court had originally granted certiorari to determine "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.* at 226. However, in the process of litigation before the Court, the Pennsylvania Supreme Court indicated that it had clarified, not changed, the law. As a result, the Supreme Court held that this clarification "presents no issue of retroactivity," *Id.* at 228, meaning that the original retroactivity question "disappeared," *Bunkley*, 538 U.S. at 840. Rather, the question was purely one of due process, whether the State had presented enough evidence to convict the defendant of all elements of the crime beyond a reasonable doubt. *Id.* at 228-29.

*Bunkley* was an extension of *Fiore*. *Bunkley* concerned a change, rather than a clarification, in law. *Bunkley*, 538 U.S. at 840-41. Once again, the Court indicated that it was not addressing a retroactivity issue. *Id.* at 840. Rather, the Court concluded that a change in law would also establish the same due process violation that occurred in *Fiore* if the change occurred prior to the conviction becoming final. *Id.* at 840-42. The problem in *Bunkley* was that the Florida Supreme Court had not indicated precisely when that change occurred. *Id.* at 841-42. As a result, the Court remanded the case to the state court for that court to determine whether or not a *Fiore* error occurred. *Id.*

As can be seen, the retroactivity question at issue here was not addressed in *Bunkley*. The Court did not determine that a change in law does not apply retroactively. Rather, in *Bunkley*, the Court was answering an antecedent question that needed to be determined before retroactivity became relevant. Certainly, if the Florida Supreme Court had later found that the change occurred after Bunkley's conviction became final, the analysis would have had to turn to whether that change should apply retroactively to him. As the original question on which certiorari was granted in *Fiore* shows, the United States Supreme Court does believe that a change in the definition of a statute could raise retroactivity concerns. But in the *Bunkley* decision itself, the Court was not addressing that subsequent retroactivity question. More important, the Court in *Bunkley* did not hold that a change in law does not, or could not, apply retroactively. The Court was simply stating, in an affirmative way, that a change in law had to be applied, as a matter of due process, to convictions that had not yet become final.

It is now *Montgomery* and *Welch* that answer the retroactivity question with respect to a change in law. In that situation, the substantive exception to *Teague* now applies to state courts as a matter of due process. That substantive exception requires that a new rule, including a narrowing interpretation of a criminal statute,

apply retroactivity so long as it meets the definition of substantive. *Byford* meets that definition so it must be applied retroactively to Branham's case.

What is important here is that the Nevada Supreme Court refused to consider whether a change in law applied retroactively at all in *Nika v. State*, 122 Nev. 1269, 1288, 198 P.3d 839, 850 (2008). It was only willing to go so far as to acknowledge the clarification/change in law dichotomy, essentially making that the end of the retroactivity analysis with respect to statutory interpretation cases. It flat out refused to address any potential retroactivity concerns with the change in law in *Byford*, stating that retroactivity only applied to constitutional rules. However, *Welch* shows that the clarification/change dichotomy is not where the retroactivity analysis ends for statutory interpretation issues. Rather, the substantive exception now applies to statutory interpretation issues in state court and that exception, and that exception alone, determines whether a change in the interpretation of a statute applies retroactively.

To be sure, the implications of *Welch* is that the clarification/change in law dichotomy has become essentially obsolete. Now, it is irrelevant whether there has been a clarification or change in law that narrows the definition of a criminal statute. Either one will apply retroactively. But that step does not necessitate an overruling of *Bunkley*. It is simply a consequence of the Supreme Court deciding in *Welch* the next step in the analysis, namely when an interpretation of a criminal statute must apply retroactively.

**D. The Petition Is Not Barred By Laches**

In the final sentence of their motion, Respondents argue, for the first time, that the petition is "barred by laches." MTD at 5.

This throwaway language is insufficient to plead a laches defense. Under N.R.S. 34.800(2), "In a motion to dismiss the petition based on . . . prejudice, the respondent or the State of Nevada must specifically plead laches. The petitioner must

be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made."

Under the statute, laches must be specifically pled and the prejudice on which the motion to dismiss is based must be indicated. There were no allegations to support such a laches defense based on prejudice in the motion. It was simply a three-word comment thrown in as the last three words of the motion. There are no allegations to which Petitioner can respond. That cannot be considered an affirmative assertion of the laches defense.

In any event, as a constitutional matter and as a matter of equity, laches cannot, and should not, bar the petition. The state courts are now constitutionally required to apply a substantive change retroactively. That is the import of *Montgomery*. And the facts of *Montgomery* demonstrate the breadth and far-reaching application of this new constitutional rule. Put simply, there is no temporal limit on how far back a new substantive change must be applied.

The question in *Montgomery* was whether the Supreme Court's prior decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), in which the Supreme Court held that a juvenile cannot be sentenced to life without parole absent consideration of the defendant's special circumstance as a juvenile, applied retroactively. *Montgomery*, 136 S.Ct. at 725. The petitioner in *Montgomery* received a life without parole sentence as a juvenile almost *50 years* prior to the decision in *Miller*. *Id.* at 726. After determining that *Miller* did apply retroactively, the Court held that "prisoners like Montgomery *must* be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored." *Id.* at 736-37 (emphasis added).

As can be seen, the new rule from *Montgomery* has exceedingly broad implications. If a change in law is retroactive, a petitioner whose conviction has already become final, even if it has been final for 50 years, must be give the benefit

of that new rule. That overcomes any allegation of lack of diligence or prejudice. These are simply not relevant factors in the retroactivity determination. The federal Constitution requires that the rule must apply to a petitioner in Branham's position.

Further, as a matter of equity, this Court should not impose the discretionary laches bar. The length of time that has passed in this case is not attributable to a delay from Branham. In fact, Branham was unable to obtain relief on this issue prior to *Montgomery* and *Welch*. The Nevada Supreme Court definitively held in *Nika* that petitioners whose convictions became final prior to *Byford* were not entitled to relief. The United States Supreme Court has now issued a new constitutional rule with direct application to Branham's case that was not previously available to him. The state courts are constitutionally required to apply this new rule to his case. The record indicates that Branham has not inappropriately delayed this case. The discretionary laches bar should not be imposed. *See State v. Powell*, 122 Nev. 751, 758-59, 138 P.3d 453, 458 (2006) (State was not entitled to relief under N.R.S. 34.800 because petitioner had not inappropriately delayed case).

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## III. CONCLUSION

Accordingly, for the reasons stated in the petition and as supplemented herein, the motion to dismiss should be denied. Branham has demonstrated sufficient grounds to overcome any purported procedural bars and respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Branham brought before the Court so that he may be discharged from his unconstitutional confinement and sentence;

2. To the extent any pertinent facts are in dispute, conduct an evidentiary hearing at which proof may be offered concerning such matters; and

3. Grant such other and further relief as, in the interest of justice, may be appropriate.

DATED this 16th day of June, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

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

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding **OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** filed in the District Court Case No. CR92-1048.

☒ Does not contain the social security number of any person.

**- OR -**

☐ Contains the social security number of a person as required by:

A: A specific state or federal law

B: For the administration of a public program or for an application for a federal or state grant.

DATED this 16th day of June, 2017.

*/s/ Jonathan M. Kirshbaum*
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## CERTIFICATE OF SERVICE

In accordance with the Rules of Civil Procedure, the undersigned hereby certifies that on this 16th day of June, 2017, a true and correct copy of the foregoing was filed electronically with the Second Judicial District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

WILLIAM EDWARD BRANHAM,

Petitioner,

v.

Case No. CR92-1048

ISIDRO BACA, WARDEN,

Dept. No. 10

Respondent.

_____/

REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

In opposing the State's motion to dismiss the petition for writ of habeas corpus from this decades-old-conviction, Branham contends that the State's position is "simply wrong" and asserts that in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Court never once distinguished changes based on constitutional error from other changes in the law. The Court makes that distinction at several points in the decision. For example, the Court rejects the notion that retroactivity depends on the nature of the constitutional guarantee, but makes it clear that there must be a constitutional issue, at page 1266. The Court went on to mention several times that the analysis was based on

new constitutional rules. That is, the Court has apparently determined that when the Constitution demands a certain construction of a statute that governs conduct, then the Constitution has always demanded that certain construction of the statute. Hence, if a court rules that the constitutional rules regarding vagueness in criminal statutes requires a certain ruling that limits a criminal statute, then that constitutional guarantee has always required that result. In contrast, when the change in construction of a statute is based not on the Constitution, but on evolving judicial interpretation, not based on constitutional rules of law, then the State decides when that evolution becomes effective. *See Nika v. State*, 124 Nev. 1272, 1280, 198 P.3d 839, 845 (2008). In *Nika*, the court very explicitly held that "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 v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008). Footnote 78 in *Nika* is equally as explicit: "We disavow any language in *Mitchell v. State* suggesting that a new nonconstitutional rule of criminal procedure applies retroactively.

The distinction between constitutional rules and common law rules is also made clear in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). The Court noted: "If, however, the *Constitution* establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court." 136 S.Ct. at 727 (emphasis added). As indicated earlier, the decision at issue here, in *Byford v. State*, 116 Nev. 214, 994 P.2d 700 (2000), was not based on any constitutional rules, but rather on evolving judicial interpretation. Hence, the State decides when the law changed. The final arbiter of state law, the Nevada Supreme Court, has determined that the change demanded in *Byford* was not effective

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retroactively, but only prospectively from the date of the *Byford* decision. *Nika*, 124 Nev. at 1288.

The balance of the opposition all depends on the notion that the Supreme Court has held that all changes in criminal laws have retroactive application. As there was no such holding, each of the arguments fails and the petition should be dismissed.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: June 26, 2017.

CHRISTOPHER J. HICKS
District Attorney

By /s/ TERRENCE P. McCARTHY
TERRENCE P. McCARTHY
Chief Appellate Deputy

**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Second Judicial District Court on June 26, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jonathan M. Kirshbaum, Esq.

/s/ DESTINEE ALLEN
DESTINEE ALLEN

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

WILLIAM EDWARD BRANHAM,

Petitioner,

vs.

ISIDRO BACA, WARDEN,

Respondent.

_____/

Case No.: CR92-1048

Dept. No.: 10

**ORDER TO SET ORAL ARGUMENT**

Presently before the Court is a MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Motion") filed by the STATE OF NEVADA ("the State") on June 1, 2017. An OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Opposition") was filed by Petitioner WILLIAM EDWARD BRANHAM ("Petitioner") on June 16, 2017. A REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Reply") was filed by the State on June 26, 2017, and it was submitted to the Court for its review.

The Court, after having reviewed all papers and pleadings on file herein, believes that an oral argument is required in deciding the merits of the Motion

**IT IS ORDERED** that the parties contact the Judicial Assistant for Department 10 within twenty (20) days from the date of this filed Order to set an oral argument on the Motion. Such setting may be made by telephone, with the parties first conference calling each other before calling the Court.

**DATED** this 17 day of August, 2017.

ELLIOTT A. SATTLER
District Judge

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of August, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 17 day of August, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

TERRENCE P. McCARTHY, ESQ.

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SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE ELLIOTT A. SATTLER, DISTRICT JUDGE

WILLIAM EDWARD BRANHAM,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.
_____/

Case No. CR92-1048

Dept. No. 10

# TRANSCRIPT OF PROCEEDINGS

## MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Wednesday, September 20, 2017

Reno, Nevada

Reported by: LORI URMSTON, CCR #51

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RENO, NEVADA; WEDNESDAY, SEPTEMBER 20, 2017; 10:02 A.M.

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THE COURT: This is CR92-1048, William Edward Branham, the petitioner, versus the State. Mr. Branham is present in court in custody with his attorney, Mr. Kirshbaum.

Is that correct?

MR. KIRSHBAUM: That's correct, Your Honor.

THE COURT: Good morning to both of you gentlemen.

MR. KIRSHBAUM: Good morning.

THE DEFENDANT: Good morning.

THE COURT: Mr. McCarthy is here on behalf of the State of Nevada.

Good morning, Mr. McCarthy.

MR. McCARTHY: Good morning, Judge.

THE COURT: We're here on a motion to dismiss the petitioner's writ of habeas corpus. The petitioner has filed numerous petitions for writs of habeas corpus and other post-conviction motions subsequent to his conviction for murder. They've all been denied. And this is the most recent one.

The Court has received and reviewed the June 1st, 2017, file-stamped Motion to Dismiss Petition for Writ of Habeas Corpus. Further, the Court has received and

reviewed the June 16th, 2017, file-stamped Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus. Additionally, the Court has received and reviewed the June 26th, 2017, file-stamped Reply to Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus. The matter was submitted to the Court for consideration on June 26th of 2017.

The most recent petition for writ of habeas corpus filed by the petitioner is file stamped April 7th of 2017. The Court did receive and review that document. On May 16th of 2017 the Court entered an order directing the State of Nevada to respond to the petition. And on June 1st of 2017 the State of Nevada filed the answer to the petition for writ of habeas corpus, and then the subsequent motion practice that brings us here today has taken place.

Counsel, I have reviewed all of those documents.

Mr. Kirshbaum, I know you haven't appeared in front of me before, so what I'll tell you is that I have the entire file here digitally with me on my bench. If at any time you feel the need to refer to any document contained in the file, please let me know and I'll immediately be able to pull it up on my computer. I just don't print out volumes of paper. I don't think

that's very environmentally conscientious, so I don't do that. But I am very familiar with Mr. Branham's case.

Mr. McCarthy, it is your motion, and so you may proceed.

MR. McCARTHY: Thank you, Your Honor.

I think what I'm about to say is mostly things the Court is quite familiar with. And I repeat these things not to be insulting but because it helps me to keep my thoughts straight. So in the beginning --

THE COURT: God created the heaven and the earth.

MR. McCARTHY: In the beginning there was the states and the feds. Our state legislature defined murder and also prohibited it for some reason. When --

I'm sorry. That was me.

THE COURT: That's okay.

MR. McCARTHY: May I take a moment and shut that off? If I know how. I think I do.

THE COURT: I can shut it off for you, but it usually involves putting it in a pitcher of water.

MR. McCARTHY: I did that just the other day. I did that and it worked.

So when we defined murder, we included things like premeditation, deliberation and intent to kill. For

quite a long time those were defined interchangeably. Those interchangeable definitions can be known as the Kazylan instruction. Not that long ago in the not too distant past the supreme court issued a decision called Byford in which these should each be defined separately. And there next came the question of what to do about all these people that had previously been convicted.

THE COURT: Hold on a second.

MR. McCARTHY: Yes.

THE COURT: Are you all right, Mr. Branham?

THE DEFENDANT: I've got the flu.

THE COURT: Well, we'll get you some water. If you're not feeling well, let me know. I don't want you to be uncomfortable while you're here, Mr. Branham, to the best of my ability.

THE DEFENDANT: I've just got this cough.

THE COURT: Go ahead, Mr. McCarthy.

MR. McCARTHY: Okay. So after Byford the Court had to decide to what extent it should be applied retroactively. There was some debate going back and forth. The Ninth Circuit got in the debate. But ultimately we have Nika. In Nika the court said that the Byford instruction would not be retroactive to

invalidate convictions that were final before the Byford decision which includes the instant petition.

The court noted that some new rules of constitutional law get applied retroactively and some do not. The court said, however, this is not a new rule of constitutional law, this is merely evolving judicial interpretation of a statute. And the court relied on a U.S. Supreme Court called Bunkley.

Bunkley was an interesting little case. It had to do with what's a knife. We have one here called Bradvica. But the Florida Supreme Court had at some point changed the definition, changed the meaning of what's a knife.

And the U.S. Supreme Court ultimately sent it back and said, "Look, when you changed this, when you -- as your evolving judicial interpretation changed this, you have to decide when it changed also." And so they sent it back to the Florida Supreme Court to decide.

And what they said is "Okay. When it's not a constitutional -- a new constitutional rule, we are in an evolving interpretation of a state statute, the retroactivity is a matter of state law." That's what we also said in Nika. In Nika they said that Byford would not be retroactive.

Since then we have Welch, a U.S. Supreme Court case. And the current debate is on what did Welch hold. My position is they changed virtually nothing. It's an application of Teague versus Lane. But one of the ways to look at it is appellate courts have often debated whether an appellate court finds the law as it always existed or makes new law.

And the way I see Welch is when a new interpretation of a statute is demanded by the Constitution, it has always been demanded by the Constitution and, therefore, the new interpretation must be retroactive. When it has not always been demanded by the Constitution, when it is merely the evolving judicial interpretation of a state statute like courts do every day, then the State must decide whether to go retroactive. And we have done that in Nika.

So, in short, nothing has changed. We have the Byford instruction that is not retroactively applied, so there is nothing new. The petition is untimely, abuse of successive, barred by laches, all the customary procedural bars. Those can sometimes be overcome if there's a new rule of law that changes things.

I suggest that there is no new rule of law, because Welch was limited to constitutional rules, those demanded by the Constitution. Those you can't determine -- those -- in those cases, a new constitutional rule, a court discovers the law as it always existed and, therefore, it has to be retroactive. That's not what we had in Nika and Byford. We had the evolving judicial interpretation. So there is --

Please pardon me. I'll turn it off in a second.

So the procedural bars remain unexcused because there is nothing new. So we're left with the petition is untimely, abusive and successive.

THE COURT: If I were to find, though, that it is an issue that had always been, the tree had always been there, we had just not found it yet, then it wouldn't be barred.

MR. McCARTHY: If which had always been?

THE COURT: If it was a constitutional issue that had always been there, if Welch was making a constitutional determination about the state of the Constitution -- and I'm trying to think of exactly the term you just used or the phrase you used. But there is a way, if I made that determination, that it would

not be procedurally barred, because Welch is identifying what the constitutional issue always has been.

MR. McCARTHY: Except that the actual issue that was in Welch that was being determined, whether it would be retroactive or not, has no application here.

THE COURT: I understand. I understand that's your argument.

MR. McCARTHY: It had to do with the federal sentencing guidelines. It has nothing to do with us.

The ruling about, you know, some state interpretations of statutes have to be retroactive, that's newish. It's a variation of Teague versus Lane, but it doesn't apply here I don't think. If they had -- if the court had actually said every person convicted of every crime in violation of every statute in all 50 states since the beginning of the founding of this nation where the statute was at any time ever tweaked by any court is entitled to a new trial, I think we would have heard about it. I think it would have been in the papers by now.

THE COURT: Well, I think that's the biggest issue that I have with the opposition and with the petition itself. Obviously this isn't your issue to argue; it

is the petitioner's. But the big question to me then is what isn't retroactive? If the argument that's being put forth by the petitioner in this case is correct, then with Welch and Montgomery -- I think it's Montgomery.

MR. McCARTHY: Yes, it is.

THE COURT: -- with Welch and Montgomery the United States Supreme Court has basically said everything is retroactive, any time a statute is modified it's retroactive, theoretically defendants who are in the Nevada Department of Corrections today on a burglary charge for a shoplifting burglary that took place five years ago would be able to come in and argue that the Nevada Legislature has modified that statute, has changed it. I think it was in the 2017 legislature. It might have been 2015, but I think it was 2017.

Regardless, the legislature changes the statute regarding burglary, what is and is not a burglary. So those defendants who are in prison on previous burglary convictions that now would be misdemeanors, but then were felonies, they get to come in theoretically and say, "Wait a minute. I need to file a writ now because the legislature has modified the statute and, therefore, I am entitled to relief."

There would be no finality to any criminal conviction under that theory, because petitioners would be waiting for something to change. Your job would be as a petitioner or a defense counsel or petitioner's counsel just to sit around and wait until some court somewhere, either in the state or federal system, said something about the issue for which your petitioner was convicted and then, boom, you have to file your petition.

MR. McCARTHY: And the court addressed that in Nika. They said proper respect for the finality of judgments requires that we limit this retroactivity to new constitutional rules. So we have --

Say the Nevada Supreme Court tweaks the law of conspiracy, they say, "Our judicial interpretation has changed a little bit and we will now require a shared criminal intent to hold a conspirator liable." If that was constitutionally required, then it would be retroactive. If it was just a court, an appellate court, doing what they do every day, changing the interpretation of the statute, then it should not be retroactive.

THE COURT: I can think of another example. You tell me if this is or is not accurate, Mr. McCarthy.

It just literally popped into my head as you were talking.

The Nevada Supreme Court some years ago modified whether or not you could be convicted of involuntary manslaughter with the use of a deadly weapon. And for a long time there was -- there were people who were convicted of that very offense, because someone might be charged with open murder hypothetically with the use of a deadly weapon, and the jury looked at all of the various forms of homicide, first degree, second degree, voluntary, involuntary, and for whatever reason concluded that a defendant was guilty of involuntary manslaughter with the use of a deadly weapon.

I forget the name of the case, but eventually the Nevada Supreme Court stepped in and said no, because you have no intent to kill. On involuntary manslaughter it's the unlawful taking of a human life -- the taking of a human life during some other unlawful act. You have no intent to kill. Then the use of a deadly weapon makes absolutely no sense. So now I don't think, if I remember correctly, you can have involuntary manslaughter with the use a deadly weapon. It's a statutory issue.

You didn't see a flood of people coming in who had

been convicted of involuntary manslaughter with the use a deadly weapon coming in and seeking writs of habeas corpus. Maybe the argument is Montgomery didn't exist then.

MR. McCARTHY: I see them.

THE COURT: But it's the same principle, I would assume, and, that is, the Nevada Supreme Court is changing the statutory framework or how it analyzes the statutory framework as opposed to announcing a new constitutional issue that has always been or acknowledging a constitutional issue that has always been.

MR. McCARTHY: Yes. And that's how I perceive Welch is distinguishing between new constitutional rules. In such case an appellate court discovers the law as it always existed. When it comes to simply interpreting statutes that courts do every day, if they change the interpretation of it, that can either be discovering the law as it always existed or announcing new law, changing it.

In Nika the court told us, "When we decided Byford and we abandoned the Kazylan instruction," in Nika the court told us, "We changed the law. We changed the interpretation." The words were the same.

They also told us no constitutional rule demanded this. "We just thought it was better this way." And that is within that court's authority. That's what appellate courts do all the time. And I think you're right, not everything is retroactive. The law is not static. Maybe that's the wrong word.

THE COURT: It sometimes is static.

MR. McCARTHY: Well, it changes.

THE COURT: Fluid.

MR. McCARTHY: Okay. It changes from time to time. And you can change it from time to time without saying for the last 200 years we've been wrong. And that's what our court did in Nika. They said in Byford, "We changed the law. We were right before. We just changed it." And that is not retroactive.

Now, there is another distinction in Welch I can make. Welch kept talking about statutory changes that narrow the conduct, the conduct that is criminalized. And Byford deals only with the mens rea, not with the conduct. I just don't feel like arguing that one anymore. I think it's right, but I don't have anything else to say about it.

THE COURT: Mr. McCarthy, how many other petitions for writs of habeas corpus that are similar to

Mr. Branham's have you seen since 2016 when the United States Supreme Court issued Welch and Montgomery?

MR. McCARTHY: If I had to guess, I would say a dozen.

THE COURT: Just here in the Second?

MR. McCARTHY: My colleagues each have one and -- I don't know. Six or a dozen, something like that. And some of them are hard to understand. Sometimes I get unrepresented prisoners, and that might be what they're arguing and it might not be. I can't tell. But I would say between six and a dozen where I can discern the argument.

THE COURT: And the reason I ask that is I'm just curious if there are similar cases in the appellate pipeline going up to the Nevada Court of Appeals and the Nevada Supreme Court addressing this very issue. I would assume at some point the Nevada Supreme Court will be issuing an opinion regarding this issue. I'm also assuming, though I might be wrong, that most, if not all, of my colleagues in the state of Nevada are denying similar petitions and allowing the Nevada Supreme Court or the Nevada Court of Appeals to say that it was wrong or it has been overturned by Welch and Montgomery, but I just don't know.

MR. McCARTHY: I checked yesterday for unpublished opinions. There are none. So -- but, yes, there are some in the pipeline, I am sure. Clark County tends to have more than we do by a factor of eight or so. And I really can't tell you. I know that the federal defender's office has been active and doing an outstanding job of it too. At least theirs make sense which is better than what I often get.

So my thought is if this petition is dismissed -- and, of course, it would be appealed -- you would be the first kid on your block to issue a final judgment.

THE COURT: Well, or at least in my building, I guess.

MR. McCARTHY: So, therefore, you should dismiss the petition.

THE COURT: Thank you, Mr. McCarthy.

Mr. Kirshbaum, is it -- now, is it -baum or -bom?

MR. KIRSHBAUM: It's -baum, Kirshbaum.

THE COURT: Obviously my question to Mr. McCarthy really was more a question to you, so it gave you an opportunity to think about it before you had to stand up. But really as I was reading the motion and the opposition and the reply and also considering the petition itself, it did strike me, you know, at what

point does it end. There has to be some period in a case that is the end of the sentence or, you know, like in a movie where it just says "The End" at the bottom after all of the credits have rolled. And it can't be when a defendant is released from custody, because, as we know, most of the cases that we see regarding these issues are murder convictions where the defendants are in custody for decades. So at some point there has to be finality to a prosecution or to a conviction.

And as I read your opposition, it really seems to me you're saying never, it just never ends. As a judge that's certainly a frightening proposition, because at some point we would like to say, "No, we're finished reviewing these facts and these issues." But if you're right, maybe it never does end, we just keep seeing them over and over again every time the Court of Appeals will issue a published opinion, because now pursuant to Supreme Court 36 only published opinions of the Court of Appeals may be cited. But if the Court of Appeals issues a published opinion on a criminal case that may affect a convicted defendant who is in custody, or the supreme court, everyone is going to be looking over that, going back to all their files and seeing who it applies to.

So with that, what are your thoughts?

MR. KIRSHBAUM: Well, my thoughts are this, that those concerns, I think, were addressed originally in Teague. So that's where the court came up with the retroactivity rules originally for federal collateral review that Nevada eventually developed their own retroactivity rules. But I think Montgomery is the best example to, I guess, show that that fear that finality is not necessarily a concept that's written in stone is true.

In Montgomery the petitioner there was sentenced to life without as a juvenile 50 years prior to the decision. And as a result of Montgomery, the United States Supreme Court commanded that he must be given the benefit of that rule. So 50 years in that case.

Here we're not quite talking about 50 years, but, yes, I understand these cases are old. And addressing some of the issues that were raised during the State's presentation is I can come up with other rules that the Nevada Supreme Court has -- where they've interpreted statutes that have narrowed the scope. There was Sharma. There was a recent one with respect to the burglary statute where they said that somebody can't burglarize their own home.

So, yes, both of those are narrowing interpretations. And the limits that are placed on retroactivity are pretty stringent and cases can only be considered or new rules can only be considered retroactive if they fall within those exceptions to Teague, the watershed one, which never happens. And the one that's been developing more recently has been the substance of exception.

And this is the new constitutional rule that we're here today on. This previously unavailable constitutional rule is Montgomery. It starts in Montgomery where the United States Supreme Court states that the substantive exception to Teague now applies to the state court system as a matter of due process. Never said that before. That's a new rule.

So what that -- the implications of that is that the state courts are now bound to apply the substantive exception to Teague in the way that the United States Supreme Court does it. That's our constitutional system. The United States Supreme Court says this is what this constitutional provision means.

All lower courts, not just the Nevada Supreme Court, all lower courts are required to apply those rules in the way that the Nevada Supreme Court has -- I

mean the way that the United States Supreme Court has both applied and interpreted those constitutional rules.

So what does that mean about Teague?

THE COURT: Well, why doesn't -- the United States Supreme Court sometimes comes right out and says what they mean and other times does not. The case that jumps to mind is Crawford versus Washington where the United States Supreme Court said, "We leave to another day basically what this means."

So it doesn't always help as a practicing attorney or as a judge when you hope that the supreme court when it announces a new rule -- I think that Justice Scalia wrote the opinion in Crawford, if I remember correctly, but I might be wrong. But when they announce a new rule, you would hope they would come out and specifically say what it means.

Why wouldn't in Welch or Montgomery the United States Supreme Court come out and just specifically say what you're suggesting I should interpret in what the justices say?

MR. KIRSHBAUM: Well, I just don't think there's any other reasonable interpretation of what they say there. It's pretty direct. So I'm going to take one

step back before Welch, because when -- the case that comes even before Montgomery is this case called Schriro which is discussed. I'm going to quote from Schriro sort of their discussion of what the substantive exception means. And they say, "New substantive rules generally apply retroactively. This includes decisions that narrow the scope of the criminal statute by interpreting its terms."

So in the federal system the substantive exception has included cases like Byford for many years now, from 2004. Montgomery gets decided. And so the question is what did they mean when they said that. And that's where Welch becomes important. And in Welch they say this -- and I don't think it can be any more clear -- "Decisions that interpret a statute are substantive if and when they meet the normal criteria for substantive rule when they alter the range of conduct of the class of persons that the law punishes." I don't know how it could be any more clear.

THE COURT: But the argument, though, is not that this is changing the range or the category of persons who can be punished. It's just identifying what each of the words specifically mean. So it doesn't -- I just -- I guess I'm not grasping how it's changing or

altering the range of people who can be punished in Mr. Branham's case or with the Kazylan, Byford, Nika trilogy. It's not changing anything. It's just simply identifying what those specific terms mean.

MR. KIRSHBAUM: Well, in this way I believe Your Honor is bound by the Nevada Supreme Court, because in Nika they said that this interpretation does narrow its terms. And that's why this whole change versus clarification aspect even came up in that decision, because they said that when a state court -- when a state highest court does that, then you have to determine whether it's a clarification or a change.

So they've already acknowledged that they've narrowed the terms. And they have narrowed the terms, because in these situations prior to Byford the prosecution's burden was lower. They didn't have to establish those three elements in order to prove somebody had committed a first degree murder. They only had to prove intent to kill.

Afterwards they have to prove those three elements. That narrows the class of people that can be convicted of this crime. It's narrowed to only those people in which the facts of that case establish those three elements. And that is similar to the analysis they use

in Welch. Welch doesn't -- when they talk about the scope of Johnson versus the United States, which is what they -- which is they're looking at the retroactive effect of that decision, they don't talk about how -- what the change was, they just look at whether it's limiting the number of people that now fall under that statute. And that's exactly what occurs here with Byford and the first degree murder instruction.

And Nika says that as well. This was a narrowing interpretation. That's the language that they use. That's the language the supreme court has used before when talking about the substantive exception.

THE COURT: The practical application of what you're suggesting is that all defendants in the Nevada Department of Corrections who are serving a sentence based on the Kazylan instruction would be entitled to a new trial; correct?

MR. KIRSHBAUM: In a broad sense, yes, but that doesn't --

THE COURT: Okay. When you say "in a broad sense," that's just -- that's an attempt to be a lawyer. I appreciate that. But the answer is just yes. You tell me -- if it's not in a broad sense, you tell me who is

sitting in the Nevada Department of Corrections with a Kazylan instruction who would not be entitled to a new trial.

MR. KIRSHBAUM: Anybody whose conviction became final after Byford, because in those situations -- the Nevada Supreme Court actually has issued an unpublished opinion on this issue. That's in Kernan. And they basically said that after Nika anybody -- and the reason why I said "broad" -- I apologize to talk like a lawyer, but it's true here, because, broadly speaking, I agree, everybody would -- everybody gets the benefit, but --

THE COURT: And it's not -- I just want you to understand, it's not determinative of my analysis or the outcome of the case. I know that it's not. The perfect example is McConnell versus State. I had the misfortune of prosecuting somebody who received the benefit of McConnell error. Mr. McCarthy wasn't able to save that one for me when I was in the D.A.'s office. But it's true. I mean, sometimes what the outcome is is that everyone who was convicted under a felony murder theory who then had that as an aggravator -- the question was whether or not they got a new trial, an entirely new trial, or whether or not

they just got a new sentencing.

And so that was eventually resolved. But I'm not -- I don't want you to think that I would just look at this from the sheer outcome determinative factor of everyone gets a new trial, because if that's the way it's supposed to be, then that's just the way it's supposed to be.

MR. KIRSHBAUM: Well, but it's not. And it has to do with the procedural rules and the situation that we're in right now. Anybody whose conviction became final after Byford, Nika basically said back in 2008 they were entitled to relief. So they had a year from Nika. And that's what the Nevada Supreme Court has said.

So we're only looking at petitioners whose convictions became final prior to Byford which is a universe of -- I don't know if it's smaller, greater. We have filed a total of 13 of these petitions around the state. We went through all our old cases. We were only able to find 13 definitively as being people who were convicted of first degree murder, received the Kazylan instruction and their convictions became final prior to Byford.

So I don't know who else has filed them up in the

Second JD. I'm sure there's a bunch of pro se ones. I just don't know. But there is a more limited universe than just everybody who was convicted of first degree and got the Kazylan instruction.

THE COURT: That's interesting. That's fewer than I would have thought.

MR. KIRSHBAUM: Yeah, that was actually our feeling too.

THE COURT: You were hoping there was going to be more.

MR. KIRSHBAUM: We weren't hoping there was going to be more, but we expected more based on litigating these cases for so many years.

So the reason why a defendant or a petitioner in Mr. Branham's situation, why it is limited to them is because the change that Montgomery established. The new rule that the substantive exception applies as a matter of due process and the way that the supreme court has interpreted it, it means that the way that the Nevada Supreme Court has been applying their own substantive exception has been too limited.

The statutory interpretation cases are subject to retroactivity, retroactive effect under the substantive exception. And that's the limiting factor here. So

when it comes to a judicial decision that interprets its terms, it's not necessarily true that the Nevada Supreme Court will always interpret the terms of a criminal statute to narrow them. Sometimes they'll make them more broad. Sometimes -- I mean, that's what they did in Kazylan originally is they made the statute more broad when they said no, it's only one element.

So it's not necessarily true that there is going to be a large number of cases. The Nevada Supreme Court actually doesn't even issue that many published opinions. But the impact is yes, somebody who would have an error like a Sharma error or like the ones that you mentioned during the State's presentation, if they fall under the substantive exception, meaning they alter the conduct or the class of persons that could be punished under the statute, then, yes, they would have retroactive effect. And we know from Montgomery that finality can last at least as long as 50 -- or finality can be upset at least 50 years afterwards.

One issue that Your Honor raised during the State's presentation was about the retroactive effect of legislature changes. The Teague rules only apply to judicial decisions. So this has no impact on that. There's other constitutional rules with respect to

that. I think they do also sort of break down along substantive and procedural grounds, but it's a different constitutional issue.

THE COURT: So the argument or the hypothetical that I put forward regarding the change in the burglary statute is not applicable, but the hypothetical that I put forward regarding McConnell error or McConnell issues for use of a deadly weapon in an involuntary manslaughter would be?

MR. KIRSHBAUM: Yes. As long as it was an interpretation of the statute that narrowed its terms, yes. I mean, the burglary one potentially could be if the Nevada Supreme Court even narrows the definition beyond what everybody's understanding was. But these -- as that quote from Schriro makes clear, we're only talking about judicial decisions with respect to Montgomery and Welch.

The State didn't really challenge our argument with respect to prejudice. If Your Honor would like --

THE COURT: You mean the laches argument?

MR. KIRSHBAUM: Not laches, just whether he established actual prejudice.

THE COURT: Okay. Go ahead.

MR. KIRSHBAUM: So once this rule -- once Byford is

made available to Mr. Branham, he can easily establish actual prejudice here. In fact, this is really a situation where the Kazylan instruction would have an impact on the case. Once again, the Kazylan instruction did not require the State to prove all the elements of the crime. That includes deliberation.

And here we have a situation where there was no evidence establishing what actually happened and the cause of death officially was undetermined. There were multiples experts who came in. One said undetermined but potentially consistent with asphyxia, but there was medical evidence that wasn't consistent with asphyxia.

There was an expert who came in and said that the cause of death was blunt trauma. However, the single bruise was about a dime size and she couldn't quite say what could have caused it. The final expert came in and said that there was -- that the cause of death could not be determined at all.

And so we have a situation where there's no evidence as to what happened, no evidence as to how this person was even killed. So it's merely impossible to establish that there was deliberation here. And, in fact, the evidence is far more consistent with a second degree murder, because all the evidence showed is that

the victim when she was seen near Mr. Branham, they were friendly with each other. There was no -- at that particular time there was no evidence that there was animosity or any sort of plan to kill.

So we have this situation where the prosecution at trial then focuses heavily on the Kazylan instruction as their theory. And so in their rebuttal argument, they quote from the instruction and basically say that if we establish that he had the intent to kill, that when this person murdered this person that was their intent, then they have established premeditated and deliberate murder. But that's exactly what Byford has changed.

That's not enough. It's not just to establish an intent to kill. But that's what they were left with, because there was no evidence to establish deliberation at all. So this really is a situation where if Byford does apply retroactively here, then actual prejudice can be established.

And with respect to laches, I can -- you know, we've mentioned that, as I've talked about, Montgomery was applied 50 years afterwards. I don't think a laches rule can get in the way of applying a new constitutional rule here. But laches is discretionary.

And the statute itself says that if Your Honor finds a miscarriage of justice, laches won't apply. And we think for the same reasons we established actual prejudice that there would be a miscarriage of justice here if Byford wasn't applied.

THE COURT: Well, I don't think that my ruling will be based on laches either way.

MR. KIRSHBAUM: Okay. All right.

THE COURT: I tend to agree with you, Mr. Kirshbaum, that it appeared to be kind of a throwaway argument and it almost appeared that way when Mr. McCarthy referenced it again today. It was at the end of a sentence that contained a number of other thoughts. So I don't -- you don't have to worry about the laches. That's not going to be the deciding factor one way or the other in this case. We have bigger issues to talk about.

MR. KIRSHBAUM: Unless Your Honor has any questions, I'll submit.

THE COURT: I do not.

Mr. McCarthy, a reply argument if you would like to.

MR. McCARTHY: I don't object to characterizing laches as a throwaway argument. It can be overcome. I

also -- I didn't address prejudice because that addresses the merits of the petition. We don't -- there are lots of petitions where the claim of prejudice is indistinguishable from the merits. And so in order to get to the merits or to get to the prejudice, we must first deal with the other procedural bars.

I agree with this, that the Welch analysis applies only to judicial changes, not to legislative changes. There's a whole different set of laws about retroactive legislative changes. While there's some overlap, they -- Welch and this instant argument deals only with judicial changes in the statutes.

You know, I don't feel like dragging it out. I think that -- when the court wrote Welch, in the beginning of the decision they refer to Teague and refer to new constitutional rules governing -- regulating conduct and all that. It's just they didn't repeat that whole phrase every time they used the word "rule" throughout the rest of the opinion.

I think if you read the opinion as a whole it is clear enough that when they use the word "new rules," they -- as a shorthand for new constitutionally-based rules, narrowing constructions required by the

Constitution, if that is indeed what that -- what the phrase "rules" means in that decision, then the petition ought to be dismissed.

If the supreme court meant every altered judicial construction of every criminal statute must be applied retroactively forever, they couldn't have picked a more obscure way of saying that. I don't think this Court should read it into the decision when it's not there. Instead you should dismiss this petition.

THE COURT: Thank you, Mr. McCarthy.

The Court will take the motion to dismiss the petition under advisement and issue a written order. I don't know where I'll be in the line headed to the Nevada Supreme Court, but one way or the other, I have no doubt that the order that I issue will be the subject of appeal either by the State or by the petitioner. And so I don't think that it's prudent just to do those things from the bench when it is undoubtable that somebody will be looking at it and picking over it carefully. So what I'll do is take it under advisement and issue a written opinion.

Thank you for the oral argument, counsel.

Court is in recess.

(The proceedings were concluded.)

STATE OF NEVADA )
) ss.
COUNTY OF WASHOE )

I, LORI URMSTON, Certified Court Reporter, in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken by me at the time and place therein set forth; that the proceedings were recorded stenographically by me and thereafter transcribed via computer under my supervision; that the foregoing is a full, true and correct transcription of the proceedings to the best of my knowledge, skill and ability.

I further certify that I am not a relative nor an employee of any attorney or any of the parties, nor am I financially or otherwise interested in this action.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing statements are true and correct.

DATED: At Reno, Nevada, this 5th day of January, 2018.

LORI URMSTON, CCR #51

_____

LORI URMSTON, CCR #51

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CR92-1048
2017-12-05 03:18:30 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6424287

CODE: 2540

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

WILLIAM EDWARD BRANHAM,
Petitioner,

vs.

ISIDRO BACA
WARDEN,

Respondent,
_____/

CASE NO: CR92-1048

DEPT. NO.: 10

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that on the 5th day of December, 2017 the Court entered a decision or order in this matter, a true and correct copy of which is attached hereto.

You may appeal to the Supreme Court from the decision or order of the Court. If you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-three (33) days, after the date this notice is mailed to you. This notice was mailed on the 5th day of December, 2017.

JACQUELINE BRYANT
Clerk of the Court

By /s/ Rosa Rodriguez
Deputy Clerk

**CERTIFICATE OF SERVICE**

CASE NO. CR92-1048

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; and that on the 5th day of December, 2017, I electronically filed the Notice of Entry of Order with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to:

Terrence Mccarthy, ESQ. for STATE OF NEVADA

Jonathan Kirschbaum, ESQ. for William Edward Branham

I further certify that on the 5th day of December, 2017, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true and correct copy of the Notice of Entry of Order, addressed to:

William Edward Branham # 39519
Northern Nevada Correctional Center
P.O Box 7000
Carson City, NV 89702

Attorney General's Office
100 N. Carson Street
Carson City, NV 89701-4717

/s/ Rosa Rodriguez
Rosa Rodriguez

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

WILLIAM EDWARD BRANHAM,

Petitioner,

vs.

ISIDRO BACA, WARDEN,

Respondent.

_____/

Case No. CR92-1048
Dept. No. 10

**ORDER**

Presently before the Court is the MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Motion") filed by ISIDRO BACA, WARDEN ("the State") on June 1, 2017. The OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Opposition") was filed by WILLIAM EDWARD BRANHAM ("the Petitioner") on June 16, 2017. The State filed the REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ("the Reply") on June 26, 2017, and contemporaneously submitted the

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matter for the Court's consideration. The Court entered an ORDER TO SET ORAL ARGUMENT on August 17, 2017. The Court heard oral argument on September 20, 2017, at which time the Court took the Motion under advisement.

The Petitioner was convicted of MURDER OF THE FIRST DEGREE in 1993. *See* JUDGMENT OF CONVICTION entered April 14, 1993. He was sentenced to life in the Nevada Department of Corrections without the possibility of parole. The Nevada Supreme Court affirmed the conviction in an ORDER DISMISSING APPEALS entered December 18, 1996. A remittitur was issued on January 6, 1997.

The Petitioner filed a PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) ("the Petition") on April 7, 2017.[1] The Court entered an ORDER TO RESPOND on May 16, 2017, directing the State to respond to the Petition. Thereafter, the State filed the Motion.

NRS 34.726 enumerates the procedural requirements for, *inter alia*, filing a writ of habeas corpus. NRS 34.726(1) provides, "a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." The Petition may be untimely filed if "good cause for delay exists." *Id.* Good cause for delay exists if: 1) the delay is not the petitioner's fault; and 2) dismissing the petition will unduly prejudice the petitioner. NRS 34.726(1)(a);(b). The delay is not the fault of the petitioner when an "impediment external to the defense" prevents the petitioner from timely filing. *Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d

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[1] The Petitioner has filed two prior state post-conviction petitions for writ of habeas corpus. The Supreme Court affirmed the order denying the first petition, and thereafter affirmed the order dismissing the second petition. *See Branham v. Warden*, Docket No. 33830 and 33831, Order Dismissing Appeals (February 15, 2000); *Branham v. State*, Docket No. 45532, Order of Affirmance (November 10, 2005).

785, 787 (1998). An impediment is external to the defense when "the factual or legal basis for a claim was not reasonably available to counsel, or that some 'interference by officials' made compliance [with procedural requirements] impracticable." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal citation omitted). Undue prejudice to the petitioner exists "not merely [when] the errors [alleged in the petition] created a possibility or prejudice, but that they worked to [the Petitioner's] actual and substantive disadvantage, in affecting the...proceedings with error of constitutional dimensions." *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993)( internal citation omitted).

The Nevada Supreme Court explains upholding procedural requirements for petitions for writs of habeas corpus is mandatory. *Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001). A court may only overlook procedural failures, including a failure to adequately demonstrate good cause for delay, where a refusal to consider a petitioner's claim would be a "fundamental miscarriage of justice." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. A fundamental miscarriage of justice is shown where the petitioner "makes a colorable showing he is actually innocent of the crime," and "that no reasonable juror would have convicted him absent a constitutional violation." *Id.* Actual innocence "means factual innocence, not mere legal insufficiency." *Bousley v. U.S.*, 523 U.S. 614, 615, 118 S. Ct. 1604, 1607 (1998). Factual innocence may be demonstrated by presenting "reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 541, 118 S. Ct. 1489, 1493 (1998). The presence in the petition of a claim for ineffective assistance of counsel may provide good cause for filing a successive petition, but the claim is still subject to timeliness requirements. *Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997); *State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005).

The Petition is allegedly based on a previously unavailable constitutional claim. The Petition, 8:14. The Petition alleges the new constitutional claim providing the Petitioner grounds for post-conviction habeas corpus relief was established in two recent United States Supreme Court decisions: *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016). The Petition, 8:18-20. Specifically, the Petition argues *Welch* and *Montgomery* mandate the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), in all cases where a "*Kazalyn* instruction" was used at trial.[2] *See* the Petition, 8:2-6.

The Motion argues the Petitioner cannot overcome the procedural bars because "*Welch* has no application to the instant case, as the change of the law announced in *Byford* had no constitutional component and did not narrow the 'conduct' that was prohibited...." The Motion, 5:9-12. The Opposition argues state courts must retroactively apply a substantive narrowing of a criminal statute "regardless of how it is characterized." The Opposition, 2:23-25.

*Montgomery* and *Welch* each utilized the "*Teague* framework" to analyze the retroactivity of two different rules of constitutional law set forth in prior United States Supreme Court decisions. While there is generally a bar on retroactive application of new rules of criminal procedure, *Teague* and its progeny mandate the retroactive application of new substantive criminal rules and new "watershed rules of criminal procedure" in federal collateral review proceedings. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989); *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 2523 (2004); *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257 (1990). "A rule is substantive rather than procedural if it alters the range of conduct or class of persons that the law punishes." *Schriro*, 542 U.S. at 353. "This includes decisions that narrow the scope of a criminal statute by interpreting

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[2] *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992). A "*Kazalyn* insruction" is a jury instruction or set of jury instructions which blurs the distinction between "deliberate" and "premeditated." *Byford*, 116 Nev. at 235, 994 P.2d at 713.

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 351-352. "Procedural rules, in contrast are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 730 (quoting *Schriro*, 542 U.S. at 353 (italics in original)).

The *Welch* Court considered the retroactive application of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The *Johnson* Court held a federal statutory clause unconstitutional under the void-for-vagueness doctrine. The *Welch* Court reasoned, "decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule...," and held *Johnson* announced a new substantive rule that is retroactive in cases on collateral review. 136 S. Ct. at 1267-68.

The new law at issue in *Montgomery* was set forth in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012). The *Miller* Court held mandatory life without parole sentences for juvenile homicide offenders is a violation of the Eighth Amendment. The *Montgomery* Court considered "whether *Teague*'s two exceptions are binding on the States as a matter of constitutional law." 136 S. Ct. at 729. The Court held, "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." *Id.* (emphasis added).

In *Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008), the Supreme Court of Nevada held *Byford* does not have retroactive application because it "announced a new rule and that rule was not required as a matter of constitutional law." The *Nika* Court noted the *Byford* Court "indicated that instructions defining these separate words are not required because they are used in the first degree murder statute 'in their ordinary sense'" and "concluded that if a jury is

instructed on the meaning of one of the terms, then it also must be instructed on the meaning of the other two terms." *Nika*, 124 Nev. at 1284, 198 P.3d at 847. Thus, the practical effect of the new rule announced in *Byford* is one of procedural significance: the terms "willful," "premediated," and "deliberate" need not be separately defined in jury instructions, but if one is defined all must be defined.

Even assuming *Montgomery* mandates the application of the *Teague* rule on state collateral review proceedings in all cases where there has been a substantive narrowing of a criminal statute, the Petitioner is not entitled to a retroactive application of *Byford*. This is because the new rule announced in *Byford* is not a substantive rule and is therefore not subject to the rule announced in *Montgomery*.

**It is ORDERED** the State's MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) is hereby **GRANTED**. The PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) is hereby **DISMISSED**.

DATED this 5 day of ~~November~~ DECEMBER, 2017.

ELLIOTT A. SATTLER
District Judge

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this ____ day of November, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 5 day of ~~November~~ DECEMBER, 2017, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Terrence P. McCarthy, Esq.

Jonathan M. Kirshbaum, Esq.

Sheila Mansfield
Judicial Assistant

2515
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

| | |
|---|---|
| WILLIAM EDWARD BRANHAM,<br><br>Petitioner,<br><br>v.<br><br>ISIDRO BACA, WARDEN, etc.<br><br>Respondents. | Case No. CR92-1048<br>Dept. No. 10 |

## NOTICE OF APPEAL

COMES NOW Petitioner and Movant, William Edward Branham ("Branham"), by and through his attorney, Jonathan M. Kirshbaum, Assistant Federal Public Defender, hereby appeals to the Nevada Supreme Court from the Order Dismissing Petition for Writ of Habeas Corpus entered into this action on December 5, 2017. The Notice of Entry was filed on December 5, 2017.

DATED this 15th Day of December, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

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

AFFIRMATION PURSUANT TO NEV. REV. STAT. § 239B.030

The undersigned does hereby affirm that the preceding Notice of Representation of Petitioner filed in the District Court Case No. CR92-1048.

☒ Does not contain the social security number of any person.

- OR -

☐ Contains the social security number of a person as required by:

A: A specific state or federal law

B: For the administration of a public program or for an application for a federal or state grant.

DATED this 15th day of December, 2017.

*/s/Jonathan M. Kirshabum*
JONATHAN M. KIRSHBAUM
Assistant Federal Public Defender
411 E. Bonneville Ave., Suite 250
Las Vegas, NV 89101
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 15, 2017, he served a true and accurate copy of the foregoing by placing it in the United States mail, first-class postage paid, addressed to:

Washoe County District Attorney
Mills B. Lane Justice Center
1 South Sierra Street
South Tower, 4th Floor, Reno, NV, 89501

Adam P. Laxalt
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

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