IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM BRANHAM,

Appellant,

v.

ISIDRO BACA, WARDEN,

Respondent.

_____/

No. 74743

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from an order dismissing a post-conviction habeas corpus petition, with the finding that the petition was procedurally barred and the proffered reason to overcome the bars was insufficient. 7 AA 1288.

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 the district 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

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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. 7 AA 1194. *Branham v. Budge*, 541 U.S. 1077, 124 S.Ct. 2423 (2004).

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. The district court ordered a response. The State moved to dismiss. Petitioner opposed the motion. The court heard oral arguments and later entered an order dismissing the petition. Branham now appeals from the order dismissing the petition.

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II. STATEMENT OF THE FACT

The appendix includes the trial transcript, and the murder has been described in prior decisions. The facts relevant to this appeal are procedural in nature and are set out above.

III. ARGUMENT

The instant petition is untimely, abusive and successive, just as was the last one. *See* NRS 34.726, 34.800, 34.810. 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, as a matter of constitutional law, there can never be a final judgment because all changes in the law, of any sort, 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 definitively 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 *Byford* Court had 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 Opening Brief 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). *Bunkley* featured prominently in the *Byford* decision. 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 statute, 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 instructions relevant to mental states involved in a murder prosecution), represented a change in the law, not a 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 disposing of the last petition, 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.

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 state statutes, which it does with great frequency, even when the Constitution does not demand that the court do so.[2]

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 "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"

[2] Without actually checking, the State guesses that there are very few criminal statutes that have never been construed by an appellate court. If each of those rulings must be applied retroactively, then one must wonder why courts all over the nation have not been ordering wholesale new trials.

that was at issue. The Supreme Court in *Welch* used the 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 was properly dismissed.

One way to view *Welch* is that it attempts to resolve the philosophical question of whether appellate courts make law, or change law, or if they simply find the law as it has always existed. That is, the Supreme 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 that governs conduct. Hence, if a court rules that the constitutional guarantees regarding vagueness in criminal statutes require 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. *See Bunkley*, *supra*. The final arbiter of state law, the Nevada Supreme Court, has determined that the change described in *Byford* was not effective retroactively, but only prospectively from the date of the *Byford* decision. *Nika*, 124 Nev. At 1288. As such, there has been no legal development that altered the legal landscape to allow Branham to bring yet another collateral challenge to his conviction.

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IV. CONCLUSION

There has been no relevant change in the law to allow yet another collateral challenge to the conviction. The judgment of the district court should be affirmed.

DATED: May 4, 2018.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 4, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on May 4, 2018. 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/ Margaret Ford
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