IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 73431

RESPONDENT'S APPENDIX
Volume 4

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Counsel for Respondent

INDEX

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 30, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DAVID ANTHONY
STACY NEWMAN
Assistant Federal Public Defenders

TALEEN PANDUKHT
Chief Deputy District Attorney

BY */s/ E. Davis*
Employee, District Attorney's Office

TP/Skyler Sullivan/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52964
District Court Case No. C117513

FILED

FEB 18 2011

CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 17th day of November, 2010.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing denied."

Judgment, as quoted above, entered this 19th day of January, 2011

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this February 14, 2011.

Tracie Lindeman, Supreme Court Clerk

By: Amanda Ingersoll
Deputy Clerk

94C117513
CCJA
NV Supreme Court Clerks Certificate/Judg
1245349

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52964

ORDER DENYING REHEARING

FILED

JAN 19 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

Douglas, C.J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

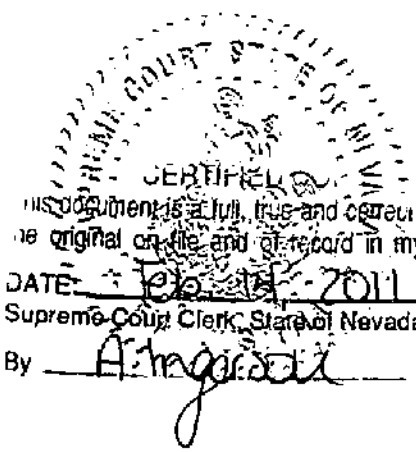
Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Valorie Vega, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk


CERTIFIED
DATE: Feb. 18, 2011
Supreme Court Clerk, State of Nevada
By: Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52964

FILED

NOV 17 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant William Lester Witter's third post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

A jury convicted Witter of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, attempted sexual assault with the use of a deadly weapon, and burglary and sentenced him to death. This court affirmed the convictions and sentence. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996), receded from in part by Byford v. State, 116 Nev. 215, 248 n.11, 249, 994 P.2d 700, 722 n. 11, 722 (2000). After unsuccessfully seeking post-conviction relief in both state and federal court, Witter filed the instant petition in the district court on April 28, 2008. The district court denied the petition as procedurally barred, and this appeal followed.

Witter's sole claim in his petition below is that the premeditation instruction given, commonly known as the Kazalyn instruction, unconstitutionally conflated the concepts of deliberation and premeditation. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). The issue was appropriate for direct appeal and thus subject to dismissal pursuant to NRS 34.810(1)(b)(2) absent a demonstration of good cause and

prejudice. Moreover, as he had previously raised the claim in his direct appeal and it was denied on the merits, further consideration of the claim is barred by the doctrine of the law of the case. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Witter argues that the district court erred in denying his post-conviction petition in concluding that (1) he failed to demonstrate good cause and prejudice to overcome the applicable procedural bars and (2) the law of the case barred consideration of his claim.

Good cause and prejudice

Witter contends that the Ninth Circuit Court of Appeals decision in Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), provided good cause to again raise his claim regarding the failure of the district court to specifically define the terms "willful" and "deliberate." We disagree.

In Byford, we disapproved of the Kazalyn instruction on the mens rea required for a first-degree murder conviction based on willful, deliberate, and premeditated murder, and provided the district courts with new instructions to use in the future. Byford, 116 Nev. at 233-37, 994 P.2d at 712-15. Recently, we addressed Polk and concluded in Nika v. State, 124 Nev. 1272, 1286-87, 198 P.3d 839, 849-50 (2008), cert. denied, 558 U.S. ___, 130 S. Ct. 414 (2009), that Byford does not apply to cases that were final when it was decided. Witter's conviction was final nearly four years before Byford was decided and therefore Byford does not apply. Accordingly, Witter cannot demonstrate good cause to overcome the applicable procedural bars with respect to this claim.

We further conclude that the district court did not err in finding that Witter failed to demonstrate prejudice. In Byford, this court set forth a first-degree murder instruction that defined willfulness as "the intent to kill," and deliberation as "the process of determining upon a course of action to kill as a result of thought, including weighing the

reasons for and against the action and considering the consequences of the action." 116 Nev. at 236, 994 P.2d at 714. No particular span of time was necessary for an act to be willful and deliberate, but the act "must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur." Id. While Witter's attack was extremely violent, the evidence did not indicate that Witter's actions were the result of an "unconsidered and rash impulse." Id. at 237, 994 P.2d at 715. Instead, Witter engaged in calculated efforts to complete his sexual assault, which included concocting a story to explain any apparent distress and electing to murder the victim when he did not accept the ruse. Given this evidence, Witter did not demonstrate that he would not have been convicted of first-degree murder had the jury been instructed on deliberateness and willfulness. Moreover, as the evidence demonstrated that the killing occurred during the attempted commission of a sexual assault and burglary, Witter failed to demonstrate that he would not have been convicted of first-degree murder under the felony-murder theory. See NRS 200.030(1)(b).

Law of the case doctrine

Next, Witter contends that the district court erred in concluding that his claim was barred by the law-of-the-case doctrine because Polk was an intervening change in the law that permitted the district court to depart from the holding in his case. We disagree.

When an appellate court states a principle or rule of law, that principle or rule becomes the law of the case and must be followed throughout its subsequent appeals. Hall, 91 Nev. at 315, 535 P.2d at 798. However, a court may "'depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.'" Hsu v. County of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007) (quoting Arizona v. California, 460 U.S. 605, 618 n.8 (1983)). "[W]hen the controlling law of

this state is substantively changed during the pendency of a remanded matter at trial or on appeal, courts of this state may apply that change to do substantial justice." Id. at 632, 173 P.3d at 729-30. This court's resolution to apply a decision retroactively may constitute good cause for failure to raise such a claim sooner. See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (stating that good cause might be shown where the "legal basis for a claim was not reasonably available at the time of any default"). Witter fails to demonstrate a manifest injustice that would excuse departure from the law-of-the-case doctrine because this court has determined that Byford is not retroactive to cases on collateral review even considering the decision in Polk. See Nika, 124 Nev. 1272, 198 P.3d 839.

Having considered Witter's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Douglas

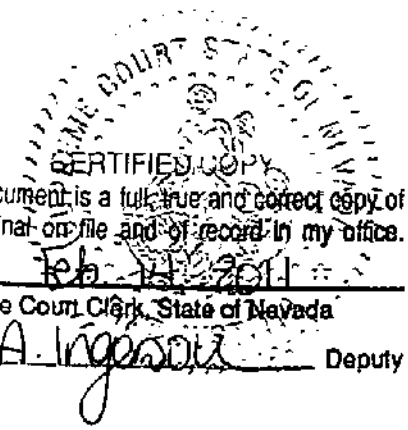
_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Valorie Vega, District Judge
Eighth District Court Clerk
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas


CERTIFIED COPY
is document is a full, true and correct copy of
he original on file and of record in my office.
DATE: Feb 14 2011
Supreme Court Clerk, State of Nevada
By A. Ingersoll Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 52964
District Court Case No. C117513

REMITTITUR

TO: Steven Grierson, District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: February 14, 2011

Tracie Lindeman, Clerk of Court

By: Amanda Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Valorie Vega, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on FEB 18 2011.

HEATHER LOFQUIST
Deputy District Court Clerk

11-04710

NOASC

RENE L. VALLADARES
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Nevada Bar No. 7978
David_Anthony@fd.org
TIFFANY L. NOCON
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Las Vegas, Nevada 89101
(702) 388-6577
(702) 388-5819 (Fax)

Attorneys for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

WILLIAM WITTER, Petitioner, v. TIMOTHY FILSON, Warden, and ADAM PAUL LAXALT, Nevada Attorney General, Respondents.	Case No. 94C117513 Dept. No. XXIII **NOTICE OF APPEAL** (Death Penalty Habeas Corpus Case)

NOTICE IS GIVEN that Petitioner William Witter appeals to the Nevada Supreme Court from the Third (sic) Amended Judgment of Conviction submitted by

/ / /

Respondents on June 30, 2017, and signed by the District Court on or about July 10, 2017.

DATED this 10th day of July, 2017.

Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Tiffany L. Nocon
TIFFANY L. NOCON
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with EDCR 7.26(a)(4) and 7.26(b)(5), the undersigned hereby certifies that on the July 10, 2017, a true and accurate copy of the foregoing NOTICE OF APPEAL was filed electronically with the Eighth Judicial District Court and served by Odyssey EFileNV, addressed as follows:

Steven S. Owens
Chief Deputy District Attorney
motions@clarkcountyda.com
Eileen.davis@clarkcountyda.com

/s/ Stephanie Young
An Employee of the
Federal Public Defender
District of Nevada

AJOC
STEVEN WOLFSON
Clark County District Attorney
Nevada Bar No. 001565
STEVEN S.OWENS
Chief Deputy District Attorney
Nevada Bar No. 004352
200 Lewis Ave.
Las Vegas, NV 89155-2212
(702) 671-2500

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

WILLIAM WITTER,
aka William Lester Witter,

Defendant.

Case No. 94C117513
Dept. No. XXIII

THIRD AMENDED JUDGMENT OF CONVICTION

WHEREAS, on the 25th day of January, 1994, Defendant, WILLIAM WITTER, aka William Lester Witter, entered a plea of Not Guilty to the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and BURGLARY (Felony), NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060; and

WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter, was tried before a Jury and the Defendant was found guilty of the crimes of COUNT

I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON (Felony); COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Felony); COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Felony); and COUNT IV – BURGLARY (Felony), in violation of NRS §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury verdict was returned on or about the 28th day of June, 1995. Thereafter, the same trial jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating circumstances in connection with the commission of said crime, to-wit:

1. The murder was committed by a person who was previously convicted of a felony involving the use or threat of violence to the person of another.

2. The murder was committed while the person was engaged in the commission of or an attempt to commit any Burglary.

3. The murder was committed while the person was engaged in the commission of or an attempt to commit a Sexual Assault.

4. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

That on or about the 13th day of July, 1995, the Jury unanimously found, beyond a reasonable doubt, that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances, and determined that the Defendant's punishment should be Death as to COUNT I – MURDER OF THE FIRST

DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located at or near Carson City, State of Nevada.

WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy District Attorney, also being present; the above-entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdict and, in addition to the $25.00 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON, Defendant was sentenced to DEATH by lethal injection; as to COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20) YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON, said sentence imposed in Count III to run consecutive to the sentence imposed in Count II; as to COUNT IV – BURGLARY, Defendant was sentenced to TEN (10) YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to run consecutive to the sentence imposed in Count III. Defendant is to pay

RESTITUTION in the amount of $2,790.00. Defendant is given 627 days credit for time served.

THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this Third Amended Judgment of Conviction as part of the record in the above entitled matter.

DATED this 7-6-17 day of June, 2017.

STEFANY MILEY
DISTRICT COURT JUDGE

STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

BY
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of Third Amended Judgment of Conviction, was made this 30th day of June, 2017, by Electronic Filing to:

DAVID ANTHONY
Email: David_Anthony@fd.org

TIFFANY L. NOCON
Email: Tiffany_Nocon@fd.org

By: _____
Employee, District Attorney's Office

SSO//ed

Eileen Davis

From: Eileen Davis
Sent: Friday, June 30, 2017 8:43 AM
To: ecf_nvchu@fd.org; tiffany_nocon@fd.org
Cc: Steven Owens; Jonathan VanBoskerck; Eileen Davis
Subject: William Witter, 94C117513.
Attachments: Witter, William, 94C117513, 3rd AJOC..pdf

Third Amended Judgment of Conviction

- This will be submitted to the Judge today, 6/30/17.

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 73444
District Court Case No. C117513

FILED
DEC 18 2019
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Affirmed."

Judgment, as quoted above, entered this 14th day of November, 2019.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this December 09, 2019.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

94C117513
CCJA
NV Supreme Court Clerks Certificate/Judgn
4882767

135 Nev., Advance Opinion 55

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73444

FILED
NOV 14 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a third amended judgment of conviction. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and David Anthony, Stacy M. Newman, and Tiffany L. Nocon, Assistant Federal Public Defenders, Las Vegas,
for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Alexander G. Chen, Chief Deputy District Attorney, Clark County,
for Respondent.

BEFORE THE COURT EN BANC.[1]

---

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

19-46626

OPINION

By the Court, STIGLICH, J.:

When a district court determines that restitution is appropriate in a criminal case, Nevada law requires that the court set forth the specific amount of restitution in the judgment of conviction. Thus, this court has held that the district court errs if it states in the judgment of conviction that restitution will be imposed in an amount to be determined sometime in the future. And going a step further, this court has held that a judgment of conviction with that kind of language is not a final judgment for purposes of an appeal to this court or for purposes of triggering the one-year deadline for filing a postconviction habeas petition. We are asked to determine whether those prior decisions allow appellant William Lester Witter to raise direct appeal issues related to his 1995 capital trial in this appeal from an amended judgment of conviction entered in 2017. They do not, for two reasons. First, the judgment of conviction in this case arose from a jury verdict that was appealable under NRS 177.015(3) regardless of any error with respect to restitution in the subsequently entered judgment of conviction. Second, and more importantly, Witter treated the 1995 judgment of conviction as final for more than two decades, litigating a direct appeal and various postconviction proceedings in state and federal court. He does not get to change course now. Although the amended judgment of conviction is appealable, the appeal is limited in scope to issues stemming from the amendment. Because Witter does not present any such issues, we affirm.

PROCEDURAL HISTORY

Witter was tried before a jury; found guilty of first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary; and sentenced to death in 1995. The district court entered a judgment of conviction setting forth the adjudication and sentence for the murder count on August 4, 1995, and amended the judgment of conviction on August 11, 1995, and September 26, 1995, to add the adjudication and sentences for the nonhomicide counts. The amended judgments further required Witter to pay restitution "in the amount of $2,790.00, with an additional amount to be determined." Witter filed a notice of appeal from the judgment of conviction, and this court affirmed the judgment of conviction and sentence on appeal. *Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996), *abrogated in part by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). Witter then litigated a timely postconviction petition for a writ of habeas corpus on the merits and two untimely and successive postconviction petitions for a writ of habeas corpus. *Witter v. State*, Docket No. 36927 (Order of Affirmance, August 10, 2001); *Witter v. State*, Docket No. 50447 (Order of Affirmance, October 20, 2009); *Witter v. State*, Docket No. 52964 (Order of Affirmance, November 17, 2010). Witter never challenged the indeterminate portion of the restitution provision or the finality of the judgment of conviction in any of the prior proceedings. Witter has also sought relief from his conviction in the federal courts.

Witter pointed to the indeterminate portion of the restitution provision in the judgment of conviction for the first time in a postconviction petition for a writ of habeas corpus filed in state court in 2017. In particular, he asserted that his conviction was not final because the judgment of

conviction contained an indeterminate restitution provision and therefore the procedural bars could not be applied to his petition. The district court agreed that the conviction was not final but nonetheless denied the petition.[2] The district court also amended the judgment of conviction to delete the indeterminate part of the restitution provision. Witter filed this appeal from the third amended judgment of conviction.

DISCUSSION

Witter argues that because of the indeterminate restitution provision in the 1995 judgment, his conviction was not final until entry of the third amended judgment of conviction in 2017. Consequently, Witter argues, the direct appeal decided in 1996 and the subsequent postconviction proceedings were null and void for lack of jurisdiction and therefore he should be allowed to raise any issues stemming from the 1995 trial without regard to the law of the case. The State argues that we lack jurisdiction over this appeal. Both parties are wrong.

NRS 176.105(1)(c) states that a judgment of conviction must include the amount and terms of any restitution. NRS 176.033(1)(c) likewise requires the district court to set forth the "amount of restitution for each victim of the offense." Despite these statutory requirements, some district courts have entered judgments of conviction that imposed restitution in an uncertain amount to be determined in the future. That clearly constitutes error, as this court first explained in *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993). *Accord Roe v. State*, 112 Nev. 733,

[2]Witter's appeal from that decision is pending in Docket No. 73431.

736, 917 P.2d 959, 960-61 (1996); *Smith v. State*, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996).

Botts and its progeny, however, did not address what effect, if any, an indeterminate restitution provision has on the finality of a judgment of conviction. *See Slaatte v. State*, 129 Nev. 219, 221, 298 P.3d 1170, 1171 (2013) ("None of our prior decisions addressed whether the judgment was final given its failure to comply with NRS 176.105(1)."). That question is significant in at least two respects: the defendant's right to appeal from a "final judgment" under NRS 177.015(3) and the starting point for the one-year period under NRS 34.726 to file a postconviction habeas petition. This court considered the question of finality when a judgment of conviction includes an indeterminate restitution provision in *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012). There, this court held that a judgment of conviction that imposed restitution in an uncertain amount was not final and therefore did not start the clock on the one-year period under NRS 34.726 for filing a postconviction habeas petition. 128 Nev. at 263, 285 P.3d at 1055. A year later in *Slaatte v. State*, this court similarly held that it lacked jurisdiction over an appeal from a judgment that imposed restitution in an indeterminate amount because the judgment was not final. 129 Nev. at 221, 298 P.3d at 1171.

The State urges us to reconsider whether a judgment that includes an indeterminate restitution provision is final. Focusing on this case, the State argues that restitution was "insignificant and utterly inconsequential to the parties." And more generally, the State argues that federal courts have suggested that the failure to include restitution in a

judgment is not a jurisdictional bar to filing an appeal. *See, e.g., Dolan v. United States*, 560 U.S. 605, 617-18 (2010); *United States v. Gilbert*, 807 F.3d 1197, 1199-1200 (9th Cir. 2015); *United States v. Muzio*, 757 F.3d 1243, 1246-47 (11th Cir. 2014). Although we acknowledge that federal courts have interpreted federal statutes differently than we have interpreted the relevant Nevada statutes, the State has not offered any compelling reasons to overrule our prior decisions. *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("[U]nder the doctrine of *stare decisis*, [this court] will not overturn [precedent] absent compelling reasons for so doing." (quoting *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008))). And we remain convinced that given our statutory scheme, the specific amount of restitution is a weighty matter that must be included in the judgment of conviction when the sentencing court determines that restitution is warranted. *See Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999) (recognizing that "[r]estitution under NRS 176.033(1)(c) is a sentencing determination," and while the defendant is not entitled to a full hearing, a defendant is entitled to challenge restitution at sentencing). In particular, the amount of restitution is not an inconsequential matter when a judgment imposing restitution "constitutes a lien in like manner as a judgment for money rendered in a civil action," NRS 176.275(1), which may be "enforced as any other judgment for money rendered in a civil action," NRS 176.275(2)(a), and "[d]oes not expire until the judgment is satisfied," NRS 176.275(2)(b). Although we adhere to our prior decisions, they are distinguishable in two respects and therefore not controlling in the circumstances presented by this case.

Our decision in *Slaatte* focused on the provision in NRS 177.015(3) that allows a defendant to appeal from a "final judgment." But NRS 177.015(3) also allows a defendant to appeal from a "verdict." That part of the jurisdiction statute was not at issue in *Slaatte* because the conviction in that case resulted from a guilty plea.[3] *See Slaatte*, 129 Nev. at 220, 298 P.3d at 1170. In contrast, the conviction in this case arose from a jury verdict. Because Witter could appeal from the verdict, the finality of the subsequently entered judgment of conviction would not have been determinative of this court's jurisdiction under NRS 177.015(3), unlike in *Slaatte*.[4]

More importantly, our prior cases do not stand for the proposition that a defendant can treat a judgment of conviction with an indeterminate restitution provision as final by litigating a direct appeal and postconviction habeas petitions only to later change course and argue that the judgment was never final. The defendants in the two cases addressing finality, *Whitehead* and *Slaatte*, raised the error regarding the indeterminate restitution provision during the first proceeding in which they challenged the validity of their judgments of conviction—on direct appeal (*Slaatte*, 129 Nev. at 220, 298 P.3d at 1170), and in a first

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[3]The defendant in *Whitehead* had also pleaded guilty. *See Whitehead*, 128 Nev. at 261, 285 P.3d at 1054.

[4]Contrary to Witter's argument, *Slaatte* does not implicate this court's subject matter jurisdiction. Nev. Const. art. 6, § 4 (providing that the Nevada Supreme Court has appellate jurisdiction "in all criminal cases in which the offense charged is within the original jurisdiction of the district courts").

postconviction habeas petition where no direct appeal had been filed (*Whitehead*, 128 Nev. at 261, 285 P.3d at 1054). Like those defendants, Witter had the benefit of *Botts*, which had been decided before his trial and conviction. Witter, however, litigated a direct appeal and state and federal postconviction proceedings without raising any issues about the indeterminate restitution provision.

This distinction implicates finality, a compelling consideration for courts when reviewing a challenge to the validity of a conviction. *Trujillo v. State*, 129 Nev. 706, 717, 310 P.3d 594, 601 (2013) (recognizing that this court has "long emphasized the importance of the finality of judgments"). A challenge to a conviction made years after the conviction is a burden on the parties and the courts because "[m]emories of the crime may diminish and become attenuated," and the record may not be sufficiently preserved. *Groesbeck v. Warden*, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984). Thus, the concern expressed in *Whitehead* that piecemeal litigation could result from restitution being imposed in an indeterminate amount, 128 Nev. at 263, 285 P.3d at 1055, must be counterbalanced against the interest in the finality of a conviction. This court has long precluded a litigant from arguing that a judgment was not final or that this court lacked jurisdiction in a prior appeal when the party treated the judgment as final. *See, e.g.*, *Renfro v. Forman*, 99 Nev. 70, 71-72, 657 P.2d 1151, 1151-52 (1983) (holding that a party is estopped from asserting that the judgment was not final after treating the judgment as final); *Gamble v. Silver Peak Mines*, 35 Nev. 319, 323-26, 133 P. 936, 937-38 (1913) (determining that when a party has treated a judgment as final,

that party may not later argue that this court lacked jurisdiction over the appeal because the judgment was not final); *Costello v. Scott*, 30 Nev. 43, 88, 94 P. 222, 223 (1908) ("Even if there was room for argument as to whether the judgment rendered in this case was a final judgment, appellants by treating it as such, and appealing therefrom, are estopped to deny the finality of the decree."). From 1995 to 2017, Witter treated the judgment of conviction as a final judgment. He therefore is estopped from now arguing that the judgment was not final and that the subsequent proceedings were null and void for lack of jurisdiction.[5]

Finally, we reject the State's argument that this court lacks jurisdiction over this appeal. An amended judgment of conviction is substantively appealable under NRS 177.015(3). *See Jackson v. State*, 133 Nev. 880, 881-82, 410 P.3d 1004, 1006 (Ct. App. 2017). The scope of the appeal is limited, however, to issues arising from the amendment. *Id.*; *see also Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (recognizing that an amendment to a judgment of conviction may provide good cause to present claims challenging the amendment in an untimely postconviction petition for a writ of habeas corpus). Here, Witter only raises issues arising from the 1995 trial. Because those issues are not properly before us in this appeal, we have not considered them and express no opinion as to their merit. And because Witter has not demonstrated any

[5]We conclude that Witter's argument that the State invited the error by requesting an amendment to the judgment of conviction to eliminate the indeterminate restitution provision is without merit. Further, in light of our decision, we decline to address whether *Whitehead* and *Slaatte* apply retroactively.

error with respect to the amendment to his judgment of conviction, we affirm the third amended judgment of conviction.

_____, J.
Stiglich

We concur:

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cadish

_____, J.
Silver

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: 12/9/19
Supreme Court Clerk, State of Nevada
By S. Young Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 73444
District Court Case No. C117513

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.
Enclosed Exhibits – Original State's Exhibits (from Guilt-Phase) 10, 18, 19, 20, 21, 22, 23, 28, 35, 36, 41 & 51; and (from Penalty-Phase) 4, 6, 7, 10 & 11.

DATE: December 09, 2019

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):
Hon. Stefany Miley, District Judge
Attorney General/Carson City \ Aaron D. Ford, Attorney General
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney
Federal Public Defender/Las Vegas \ Rene L. Valladares
Federal Public Defender/Las Vegas \ David Anthony
Federal Public Defender/Las Vegas \ Tiffany L. Nocon
Federal Public Defender/Las Vegas \ Stacy M. Newman

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on DEC 18 2019.

HEATHER UNGERMANN
Deputy District Court Clerk

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DEC 13 2019
CLERK OF THE COURT