

IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILLIAM EDWARD BRANHAM,  
Appellant,

vs.

ISIDRO BACA, WARDEN,  
Respondent.

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No. 74743 Electronically Filed  
Dec 28 2018 11:12 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**PETITION FOR REVIEW**

Appellant WILLIAM BRANHAM by and through counsel,  
Assistant Federal Defender Jonathan M. Kirshbaum, hereby petitions,  
pursuant to NRAP 40B, for review of the Court of Appeals' published  
opinion issued on December 13, 2018.

This petition is based on the following memorandum of points and  
authorities and all papers and pleadings on file herein.

DATED this 28<sup>th</sup> day of December, 2018.

Respectfully submitted,

/s/ Jonathan M. Kirshbaum  
JONATHAN M. KIRSHBAUM  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. JURISDICTION

On December 13, 2018, the Nevada Court of Appeals issued a published opinion, affirming the dismissal of William Branham's second post-conviction petition. The opinion is attached as Exhibit 1. This petition for review has been timely filed within the 18-day period set forth in NRAP 40B(c).

### II. QUESTIONS PRESENTED

1. Whether the recent United States Supreme Court decisions in *Montgomery v. Louisiana* and *Welch v. United States* now require state courts to apply narrowing interpretations of a substantive criminal statute retroactively as a matter of federal constitutional law?

2. Whether this Court should reconsider its prior retroactivity decisions in light of *Welch* and the emerging nationwide consensus to grant full retroactive effect to narrowing statutory interpretation decisions?

### III. STATEMENT OF FACTS

Branham was charged with open murder. (I.App.1.) He proceeded to a jury trial that took place in March 1993. (I.App. 11.) The State's

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

However, the State presented little evidence about the events that transpired at the time of Fetherston's death. The State could not definitely prove the cause of death as their own medical experts disagreed about how she died. (I.App.105; V.App.865-67, 892; IV.App.725-27, 741-43.) While Branham was seen with the victim in her apartment on February 6, 1992, the last person to see them together stated they were happy and getting along. (III.App.457, 493.) There was simply no evidence that Branham had any plans to kill Fetherston that day or any other day.

The court provided the jury with what is known as the *Kazalyn* instruction, which provided the definition of the elements of first-degree murder. (VI.App.1149.) The jury convicted Branham of first-degree murder and he was sentenced to life without the possibility of parole. (VI.App. 1156.)

This Court affirmed Branham's conviction on December 18, 1996 (VII.App.1183), and his conviction became final on March 18, 1997. *See Nika v. State*, 124 Nev. 1272, 1284 n.52, 198 P.3d 839, 848 n.52 (2008).

Almost three years later, on February 28, 2000, this Court decided *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). In *Byford*, this Court disapproved of the *Kazalyn* instruction because it did not define premeditation and deliberation as separate elements of first-degree murder. *Id.* at 234-35, 994 P.2d at 713-14. This Court narrowed the meaning of the first-degree murder statute by requiring the jury to find deliberation as a separately defined element. *Id.* at 235, 994 P.2d at 714. This Court held this error was not of constitutional magnitude and only applied prospectively. *Garner v. State*, 116 Nev. 770, 788-89, 6 P.3d 1013, 1025 (2000).

Later, in *Nika*, this Court acknowledged that *Byford* had interpreted the first-degree murder statute by narrowing its terms. *Nika*, 124 Nev. at 1286-87, 1287 n.72-74, 1301, 198 P.3d at 849-50, 850 n.72-74, 859. However, under the Nevada retroactivity rules, this statutory interpretation issue had no retroactive effect to convictions that

had already become final because it was not a new constitutional rule. *Id.* at 1288-89, 198 P.3d at 850-51.

Nonetheless, this Court acknowledged that it had erred when it held *Byford* only applied prospectively. It explained the question for statutory interpretations was limited to whether the interpretation was a “clarification” or a “change” in state law. As a matter of due process, a “clarification” applies to all cases while a “change” applies to only those cases in which the judgment has yet to become final. *Id.* at 1287, 1287 n.72-74, 1301, 198 P.3d at 850, 850 n.72-74, 859. This Court concluded *Byford* was a “change” in state law, *id.*, so petitioners, like Branham, were barred from obtaining the benefit of *Byford*.

On April 19, 2017, Branham filed a post-conviction petition arguing that he was now entitled to the benefit of *Byford* as a result of the United States Supreme Court decisions in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and *Welch v. United States*, 136 S.Ct. 1257 (2016). (VII.App.1190-1219.) He argued that *Montgomery* established a new constitutional rule, namely the *Teague* substantive rule exception was now a federal constitutional rule, and *Welch* clarified that this

constitutional substantive rule exception included narrowing interpretations of a statute, such as *Byford*. (*Id.*)

After hearing oral argument, the district court dismissed the petition, concluding *Byford* was not substantive. (VII.App.1286-94.) In a published opinion, the Court of Appeals rejected the argument but affirmed on another ground, concluding that *Montgomery* and *Welch* did not alter *Teague*'s threshold requirement that the new rule be a constitutional rule. Exhibit 1 at 6-7.

#### IV. REASONS REVIEW IS WARRANTED

A. The recent United States Supreme Court decisions in *Montgomery v. Louisiana* and *Welch v. United States* now require state courts to apply narrowing interpretations of a substantive criminal statute retroactively as a matter of federal constitutional law

1. *Montgomery* and *Welch* created a new constitutional rule that changes retroactivity law in Nevada

In *Teague v. Lane*, 489 U.S. 288 (1989), the United States Supreme Court set forth a framework for retroactivity in cases on collateral review. Under *Teague*, a new rule does not apply, as a general matter, to convictions that were final when the new rule was announced. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016).

However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.* Second, and the exception at issue in this case, courts must give retroactive effect to new substantive rules. *Id.* “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Under the federal retroactivity framework, the substantive rule exception is not just limited to constitutional rules, but also “includes decisions that narrow the scope of a criminal statute by interpreting its terms.” *Id.* (quoting *Schriro*, 542 U.S. at 351-52).

This Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Clem v. State*, 119 Nev. 615, 621, 628, 81 P.3d 521, 530-31 (2003); *Colwell v. State*, 118 Nev. 807, 819-20, 59 P.3d 463, 471-72 (2002).

However, there is one significant difference between the Nevada retroactivity rules and those adopted by the United States Supreme Court. In contrast to the United States Supreme Court, the Nevada Supreme Court has held that decisions interpreting a criminal statute fall outside its retroactivity framework and have no retroactivity implications. *Nika v. State*, 124 Nev. 1272, 1288-89, 1301, 198 P.3d 839, 850-51, 859 (2008). It has reasoned that only constitutional rules raise retroactivity concerns. Decisions interpreting a statute are solely matters of state law. *Id.* at 1288-89, 1301, 198 P.3d at 850-51, 859. The only question with respect to who gets the benefit of a narrowing statutory interpretation is whether it represents a “clarification” or a “change” in state law. *Id.* at 1287, 198 P.3d at 850.

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



In *Montgomery*, the United States Supreme Court, for the first time, constitutionalized the “substantive rule” exception to the *Teague* retroactivity rules. The consequence of this step is that state courts are now required to apply the “substantive rule” exception in the manner in which the United States Supreme Court applies it. *See Montgomery*, 136 U.S. at 727 (“States may not disregard a controlling constitutional command in their own courts.”); *Colwell*, 118 Nev. at 818, 59 P.3d at 471 (state courts must “give federal constitutional rights at least as broad a scope as the United States Supreme Court requires”). Thus, the United States Supreme Court’s interpretation of the substantive rule exception provides the constitutional floor for how this new constitutional rule must be applied in state courts.<sup>1</sup>

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<sup>1</sup> In a footnote, the Court of Appeals stated that Branham could have raised his retroactivity argument prior to *Montgomery*. Exhibit 1 at 7 n.3. This is clearly wrong. State courts were not constitutionally required to apply the substantive rule exception prior to *Montgomery*. *See Montgomery*, 136 S. Ct. at 729 (Supreme Court had previously “left open the question whether *Teague*’s two exceptions are binding on the States as a matter of constitutional law.”). Prior to that decision, Branham would have no basis to argue that the state courts were constitutionally required to apply the Supreme Court’s interpretation of the substantive rule exception. And, as discussed below, *Welch* provides the basis to argue that the substantive rule exception includes decisions narrowing the interpretation of a criminal statute.

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

In fact, the *Welch* Court not only stated that the exception applies to statutory interpretation cases, it explained how to apply that exception in those cases. “[D]ecisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they ‘alter the range of conduct or the class of persons that the law punishes.’” *Id.* at 1267 (quoting *Schriro*, 542 U.S. at 353).

This conclusion is also readily apparent in *Welch*’s discussion of its prior decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137

(1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review. As *Welch* put it, “The Court in *Bousley* had no difficulty concluding that *Bailey* was substantive, as it was a decision ‘holding that a substantive federal criminal statute does not reach certain conduct.’” *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*, 523 U.S. at 620).

But *Bailey* did not turn on constitutional principles; like *Byford*, it was a statutory interpretation decision, not a constitutional decision. Nonetheless, the Court in *Welch* classified *Bailey* as substantive. Thus, as *Welch* illustrates, it is irrelevant whether a decision rests on constitutional principles—if the decision is substantive, it is retroactive under the “substantive rule” exception no matter the basis for the decision.

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

for determining whether a decision that interprets the meaning of a statute is substantive, and must apply retroactively to all cases, is whether the new interpretation meets the criteria for a substantive rule, namely whether it alters the range of conduct or the class of persons that the law punishes.

*Welch*'s broader holdings bolster that conclusion. *Welch* announced a new test for how to determine if a new rule is substantive. The Court held, for the first time, that a new rule is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. A rule has a "substantive function" when it "alters the range of conduct or class of persons that the law punishes." *Id.* As the Court indicated in *Welch*, when a decision narrows the scope of a criminal statute, it has such a substantive function, and is therefore retroactive. *Id.* at 1265-67.

In light of *Welch*, the distinction between a "change" and "clarification" is no longer operative for determining who gets the benefit of a narrowing statutory interpretation. *Welch* made clear that the *only* relevant question with respect to the retroactivity of such an interpretation is whether the new interpretation meets the definition of

a substantive rule. If it meets the definition of a substantive rule, it does not matter whether that narrowing statutory interpretation is labeled a “change” or a “clarification,” because both types of decisions have “a substantive function.” *Welch*, 136 S.Ct. at 1266.

In sum, *Welch* holds that *all* statutory interpretation cases that narrow the scope of a substantive criminal statute—and not just those that are based on a constitutional rule—qualify as “substantive” rules for the purpose of retroactivity analysis. Under the Supremacy Clause, that rule is binding in state courts, just the same as in federal courts. *See Montgomery*, 136 S.Ct. at 727. Thus, after *Montgomery* and *Welch*, state courts are now required to give retroactive effect to any of their decisions that narrow the scope of a criminal statute.

**2. The Court of Appeals’ published opinion is contrary to the clear language of *Welch***

In a published opinion, the Court of Appeals rejected this argument. *See Ex. 1, Branham v. State*, 134 Nev. Adv. Opinion 99 (Dec. 13, 2018). The Court of Appeals concluded that *Montgomery* and *Welch* did not alter *Teague’s* “threshold requirement that the new rule at issue must be a constitutional rule.” *Id.* at 6-7. Mirroring this Court’s prior precedent,

the lower court reasoned *Byford* was not a constitutional rule, so it did not need to be applied retroactively under *Teague*. *Id.*

This reasoning is contrary to the express language of *Welch*. As discussed before, *Welch* made explicitly clear the “substantive rule” exception includes narrowing interpretations of criminal statutes:

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 S.Ct. at 1264-65 (emphasis added) (internal citations omitted). And this is just one of several explicit statements indicating the same. *E.g. Id.* at 1267 (stating in a parenthetical that “[a] decision that modifies the elements of an offense is normally substantive rather than procedural”). As that case indicates, determining whether a statutory interpretation decision is substantive is a “*Teague* inquiry.” *Id.* at 1267.

The Court of Appeals does not acknowledge the Supreme Court’s express language or explain why it doesn’t control here. Its failure to

grapple with these clear statements in *Welch* is not sustainable. This Court should review the lower court's published opinion.

**3. This Court should exercise its discretion and grant review as the issue presents each of the factors for review listed under Rule 40(B)(a)**

The import of *Montgomery* and *Welch* on Nevada's retroactivity scheme presents all of the factors listed in NRAP 40(B)(a). It is a question of first impression on a pure legal issue of general statewide importance. This case is also an appropriate vehicle to decide the question. The petition was timely filed within one year of *Welch*. *Nika* made clear that *Byford* was a decision narrowing the interpretation of the first-degree murder statute. Thus, the new rule from *Montgomery* and *Welch* directly impacts the retroactivity of *Byford*. Branham is within the category of petitioners who would benefit if *Byford* is applied retroactively. There is also no dispute here as to prejudice.

As discussed previously in subsection IV.A.2, the decision of the Court of Appeals conflicts with the clear language of *Welch*. In a similar fashion, the new constitutional rule in *Montgomery* and *Welch* has undercut this Court's prior precedent concerning the retroactive

application of a decision narrowing the interpretation of a substantive criminal statute.

Indeed, the United States Supreme Court's position on this question is clear. After *Welch*, there can be no debate that the Supreme Court believes the scope of the substantive rule exception includes narrowing statutory interpretations. Indeed, *Welch* was a seven to one decision and the dissenting judge did not take issue with this part of the opinion. *See Welch*, 136 S. Ct. at 1271 (Thomas, J., dissenting) ("The Court has identified two types of substantive rules, and *Johnson's* rule of decision fits neither description. It is not a new substantive constitutional rule, *nor does it narrow the scope of a criminal statute through statutory construction.*" (emphasis added)). This Court should review this issue to harmonize the Nevada retroactivity rules with this new rule.

Finally, this case involves an issue of fundamental statewide importance. The scope of the new federal constitutional "substantive rule" exception is an issue that will continue to recur. The specific question in this case is whether this new rule requires the retroactive application of this Court's narrowing interpretation set forth in *Byford*.



That alone is a matter of statewide importance. When viewed in terms of the potential difference in restrictions of personal liberty attendant to each, the difference between first and second degree murder is one of the most consequential distinctions in the Nevada criminal justice system. *See Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

But the question here is not limited to the retroactivity of *Byford*. This new constitutional rule will apply to all future narrowing interpretations of a substantive statute. This Court should provide guidance to the lower courts on this matter.

**B. This Court should reconsider its prior retroactivity decisions in light of *Welch* and the emerging nationwide consensus to grant full retroactive effect to narrowing statutory interpretation decisions.**

Even if this Court disagrees with Petitioner's position that *Welch* imposes a constitutional requirement that the States give full retroactive effect to narrowing statutory interpretation decisions, *Welch* still provides good cause for this Court to reconsider its prior approach to retroactivity. It is clear from *Welch* in which direction this area of law is moving. That decision is a strong signal from the Supreme Court as to the broad retroactive impact of decisions narrowing the interpretation of

a substantive criminal statute. In conjunction with *Montgomery*, *Welch* must be viewed, at the very least, as an indication the Court will seek uniform retroactive application of substantive rules amongst the States.

Nevada's complete bar on the retroactive application of a narrowing interpretation is inconsistent with the Supreme Court's approach. It is also an extreme outlier. Indeed, Nevada is the *only* jurisdiction to have adopted such a bar. In addition to the United States Supreme Court, the overwhelming majority of states to consider the issue (twelve of the fifteen) allow for full retroactive application of this type of narrowing interpretation. *See State v. Robertson*, 839 Utah Adv. Rep. 42, 2017 WL 2123459 at \*16-17 & \*16 n.137 (Utah May 15, 2017) (following federal rule and majority of state jurisdictions that allow for full retroactivity, listing cases). The other two states to have addressed the issue allow for retroactivity for most narrowing interpretations. *See Luuertsema v. Comm'r of Corr.*, 299 Conn. 740, 12 A.3d 817, 832 (2011) (general presumption in favor of full retroactivity); *Policano v. Herbert*, 7 N.Y.3d 588, 825 N.Y.S.2d 678, 859 N.E.2d 484, 495-95 (2006) (new precedent

applies retroactively based, primarily, upon purpose to be served by new standard).

Thus, there is an emerging nationwide consensus on this issue. The Utah Supreme Court has recently provided a compelling analysis as to why this is so. That court explained that decisions interpreting substantive criminal statutes should be given full retroactive effect—both on appeal and on collateral review—because such decisions demonstrate “a significant risk that a defendant stands convicted of an act that the law does not make criminal.” *Robertson*, 2017 WL 2123459 at \*16 (internal citations omitted). The court recognized, like the United States Supreme Court, that “it is only [the legislature], and not the courts, which can make conduct criminal.” *Id.*

This Court should follow this reasoning. A decision that modifies the elements of an offense, one such as *Byford*, strikes at the very core of what makes a new rule substantive. They are precisely the type of rules that alter the range of conduct the statute punishes. The timing or the characterization of the decision should not matter. A court does not legislate, it merely interprets. If a narrowing interpretation excludes a

defendant, that defendant, no matter when the conviction became final, should receive the benefit of that interpretation.

At bottom, there is no equitable basis for this Court to treat the citizens of Nevada worse than how they would be treated in these other states and in the federal system. *Montgomery* and *Welch* have moved the needle towards a uniform application of the substantive rule exception amongst the States. Almost every other state to decide this issue is fully in line with the Supreme Court's approach. Petitioner urges this Court to review this issue to shift Nevada into that category.

## V. CONCLUSION

Based on the foregoing, this Court should grant review.

DATED this 28<sup>th</sup> day of December, 2018.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing 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:

It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font, Century.

2. I further certify that this petition for rehearing complies with the page or type-volume limitations of NRAP 40B because it is proportionately spaced, has a typeface of 14 points, and contains 3,561 words.

DATED this 28<sup>th</sup> day of December, 2018.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of December, 2018, electronic service of the foregoing PETITION FOR REVIEW shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy

/s/ Arielle Blanck

An Employee of the Federal Public  
Defender, District of Nevada

## CERTIFICATE OF MAILING

In accordance with Rule 5(b) of the Nevada rules of Civil Procedure, the undersigned hereby certifies that on this December 28, 2018, a true and correct copy of the foregoing was mailed in the United States mail, first-class postage prepaid and addressed to the parties as follows:

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