IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 74743

WILLIAM BRANHAM,

Appellant,

v.

ISIDRO BACA, WARDEN,

Respondent.

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

By constitutionalizing the "substantive rule" exception to the *Teague* retroactivity principles in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the United States Supreme Court now requires state courts to apply this exception in the manner in which the Supreme Court applies it. Respondents do not challenge this contention.

Rather, Respondents essentially make three arguments challenging Branham's claim that, in light of *Welch v. United States*, 136 S. Ct. 1257 (2016), the "substantive rule" exception requires a state court to retroactively apply a statutory interpretation decision that narrows the meaning of a criminal statute. None of Respondents' arguments have any merit.

First, Respondents claim Branham's argument requires this Court to conclude that *Welch* implicitly overruled *Bunkley v. Florida*, 538 U.S. 835 (2003), which held, as a matter of due process, a change in law applies to convictions yet to be final. Answering Brief ("AB") at 4-5. This is false. Branham is not arguing that *Welch* overruled *Bunkley*. In actuality, the *Welch* decision settled a separate constitutional question left open in

Bunkley—whether a narrowing interpretation of the meaning of a criminal statute applies retroactively as a matter of federal constitutional law.

Second, they argue the narrowing interpretation of the definition of the first-degree murder statute in *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), does not fall under the "substantive rule" exception because it does not apply to conduct, only to a mental state. AB at 6-7. This is wrong. *Byford*'s narrowing interpretation falls squarely under the "substantive rule" exception as it altered both the range of conduct (*i.e.* the conduct establishing a person did not act with deliberation) and the class of persons (*i.e.* the class of people who did not act with deliberation) that the law punishes.

Third, they argue *Welch* limited the question of retroactivity to only new "constitutional rules." AB at 6. This is also untrue. *Welch* stated expressly, on multiple occasions, the "substantive rule" exception applies to statutory interpretation decisions.

Further, contrary to Respondents' argument, a State does not retain the right to determine the retroactivity of statutory

interpretations. AB at 7-8. To the extent this could have been true before, *Welch* and *Montgomery* have invalidated that concept. These cases establish, as a matter of federal constitutional principle, that the "substantive rule" exception requires state courts to retroactively apply a decision narrowing the interpretation of a criminal statute.

As this Court previously indicated in *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008), *Byford* is such a substantive rule. Due to the new constitutional principles in *Welch* and *Montgomery*, Branham is now entitled to the benefit of *Byford*. The first-degree murder instruction in Branham's case was erroneous. *Welch* and *Montgomery* establish good cause to overcome any procedural default. For the reasons discussed in the Opening Brief, Branham can establish actual prejudice. The petition should be granted.

A. *Welch* settles a question left open in *Bunkley*—the federal constitution requires a state court to retroactively apply a narrowing interpretation of a criminal statute

Respondents argue that Branham cannot obtain relief here because this Court would need to conclude *Welch* overruled *Bunkley*. AB at 4-5.

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*. Branham is arguing *Welch* answers the retroactivity question left open in *Bunkley*—whether state courts must apply a narrowing interpretation of a criminal statute retroactively as a federal constitutional matter.

Bunkley did not address this retroactivity question. *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.

Instead, the case presented a different type of due process question, 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 nothing more than 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 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 addressing a different constitutional question.

Just as important, the Court in *Bunkley* did not hold a change in law does not, or could not, apply retroactively. The Court was simply stating, in an affirmative way, a change in law had to be applied, as a matter of due process, to convictions that had yet to become final.

Montgomery and *Welch* now settle the retroactivity question with respect to a change in law left open in *Bunkley*. These new cases establish that the "substantive rule" exception to *Teague* requires any new substantive rule, including a decision narrowing the interpretation of a criminal statute, to apply 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. That is the result of *Welch*'s new substantive function test, which looks at the function of the new rule, not its characterization. *Welch*, 136 S.Ct. at 1266 (new rule is substantive as long as it has a "substantive function," *i.e.* when it "alters the range of conduct or class of persons that the law punishes"); Opening Brieft at 32-33 (discussing substantive function

test). But to find that *Welch* requires a narrowing statutory interpretation to apply retroactively does not necessitate an overruling of *Bunkley*. It is simply a consequence of the Supreme Court settling a previously unanswered retroactivity question.

B. *Byford* is substantive because it alters both the range of conduct and the class of persons the law punishes

Respondents argue that the "substantive rule" exception does not apply here because *Byford* narrowed the *mens rea* element. AB at 6-7. As such, *Byford* did not alter the range of "conduct" that the statute made criminal. *Id.*

This argument has no merit. In the first instance, Respondents left out one of the categories of the "substantive rule" exception. The 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.

First, 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 a defendant acted with deliberation as defined in *Byford* when committing a murder.[1]

Second, *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 premeditation *and* deliberation as defined in *Byford* when committing a murder. *See Welch*, 136 S. Ct. at 1265 (new rule was substantive because it limited the "class of persons" who could be sentenced under the Armed Career Criminal Act to only those who possessed a firearm with three qualifying felonies, none of which fell under the unconstitutional "residual clause").

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[1] Respondents' argument would also undermine the entire principle of the substantive rule exception. The State is constitutionally required to prove all elements of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This includes any mens rea element. *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979). The substantive rule provides for the retroactive application of any new rule that places a limit on the State's power to punish certain offenders. A narrowing interpretation of any element of a crime has that effect, regardless of the type of element.

Looked at another way, prior to *Byford*, someone who intentionally committed a murder, but did not act with deliberation, could have been found guilty of first-degree murder. After *Byford*, that same person could not be punished for first-degree murder. That most certainly makes *Byford* a substantive rule. *See Welch*, 136 S. Ct. at 1265.

C. *Welch* specifically stated the "substantive rule" exception applies to statutory interpretation decisions.

Respondents argue that the Supreme Court in *Welch* indicated that the *Teague* "substantive rule" exception applies only to new constitutional rules. AB at 6. To support this argument, they assert that *Welch* "noted several times" that the exception applies "only with new 'constitutional' rules." *Id.*

This is simply wrong. Not once in *Welch* did the Supreme Court state that the "substantive rule" exception to *Teague* applies "only" to new constitutional rules. In fact, the Court said the opposite. The Court expressly stated in its discussion of the relevant legal standards that the "substantive rule" exception applies to statutory interpretation cases:

> A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. ***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.

Welch, 136 U.S. at 1264-65 (emphasis added; internal citations omitted). The Court repeated this express statement two other times in *Welch*. *Id.* at 1267 ("A decision that modifies the elements of an offense is normally substantive rather than procedural."); *Id.* ("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,'" quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

In fact, *Welch* not only made clear that the substantive exception applies to statutory interpretation decisions, it explained precisely *how to apply the substantive rule exception to those decisions*. *Welch*, 136 S.Ct. at 1267.

Respondents simply ignore this express language in *Welch*. They provide no reason why this language does not mean precisely what it says it means. Instead, they essentially ask this Court to ignore it. They

argue the primary question in *Welch* concerned the retroactivity of a decision finding a statute unconstitutional, as opposed to the retroactivity of a statutory interpretation decision. AB at 6.

That has no impact on the analysis here. In the first instance, it is difficult to see how this Court can be asked to ignore the Supreme Court's express statement in its discussion of the relevant legal standards that the "substantive rule" exception "***includes decisions that narrow the scope of a criminal statute by interpreting its terms***." *Welch*, 136 U.S. at 1264-65 (emphasis added). It can't get any more authoritative than that.

The same can be said about the Court's more in depth analysis on how the "substantive rule" exception applies in statutory interpretation cases. This discussion was a crucial component of the *Welch* decision. Because it was an essential part of *Welch*, lower courts are bound to follow it.

The statutory interpretation discussion appears in the Court's rebuttal of the amicus's argument. The Supreme Court appointed amicus curiae to argue against retroactivity in *Welch* because both of the parties agreed that the rule at issue should be given retroactive effect. *Welch*,

136 S.Ct. at 1263. The *Welch* Court's rebuttals of the amicus's arguments, including its discussion of how the substantive rule applies in statutory interpretation cases, were not simply a side note; rather, they lie at the core of the opinion. In addressing these arguments, the Court was engaging in a necessary and essential analysis related directly to the ultimate question of whether or not the lower court's decision could be sustained.

As part of this analysis, the Court laid out a specific test governing the question whether a decision is a "substantive" rule under *Teague*. As it stated, the question whether a rule is retroactive depends on whether the rule "has a substantive function," and *any* decision, including a statutory interpretation one, that narrows the scope of a criminal statute is a decision with a substantive function. *Id.* at 1266-67. As part of this analysis, the Court explained this substantive function test works the same way for statutory interpretation decisions as it would for any other type of new rule. That logic was essential to the Court's rejection of the amicus's arguments and its ultimate conclusion, namely that the rule at

issue in *Welch* was a "substantive" rule because it had the function of narrowing the class of people who could be punished under the statute.

The *Welch* Court's discussion of the retroactivity of statutory interpretation decisions was essential and necessary to the judgment, so it qualifies as a holding that lower courts must follow. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [lower courts] are bound.").[2]

Finally, Respondents argue a State has the right to determine the retroactivity of statutory interpretations as they are not constitutional rules.[3] AB at 7-8. To the extent this could have been true before, *Welch* and *Montgomery* have invalidated that concept.

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[2] Even assuming that these portions of the opinion were dicta, a lower court should "afford considered dicta from the Supreme Court . . . a weight that is greater than ordinary judicial dicta as prophecy of what the court might hold." *Nettles v. Grounds*, 830 F.3d 922, 930-31 (9th Cir. 2016) (internal quotations omitted).

[3] It should be noted that, prior to *Montgomery* and *Welch*, the vast majority of States to address the issue gave full retroactive effect to narrowing statutory interpretation decisions. *See Luurtsema v. Comm'r of Corr.*, 299 Conn. 740, 12 A.3d 817, 827-28 (2011). Nevada was in a small minority that did not and appears to be the only one to have implemented a full retroactivity bar. *Id.* at 828 (discussing how States

"'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 rule" exception applies to state courts as a matter of federal constitutional law. The Supreme Court has applied the "substantive rule" exception to statutory interpretation cases that narrow the definition of a criminal statute. The state courts are now constitutionally required to apply the substantive exception in the same manner.

As a result of *Welch* and *Montgomery*, it is the "substantive rule" exception that dictates whether a statutory interpretation decision applies retroactively. If the decision meets the definition of a substantive rule, it must apply retroactively. The Nevada Supreme Court has already declared *Byford* is a substantive decision. *See Nika*, 124 Nev. at 1287, 1301, 198 P.3d at 850, 859. Branham, whose conviction became

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in this small minority typically utilize either balancing test or case-by-case analysis).

final prior to *Byford*, is entitled to have that decision retroactively applied to his case.

The new constitutional rule set forth in *Welch* and *Montgomery* establishes good cause to overcome any procedural default. Respondents have not contested Branham's assertions that the jury instruction in his case was erroneous under *Byford* or that he was prejudiced by this error. The petition should be granted.

CONCLUSION

For the reasons discussed herein and in the Opening Brief, the petition should be granted, the judgment of conviction and sentence should be vacated, and a new trial ordered.

Dated this 12th day of June, 2018.

Respectfully submitted,

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 12, 2018. Electronic Service of the foregoing **Appellant's Reply Brief** shall be made in accordance with the Master Service

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