IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73444

WILLIAM WITTER,

Appellant,

v.

STATE OF NEVADA,

Respondent.

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Stephen L. Huffaker, District Judge
District Court Case C117513

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITES

FEDERAL CASES

STATE CASES

STATE STATUTES

CONSTITUTION

SECONDARY

I. JURISDICTIONAL STATEMENT

This is a direct appeal from a judgment of conviction and sentence of death in Case No. C117513. A third amended judgment of conviction was entered on July 12, 2017. 26ROA5826-5829. Witter filed a timely notice of appeal on July 10, 2017. 26ROA5808-10. See NRAP 4(a)(6) (premature notice of appeal "shall be considered filed on the date of" entry of judgment). This Court has appellate jurisdiction under NRS 177.015(3).

II. ROUTING STATEMENT

This proceeding is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(a)(1) because it is a death penalty case.

III. STATEMENT OF THE ISSUES

A. Whether *Slaatte v. State*, 129 Nev. 219, 298 P.3d 1170 (2013) has any implications for this appeal and whether a lack of subject matter jurisdiction rendered previous proceedings a nullity.

B. Whether the trial court's mishandling of Witter's *Batson v. Kentucky*, 476 U.S. 79 (1986) challenge and the State's demonstratively pretextual reason for striking a Black female juror compel reversal.

C. Whether pervasive and egregious errors during Witter's voir dire contaminated the jury.

D. Whether the trial court violated Witter's federal constitutional rights when it erroneously instructed the jury on premeditated first-degree murder.

E. Whether the jury's consideration of four invalid aggravators to find Witter eligible for the death penalty violated his constitutional rights, and whether that death sentence survives this Court's mandatory review in light of the invalid aggravators.

F. Whether the murder victim's family's irrelevant and prejudicial victim impact testimony violated constitutional prohibitions on victims making sentencing recommendations.

G. Whether the State committed prosecutorial misconduct by injecting improper and inflammatory statements into its opening and closing arguments.

H. Whether the State's introduction of misleading and highly prejudicial evidence that Witter was in a gang, and the trial court's

subsequent failure to grant a sentencing continuance, to the defense to address this evidence violated Witter's constitutional rights.

I. Whether the State's use of Witter's juvenile conduct to support a sentence of death violated *Roper v. Simmons*, 543 U.S. 551 (2005).

J. Whether the admission of unnecessarily gruesome and duplicative photographs during the guilt phase prejudiced the jury and violated Witter's constitutional rights.

K. Whether the State's improper use of facts and data underlying a defense expert's report violated Witter's constitutional rights.

L. Whether the trial court erred in restricting Witter from cross-examining a prosecution witness who was asked questions as an "expert" on direct examination.

M. Whether the trial court's failure to give proper instructions, and the ensuing exploitation of that failure by the State, violated Witter's constitutional rights.

N. Whether Nevada's arbitrary and capricious capital punishment scheme violates the state and federal constitutions.

O. Whether elected judge's review of Witter's capital cases is constitutional.

P. Whether the cumulative effect of the voluminous errors throughout Witter's trial require reversal.

IV. STATEMENT OF THE CASE

A jury convicted Witter of first-degree murder, among other offenses. 26ROA5826-28. At sentencing, the jury found four aggravating circumstances: the murder was committed by a person previously convicted of a violent felony, while the person was engaged in burglary, while the person was engaged in sexual assault, and to avoid or prevent a lawful arrest. 26ROA5827. The jury determined no mitigating circumstances outweighed the aggravating circumstances and Witter should be sentenced to death. A third amended judgment of conviction was entered on July 12, 2017. 26ROA5826.

V. STATEMENT OF THE FACTS

A. Guilt Phase

Kathryn Cox, a clerk at the Luxor Hotel, took a shuttle bus to the hotel parking lot when her shift concluded at 10:00 p.m. on November 14, 1993. Finding her vehicle would not start, she got a ride back to the

hotel with a fellow employee and called her husband and asked him to pick her up. Cox then returned to her car via the shuttle bus to wait for her husband. She got into the car and began reading a book. 4ROA873–84.

Five to ten minutes later, the passenger door opened and a man later identified as Witter got into the car. He ordered Cox not to look at him and drive the car out of the parking lot. When Cox told him that she couldn't, Witter got "very angry" and started "raging," stabbing her repeatedly with a knife and threatening to kill her. He then removed his penis from his pants and attempted to have Cox perform oral sex on him. 4ROA884–99.

Cox briefly escaped the vehicle before Witter grabbed her and returned her to the vehicle. She could smell alcohol on his breath. 4ROA899–903. The jury would later learn that Witter had been gambling and drinking since at least 8:00 p.m., approximately three hours before the offense. 6ROA1182–83, 1214–16. By the time of the offense, Witter was extremely intoxicated, with a blood-alcohol content between .13 and .19. 6ROA1229–46.

As Witter continued his attempt to sexually assault Ms. Cox and grew increasingly agitated, her husband, James Cox, arrived in the taxi he drove and opened the driver's-side door of his wife's vehicle. Unaware that the two were married, Witter attempted to persuade James to leave. He refused and ordered Witter out of the vehicle. Witter complied, leaving his knife on the dashboard of Kathryn's vehicle. 4ROA900–10.

Outside of the vehicle, Witter and James engaged in "scuffling and yelling." At some point, Witter retrieved the knife from the dashboard and stabbed James several times. Witter again prevented Kathryn's attempt to flee and returned her to her vehicle. Hotel security eventually arrived; Kathryn heard "a lot of noise" and Witter yelling, "Shoot me; shoot me; why don't you just shoot me." 4ROA910–920; 5ROA921. Witter was apprehended; Kathryn survived her injuries; James did not.

In his post-arrest statements to the police, Witter explained that "things were very fuzzy in his mind about what had happened" at the time of the offense, the events "a blur in his mind," his "head . . . all

sorts of fucked up." Witter rambled; his eyes were bloodshot, either from intoxication or crying. Witter explained that he and James Cox "got into it," at which point Witter "lost control." According to the officer receiving the statement, Witter's demeanor at the time of the interview "was that of someone that has calmed down after being excited," or like "someone that's been really upset is finally catching their breath and calming down." 6ROA1183, 1186, 1217–19.

B. Penalty Phase

In the penalty phase, the State presented evidence of Witter's prior conviction for assault with a deadly weapon, arising from a 1986 altercation in San Jose, California, with the new boyfriend of an ex-girlfriend, Gina Martin. The arresting officer noted that at the time he took Witter into custody there was some odor of alcohol about his person, as well as slurred speech and glassy eyes. 7ROA1609. Other testimony established that Witter had a blood-alcohol level of .21 percent. 8ROA1624; 9ROA1998. Another San Jose officer described a 1993 arrest; once again, Witter had a strong odor of alcohol on his breath and bloodshot, watering eyes. 8ROA1637–47. Witter's parole

officer in connection with his 1986 conviction noted that his institutional history had identified him as an "alcohol abuser." 8ROA1614–28.

At trial, two San Jose police officers speculated that Mr. Witter was "possibly" a gang member 8ROA1656, based their examination of several photographs showing Witter's tattoos, or Witter wearing clothing associated with the San Francisco 49ers football team, or Witter allegedly making hand signs consistent with those used by gangs by folding his thumbs under his palms. 8ROA1652–55, 1690–94. On the other hand, both of the officers who testified regarding Witter's prior criminal conduct admitted they were not gang-related offenses and that the underlying police reports did not identify him as a gang member. 8ROA1660–66, 1694. Likewise, Witter's former parole officer, Linda Rose, testifying about his prior record, never once indicated that any particular prior offense was gang-related, or even that Witter had been identified as a gang member. 7ROA1610; 8ROA1611–34.

The State also presented testimony from three family members of the victim James Cox, including Kathryn Cox herself, who asked the jury to show Witter "no mercy." 8ROA1783–86.

In mitigation, trial counsel presented the testimony of various family members, including:

(1) His aunt, Ruth Fabela, who explained that Witter's mother (her sister) had serious drug and alcohol problems from a young age. 8ROA1810–23.

(2) Witter's half-sister, Tina Whitesell, described their mother as someone who "didn't care about anybody but herself and her drugs and alcohol and men," and life with her as "awful . . . lots of people at our house; spoons; cotton; syringes; pills." She remembered incidents of her mother chasing Witter's father, Louis Witter,[1] with a knife; and of him hitting his wife while she was pregnant. Tina also explained that Witter's father wasn't around much because he was in prison. Eventually the Witter children were sent to live with their grandparents, who also drank heavily. Tina added that as she was

[1] The correct spelling of Witter's father's name is Lewis.

growing up, Witter got hit a lot. Tina also testified that the grandfather used to try to fondle her. 8ROA1824–40; 9ROA1841–58.

(3) Witter's father, Louis, told the jury that he had three felony convictions for robbery, firearms possession by an ex-felon, and rape. He also acknowledged having problems with alcohol, heroin, methamphetamine, barbiturates and "whatever I could get my hands on." He described Witter's mother as an alcoholic and heroin addict. Regarding the couple's relationship, Louis Witter explained:

> Well, we would drink to the point of excess, which was usually most of the time, and she used to have this habit or bringing up things that I had done in the past, to the point of I couldn't stand it anymore and I would start hitting her, kicking her. . . . She was pretty tough. She would try to fight me back with her fists, but a lot of times, she'd run to the kitchen and grab a butcher knife and try to attack me.

9ROA1864.

The children, including Witter, witnessed the fights. Louis Witter admitted that when his son was older, he would include him in his drug usage, including helping Witter shoot up methamphetamine. 9ROA1859–93.

(4) Arlan Justice, an investigator for the Clark County Public Defender's Office, explained that Witter, early in the proceedings, acknowledged to him that the crime "was his responsibility; he was responsible for what happened; it was up to him to bear whatever happened to him." 9ROA1922–24.

(5) Another of Witter's sisters, Elisa "Lani" Sanders, testified that their grandfather was very strict with William, and would discipline him by punching him in the face. Lani had also been sexually abused by the grandfather. She testified that when not drunk, Witter "was a good person, very generous," with a "big heart," who treated his nieces and nephews well. She testified that she loved her brother. 9ROA1928–54.

(6) Psychologist Louis Etcoff testified that he had diagnosed Witter with various disorders, including attention deficit hyperactivity disorder, marijuana, alcohol and amphetamine abuse, and antisocial personality disorder. 9ROA1985–86. In his expertise, Witter "grew up in one of the most dysfunctional families that I can remember studying. . . For all intents and purposes, he would have been better off without

parents than having the parents that he had." 9ROA1987–88. He also described Witter's background as "the quintessential family that would produce a violent person." 9ROA1987.

Dr. Etcoff told the jury that "alcohol disinhibits in the brain a person's ability to stop whatever is inside from coming out." 9ROA1995. Applying this to Witter, the doctor testified:

> So alcohol in a very angry person is a substance that a very angry person, it should be illegal, so to speak, for them to have, because it disinhibits them and allows the anger to be manifested and sometimes in terrible ways.
>
> . . .
>
> [Witter's] records and his behaviors are replete with anger. Anger is a huge, huge important characteristic of his person.

9ROA1996–97. In short, anger generated in Witter from his dysfunctional upbringing, including Witter's report that he had been molested by his uncle at a young age, caused him to act out violently, especially under the influence of substances, in particular alcohol. 9ROA1994–97.

VI. SUMMARY OF ARGUMENT

This is a direct appeal from a final judgment in a death penalty case. Due to the existence of prior proceedings, this Court invited the parties to discuss issues "related to the law of the case doctrine and the implications of this court's decision in *Slaatte v. State*, 129 Nev. 219, 298 P.3d 117 (2013)." Document 18-07121. Witter believes that the only potential relevance of *Slaatte* to this appeal is that it shows this Court previously lacked appellate subject matter jurisdiction over the 1996 appeal. That issue does not affect the disposition of the instant appeal because the Third Amended Judgment of Conviction is undoubtedly final, and, even if *Slaatte* was relevant here, this Court's precedents dictate the decision must apply to Witter. And even if this Court did have subject matter jurisdiction in 1996, it is still appropriate to litigate the instant appeal from the Third Amended Judgment.

Similarly, the law-of-the-case doctrine does not apply to the claims raised in Witter's instant appeal because the absence of appellate subject matter jurisdiction in 1996 renders that proceeding a nullity. Even if this were not the case, however, Witter's claims must still be

reviewed because he can show that exceptions to the law-of-the-case apply here. He has included a section on the law of the case after each of his claims.

On the merits, Witter's trial and sentencing were infected by numerous claims of constitutional error that skewed the proceedings in favor of the State and prejudiced him. The composition of the jury itself was distorted by the prosecutor's discriminatory use of a peremptory challenge to remove a Black female juror. The trial court contaminated the jury throughout voir dire with prejudicial statements regarding the position of the Christian Bible on the death penalty; prevented defense counsel from life qualifying the jury in light of Witter's prior violent felony conviction; made prejudicial statements regarding the equal consideration of penalties, the diminished role of each juror in the sentencing process, and the existence of other high profile murder cases; and the trial court failed to grant a meritorious challenge to a juror for cause.

The trial court skewed the proceedings in favor of the State and against Witter throughout the rest of the trial. The instructions given to

the jury in the guilt and penalty proceedings misstated the law and diluted the State's burden of proof. The trial court submitted three invalid aggravating circumstances that were found by the jury. The trial court improperly admitted prejudicial victim impact testimony, failed to sustain objections to prosecutorial misconduct, and improperly admitted prejudicial evidence regarding Witter's alleged gang affiliation, juvenile history, and gruesome photographs. The court allowed the State to present expert testimony on direct examination, but refused to allow the defense to cross-examine the same witness on his opinions. The court also permitted the State to misuse expert data generated by Witter's defense expert for substantive purposes.

Witter submits that the cumulative effect of the errors that occurred in his case require reversal of his convictions and death sentence even if they are not individually found to be harmful. The prejudice resulting from the errors discussed above (and argued in more detail below) were exacerbated by Nevada's arbitrary and capricious capital sentencing scheme and the fact that Witter's case was

adjudicated by judges and reviewed by justices whose tenure was dependent on popular election.

VII. ARGUMENT

A. This is a direct appeal from a final judgment

1. The instant appeal does not provide an occasion to determine the implications of this Court's decision in *Slaatte v. State*, 129 Nev. 219, 298 P.3d 1170 (2017), in Witter's case

This Court previously invited the parties to discuss "the implications of this court's decision in *Slaatte v. State*, 129 Nev. 219, 298 P.3d 1170 (2013)." Document 18-07121 at 1.[2] *Slaatte* holds that this Court does not have subject matter jurisdiction over an appeal where the judgment of conviction contemplates restitution but does not specify a definite amount. *Id.* at 220-222, 298 P.3d at 1170-71 (citing NRS 176.105(1)(c), 176.033(1)(c)).

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[2] In its order denying the State's petition for writ of mandamus in Docket No. 75417, the Court said the "State may litigate claims challenging the applicability of the decisions in *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012), and *Slaatte v. State*, 129 Nev. 219, 298 P.3d 1170 (2013), and the effect of the third amended judgment of conviction in the appeals pending in *Witter v. State*, Docket Nos. 73431, 73444." *State v. Eighth Judicial District Court*, No. 75417, Order Denying Petition (filed May 15, 2018).

Slaatte does not have any application to this appeal because the Third Amended Judgment is final as it contains a definite amount of restitution. *Slaatte* is only relevant to a case where the amount of restitution is indefinite. Any discussion of *Slaatte* in this appeal is improper as it would constitute an advisory opinion. *See Personhood Nevada v. Bristol*, 126 Nev. 599, 602-03, 245 P.3d 572, 574-75 (2010). Whatever this Court believed about how *Slaatte* applied to Witter's prior judgment of conviction, an appeal from the instant final judgment of conviction would not be affected by such a decision. This Court implicitly confirmed this position when it dismissed the State's amended notice of appeal from the Third Amended Judgment. Document 18-07121 at 1. Without a valid cross-appeal, no relief can be afforded to the State here.

The State also acknowledges it cannot litigate the application of *Slaatte* in this appeal. In its petition for writ of mandamus filed in Docket No. 75417, the State argued it "has no right of appeal from an order granting the Third Amended Judgment of Conviction" and "this Court will have no opportunity to review the propriety and authority for

ordering the third amended judgment of conviction outside of a habeas proceeding." Pet. For Writ of Mandamus, No. 75417, at 5 (filed March 26, 2018); *id.* at 8 ("In neither of the two appeals will this Court have the ability to vacate or strike the Third Amended Judgment of Conviction as is being sought in this mandamus petition."). Witter agrees with the State on this point.

The procedural posture of this case also makes its inappropriate for this Court to entertain arguments from the State regarding the effect of *Slaatte* on Witter's appeal. The State invited the very error upon which it now complains by stating a need to file the amended judgment, 26ROA 5791–92, and also waived any argument against entry of the Third Amended Judgment that was omitted from its opposition to the motion for order. 26ROA 5792–93; *see* EDCR 2.20(e), 3.20(c). The doctrines of invited error and waiver accordingly prevent the State from arguing against the entry of the Third Amended Judgment on appeal. *E.g.*, *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345-46 (1994).

Even if *Slaatte* could be litigated in this appeal, it would not provide a basis for disturbing the Third Amended Judgment. While *Slaatte* acknowledged earlier cases from this Court where the judgment was reversed for entry of a definite amount of restitution, none of those "prior decisions addressed whether the judgment was final given its failure to comply with NRS 176.105(1)." *Id.* at 221, 298 P.3d at 1171. It is axiomatic that prior cases do not stand for propositions not actually decided.

When this Court interprets a statute for the first time, it declares what the law has always been. *Cf. Metrish v. Lancaster*, 569 U.S. 351, 366-68 (2013). "When a decision merely interprets and clarifies an existing rule . . . and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law." *Colwell v. State*, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (citation omitted). This Court has previously acknowledged its interpretations of the restitution statute are fully retroactive. *Buffington v. State*, 110 Nev. 124, 126-27, 868 P.2d 643, 644-45 (1994). This Court has even found a substantive rule retroactive when it overrules prior precedent.

E.g., *Mitchell v. State*, 122 Nev. 1269, 1276-77, 149 P.3d 33, 37-38 (2006). State and federal due process principles of notice and decisional consistency prevent this Court from departing from this law in Witter's case. *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

In light of these authorities, this Court must conclude that *Slaatte* applies to Witter. As explained above, there was no contrary authority overruled by *Slaatte*. To the contrary, *Buffington* holds that this Court's interpretation of the restitution statutes must be accorded full retroactivity. Moreover, any suggestion that subject matter jurisdiction existed in 1996 (but not today) is dubious. "Lack of jurisdiction . . . shall be noticed by the court at any time during the pendency of the proceedings." NRS 174.105(3); *e.g.*, *Application of Alexander*, 80 Nev. 354, 358, 393 P.2d 615, 617 (1964).

Considerations of judicial restraint are at their highest when an interpretation of a statute implicates the Court's subject matter jurisdiction, as jurisdictional defects cannot be waived. *Cf. id.* If there is going to be a change in the law with respect to this Court's subject matter jurisdiction, it must come from the Legislature, not this Court.

2. The law of the case doctrine does not prevent this Court from deciding the issues in Witter's appeal

This Court also invited the parties to discuss the application of the law of the case doctrine to the issues in Witter's appeal. Document 18-07121 at 1. For the same reasons discussed above, the law of the case doctrine does not apply when the prior proceedings were a nullity due to the absence of a final judgment and a lack of appellate subject matter jurisdiction. *Cf. Long v. Tighe*, 36 Nev. 129, 129, 133 P. 60, 61 (1913) (void order "subject to collateral attack"). At most, this Court's prior decisions are persuasive but not preclusive. As explained in detail below, the law of the case doctrine also does not apply because the factual record before this Court is substantially different and/or because of intervening changes in the law. *See Hsu v. County of Clark*, 123 Nev. 625, 631-32 173 P.3d 724, 729-30 (2007). Assuming the law-of-the-case doctrine applies at all, Witter includes a section with each claim specifically explaining why the doctrine does not bar this Court's consideration of the constitutional claims that infect his conviction and death sentence.

B. The State violated *Batson* when it struck a Black juror for a pretextual reason and the trial court erred in resolving Mr. Witter's timely *Batson* objection

Witter's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, the right to trial by an impartial, representative jury, and a reliable sentence due to the prosecutor's discrimination in the exercise of a peremptory challenge. U.S. Const. Amends. V, VI, VIII & XIV. Nev. Const. Art. 1, §§ 3, 6, and 8; Art. 4, § 21.

The State violated *Batson v. Kentucky*, 476 U.S. 79 (1986) when it struck potential juror Elois Brown, and the trial court erred in its ruling on Witter's *Batson* challenge. First, Witter established a prima facie case that the State's peremptory challenge was used in a discriminatory manner when it struck Brown, a Black female juror. Second, the State's proffered race-neutral reason for striking Brown was pretextual, belied both by the record and subsequent discovery. Third, the trial court failed to decide if Witter showed purposeful discrimination. Instead, the court erroneously concluded that *Batson* did not apply because Witter was not Black.

1. Standard of Review

This Court reviews a trial court's decision on discriminatory intent for an abuse of discretion. *See e.g. Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). If such an abuse occurred, it is structural error, which means prejudice is presumed and reversal is necessary. *Williams v. Woodford*, 396 F.3d 1059, 1069 (9th Cir. 2005); *Diomampo*, 124 Nev. at 423, 185 P.3d at 1037.

2. Background

Despite the prosecutor's assertion that it struck potential juror Elois Brown because she was indecisive, the record reveals that she was anything but.

During voir dire, the trial court asked Brown if she could select an appropriate punishment and she answered decisively that she could:

> The Court: Under the laws of the State of Nevada, you would have, in the penalty phase, three possible forms of punishment from among which you would select one. Those three forms are the imposition of the death penalty, life imprisonment without the possibility of parole and life imprisonment with the possibility of parole. In your present state of mind, Miss Brown, if you're selected as a juror in this case, can you consider equally all three of these

> possible forms of punishment and select from among them the one you feel to be the most appropriate, under the facts and evidence of this case?
>
> Brown: Yes, I could.
>
> The Court: And will you do it?
>
> Brown: I would do that.

1ROA230; 2ROA231.

Nor did Brown show indecisiveness during the second phase of jury selection, where the prosecutor questioned Brown. For example, when the State specifically asked, "[d]o you feel as though you are good in making decisions?" Brown unequivocally responded, "Yes, I do." 2ROA452. Brown acknowledged that judging others may be "uncomfortable," but stressed she "would be open minded to look at both cases by the State and defense to know which decision I'm going to make." 2ROA453.

When asked about her general views on the death penalty, Brown showed a willingness to impose it:

> I know it's one of the penalties imposed, but I gave it just as much thought as I gave the other two penalties that were given to us as a thought.

> After hearing evidence, that's when I can decide on which penalty suits the crime. So each one is just as equally important to me, in my opinion.

Id. The State again asked if she had the "capacity in [her] heart" to consider each penalty, and Brown again answered, "Yes, I do." 2ROA454. Brown then specifically said she could tell Witter he deserved to die if she felt death was the appropriate punishment. *Id.*

When the prosecutor tried to lead Brown into a corner by asking her, "Is [serving as a juror] something that you look forward to with great reservation? Would that be accurate?" Brown unequivocally answered, "I wouldn't say any kind of reservation. I feel, as a citizen, it's my duty to serve on a jury if called. I have no reservations at all about it." 2ROA454. Lastly, Brown stated, without hesitation, she could and would be fair to the State and Mr. Witter. *See id.* The prosecutor passed Brown for cause. 2ROA454–55. The trial judge did not ask Brown any follow-up questions. 2ROA458.

Near the close of jury selection, the prosecutor exercised his first peremptory to strike Elois Brown. *See* 4ROA803. Witter's trial counsel

immediately made a *Batson* objection arguing, "Miss Brown was one of two African Americans . . . left on the panel." *Id.*

In response to Witter's challenge, the trial court stated, "This isn't an African-American defendant." *Id.* Trial counsel explained that "I believe [Witter's] right to trial under the Fourteenth, Sixth, and Seventh Amendments is violated by [the State] striking people of color. We are down to two black people; [Brown being] one of the two." 4ROA804. In response, the court stated, "First off, I should note the defendant isn't a person of color, so I think it's an unusual challenge, but I'll let the State put on their reasons." *Id.* The prosecutor agreed *Batson* did not apply, and stated his notes on Brown were "absolutely blank, indifferent as to race, other than the fact I put I did not believe she was capable of making a decision." *Id.*

The trial court overruled trial counsel's *Batson* objection "because I don't think it even applies in this instance." 4ROA804. The trial court further stated, "I didn't think we had even a racial issue because I thought the defendant was a caucasian (sic)." 4ROA806. The trial court was apparently unaware that the United States Supreme Court had

decided *Batson* applied to all minority jurors—regardless of the race of the defendant—about four years previously. *See Powers v. Ohio*, 499 U.S. 400 (1991). As a result of this error, the trial court did not assess the credibility of or make any factual findings regarding the prosecutor's purported race-neutral reason.

3. The *Batson* error in Witter's case requires reversal.

A *Batson* challenge has three steps: (1) a defendant must make a prima facie case that a peremptory challenge has been used in a discriminatory manner; (2) the State must offer a race-neutral reason for striking the juror; and (3) the trial court must decide if the defendant has shown purposeful discrimination. *Snyder v. Louisiana*, 522 U.S. 472, 476–77 (2008) (citation omitted).

Reversal is required here for two reasons. First, the trial court failed to conduct an adequate inquiry into any of the *Batson* steps because it misconstrued *Batson*'s applicability entirely. Second, with respect to *Batson*'s second step, not only does the voir dire transcript show the State's reason was pretextual, but evidence from a post-conviction deposition further demonstrates the fantastic nature of the

State's race-neutral reason. This shows that the prosecutor's discrimination was purposeful and in violation of *Batson*, requiring reversal.

1. The trial court failed to make any factual findings regarding Witter's *Batson* challenge

Although *Powers v. Ohio* issued four years prior to Witter's voir dire, the trial judge ignored its central holding: a defendant can maintain a *Batson* challenge on behalf of a minority juror regardless of the defendant's race. 499 U.S. at 409. Instead, the trial court overruled Witter's *Batson* challenge due to its belief that Witter, as a White man,[3] could not assert such a challenge. 4ROA804. Believing that *Batson* did not apply, the trial court did not make factual findings regarding any of the steps. The court did not determine whether Witter met his prima facie burden, whether the prosecutor's stated reason was pretextual, nor the ultimate question of purposeful discrimination.

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[3] This too was a mistake. After Witter's trial counsel informed the judge that Witter was Hispanic and not Caucasian, the trial judge said that he "looks caucasian to me (sic)." 4ROA 805. The trial judge also noted he was not keeping notes of race because he "didn't think we had even a racial issue because I thought the defendant was a caucasian (sic)." *Id.* at 806.

The trial court's failure to resolve any of *Batson*'s steps require reversal. First, "it is a structural error to dismiss [a] challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it." *Brass v. State*, 128 Nev. 748, 750, 291 P.3d 145, 147 (2012). Here, the trial court predetermined that it would deny *any Batson* challenge because it erroneously believed it did not apply. 4ROA804 ("I overrule it in this matter, because I don't think it even applies in this instance."). This was structural error, mandating reversal under *Brass*.

Next, there are no factual findings for this Court defer to, and affirming on such a record would be inappropriate. *See Somee v. State*, 124 Nev. 434, 442, 187 P.3d 152, 158 (2008) (reversing on a Fourth Amendment issue because it presented a mixed question of fact and law and the trial court failed to make specific factual findings). Nor should this Court make *Batson* findings in an appellate posture, in the first instance. *See e.g. Snyder*, 552 U.S. at 477 (2008) ("The trial court has a pivotal role in evaluating Batson claims"); *McCarty v. State*, 132 Nev. ___, 371 P.3d 1002, 1011 (2016), *reh'g denied* (June 24, 2016) (Douglas,

J., concurring) (agreeing reversal was necessary because, by not undertaking the proper *Batson* inquiry, "the district court has left us in the dark.").

Finally, reversal is in accordance with other state courts that have confronted similar situations. *See People v. Tennille*, 888 N.W.2d 278, 282 (Mich. App. 2016) (remanding for a *Batson* evidentiary hearing where "the court made no factual findings regarding the jurors' appearances, the prosecutor's credibility, or whether defendants established purposeful discrimination and warning that "[i]f the necessary facts cannot be determined with confidence, the trial court must vacate defendants' convictions and retry them."); *Jackson v. Com.*, 380 S.E.2d 1, 6, on reh'g, 384 S.E.2d 343 (Va. App. 1989) (reversing where trial court made "no factual findings" regarding a prosecutor's race-neutral reason because a court "must independently evaluate those reasons as he would any disputed fact"); *State v. Collier*, 553 So.2d 815, 822 (La.1989) (reversing where the trial court "failed to assess the weight and credibility of each explanation and to make the necessary finding whether the explanation was legitimate and acceptable");

Miller-El v. State, 790 S.W.2d 351, 356 (Tex.Ct.Crim.App. 1990) (reversing where the trial court accepted the prosecutor's race-neutral reasons at face value because "[t]he trial judge must examine each of the prosecutor's reasons for striking a potential African-American juror within the circumstances of the particular case to determine whether the State gave a 'neutral explanation' for a strike as a pretext for a racially motivated peremptory challenge."); *People v. Fuentes*, 818 P.2d 75, 81–82 (Cal. 1991) (reversing where trial court did not evaluate "race neutral" reasons offered by the State and determine whether those reasons were "bona fide" or a "sham").

Because the trial court made absolutely no findings on this issue and failed to resolve the challenge in any way—despite trial counsels' timely objection—this Court must reverse.

2. The prosecutor's race-neutral reason was a sham and constitutes purposeful discrimination

Even if the trial court's gross mishandling of the *Batson* challenge alone did not warrant reversal, Witter can show that the State's race-neutral reason was pretextual.

First, the trial court's request for the State's race-neutral reason rendered *Batson's* first step moot. *See Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004) (explaining *Batson's* three-step process). Here, the trial court responded to Witter's *Batson* objection with: "First off, I should note the defendant isn't a person of color, so I think it's an unusual challenge, but I'll let the State put on their reasons." 4ROA804. The State did, proffering that the only note it had on Brown was "I did not believe she was capable of making a decision." *Id.*

The key question remaining was "whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez,* 500 U.S. at 365. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Even in the absence of trial court findings, the record below shows that the State's proffered reason is not only "implausible" and "fantastic," but flat-out wrong. The voir dire transcript is replete with examples of Brown repeatedly and consistently telling the court she could impose death if she felt it was warranted. As detailed below,

Brown never showed any hesitation or trouble with making decisions. Not only does a cursory reading of her voir dire testimony establish that she was capable of making a decision, but Brown later expressed puzzlement over the prosecutor's allegation that she could not make a decision:

> I am an African-American female. [. . .]
>
> I do not know how the prosecutor could conclude that I was hesitant about imposing the death penalty.
>
> I told the prosecutor that I believed in the criminal justice system, that I believed individuals should be held responsible for their actions, that I was good at making decisions, that I had twice served as a juror in the past, that I had made important decisions in my life, that I had no concerns about passing a final judgment, that I could consider each of the three possible penalties, that I could tell Mr. Witter to his face that he deserved to die, that I had no concerns about serving as a juror, that I believed it was my duty to serve as a juror, and that I could be fair to both sides.
>
> I am not opposed to the death penalty as a form of punishment for offenders in egregious cases like this one. Nor would I hesitate to impose the death penalty in a case like this one. In fact, my belief at jury selection was that I would most likely vote for the death penalty in the penalty

> phase so long as the prosecution was able to establish that Mr. Witter was responsible for the crimes charged in the guilt phase.

22ROA4966–67.

Moreover, in post-conviction proceedings, Witter obtained the prosecutor's notes, which further prove his reason was pretextual. Despite the prosecutor's claim that he noted Brown was incapable of making a decision in his notes, such a comment was nowhere to be found. 14ROA3206. The only thing written on Brown's juror information section is the letter "C," using the A, B, C grading system. 14ROA3206, 3182. The prosecutor later testified at a deposition that a "C" shows that a potential juror is "bland" and "neutral in their assertions." 14ROA3182. The prosecutor's notes did not note Brown was indecisive, as he noted regarding several other potential jurors.[4]

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[4] The prosecutor made notes about countless other jurors who received low grades for their indecisiveness or anti-death penalty views, which shows the lack of such notes for Brown means he did not actually believe she was indecisive and that Brown was treated disparately. *See, e.g.*, 14ROA3202–3220; 15ROA3221–250; Lenda Jones' jury card ("Couldn't sentence to death"); Karl Hanson's jury card ("This guy is weak; DUI prior; equally no in answer to can be open to death; very hard find w/ giving death penalty"); Gerald Hon's jury card ("Can't consider death"); Louise Collins' jury card ("This witness is weak; not sure if she can pass judge"); Tandy Yates' jury card ("Doesn't want

Put simply, there is nothing to support that the prosecutor struck Brown because she was indecisive, and his race-neutral reason misrepresented both the record *and his own notes*. The prosecutor's improper exclusion of jurors on the basis of race is structural error which is prejudicial per se. Reversal is necessary because the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder*, 522 U.S. at 478.

4. Law of the Case Doctrine

This Court considered this issue once before in resolving a state post-conviction petition, in the context of an ineffective assistance of appellate counsel claim. *Witter v. State*, 117 Nev. 1192, 105 P.3d 826

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responsibility to hand down the verdict; can't handle a decision"); Evelyn Mitchell's jury card ("Don't think so re: death penalty; don't want responsibility; woman w/ cough drive me crazy"); Tita Ramos' jury card ("can't... judgment guilt"); Mary Phillips' jury card ("passing judgment doesn't like to but understands need under the law; disinclined to choose death penalty; couldn't weigh them equal"); Donna Barber's jury card ("could not consider death"); Donald McClaflin's jury card ("Judge read panel 'the question' 143 shook head no; notice a bad attitude yesterday"); Fancy Winder jury card ("couldn't consider death"); Lynnedee Shay's jury card ("couldn't consider death"); Dave Hickey's jury card ("has a bad attitude"); Heather York's jury card ("couldn't consider death; couldn't make a decision."). This disparate treatment of Brown further shows "that it is more likely than not that the reasons given for striking [a prospective juror] were mere pretext for purposeful discrimination." *McCarty v. State*, 132 Nev. ___, 371 P.3d 1002, 1008 (2016), *reh'g denied* (June 24, 2016).

(2001) (unpublished). This Court noted that the trial court erred in resolving the *Batson* objection, but affirmed anyway, holding that appellate counsel "reasonably decided not to raise the issue since the State gave a race-neutral reason for striking the veniremember." *Id.* at *5. There was no factual basis for this finding.

The Court here is considering a different question as it is not tasked to assess whether appellate counsel was reasonable or unreasonable in deciding not to appeal this issue. Instead, this Court must review whether Witter's constitutional rights were violated by the trial court's mishandling of his *Batson* objection and the prosecutor's pretextual explanation. A failure to consider this issue on the merits would work a manifest injustice for all the reasons above. *See Hsu v. County of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007).

C. Pervasive and egregious errors during voir dire violated Witter's constitutional rights

During voir dire, the trial court violated Witter's constitutional right to a fair and impartial jury. First, the court made inappropriate and prejudicial comments about the Bible that misled jurors regarding state law and applicable constitutional requirements. Second, the court

erred not allowing Witter to life qualify the jury in light of a prior violent felony conviction. Third, the trial court and the prosecutor improperly informed jurors they must give equal consideration to the three penalties. Fourth, the court made prejudicial references to other high-profile criminal cases. Fifth, the court misled potential jurors to believe their personal responsibility in imposing the death penalty was less significant that it was. And Sixth, the court failed to remove biased potential jurors for cause.

These failures and ensuing errors invalidate Witter's conviction and death sentence, denying him his right to a fair trial and an impartial and unbiased jury. *See* U.S. Const. amends. V, VI, VIII, XIV. Nev. Const. art. 1, §§ 3, 6, and 8; Art. 4, § 21. The court's many failures throughout voir dire compel reversal.

1. Standard of Review

A biased jury constitutes "structural error," which is not susceptible to harmless error review and requires reversal. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) The various errors that occurred during Witter's voir dire resulted in a tribunal organized to convict and

return a verdict of death. *See Witherspoon v. Illinois*, 391 U.S. 510, 518–21 (1968). Given this jury's inclination towards death, this Court should reverse—without considering harmlessness—if it agrees there was error.

Alternatively, non-structural and preserved errors of constitutional dimension are reviewed using the *Chapman* "harmless error" standard. *See also Martinorellan v. State*, 131 Nev. ___, 343 P.3d 590, 593 (2015) (acknowledging the *Chapman* standard for preserved constitutional errors). The *Chapman* standard requires reversal unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. *Chapman*, 386 U.S. at 24.

Unpreserved errors (constitutional or not) are reviewed for plain error. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Plain error is established if: (1) the error "had a prejudicial impact on the verdict when viewed in context of the trial as a whole;" or (2) the error "seriously affects the integrity or public reputation of the judicial proceedings." *Libby v. State*, 109 Nev. 905, 911, 859 P.2d 1050, 1054

(1993) *overruled on other grounds by Libby v. Nevada*, 516 U.S. 1037 (1996).

In *Parodi v. Washoe Med. Ctr., Inc., 111 Nev. 365, 367, 892 P.2d 588, 589 (1995)* this court reversed even though appellant's counsel failed to object, reasoning that objections sometimes place counsel on unpleasant footing with the jury: *Parodi* reversed even though appellant's counsel failed to object, reasoning that objections sometimes place counsel on unpleasant footing with the jury:

> counsel for plaintiffs was placed in the untenable position of silently accepting the judge's trivialization of the proceedings, or risking the prospect of alienating the judge or jury . . . counsel may have been unwise or remiss if he had responded by objection to every slight offense which alone may not have been sufficient to warrant a mistrial or other remedial response, but which created a cumulative impact the effect of which we are unable to calculate.

Id. at 369, 892 P.2d at 590. This Court later applied this reasoning to a criminal case, finding plain error where numerous errors "were individually neither prejudicial nor egregious; however, viewed in their entirety, they were clearly erroneous and potentially prejudicial to [the defendant's] case." *Oade v. State*, 114 Nev. 619, 624, 960 P.2d 336, 339

(1998). *Oade* reversed where there was "persuasive evidence" of the defendant's guilt, but where "the judge's remarks may have lessened the defense's credibility and prevented the defense from obtaining full and fair consideration from the jury." *Id.* at 624, 960 P.2d at 339 (citation omitted).

2. The trial court violated Witter's constitutional rights by instructing the jury to follow the Bible in their role as juror

a. Background

The trial court repeatedly made improper and prejudicial comments when confronted with prospective jurors who held religious views opposed to the death penalty.

For example, when asked whether she could equally consider all three punishments Lynnedee Shay said she would have difficulty considering the death penalty because of her religious convictions. 2ROA407-408. The trial court told Shay that the Bible sanctioned the death penalty:

> The Court: What religion is against the death penalty?
>
> Shay: I'm Lutheran.

The Court: They are against the death penalty?

Shay: I'm against [the death penalty].

The Court: They are not against it; your religion is not against it?

Shay: Not specifically.

The Court: The Bible isn't against the death penalty.

Shay: I think the Bible is against vengeance.

The Court: We are not talking about vengeance.

Shay: I am.

The Court: The Lord gives vengeance. But you don't feel you can?

Shay: No.

The Court: You realize the laws of this state say someone will consider this punishment?

Shay: Yes.

The Court: And I take it your religion says you should follow the laws of the State as well?

Shay: Yes, sir.

The Court: I'm working you into a box, aren't I?

> Shay: Yes, you are.
>
> The Court: Do you wish not to follow the laws of this state?
>
> Shay: Yes, as it pertains to the death penalty.

2ROA407–08.

The court excused Shay for cause. 2ROA408. Eleven other potential jurors witnessed this exchange. 2ROA395–96, 98, 403, 406.[5]

An even more prejudicial dialogue took place between the trial court and potential juror Heather York, who was present during Shay's questioning. 2ROA 395–96. After York expressed hesitation in imposing the death penalty due to her spiritual beliefs, the court said he could "trap" York into believing that the Bible sanctioned the death penalty:

> York: I wouldn't consider myself religious at all—I don't go to church—but I'm real spiritual; but I feel [the death penalty is] God's job, not mine.
>
> The Court: I could go around the horn and trap you on that one.
>
> York: Okay.
>
> The Court: Do you want me to try to do that?

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[5] The panel began with 14 potential jurors, but by the time the court questioned Shay, three others had been excused for cause.

York: If you wish. It's just a—

The Court: We are told by our maker to live here and follow the laws that we live under, right?

York: Uh-huh.

The Court: And the Bible, which tells of that, has many instances where death is meted out by tribunals, one, the Savior himself, and sometimes whole cities have been destroyed for wrongdoing. So it's hard to say out of religious beliefs you don't believe in doing justice by using a penalty such as this if we are told to do it.

Number two, you're not doing it; the legislature of this state is. You're acting as one of 12 people to determine whether it should be applied or not.

I'm sure you like to follow the laws of the State.

York: Uh-huh.

The Court: But you don't want to follow this one?

York: You know, people, I think, have to make decisions they can live with, and this is a decision that I couldn't live with. I would have a hard time dealing with myself if I had to make that decision. Therefore, I couldn't be fair considering that because I would hold back. I don't want it on my—

The Court: So you want others to do it, not you?

> York: Whatever they want to do is what they do and that's their business. What's my decision—
>
> The Court: I guess you wouldn't fight in a war either?
>
> York: You're right, I would not.
>
> I couldn't make a decision if it meant a cat was going to get killed. I wouldn't do it in a person's life.
>
> The Court: I wouldn't want to kill a cat either unless that cat was killing something else, which is what happens sometimes.
>
> All I'm saying is this: We each have a responsibility to live in the community we live in. We enjoy the benefits of the laws and protection of the laws, and each of us have an obligation to honor them and uphold them unless we have some moral reason why we couldn't do that, which generally we say in this country would be reason enough to not apply that law to us, unless we do something unusual, and I would respect that.
>
> What I don't respect is when someone tells me I believe in the law and I'd like to uphold it, but I'd like someone else to do it, but not me, because then you're accepting the benefit without accepting the responsibility.

2ROA414–417.

The court excused York for cause. 2ROA417. Nine other potential jurors witnessed this exchange. 2ROA395–96, 98, 403, 406, 410.[6]

One juror who was ultimately empaneled as an alternate specifically referenced the judge's questioning during his own voir dire. 4ROA787. Juror Norman Becker explained that, prior to voir dire, he was against the death penalty. *Id.* When pressed specifically on what beliefs he previously held, and why they changed, Becker stated: "I was raised in a pretty structured Christian environment, and that's just not an acceptable—I haven't read the whole Bible, but I know from my old religious classes, none of us have the right to take anybody's life." 4ROA788. However, Becker then stated, "[b]ut then understanding it's the law of the land and bringing home a close to home situation made me re-examine my convictions." *Id.*[7]

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[6] The panel began with 14 potential jurors, but by the time the court questioned York, four others had been excused cause.

[7] It is unclear from the transcript whether Becker was referring to the trial court's comments on the Bible or the judge's hypothetical questioning of whether someone would impose the death penalty if their family member was murdered—or both. However, under either scenario, it is clear the trial court's questioning impacted Becker's deeply held beliefs, to the point that his views on the death penalty changed in less than a week.

b. The trial court's Biblical comments directed the jury to consider impermissible authority.

Federal law on this issue is clear: it is always improper for the trial court and the prosecution to point to a "higher authority" that directs jurors to impose the death penalty. *Sandoval v. Calderon*, 241 F.3d 765, 775–80 (9th Cir. 2000) (prosecution's argument that "the death penalty was sanctioned by God" violated the Eighth Amendment's requirement that a jury make specific findings under a particular sentencing scheme); *accord Jones v. Kemp*, 706 F. Supp. 1534, 1559-60 (N.D. Ga. 1989) ("It is well settled that religion may not play a role in the sentencing process."); *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991); *State v. Wangberg*, 136 N.W.2d 853, 854 (Minn. 1965). *See also Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991) (condemning "numerous appeal to religious symbols and beliefs" made by the prosecution).

This Court has considered Biblical comments by a prosecutor and noted that "the possibility always exists that some jurors will be at least as impressed by Biblical authority as by the authority of a court or legal scholar." *Young v. State*, 120 Nev. 963, 972, 102 P.3d 572, 578 (2004)

(citing *Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir.2001)). In *Young*, this Court reviewed a prosecutor's recitation of a passage from the Bible's Book of Proverbs during a capital case. 120 Nev. at 972, 102 P.3d at 578. *Id.* This Court condemned these comments and explained that "the prosecutor is basically saying that the Bible requires the death penalty for the defendant once he is found guilty[,]" and held that such tactics were, "unacceptable."

In Witter's case, the comments violated the Sixth and Fourteenth Amendments' requirements that a state may not entrust the determination of whether a man should live or die to a tribunal predisposed to return a verdict of death. *See Witherspoon v. Illinois*, 391 U.S. 510, 518–21 (1968).

Further, the trial court's comments violated the Eighth Amendment because it directed the jury's consideration of the death penalty beyond the evidence and the permissible considerations in Nevada's capital sentencing scheme. *See Sandoval*, 241 F.3d at 775–80. The court's comments were made in such a way to misleadingly imply that the Bible, and Jesus Christ himself, endorse the death penalty for

all murderers which is contrary to Nevada's capital sentencing scheme. *Compare e.g.*, 2ROA415 ("And the Bible, which tells of that, has many instances where death is meted out by tribunals, one, the Savior himself, and sometimes whole cities have been destroyed for wrongdoing.") *with* NRS 200.030(4) (allowing the death-penalty for first-degree murders only). Such references to Biblical authority inflamed the passions and prejudices of the jury.

c. Law of the case doctrine

The law of the case doctrine does not apply to this issue because this Court has never addressed this issue on the merits. *See Dictor v. Creative Mgmt. Servs., L.L.C.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010)); *see Witter v. State*, 281 P.3d 1232, *3 (noting Witter's claim that the court made improper comments about the Bible during voir dire, but declining to consider the issue because the petition was untimely and successive.

3. The trial court erred by not allowing defense counsel to life qualify the jury during voir dire as to one of the state's statutory aggravators

Witter's death sentence is invalid due to the trial court's refusal to allow voir dire on whether prospective jurors would consider all three sentencing options for someone previously convicted of a violent felony.

A capital defendant has a right to life-qualify prospective jurors. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). To prevent the possibility of seating a juror who will refuse to consider the aggravating and mitigating circumstances present in the case, *Morgan* requires that, upon defendant's request, jurors be questioned as to whether they would automatically vote for death upon conviction of a capital offense. *Id.* at 736. As is the case for death-qualifying questions, life-qualification cannot seek to commit any specific juror to any specific verdict on an assumed set of facts. *See Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (defining a "stake out" question as one which causes a juror "to pledge themselves to a future course of action and indoctrinate[s] them regarding potential issues before the evidence ha[s] been presented."). Proper life-qualification questioning,

therefore, seeks to reveal a potential juror's views without requiring them to commit to a particular position.

In the instant case, Witter sought to engage in a non-leading inquiry of jurors as to whether they would follow the law as they would be instructed. Prior to the commencement of individual voir dire Witter requested permission to question prospective jurors on whether "they would still consider all three penalties … if they knew one of the aggravating circumstances was a prior crime of violence." 2ROA363. The question was open-ended and mirrored the questioning previously engaged in by the court during its general life-and-death qualification. 1ROA225. The State objected to this line of questioning arguing that it improperly attempted to stake out the jurors' feelings on a hypothetical issue. The court ruled against Witter, subscribing to the state's mischaracterization of the question.

The following day, Witter renewed his request for an open-ended question on the jury's ability to consider all three sentencing options and pointed the court to the recently-issued decision in *Morgan v. Illinois*. 3ROA469. The Court refused to read or consider *Morgan*,

stating "Not right now counsel. I don't think it's appropriate to start bringing up cases with the Court when we have a jury out there waiting." *Id.*

The trial court, in justifying its decision to bar Witter's life-qualification questioning of the jury, claimed that it did so in the interests of ensuring an even playing field between the prosecution and defense 2ROA366 (emphasis added).

The trial court's stated intention notwithstanding, it then allowed the prosecution to question prospective jurors about specific items of evidence which would be introduced at trial. 2ROA332 (questioning prospective juror Jimmy Earl King about his thoughts on evidence which would be presented in this case, including the use of a deadly weapon, an attempted sexual assault, and evidence of alcohol use); 2ROA420 (questioning prospective juror Edith Blankman about her willingness to impose the death penalty where a defendant is convicted of murders involving sexual assault and the use of a deadly weapon in the course of a robbery); 2ROA429 (questioning prospective juror Raque Lapuz about whether his verdict would be affected due to this case

involving a sexual assault and due to "evidence of a horrific crime scene, evidence of blood and violence"); 3ROA561 (questioning prospective juror Marlene Widnes about whether she could be fair given allegations of sexual assault and robbery with a deadly weapon).

Not only was the State allowed to death-qualify by reference to specific aggravating circumstances, but it was also allowed to death-qualify jurors by priming them to discount mitigation evidence the defense would undoubtedly offer. 2ROA320-21 ("The defendant … undoubtedly has family members that care for him, that love him. Can you honestly say that if you believe he's deserving of the death penalty, that you can come back into this courtroom and tell him that he deserves to die.").

Faced with a similar situation, the California Supreme Court held that just as the prosecution was permitted to probe a juror's thoughts about specific factual scenarios in the course of death-qualifying a venire, so too could the defense pose specific factual scenarios in order to life-qualify the same panel. In *People v. Cash*, 50 P.3d 332, 342 (Cal. 2002), the trial court erred where it restricted defense counsel from

inquiring whether the defendant's previous homicide conviction would render the jury predisposed to imposing a death sentence if it found him guilty of the instant murder. In so doing, the Court relied on California's history of allowing prosecutors to use specific factual scenarios in determining whether, under those scenarios, a particular juror was still death-qualified. *Id.* at 341; *People v. Pinholster*, 824 P.2d 571, 588 (Cal. 1992) (*en banc*) (wherein the prosecutor inquired whether death could be imposed in a felony-murder case); *People v. Ochoa*, 28 P.3d 78, 94 (Cal. 2001) (wherein the prosecutor inquired whether death could be imposed where the defendant did not personally kill the victim); *People v. Livaditis*, 831 P.2d 297, 304 (Cal. 1992) (wherein the prosecutor inquired whether death could be imposed on a young defendant who had never previously been convicted of murder).

Other state high courts throughout the country reviewing whether life-qualification can entail fact-specific inquiry have determined that in appropriate cases, it must. *See State v. Jackson*, 836 N.E.2d 1173, 1190 (Ohio 2005) (trial court erred by prohibiting defendant from life-qualifying jury with reference to fact that murder victim was a 3 year

old child); *State v. Clark*, 981 S.W.2d 143, 147 (Mo. 1998) (en banc). Similarly, federal courts have, where appropriate, found case-specific factual inquiry necessary in order to empanel a fair and impartial jury. *Turner v. Murray*, 476 U.S. 28, 37 (1986) (requiring that, in interracial capital case, prospective jurors be informed of victim and defendant's races and questioned on bias); *United States v. Flores*, 63 F.3d 1342, 1355 (5th Cir. 1995) (holding that, where juror indicated that he was death-qualified in abstract, but not on specific factual circumstances of case, exclusion of juror was proper); *United States v. Johnson*, 366 F.Supp.2d 822, 849 (N.D.Iowa, 2005) (holding that, depending on facts of the case, specific case information must be disclosed as part of life-qualification process).

Nevada, like California, has a lengthy history of cases wherein the court and/or prosecution was permitted to death-qualify a juror on the specific factual circumstances of a case. *Browning v. State*, 124 Nev. 517, 531, 188 P.3d 60, 69-70 (2008) (finding trial court acted properly by asking prospective juror "whether he could consider the death penalty in a case where, as here, the defendant was convicted of first-degree

murder by entering a jewelry store, stealing jewelry, and stabbing the owner to death."); *Walker v. State*, 113 Nev. 853, 866, 944 P.2d 762, 771 (1997) (upholding specific death-qualification questioning involving examples of a "revenge killing" and "serial killing").

In *Cash*, California recognized its long history of allowing the prosecution and courts to engage in specific questioning about factual issues likely to be adduced at trial in order to assist in death-qualifying a jury, and found that the defense has a similar right in order to assist in life-qualifying a jury. *Cash*, 50 P.3d at 342. This implicit recognition of the importance of symmetrical rights is a foundational due process consideration. *See Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

In this Court's 1996 opinion, it rejected Witter's argument that the trial court erred by failing to allow Witter to life-qualify the jury with the fact of his prior felony conviction. *Witter v. State*, 112 Nev. 908, 921, 921 P.2d 886, 895 (1996). Citing to EJDCR § 7.70, this Court concluded "that the district court did not abuse its discretion when it precluded Witter's counsel from asking his proposed question of prospective jurors."

This Court erred by failing to determine whether Witter's life qualifying questions were necessary to receive a fair trial. While it is true that, ordinarily, specific voir-dire questioning is left to the sound discretion of the trial court and subject to review for abuse of that discretion, *see Sanders v. Sears-Page*, 131 Nev. ____, 354 P.3d 201, 206 (2015), life-qualification questions, when asked by the defense, are not subject to a trial court's discretion. *Morgan,* 504 U.S. at 735. Because this Court previously erred by failing to recognize that defense counsel's questions were appropriate, particularly when the prosecutor was allowed to ask specific questions about the facts of the case, the law-of-the-case doctrine does not bar consideration of this issue. *Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (recognizing exceptions to law-of-the-case doctrine).

Where even a single seated juror is invariably predisposed to vote for death, prejudice has been established. *Morgan*, 504 U.S. at 728. Likewise, a trial court's failure to allow a defendant to make reasonable inquiry to determine whether a juror is invariably predisposed to vote for death, is prejudicial. *Id.* at 734-36. The denial of an opportunity to

make a reasonable inquiry to "life-qualify" the jurors on the panel, was prejudicial.

4. Improper statements regarding equal consideration of penalties

The trial court erred by telling jurors, and permitting the prosecutor to tell the jurors, that state law required them to give "equal consideration" to the three penalties. The prosecutor contaminated the jury and violated Witter's right to due process, an impartial jury, equal protection, and a reliable sentence. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

At the outset of voir dire, the trial court phrased the terms of death qualification as follows: "Now this is the question I'll be asking each of you: If you are selected as a juror, can, in your present state of mind, consider equally all three of these forms of punishment and select the one which you feel, under the evidence and circumstances of this case is most appropriate?" 2ROA241. This statement was repeated almost verbatim with each juror. 2ROA242, 43, 245-246, 248-249, 254, 258-259, 261-262, 266, 268, 269, 271-274, 284, 286-287, 293, 373, 376-379, 383, 391, 393-394, 396-397, 399-402, 405-406, 409, 411-414, 417.

The same question was asked by the prosecutor on several occasions as well. 3ROA476, 550, 545, 673, 705.

It was not until the end of voir dire that the trial court acknowledged it was a mistake to qualify the jurors in such a manner. During voir dire of potential juror Phillips, the trial court stated,

> Miss Phillips, sometimes we sit here year after year and go through these kinds of thing and think we know it all, and a situation comes up and I realize sometimes we have something to learn here too. And I've learned something from your answers; and that is, that word equally really isn't a good word, because, as you say these things aren't equal. So how do you consider them equally? I realize maybe that isn't a good word that we are using. Appellate courts struggle over these words for hundreds of years and finally they come up with ones we all use, and I can see that probably isn't a good connotation for what we are asking. So what we are trying to say… that I, select the proper punishment for whatever it is the evidence shows has been done, can you consider each of them – even though not equally, can you consider each and select the on that you feel, under the facts that you hear, to be most appropriate?"

3ROA553-554.[8] Nevertheless, the trial court allowed the same improper language to continue to be used by the prosecutor (3ROA673 (with Ms. McArthur), 3ROA705 (with Mr. Purdy)). The trial court also failed to correct its improper statements to the jurors that were previously questioned.

The trial court and prosecutor's comments regarding equal consideration of penalties was contrary to state law as well as the state and federal constitutions. This Court has recognized that such statements are "susceptible to being interpreted to require that jurors accord the same consideration to each of the possible penalties. There is no such requirement under Nevada law." *Leonard v. State*, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001). As this Court noted in *Leonard*, requiring equal consideration is contrary to the law where the prosecutor has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt, where Witter is not death eligible if mitigation outweighs aggravating circumstances, and where the jury is not required to impose the death penalty under any circumstances. *Id.*

[8] Phillips was later excused by a peremptory challenge. 4ROA809.

The requirement of equal consideration of penalties also violates state and federal constitutional principles. Statements by the trial court and the prosecutor requiring jurors to give more consideration to a death sentence than required under state law violates constitutional requirements of due process, equal protection, and a reliable sentence. Those statements also violate the Eighth Amendment principle that a capital sentencing scheme separate the few murder cases that warrant the ultimate sanction from the many that do not. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980).

The State cannot show that the trial court's and prosecutor's comments regarding equal consideration of penalties was harmless beyond a reasonable doubt. Considered singly and in combination, the trial court and prosecutor's improper comments were prejudicial and invalidate Witter's death sentence.

The law of the case doctrine does not apply because this claim has not been previously decided on the merits.

5. The trial court made inappropriate references to the O.J. Simpson trial in an already contentious media climate for criminal defendants

a. Background

At the time of Witter's voir dire, the O.J. Simpson trial was in full swing. Less than two months before the start of Witter's voir dire, the O.J. jury made headlines when several of its members refused to attended court and came dressed in all black. *See* Neil Henderson, "Thirteen Simpson Jurors Stage Revolt," The Washington Post, *available at* https://www.washingtonpost.com/archive/politics/1995/04/22/thirteen-simpson-jurors-stage-revolt/f0b8a434-5491-49bb-be5e-e1c082250cfa/?noredirect=on&utm_term=.e69a8b2b8f3f (Apr. 22, 1995). Indeed, Simpson infamously tried on a pair of gloves a mere four days before the start of Witter's voir dire. *See* "Timeline: O.J. Simpson Murder Trial," LA Times, *available at* http://timelines.latimes.com/oj-simpson-murder-trial (Mar. 4, 2016).

Additionally, the "Menendez Brothers" trial had concluded the previous year with a hung jury, and the brothers were anticipating a retrial scheduled that autumn. *See* Janelle Harris, "Menendez

Brothers: Everything You Need to Know," *Rolling Stone*, available at https://www.rollingstone.com/culture/news/menendez-brothers-everything-you-need-to-know-w442897 (Oct. 2, 2016). The trial provoked sensation for many reasons, one being the defense's theory that the brothers killed their parents after suffering years of abuse. *Id.*

On top of these two California cases, a grand jury spent the summer of 1995 deciding whether to indict Timothy McVeigh and Terry Nichols for the Oklahoma City Bombing. *See* Lisa Smith, "Grand Jury Allowed More Time in Bombing Case," Reuters (June 17, 1995).

When Witter's trial counsel expressed concern regarding the effect of the Menendez brother's trial on Witter's case,[9] the trial court refused to read the relevant case law. *Id.* Not only did the court reveal it had

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[9] Witter's counsel raised this issue because the Review Journal published a letter by Victor Schulze, written in his capacity as a Deputy Attorney General. 3ROA466. Published on the second day of Witter's voir dire, Schulze's article was critical of mitigation and ridiculed sentencing hearings for allowing defendants to "demand lengthy and expensive 'social assessment analysis' in an attempt to explain away or rationalize to a judge why they committed the horrible and cruel things they did when they chose to hurt another fellow human being." 18ROA4096. Witter's counsel began to explain that that he wanted to know "if some juror feels because this article or because of the Menendez trial—" but the trial court interrupted that it was not going to "get involved." 3ROA467.

not read the case, it warned counsel that it was not "appropriate to start bringing up cases with the Court when we have a jury out there waiting." *Id.*

Despite the trial court's assertions that it would not "get involved" with the media or respond to anything in the press, the court made numerous references to the O.J. Simpson case throughout voir dire. For example, the court told the potential jury pool "I know all of you have seen on television the example of the case we all know, where it's been a problem nationwide [to try the case]. I assure you, this case will not be run like that one." 1ROA215. The court then referred to its previous remark by saying "I just told you this wasn't an O.J. trial, and we have Larry King on the jury." 1ROA217. Further, the court used the O.J. trial as an example of why victims' family members cannot sit on juries. 2ROA346. The court also asked the jury not to tell their families what kind of case they are serving on because "they are going to give you their opinion about the O.J. case, which we don't need." 2ROA351.

Perhaps prompted by the trial court's myriad references, two jurors—who were later empaneled and served in Witter's case—also

referenced the O.J. case. 3ROA462. For example, juror Robert Hutchinson said that he had strong opinions on the criminal justice system because of the "trial that's been on TV lately." 2ROA323. When Witter's counsel followed up by asking if anything from the trial stuck out, Hutchinson replied: "No. I think a lot of it is really funny. It seems anyone can say anything as long as they are not under oath. Most of them make sure they are not when they say it." 2ROA324. Hutchinson then agreed with Witter's counsel that the O.J. trial was a "complete aberration" and moved on from the topic. 2ROA324. Another seated juror, Sharon Vacelli, said that she hoped that jurors would have a different experience from the jury in the O.J. case. 3ROA512.

b. The trial judge's comments were inappropriate and prejudicial to Witter's case.

Under the Sixth Amendment, "[t]he requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. State of Louisiana*, 379 U.S. 466, 472 (1965). In *Parodi v. Washoe Med. Ctr., Inc.*, this Court held that a judge's inappropriate comments—even if well-intentioned—can

prejudice a party's right to fair trial and require reversal. 111 Nev. 365, 367, 892 P.2d 588, 589 (1995). Thus, *Parodi* reversed where the totality of the trial judge's conduct inserted "unwarranted levity" into the proceedings, which was "potentially prejudicial" to the appellant's case. *Id.* at 368, 892 P.2d at 590.

Here, the trial judge's comments were clearly prejudicial to Witter's case because the judge repeatedly brought up a very famous, hotly contested, and ongoing trial. As discussed above, this was uniquely prejudicial given the media climate towards criminal defendants at the time. The trial court brought up the O.J. trial early on in the proceedings, appearing to deride the case by reassuring the jury that Witter's case would not be "run like that one." 1ROA215. And similar to *Parodi*, Witter's trial judge referenced the O.J. case with levity, joking with the jurors about the presence of a Larry King in voir dire. 1ROA217. Thus, it was inappropriate and harmful for the trial judge to repeatedly reference the O.J. trial because it prevented fair consideration of Witter's case by the jury. *See Oade,* 114 Nev. at 624, 960 P.2d at 339.

c. The law of the case doctrine

The law of the case doctrine does not bar consideration of this issue because this Court has never addressed this issue. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

6. The trial court's made improper comments regarding jurors' individual responsibility

The trial court improperly told two potential jurors that their individual responsibility would be lessened if they imposed the death penalty. First, the court told Shay:[10] "you're not doing it; the legislature of this state is. You're acting as one of 12 people to determine whether it should be applied or not." 2ROA at 415. Next, the court told potential juror Hanson: "In your case, it would be diluted by 12. You would have your say, along with 11 others, on the punishment to be given. And if you decided, the 12 of you–and once again, it must be unanimous–if you decided, the 12 of you, it should be death, then it's diluted by 12 ways."). 3ROA488. Sharon Vacelli, who later served as a juror in Witter's trial, witnessed Hanson's questioning. 3ROA473, 462.

[10] This is the same juror discussed above in section VII(C)(2).

In *Caldwell v. Mississippi*, the United States Supreme Court held that, under the Eighth Amendment, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328–29 (1985). *See also Geary v. State*, 112 Nev. 1434, 1451, 930 P.2d 719, 730 (1996) ("If the jury is not properly instructed regarding the gravity of its responsibility, the jury may minimize the importance of its role, which is an intolerable danger in the capital sentencing process") (internal quotations omitted) *decision clarified on reh'g*, 114 Nev. 100, 952 P.2d 431 (1998);

In this case, although Witter's trial counsel failed to object to this line of questioning, Witter can show plain error because the trial court's remarks prejudiced Witter's substantial rights. Here, the court's comments served to minimize the jury's sense of individual responsibility when imposing a death sentence. The court's comments led the jury to believe they were absolved of their individual responsibility in imposing a death sentence, in violation of *Caldwell*.

3ROA473, 462. The prejudicial effect of the comments made by the court were even more severe in this capital case where Witter's life was at stake, and constitute reversible error.

a. Law of the case doctrine

The law of the case doctrine does not apply to this issue because this Court has never addressed it on the merits. *See Dictor v. Creative Mgmt. Servs., L.L.C.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010). *See* 25ROA5591-92 (noting Witter's claim that the court made improper comments about the Bible during voir dire, but declining to consider the issue because the petition was timely and successive)

7. The trial court's failure to remove biased jurors for cause

The Sixth Amendment guarantees Witter an impartial jury. The presence of a single biased juror who should have been dismissed following a challenge for cause can be the basis for reversal. *See Thompson v. State*, 111 Nev. 439, 894 P.2d 375 (1995); *In re Michael*, 326 U.S. 224, 228 (1945).

"The test for determining if a veniremember should be removed for cause is whether their views 'would prevent or substantially impair

the performance of his duties as a juror in accordance with his instructions and his oath.'" *Nelson v. State*, 123 Nev. 534, 543–44, 170 P.3d 517, 524 (2007) (citation omitted); Wainwright v. Witt, 469 U.S. 412, 424 (1985). In resolving challenges for cause, a trial court may not rely solely on a "final assertion" but instead must "construe[] the whole declaration together." *Thompson*, 111 Nev. at 442, 849 P.2d at 377 (quotation omitted).

A trial court has "broad discretion in ruling on challenges for cause," and thus this Court reviews for an abuse of discretion and will defer to the trial court's judgment if the juror is "equivocal." *Walker v. State*, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997).

a. Juror Edward Miller

During voir dire, Witter's trial counsel challenged Edward Miller for cause after Miller said he would not consider Witter's upbringing when deciding on the appropriate sentence:

> [Counsel]: Do you believe the way in which a defendant was raised is important to your decision as to penalty?
>
> Miller: No.

> [Counsel]: Can you explain that?
>
> Miller: I think the individual should be accountable for his self. How he was raised—I was raised in the coal country. It didn't bother me. I went to school. Everybody has the same opportunities. I think it's what you make of yourself.
>
> [Counsel]: So if we put on evidence of a bad childhood, that's not something you would consider in mitigation stage; is that correct?
>
> Miller: Yes.
>
> [Counsel]: You would not consider it, right?
>
> Miller: No, I would not consider it.
>
> [Counsel]: Your Honor, I would ask he be struck for cause.

4ROA724–25.

The trial court told Miller that while some people have tough childhoods they overcome—and that "I put myself in that category"—others do not. 4ROA725. The court then asked Miller if he could consider evidence regarding Witter's childhood, even though he just said he could not. 4ROA726. Miller answered, "I misunderstood. I would listen to the evidence of the crime presented. As far as childhood—" *Id.*

The court interrupted, saying "No. We are talking about the upbringing now," and told the juror that "if you don't think it's enough, you don't have to buy it. If you think it's enough, you might buy it." *Id.* The court again asked Miller "would you consider [upbringing]?" and Miller responded that he would. 4ROA726-27. When the court pointed out that "You just said you wouldn't. Do you understand that?" Miller responded "No, *you've lost me.*" *Id.* at 727 (emphasis added). The court engaged in more questioning that led Miller to state he would consider Witter's upbringing. *Id.*

After the court's questioning, Witter's trial counsel again questioned Miller, and Miller flip-flopped on upbringing again. Counsel asked Miller, "[d]o you agree childhood matters in how a person grows up?" to which Miller responded "Not really, *I may be contradicting myself.*" 4ROA728 (emphasis added). Counsel pointed out that Miller was responding one way to him and another way to the court, but the court interjected, saying "I don't think he's skeptical. The way you asked it, you probably solicited a certain answer, and I could probably

do the same thing." 4ROA729. Miller then stated that he could consider Witter's upbringing. 4ROA730.

After this questioning, counsel renewed his chellenge for cause, which the trial court denied. 4ROA731. At the next break, counsel made a record concerning the challenge. 4ROA 740. The court told counsel that Miller said he could consider mitigation, focusing on Miller's honesty in answering the questions. 4ROA742. At the end of the peremptory process, trial counsel noted that he was required to use his last peremptory challenge on Miller, and that there was another juror that he would have preempted if he had not had to use his last one on Miller. 4ROA827.

(1) The trial court's failure to grant the challenge for cause against Miller was an abuse of discretion

The trial court erred by denying trial counsel's challenge to Miller for cause. Miller's statements during voir dire as a whole demonstrate he was unable to consider mitigation evidence regarding Witter's upbringing. 4ROA 724–31. But a capital juror may not refuse to consider relevant mitigating evidence. *See Eddings v. Oklahoma*, 455

U.S. 104, 113–15 (1982). Thus, trial counsel properly moved to remove Miller for cause. *See* NRS 16.050(1)(f).

Construed as a whole, Miller's comments show that his views on childhood upbringing "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"—he stated several times that he did not believe that a person's upbringing mattered when considering a capital sentence. *See Nelson v. State*, 123 Nev. 534, 543–44, 170 P.3d 517, 524 (2007).

The court abused its discretion by relying upon Miller's "final assertion" instead of "the whole declaration together." *Thompson*, 111 Nev. at 442, 849 P.2d at 377. Taken together, his whole declaration showed that Miller was, at best, highly confused, and at worst, unwilling to consider mitigation evidence. This Court should not give the court's findings to the contrary deference because Miller's statements was not equivocal: he only agreed to consider mitigating evidence after being asked leading questions by the court. But, even after leading questions, Miller expressed repeatedly that he found evidence of upbringing unimportant. This was likely made worse by the

fact the court began its questioning by telling Miller that some people—including the judge himself—were able to overcome tough childhoods. *See* 4ROA725.

The denial of a meritorious challenge for cause is prejudicial per se when it deprives Witter of a peremptory challenge to remove another biased juror, as explained below.

(2) Law of the case doctrine

This Court considered this issue once before in resolving a state post-conviction petition, in the context of an ineffective assistance of counsel claim. 12ROA2545. This Court held that Witter was not prejudiced by the denial because "the trial court acted within its discretion in finding that the potential juror's statements as a whole showed that he would fairly consider the evidence. *Id.*

The law of the case doctrine should not apply to bar consideration of this issue because failure to consider this issue on the merits would work a manifest injustice. *See Hsu v. County of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007). Moreover, this Court is in a

different procedural posture to assess this claim, and has never considered this error as a substantive claim.

b. Juror Marsha Ann Clark

Marsha Ann Clark served as a juror in Witter's case. 3ROA462. However, during voir dire, she displayed a significant pro-prosecution bias.

First, when asked about the death penalty, she said she supported it because "Nevada's laws may not be as tough as I think they should be." 3ROA 678. When asked by the State, "There's nothing tougher than the death penalty, correct?" Clark responded "That's true. Maybe I better leave it like that." 3ROA 678–79. When Witter's trial counsel pressed her on this point, Clark explained that she was the victim of a mugging and "left with really no answers to why he did what he did." 3ROA 680. She also disclosed that she was hurt physically and emotionally by the crime, and that she still suffered "to a degree mental, but more so physical." *Id.*

These comments showed that Clark was not impartial in violation of Witter's rights. *See Witherspoon v. Illinois*, 391 U.S. 510, 518–21

(1968). Clark's pro-death sentiment revealed a bias that was "so unmistakable that it is apparent from a casual inspection of the record." *Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007). Although trial counsel failed to challenge Ms. Clark for cause, her empanelment was plain error because a failure to have a neutral jury affected Witter's substantial rights.

(1) Law of the case doctrine

The law of the case doctrine does not apply to this issue because this Court has never addressed this issue. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

D. The district court violated Witter's constitutional rights when it erroneously instructed the jury on premeditated first-degree murder

Defense counsel objected to the district court's inclusion of Instruction 9, which defined premeditation. 6ROA1317. Counsel argued the instruction "blur[red] the distinction[]" between first- and second-degree murder. 7ROA1383–86. Counsel also requested a specific instruction defining the term "deliberation." 7ROA1384, 9ROA2062. The district court overruled the objection and declined to give the

proffered instruction. 7ROA1388. Defense counsel preserved this claim for review.

This Court evaluates claims concerning jury instructions under a harmless error standard of review. *Barnier v. State*, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). Because the instructional error implicates a constitutional right, the State bears the burden to prove beyond a reasonable doubt the error was harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967).

1. The instruction defining premeditation was constitutionally deficient

Following the presentation of evidence during the guilt phase of Witter's capital murder trial, the district court provided the following instruction to the jury on premeditation:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed

> by the act constituting the killing, it is willful, deliberate and premeditated murder.

6ROA1317; 7ROA1404. This instruction was consistent with an instruction approved by this Court in *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), and has since been commonly referred to as the *Kazalyn* instruction. But in *State v. Byford*, 116 Nev. 215, 994 P.2d 700, 713–14 (2000), this Court rejected the *Kazalyn* instruction because it "blur[red] the distinction between first-degree and second-degree murder." *Id.* at 235, 994 P.2d at 713. As explained in *Byford*, the instruction removed the element of deliberation. *Id.* at 235, 994 P.2d at 713. *Byford* provided that the statutory terms "deliberate" and "premeditated" were distinct elements and that "'all three elements, willfulness, deliberation, and premeditation, must be proven beyond a reasonable doubt.'" *Id.* at 235, 994 P.2d at 713-14 (emphasis in original). This Court concluded that the *Kazalyn* instruction failed to "do full justice to the [statutory] phrase 'willful, deliberate, and premeditated.'" *Id.* at 714. This Court stated "[d]eliberation remains a critical element of the mens rea necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences

before acting." *Id.* at 235, 994 P.2d at 714 (deliberation requires "coolness and reflection").

In *Nika v. State*, 124 Nev. 1272, 1287, 198 P.3d 839, 849 (2008), this Court characterized *Byford* as a change in the law respecting the meaning of the mens rea for first-degree premeditated murder. Accordingly, this Court recognized due process required "the change effected in *Byford* [to] appl[y] to convictions that were not yet final at the time of the change." *Id.* at 1287, 198 P.3d at 850. Thus, for convictions not final when *Byford* was decided, the change in law applies.

Under *Nika*, Witter is entitled to the benefit of *Byford* and the use of the *Kazalyn* instruction was constitutional error. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

2. The constitutional error was not harmless

Because the use of the *Kazalyn* instruction constitutes constitutional error, the State bears the burden of proving beyond a reasonable doubt that the error was harmless. See *Chapman v.*

California, 386 U.S. 18, 24 (1967). The State cannot meet its burden here.

The *Kazalyn* instruction collapsed the three elements of first-degree murder (willfulness, deliberation, and premeditation) into one: premeditation. Absent from the instruction was the "critical element" distinguishing first-degree murder from second-degree murder. *Byford*, 116 Nev. at 235, 994 P.2d at 714. The separate element of deliberation requires proof beyond a reasonable doubt that the defendant committed the murder with "coolness and reflection." *Id.* In other words, "[t]he defendant must have engaged in a 'dispassionate weighing process and consideration of consequences before acting,' if his decision to kill was 'formed in passion,' and that passion had not subsided by the time the murder was carried it was not deliberate". *Riley v. McDaniel*, 786 F.3d 719, 725 (9th Cir. 2015) (quoting *Byford*).

In this case, the faulty instruction on premeditated murder was the focal point of the prosecutor's argument in urging the jury to return a finding of first-degree murder. In fact, the prosecutor presented the

faulty instruction in the form of a "blow[n] up" demonstrative exhibit.

7ROA1436. The prosecutor stated:

> "I blew it up because it is so far removed from what all of us would think premeditation is, if we weren't attorneys that used fancy words and strange definitions".

7ROA1435–36.

The prosecutor then read the faulty instruction aloud. Thereafter, the prosecutor stated:

> Based on my experience, that is probably not what you thought premeditation is. Normally when we think of premeditation, we think of somebody who has plotted this out in advance; sat down and drawn (sic) up a plan and said, okay, I'm going to kill this person. I'm going to do it on this date, in this manner, at this time, under these conditions; goes to the store, buys whatever he needs to do it and brings everything that he needs and carries out his planned and plotted out murder. And that is not what premeditation means. It is not related to time; doesn't have anything to do with time. It has to do with making a decision, forming a decision or making a determination in your mind. It's the decision making process that we are talking about, and decisions can be arrived at like that or they could take a long time, and that's why it's not – time doesn't factor into this.
> You look at and decide whether or not he had formed the decision, made the determination to

> kill James Cox. If the answer to that question is yes, then there's premeditation. It can happen as quickly as successive thoughts of the mind, and thoughts can happen quickly.

7ROA1436–37.

The prosecutor's emphasis on this faulty instruction was critical to the State's theory of premeditated murder. As the prosecutor recognized, Witter could not have had any relevant culpable mental state before James Cox arrived on the scene. The prosecutor relied heavily on the "successive thoughts of the mind" language from the premeditation instruction and argued Witter's intentional act constituted premeditation.

The prosecutor highlighted on a demonstrative exhibit and emphasized through argument the erroneous language of the *Kazalyn* instruction in order to secure a first-degree murder conviction. Using the improper *Kazalyn* instruction as a roadmap, the prosecutor conflated the concepts of intent with premeditation and deliberation, thereby exacerbating the prejudice inherent in the *Kazalyn* instruction.

The evidence in this case regarding the missing element of deliberation was not so great to preclude a finding of second-degree

murder had the jury been properly instructed. In fact, the evidence presented at trial supported a theory that Witter acted in a sudden, drunken rage, which is inconsistent with the element of deliberation. Witter was intoxicated, emotionally distraught, and irrational. Witter repeatedly told Cox to leave. At some point the yelling turned into scuffling and Cox wound up stabbed. Witter told police that he had lost control and that events were a blur in his mind. The officer recording the statement described Witter's demeanor at the time as "that of someone that has calmed down after being excited" and like "someone that's been really upset [and] is finally catching their breath and calming down." 6ROA1186, 1219. The circumstances surrounding the murder, Witter's emotionality, and the suddenness of the quarrel weigh strongly in favor of a finding of second-degree murder.

The State cannot meet its burden to show beyond a reasonable doubt that the instructional error coupled with the prosecutor's exploitation of the improper instruction was harmless.

Moreover, the State cannot rely on the fact that Witter was charged with felony murder in addition to premeditated first-degree

murder to show harmlessness. The jury's general guilty verdict did not specifically state which theory it relied upon. 6ROA1364. And the prosecutor relied almost exclusively on the premeditated theory—going so far as to blow up the instruction on premeditation and arguing for its application to the facts of this case. The State cannot meet its burden to prove that the instructional error was harmless beyond a reasonable doubt because the State cannot show "the jury had in fact" convicted Witter on a felony-murder theory. *Riley*, 786 F.3d at 727.

3. Alternative arguments that due process requires the reversal of Witter's conviction

Should this court disagree with Witter's argument with respect to the finality of his conviction and determine he is not entitled to the rule in *Byford*, Witter advances the following arguments.

a. The *Kazalyn* instruction omitted an element of the crime

It is axiomatic that jury instructions must properly state the law. *Harris v. State*, 83 Nev. 404, 407, 432 P.2d 929, 931 (1967). Since the territorial legislature first enacted a statute defining first-degree murder in 1861 to its present day codification in NRS 200.030(1)(a),

first-degree murder in Nevada has included "willful, deliberate and premeditated" killings. *See Nika*, 124 Nev. at 1280, 198 P.3d at 845; 1861 Nev. Stat. § 17 at 58-59. And this Court has explained that the terms encompass their ordinary dictionary meanings. *Ogden v. State*, 96 Nev. 258, 263, 607 P.2d 576, 579 (1980). Moreover, this Court has consistently held that NRS 200.030(1)(a) consists of three mens rea elements and it always has. *See Leavitt v. State*, 132 Nev. __, 386 P.3d 620, 620 (2016); *Hern v. State*, 97 Nev. 529, 532, 635 P.2d 278, 280 (1981). But, as recognized in *Byford*, the *Kazalyn* instruction blurred the distinction between first- and second-degree murder. The instruction relieved the State of its burden of proving an element of the crime, specifically, the distinct mens rea element of deliberation. The omission renders the instruction constitutionally infirm. *See Sandstrom*, 442 U.S. at 521.

b. If the *Kazalyn* instruction accurately described the crime of first-degree murder, it was indistinguishable from second-degree murder and thus unconstitutionally vague

In *Leavitt*, this Court stated that the statutory phrase "'willful, deliberate, and premeditated'" consisted of three terms that "together

convey[ed] a meaning that was sufficiently described by the definition of 'premeditation' eventually approved in *Kazalyn* and *Powell*." *Leavitt*, 132 Nev. __, 386 P.3d at 620–21. But under such a reading, there is no distinction between premeditated first-degree murder and second-degree murder. Thus, the statute defining premeditated first-degree murder was unconstitutionally vague.

The void-for-vagueness doctrine requires a penal statute define the criminal offense with sufficient definiteness and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

Absent a line delineating conduct that constitutes first-degree murder and that which constitutes second-degree murder, the statute is unconstitutional. *United States v. Chapman*, 528 F.3d 1215, 1220 (9th Cir. 2008) (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). Accordingly, the first-degree murder statute, as applied to Witter and given effect via jury instructions, must involve something more than the

instantaneous, intentional act of taking another's life in order to distinguish the crime from second-degree murder.

This Court recognized in *Byford* the error of flowing from the *Kazalyn* instruction. The instruction informed the jury that premeditation may be "formed in the mind at any moment before or *at the time of the killing*." 6ROA1317. The instruction reinforced the concept of instantaneous premeditation, i.e., that arising concurrently with the act of killing another, when it informed the jury that premeditation "may be as instantaneous as successive thoughts of the mind." *Id.* The instruction reduced willful, deliberate, and premeditated to a mere intent to kill. Thus, first-degree murder was indistinguishable from second-degree murder.

In addition to the Due Process Clause, the Eighth Amendment also requires a meaningful distinction between capital and non-capital offenses to ensure "reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). This Court's interpretation of the first-degree murder statute eliminates any distinguishing element from second-degree murder. The Nevada state legislature limited the

application of the death penalty to first-degree murder, but through interpretation this Court erased any distinction between first-degree murder and the non-capital offense of second-degree murder and ensured the arbitrary imposition of the death penalty in violation of due process and the Eighth Amendment. Such arbitrary imposition occurred in this case, and Witter's conviction must be vacated.

c. *Byford* announced a substantive rule that must be applied retroactively

This Court concluded that *Byford* announced a new rule, i.e., a change in the law, and that the decision applied prospectively only. *Nika*, 124 Nev. at 1287, 198 P.3d at 849. New rules "'apply prospectively unless they are rules of constitutional law.'" *Id.* at 1288 n.77, 198 P.3d at 850. After concluding *Byford* did not involve any constitutional concerns, this Court held the decision had no retroactive application on collateral review. *Nika*, 124 Nev. at 1287, 198 P.3d at 850.

Generally, new constitutional rules of criminal procedure are not applicable to cases on collateral review, i.e., "cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S.

288, 310 (1989) (plurality opinion. But two categories of new rules are not subject to this general retroactivity bar: substantive rules and watershed rules of criminal procedure. *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004). To the extent that *Byford* announced a new rule, it was a new substantive rule and should have been applied retroactively.

New substantive rules apply retroactively to convictions that are already final. *See Welch v. United States*, 136 S. Ct. 1257 (2016). Substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro*, 542 U.S. at 351 (citing *Bousley v. United States*, 523 U.S. 614, 620–621 (1998)). Moreover, a decision that modifies the elements of an offense is substantive. *Id.* at 354.

According to this Court, before *Byford*, the *Kazalyn* instruction adequately described the statutory phrase "willful, deliberate and premeditated." *Nika*, 124 Nev. at 1272, 198 P.3d at 850. Following the *Byford* decision, first-degree murder included the discrete element of deliberation, which involved "weighing the reasons for and against the action and considering the consequences of the action." 116 Nev. at 236,

994 P.2d at 714. Thus, a person engaging in certain conduct pre-*Byford* could be convicted of first-degree murder whereas a person engaging in the same conduct post-*Byford* would be subject only to second-degree murder. *See Byford*, 116 Nev. at 249, 994 P.2d at 722 (Maupin, J., concurring) (criticizing majority for "defin[ing] many types of premeditated murder out of existence"). The *Byford* court narrowed the conduct that constitutes first-degree murder under NRS 200.030(1)(a) and changed the substantive reach of the statute. Accordingly, the range of conduct punishable by death in Nevada also changed as a result of *Byford*.

The *Byford* decision constituted a new substantive rule that must be applied retroactively here.

d. An exception to the law-of-the-case doctrine applies

The law-of-the-case doctrine is no bar to considering any of the above claims because this court's *Byford* and *Nika* decisions constitute an intervening change in controlling law. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007).

E. The jury improperly found three invalid aggravating circumstances

1. This Court must consider that only one of four aggravating circumstances remain

The jury's consideration of three invalid aggravators to find Witter eligible for the death penalty violated his state and federal constitutional rights to due process of law, equal protection, and a reliable sentence. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. Moreover, this Court's failure to provide close appellate scrutiny of the effect of the invalid aggravating circumstances violated the same constitutional guarantees.

Because Witter challenges the constitutionality Nevada's statutory aggravators, he raises a "question of law" that "this court reviews de novo." *Sheriff, Washoe Cty. v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002). In capital cases, this Court must conduct "mandatory review" to decide if evidence supports statutory aggravating circumstances and if the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor. NRS 177.055(2)(c)-(d).

Only one aggravating circumstance exists in this case, but the jury found four. First, the jury found Witter committed the murder to avoid or prevent a lawful arrest. This Court struck this aggravator because evidence showed Witter killed the victim "so that he could continue his assault" and "not to avoid arrest." *Witter v. State*, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996) (direct appeal).

Moreover, the jury found Witter committed the murder in the commission of a burglary and in the commission of a sexual assault. The district court struck these two aggravators in a prior proceeding under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), and this Court agreed that the jury shouldn't have considered them.25ROA5585-98.

Here, the Court must consider the invalid aggravators' cumulative impact on the jury's verdict. Without the three invalid aggravators, the mitigating evidence would have prevailed. At Witter's penalty hearing, the jury heard Witter didn't stand a chance against his neglectful upbringing. Witter's Aunt Ruth Fabela testified his mom had inherited alcohol addiction and "had all these friends coming in and out of her

house at all hours of the night." 8ROA1814. Witter's sister Tina said their dad was rarely around and mom "didn't care about anybody but herself and her drugs and alcohol and men." 8ROA1826–27. One of these men choked Witter with a cane. 8ROA1830; 9ROA1933. Witter's mother had sex with men like this in front of her kids. 9ROA1959. Through Witter's childhood, she continued to raise her children around parties, spoons, cotton, syringes, and pills. 8ROA1827. Witter's other sister Lani Witter vividly remembers her mom "heating something in a spoon over candles and syringes." 9ROA1931.

In addition to neglect, penalty phase testimony revealed violence, addiction, and sexual abuse in Witter's upbringing. Witter's cousin Michael Louis Ritchinson said Witter's childhood home had "alcohol and a lot of violence and drug abuse." 9ROA1958. Tina testified in the rare times they were together, Witter's mom chased around his dad with a knife and his dad hit his mom while pregnant. 8ROA1828. Witter's dad, Lew Witter, testified he went to prison for robbery and rape instead of raising his children. 9ROA1861. He had violent drug and alcohol addictions. 9ROA1861, 1863. Similarly, Witter's grandparents shared

violent alcohol addictions (i.e., Witter's grandpa threw Witter's grandma down a ditch, threw a large rock at her, and drove away with Lew and his sister). Witter's grandpa punched Witter in the face at age 13 or 14. 9ROA1867, 1935. Lew testified he was a violent dad to Witter like his father was to him, maybe worse because Lew abused drugs. 9ROA1868. Lew offered alcohol to Witter and abused heroin with his son—they even shot up together. 9ROA1870. Around this time, Witter started drinking in junior high. 9ROA1844. He acted loving when sober but, like his grandparents and parents, violent when drunk. 9ROA1938. Dr. Lewis Etcoff testified Witter "would have been better off without parents." 9ROA1988.

Because Witter's mother was an alcoholic heroin addict and his father was in prison, Witter and his siblings were sent to live with their grandparents, but things didn't improve. Tina saw they were alcoholics and her grandpa "fondled" her sexually. 8ROA1832; 9ROA1856. Her traumatic upbringing gave way to a drinking problem, later chasing her husband with a knife, and slitting her wrists. 9ROA1937. Lani testified

that as little kids, Witter would brush Lani's hair and say "things were going to be better." 9ROA1932.

New mitigation evidence only further weakens the sole remaining aggravator. For example, because Witter's mom drank while pregnant with him, he had Fetal Alcohol Syndrome (FAS), impacting his emotional and mental development. 20ROA4389.

Witter's cousin Lisa Reyes said, "Having a maternal figure to turn to was a constant need for Will". It made him feel secure. It gave him something he never had." 21ROA4649. Accordingly, Witter tried fill the hole his mother left by dating. His brother-in-law Donny Sanders said Witter loved his ex-girlfriend Gina Martin. Gina broke up with him and said she was dating someone else "to make him jealous." 21ROA4669. He attacked Gina's paramour drunkenly, which is the sole aggravator for a prior violent felony. *Id.* Taken together, Witter presented compelling mitigation evidence that outweighed the only remaining aggravator.

2. The law of the case doctrine has no application

The law of the case "does not bar a district court from hearing and adjudicating issues not previously decided, and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal." *Dictor v. Creative Mgmt. Servs.*, LLC, 126 Nev. 41, 44–45, 223 P.3d 332, 334 (2010).

Here, this Court never considered whether the three invalid aggravators together were prejudicial as to the penalty verdict and whether the verdict was imposed under the influence of passion, prejudice, or any arbitrary factor. NRS 177.055(2)(c)-(d). This Court concluded Witter suffered no "actual prejudice" in a post-conviction proceeding. 25ROA5585-98. But this Court never considered the three invalid aggravators' impact together under its "mandatory review." NRS 177.055(2)(c)-(d).

Moreover, this Court failed to apply "close appellate scrutiny" after it struck the invalid aggravators. *Valerio v. Crawford*, 306 F.3d 742, 747 (9th Cir. 2002) (reversing death sentence based on this Court's invalid harmless error analysis). For example, after striking the avoid

or prevent lawful arrest aggravator, this Court found harmless the jury's consideration of the aggravator because "there remain *four* aggravators that the State has proven beyond a reasonable doubt. *Witter v. State*, 112 Nev. 908, 930, 921 P.2d 886, 900 (1996) (emphasis added). However, there were only three aggravators remaining—not four. This is just one example showing the absence of close appellate scrutiny after the Court struck the invalid aggravator.

In addition, this Court failed to apply close appellate scrutiny by ignoring the impact of all mitigation evidence—including mitigation presented after trial. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) ("State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation.").

Here, in post-conviction proceedings, this Court expressly refused to consider any post-trial mitigating evidence, including the undisputed fact that Witter suffers from FAS. 25ROA5589 ("the reweighing

analysis is limited to the trial record"). This Court also overlooked substantial mitigating evidence presented at trial, such as acceptance of responsibility, Witter's history of abuse, and mitigation as to his prior offense. *Id.*

This Court's failure to provide close appellate scrutiny is prejudicial because it deprived Witter of an individualized sentencing determination. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The State cannot prove beyond a reasonable doubt that such error was harmless.

F. The trial court erred in admitting impermissible and unduly prejudicial victim impact evidence

At Witter' sentencing, three members of the murder victim's family provided irrelevant and prejudicial testimony outside the scope of admissible victim impact testimony. Witter's death sentence is therefore invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to the admission of impermissible and unduly prejudicial victim impact evidence. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1, secs. 1, 3, 6, 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews the admission of victim-impact evidence for an abuse of discretion. *Kaczmarek v. State*, 120 Nev. 314, 338–39, 91 P.3d 16, 33 (2004). The erroneous admission of unduly prejudicial victim impact evidence violates the Eighth Amendment, and is thus reviewed using the *Chapman v. California*, 386 U.S. 18, 24 (1967) "harmless error" standard. *See also Martinorellan v. State*, 131 Nev. ___, 343 P.3d 590, 593 (2015) (acknowledging the *Chapman* standard for preserved constitutional error); *Kaczmarek*, 120 Nev. at 339, 91 P.3d at 33 (improper victim impact evidence may violate the Eighth Amendment). The *Chapman* standard requires reversal unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. *Chapman*, 386 U.S. at 24.

2. Background

Several family members of the murder victim testified during sentencing: James R. Cox (the victim's son), Phillip Cox (the victim's brother), and Kathryn Cox (the victim's wife).

a. James R. Cox's Testimony

James R. Cox testified that his son (the murder victim's grandson) wanted Witter to be prevented from hurting anyone ever again:

> Initially, he was angry and wanted to hurt the men [sic] that caused this . . . he's not so much interested in hurting the individual that hurt Grandpa, but he wants to make sure—and he voiced this to my ex-wife—that this never happens again, that this man never hurts anybody else.

8ROA1748. James R. Cox also referenced his own military training and opined that his father had no chance to defend himself:

> My father was either caught off guard or was stunned within the first few moments of the fight, and was probably not in a position where he could defend himself, either thinking about it consciously or unconsciously, to throw his hands up to defend himself.
>
> That took me by surprise and shocked me because . . . that's something I would assume . . . it really shocked me and made me realize, based on the evidence and based on my understanding of my father and hand to hand combat, that whatever happened initially, he had no chance.

8ROA1750–51.

b. Phillip Cox's Testimony

When Phillip Cox testified, he opined that America had a reputation for being soft on crime, and he encouraged jurors to sentence Witter to the harshest penalty under the law:

> As Bible believing people, we are commanded to respect the authority of the government and support its efforts to promote peace and order in our society.
>
> I really feel, as Americans, we are the laughing stock of the world because of our light sentences that we give to people who commit crime; and we parole them early for those things when they should not be.
>
> I really feel this is an opportunity for the State to inflict as strong a penalty that fits a sentence, and I ask as a brother of Jim for my other brothers, for my sister and my parents, that you issue a penalty that fits this crime.

8ROA1778-79.

c. Kathryn Cox's Testimony and defense objection

Ms. Cox's testified that "the events of November 14, 1993, demand that you show this defendant no mercy." 8ROA1784. She added, "William Witter viciously and brutally murdered my husband James Cox. William Witter perpetrated unconscionable acts of violence directed at me and then my husband. My greatest fear is that William

Witter would inflict the same violent acts of destruction on some other unsuspecting victim." 8ROA1785. She then told the jury that "I'm here today to do everything in my power to see that William Witter receives no mercy." 8ROA1786

After Ms. Cox testified, trial counsel noted that "we have just gone through some very emotional victim impact just prior to this," and expressed specific concern over Ms. Cox's testimony. 8ROA1796. Counsel moved for a mistrial on the basis of Ms. Cox's testimony, arguing that although this Court had applied *Payne's* holding in *Homick v. State*, 108 Nev. 127, 825 P.2d 600 (1992), *Payne* and *Homick* only allowed victim impact evidence to show how the crime impacted the family. 8ROA1796–97. The prosecutor responded that he had instructed all the victims not to ask for the death penalty, but that the victims were "entitled to state their views concerning this particular crime, and their view is he should have no mercy." 8ROA1799. The Court responded, "I think that pretty well covers it on the record counsel. I'll leave it at that. Anything else needs to come before the Court?" and moved on. *Id.*

3. The family's testimony far exceeded the bounds of proper victim impact evidence

In *Booth v. Maryland*, 482 U.S. 496 (1987), the Supreme Court addressed "whether the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence." *Id.* at 501–02. *Booth* considered two categories of evidence: that which "described the personal characteristics of the victims and the emotional impact of the crimes on the family," and that which "set forth the family members' opinions and characterizations of the crimes and the defendant." *Id.* at 502. *Booth* concluded that the admission of either type of evidence violated the Eighth Amendment. *Id.* at 509. As to the second type of information, *Booth* concluded such testimony could "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* at 508. Thus, *Booth* reversed a death sentence where the murder victim's son said that no one should be able to "do something like that and get away with it" and the daughter said that she "doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this." *Id.*

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court reversed course, but only partially, concluding, "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed," subject to the due process limitations found in the Fourteenth Amendment. *Id.* at 825, 828. Accordingly, with respect to this category of victim-impact evidence, the Supreme Court determined that it was permissible to provide a capital jury with a "'quick glimpse of the life' which [the] defendant 'chose to extinguish.'" *Id.* at 822 (citation ommitted).

Payne, however, expressly noted its limited reach:

> Our holding today is limited to the holdings of *Booth* . . . and *South Carolina v. Gathers*, 490 U.S. 805 (1989), that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, 501 U.S. at 830 n.2.

The United States Supreme Court reiterated that sentencing recommendations are inadmissible in *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016). *Bosse* reversed a state court for holding that *Payne* "implicitly overruled *Booth*" in its entirety. *Id. Bosse* admonished the state court that it "remains bound by *Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban." *Id.*

In Witter's case, the victim's family members all commented on what kind of sentence Witter should receive, in direct violation of *Booth*, *Payne* and *Bosse*.

A person testifying as to victim impact simply cannot advocate for a specific sentence in a capital proceeding. *See Bosse*, 137 S.Ct. at *2 (noting a ban on testimony regarding the "appropriate sentence"). Nor can that person characterize the crime itself. *Id.* at 2 (noting a ban on "characterizations and opinions from a victim's family members about the crime"). James R. Cox's testimony as to the appropriate sentence

and the crime itself clearly exceeded the bounds of permissible victim impact evidence, and the court abused its discretion in allowing it.

Next, Phillip Cox testified that he thought Americans were "the laughing stock of the world because of our light sentences," that the State should "inflict as strong a penalty that fits a sentence," and asked "as a brother of Jim for my other brothers, for my sister and my parents, that you issue a penalty that fits the crime." 8ROA1778-79. This too goes beyond offering a "quick glimpse" of the victim's life or the impact of the crime on the family. *See Payne v. Tennessee*, 501 U.S. 808. Instead, Phillip both opined on the appropriate sentence and asked for that sentence on behalf of the family. This is plainly inappropriate under *Booth*, *Payne* and *Bosse*, and the court abused its discretion by allowing it.

Last—and most prejudicial—was Ms. Cox's victim impact testimony. First, she testified that "the events of November 14, 1993, demand that you show this defendant no mercy." 8ROA1784. She also testified that her greatest fear was that Witter would commit additional violent acts against others. 8ROA1785. She then said she was testifying

"to do everything in my power to see that William Witter receives no mercy." 8ROA1786.

Ms. Cox's testimony was the exact kind of testimony that *Booth*, *Payne* and *Bosse* forbids. Given the death-penalty was on the table, a reasonable juror would necessarily construe Ms. Cox's testimony as a plea for death. This is especially true given that the jurors were explicitly instructed that they should consider mitigating circumstances "in fairness *and mercy*" when deciding on the appropriate sentence. 9ROA1910 (emphasis added). Not only did Ms. Cox twice ask the jury to show "no mercy," but she also said alluded to Witter's future dangerousness. 8ROA1784–86. This clearly violates the United States Supreme Court's ban on testimony regarding "the appropriate sentence." *See Bosse*, 137 S.Ct. at *2. This is true even if Ms. Cox was not asking for the death penalty specifically—any victim impact evidence opining on the appropriate sentence is inappropriate. *Id.*

The family members' repeated comments on Witter's sentence violated Mr. Witter's Eighth Amendment right to be free of a sentence influenced by passion and prejudice. Thus, *Chapman* "harmless error"

applies to this preserved error,[11] and the burden is on the State to demonstrate, beyond a reasonable doubt, that the error did not contribute to the verdict. The State cannot show, beyond a reasonable doubt, that the family's heart-rending (but improper) testimony did not contribute to Witter's death verdict and reversal is therefore necessary.

a. Law of the Case

This Court considered whether Kathryn Cox's testimony violated *Payne* in Witter's direct appeal. *Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996). Addressing only Ms. Cox's testimony, this Court concluded that she did not express an opinion as to Witter's sentence:

> We conclude that by asking the jury to 'show no mercy,' Kathryn was not expressing her opinion as to what sentence Witter should receive. Rather, we believe that Kathryn was only asking that the jury return the most severe verdict that it deemed appropriate under the facts and circumstances of this case.

Id. at 922, 921 P.2d at 896.

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[11] Because Witter's trial counsel objected to victim impact evidence at the first opportunity, and because the trial court heard arguments from the State regarding all three family members, all three have been preserved for the purposes of *Chapman* review. *See* 8ROA1796–99.

Despite this Court's prior adjudication on the merits of this issue, the law of the case doctrine should not bar renewed consideration of this issue because there has been intervening law and a failure to reconsider this issue would work a manifest injustice. *Hsu v. County of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007).

First, *Bosse* is an intervening clarification in controlling law. Here, between the first direct appeal in Witter's case and the instant appeal, *Bosse* issued and clarified the parameters of *Payne*. Prior to *Bosse*, it was unclear to some courts whether the overall logic underlying *Booth* was completely overruled by the reasoning in *Payne*. *See Bosse*, 137 S.Ct. at *1 (reciting the history of *Booth* and *Payne*). *Bosse* explicitly held that "*Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence" were prohibited "unless this Court reconsiders that ban." *Id.* at *2. Indeed in a recent unpublished disposition, this Court characterized *Bosse's* holding as a "recent conclusion." *See Middleton v. McDaniel*, 386 P.3d 995, at *7 n. 11 (Nev. 2016) (unpublished).

Because United States Supreme Court law is the supreme law of the land, its decisions are controlling and *Bosse* bars application of the law of the case doctrine to this issue. *See Hsu*, 123 Nev. at 632, 173 P.3d at 730 *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause).

G. The State committed prosecutorial misconduct by injecting improper and inflammatory statements into its opening and closing arguments

The State violated Witter's constitutional rights by peppering its arguments to the jury with improper opinions and statements. First, the State asked the jury to find Witter guilty of murder after telling them that Witter no longer had the presumption of innocence. Second, the State shifted the burden of proof to Witter by commenting on a failure to call witnesses. Third, the State called Witter "evil" several times and referred to him using animalistic terms. And fourth, the State closed out the last phase of Witter's trial with voluminous inflammatory arguments.

As a result, Witter's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, and a reliable sentence due to extensive prosecutorial

misconduct during argument, which distorted the fact finding process and rendered the proceedings fundamentally unfair. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1, secs. 1, 3, 6, 8; Art. IV, Sec. 21.

1. Standard of Review

This Court uses a two-step process to review prosecutorial misconduct: first, this Court determines whether the State acted improperly, and second, this Court determines the effect of that misconduct on the proceedings. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

As for the second step, preserved errors of constitutional dimension are reviewed using the *Chapman v. California*, 386 U.S. 18, 24 (1967) "harmless error" standard. *See also Martinorellan v. State*, 131 Nev. ___, 343 P.3d 590, 593 (2015). The *Chapman* standard requires reversal unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. *Chapman*, 386 U.S. at 24. Unpreserved instances of prosecutorial misconduct are reviewed for plain error. *See Anderson v. State*, 121 Nev. 511, 516, 118

P.3d 184, 187 (2005). Plain errors require reversal if the defendant shows actual prejudice or a miscarriage of justice. *Id.*

2. The State riddled its opening and closing guilt-phase arguments with improper arguments

a. The State told the jury that Witter no longer had the presumption of innocence

The State undermined Witter's presumption of innocence, which denied him due process. During closing arguments in the guilt phase, the State told the jury that:

> [t]his is the time now that the defendant is to be held accountable for his choices, because *up until now, the defendant has been clothed with the presumption of innocence.* But I submit to you with each part of the evidence that came into this case, a part of that cloak was removed until the *defendant sits there now in his naked guilt*.

7ROA1455 (emphasis added).

This Court's precedent forbids such arguments.

In *Morales v. State*, this Court held a prosecutor's improper comment on the presumption of innocence constituted plain error. 122 Nev. 966, 972,143 P.3d 463, 467 (2006); *See* also, In re Winship, 397 U.S. 358, 363 (1970) (referring to the presumption of innocence as automatic and elementary). There, the State told the jury that the

defendant "was cloaked with a presumption of innocence at the beginning of trial, but, because the State satisfied its burden in demonstrating that he committed the crimes, 'there [was] no presumption of innocence anymore.'" 122 Nev. 966, 972,143 P.3d 463, 467 (2006). Declining to reverse on the basis of this plain error alone, this Court nevertheless considered it with other instances of prosecutorial misconduct and reversed on due process grounds. *Id.* at 974, 143 P.3d at 468.

The unobjected-to statements in Witter's case are worse than those in *Morales*. Here, the State suggested that the presumption no longer applied to Witter: "up until now, the defendant has been clothed with the presumption of innocence." 7ROA1455. But then the State went even further than *Morales*. The State referred to Witter's presumption of innocence as a "cloak" that had been chipped away and Witter "sits there now in his naked guilt." *Id.* Because these comments offend due process to a degree even more egregious than those in *Morales*, reversal on these comments alone are appropriate.

(1) The law of the case doctrine

The law of the case doctrine is inapplicable because this Court has never addressed this issue. *See Dictor v. Creative Mgmt. Servs., L.L.C.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

b. The State commented on Witter's failure to call a witness.

During closing arguments, the State shifted the burden of proof and violated Mr. Witter's Fifth Amendment right to remain silent by commenting on his failure to call a witness.

The State commented on Witter's failure to call a witness on alcohol impairment:

> [State]: I submit to you that there has been no evidence of how alcohol affects a person's state of mind and their intent or their ability to form intent, or just what effect alcohol may or may not have to impair a person's state of mind or intent. Neither the State nor the defense called a witness to that effect. There is no evidence of mental impairment.
>
> [Witter's counsel]: Your Honor, I'd object. Counsel is commenting on what we did and we have no burden. I think that is improper.

> THE COURT: That's true. The jury knows that there is no burden. He's just saying what was and was not presented at the time of the trial.

7ROA1443.

Generally, a prosecutor cannot comment on a defendant's failure to call a witness. *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882 (1996). Commenting on a lack of witnesses impermissibly shifts the burden of proof to the defense. *Barren v. State*, 105 Nev. 767, 778, 783 P.2d 444, 4561 (1989). Such shifting is improper because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate."

Here, the State impermissibly shifted the burden to Witter by suggesting to the jury that Witter had a duty to present a witness. 7ROA1443. Such comments violate *Whitney*. Moreover, because this error was preserved and of the constitutional dimension, the *Chapman* standard applies. Thus, the burden is on the State to demonstrate, beyond a reasonable doubt, that the error did not contribute to the verdict.

The State cannot meet its *Chapman* burden. Alone, and considered cumulatively with the other errors described throughout this section, such error prejudiced Witter because it distorted the fact-finding process and rendered his trial fundamentally unfair. *See Morales* 122 Nev. at 974, 143 P.3d at 468 (prosecutorial misconduct can accumulate to compel reversal); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (prosecutorial misconduct can "so infect[] the proceedings with unfairness as to make the results a denial of due process").

(1) The law of the case doctrine

This Court considered this issue once before in resolving a state post-conviction petition, in the context of an ineffective assistance of appellate counsel claim. *Witter v. State*, 117 Nev. 1192, 105 P.3d 826 (2001) (unpublished). This Court noted that neither party provided the actual transcripts necessary to resolve this issue. *Id.* at *6. This Court also held that, assuming the remarks improperly shifted the burden of proof, they were not egregious and the trial court reiterated to the jury that Witter had no burden of proof. *Id.* In resolving this claim, this Court made no reference to Fifth Amendment jurisprudence.

The law of the case doctrine should not apply to bar consideration of this issue because this Court has never addressed this claim on Fifth Amendment grounds, nor with consideration of proper transcripts. *See Dictor*, 126 Nev. at 44, 223 P.3d at 334.

Even if the law of the case doctrine did apply here, a failure to consider this issue on the merits would work a manifest injustice. *See Hsu v. County of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007). Although this Court before lacked the proper record to resolve the case, the transcripts have now been provided. Moreover, this Court now sits in a different procedural posture to assess this claim, and is reviewing for *Chapman* harmless error. The impermissible burden-shifting by the State was clearly error, which violated Witter's Fifth Amendment rights for all the reasons discussed above, and a failure to reconsider this issue would work a manifest injustice to Witter.

c. The State referred to Witter as "evil," and told the jury that Witter "hunted" his "prey" in a "jungle."

First, during opening arguments in the guilt phase, the State said that Kathryn Cox, "will tell you she will never forget the look on the

defendant's face as she looked into his eyes, and she'll describe the evilness she saw on the defendant's face that night." 4ROA843. Next, the State told the jury that a witness at the scene of the crime "sees evilness in this man and realizes there's something wrong and this man is bent on doing heinous, heinous evil things." 4ROA849. Last, the State argued to the jury that "Kathryn Cox was subjected to evilness that many of us can't even imagine." 4ROA861.

The State continued to argue Witter's "evil" nature during the guilt-phase closing arguments—but also compared Witter to an animal. The State began its closing argument with a quote: "He who is bent on doing evil can never want occasion." 7ROA1454. The State then stated that Witter "was bent on doing evil." *Id.* The State then went on to say—twice—that the scene of the crime was Witter's "jungle" and that Kathryn Cox was his "prey." *Id.*, 7ROA1458.

Comments by the State that serve only to "inflame the emotions of the jury" constitute misconduct. *McGuire v. State*, 100 Nev. 153, 156, 677 P.2d 1060, 1063 (1984); *Berger v. United States*, 295 U.S. 78, 88, 55 (1935).

The State's characterization of Witter—twice—as "hunting" his "prey" in a "jungle" was misconduct that inflamed the jury because it impermissibly likened Witter to an animal. *See Jones v. State*, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (a prosecutor's comparison of the defendant to a rabid animal was misconduct as well as "demeaning and unprofessional"); *see also Pacheco v. State*, 82 Nev. 172, 180, 414 P.2d 100, 104 (1966) (discussing prosecutor's statement calling a defendant a "mad dog."). Thus, the State's comments referring to Witter using animalistic terms, coupled with repeated references to Witter as evil, served to impermissibly inflame the jury. When considered cumulatively with the other examples of error described throughout this section, such error prejudiced Witter because it distorted the fact-finding process and rendered his trial fundamentally unfair. *See Morales* 122 Nev. at 974, 143 P.3d at 468 (prosecutorial misconduct can accumulate to compel reversal).

(1) The law of the case doctrine

The law of the case doctrine should not bar consideration of this issue because this Court has never addressed the State's comments

referring to Witter in animalistic terms. *See Dictor*, 126 Nev. at 44, 223 P.3d at 334 (2010).

Although this Court previously considered some of the "evil" comments during the State's opening in the context of an ineffective assistance of counsel claim, it did not consider any of the other remarks during closing. *See Witter v. State*, 117 Nev. 1192, 105 P.3d 826, *3 (unpublished) (holding that, of the opening arguments, "none were so extreme that they prejudice Witter."). Nor did this Court employ or mention any constitutional analysis in resolving this claim. *Id.* Moreover, this Court now sits in a different procedural posture to assess this claim. Thus, application of the law of the case doctrine to this issue to deny consideration on the merits would work a manifest injustice to Witter, who can show prejudice from these comments for all the reasons articulated above.

3. The State ended Witter's penalty trial with more inflammatory arguments

The State peppered its closing statement for Witter's sentencing with arguments that encouraged the jury to condemn Witter based on impermissible and unconstitutional grounds, which denied him due

process and violated the Eighth Amendment *Booth v. Maryland*, 482 U.S. 496, 508 (1987) (holding that, "any decision to impose the death sentence must be, and appear to be, based on reason rather than caprice or emotion.") (quotations and citations omitted), *overruled on other grounds by Payne v. Tennesse*e, 501 U.S. 808 (1991).

First, the State made improper references to a duty to society at large. Specifically, the State stated that the death penalty "is important for the image of the criminal justice system." 10ROA2083; the death penalty "is an expression of society's sense of moral outrage," *id.*; that "[s]ociety has a right to feel that outrage when confronted with these crimes and to respond to it," *id.*; and twice declared that imposition of anything less than the death penalty for Witter "would be disrespectful to the dead and irresponsible to the living." 10ROA2122, 2133. The State encouraged the jury to send a message:

> Will we tell would be murderers, will we tell this community, that you can kill a man, thrust a knife into his skull 16 times, one time through his skull, 16 times into his body, that you can perpetrate unspeakable, despicable deeds upon his wife in her own car and that you, the husband, can drive upon that crime scene and witness your wife bleeding to death, struggling for your life, what message does

> it send to say the man that perpetrates those crimes can live his life in prison, can write his family, see his family, speak to his family?

10ROA2120.

These appeals to general community standards and a duty to society at large constitute error under *Collier v. State*, 101 Nev. 473, 479, 705 P.2d 1126, 1129 (1985), which held that the State's statement to the jury that anything less than death would send the message that "we are not a moral community" inflamed the jury and constituted misconduct. *Collier* held that a prosecutor may not "blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' then they must approach their duties in anger and give the community what it 'needs'" *Id.* at 479, 705 P.2d at 1130.

Although this Court has declined to reverse when an appeal to the community does not rise to the level as the misconduct in *Collier*, the repeated references in Witter's case exceed *Collier's* standards and justify reversal. *See Mazzan v. State*, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989). The State in Witter's case repeatedly warned jurors that a failure to impose the death penalty would be "irresponsible towards the

living" and would not send the proper "message to the community." 10ROA2120, 2122, 2133. These remarks are equally egregious, as the remarks *Collier* condemned in.

Second, the State referred to matters outside the record and disparaged a legitimate defense. Specifically, the State alluded to other defense cases, telling the jury that "in any penalty hearing what the defense and every witness that the defense calls wants you to do is to forget about—" Trial counsel for Witter objected, which the court overruled. 10ROA2094. The State then argued to the jury that "[w]hat the defense has done in this case, ladies and gentleman, is to try and make you forget about [the victims]. The whole case gets turned upside down and they twist things around until they can portray the vic—the defendant, William Witter, as if he is the victim." *Id.*

The State cannot disparage a legitimate defense. *See e.g., Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004). For capital cases, presentation of mitigating evidence is not only a legitimate defense, but capital counsel has a duty to present such evidence. *See Penry v. Lynaugh*, 492 U.S. 302, 326–28 (1989) (explaining that there must be no

impediment, including prosecutorial argument, to a sentencer's full consideration and ability to give effect to mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that, under the Eighth and Fourteenth Amendments, a jury must be allowed to consider "as a mitigating factor any aspect of the defendant's character or record").

In Witter's case, the State disparaged the important role of mitigation by arguing that the evidence Witter presented "twist[ed] things around" to make him "a victim" in an attempt to make the jurors "forget" about the victims of the crime. 10ROA2094. This was clearly disparaging to a legitimate defense, made worse by the fact that the State attributed the tactic to defense attorneys at large. *See Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) ("Factual matters outside the record are not proper subjects for argument.")

Third, the State commented nine times that Witter's violent history "would repeat itself." 7ROA1562, 1565; 10ROA2118, 2122, 2127, 2129, 2132. Moreover, the State's argument called for speculation and placed "undue pressure" on the jury to speculate that Witter would kill

again unless put to death. *See, Flanagan v. State*, 104 Nev. 105, 109, 754 P.2d 836, 838 (1988) (the State's "repeated references to Flanagan's improbably rehabilitation and future killings" put "undue pressure" on the jury to impose death). It was therefore misconduct for the State to encourage the jury to speculate in this manner.

Fourth, the State repeatedly invoked the so-called "Golden Rule" by asking the jury to impose death on behalf of the victims. For instance, the State placed the jurors in the victim's shoes by asking, "But how aggravating is it to sit there and this man gets in your car, the vehicle that you own, and begin to perpetrate these crimes on you?"10ROA2125. The State also told the jury that a failure to impose death would be "disrespectful to the dead"—twice. 10ROA2122, 2133. He closed by asking the jury to return the death penalty because the victims "need justice." 10ROA2098–99.

But the State may not ask for the death penalty on behalf of the victim, or align himself with the victim. *Howard v. State*, 106 Nev. 713, 718, 800 P.2d 175, 178 (1990); Thus, the State's repeated

encouragements to the jury were plainly inappropriate, and served only to inflame the jury.

Considered cumulatively with the other examples of error described throughout this section, such error prejudiced Witter because it distorted the fact-finding process and rendered his trial fundamentally unfair. *See Morales* 122 Nev. at 974, 143 P.3d at 468 (prosecutorial misconduct can accumulate to compel reversal). When considered in combination, the State's improper arguments "so infected the proceedings with unfairness as to make the results a denial of due process." *See Hernandez*, 118 Nev. at 525, 50 P.3d at 1108. And although Witter's trial counsel failed to object to some of these statements, he suffered actual prejudice because the misconduct throughout arguments were both substantial and prejudicial. *See Miller v. State,* 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quotation omitted). Additionally, the trial court's denial of Witter's motion to argue last, 9ROA2059, compounded the prejudicial nature of these comments because the last things the jury heard were inflammatory.

a. The law of the case doctrine

This Court considered these issues once before in resolving Witter's direct appeal, and rejected them all. *Witter v. State*, 112 Nev. 908, 923-28, 921 P.2d 886, 897-900(1996).

However, this Court has never considered these examples of misconduct cumulatively, and with regard to the Eighth Amendment. *See id.* at 923–28, 921 P.2d at 897–900 (resolving prosecutorial misconduct issues based on due process concerns alone). Thus, the law of the case doctrine should not apply to bar consideration of this issue. *See Dictor*, 126 Nev. at 44, 223 P.3d at 334.

Even if the law of the case doctrine did apply here, a failure to consider this issue on the merits would work a manifest injustice. *See Hsu v. County of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724, 728–29 (2007). The combination of the State's erroneous comments constituted error that violated Witter's rights for all the reasons discussed above, and a failure to resolve this case on the merits would work a manifest injustice to Witter.

H. The admission of gang-affiliation evidence during the penalty phase was prejudicial error

The State's last-minute motion to admit highly prejudicial evidence tenuously linking Witter to a violent California prison gang, which the district court granted, violated Witter's state and federal constitutional rights to due process, freedom of expression and association, equal protection, and a reliable sentence. U.S. Const. amends. I, V, VIII, and XIV; Nev. Const. Art. 1 §§ 6, 8, 9; Art. 4 § 21.

1. The State ambushed Witter's defense team with a motion to admit evidence of gang affiliation

During the guilt phase of Witter's trial, the State stipulated that it would not introduce evidence of Witter's alleged gang affiliation and would "strongly admonish[]" its witnesses to avoid the topic. 5ROA957. Based on the stipulation, the district court directed that "[n]o mention will be made of any gang affiliation." *Id.*

The issue of gang affiliation arose later in the proceeding when the State sought to admit photos showing blood on Witter's hands and clothing following his arrest. 5ROA1103. Defense counsel expressed concern that certain photographs emphasized Witter's tattoos, which

could indicate gang affiliation. 5ROA1104. The State asserted that it was not offering the photos to prove gang affiliation but rather to demonstrate the investigative process and the presence of blood. *Id.* Ultimately, the district court excluded certain photos that were duplicitous and "demonstrate[d] more of the tattoos." 5ROA1106.

After the conclusion of the guilt phase and a mere four days before the start of the penalty phase of Witter's trial, the State moved to admit testimony regarding Witter's alleged gang affiliation. 7ROA1493. In the motion, the State recognized it had stipulated that it would not introduce evidence of gang affiliation. 7ROA1495. Nevertheless, the State moved the court to permit it to introduce testimony about Witter's purported gang affiliation through two California police officers. Although the officers were identified as possible penalty-phase witnesses, they were originally set to testify about Witter's involvement in two specific prior criminal incidents—neither of which involved gang-related criminal activity. Through its motion, the State sought to elicit additional testimony from the officers identifying Witter as a member of the Norteños street gang. 7ROA1496. The State argued this evidence would

"show that [Witter] has a violent disposition consistent with his gang affiliation and that the said affiliation is consistent with [his] future dangerousness to society." 7ROA1498.

Defense counsel opposed the motion and, in the alternative, moved to continue the penalty phase. 7ROA1500, 1511.

In support of its opposition, the defense argued that any probative value of gang-affiliation evidence was substantially "'outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'" 7ROA1512 (quoting NRS 48.035(1)). Defense counsel distinguished cases relied on by the State and argued that gang affiliation was improper general character evidence. 7ROA1515. Defense counsel also argued that the State had provided insufficient notice that it intended to put on gang evidence. *Id.* Defense counsel explained that there were "numerous issues related to gangs" ranging from psycho-social needs of the individual to basic survival—issues that would need to be put in context through the use of experts. *Id.* Thus, defense counsel urged the district court to deny the State's motion or grant a continuance so experts could be secured to "describe the complex reasons why a person

might join a gang and how that would relate specifically to [Witter]." 7ROA1516.

In the motion to continue, defense counsel argued the State's failure to provide more timely notice of its intention to present gang evidence violated Witter's rights to due process. The defense asserted it needed additional time to investigate and call experts. 7ROA1501.

The district court held a hasty motions conference on the morning the penalty phase was scheduled to begin. 7ROA1522. The State argued that Witter "had numerous ties to the Norteno [sic] gang, which is a gang in San Jose; it's also a prison gang in northern California." 7ROA1523. The State pointed to Witter's tattoos, specifically a tattoo that read "'San Jo XIV,'" and statements Witter allegedly made to arresting officers in this case and to defense expert Dr. Louis Etcoff about his gang affiliation. *Id.* Based on these proffers, the State asserted Witter's "affiliation with violence and affiliation with gangs certainly goes to the future dangerousness of the defendant." 7ROA1525.

The State concluded by directing the court to certain photos taken following Witter's arrest. In one photo, the photographer documented

Witter's palms. Two others photographs depicted the back of Witter's hands and extended fingers, presumably to document blood under Witter's fingernails.[12] Witter's thumbs are tucked into his palms. The State contended Witter was showing gang signs in the two photos of the backs of his hands, arguing "his thumbs are tucked in, consistent with his gang affiliation." 7ROA1526.

In response, defense counsel argued the prejudicial harm of the evidence of gang affiliation substantially outweighed any probative value it may hold. 7ROA1528. In addition, the defense argued the constitution required that gang-affiliation evidence must be "more than just general character evidence." *Id.*

The district court ruled admissible the evidence of gang affiliation. 7ROA1529. Relying on Witter's alleged statements of gang affiliation, the district court determined the evidence was neither tenuous nor dubious. *Id.* The court explained:

> [W]e have testimony at the guilt phase that showed the defendant here stated in his own words

[12] The State offered the intake photographs of the back of Witter's hands during the guilt-phase proceeding for the express purpose of showing blood under Witter's fingernails. 5ROA1104.

> that he wanted to kill an officer. He stated that on several occasions. And that is one of the things that gangs heighten their reputation by doing, is killing a police officer, which shows a definite gang related event that has to do and is relevant with this case.

7ROA1530.

Next, the court stated "that [gang] membership is admissible to show an individual's future dangerousness to society." 7ROA1530. Accordingly, the district court concluded that evidence of gang affiliation was relevant to the case and allowed its admission. *Id.*

Following the court's ruling, defense counsel argued in support of the motion to continue. Noting that the State had filed its motion only four days before the penalty-phase proceeding, defense counsel stated:

> I've had no time to do anything about this whatsoever. I need to bring in experts to talk about gang violence; talk about violence in prisons, . . . Those experts exist. We were not noticed.

7ROA1535.

The judge appeared frustrated with the defense request. The judge explained that his preference had been to hold the penalty-phase proceeding within "a couple days" of the guilt-phase proceeding.

7ROA1537. But because of a defense objection, he agreed to hold the penalty-phase proceeding twelve days later, on July 10, 1995. The judge then complained that defense counsel had made a pattern of requesting continuances—although the other continuance requests related to the guilt phase. 7ROA1538–39.

Ultimately, the district court denied the defense motion for a continuance. *Id.* at1539.

2. The State centered its penalty-phase theme on Witter's gang affiliation and future dangerousness

As a result of the district court's ruling that evidence in support of Witter's gang affiliation was admissible, the State crafted a penalty-phase prosecution theme that cast Witter as a dangerous and unrepentant gang member. The State sought to elicit gang-affiliation testimony during its case-in-chief and during the defense's mitigation presentation. In closing, the State relied heavily on its argument that Witter's gang affiliation rendered him a future danger to other inmates and prison personnel.

During its penalty-phase case-in-chief, the State offered testimony by Officers James Ford and Timothy Jackson. Both officers had arrested Witter on separate occasions in California for non-gang related criminal conduct. And although the State never qualified either as an expert, both opined generally on street gangs in California.[13] In addition, the officers testified about tattoos that might indicate gang affiliation.

Ford testified about the Norteños and Sureños gangs. 8ROA1649. Ford explained that the two gangs occupied territory in opposite ends of California, with the Norteños occupying the north and the Sureños in the southern part of the state. *Id.* Ford stated that the two gangs "fight each other; sometimes they stab and shoot each other." 8ROA1650. In addition, Ford agreed with the prosecutor that the gangs were "involved in the criminal enterprise of violence." *Id.*

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[13] Ford stated on cross-examination that he had never read any studies on gang affiliation or activity and that his gang knowledge was limited to his law enforcement training and his interactions with gang members. 8ROA1657–58. Jackson had been on the San Jose gang enforcement unit for only ten months before he opined at trial on gang affiliation and had never testified as an expert on gang matters. 8ROA1688–90.

Turning to tattoos, Ford explained that Norteños often had tattoos that included a four or fourteen. 8ROA1650–51. After being shown the intake photos of Witter, Ford stated that he noted some tattoos "that a gang member may have." 8ROA1652–53. In addition to the tattoos, Ford noted that Witter was wearing red and white shoes bearing a logo for the San Francisco 49ers. Ford stated "Nortenos do wear a lot of 49er wear like this." 8ROA1654. Finally, when shown the intake photos of the back of Witter's hands, Ford agreed with the prosecutor that the photos depicted "a common sign shown or thrown by the Norteños in [San Jose]." 8ROA1655.

Similar to Ford, Jackson testified about gang tattoos, clothing, and gang hand signs that generally denote gang affiliation. 8ROA1691–92. Jackson also opined about an alleged statement Witter had made at the time of arrest in this case. Witter allegedly told the arresting officer: "'I want you to take these handcuffs off of me. All I need to do now is to kill an officer and my reputation will be higher.'" 8ROA1692. According to Jackson, the statement was "indicative of gang members[hip]." *Id.* And

in response to the prosecutor's inquiry as to why killing a police officer would "heighten one's reputation," Jackson stated:

> Who is the toughest; how many people you take out; being down; down meaning loyal to your gang; and taking on a cop is [a] number one priority. If you can do that, that's like the ultimate thing.

8ROA1692–93. Jackson described the statement as a serious threat. *Id.* at 1693.

The State continued pressing the theme of gang affiliation during the defense's mitigation presentation. On cross-examination of Witter's father, a former California inmate, the prosecutor asked about the Norteños and Sureños. 9ROA1880. The prosecutor described the two gangs as "enemies" and Witter's father agreed with that characterization. 9ROA1881. Witter's father agreed as the prosecutor stated the two gangs "don't get along," "fight one another," "stab one another," and "[t]ry to hurt each other." *Id.*

During cross-examination of Etcoff, the prosecutor inquired about whether "there [was] a way to predict future dangerousness." 9ROA2046. After getting Etcoff to agree that "[h]istory is usually the best indicator" of future dangerousness, the prosecutor asked whether "[g]ang

involvement and fighting their [sic] enemies in L.A., [demonstrated a] history of dangerousness?" 9ROA2048. Etcoff agreed such factors would indicate a history of danger that would correlate with future dangerousness. 9ROA2048.

In arguing for death during closing argument, the prosecutor relied heavily on Witter's alleged gang affiliation. The prosecutor argued:

> Don't let [Witter] go back to prison where he can glory in what he has done, where he can glory like this, with the dried blood of James Cox still on his hands.
>
> Just hours after murdering James Cox, what does the defendant think to do? He throws us a gang sign. He's proud of his gang.
>
> Don't let him go back to prison and be proud for what he's done. Don't let him go back where he can brag about what he has done. Don't let him go back with a higher reputation and get respect from the other inmates in the prison, where he can profit from his crime by reaping the benefits of this murder, by taking a step above everyone else in the prison in esteem and power.
>
> . . .
>
> Don't let him raise his reputation to the next step by murdering again, this next time perhaps a corrections officer.
>
> . . .
>
> Don't let him go back where he can murder again, and perhaps this time a corrections officer, because that is exactly what he has threatened to do. He told the police officers that "Take these

> handcuffs off of me so I can kill a police officer. That's all I need to do to raise my reputation higher."
>
> Don't give him the chance.

10ROA2097–98.

The prosecutor continued with the gang theme in his rebuttal argument. The prosecutor argued that, if imprisoned, Witter could "heighten his reputation and perpetrate unspeakable crimes on perhaps unsuspecting guards." 10ROA2122. The prosecutor argued further:

> If history repeats itself, we begin to look at his life and we find when he was in the California Youth Authority, he was fighting all the time, involved in gang violence, fighting his enemies from L.A., Nortenos and Sorenos [sic], northern and Southern; that he witnessed stabbings, jumpings, was involved in those fights, got extra time, got extra punishment. He knew he would be punished additionally for that involvement, yet he did it anyway.
>
> There's not a punishment that slows this man down. There's not a punishment that stops him, with the exception of the harshest punishment.

10ROA2129.

The admission of gang-affiliation evidence was erroneous on both constitutional and statutory grounds. Generally, this Court reviews a

district court's decision to admit evidence for an abuse of discretion or manifest error. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). But when a party asserts a constitutional challenge to the admission of evidence, the claim is reviewed de novo. *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008) ("This court applies a de novo standard of review to constitutional challenges.").

3. The admission of gang-affiliation evidence violated *Dawson v. Delaware*, 503 U.S. 159 (1992)

In *Dawson v. Delaware*, 503 U.S. 159 (1992), the United States Supreme Court considered whether admission during sentencing of evidence demonstrating a capital defendant belonged to a prison gang violated his rights under the First and Fourteenth Amendments. Like the case before this court, the gang-affiliation evidence offered by the prosecution did not relate to the crime for which Dawson was convicted. *Id.* at 166. Ultimately, the Court held the admission of evidence was unconstitutional as a state cannot "employ[] evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried." *Id.* at 168.

Applying *Dawson*, this Court has held that "[e]vidence of affiliation with a particular group is only relevant at the penalty phase of a criminal trial when membership in that group is linked to the charged offense, or is used as other than general character evidence." *Lay v. State*, 110 Nev. 1189, 1196, 886 P.2d 448, 452 (1994). Documents and testimony that make "general references to [a defendant's] affiliation with gangs" constitute inadmissible general character evidence. *Burnside v. State*, 131 Nev. __, 352 P.3d 627, 647 (2015).

It is indisputable that Witter's crimes of conviction were unrelated to any alleged gang affiliation. Thus, to be admissible, the gang-affiliation evidence had to constitute more than general character evidence. *Lay*, 110 Nev. at 1196. Where the State seeks to introduce associational memberships to prove future dangerousness, it must "introduce evidence demonstrating a link between [a defendant's] membership and future harmful conduct." *Beam v. Paskett*, 3 F.3d 1301, 1309 (9th Cir. 1993). The State failed to make that link in this case.

Dawson requires a determination that the gang or other association to which the defendant allegedly belonged advocates violence as part of

its ideology. 503 U.S. at 165. Equally important is that any such ideology must create an inference of future danger in the jurisdiction in which the inmate will be housed. *Id.* at 165-66.

The evidence adduced at trial failed to meet the requirements of *Dawson*. The State failed to establish that the Norteños advocate the killing of any particular identifiable group in prison, or on the streets, or otherwise hold beliefs creating a nexus between Witter's alleged membership and his future dangerousness. The only evidence presented at trial regarding the allegedly violent nature of the Norteños came from two police officers from San Jose, California, who testified solely about the allegedly violent nature of the Norteños street gang in California. Neither indicated they had any information about the existence or beliefs of Norteños gang activity in Nevada prisons or elsewhere in the state.

The evidence also did not establish any ideology. The officers testified vaguely that "[t]here is a problem with street gang violence in San Jose" and that "sometimes [rival gangs] fight with each other; sometimes they stab and shoot each other." That members of the Norteños may engage in violent acts is one thing; it is another thing to

assume that such membership is the motivating force behind the violent conduct in the absence of specific testimony setting forth an ideology of violence.

The officers' testimony at trial was generic gang testimony that failed to identify any ideology of violence specific to the Norteños. Moreover, neither the crime underlying Witter's capital conviction nor the crimes in San Jose involved gang-related activity. The State failed to link Witter's affiliation with the Norteños to an increased likelihood of future acts of violence.

The prosecutor's argument to the jury to rely on the gang-affiliation evidence to find that Witter represented a future danger to society was unsupported by the evidence and prejudicial. The prosecutor invited the jury to sentence Witter to death for exercising his constitutionally protected right of affiliation. Witter's sentence of death must be reversed.

4. Any probative value of the gang-affiliation evidence was substantially outweighed by unfair prejudice

Assuming this court determines the gang-affiliation evidence was not barred under *Dawson* and concludes further that the evidence was

relevant, it nevertheless should have been excluded because any probative value was substantially outweighed by the danger of unfair prejudice, of confusion of the issues, and of misleading the jury. NRS 48.035.

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Collins v. State*, 133 Nev. __, 405 P.3d 657, 665 (2017). A judicial action constitutes an abuse of discretion if the action is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

NRS 48.035 provides that, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by considerations of unfair prejudice, of confusion of the issues[,] or of misleading the jury."

Here, the probative value of Witter's alleged gang affiliation was nominal. The underlying crime of conviction was not gang related. The prior crime offered in support of the aggravating circumstance was not gang related. The State's proffer to the district court failed to connect

Witter's alleged affiliation with a street gang in California to any risk of future dangerousness in a Nevada prison.

At trial, it became even clearer that the gang-affiliation evidence lacked significant probative value. Witter's probation officer did not identify Witter as a gang member or indicate that he had any gang-related infractions while on probation. The two officers conceded that neither offense for which they arrested Witter was gang related; and both officers were equivocal as to whether Witter was, in fact, a member of a gang. Apart from some self-identification with a gang, there was scant support that Witter's alleged affiliation with the Norteños made it more probable than not that he would pose a future danger in a Nevada penitentiary.

At all times, the risk of unfair prejudice was apparent. Gang-affiliation evidence is inherently prejudicial evidence. *See Gonzalez v. State*, 131 Nev. __, 366 P.3d 680, 688 (2015); *People v. Avitia*, 127 Cal. App. 4th 185, 192 (2005) (describing gang evidence as "highly inflammatory" and cautioning trial courts to "carefully scrutinize such evidence before admitting it"); *People v. Davenport*, 702 N.E.2d 335, 341

(Ill. App. 1998) (noting that "a deep and widespread public prejudice may exist against street gangs").

Witter challenged the gang-affiliation evidence as being unfairly prejudicial, but the district court failed to consider the risk of unfair prejudice when it ruled the evidence admissible. 7ROA1529–30. Instead, the district court focused exclusively on relevance. This constitutes an error of law and renders the court's ruling an abuse of discretion. Had the district court considered the risk of unfair prejudice, it would have had to conclude the evidence was inadmissible under NRS 48.035.

5. The State's lack of notice that it intended to use gang-affiliation evidence in the penalty phase after stipulating not to use such evidence violated Witter's Due Process rights

The standard for the denial of due process is whether the conduct "is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 809 (1991). The State's conduct in this case meets that test.

As noted above, the State stipulated that it would not introduce gang evidence during Witter's trial. Four days before the penalty-phase proceeding, the State reversed course and sought to admit highly

prejudicial evidence of Witter's alleged gang affiliation in order to prove future dangerousness. For reasons set forth above, this evidence was at most nominally probative of Witter's gang affiliation but failed to speak to future dangerousness. Nevertheless, the prosecutor used this evidence to draw unreasonable inferences about future dangerousness and used gang affiliation as a central theme in arguing for death. With only days to prepare for this bombshell, defense counsel were caught off guard and were unable to marshal defense experts to mitigate the prosecution's non-statutory aggravator.

The State lulled the defense into believing that it did not need to anticipate for gang-affiliation evidence in the penalty phase. The State's sandbagging of the defense on the issue of gang evidence violated Witter's due process rights under the Fourteenth Amendment.

In *Gonzalez*, this court held the district court abused its discretion when it failed to bifurcate the guilt and gang-enhancement portions of a criminal trial. 366 P.3d at 688. This Court recognized that "the admission of highly prejudicial evidence" establishing gang affiliation compromised a defendant's right to a fair trial. *Id.* The same rationale holds for Witter's

penalty-phase proceeding. The admission of highly prejudicial gang evidence, which held little probative value, violated Witter's right to due process.

6. Law of the Case

In this Court's 1996 decision, it rejected Witter's argument that the gang evidence "lacked any probative value and was offered only to inflame the passions of the jury." *Witter v. State*, 112 Nev. 908, 921, 921 P.2d 886, 895 (1996). Citing NRS 48.035(1) and *Dawson*, this court held:

> In this case, the State presented testimony from the arresting officers indicating that Witter told them that he could heighten his reputation if he were to kill police officers, and from a second officer who stated that from the clothing Witter was wearing and from the tatoos [sic] on his arm, he believed that Witter was a member of a violent California gang known as the "Nortenos." We conclude that this evidence tends to show that Witter posed a threat of future violence to the community. Moreover, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, or confusion of the issues or of misleading the jury. Accordingly, we conclude that the district court properly admitted evidence of Witter's affiliation with a street gang.

This Court erred when it equated membership alone as being probative of future dangerousness. *See Dawson*, 503 U.S. at 166-67. In addition, this Court failed to recognize the wealth of authority noting the highly prejudicial nature of gang evidence. Thus, this Court's analysis under NRS 48.035(1) was also flawed. These errors render this Court's analysis clearly erroneous. *Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007).

This Court's prior opinion did not address Witter's claim that the State's lack of notice that it intended to use gang-affiliation evidence in the penalty phase violated his due process or First Amendment rights. Thus, the law-of-the-case doctrine is inapplicable to those claims.

I. The State's use of Witter's juvenile conduct to support a sentence of death violated *Roper v. Simmons*, 543 U.S. 551 (2005)

Witter's death sentence is invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable death sentence due to the State's use of Witter's juvenile convictions and other juvenile conduct as non-statutory aggravating circumstances

during the penalty phase. U.S. Const. amends. V, VI, VIII, and XIV; Nev. Const. Art. 1 §§ 6, 8; Art. 4 § 21.

During the penalty phase, the State called Witter's former parole officer, Linda Rose, who testified about Witter's prior record, including juvenile arrests and commitments. She testified about Witter's juvenile arrests for rape, vandalism, and arson. 8ROA1627. The State used these juvenile offenses to demonstrate a pattern of conduct and to improperly bolster its future dangerous argument.

The use of Witter's juvenile commitments was improper because of the lack of due process during juvenile adjudications and because of the unstable nature of a juvenile's development. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court recognized that juveniles are more likely to engage in reckless behavior without fully understanding the consequences of that behavior. Due to a juvenile's continuing intellectual development, along with his or her impulsiveness and susceptibility, it is probable that minors disregard the negative repercussions of their actions not only for the immediate offense but for its future impact. The Court explained that this decreases a juvenile's level of culpability.

Similarly, the use of a prior conviction that occurred before a capital defendant reached eighteen violates the heightened reliability required of death sentences. If age and development prohibits a capital sentence on a juvenile so too must it preclude evidence of juvenile crimes when used by the State in support of a death sentence.

The state cannot show that the improper admission of Witter's juvenile convictions was harmless beyond a reasonable doubt.

This claim has not been adjudicated by this Court so the law-of-the-case doctrine does not apply.

J. The admission of unnecessarily gruesome and duplicative photographs during the guilt phase prejudiced the jury and violated Witter's Constitutional rights

The district court's improper admission of gruesome photographs violated Witter's state and federal constitutional rights to due process and a reliable sentence. U.S. Const. amends. V, VIII, and XIV; Nev. Const. Art. 1 §§ 6, 8.

This Court has held that gruesome photos may be admitted "if they aid in ascertaining the truth." *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997). Thus, gruesome photos may be admissible when

utilized to show cause of death and when it reflects the severity of wounds and the manner of their infliction. *Id.* The admission of gruesome photographs is reviewed for abuse of discretion. *Flores v. State*, 121 Nev. 706, 722, 120 P.3d 1170, 1180 (2005); *see* NRS 48.035 (relevant evidence not admissible if probative value substantially outweighed by unfair prejudice).

During the guilt phase, defense counsel objected to several postmortem photos of the victim offered by the State. 5ROA957–58. Certain photos depicted the victim covered in blood and lying under his cab and the blood-stained interior of the cab. AA001–2, 15–16, 21–22 (State's guilt-phase exhibits 10, 28, 41). The remaining photos were photos of Kathryn Cox' injuries. AA003–012 (State's guilt-phase exhibits 18-22). The State conceded that the photos were grotesque but argued they were necessary to show the lethal wound and to demonstrate Witter's intent. 5ROA959–62. Defense counsel asserted the photos were duplicitous and any probative value was substantially outweighed by the risk of unfair prejudice. 5ROA963. The district court overruled the

objections and the photos were admitted into evidence. 5ROA1005, 1022, 1039, 1102, 1153.

As recognized by the State, the photos were extremely grotesque. In one photo, the blood-covered body of James Cox, with eyes open, lay under the cab. The photos of Kathryn Cox showed deep wounds into the flesh—images that make the skin crawl. These bloody images offered nothing additional to testimony elicited from officers and other witnesses with respect to the murder scene, the positioning of the victim's body, or Kathryn's injuries. The photos did not aid in ascertaining the truth in this case because there was no question that James died as a result of a stabbing. The district court abused its discretion by admitting the grotesque photos, which only served to inflame the passions of the jury. The state cannot show beyond a reasonable doubt that the improper admission of the photos did not affect the guilt or penalty verdicts.

This claim has not been adjudicated by this Court. The law-of-the-case doctrine is inapplicable.

K. The State improperly used the facts and data underlying Dr. Etcoff's expert report for substantive purposes, which violated Witter's constitutional rights

During Witter's sentencing, the State used the facts and data underlying a defense expert's report in impermissible and unconstitutional ways. Thus, Witter's death sentence is invalid under state and federal constitutional guarantees of due process, self-incrimination, and a reliable sentence. U.S. Const. amends. V, VI, VIII & XIV; Nev. Const. Art. 1, secs. 1, 3, 6, 8; Art. IV, Sec. 21.

1. Standard of Review

Trial court decisions "regarding the admissibility of evidence that implicate constitutional rights [are] mixed questions of law and fact subject to de novo review." *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008). If the error was preserved, this Court applies the *Chapman v. California*, 386 U.S. 18, 24 (1967) "harmless error" standard. *See Martinorellan v. State*, 131 Nev. ___, 343 P.3d 590, 593 (2015). The *Chapman* standard requires reversal unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. *Chapman*, 386 U.S. at 24. Unpreserved errors

are reviewed using the "plain error" test. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Plain errors require reversal if the defendant shows actual prejudice or a miscarriage of justice. *Id.*

2. Background

During the defense expert's testing and interview, Witter made comments that were later used against him by the State. Witter was not warned of the possibility that the State may use his answers against him, or of his Fifth Amendment right to remain silent. 21ROA4728. Further, the instructions that are published with the test, explain that the questions have no validity independent of the test and are not meant to be independently interpreted outside of a clinical setting. 19ROA4347.

The State introduced Witter's comments from Dr. Etcoff's tests before the defense called Dr. Etcoff as a witness. First, before opening arguments for the penalty phase, the State used statements Witter made to Dr. Etcoff to argue that gang evidence should be admitted during sentencing. 7ROA1524. Witter's counsel objected to this line of

argument because "Dr. Etcoff [was being] used against us before we've called him." 7ROA1543.

Next, during the prosecutor's opening argument to the jury, the State referred to statements Witter made about his juvenile incarceration to Dr. Etcoff. 7ROA1557–58. Specifically, the prosecutor said "By [Witter's] own admission, he didn't mind being [incarcerated]; he was young, he was on his own; there were all sorts of violence and fighting there. He could disrespect others. There were people getting jumped in there and people getting stabbed with pencils, and the defendant didn't mind being there." *Id.*

Then, while cross-examining a defense witness, the State again used Witter's statements to Dr. Etcoff against him—all before the defense had called Dr. Etcoff as a witness. The State used comments in Dr. Etcoff's report to ask Witter's father questions about Witter's behavior in prison. 9ROA1883. At the next break, Witter's counsel objected to this questioning: "I was watching the District Attorney during his cross-examination of Mr. Witter, and it appeared to me he was using the report that I gave him from Dr. Etcoff as cross-

examination material. He had it in his hand; he's referring to it. I believe at this point in the proceedings it was wrong." 9ROA1895. The State replied, "it is true that I took a quote from the defendant in that material, absolutely, Your Honor. I don't know I'm precluded from doing that." *Id.* The trial court overruled the defense objection, saying "I don't think it's wrong, counsel." *Id.*

Finally, as their last witness, the defense called Dr. Etcoff. On direct, Dr. Etcoff testified that Witter was very honest during his evaluation, and that Witter admitted to doing "a lot of bad things," struggling with addictions, and that "you didn't want to be around him because he was a dangerous person tending towards violent behavior." 9ROA1984. He opined that Witter suffered from ADHD, marijuana, amphetamine, and alcohol abuse. 9ROA1985–86. He also opined that Witter had antisocial personality disorder and developmental arithmetic disorder. 9ROA1986. When asked by Witter's counsel how Witter "became what he is today," Dr. Etcoff testified that "[h]e grew up in what I would describe to be the quintessential family that would produce a violent person." 9ROA1987. Dr. Etcoff continued to testify on

a multitude of issues, such as Witter's extremely detrimental upbringing, family life, addiction issues, criminal history, and rage problems. 9ROA1988–2008.

On cross, under the pretense of giving the jury "an understanding," the State read a series of questions from an MMPI-2 Dr. Etcoff administered to Witter, followed by Witter's verbatim answers. 9ROA2022–35. The State continued to read direct quotes from the report to Dr. Etcoff, who simply responded with "correct" or other affirmative answers repeatedly. 9ROA2038–46. After this questioning, Dr. Etcoff agreed with the State that "history is usually the best indicator" of future dangerousness, and then testified that "there was a concern" with Witter's future dangerousness. 9ROA2047–51.

In the State's closing arguments during sentencing, it referenced the tests Dr. Etcoff gave and again read direct quotes from Witter verbatim. 10ROA2127–29. The State told the jury that the defense did not ask Dr. Etcoff about future dangerousness, but that Dr. Etcoff agreed that the best indicator was Witter's history. 10ROA2132. After

the State closed, Witter's trial counsel objected to the repeated references to future dangerousness. 10ROA2136.

3. The State did not use Dr. Etcoff's report to rebut his diagnosis, and instead used it to tell the jury Witter's self-incriminating statements

The State may attack the opinions contained in a defense expert's report by contradicting the basis of those opinions during cross-examination. NRS 50.305; *Blake v. State*, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005). However, such cross-examination must be limited to evidence the report actually relied upon. *Id.* And the State must provide adequate notice of the areas of its cross. *Id.*

In this case, the State did not limit its use of data underlying Dr. Etcoff's report to attack his qualifications and opinion. Instead, the State used statements from Witter's interviews with Dr. Etcoff as a way to introduce prejudicial gang testimony—before the defense had called Dr. Etcoff.[14] 7ROA1524. The State again used Witter's statements prematurely during its opening argument to the jury. 7ROA1557–58.

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[14] See section VII (H) for more on the erroneous admission of the gang evidence and the prejudice resulting therein.

Later, the State admitted it was reading from Dr. Etcoff's data when cross-examining Witter's father, again before Dr. Etcoff had been called. 9ROA1895. In its closing, the State again referenced statements Witter had made to Dr. Etcoff. 10ROA2127–29. Even after Dr. Etcoff testified for the defense, the State continued to use the facts and data underlying his opinion improperly on cross-examination. Despite Dr. Etcoff's admission during his direct-examination that "you didn't want to be around [Witter] because he was a dangerous person tending towards violent behavior," 9ROA1984, the State nonetheless used Witter's "future dangerousness" as justification for reading Witter's statements to Dr. Etcoff verbatim.

But the underlying facts and data were inadmissible unless the State was attacking Dr. Etcoff's opinion. NRS 50.305. This was not the case—in fact, a review of the transcript reveals there was very little the State and Dr. Etcoff *disagreed* on. Thus, under this Court's de novo review, the repeated use of these statements, without notice to the defense, were improper. *See Blake*, 121 Nev. at 790, 121 P.3d at 574.

The erroneous admission of these statements require reversal because they were actually prejudicial to Witter and implicated his Fifth Amendment rights. The Fifth Amendment right against self-incrimination states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." *See Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting U.S. Const. amend. V). The United States Supreme Court has held that a state may not compel a person to choose between the Fifth Amendment privilege against self-incrimination and another important interest because such a choice is inherently coercive. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805–08 (1977).

In this case, Witter made honest but incriminating statements for the important interest of developing mitigation evidence, but those same statements were later used against him. The jury was not provided with a limiting instruction explaining the permissible use of such evidence. The State introduced these statements improperly and to justify further erroneous introduction of extremely prejudicial gang evidence.

For the preserved errors, the State cannot meet its *Chapman* burden and show that the errors were harmless beyond a reasonable doubt. Similarly for any unpreserved errors, Witter can show actual prejudice because these errors actually prejudiced his Fifth Amendment rights.

4. Law of the case doctrine

The law of the case doctrine does not apply to this issue because this Court has never addressed this issue on the merits. *See Dictor v. Creative Mgmt. Servs., L.L.C.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010)); *see* 25ROA5591–92 (this Court noting Witter's claim that "he was prejudiced by the disclosure of his mental health records," but declining to consider the issue because the petition was untimely and successive).

L. The district court prevented Witter from cross-examining the State's expert

The district court allowed a police officer's expert opinions for the State but prevented Witter from cross-examining the same witness. This violated Witter's state and federal constitutional rights to cross-examine and confront witnesses, due process of law, equal protection,

and a reliable sentence. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. "This court reviews a district court's decision to allow expert testimony for abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). However, this Court reviews the constitutional violation resulting from the disparate treatment of the prosecution and the defense de novo.

Although Witter couldn't cross-examine him, Metro Detective Thomas Thowsen testified as the State's expert. Detective Thowsen opined Witter was not drunk on arrest. 6ROA1189. Detective Thowsen based this opinion on his "police academy" training because it taught him "signs of intoxication," like "slurred" speech and impaired "motor skills." 6ROA1187. He also purportedly knew "how an individual's tolerance for alcohol would affect his ability to function at various blood alcohol levels." 6ROA1223. Witter's counsel tried to cross-examine Detective Thowsen by asking him about how individuals function after drinking alcohol. But the district court thwarted him repeatedly:

Q Is it your experience that alcoholics can function better after consuming alcohol?

MR. GUYMON: Your Honor, I'm going to object based on the notion that he's not an expert, and I believe it calls for speculation when you start talking about what an alcoholic is.

THE COURT: You tended to use him as an expert also, and I would have sustained an objection. At this point, I am going to sustain it. You're going too far.

6ROA1225 (emphasis added).

BY MR. KOHN:

Q Could an alcoholic, in your opinion, function better at a .07 than a person who is not an alcoholic?

MR. GUYMON: I'm going to object.

THE COURT: I sustain. We're going too far. He's here as a detective on this case, not as an expert on alcohol. We're going too far afield on this.

6ROA1227 (emphasis added).

Despite defense counsel's attempt to cross-examine Detective Thowsen, the State objected—claiming Detective Thowsen wasn't "an expert." *Id.* Inexplicably, the district court recognized the State used him as an expert but still sustained the State's objection. 6ROA1225. The district court stated Witter was "going too far." 6ROA1227. But his questions about functioning under alcohol's influence were within the scope of proper cross-examination because the State used Detective Thowsen to opine about "how an individual's tolerance for alcohol would affect his ability to function at various blood alcohol levels." 6ROA1223. A side-by-side comparison shows the State and Witter's attorney asked Detective Thowsen the same questions. The only difference was the district court prevented him from answering Witter.

State questioning Detective Thowsen as an expert	Witter questioning Detective Thowsen as an expert
"Your experience with that would -- or do you know, based on your training, how an individual's tolerance for alcohol would affect his ability to function at various blood alcohol levels?" 6ROA1223	"Could an alcoholic, in your opinion, function better at a .07 [blood alcohol level] better than a person who is not an alcoholic?" 6ROA1227

The district court's thwarting of trial counsel's cross-examination was an abuse of discretion. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650; *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (internal quotation omitted); *see Chavez v. State*, 125 Nev. 328, 338, 213 P.3d 476, 483 (2009).

Here, the district court prevented Witter from cross-examining Detective Thowsen because: "He's here as a detective on this case, not as an expert on alcohol." 6ROA1227. However, the district court allowed Detective Thowsen, to answer the State's questions about functioning and alcohol tolerance. 6ROA1223. The State capitalized on this unfairness by emphasizing in its closing argument, "Detective Thowsen testified, in his experience, he's seen people with a .20 blood alcohol who don't show it. Other people would be falling down drunk; some people can hold their alcohol and not have it show." 7ROA1444. This is the same testimony the district court deemed outside Detective Thowsen's aptitude. 6ROA1227.

1. The law of the case doctrine has no application

This Court has never previously considered Witter's inability to cross-examine the officer's expert opinions.

Here, the Court cannot apply the law of the case doctrine because it has never adjudicated this issue before.

M. The district court failed to instruct the jury properly and the State exploited the failure

The jury instructions given by the trial court violated Witter's state and federal constitutional rights to due process of law, equal protection, a fair trial, and the presumption of innocence. U.S. Const. amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

Where no objection occurred in district court, this Court reviews the district court's settling of jury instructions for plain error. *Tavares v. State*, 117 Nev. 725, 729, 30 P.3d 1128, 1130–31 (2001), *holding modified by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008).

Where an objection occurred in district court, this Court reviews a district court's settling of jury instructions for judicial error.

Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009) (citation omitted).

Preserved errors of constitutional dimension are reviewed using the *Chapman v. California*, 386 U.S. 18, 24 (1967) "harmless error" standard. *See Martinorellan v. State*, 131 Nev. ___, 343 P.3d 590, 593 (2015). The *Chapman* standard requires reversal unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. *Chapman*, 386 U.S. at 24.

1. Guilt phase instructional errors

a. The reasonable doubt instruction minimized the State's burden of proof

The district court gave an instruction characterizing the reasonable doubt standard as an "abiding conviction of the truth of the charge." 7ROA 1412; 9ROA1907. However, this instruction reversed the State's burden of proof.

The district court's improper reasonable doubt instruction was plain error. The reasonable doubt instruction unconstitutionally minimized the State's burden of proof. 7ROA 1412; 9ROA1907. *Cf.*, *McAllister v. State*, 88 N.W. 212, 214-15 (Wis. 1901); *Commonwealth v.*

Miller, 21 A. 138, 140 (Penn. 1891); *contra Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991); *Ramirez v. Hatcher*, 136 F.3d 1209, 1210-15 (9th Cir. 1998). The characterization of standard of proof as an "abiding conviction of the truth of the charge," 7ROA 1412; 9ROA1907, cannot be linked to any proper definition of the reasonable doubt standard and with the language that immediately preceded this statement, provided with an impermissibly low standard of proof.

The use of this unconstitutional definition of reasonable doubt impermissibly minimized the standard of proof of beyond a reasonable doubt and is prejudicial per se. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993). This error seriously affects the integrity of the judicial proceedings because it renders Witter's death sentence unreliable.

Witter acknowledges that this Court and the Ninth Circuit have rejected similar challenges to this instruction. *Nevius v. McDaniel*, 218 F.3d 940, 944-45 (9th Cir. 2000); *Canape v. State*, 109 Nev. 871-72, 859 P.2d 1023, 1028 (1993). However, none of those decisions addressed the authorities, such as *McAllister* and *Miller*, on which Witter relies, and this Court should do so now.

(1) The law of the case doctrine has no application

This Court applied procedural default to a reasonable doubt instruction argument in an order affirming the denial of Witter's second habeas petition on October 20, 2009. 25ROA5591-92. Penalty phase instructional errors

2. Penalty phase instructional errors

a. The State offered character evidence improperly and the district court failed to instruct the jury when to consider character evidence

Without an instruction that they could consider character evidence only *after* finding death eligibility, Witter's jurors heard about his prior attempted murder charge and parole violations. The prosecutor exploited the lack of instruction by advancing a theme that "history repeats itself." The prosecutor argued nine times that Witter's prior offenses showed "history repeats itself" and Witter acted "true to form." 7ROA1562, 1565; 10ROA2118, 2122, 2127, 2129, 2132 (prosecutor arguing "history repeats itself" nine times through Witter's penalty hearing).

The consideration of character evidence and the district court's failure to instruct on character evidence demonstrates plain error. A jury may not consider character evidence to determine death eligibility. *Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). It may consider "evidence of the defendant's character" where it "is relevant to the *sentence*." *Butler v. State*, 397 P.3d 1269 (Nev. 2017) (emphasis added) (unpublished). This means "the State can offer this evidence for only one purpose: for jurors to consider in deciding on an appropriate sentence after they have determined whether the defendant is or is not eligible for death." *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000), *overruled on other grounds by Lisle v. State*, 131 Nev. ___, 351 P.3d 725 (2015).

Here, this Court already found "Witter is correct that jurors should not consider character evidence, i.e., 'other matter' evidence admitted under NRS 175.552(3), until they have decided whether the defendant is death eligible." 12ROA2541. However, the Court concluded: (1) the lack of such an instruction did not "violate[] any rule or law;" and (2) the Court had no reason "to believe that jurors relied on

the 'other matter' evidence in determining his death eligibility," "such as improper argument by the prosecutor." *Id.*

Hollaway acknowledges the lack of such an instruction *did* violate state law. *Hollaway* declared the State could only offer character evidence for the jury to consider after death eligibility was established.

Accordingly, the district court erred in failing to instruct when the jury could properly consider character evidence. This error seriously affected the integrity of the judicial proceedings as it rendered Witter's death sentence unreliable.

(1) The law of the case doctrine has no application

The law of the case doctrine does not preclude consideration of Witter's argument because it was only previously addressed in the context of an ineffective assistance of counsel claim. 12ROA2541.

Moreover, this Court may decline to apply the law of the case doctrine where "the controlling law of this state is substantively changed during the pendency of a remanded matter at trial or on appeal." *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 729–30 (2007).

Here, the Court should decline to apply the law of the case doctrine to Witter's character evidence argument because *Hollaway* clarifies the controlling law, *Hollaway* announced "the State can offer this evidence for only one purpose." *Hollaway*, 116 Nev. at 746, 6 P.3d at 997. Accordingly, the law of the case doctrine does not apply to Witter's character evidence argument because it was not previously decided.

b. The district court failed to instruct the jury to find aggravators unanimously and that mitigators required no consensus

Without any instruction on unanimity, Witter's district court instructed on aggravators and mitigators as follows: "The jury may impose a sentence of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt, and further finds there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." 10ROA2077.

The district court's failure to instruct on unanimity constitutes plain error. As to aggravating circumstances, "the jury must find

unanimously and beyond a reasonable doubt that at least one enumerated *aggravating* circumstance exists." *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000) (emphasis added), *overruled on other grounds by Lisle v. State*, 131 Nev. ___, 351 P.3d 725 (2015). Moreover, "a jury's finding of *mitigating* circumstances in a capital penalty hearing *does not have to be unanimous*." *Doleman v. State*, 112 Nev. 843, 850, 921 P.2d 278, 282 (1996) (emphasis added).

To effectuate unanimity rules, this Court recognized jurors would need clear instructions and ordered the following instruction be given prospectively: "The jury must find the existence of each aggravating circumstance, if any, unanimously and beyond a reasonable doubt. The jurors need not find mitigating circumstances unanimously. In determining the appropriate sentence, each juror must consider and weigh any mitigating circumstance or circumstances which that juror finds." *Geary v. State*, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998).

Here, Witter's jury never received instructions that it had to find aggravators unanimously and that it did not need to find mitigators unanimously. Because the district court should have clarified the

unanimity rules, as *Geary* did, the district court erred. This error seriously affects the integrity of the judicial proceedings because it renders Witter's death sentence unreliable.

(1) The law of the case doctrine has no application

This Court applied procedural default to a unanimity instruction argument in an order affirming the denial of Witter's second habeas petition on October 20, 2009. 25ROA5591-92. Accordingly does not apply because there was no ruling on the merits in Witter's claim.

c. The district court failed to instruct the jury that the State was required to prove beyond a reasonable doubt that the mitigation evidence did not outweigh the aggravating circumstances and this Court shouldn't have reweighed the evidence after striking invalid aggravators

The jury found Witter eligible for the death penalty because it found four aggravating circumstances and concluded the mitigation evidence did not outweigh the aggravating circumstances. The district court failed to instruct the jury that the State was required to prove beyond a reasonable doubt that the mitigation evidence did not outweigh the aggravating circumstances. On Witter's prior direct

appeal, this Court struck one of the four aggravators the jury found. The Court relied on the three remaining aggravators for reweighing and finding Witter death-eligible. On October 20, 2009, during exhaustion proceedings, the Court struck two of the remaining three aggravators the jury found. Nevertheless, the Court relied on the one sole remaining aggravator to reweigh and find Witter death-eligible.

(1) The district court should've instructed the jury to apply the reasonable doubt standard when weighing the evidence

The district court's failure to instruct on the beyond a reasonable doubt standard for weighing constitutes plain error. *Tavares*, 117 Nev. at 729, 30 P.3d at 1130–31. The United States Supreme Court in *Hurst* held a jury must find beyond a reasonable doubt *all* conditions precedent to the imposition of a death sentence, not just the presence of an aggravating circumstance. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); *id.* at 621 (explaining that Sixth Amendment, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a

reasonable doubt"). Thus, in "relatively unique" states, like Nevada, that require the outweighing determination to be resolved in the state's favor as a condition of death eligibility, *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000), the outweighing determination, along with any other death-eligibility findings, must be made by the jury beyond a reasonable doubt.[15] Ironically, in Witter's direct appeal this Court previously noted the prosecution's burden to prove the outweighing requirements without noting the jury was incorrectly instructed on this point. *Witter v. State*, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996).

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[15] In rejecting this point, this Court relied on *Ex parte Bohannon*, 222 So.3d 525, 532 (Ala. 2016) *cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831 (2017). *See Jeremias*, 412 P.3d at 53. This reliance was misplaced. *Bohannon* analyzed *Hurst* and concluded that it was "consistent with the Sixth Amendment" for Alabama judges to determine if aggravating circumstances outweigh mitigating circumstances. 222 So.3d at 532. *Bohannon* also concluded that *Hurst* did not invalidate the Alabama practice of juries "recommending" sentences, but leaving the final authority with the judge. *Id.* at 534. But in April of 2017, Alabama governor Kay Ivey signed into law a bill requiring juries, not judges, to have the final say on whether to impose the death penalty. *See* Kent Faulk, *Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases*, http://www.al.com/news/birmingham/index.ssf/2017/04/post_317.html (Apr. 11, 2017). In addition, Alabama's former death-penalty scheme, like many states, included outweighing as part of the selection phase, not the eligibility phase. *See Bohannon*, 222 So.3d at 532. This Court should not rely on case law from another jurisdiction—that already has been legislatively overwritten—to overlook *Hurst*'s unique application to Nevada.

This Court recently stated although *Hurst* "appears to characterize the weighing determination as a 'fact,'" the United States Supreme Court was simply "quoting the Florida statute, not pronouncing a new rule that the weighing of aggravating and mitigating circumstances is a factual determination subject to a beyond-a-reasonable-doubt standard." *Jeremias v. State*, 134 Nev. ___, 412 P.3d 43, 53–54 (2018). But the Florida Supreme Court, on remand from *Hurst*, interpreted its own statutes and the United States Supreme Court's decision to mean that all eligibility findings, including the outweighing determination, are factual and subject to *Hurst*. *Hurst v. State*, 202 So. 3d 40, 53–58 (Fla. 2016), *cert. denied sub nom. Florida v. Hurst*, 137 S. Ct. 2161 (2017).

Here, the jury was not instructed that the State had to prove beyond a reasonable doubt that the mitigation evidence did not outweigh the aggravating circumstances. Because *Hurst* requires the jury to apply the beyond a reasonable doubt standard to the weighing determination and Witter's jury did not make that finding, the district court erred.

(2)This Court shouldn't have supplanted the jury's role by reweighing evidence twice after striking invalid aggravating circumstances

This Court erred when it reweighed the one sole remaining aggravator to find Witter death-eligible. As stated above, *Hurst* requires a jury to determine the evidence's weight beyond a reasonable doubt. By twice reweighing the aggravators and mitigators to affirm Witter's death sentence, this Court committed error. *Clemons v. Mississippi*, 494 U.S. 738, 752-53 (1990).

(3) The law of the case doctrine has no application

The law of the case doctrine is inapplicable to issue because this Court has never addressed this issue on the merits. *See Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

N. Nevada's arbitrary and capricious capital punishment scheme violates the Constitution

Nevada's arbitrary and capricious capital punishment system violates Witter's state and federal constitutional rights to due process of law, equal protection, and right to be free from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. This Court has found the death

penalty to be constitutional, but Witter urges this Court to reconsider its prior decisions. Because Witter challenges the constitutionality Nevada's capital punishment statutes, he raises a "question of law" that "this court reviews de novo." *Sheriff, Washoe Cty. v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

Nevada's statutory aggravating circumstances are so numerous and vague they exist in every first-degree murder case. *See* NRS 200.033; NRS 200.030(4)(a). *E.g.*, *Hidalgo v. Arizona*, 138 S. Ct. 1054, (2018) (Breyer, J., dissenting from denial of certiorari, joined by Ginsburg, Sotomayor, and Kagan, J.J.). But a capital sentencing scheme must genuinely narrow the class of death eligible defendants. *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *see also McConnell v. State*, 120 Nev. 1043, 1063, 102 P.3d 606, 620 (2004).

Nevada permits the death penalty for all first degree murders, and first-degree murders are not restricted in Nevada within traditional bounds of premeditated and deliberate murder. As the result of the Nevada courts' use of unconstitutional definitions of reasonable doubt, express malice, and premeditation and deliberation, first degree murder

convictions occur absent proof of every element of the offense beyond a reasonable doubt, absent any rational showing of premeditation and deliberation and because of the presumption of malice aforethought. Consequently, a death sentence is permissible under Nevada law in every case where the prosecution can present evidence, not even beyond a reasonable doubt, that an accused committed an intentional killing. This arbitrary, capricious, and irrational scheme violates Witter's state and federal constitutional rights and is prejudicial per se.

1. The law of the case doctrine has no application

This Court applied procedural default to a challenge to Nevada's arbitrary and capricious capital punishment in an order affirming the denial of Witter's second habeas petition on October 20, 2009. 25ROA5591-92. Accordingly, the law of the case doctrine does not apply to this claim because it was not previously decided.

O. Elected judges' review of Witter's capital case violates the Constitution

Witter's conviction and death sentence are invalid under the state and federal constitutional guarantees of due process, equal protection, and a reliable sentence because the tenure of the Nevada judges who

reviewed Witter's case were dependent on popular election. U.S. Const. amends. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

Because Witter challenges the constitutionality of elected judges reviewing his case, he raises a "question of law" that "this court reviews de novo." *Sheriff, Washoe Cty. v. Burdg*, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

1. Electoral pressures prevent judges from reviewing capital cases fairly

Ruling for a capital defendant or a capitally-sentenced appellant threatens the tenure of elected judges. After reviewing 2,102 state Supreme Court rulings in capital cases from 2000 through 2015, Reuters found elected judges reverse death sentences at less than half of the rate of those who are appointed. D. Levine and K. Cooke, *Uneven Justice: In states with elected high court judges, a harder line on capital punishment*, Reuters, September 22, 2015, available at: http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/ (last accessed June 19, 2018). States with appointed justices reversed death penalty cases at the highest rate: 26 percent. States, like

Nevada, with judicial elections, had substantially lower reversal rates: 15 percent in states with appointed justices who must face retention elections, and 11 percent in states where justices are elected in contested elections. *See id.* The function of having death sentences reviewed by judges who must court the public vote results in an unconstitutional disparity in applying the death penalty throughout the United States. It also adds an arbitrary component to imposition of the death penalty. "The Eighth and Fourteenth Amendments prohibit imposing capital punishment in an arbitrary or capricious manner." *Chaney v. Lewis*, 801 F.2d 1191, 1195 (9th Cir. 1986) (citation omitted).

The threat of removal because of an unpopular decision "offer[s] a possible temptation to the average [person] as a judge . . . not to hold the balance nice, clear and true between the state and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009. As former United States Supreme Court Justice Sandra Day O'Connor explained, "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection

prospects," further noting that "if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case." *Republican Party v. White*, 536 U.S. 765, 788–89 (2002) (O'Connor, J., concurring).

Other United States Supreme Court justices have also noted the corrosive effect of elected judges on the rights of criminal defendants. In 1987, then-sitting Justice Byron White acknowledged the due process implications of elected judges who face possible loss of office for correct, though politically unpopular, rulings: "If a judge's ruling for the defendant . . . may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion." *See* Ruth Marcus, *Justice White Criticizes Judicial Elections*, Wash. Post (Aug. 11, 1987), available at 1987 WLNR 2255221. Former Justice John Paul Stevens has also spoken extensively about the corrosive effects of elections on the rights of criminal defendants. *See, e.g.*, John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting,

Orlando, Florida, Aug. 3, 1996, 12 St. John's J. Legal Comment. 21, 30-31 (1996).

In *Woodward v. Alabama*, 134 S. Ct. 405 (2013), two sitting justices (Sotomayor and Breyer) dissented from the denial of certiorari over petitioner's challenge to a death-penalty statute permitting judicial override of juries' recommendations of life sentences, raising "important concerns that are worthy of this Court's review," including the impact of elected judges on the review of death penalty cases:

> What could explain Alabama judges' . . . proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.

See 134 S. Ct. at 408-09 (Sotomayor, J., dissenting from the denial of certiorari).

2. Electoral pressures pressure Nevada Supreme Court Justices to appear "tough on crime"

Addressing Nevada's system of elected judges, Former Nevada Supreme Court Justice Cliff Young explained,

> If recent campaigns are an indication, any laxity toward a defendant in a homicide case would be considered a serious, if not fatal, campaign liability. With sixty-one people on death row, Nevada has the highest per capita number of inmates under sentence of death of any state. Candidates, almost without exception, seek to be known for their tough stances on crime. A three-judge panel statistically imposes the death penalty with far greater frequency than a jury. [FN 3 - The Clark County Public Defender's Office advises the court that, since July of 1998, seven defendants were represented before a three-judge panel and one-hundred percent of the defendants received a sentence of death. In contrast, defendants appearing before a jury received a sentence of death in only forty-five percent of the cases.] If through the element of caprice, the jury is unable to reach a decision in the penalty phase and determination of the penalty in a death case is given to a three-judge panel, the outcome is fairly predictable. This portion of Nevada's capital

sentencing scheme, therefore, fails to distinguish cases in which the death penalty is imposed from those in which it is not.

Beets v. State, 107 Nev. 957, 975-76 & n.3 (1991) (Young, J., dissenting; emphases in original); *see also*, *e.g.*, Legislative Comm'n Subcomm. to Study the Death Penalty and Related DNA Testing Tr., Feb. 21, 2002 (Justice Robert E. Rose stating that the lesson of election campaigns, involving allegation that a Nevada Supreme Court justice "wanted to give relief to a murderer and rapist," was "not lost on the judges in the State of Nevada, and I have often heard it said by judges, 'a judge never lost his job by being tough on crime.'").

The actual or attempted removals of a Nevada Supreme Court justice for participating in an unpopular decision establishes this point. In 1970, this Court, compelled to act by an intervening United States Supreme Court decision, granted relief to Jeremiah Bean, previously sentenced to death. *See Bean v. State*, 86 Nev. 80, 465 P.2d 133 (1970). Addressing the aftermath of this decision, the federal district court (the Honorable Bruce Thompson) explained that the *Bean* decision was a widely publicized and controversial decision, which generated much

public criticism and dissension, including the citation of the Washoe County District Attorney for contempt of the Nevada Supreme Court because of his intemperate comments and the circulation of petitions to recall the three Nevada Supreme Court Justices who issued the ruling. *See Shuster v. Brown*, 347 F. Supp. 319, 320 & n.1 (D. Nev. 1972).

Later Nevada Supreme Court justices also faced removal for their participation in unpopular decisions. *See* Sherman Frederick, *Voters like R-J's Ideas—Guess Who Hates That?*, Las Vegas Rev. J., Nov. 12, 2006; Editorial, *Brian Greenspun on Tuesday's Victories Amid a Judicial Warning*, Las Vegas Sun, Nov. 9, 2006; Carri Geer Thevenot, *Supreme Court's Becker Falls to Saitta – Douglas Retains Seat – Political Consultant Says Justice Hurt by* Guinn v. Legislature *Ruling in 2003*, Las Vegas Rev.-J., Nov. 8, 2006; Editorial, *Nancy Becker Must Be Removed – Supreme Court Justice Backed* Guinn v. Legislature *Travesty*, Las Vegas Rev. J., Nov. 5, 2006; Editorial, *Nancy Becker Has the Right Stuff – State Supreme Court Justice has Faithfully and Honestly Interpreted the Constitution*, Las Vegas Sun, Oct. 22, 2006; *Jeff German, Far Right Targets Justice Becker – Supreme Court Vote*

on Tax Increase Was Right Thing to Do, She Says, Las Vegas Sun, Oct. 15, 2006; Jon Ralston, *Campaign Ad Reality Check*, Las Vegas Sun, Oct. 3, 2006; Jon Ralston, *Jon Ralston Is Impressed at the Clarity and Brevity Displayed by Lawyer-Politicians*, Las Vegas Sun, Sept. 22, 2006; Michael J. Mishak, *Libertarian Lawyer Has More Issues Up His Sleeve – Waters' Next Targets: Campaign Funds, Real Estate Tax*, Las Vegas Sun, Sept. 16, 2006; Sam Skolnik, *Who Owns Whom Is Supreme Theme – Becker, Saitta Race Is Rife with Accusations*, Las Vegas Sun, Aug. 27, 2006.

3. Elected judges reviewed Witter's case unfairly

Nevada law includes no mechanism for insulating state judges and justices from majoritarian pressures that would affect the impartiality of an average person as a judge in a capital case. Making unpopular rulings favorable to a capital defendant or to a capitally sentenced appellant poses the threat to a judge or justice of expending significant personal resources, of both time and money, to defend against an election challenger who can exploit popular sentiment

against the jurist's pro-capital defendant rulings. This poses the threat of removal from office.

The United States Supreme Court has repeatedly emphasized that when a state opts to act in a field where its action has significant discretionary elements—such as when it allows for an appeal of right or for an opportunity to challenge a conviction in a state post-conviction proceeding—it must still act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). This is all the more so when one's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 273 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests). Death is different; for that reason, more process is due—not less. *See Lockett v. Ohio*, 438 U.S. 586, 608 (1978). An impartial decision-maker is an integral part of due process. *See Tumey*, 273 U.S.

at 535. Thus, elected judges' review of Witter's capital case violates the state and federal constitutions.

4. The law of the case doctrine has no application

The Court declined to address Witter's elected judges claim on the merits in 2009. 25ROA5591-92. Accordingly, the law of the case doctrine does not apply to Witter's elected judges claim because it was not previously decided.

P. Witter's conviction and death sentence are invalid under the cumulative error doctrine

Witter's conviction and death sentence are invalid under state and federal constitutional guarantees of due process and a reliable sentence due to the voluminous errors that occurred throughout his case, which accumulated to render his trial fundamentally unfair. U.S. Const. amends. V, VI, VIII, & XIV; Nev. Const. Art. 1, secs. 1, 3, 6, 8; Art. IV, Sec. 21.

1. Standard of Review

This court reviews for cumulative error de novo. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Butler v. State*, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); "The Supreme Court has clearly established that the combined effect of multiple trial errors violate due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Id.* (citing *Chambers*, 410 U.S. at 290 n.3).

When evaluating a claim of cumulative error for guilt-phase claims, this Court considers the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (quotations and citations omitted). For cumulative error at sentencing,

this Court considers "the effect of [the errors] on the jury's sentencing decision." *Butler v. State*, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004).

2. This Court should review Witter's asserted errors holistically, after determining whether they are harmless individually

Prior to this Court's ruling in *Jeremias v. State*, 134 Nev. ___, 412 P.3d 43 (2018), this Court considered the cumulative effect of errors holistically, regardless of what stage of the trial they occurred. *See Valdez*, 124 Nev. at 1196, 196 P.3d at 481 (reversing for cumulative error based on inadequate jury instructions at the end of the guilt phase, prosecutorial misconduct during voir dire and the guilt phase, and juror misconduct). Similarly, in *Butler*, this Court considered errors occurring during sentencing holistically, under its duty of mandatory review. 120 Nev. at 900, 102 P.3d at 85 ("NRS 177.055(2) requires this court to review every death sentence and consider, among other things, whether 'it was imposed under the influence of passion, prejudice or any arbitrary factor.' We will therefore consider the effect of these remarks and any other error on the jury's sentencing decision."). This Court has applied *Butler*'s reasoning to claims of sentencing error, regardless of

whether the error was preserved. *See Blake v. State*, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005).

However, in *Jeremias*, this Court indicated that appellants must explain how errors accumulate over different stages in the proceedings, while differentiating between preserved and unpreserved error. 412 P.3d at 55. But as set forth above, a review for cumulative error analyzes the *total* impact of errors that have been held as harmless individually. *See Egelhoff*, 518 U.S. at 53. Thus, appellate courts undertake cumulative error review after they have already resolved whether asserted errors are harmless. In other words, courts do not undertake a cumulative error analysis before knowing which harmless errors they are accumulating. For similar reasons, it is highly unlikely that an appellant could anticipate the myriad ways an appellate court may adjudicate the harmlessness of their asserted errors. As a result, it is equally unlikely the appellant could provide a helpful calculation of how those otherwise harmless errors accumulated at each stage to impact the trial as a whole. This problem compounds itself if the appellant must provide an analysis that differentiates between jury

selection, guilt, penalty—and also whether the error was preserved. However, to comply with this Court's language in *Jeremias*, the analysis below assumes for the sake of completeness this Court finds all errors harmless individually.

1. Errors accumulated during the guilt phase, which rendered that portion of the trial fundamentally unfair

Under *Valdez*, the totality of guilt-phase errors set forth in this appeal require reversal of the judgment.

Incorporating all of Witter's assertions of error and their accompanying factual basis here, the cumulative effect of these errors—even if held harmless individually—demonstrates that Witter's guilt phase lacked fundamental fairness and resulted in a constitutionally unreliable conviction. Although the issue of guilt or innocence may not have been close, the degree of Witter's culpability was. And the sheer quantity and character of the errors asserted and the gravity of the charges—specifically first-degree murder—clearly weigh in favor of

reversal.[16] Thus, whether or not any individual error at voir dire and the guilt phase require vacating the conviction, the totality of these multiple errors and omissions resulted in substantial prejudice. For the errors of constitutional dimension, the State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Witter. He therefore requests that this Court vacate his conviction and remand for a new trial.

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[16] By way of reminder, Witter asserts the following guilt-phase errors in this brief: 1) the trial court's mishandling of his *Batson* claim and the States pretextual reason for striking Elois Brown require reversal; 2) pervasive and egregious error during his voir dire contaminated his jury; 3) the jury was erroneously instructed on premeditation; 4) the State committed prosecutorial misconduct by injecting improper and inflammatory statements into its opening and closing arguments; 5) the admission of unnecessarily gruesome photos prejudiced him; 6) the trial court's error in restricting Witter from cross-examining the State's expert; and 7) the trial court gave misleading instructions on the reasonable doubt standard.

2. Errors accumulated during the penalty phase, which rendered that portion of the trial fundamentally unfair

Under *Butler*, the totality of errors set forth in this appeal requires reversal of Witter's death sentence.

Again, incorporating all of Witter's assertions of error and their accompanying factual basis here, the cumulative effect of these errors—even if held harmless individually—demonstrates that Witter's death sentence lacks fundamental fairness and is constitutionally unreliable.[17] This is true even if this Court concludes that overwhelming evidence supports the conviction. *See Butler*, 120 Nev. at 900, 102 P.3d at 86. ("Although overwhelming evidence supports

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[17] In addition to the arguments noted in the previous footnote, which also impact this Court's review for cumulative error at sentencing, Witter has asserted the following penalty-phase errors throughout this brief: 1) the jury considered three invalid aggravators; 2) the victim's family members gave irrelevant and prejudicial victim impact testimony; 3) the State introduced misleading and highly prejudicial evidence that Witter was in a gang and the trial court failed to grant a continuance; 4) the State used Witter's juvenile conduct to support a sentence of death; 5) the State improperly used facts and data underlying a defense expert's report to support a sentence of death; 6) the jury was erroneously instructed on unanimity, outweighing, and the use of character evidence at sentencing; 7) Nevada's capital punishment scheme is arbitrary and capricious.

Butler's two convictions, he was entitled to a hearing that was fair before the jury decided to impose a penalty of death."). Thus, whether or not any individual error throughout Witter's proceedings require vacating the conviction or sentence, the totality of these multiple errors and omissions resulted in substantial prejudice. For the errors of constitutional dimension, the State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Witter. He requests that this Court vacate his death sentence.

VIII. CONCLUSION

For the foregoing reasons, Witter request that this Court reverse his convictions and death sentence.

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DATED this 25th day of June, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c)it is either:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 36,522 words: or

[ ] Monospaced. Has 10.5 or few

[ ] Does not exceed pages.

3. Finally. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that

this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

In accordance with NRAP 25(c)(1)(D), the undersigned hereby certifies that APPELLANT'S OPENING BRIEF was filed electronically with the Nevada Supreme Court on June 25, 2018. Electronic service of the foregoing APPELLANT'S OPENING BRIEF shall be made in accordance with the service list as follows:

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