

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LESTER WITTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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)
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Electronically Filed
Nov 03 2017 11:50 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 73444

MOTION TO DISMISS APPEAL

As an alternative to the consolidation motion the State has previously filed in this appeal, the State now also moves to dismiss the instant appeal as Witter is not an “aggrieved” party within the meaning of NRS 177.015 and has no standing to seek appellate review of the Amended Judgment he specifically requested. The instant appeal should be dismissed for lack of jurisdiction.

On July 10, 2017, Witter filed a Notice of Appeal from the Third Amended Judgment of Conviction submitted by the State on June 30, 2017, and signed by the District Court on July 10, 2017. That Third Amended Judgment is attached hereto as Exhibit 1. When compared to the Second Amended Judgment, attached hereto as Exhibit 2, the only change was to remove the following language on page 4: “. . . with an additional amount [of restitution] to be determined.” This change was in Witter’s favor as he is now no longer subject to this additional restitution. This change was also made upon the written motion by Witter and at the specific instance

of his attorney. Exhibit 3. In fact, Witter's motion included a proposed judgment identical to that which he is now appealing. Id.

Although the State had initially requested permission to file the Amended Judgment for its own purposes, the State changed its mind and decided not to submit one. Exhibit 4. In fact, the State filed a written opposition against the filing of the Amended Judgment so as to clarify that such was being requested by Witter, not by the State. Id. Although the State was ultimately ordered to and did in fact submit the Third Amended Judgment, such was done at Witter's specific request and for his benefit. Exhibit 5.

Only an "aggrieved" party may appeal. NRS 177.015. An "aggrieved" party is one whose "personal right or right of property is adversely and substantially affected." Estate of Hughes v. First Nat'l Bank, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980). The party who wins below and receives full relief, is not aggrieved and may not appeal. Ford v. Showboat Operating Co., 110 Nev. 752, 757, 877 P.2d 546, 550 (1994) ("A party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved."); see also Dynamic Transit v. Trans Pac. Ventures, 128 Nev. 755, fn2, 291 P.3d 114 (2012); Farnham v. Farnham, 80 Nev. 180, 184, 391 P.2d 26 (1964) (Appellant "won the case below and is not an 'aggrieved party' entitled to appeal"). Nor is there

generally a right to appeal from a judgment to which the party has consented. 69
ALR2d 755.

WHEREFORE, the State respectfully requests that the instant appeal be
dismissed for lack of jurisdiction.

Dated this 3rd day of November, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 3rd, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

DAVIDANTHONY
Assistant Federal Public Defender

STEVEN S. OWENS
Chief Deputy District Attorney

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

SSO//ed

EXHIBIT 1

EXHIBIT 1

Steven D. Grierson

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

1 I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON
2 (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY WEAPON
3 (Felony); COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY
4 WEAPON (Felony); and COUNT IV - BURGLARY (Felony), in violation of NRS
5 §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury
6 verdict was returned on or about the 28th day of June, 1995. Thereafter, the same
7 trial jury, deliberating in the penalty phase of said trial, in accordance with the
8 provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating
9 circumstances in connection with the commission of said crime, to-wit:

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

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

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

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

18 That on or about the 13th day of July, 1995, the Jury unanimously found,
19 beyond a reasonable doubt, that there were no mitigating circumstances sufficient to
20 outweigh the aggravating circumstance or circumstances, and determined that the
21 Defendant's punishment should be Death as to COUNT I - MURDER OF THE FIRST
22
23

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

3 WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being
4 present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and
5 KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy
6 District Attorney, also being present; the above-entitled Court did adjudge Defendant
7 guilty thereof by reason of said trial and verdict and, in addition to the \$25.00
8 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT
9 I - MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON,
10 Defendant was sentenced to DEATH by lethal injection; as to COUNT II - ATTEMPT
11 MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to
12 TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT
13 MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada
14 Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III -
15 ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant
16 was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the
17 ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20)
18 YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON,
19 said sentence imposed in Count III to run consecutive to the sentence imposed in
20 Count II; as to COUNT IV - BURGLARY, Defendant was sentenced to TEN (10)
21 YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to
22 run consecutive to the sentence imposed in Count III. Defendant is to pay
23

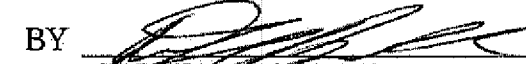
1 RESTITUTION in the amount of \$2,790.00. Defendant is given 627 days credit for
2 time served.

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

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

7
8 
9 STEFANY MILEY
DISTRICT COURT JUDGE MSB

10
11 STEVEN B. WOLFSON
DISTRICT ATTORNEY
Nevada Bar #001565

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

1 CERTIFICATE OF ELECTRONIC FILING

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

4 DAVID ANTHONY
5 Email: David_Anthony@fd.org

6 TIFFANY L. NOCON
7 Email: Tiffany_Nocon@fd.org

8 *[Signature]*
9 By: _____
 Employee, District Attorney's Office

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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.

EXHIBIT 2

EXHIBIT 2

FILED

SEP 26 10 47 AM '95

Letitia S. ...
CLERK

1 STEWART L. BELL
2 DISTRICT ATTORNEY
3 Nevada Bar #001799
4 200 S. Third Street
5 Las Vegas, Nevada 89155
6 (702) 455-4711
7 Attorney for Plaintiff
8 THE STATE OF NEVADA

DISTRICT COURT

CLARK COUNTY, NEVADA

9	THE STATE OF NEVADA,)	CASE NO.	C117513
)		
10	Plaintiff,)	DEPT. NO.	IX
)		
11	-vs-)	DOCKET NO.	W
)		
12	WILLIAM WITTER,)		
	aka William Lester Witter,)		
13	#1204227)		
)		
14	Defendant.)		

SECOND AMENDED
JUDGMENT OF CONVICTION

17 WHEREAS, on the 25th day of January, 1994, Defendant, WILLIAM
18 WITTER, aka William Lester Witter, entered a plea of Not Guilty to
19 the crimes of MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT
20 MURDER WITH USE OF A DEADLY WEAPON (Felony); ATTEMPT SEXUAL ASSAULT
21 WITH USE OF A DEADLY WEAPON (Felony); and BURGLARY (Felony), NRS
22 §200.010, §200.030, §193.165, §193.330, §200.364, §200.366,
23 §205.060; and

24 WHEREAS, the Defendant WILLIAM WITTER, aka William Lester
25 Witter, was tried before a Jury and the Defendant was found guilty
26 of the crimes of COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF
27 A DEADLY WEAPON (Felony); COUNT II - ATTEMPT MURDER WITH USE OF A
28 DEADLY WEAPON (Felony); COUNT III - ATTEMPT SEXUAL ASSAULT WITH USE

SEP 21 1995

1 OF A DEADLY WEAPON (Felony); and COUNT IV - BURGLARY (Felony), in
2 violation of NRS §200.010, §200.030, §193.165, §193.330, §200.364,
3 §200.366, §205.060, and the Jury verdict was returned on or about
4 the 28th day of June, 1995. Thereafter, the same trial jury,
5 deliberating in the penalty phase of said trial, in accordance with
6 the provisions of NRS §175.552 and §175.554, found that there were
7 four (4) aggravating circumstances in connection with the
8 commission of said crime, to-wit:

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

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

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

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

18 That on or about the 13th day of July, 1995, the Jury
19 unanimously found, beyond a reasonable doubt, that there were no
20 mitigating circumstances sufficient to outweigh the aggravating
21 circumstance or circumstances, and determined that the Defendant's
22 punishment should be Death as to COUNT I - MURDER OF THE FIRST
23 DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison
24 located at or near Carson City, State of Nevada.

25 WHEREAS, thereafter, on the 3rd day of August, 1995, the
26 Defendant being present in court with his counsel, PHILIP J. KOHN,
27 Deputy Public Defender, and KEDRIC A. BASSETT, Deputy Public
28 Defender, and GARY L. GUYMON, Deputy District Attorney, also being

1 present; the above-entitled Court did adjudge Defendant guilty
2 thereof by reason of said trial and verdict and, in addition to the
3 \$25.00 Administrative Assessment Fee, SENTENCED Defendant, as
4 follows: As to COUNT I - MURDER OF THE FIRST DEGREE WITH USE OF A
5 DEADLY WEAPON, Defendant was sentenced to DEATH by lethal
6 injection; as to COUNT II - ATTEMPT MURDER WITH USE OF A DEADLY
7 WEAPON, Defendant was sentenced to TWENTY (20) YEARS in the Nevada
8 Department of Prisons for the ATTEMPT MURDER, plus an equal and
9 consecutive TWENTY (20) YEARS in the Nevada Department of Prisons
10 for the USE OF A DEADLY WEAPON; as to COUNT III - ATTEMPT SEXUAL
11 ASSAULT WITH USE OF A DEADLY WEAPON, Defendant was sentenced to
12 TWENTY (20) YEARS in the Nevada Department of Prisons for the
13 ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20)
14 YEARS in the Nevada Department of Prisons for the USE OF A DEADLY
15 WEAPON, said sentence imposed in Count III to run consecutive to
16 the sentence imposed in Count II; as to COUNT IV - BURGLARY,
17 Defendant was sentenced to TEN (10) YEARS in the Nevada Department
18 of Prisons, said sentence imposed in Count IV to run consecutive to
19 the sentence imposed in Count III. Defendant is to pay RESTITUTION

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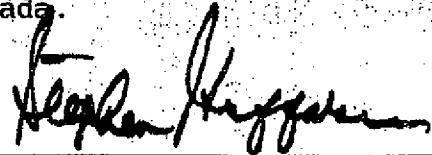
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1 in the amount of \$2,790.00, with an additional amount to be
2 determined. Defendant is given 627 days credit for time served.

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

6 DATED this 25 day of September, 1995, in the City of Las
7 Vegas, County of Clark, State of Nevada.

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DISTRICT JUDGE

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LVMPD DR#9311141809
28 1° MURDER W/WPN - F

EXHIBIT 3

EXHIBIT 3



1 **NOTM**
2 RENE L. VALLADARES
3 Federal Public Defender
4 DAVID ANTHONY
5 Assistant Federal Public Defender
6 Nevada State Bar No. 7978
7 David_Anthony@fd.org
8 TIFFANY L. NOCON
9 Assistant Federal Public Defender
10 Nevada State Bar No. 14318C
11 Tiffany_Nocon@fd.org
12 411 E. Bonneville Avenue, Ste. 250
13 Las Vegas, NV 89101
14 (702) 388-6577
15 (702) 388-5819 (fax)

16 Attorneys for Petitioner

17
18 DISTRICT COURT
19 CLARK COUNTY, NEVADA

20 WILLIAM WITTER,

21 Petitioner,

22 v.

23 TIMOTHY FILSON, Warden, Ely State
Prison, and ADAM PAUL LAXALT,
Attorney General for the State of Nevada.

Respondents.

Case No. C117513
Dept. No. XXIII

**NOTICE OF MOTION AND MOTION
FOR ORDER**

(Death Penalty Habeas Corpus Case)

18 Petitioner William Witter hereby moves the Court to enter the attached
19 Proposed Second Amended Judgment of Conviction. See Ex. 1. Mr. Witter bases this
20 motion on the attached memorandum of points and authorities, attached Declaration

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1 of Assistant Federal Public Defender David Anthony, see Ex. 2, and the entire file in
2 this matter.

3 DATED this 7th day of June, 2017.

4 Respectfully submitted,
5 RENE L. VALLADARES
6 Federal Public Defender

7 /s/ David Anthony
8 DAVID ANTHONY
9 Assistant Federal Public Defender

10 /s/ Tiffany L. Nocon
11 TIFFANY L. NOCON
12 Assistant Federal Public Defender
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PLEASE TAKE NOTICE that the MOTION FOR ORDER filed June 7, 2017,
will be heard on the 19 day of June 2017, at the hour of 9:30 a.m. ~~p.m.~~,
in Department 23 of the District Court.

Respectfully submitted,
RENE L. VALLADARES
 Federal Public Defender

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On January 11, 2017, Mr. Witter filed a Petition for a Writ of Habeas Corpus.
4 He explained that this petition was not subject to procedural default because, inter
5 alia, the amended judgment of conviction entered against him on August 11, 1995,
6 was not a final appealable judgment as it failed to specify the amount of restitution.
7 See Whitehead v. State, 128 Nev. __, 285 P.3d 1053 (2012) (en banc); Slaatte v. State,
8 129 Nev. __, 298 P.3d 1170 (2013) (per curiam).

9 This Court heard argument on Mr. Witter's petition on April 19, 2017. See Ex.
10 3 (Transcript of Proceedings). This Court agreed with Mr. Witter's position regarding
11 the effect of Whitehead and Slaatte. See id. at 2-3. This Court expressly found,
12 consistent with Whitehead and Slaatte, that the prior amended judgment of conviction
13 was not final because it imposed "an additional amount [of restitution] to be
14 determined at a later date." Id. The Court subsequently denied Mr. Witter's petition
15 on the merits. See id. at 12.

16 The Court then directed the State to prepare an order consistent with its
17 findings, including "the Court's findings on the timing issue." See id. at 13-14. The
18 State represented that it would file an amended judgment of conviction in order to
19 address this Court's finding regarding the non-finality of the earlier amended
20 judgment of conviction:

21 MR. OWENS: What I would like to do is along with these findings is
22 submit an amended judgment. I guess it would be a second amended
23 judgment but would differ from the last amended judgment in simply
 striking the language that says something to the effect of 'and an
 additional amount of restitution to be determined in the future.' If I –

1 THE COURT: That may be a suggestion if you want to ensure finality
given the Whitehead and Slaatte cases.

2 MR. OWENS: You know, I don't agree with the Court that its necessary,
3 but to avoid this issue in the future, and I'm all about doing what we can
4 to avoid problems in the future, it won't help us with this case or this
appeal going up, but for the next petition it might start the time bar. If
5 the court later agrees with you that, yeah, the time for – when your time
bar never started then I'd like to get it started with an amended
judgment so I'll submit that along with the findings.

6 Id. at 14.

7 The State submitted its Proposed Findings of Fact, Conclusions of Law, and
8 Order to the Court on May 17, 2017, which the Court entered on May 31, 2017 and
9 filed on June 5, 2017. Ex. 4 (Notice of Entry of Findings of Fact, Conclusions of Law
10 and Order). Therein, it correctly reflected the Court's findings that the first amended
11 judgment of conviction was a non-final order:

12 This Court finds that the instant petition, which is a fourth petition for
a writ of habeas corpus by this Petitioner, is timely filed because the last
13 Judgment of Conviction, although it does set a restitution amount, it
also says an additional amount to be determined at a later date.
Accordingly, it is not a final judgment and the time and procedural bars
14 in NRS 34 never started to run. See Whitehead v. State, 128 Nev. __,
285 P.3d 1053 (2012); Slaatte v. State, 129 Nev. __, 298 P.3d 1170, 1171
15 (2013) ("Because the judgment of conviction contemplates restitution in
an uncertain amount, it is not final and therefore is not appealable.").

16 See id. at 2.

17 Contrary to its representations to this Court, however, the State did not submit
18 an amended judgment. Mr. Witter, through counsel, inquired about this omission on
19 May 31, 2017, and offered a proposed second amended judgment consistent with the
20 State's intent to "strik[e] the language that says something to the effect of 'and an
21 additional amount of restitution to be determined in the future.'" See Ex. 1 (Decl. of
22 Assistant Federal Public Defender David Anthony). The next day, June 1, 2017, the
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1 State responded that it had changed course and no longer intended to file an amended
2 judgment of conviction. Id.

3 **II. A SECOND AMENDED JUDGMENT OF CONVICTION MUST BE**
4 **ENTERED**

5 To ensure proper jurisdiction, this Court must enter the attached Proposed
6 Second Amended Judgment of Conviction, Ex. 3. On the one hand, this Court has
7 entered notice of entry of its order denying his petition, triggering, in the usual case,
8 his obligation to file a notice of appeal within thirty days. See NRAP 4(a)(1). On the
9 other hand, this Court also has found that the operative judgment of conviction in
10 this case "is not a final judgment" and therefore the Nevada Supreme Court is without
11 jurisdiction to consider any appeal of Mr. Witter's case until the deficiency is cured.
12 See Slaatte, 129 Nev. ___, 298 P.3d at 1170.

13 In light of Slaatte and Whitehead, Mr. Witter submits that the only way to give
14 effect to this Court's order denying his petition, and to permit his appeal on the merits
15 of his petition, is to enter the Proposed Second Amended Judgment of Conviction
16 envisioned by the State at the hearing on his petition.

17 ///

18 ///

1 **III. CONCLUSION**

2 Mr. Witter requests this Court sign and enter the Proposed Second Amended
3 Judgment of Conviction.

4 DATED this 7th day of June, 2017.

5 Respectfully submitted,
6 RENE L. VALLADARES
Federal Public Defender

7 /s/ David Anthony
8 DAVID ANTHONY
Assistant Federal Public Defender

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

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

/s/ Stephanie Young

EXHIBIT 1

EXHIBIT 1

1 **AJOC**

2 RENE L. VALLADARES

3 Federal Public Defender

4 Nevada Bar No. 11479

5 DAVID ANTHONY

6 Assistant Federal Public Defender

7 Nevada Bar No. 7978

8 David_Anthony@fd.org

9 411 E. Bonneville, Ste. 250

10 Las Vegas, Nevada 89101

11 (702) 388-6577

12 (702) 388-5819 (Fax)

13 Attorneys for William Witter

14 DISTRICT COURT
15 CLARK COUNTY, NEVADA

16 THE STATE OF NEVADA,

17 Plaintiff,

18 v.

19 WILLIAM WITTER,
20 aka William Lester Witter,

21 Defendant.

Case No. 117513

Dept. No. XXIII

22 **PROPOSED SECOND AMENDED**
23 **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

1 WHEREAS, the Defendant WILLIAM WITTER, aka William Lester Witter,
2 was tried before a Jury and the Defendant was found guilty of the crimes of COUNT
3 I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON
4 (Felony); COUNT II – ATTEMPT MURDER WITH USE OF A DEADLY WEAPON
5 (Felony); COUNT III – ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY
6 WEAPON (Felony); and COUNT IV – BURGLARY (Felony), in violation of NRS
7 §200.010, §200.030, §193.165, §193.330, §200.364, §200.366, §205.060, and the Jury
8 verdict was returned on or about the 28th day of June, 1995. Thereafter, the same
9 trial jury, deliberating in the penalty phase of said trial, in accordance with the
10 provisions of NRS §175.552 and §175.554, found that there were four (4) aggravating
11 circumstances in connection with the commission of said crime, to-wit:

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

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

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

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

20 That on or about the 13th day of July, 1995, the Jury unanimously found,
21 beyond a reasonable doubt, that there were no mitigating circumstances sufficient to
22 outweigh the aggravating circumstance or circumstances, and determined that the
23

1 Defendant's punishment should be Death as to COUNT I – MURDER OF THE FIRST
2 DEGREE WITH USE OF A DEADLY WEAPON in the Nevada State Prison located
3 at or near Carson City, State of Nevada.

4 WHEREAS, thereafter, on the 3rd day of August, 1995, the Defendant being
5 present in court with his counsel, PHILIP J. KOHN, Deputy Public Defender, and
6 KEDRIC A. BASSETT, Deputy Public Defender, and GARY L. GUYMON, Deputy
7 District Attorney, also being present; the above-entitled Court did adjudge Defendant
8 guilty thereof by reason of said trial and verdict and, in addition to the \$25.00
9 Administrative Assessment Fee, SENTENCED Defendant, as follows: As to COUNT
10 I – MURDER OF THE FIRST DEGREE WITH USE OF A DEADLY WEAPON,
11 Defendant was sentenced to DEATH by lethal injection; as to COUNT II – ATTEMPT
12 MURDER WITH USE OF A DEADLY WEAPON, Defendant was sentenced to
13 TWENTY (20) YEARS in the Nevada Department of Prisons for the ATTEMPT
14 MURDER, plus an equal and consecutive TWENTY (20) YEARS in the Nevada
15 Department of Prisons for the USE OF A DEADLY WEAPON; as to COUNT III –
16 ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON, Defendant
17 was sentenced to TWENTY (20) YEARS in the Nevada Department of Prisons for the
18 ATTEMPT SEXUAL ASSAULT, plus an equal and consecutive TWENTY (20)
19 YEARS in the Nevada Department of Prisons for the USE OF A DEADLY WEAPON,
20 said sentence imposed in Count III to run consecutive to the sentence imposed in
21 Count II; as to COUNT IV – BURGLARY, Defendant was sentenced to TEN (10)
22 YEARS in the Nevada Department of Prisons, said sentence imposed in Count IV to
23

1 run consecutive to the sentence imposed in Count III. Defendant is to pay
2 RESTITUTION in the amount of \$2,790.00. Defendant is given 627 days credit for
3 time served.

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

7 DATED this ____ day of June, 2017.

8 _____
District Judge
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EXHIBIT 2

EXHIBIT 2

1 DECLARATION OF DAVID ANTHONY

2 I, David Anthony, declare as follows:

3 1. I am an attorney at law admitted to practice before this Court and employed
4 as an Assistant Federal Public Defender. I represent Petitioner William Witter in
5 this capital case.

6 2. I was present at the April 19, 2017, hearing on Mr. Witter's petition, at which
7 time this Court denied Mr. Witter's claims premised on Hurst v. Florida, 136 S. Ct.
8 616 (2016), on the merits. The Court instructed Deputy District Attorney Steven S.
9 Owens to prepare a written order to this effect.

10 3. At the hearing, Mr. Owens represented that he would additionally file with the
11 Court a second amended judgment of conviction to address this Court's finding that
12 the previous judgment of conviction, entered August 11, 1995, was a non-final order.
13 Specifically, Mr. Owens represented that he would remedy this error by submitting
14 a new judgment "striking the language that says something to the effect of 'and an
15 additional amount of restitution to be determined in the future.'"

16 4. On May 10, 2017, Mr. Owens caused a proposed order denying Mr. Witter's
17 petition to be sent to my office. This proposed order correctly reflected this Court's
18 finding that the August 11, 1995, judgment "is not a final judgment and the time and
19 procedural bars in NRS 34 never started to run," and otherwise accurately reflected
20 the findings this Court made on the record. Accordingly, I lodged no objection to the
21 proposed order, presuming at that time that Mr. Owens would follow through on his
22 stated intent to file an amended judgment of conviction. The proposed order was
23

1 delivered to the Court on or about May 17, 2017.

2 5. On May 31, 2017, still not having received any information about the amended
3 judgment of conviction, I e-mailed Mr. Owens inquiring about its status and attached
4 a proposed amended judgment of conviction conforming to the change Mr. Owens
5 suggested at the hearing.
6

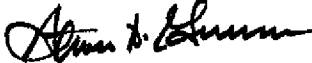
7 6. On June 1, 2017, Mr. Owens responded that he did not feel that it was
8 necessary to file an amended judgment of conviction, and did not intend to do so at
9 the present time.
10

11 I declare under penalty of perjury that the foregoing is true and correct and this
12 declaration was executed on June 7, 2017, in Las Vegas, Nevada.
13

14 /s/ David Anthony
15 DAVID ANTHONY
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EXHIBIT 3

EXHIBIT 3


CLERK OF THE COURT

1 RTRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

6
7 THE STATE OF NEVADA,
8
9 Plaintiff,
10 vs.
11 WILLIAM L. WITTER,
12 Defendant.
13

CASE NO.: 94C117513

DEPT. XXIII

TRANSCRIPT OF PROCEEDINGS

14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE
15 WEDNESDAY, APRIL 19, 2017

16 ***DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION***

17 ***DEFENDANT'S OPPOSITION TO STATE'S RESPONSE AND MOTION TO***
18 ***DISMISS***

19 APPEARANCES:

20 For the State:

STEVEN S. OWENS, ESQ.
Chief Deputy District Attorney

22 For the Defendant:

23 DAVID ANTHONY, ESQ.
TIFFANY L. NOCON, ESQ.
24 Assistant Federal Public Defenders

25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 LAS VEGAS, NEVADA, WEDNESDAY, APRIL 19, 2017 at 10:53 A.M.

2
3 THE RECORDER: Page 16, C117513; Witter.

4 THE COURT: All right, so it's State of Nevada -- its Witter versus State
5 of Nevada, C -- you know 117513. It's a motion to dismiss the 4th habeas
6 petition. There's a petition for habeas corpus and there's a motion to dismiss it
7 and then I have a reply and opposition as well.

8 Good morning, everyone; if you want to introduce yourself for the
9 record.

10 MR. ANTHONY: Good afternoon, Your Honor, David Anthony from the
11 Federal Public Defender for William Witter who's in custody.

12 THE COURT: Okay.

13 MR. ANTHONY: You want to introduce yourself?

14 MS. NOCON: Oh, Tiffany Nocon also from the Federal Public Defenders
15 Office on behalf of Mr. Witter.

16 MR. OWENS: Your Honor, Steve Owens for the State.

17 THE COURT: Okay, so there's a couple of claims brought up. One of the
18 first issues brought up was the timeliness issue. And I know that the State's
19 position is that it's untimely and that we'd go off the original judgment of
20 conviction. I'll be frank with you, I went through and I looked at Slaatte versus
21 State and Whitehead versus State and I would tend to agree with the Defense
22 that the way those cases are -- well, the way the holding came out in those
23 particular cases, that unless there's a JOC that I didn't see, that it would be
24 timely. It looks like that last judgment of conviction, although it does set a
25 restitution amount, it also says an additional amount to be determined at a later

1 date. I don't show where there's been any additional judgments of conviction
2 subsequent to that second one.

3 MR. OWENS: You know I'll be happy to address that.

4 THE COURT: And the other thing I want to address is I know that the
5 case law says if it appears to be clerical, but I don't think that the -- but I don't
6 think that it's a clerical matter because when you look at the first judgment of
7 conviction it sets forth the sentence on the murder charge. The second
8 judgment of conviction, it not only sets forth the sentence for the murder
9 charge, it also sets forth the sentence on the additional counts on which the
10 Defendant was convicted, so I just don't see where that could be clerical in
11 nature. I mean I understand -- not being there, my guess is probably it was just
12 inadvertently left out. But on its face, I don't think that you can find that its -- I
13 don't think the Court can find that it's clerical in nature. So unless you have
14 something I don't know, it appears that everything is timely by the Defense.

15 MR. OWENS: I was under the impression that the original judgment had
16 sentenced on everything --

17 THE COURT: Let me look at it.

18 MR. OWENS: -- other than the amended just came in and sentenced --
19 and added some restitution in.

20 THE COURT: Let me look at it. Judgment of Conviction; the original
21 one's '95. No, it doesn't. If you look at it, you go through and there's no -- it
22 sentences on the murder. It doesn't sentence on the other ones. Do you see it,
23 the August 4th, 1995 judgment of conviction?

24 MR. OWENS: Yeah, I'm looking at the August 4th one right now. Well, I
25 -- you know I would say that unlike those other cases that the Defense has

1 cited where they were remanded because it was improper to take an appeal
2 because the court said those aren't -- that's not a final judgment, it leaves an
3 amount uncertain of restitution. Here we had a direct appeal. It was treated as
4 a final judgment.

5 THE COURT: Yeah, and -- but the appeal was obviously subsequent to
6 the Court's clarification in the Slaatte and the Whitehead case.

7 MR. ANTHONY: And the other thing that I might add, Your Honor, is is
8 that really the conduct of the parties can't confer appellate jurisdiction on the
9 Nevada Supreme Court. That's why they dismissed the appeal in the Slaatte
10 case is that jurisdiction either exists or it doesn't and it's not something that
11 can be conferred by the parties, so.

12 THE COURT: All right, my guess is it was just never raised previously.
13 You know it's never been --

14 MR. OWENS: Well, if the Court's telling me that after this many years
15 they can go and find a defect like this and it's not procedurally barred, and even
16 though there was a direct appeal with issuance of a remittitur and you're telling
17 me that this case was never final all along and we got to redo a capital case,
18 there's been no other published --

19 THE COURT: That's not what I'm telling you at all. What I'm telling you
20 is -- you know honestly, if I read between the lines, my guess is what happened
21 is -- I don't have access to what happened you know twenty plus years ago;
22 okay? My guess is probably she -- he was sentenced on everything at the
23 original hearing date and the judgment of conviction inadvertently did not
24 include the sentence for all the other counts, but that's just me guessing. All I
25 can see is I have a judgment of conviction that convicts him -- that sentences --

1 adjudicates him on the murder charge. Then I have a subsequent judgment of
2 conviction that comes along not too long later and adds a sentence for all the
3 other charges on which the Defendant was convicted. In addition, it adds a
4 restitution amount with the additional caveat to be determined; okay? When
5 you look at the subsequent -- the case law that's come along, what, 15, 20
6 years later, I think the Supreme Court was pretty clear that for purposes of
7 determining timing issues, and I say timing issues and that's for
8 post-conviction relief, that if there's an open issue in that judgment of
9 conviction the -- its not final and that doesn't start the timing -- the timing
10 doesn't start to run. That's all I'm saying. I'm not saying you're going to redo
11 this murder case.

12 MR. OWENS: Okay.

13 THE COURT: So, that -- where that comes into play in this case is if
14 those cases had not come out I think the State would have a very good
15 argument that its time barred. I mean quite simply there's been many, many,
16 many years passed since remittitur on the direct appeal, remittitur on the post-
17 conviction petition for habeas corpus, but you know those cases came out and I
18 don't know any other way to reconcile them.

19 MR. OWENS: I see what Your Honor is saying now. So, if --

20 THE COURT: So that would mean we go into the merits.

21 MR. OWENS: Well, there's still a successive petition bar. This is --
22 there's been -- this is, what, the fourth petition bar? It has nothing to do with
23 time. It has to do with the number of petitions that have been filed regardless of
24 whether or not they're still timely and that the one year time bar never started
25 ticking. This is their fourth habeas petition. Their last one was procedurally

1 barred because it was successive. I don't think that argument gets them around
2 the successive petition bar and being here today on a fourth. So, I think we still
3 have bars.

4 But let me jump to the merits on the Hurst issue because really,
5 yeah, we have raised procedural bars. Those are mandatory. The Court's got to
6 deal with those. But the merits of the Hurst issue to me is very simple. I don't
7 see how any reasonable attorney can go read the Hurst case and come out of it
8 with the interpretation that the Federal Public Defender has. I guess reasonable
9 minds can disagree about just about anything, but I haven't found any court
10 anywhere in the country that has attributed to it the interpretation that they
11 have.

12 They've got a case from back east that I've gone and read and,
13 yeah, there's a court there and there's a few other courts elsewhere that have
14 applied the beyond a reasonable doubt standard to the weighing of aggravating
15 and mitigators, but their case -- is it Delaware?

16 MR. ANTHONY: Delaware; correct.

17 MR. OWENS: My reading of that case is that part of their opinion was
18 not in any way premised upon the Hurst decision 'cause Hurst doesn't say that
19 and they didn't rely on Hurst for coming up with that part of their ruling. They
20 based that on Delaware state law and the interpretation of other cases. And
21 there's a few other jurisdictions that do the weighing beyond a reasonable
22 doubt but it's not based on Hurst. So, I just fundamentally disagree with them
23 on Hurst.

24 If Your Honor wants to reach the merits of that as an alternative
25 decision if overcoming the one year time bar, they still have to show prejudice

1 and Hurst does not give them the relief and remedy that they're looking for if it
2 did. We're talking about almost every death sentence in the country would be
3 overturned. And here we are more than a year since Hurst publication; nobody's
4 interpreted Hurst that way and overturned a death sentence based on Hurst
5 saying that, oh, you didn't use the beyond a reasonable doubt standard on the
6 weighing of aggravating and mitigators. There's tons of federal cases out there
7 that have looked at this issue and said you don't have to do weighing beyond a
8 reasonable doubt. I cited to all these circuits that have looked at this issue and
9 none of those cases were addressed by the court in Hurst. None of them were
10 overturned in Hurst. The argument they've got, if they're right, it would be
11 astronomically devastating to the death penalty across the country. And the
12 fact that it's not belies that they've got an issue here.

13 I don't know what else to say on it. I -- they filed this in 20
14 different death penalty cases here in Clark County and we're going in one by
15 one and ticking them off. We're [indiscernible]. Judge Cadish has denied this in
16 two capital cases. You're the third judge to look at this issue as far as I am
17 aware. Jonathan Vanboskerck might have had it.

18 THE COURT: You know I actually had this issue on calendar twice today
19 in a pending case and in this case.

20 MR. OWENS: Okay. Well, I obviously don't have them all. I've got 20 of
21 them myself and you'd be the third one in my stack. The issue's floating around
22 out there. I'm not aware of anyone granting them relief so far. They may yet
23 get relief. But that's where we're at with this and if you have further questions
24 I'll be happy to answer but they -- my brief covers everything else I wanted to
25 say.

1 THE COURT: I tend to agree with the State upon reading Hurst. I just
2 don't see how you got to the position you have.

3 MR. ANTHONY: Could --

4 THE COURT: I mean Hurst does repeatedly reference Ring which was
5 many, many years prior. And I just don't -- looking at the facts of Hurst I just
6 even know how you're applying them to this situation because as in this -- I'm
7 sorry, I'll let you argue.

8 MR. ANTHONY: Well, first of all, Your Honor, one of the things that I
9 think is unique about the Hurst decision, and I'm looking at section 2 of the
10 decision. I'm sure at this point we've all read it probably several times.

11 THE COURT: Yes.

12 MR. ANTHONY: The court refers to findings plural and they refer to two
13 different sets of findings: one regarding the existence of the aggravating
14 circumstances and one finding regarding the weighing of the aggravating
15 circumstances against the mitigation. Now, the reason that I believe that our
16 reading of Hurst is supportable is because that's exactly the reading of Hurst
17 that the Florida Supreme Court adopted on remand in the Hurst case. Mr.
18 Owens notes that Delaware also took the same route in the Rauf case. Not
19 only did they do that, in the follow up case, in Powell, they did apply the
20 reasonable doubt standard exactly the way that we're asking the Court to do so
21 and they completely emptied Delaware's death row. So, if the question is
22 there's no court anywhere that hasn't done this, well there is. There is a state
23 and they completely emptied their death row. There's a very similar situation
24 that appears to be occurring in Florida as a result of this as well, so.

25 THE COURT: Okay, so obviously the different states can choose to

1 obviously not be inconsistent with the U.S. Supreme Court but they can go over
2 and beyond what's mandated by the U.S. Supreme Court which, --

3 MR. ANTHONY: Correct, Your Honor.

4 THE COURT: -- in these particular jurisdictions, it sounds like some states
5 have made that decision to go over and beyond what's mandated by the
6 Nevada Supreme Court -- I'm sorry, the U.S. Supreme Court. However, there is
7 -- the State is correct, there is a whole bunch of cases -- I mean it was a whole
8 bunch of jurisdictions that have not gone over and beyond what was mandated
9 by the U.S. Supreme Court in Hurst and the cases from those states are not
10 being overturned as being inconsistent with Hurst.

11 MR. ANTHONY: Could I address that aspect --

12 THE COURT: Yes, please.

13 MR. ANTHONY: -- of it, Your Honor?

14 Again, I think the State has done an admirable job of collecting, you
15 know the way that different states have handled this. The one thing that I
16 would comment to the Court about that is that it varies state by state.

17 THE COURT: Okay.

18 MR. ANTHONY: And a lot of times -- for example, the State cites to the
19 California system but California doesn't have a system where you weigh
20 aggravating and mitigating factors. It's not a weighing state. So, the way that
21 I would address the Court's concern is that there are state systems that don't
22 do this. There are different state systems like in Texas there's no weighing at
23 all. You just answer a list of questions. So, I'm not saying that Hurst has
24 application in every state.

25 What I am saying is that in a state like Nevada where you have

1 what I would consider a three-step process, the first step being the finding of
2 the aggravating circumstances, the second step being the weighing of the
3 aggravating circumstances, and only then can you get to the third step where
4 you can consider other matter evidence or the jury can decide to extend mercy,
5 my argument, Your Honor, is that if you look at the unique way that the
6 capital sentencing scheme is set up in Nevada that's what differentiates Nevada
7 from a place like California or a place like Arizona where once the jury finds the
8 aggravating circumstance they're basically done as far as finding the Defendant
9 eligible for the death penalty.

10 So, while I agree that the State has definitely cataloged and brought
11 forward a lot of the ways different states have gone, and there are different
12 states that have gone in different directions, my argument is that our system is
13 very, very similar to Florida's which is they have the finding of the aggravators
14 and then the weighing of the aggravators against the mitigators. And so, I
15 would certainly agree with their point that this doesn't have an effect in every
16 state on every capital punishment system but I believe it does in Nevada based
17 upon the way that the Legislature has basically set out this capital sentencing
18 scheme. So, that's the way that I would distinguish the cases that Mr. Owens
19 cited. And a lot of those cases from the federal system also pre-date Hurst.

20 And so, I think that in light of Hurst I think that there is certainly a
21 movement that I see, the opposite direction, mostly by the Florida Supreme
22 Court, also by the Delaware Supreme Court. Maybe this is something that
23 ultimately needs to go to the Nevada Supreme Court obviously to speak to this
24 because the Nevada Supreme Court decided the Nunnery decision which is kind
25 of what we're kind of up against. That's the difficulty that we face. But that's

1 the same thing that occurred in Delaware and Florida. They had adverse
2 authority. Hurst came out. They interpreted Hurst to apply to the weighing
3 stage in their state and we would just ask that that same consideration apply to
4 Nevada based on the way the statute is set up.

5 THE COURT: Okay.

6 Anything else from the State?

7 MR. OWENS: Well, any time we're dealing with the death penalty it gets
8 real political and I perceive that's what happened in Delaware. Many
9 jurisdictions are looking at the death penalty. The Legislature is looking at the
10 death penalty. But here, Nevada has looked at the issue in terms of what the
11 policy is here in Nevada and whether weighing applies to the aggravating and
12 mitigating circumstances or beyond a reasonable doubt standard applies and
13 they said it doesn't. Granted, they haven't revisited that decision in light of
14 Hurst, but Hurst doesn't give you any reason to overturn that published case
15 law that is against them. The Nevada jurisprudence on the death penalty is
16 whatever the Nevada Supreme Court says it is. And if there's any confusion in
17 the case law it's because of federal counsel coming in and trying to compare us
18 to other jurisdictions like Florida and saying, no, Nevada, this is what your
19 system is. They have no grounds or standing to come in and tell us in Nevada
20 what our own death penalty statutes mean and what they don't mean. We're
21 free to interpret them, the Nevada Supreme Court is, any way we want to. We
22 can say black is white. And so they get caught up on these words that, oh,
23 you called this an eligibility factor, you called this a selection. Our Nevada
24 Supreme Court has used those terms in different ways than what federal
25 counsel used to from the U.S. Supreme Court but -- and so we have a

1 fundamental disagreement. They don't agree with how Nevada has itself
2 defined the factors for aggravating and mitigating and selection and how
3 Nevada has defined its own case law so I have problems even overcoming that.
4 We're not on the same equal footing when discussing what Nevada law means.
5 So, I'll just submit it.

6 THE COURT: Is there anything else, any other record you want to make?

7 MR. ANTHONY: I don't think so, Your Honor.

8 Just one thing that I would mention that I think I neglected to
9 mention just a moment ago is that the State's brief focuses a lot on the
10 difference between the identity of the fact finder versus the standard of proof.
11 And I just wanted to just make it clear that in Hurst itself and also in the
12 Apprendi case which is the predecessor to Hurst they make it very clear that if
13 you decide something is an element of the offense then it follows that the
14 beyond a reasonable doubt standard of proof has to apply to that element. And
15 so, I would disagree with at least what's being said over here that nobody has
16 extended the sixth amendment jurisprudence to the beyond a reasonable doubt
17 standard. I think that's clearly in Hurst. Its right at the tip of section 2 and it's
18 also in Apprendi as well. So, that's the only thing that I think that I haven't
19 covered that I wanted to at least talk about 'cause it was in their reply.

20 Thank you, Your Honor.

21 THE COURT: Okay, I am going to deny it. I do agree with the State's
22 position. I am going to adopt the State's position. I do believe that the capital
23 proceedings in this case are consistent with Apprendi, Ring, and Hurst. First of
24 all, both the eligibility and suitability were decided by a jury, not by the judge.
25 And likewise, the Court doesn't find anything in Hurst that mandates that the

1 second prong likewise be proven beyond -- or the -- aggravating, the mitigating
2 weighing that be done beyond a reasonable doubt.

3 I am going to ask the State please prepare an order to be run by the
4 special -- I'm sorry, the Federal Public Defenders Office for approval.

5 MR. OWENS: Okay. Could I get a transcript from today? Do you want
6 me to submit an order?

7 THE COURT: Yes.

8 MR. OWENS: Okay; will do.

9 THE COURT: And also address the timing issue.

10 MR. OWENS: Yes, in line with you finding that it is -- or it's timely
11 because the judgment was never final, but are you finding that it's successive
12 and as an alternative basis there's no prejudice because Hurst doesn't mean
13 these things?

14 THE COURT: Well, just basically finding that there's no prejudice. I mean
15 --

16 MR. OWENS: No prejudice.

17 THE COURT: -- prejudice to the --

18 MR. OWENS: Okay.

19 THE COURT: -- State because basically the Court found that the capital
20 scheme is not inconsistent with Hurst, and again, Hurst references Ring which
21 they could have brought that relief several years prior but I just chose to go into
22 the merits of the case because of --

23 MR. OWENS: Sure.

24 THE COURT: -- the time bars. But my suggestion would be to put the
25 Court's findings on the timing issue to put it in the order. That way if you ever

1 want to bring it back up in front of the Nevada Supreme Court at least it's
2 obviously there.

3 MR. OWENS: Oh, absolutely. They'll want that in there.

4 THE COURT: Because perhaps they're going to want --

5 MR. ANTHONY: We would definitely want to see that in there.

6 THE COURT: I mean it's kind of weird how it all played out and you
7 know perhaps in some other cases the Supreme Court will issue a clarification
8 on --

9 MR. OWENS: What I would like to do is along with these findings is
10 submit an amended judgment. I guess it would be a second amended judgment
11 but would differ from the last amended judgment in simply striking the language
12 that says something to the effect of 'and an additional amount of restitution to
13 be determined in the future.' If I --

14 THE COURT: That may be a suggestion if you want to ensure finality
15 given the Whitehead and Slaatte cases.

16 MR. OWENS: You know, I don't agree with the Court that its necessary,
17 but to avoid this issue in the future, and I'm all about doing what we can to
18 avoid problems in the future, it won't help us with this case or this appeal going
19 up, but for the next petition it might start the time bar. If the court later agrees
20 with you that, yeah, the time for -- when your time bar never started then I'd
21 like to get it started with an amended judgment so I'll submit that along with
22 the findings.

23 THE COURT: It would be inappropriate for me to put my position there
24 but I have a feeling the issue could be -- unless the Supreme Court issues some
25 clarification it could be raised, because looking at old judgment of convictions it

1 seems to happen a lot where it's to be determined on certain things. So I guess
2 there's always the potential for this issue to arise again so perhaps the Supreme
3 Court should address it if they deem it appropriate.

4 MR. ANTHONY: And also, Your Honor, we would agree to the
5 submission of an amended judgment consistent with what Mr. Owens is saying
6 as well.

7 THE COURT: Yeah. Okay; thank you.

8 MR. OWENS: Okay. Thank you.

9 MR. ANTHONY: Thank you, Your Honor.

10
11 [Proceedings concluded at 11:12 a.m.]

12 * * * * *

13 ATTEST: I do hereby certify that I have truly and correctly transcribed the
14 audio/video recording in the above-entitled case to the best of my ability.


15 
16 CYNTHIA GEORGILAS
17 Court Recorder/Transcriber
18 District Court Dept. XVII
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23
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25

EXHIBIT 4

EXHIBIT 4

Steven D. Grierson

1 NEO

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 WILLIAM WITTER,

5
6 Petitioner,

Case No: 94C117513

Dept No: XXIII

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

10
11 **PLEASE TAKE NOTICE** that on May 31, 2017, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

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

16 STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 5 day of June 2017, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

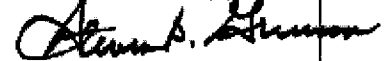
23 ☒ The United States mail addressed as follows:

24 William Witter # 47405
P.O. Box 1989
25 Ely, NV 89301

Rene L. Valladares, Federal Public Defender
411 E. Bonneville Ave., Ste 250
Las Vegas, NV 89101

26 /s/ Amanda Hampton

27 Amanda Hampton, Deputy Clerk
28



1 **FFCL**
2 STEVEN WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN S. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #004352
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 WILLIAM WITTER,)

10 Petitioner,)

CASE NO: 94C117513

11 -vs-)

DEPT NO: XXIII

12 THE STATE OF NEVADA,)

13 Respondent.)

14
15 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

16 DATE OF HEARING: 4/19/17
17 TIME OF HEARING: 11:00 AM

18 This Cause having come on for hearing before the Honorable STEFANY A. MILEY,
19 District Judge, on the 19th day of April, 2017, the Petitioner not being present, represented by
20 DAVID ANTHONY and TIFFANY L. NOCON, Assistant Federal Public Defenders, the
21 Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and
22 through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having
23 considered the matter, including briefs, transcripts, arguments of counsel, and documents on
24 file herein, now makes the following findings of fact and conclusions of law:

25 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

26 In 1995, William Witter was convicted of Murder With Deadly Weapon, Attempt
27 Sexual Assault With Deadly Weapon, and Burglary for assaulting and attempting to rape
28 Kathryn Cox, and then stabbing to death her husband, James Cox, when he tried to come to
his wife's aid. Witter received the death penalty. His convictions and sentence were

1 affirmed on direct appeal. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Remittitur
2 issued on December 23, 1996.

3 Witter filed a timely first post-conviction petition which was denied by the district
4 court after an evidentiary hearing and then affirmed on appeal by the Nevada Supreme Court
5 in an unpublished order (SC# 36927). Remittitur issued on September 14, 2001. After
6 litigating a federal habeas petition for several years, Witter returned to state court by filing a
7 second state habeas petition on February 14, 2007. That petition was also denied and again
8 affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 50447).
9 Witter also filed a third state habeas petition on April 28, 2008, which was also denied and
10 affirmed on appeal (SC# 52964). Remittitur from this third habeas appeal issued on
11 February 14, 2011. On January 11, 2017, Petitioner filed a fourth state habeas petition which
12 raises a single issue based on Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). The State
13 has filed a response and motion to dismiss the petition based on procedural default.

14 This Court finds that the instant petition, which is a fourth petition for a writ of habeas
15 corpus by this Petitioner, is timely filed because the last Judgment of Conviction, although it
16 does set a restitution amount, it also says an additional amount to be determined at a later
17 date. Accordingly, it is not a final judgment and the time and procedural bars in NRS 34
18 never started to run. See Whitehead v. State, 128 Nev. ___, 285 P.3d 1053 (2012); Slaatte v.
19 State, 129 Nev. ___, 298 P.3d 1170, 1171 (2013) ("Because the judgment of conviction
20 contemplates restitution in an uncertain amount, it is not final and therefore is not
21 appealable"). Therefore, the petition is not procedurally barred.

22 Turning to the merits of the issue, this Court finds that the capital proceedings in this
23 case are consistent with Apprendi, Ring, and Hurst. See Hurst v. Florida, 577 U.S. ___, 136
24 S.Ct. 616 (2016). First of all, both the eligibility and suitability were decided by a jury, not
25 by the judge. And likewise, the Court doesn't find anything in Hurst that mandates that the
26 weighing of aggravating and mitigating circumstances be done beyond a reasonable doubt.
27 Accordingly, neither appellate reweighing nor the weighing process implicate Hurst.
28 Because Petitioner has not demonstrated prejudice the petition is denied.

1 **ORDER**

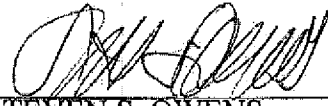
2 Based on the foregoing, the fourth petition is timely filed due to the lack of a final
3 Judgment of Conviction, but Hurst is simply an application of Ring and nothing in Hurst
4 requires the weighing process be subject to the beyond a reasonable doubt standard. The
5 motion to dismiss the petition is granted and the petition is denied.

6 DATED this 23rd day of May, 2017.

7
8 
9 STEFANY A. MILEY
DISTRICT JUDGE

10 STEVEN B. WOLFSON
11 DISTRICT ATTORNEY
Nevada Bar #001565

12
13 BY


14 STEVEN S. OWENS
15 Chief Deputy District Attorney
16 Nevada Bar #004352
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Eileen Davis

From: Eileen Davis
Sent: Wednesday, May 10, 2017 10:24 AM
To: david_anthony@fd.org; tiffany_nocon@fd.org
Cc: Steven Owens; Eileen Davis
Subject: William Witter, 94C117513.
Attachments: Witter, William, 94C117513, FFCL&O,.pdf

Findings of Fact, Conclusions of Law and Order.

The attached Findings will be submitted to the Judge on May 17, 2017.

EXHIBIT 4

EXHIBIT 4



1 **OPPM**
2 STEVEN WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN S. OWENS
6 Chief Deputy District Attorney
7 Nevada Bar #004352
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 WILLIAM WITTER,

10 Petitioner,

11 -vs-

12 THE STATE OF NEVADA,

13 Respondent.

CASE NO: 94C117513

DEPT NO: IV

14 **OPPOSITION TO MOTION**

15 COMES NOW, the State of Nevada, by STEVEN WOLFSON, District Attorney,
16 through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits this
17 Opposition to Motion.

18 This opposition is made and based upon all the papers and pleadings on file herein, the
19 attached points and authorities in support hereof, and oral argument at the time of hearing, if
20 deemed necessary by this Honorable Court.

21 **POINTS AND AUTHORITIES**

22 In his motion filed on June 7, 2017, Witter requests entry of an amended judgment of
23 conviction in connection with his recently denied habeas petition. Written findings denying
24 the habeas petition have already been signed and were filed on May 31, 2017. When the
25 habeas petition was argued in court on April 19, 2017, this court held that the time bars did
26 not apply because the prior judgment of conviction had ordered restitution in an uncertain
27 amount. This court went on to deny the petition on the merits and asked the State to prepare
28 the findings. In response, it was the State's prosecutor, not Witter's counsel, who requested

1 permission to submit an amended judgment curing the alleged defect by striking the uncertain
2 restitution order so as to start the time bars for future habeas filings in light of the court's
3 ruling. The court agreed, "that may be a suggestion if you want to ensure finality given the
4 Whitehead and Slatte cases." Transcript, 4/19/2017, p. 14.

5 However, after having drafted the findings to deny the habeas petition, the State's
6 prosecutor no longer believes an amended judgment is necessary to start the time bars or to
7 procedurally bar future habeas filings. This court's reasoning and determination regarding the
8 nonfinality of the prior judgment with its uncertain restitution award, is fully set forth in the
9 written findings and the issues are preserved for appeal. Accordingly, the State did not prepare
10 or submit an amended judgment as it had requested permission to do. The transcript from
11 April 19, 2017, shows that the amended judgment was merely permissive at the State's request
12 and for the State's unique purpose, and had not been affirmatively "ordered" by the court or
13 requested by the defense as part of any kind of habeas relief as is now asserted. At most,
14 Witter's counsel simply agreed to the submission of an amended judgment, "consistent with
15 what Mr. Owens is saying." Id., at p. 15. But at no time in his petition, in his pleadings, or at
16 argument did Witter's counsel request the remedy of an amended judgment to cure the
17 restitution defect.

18 Now in the instant motion, Witter's counsel for the first time is demanding the entry of
19 an amended judgment of conviction for his own purposes in addition to the written findings
20 already filed. Witter claims that the Nevada Supreme Court is "without jurisdiction to consider
21 any appeal of Mr. Witter's case until the deficiency is cured." Motion, p. 6. That's utter
22 nonsense. In Whitehead, the restitution defect in the judgment did not mean there was no
23 jurisdiction for the subsequent habeas appeal, but rather that the district court was required to
24 reach the merits of the habeas petition rather than applying the procedural bars. Whitehead v.
25 State, 128 Nev. ___, 285 P.3d 1053 (2012). That is exactly what this court has done. Although
26 the Court in Slaatte may have dismissed the appeal in that case for lack of jurisdiction, that
27 was an appeal directly from the nonfinal judgment of conviction pursuant to a guilty plea, not
28 a habeas appeal as in the present case. *See* Slaatte v. State, 129 Nev. ___, 298 P.3d 1170, 1171

1 (2013). In a habeas appeal the final judgment being appealed is the Findings of Fact and
2 Conclusions of Law, not the judgment of conviction. NRS 34.575. No amended judgment is
3 necessary for Witter to pursue his appeal.

4 Just as the State has reconsidered its position regarding its need for an amended
5 judgment, the defense apparently has also thought about it and decided an amended judgment
6 would benefit them. There is probably some kind of tolling or restarting of the federal habeas
7 bars that works to the defendant's advantage should an amended judgment be entered, even if
8 that amended judgment is later vacated as unnecessary. An amended judgment can always be
9 entered following Witter's appeal if the Nevada Supreme Court agrees that the habeas time
10 bars never started running due to the defect in the judgment. But if an amended judgment is
11 entered now before the Nevada Supreme Court has had an opportunity to review the issue, it
12 may have irreversible consequences rendering all prior rulings in this case for the past 20 years
13 a nullity. Because the defense did not ask for such relief in their petition and the petition has
14 already been denied by a final written order, there is no authority for belatedly granting the
15 defense such relief now by way of motion.

16 WHEREFORE, the State respectfully requests that the motion be denied.

17 Dated this 24th day of June, 2017.

18 Respectfully submitted,

19 STEVEN WOLFSON
20 Clark County District Attorney
Nevada Bar #001565

21
22 BY /s/ Steven S. Owens

23 STEVEN S. OWENS
24 Chief Deputy District Attorney
25 Nevada Bar #004352
26 Office of the District Attorney
27 Regional Justice Center
28 200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

1 **CERTIFICATE OF ELECTRONIC FILING**

2 I hereby certify that service of Opposition to Motion, was made this 24th day of June,
3 2017, by Electronic Filing to:

4 MICHAEL PESCETTA
5 DAVID ANTHONY
6 Email: ecf_nvchu@fd.org

7 TIFFANY L. NOCON
8 Email: Tiffany_Nocon@fd.org


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10 By: /s/ E.Davis

11 Employee, District Attorney's Office
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EXHIBIT 5

EXHIBIT 5



1 RTRAN

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3
4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6
7 STATE OF NEVADA,

8 Plaintiff,

9 vs.

10 WILLIAM L. WITTER,

11 Defendant.

CASE NO. 94C117513

DEPT. NO. XXIII

TRANSCRIPT OF PROCEEDINGS

12
13
14 BEFORE THE HONORABLE STEFANY A. MILEY, DISTRICT COURT JUDGE

15 WEDNESDAY, JUNE 28, 2017

16
17 DEFENDANT'S MOTION FOR ORDER

18
19 APPEARANCES:

20 For the Plaintiff:

JONATHAN VAN BOSKERCK, ESQ.
Deputy District Attorney

21
22 For the Defendant:

TIFFANY L. NOCON, ESQ.
DAVID S. ANTHONY, ESQ.
Deputy Federal Public Defenders

23
24
25 RECORDED BY: MARIA L. GARIBAY, COURT RECORDER

1 WEDNESDAY, JUNE 28, 2017, 9:35 A.M.

2
3 THE MARSHAL: Top of page 1, C117513, Witter.

4 THE COURT: Hi. Hi, you guys.

5 MR. VAN BOSKERCK: Good morning, Your Honor, Jonathan Van Boskerck
6 for the State.

7 MR. ANTHONY: David Anthony from the Federal Public Defender's Office for
8 Mr. Witter who's in custody and we will waive his appearance for the purpose of this
9 hearing.

10 THE COURT: Okay, so --

11 MS. NOCON: Tiffany Nocon from the Federal Defender's Office.

12 THE COURT: Good morning. I guess I don't understand the why. It's just
13 why a JOC is not being done. I mean legally why?

14 MR. VAN BOSKERCK: First off, Judge, Mr. Owens asked me to apologize to
15 you that he is not here. He's speaking at the bar convention or he'd be here himself,
16 so that's why you have me. But to answer your question, the reason Mr. Owens
17 decided that he didn't want to adopt what you described as his suggestion of filing
18 an Amended JOC, there's two reasons. Number one, we have real concerns that
19 on appeal *Whitehead* and *Slaatte* will not be found to be retroactive. So we don't
20 necessarily -- we still believe the petition will be filed untimely in the end. But our
21 ultimately concern, that is, when it comes to --

22 THE COURT: But you can still raise that issue.

23 MR. VAN BOSKERCK: But ultimately our real concern is whether the
24 petition, whether it's timely or not. If we file an Amended JOC at this point without
25 waiting for the Nevada Supreme Court, they will argue in federal court that we have

1 waived all of the procedural bars by filing a new JOC. So we felt that it would be
2 more prudent to wait until we have a decision from the Nevada Supreme Court
3 'cause we --

4 THE COURT: Okay.

5 MR. VAN BOSKERCK: -- don't have to waive the procedural bars in federal
6 court.

7 THE COURT: Well, I guess Mr. Owens misunderstood the distinction
8 between leaving it in the State's discretion versus an order from the Court. And
9 perhaps it's the way I phrased it. I recognize that you're trying to preserve issues on
10 appeal but many of those issues are already in the record and certainly they will be
11 contained within the record should this case go forward into other courts for further
12 relief, but there needs to be a JOC. And I did not intent to make it a suggestion that
13 the State could choose to comply or not comply with. So it is now, if everyone's
14 clear, an order. Okay. Thank you.

15 MR. ANTHONY: Thank you, Your Honor.

16 PROCEEDINGS CONCLUDED AT 9:37 A.M.

17 * * * * *

18 ATTEST: I do hereby certify that I have truly and correctly transcribed the
19 audio/video recording in the above-entitled case to the best of my ability.

20 
21 MARIA L. GARIBAY
22 Court Recorder/Transcriber
23
24
25