IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM WITTER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 73444

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

Pursuant to NRAP 17(a)(1), this appeal is retained by the Nevada Supreme Court because it is a death penalty case.

STATEMENT OF THE CASE

In 1995, William Witter was convicted of Murder with Deadly Weapon, Attempt Sexual Assault with Deadly Weapon, and Burglary for assaulting and attempting to rape K.C., and then stabbing to death her husband when he tried to come to his wife's aid. 10 ROA 2167-9. Witter received the death penalty. Id. His convictions and sentence were affirmed on direct appeal. Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996). Remittitur issued on December 23, 1996. 10 ROA 2241-59.

Witter filed a timely first post-conviction petition which was denied by the district court after an evidentiary hearing and then affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 36927). 10 ROA 2252; 12 ROA 2538-46. Remittitur issued on September 5, 2001. 12 ROA 2548. After litigating a federal habeas petition for several years, Witter returned to state court by filing a second state habeas petition on February 14, 2007. 22 ROA 2979. That petition was also denied and again affirmed on appeal by the Nevada Supreme Court in an unpublished order (SC# 50447). 25 ROA 5585-98. Witter also filed a third state habeas petition on April 28, 2008, which was also denied and affirmed on appeal (SC# 52964). 24 ROA 5488; 25 ROA 5608-11. Remittitur from this third habeas appeal issued on February 14, 2011. 25 ROA 5614. Thereafter, Witter returned to his federal habeas litigation and currently has an appeal pending in the Ninth Circuit. 25 ROA 5623.

On January 11, 2017, Witter filed his fourth state habeas petition which raised issues based on Hurst v. Florida, 577 U.S. __, 136 S.Ct. 616 (2016). 25 ROA 5615-32. The State responded on January 31, 2017. 25 ROA 5634-50. Witter filed his opposition on March 3, 2017, followed by the State's reply on March 22, 2017. 25 ROA 5665-5709; 25 ROA 5711-17. The petition was argued and denied on April 19, 2017, 25 ROA 5723-37, and written findings were filed on May 31, 2017. 25

ROA 5741-3. Witter's appeal from the denial of habeas has been docketed as SC# 73431 but has been stayed pending the outcome of the instant appeal.

Meanwhile, on June 7, 2017, Witter filed a motion for an amended judgment of conviction seeking to remove an uncertain amount of restitution. 26 ROA 5752-9. The State opposed the motion on June 23, 2017, 26 ROA 5791-4, and Witter filed a reply on June 27, 2017. 26 ROA 5795-8. On June 28, 2017, the judge granted the motion and ordered the State to file an Amended Judgment of Conviction. 26 ROA 5805-7. As ordered, the amended judgment was filed on July 12, 2017, from which Witter now appeals in the instant case. 26 ROA 5826-9. Prior to briefing on the merits, the State moved to dismiss the instant appeal for lack of jurisdiction on November 3, 2017. By Order filed on February 23, 2018, this Court denied the motion to dismiss at that time but indicated that the jurisdictional issue could be revisited in the briefs.[1] Witter filed his Opening Brief on June 25, 2018, and the State's Answering Brief now follows.

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[1] The State's attempt to appeal from the habeas decision and the amended judgment was dismissed by Order of this Court on February 23, 2018, in SC# 73431. Likewise, the State's attempt at mandamus was denied on May 15, 2018, in SC# 73444, leaving the State with no remedy from entry of the amended judgment other than the argument in the instant brief.

STATEMENT OF THE FACTS

On November 14, 1993, K.C. was working as a retail clerk at the Park Avenue Gift Shop in the Luxor Hotel in Las Vegas, Clark County, Nevada. 4 ROA 873. On that date, K.C. was forty-four (44) years old and had been married to her husband for approximately twelve (12) years. 4 ROA 872. Her husband was a fifty-three (53) year-old taxi cab driver for the Yellow Checker Star cab company. 4 ROA 872-73. On November 14, 1993, Witter sexually assaulted K.C., stabbed her, and then brutally killed her husband. The details of this crime are as follows:

On the evening of November 14, 1993, K.C. finished her shift at 10:00 p.m. and boarded the shuttle bus that would take her to the parking lot where K.C.'s Mercury Tracer was parked. 4 ROA 878. K.C. unlocked the driver's door, got inside, and tried to start the car. 4 ROA 879. K.C. tried several times to start the car, but was unsuccessful. 4 ROA 879. K.C. called her husband from a pay phone. 4 ROA 880-81. K.C. told him that the car would not start and asked if he could pick her up and give her a ride home. Id. He told K.C. that he was on his way to pick up a passenger and that it would be about 25 to 30 minutes before he could come and pick her up. 4 ROA 881. K.C. then returned to her car on the shuttle bus in order to wait for her husband to arrive. 4 ROA 882.

When K.C. arrived at her car, she got inside, locked the driver's door and started to read a book. Id. After about five (5) to ten (10) minutes, the passenger

door suddenly opened and Witter quickly got inside K.C.'s car. 4 ROA 884-85. Witter immediately told K.C. in a loud voice, "Don't look at me." 4 ROA 885. Witter then instructed K.C., "Drive this car out of the parking lot." 4 ROA 886. K.C. responded that she could not drive the car because it would not start. Id. Witter then angrily stated, "You will drive this out of here, you bitch." Id. Following this statement, Witter stabbed K.C. with a knife just above the left breast. 4 ROA 886-87. K.C. screamed and Witter told her to be quiet, again instructing her, "You will drive this car out of here right now." 4 ROA 888. K.C. again told Witter that she could not drive the car because the car would not start. Id. Witter then grabbed K.C. by her hair and pulled her towards him, leaving K.C.'s hair over her face so she could not see. 4 ROA 889. Witter told K.C., "I'm going to kill you, you bitch", and then with his right hand stabbed K.C. six (6) more times in the left side of her body, between K.C.'s arm pit and left breast, and one (1) time in the back, near her shoulder blade. 4 ROA 889-92.

K.C. began screaming and Witter repeatedly told her, "Shut up. I'm going to kill you, you bitch." 4 ROA 892. Witter then asked K.C. if she knew that he was going to kill her and K.C. responded that she was aware Witter would kill her. 4 ROA 892-93. Witter also asked if K.C. was aware that he was going to rape her and K.C. again responded that she was aware that Witter would rape her. Id. Following these questions, Witter unzipped his pants and exposed his penis and told K.C. to

"suck his cock like [she] would for [her] old man and make him feel better or good." 4 ROA 893-94. While Witter was making this statement to K.C., he placed K.C.'s hand on his flaccid penis and pushed her head down towards his lap. Id. K.C. was unable to meet Witter's demands because she kept passing out as a result of a collapsed lung that was caused by the stab wounds inflicted by Witter. 4 ROA 895. When Witter realized K.C. was not able to comply with his demands, Witter lifted K.C.'s head back up and again told her that he was going to rape her and kill her. 4 ROA 897. Witter added, "you're probably already dead." Id. At that point, K.C. could feel the blood exuding from her multiple stab wounds. Id. K.C. tried not to breathe very often or very deep in order to decrease her blood loss. 4 ROA 897-98. K.C. also tried to keep Witter calm so that he would not rage again and inflict more stab wounds. Id.

At one point, Witter turned his head away from K.C. and she quickly jumped out of her car and ran away screaming. 4 ROA 899. K.C. only ran about 10 to 15 feet when Witter caught her, grabbing her by the back of the neck and hair. 4 ROA 899-900. Witter dragged K.C. back to the car and pushed her into the driver's seat again. 4 ROA 900. After Witter got back inside the car he kissed K.C. at least one (1) time. 4 ROA 901-02.

Witter then tried to remove K.C.'s Levi pants by unbuttoning them, but was unable to because the pants fit tightly. 4 ROA 903. Witter became frustrated and

slashed K.C.'s pants with his knife, leaving four (4) or five (5) knife wounds on K.C.'s right hip. 4 ROA 904-05. After Witter cut K.C.'s pants, he pulled the clothing open, exposing K.C.'s vaginal area. 4 ROA 905. Witter reached over with his hand and began rubbing K.C.'s vaginal area with his hand and fingers. Id. While Witter was rubbing K.C.'s vaginal area, he began kissing her again and reached underneath K.C.'s shirt, undid her bra and began squeezing K.C.'s breast. 4 ROA 905-06. At this point, K.C. thought she was going to die, because her blood was everywhere. 4 ROA 906-07.

While Witter was attacking her, K.C. saw in the side-view mirror her husband's taxi cab pull up alongside the car. 4 ROA 907. K.C. was afraid Witter would hurt her husband. 4 ROA 908. K.C. also noticed that the knife, which had a six-inch blade and four-inch handle, was lying on the dashboard of the car. 4 ROA 909. Witter, not knowing that the taxi driver was K.C.'s husband, instructed K.C. to be quiet so he could tell the taxi driver that K.C. was having a bad cocaine trip and Witter was just trying to help. 4 ROA 908. K.C.'s husband opened the driver's door and asked, "What's going on here?" 4 ROA 909. Witter told him that K.C. was having a bad cocaine trip and that he was just trying to help. K.C.'s husband responded, "I don't think so. 4 ROA 910. This is my wife and this is my car and get the hell out." Id. Witter got out of the car through the passenger's door and confronted

K.C.'s husband. Id. K.C. noticed that the knife was no longer lying on the dashboard. Id.

After Witter got out of the car, K.C. could hear her husband and Witter yelling and scuffling. Id. K.C. got out of the car and attempted to get inside the taxi cab in order to call for help. 4 ROA 911. When K.C. was unable to get inside the taxi, she turned and saw Witter stabbing her husband in the left shoulder area. 4 ROA 912. He screamed in pain and Witter continued to stab him repeatedly. 4 ROA 912-13. K.C.'s husband eventually fell into K.C. and they both fell to the ground. 4 ROA 913. K.C. began screaming and kicking and Witter stabbed her in the calf area of her left leg, the knife blade passing completely through K.C.'s leg. 4 ROA 914. Her husband lay motionless in K.C.'s arms. Id.

K.C. told her husband she loved him and she was going to get help and then got up and ran towards the bus stop. 4 ROA 916. K.C. lost one shoe while she was running and then Witter caught her again. 4 ROA 916-17. Witter grabbed K.C. by the hair and picked her up from the ground. 4 ROA 918. Witter took K.C. back to the car and stuffed her into the back seat area on the passenger's side floor. Id. Witter then completely removed K.C.'s pantyhose and Levi's. 4 ROA 919. Witter left K.C. in the back seat and K.C. could hear Witter attempting to move her husband's body. Id. Witter returned and began touching K.C.'s legs. 4 ROA 920. Shortly thereafter,

K.C. heard the voices of the hotel security and Witter left her in the back seat of her car. Id.

Thomas McKinnon witnessed Witter pursuing K.C. in the parking lot before dragging her by the hair to the ground. 5 ROA 931-32. He informed Thomas Pummil of the incident. 5 ROA 933. Security Officer Thomas Pummil was patrolling the Luxor/Excalibur employee parking lot on the evening of November 14, 1993. 5 ROA 945.

After being informed of the attack, Officer Pummil immediately went to the location of K.C.'s car and saw Witter standing between K.C.'s car and the taxi cab. 5 ROA 947. It appeared to Officer Pummil that Witter was trying to stuff something in the back seat of the car. 5 ROA 947-48. Officer Pummil got out of his truck and asked Witter, "What is the problem?" 5 ROA 948-49. Witter responded, "Nothing." Id. Witter then turned and came towards Officer Pummil from between K.C.'s car and the taxi cab. Id. Officer Pummil instructed Witter to stop. 5 ROA 965. Witter ignored the instructions and stated, "Fuck you", and took several steps towards Pummil. 5 ROA 967. Officer Pummil retreated several steps to keep a safe distance and again instructed Witter to stop. 5 ROA 965, 969. Witter again ignored the instructions and advanced towards Officer Pummil stating, "Kill me. Go ahead, shoot me. Kill me, mother fucker." 5 ROA 968-69. Witter repeated these same words several times as he approached Officer Pummil. 5 ROA 969. After Officer

Pummil stepped back a second time, he drew his weapon and ordered Witter to lie on the ground. 5 ROA 966-67. Officer Pummil also called for backup assistance at this time. Id. Approximately a minute and-a-half after Officer Pummil arrived, Officer Schroeder arrived, walked up behind Witter and placed him in handcuffs. 5 ROA 971. Officer Pummil patted down Witter and found a knife sheath in Witter's front pocket. 5 ROA 973. Officer Pummil also saw blood everywhere, including on Witter. 5 ROA 985.

After Witter was handcuffed, Officer Schroeder went over near the taxi cab and noticed K.C.'s husband's body lying on the ground partially underneath the taxi cab. 5 ROA 998, 1001, 1004. K.C.'s husband's face and upper torso were covered with a coat, and he was lying in a puddle of blood. 5 ROA 1001-02. Officer Schroeder removed the coat and determined that he was not breathing and did not have a noticeable pulse. Id. Officer Schroeder then heard K.C.'s moans coming from the back seat of the car. 5 ROA 1005-06.

K.C. was found lying in the back seat with no clothes on from the waist down and several visible stab wounds. 5 ROA 1006-07, 1011. Paramedics soon arrived and K.C. was transported to the hospital, where she remained for eight (8) days, only leaving to attend her husband's funeral. 4 ROA 924, 1007-11. K.C. told one of the paramedics, Kimberly Bayer, that she had been stabbed. 5 ROA 1029. Kimberly

observed multiple stab wounds to the left side of K.C.'s chest and to the left side of her back. 5 ROA 1030-31.

Officer Candiano of the Las Vegas Metropolitan Police Department (LVMPD) was one of the first police officers to arrive at the crime scene. 5 ROA 1051. Officer Candiano took control of Witter from the security officers. 5 ROA 1052. While Officer Candiano was taking Witter to his patrol car, Witter stated several times that he hated all cops and was going "to kill all the fucking cops he could." 5 ROA 1054. Officer Candiano read Witter his Miranda rights twice, once before placing him inside the patrol car and once after Witter was inside the car. 5 ROA 1054-56. Witter acknowledged that he understood his constitutional rights. 5 ROA 1057. Officer Candiano noticed that Witter's pants, shoes and hands were all covered in blood. 5 ROA 1059. Witter was taken to the police station and during questioning stated that he "wanted to get the pictures out of his head" and added, "I can't believe I did it. I just can't believe I did it." 5 ROA 1067.

Witter was interviewed at the police station by Detective Thowsen. 6 ROA 1174-76. Detective Thowsen showed Witter a Miranda card which Witter read out loud and signed. 6 ROA 1179-81. Subsequently, Witter admitted being in the Luxor parking lot, approaching K.C. and becoming aggressive with her, stabbing her husband with the hunting knife, and using his jacket to cover his body after the

stabbing. 6 ROA 1183-84, 1186, 1219. Witter refused to talk about his attempted sexual assault on K.C.. 6 ROA 1184.

Alan Galaspy, a Criminalist with the Las Vegas Metropolitan Police Department's Forensic Laboratory (LVMPD), conducted a scientific analysis of Witter's blood that was drawn on the early morning of November 15, 1993. 6 ROA 1229, 1231-32. The results of this analysis demonstrated that Witter had a .07 blood alcohol level. 6 ROA 1236. Criminalist Mino Aoki signed an affidavit indicating that he found no controlled substances in Witter's blood when it was tested. 6 ROA 1250.

On November 15, 1993, Dr. Robert Jordan, a Clark County Medical Examiner, performed an autopsy on the body of K.C.'s husband. 6 ROA 1279, 1283. The autopsy revealed a total of sixteen (16) stab wounds: one (1) wound in front of the left ear; three (3) wounds through the left ear; one (1) wound behind the left ear; and eleven (11) wounds to the left neck, shoulder and upper left arm. 6 ROA 1286, 1288. The autopsy also revealed that one of the stab wounds extended through the shoulder muscles and lacerated the victim's axillary artery, from which he most likely bled to death. 6 ROA 1289. The autopsy also revealed that one of the stab wounds penetrated his skull and extended a half inch into his brain. Id. Dr. Jordan concluded that this injury would have caused fatal hemorrhaging, however, the stab wound which lacerated the axillary artery caused his death first. 6 ROA 1290-91,

1294-96, 1299. Dr. Jordan concluded that the injuries were inflicted by a knife and his death was the result of the injuries to his neck and head. Id. Dr. Jordan also concluded that the manner of death was homicide. 6 ROA 1300-01.

SUMMARY OF THE ARGUMENT

Witter was not aggrieved by the amended judgment and may not raise direct appeal claims which relate back to the original judgment of conviction 22 years ago. Although the original judgment deferred restitution, it was "freighted with sufficiently substantial indicia of finality to support an appeal," under U.S. Supreme Court authority. In regards to the merits of his brief, Witter's claims of error occurring at trial and in the penalty phase either do not constitute error at all or harmless under the circumstances. Additionally, his claims of error which were not preserved do not amount to plain error.

ARGUMENT

A. No jurisdiction for this appeal

Witter is appealing from the Third Amended Judgment of Conviction filed on July 12, 2017. 26 ROA 5826-30. When compared to the Second Amended Judgment filed on September 26, 1995, the only change was to remove the following language on the fourth page: ". . . with an additional amount [of restitution] to be determined." 10 ROA 2187-90. This change was in Witter's favor as he is now no longer subject to an additional uncertain amount of restitution. This change was also

made upon the written motion of Witter and at the specific insistence of his attorney. 26 ROA 5752-59. In fact, Witter's motion included a proposed judgment identical to that which he is now appealing. 26 ROA 5761-64; EDCR Rule 7.21 (counsel obtaining any judgment must furnish the form to the judge). The State opposed the motion. 26 ROA 5791-94.

Only an "aggrieved" party may appeal. NRS 177.015. An "aggrieved" party is one whose "personal right or right of property is adversely and substantially affected." Estate of Hughes v. First Nat'l Bank, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980). The party who wins below and receives full relief, is not aggrieved and may not appeal. Ford v. Showboat Operating Co., 110 Nev. 752, 757, 877 P.2d 546, 550 (1994) ("A party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved."); *see also* Dynamic Transit v. Trans Pac. Ventures, 128 Nev. 755, fn2, 291 P.3d 114 (2012); Farnham v. Farnham, 80 Nev. 180, 184, 391 P.2d 26 (1964) (Appellant "won the case below and is not an 'aggrieved party' entitled to appeal"). Nor is there generally a right to appeal from a judgment to which the party has consented. 69 ALR2d 755. Because Witter requested and received an amended judgment removing his obligation for an uncertain amount of restitution, he is not aggrieved by the decision in his favor and may not appeal.

Furthermore, in an appeal taken from an amended judgment of conviction, the appellant may only raise challenges that arise from the amendments made to the original judgment of conviction. Jackson v. State, 133 Nev. ___, 410 P.3d 1004, 1006 (Nev. App. 2017); Cf. Sullivan v. State, 120 Nev. 537, 540–42, 96 P.3d 761, 763–65 (2004) (entry of an amended judgment of conviction can only provide good cause to file an untimely post-conviction petition for a writ of habeas corpus if the claims raised relate to the amendment); *see also* Morrell v. Edwards, 98 Nev. 91, 640 P.2d 1322 (1982). Witter's Opening Brief contains no claim concerning the recent amendment to the judgment of conviction as to his obligation to pay an uncertain amount of restitution. Instead, all of his claims pertain to and arise out of the original judgments of conviction filed 22 years ago.[2] Witter already filed a notice of direct appeal from the original judgment on August 31, 1995, 10 ROA 2183-84, this Court published an Opinion affirming the judgment on July 22, 1996, 10 ROA 2217-41, and remittitur issued on December 23, 1996. 10 ROA 2241.

[2] It appears there have been four judgments entered in this case. The original judgment filed on August 4, 1995, memorialized the jury's verdicts and sentence of death. 10 ROA 2167. An Amended Judgment filed on August 11, 1995, added the judge's pronouncement of sentence as to the non-murder counts. 10 ROA 2177. The Second Amended Judgment filed on September 26, 1995, added a $25.00 administrative assessment fee after the notice of appeal had already been filed. 10 ROA 2183, 2187. The Third Amended Judgment, which is the subject of the instant appeal, was filed 22 years later on July 12, 2017, and removed the order for an uncertain amount of restitution. 26 ROA 5826.

As the Sullivan court noted, an amended judgment of conviction can be entered years, or even decades, after entry of the original judgment of conviction. *See* Sullivan, 120 Nev. at 540, 96 P.3d at 764. Allowing a defendant in an appeal from an amended judgment of conviction to raise challenges that could have been raised on appeal from the original judgment of conviction would undermine the doctrine of finality of judgments by allowing a defendant to challenge the original judgment of conviction in perpetuity. The entry of an amended judgment of conviction should not provide a basis for raising claims that could have, and should have, been raised on appeal from the original judgment of conviction. *See* Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (providing that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Apparently, Witter's theory of jurisdiction for the instant appeal is that the prior judgment of conviction in 1995 was not final for the past 22 years until the uncertain amount of restitution was removed in the Third Amended Judgment. *See* NRS 177.015(3) (requiring a final judgment for an appeal). This novel reasoning arises as an extrapolation from Slaatte v. State, 129 Nev. 219, 298 P.3d 1170 (2013), where this Court held that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment within the meaning

of NRS 177.015 and is therefore not appealable. *See also* Whitehead v. State, 128 Nev. 259, 260-61, 285 P.3d 1053, 1054 (2012) (Judgment of conviction which imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Importantly, this Court in Slaatte caught the error in the judgment of conviction prior to accepting jurisdiction over the direct appeal. Slaatte did not address the situation of when a judgment is treated as final and an appeal is entertained on the merits only to have a purported defect in the finality of the judgment be raised many years later as in the present case.

However, Slaatte recognized that historically this Court had entertained appeals from such non-final judgments on the merits by accepting jurisdiction and then affirming and remanding with instructions to set an amount of restitution. Slaatte, 298 P.3d at 1171. For example, in Washington this Court affirmed the judgment of conviction pertaining to the term of imprisonment but reversed and remanded the judgment pertaining to restitution for future counseling costs. Washington v. State, 112 Nev. 1067, 1075, 922 P.2d 547, 552 (1996). In Smith, this Court remanded with instructions to amend the judgment to impose restitution in a specific amount, but affirmed the conviction in all other respects. Smith v. State, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996). In Roe, this Court affirmed the part of the judgment that was final, but remanded for a specific dollar amount of

restitution. Roe v. State, 112 Nev. 733, 736, 917 P.2d 959, 961 (1996). Finally, in Botts this Court accepted jurisdiction and entertained the merits of the appeal but reversed in part and remanded to set a specific amount of restitution. Botts v. State, 109 Nev. 567, 569, 854 P.2d 856, 857–58 (1993). Given the longstanding practice of district courts deferring calculation of specific restitution amounts, there are doubtless many judgments this Court has treated as final over the years and entertained on the merits even though the specific amount of restitution was not final. The instant case is but one such example.

Slaatte goes too far in refusing appellate jurisdiction over judgments of conviction that defer the specific amount of restitution but are final in all other material respects. Such reasoning is contrary to the weight of Supreme Court authority and results in judicial inefficiency as well as the potential violation of constitutional rights as argued below. In the present case, the uncertain amount of restitution was insignificant and utterly inconsequential to the parties but has resulted in the instant frivolous appeal and order for the parties to brief the merits of a 22 year old case that this Court has already heard and denied on direct appeal. Furthermore, application of Whitehead *supra*, would mean that despite having had four rounds of habeas proceedings, the one-year time bar for Witter will not begin to run until after issuance of remittitur from the instant appeal should this Court re-

entertain it as a new direct appeal on the merits. Such waste of time and resources does not serve the purposes of the final judgment rule nor the interests of justice.

The Supreme Court in Corey held that although a criminal defendant has a right to await the imposition of a final sentence before seeking review of the conviction, a commitment order imposing a temporary term of imprisonment pending formal sentencing had "sufficient finality" to support an immediate appeal. Corey v. United States, 375 U.S. 169, 174–75, 84 S.Ct. 298 (1963). This was true even though the defendant was ultimately sentenced to probation more than three months later in a separate final order. Id. The Court reasoned that criminal defendants should not be made to wait three to six months for final sentence to be imposed before they can appeal their underlying criminal conviction which is "sufficiently final" to support an appeal. Id. Next, in Dolan v. United States, 560 U.S. 605, 618, 130 S.Ct. 2533 (2010), the Supreme Court held that a sentencing court retains jurisdiction to fix the specific amount of restitution many months after having entered an initial judgment of conviction which had deferred restitution. Id. In rejecting defendant's argument that delaying the determination of the amount of restitution would delay the defendant's ability to appeal for want of a final judgment, the Court reasoned as follows:

> To the contrary, strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount. The initial judgment here imposed a sentence of imprisonment and supervised release, and stated that restitution would be awarded.

> This Court has previously said that a judgment that imposes "discipline" may still be "freighted with sufficiently substantial indicia of finality to support an appeal" [internal citation omitted] . . . . Thus, it is not surprising to find instances where a defendant has appealed from the entry of a judgment containing an initial sentence that includes a term of imprisonment; that same defendant has subsequently appealed from a later order setting forth the final amount of restitution; and the Court of Appeals has consolidated the two appeals and decided them together.

Dolan, 560 U.S. at 617-18, 130 S. Ct. at 2542. Finally, the Supreme Court recently enforced just such a procedure in Manrique, where the Court held that, "Our analysis in Dolan thus makes clear that deferred restitution cases involve two appealable judgments, not one." Manrique v. United States, 137 S. Ct. 1266, 1272-73 (2017). The Court in Manrique soundly rejected the premise of Slaatte that a sentencing judgment is not "final" until it contains a definitive determination of the amount of restitution. Id.

Federal Circuit Courts are in agreement. For example, the Eleventh Circuit, in United States v. Muzio, 757 F.3d 1243, 1249–50 (11th Cir. 2014), relied on Corey to hold that a judgment imposing a prison sentence and restitution but leaving the specific amount of restitution unsettled is immediately appealable as a sufficiently final judgment. While recognizing that this may lead to bifurcation of some defendants' cases, the appeals may be consolidated or the defendant may choose to avoid bifurcation by waiting until restitution has been resolved to appeal. Id. Likewise, even the Ninth Circuit, the most liberal and out-of-step court in the

country, in Gilbert held that a sentence of incarceration coupled with an unspecified amount of restitution is a sufficiently final judgment to support a direct appeal, recognizing there is a serious policy concern with requiring incarcerated defendants to delay their appeals until the district court has finalized the amount of restitution. United States v. Gilbert, 807 F.3d 1197, 1199–200 (9th Cir. 2015). Also, the Second Circuit in Tulsiram said it had no difficulty in reaching its holding that "a judgment of conviction that imposes a sentence including incarceration and restitution is 'final' within the meaning of 28 U.S.C. § 1291, even if the sentence defers determination of the amount of restitution." United States v. Tulsiram, 815 F.3d 114, 119 (2d Cir. 2016). The Court reasoned that a defendant is permitted either to appeal immediately from the initial sentence or to wait until all aspects of the sentence have been determined. Id.; *see also* Gonzalez v. United States, 792 F.3d 232, 236–37 (2d Cir. 2015); United States v. Bogart, 576 F.3d 565, 571 (6th Cir. 2009); United States v. Cheal, 389 F.3d 35, 51–52 (1st Cir.2004).

This Court has acknowledged that the purpose of the final judgment rule is to promote judicial economy and avoid piecemeal appellate review. Archon Corp. v. District Court, 133 Nev. ___, 507 P.3d 702 (2017). "[F]or the appellate court, it prevents an increased caseload and permits the court to review the matter with the benefit of a complete record." Id. (quoting Reno Hilton Resort Corp., 121 Nev. 1, 5 (2005)). While these policies are laudable, they are not always served by a strict

interpretation of the final judgment rule. For example, this Court has previously interpreted the final judgment rule with some flexibility in the context of allowing appeals from the granting of a motion for new trial. In Harris, this Court held that the rationale and policies behind the final judgment rule were not served by precluding such appeals:

> These interests outweigh the policy justifications that this court relied upon in Lewis to preclude the State from appealing a prejudgment order granting a new trial. The efficiency of the final judgment rule loses some weight when put against the costs, both financial and societal, of an improvidently granted new trial. In this respect, there is no valid reason to distinguish between an order granting a new trial that is entered before final judgment (not appealable after Lewis) and one entered after final judgment (appealable).

State v. Harris, 131 Nev. ___, 355 P.3d 791, 793 (2015), overruling State v. Lewis, 124 Nev. 132, 178 P.3d 146 (2008).

A deferred restitution case need not invariably result in piecemeal review or judicial inefficiency. Many criminal defendants will elect to await the final determination of restitution before seeking appellate review of their judgment of conviction and sentence. If a defendant files a notice of appeal from a judgment of conviction that has an order for an unspecified amount of restitution, this Court may elect to treat it as a premature notice of appeal pursuant to NRAP 4(b)(2) and direct the district court to set a specific amount of restitution prior to this Court determining

and accepting jurisdiction over the appeal as has been done in other contexts.[3] Alternatively, this Court may treat the initial judgment as sufficiently final for an appeal and later consolidate it with a second appeal taken from the final restitution order in accord with the Supreme Court authority above. Indeed, this Court is already familiar with the similar practice of consolidating direct appeals with appeals from the denial of a motion for new trial. *See e.g.*, Mortensen v. State, 115 Nev. 273, 86 P.2d 1105 (1999); Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991). Many defendants may not contest the specific amount of restitution and will have no need of filing a second notice of appeal.

The danger in outright dismissing an appeal from a deferred restitution case for lack of a final judgment as this Court did in Slaatte, is that restitution may never get finally determined (as occurred in the present case) or the defendant may be deprived of a speedy appeal:

> It would obviously contravene the basic policies of the criminal appellate rules to require a defendant sentenced under s 4208(b) to defer his appeal until after he had submitted to the three or six months of incarceration and diagnostic study prescribed by the statute. Such a requirement would not only forestall any opportunity of a prompt appeal from an underlying criminal conviction, but would deprive a convicted defendant of the substantial right to be enlarged on bail while

[3] Prior to the entry of a final written judgment, and the timely filing of a notice of appeal, the district court technically retains jurisdiction over appellant's case. *See* Bradley v. State, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1275 (1993). In a criminal case, a notice of appeal filed after announcement of the decision, but before entry of the written judgment or order is deemed to have been filed after such entry and on the day thereof. NRAP 4(b)(2).

> his appeal was pending. Indeed, the imposition of such a mandatory three- or six-month term of imprisonment before the defendant could file an appeal might raise constitutional problems of significant proportions.

Corey v. United States, 375 U.S. 169, 173, 84 S. Ct. 298, 301–02 (1963); *see also* United States v. Gilbert, 807 F.3d 1197, 1199–200 (9th Cir. 2015) (Recognizing there is a serious policy concern with requiring incarcerated defendants to delay their appeals until the district court has finalized the amount of restitution). Such outcomes are inconsistent with the policies behind the final judgment rule. The foreseeable consequence of this Court's flawed reasoning in Slaatte is that many criminal defendants in the same position as Witter will now be seeking a windfall do-over of their direct appeal and subsequent habeas decisions on the faulty legal premise that their judgment of conviction was not final due to an order for deferred restitution. Slaatte was poorly reasoned and should be reconsidered in light of Supreme Court authority to the contrary.

In the present case, the original judgment of conviction filed in open court on August 4, 1995, was a final appealable adjudication with respect to First Degree Murder and the sentence of death. 10 ROA 2167-69. It contained no uncertain amount of restitution to which Slaatte would apply. Whatever argument Witter might have as to lack of finality for an appeal when an uncertain amount of restitution is ordered, does not apply to this original judgment.

Thereafter, an amended judgment filed on August 11, 1995, added an adjudication and sentence as to all remaining counts and even ordered "restitution in the amount of $2,790," although it also provided for "an additional amount to be determined." 10 ROA 2179-80. It appears that $2,790 restitution was intended for the victim's counseling but that additional costs were anticipated both for future counseling and to reimburse Circus Circus which had paid for the victim's medical treatment, her husband's funeral expenses as well as maintaining a caregiver for the victim. 10 ROA 2152 (sealed), 2203. To the State's knowledge, no other hearing was ever held to determine and fix these restitution amounts. Neither the restitution that was ordered ($2,790) nor the order to determine an additional amount in the future, were contested. 10 ROA 2199-2204.

Witter filed a notice of appeal seeking appellate review of the judgment entered against him on August 3, 1995, to include all counts and sentences. 10 ROA 2183-84. The judgment was final in all material respects that mattered to Witter. Especially in a death penalty case, the defendant is effectively judgment-proof and seldom if ever disputes an order for restitution in light of far more pressing issues. This Court treated the judgment of conviction in this case as a final judgment at Witter's request and entertained the appeal on the merits. 10 ROA 2217-40. Having elected to appeal from the judgment containing an order for deferred restitution and

having induced this Court to treat the judgment as final, Witter is now estopped from claiming otherwise.

If this Court is not inclined to adopt the reasoning of the Supreme Court in handling deferred restitution appeals, then at most Slaatte should only have prospective application. This Court may refuse, at its peril, to accept jurisdiction over deferred restitution judgments in the future, but at least should recognize that deferred restitution judgments were commonplace and "sufficiently final" for jurisdiction to entertain an appeal in many cases in the past. Otherwise, countless appeals from deferred restitution judgments will be rendered retroactively null and void for lack of jurisdiction as a result of Slaatte. This Court will be faced with re-entertaining all those past direct appeals many years later as in the present case. Such an outcome is wholly inconsistent with the policies and purposes behind the final judgment rule and the fair administration of justice.

Because this Court declined to rule on the jurisdictional issue in this appeal previously and has ordered briefing on the merits, the State must comply. Accordingly, the remainder of the State's Answering Brief addresses the merits of the alleged trial court errors from 22 years ago as if this were a complete re-do of the prior direct appeal. That is an absurdity and the State can find no authority anywhere for entertaining the merits of such an appeal again. Respectfully, the remaining portion of the State's Answering Brief on the merits of the direct appeal

claims has consumed a significant amount of time and resources that could have been better spent elsewhere and should not have been ordered prior to determining jurisdiction.

B. Alleged Batson violation

Witter claims the judge erred in denying his Batson challenge by failing to make adequate findings and because the record does not support the State's race-neutral reason. However, the record shows that Witter never made a prima facie showing sufficient to even trigger a Batson inquiry.

This Court has previously adopted the three-step analysis set forth by the United States Supreme Court in Purkett v. Elem, 514 U.S. 765, 767 (1995), for consideration of a Batson claim. Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004). To establish a prima facie case, the opponent of the strike must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Batson v. Kentucky, 476 U.S. 79, 93-4, 106 S.Ct. (1986). This standard is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under *Batson*. Johnson v. California, 545 U.S. 162, 170, 125 S.Ct. 2410 (2005) (rejecting California's "more likely than not" standard to measure the sufficiency of a prima facie case). Rather, the opponent of the strike must provide sufficient evidence to permit the trier of fact to "draw an inference that discrimination has occurred." Watson v. State, 130 Nev. ___, 335 P.3d 157, 166

(2014). "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" Johnson, 545 U.S. at 168 n.4 (quoting Black's Law Dictionary 781 (7th ed. 1999)).

Where there is no pattern of strikes against members of the targeted group to give rise to an inference of discrimination, the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group:

> In other words, the mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step; "something more" is required

Watson, 335 P.3d at 166-7. Aside from a pattern of strikes against members of a targeted group, circumstances that might support an inference of discrimination include, but are not limited to, the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias. Id.

In the present case, there was no pattern of strikes because the challenge was made upon the prosecutor's very first peremptory strike. 4 ROA 803. Instead, the supposed prima facie evidence of discrimination was defense counsel's representation that the challenged juror was one of two African-Americans

remaining on the panel who had been passed for cause. 4 ROA 803-7. At best, defense counsel's concern was with getting a fair-cross section and a bare fear that the prosecutor would discriminate in the future:

> I believe counsel is going to exclude black people because they cannot impose the death penalty. And I think that's what he's doing. They tend to be more liberal and – because they know who the death penalty is used against. I believe my client has a right to a cross-section of this community, which includes black Americans.

4 ROA 807. This blatant expression of racist beliefs and bias came from the mouth of Witter's counsel, not the prosecutor. Furthermore, neither the judge nor the prosecutor were even aware that the juror was a minority:

> [The Prosecutor]: . . . .My notes, I did not reflect anything about her race at all. . .
>
> The Court: I should note I didn't know she was Hispanic or anything either. Her name is Elois Kline Brown. It's not a – you say she's black?
>
> Mr. Kohn: She's black, you Honor.
>
> The Court: I wasn't aware of that either, counsel

4 ROA 804. Immediately at that juncture, the judge overruled the Batson challenge, "because I don't think it even applies in this instance." Id.; United States v. Guerrero, 595 F.3d 1059, 1062 (9th Cir.2010) (no evidence that race played any role in the decision to strike the prospective juror because neither the prosecutor nor the judge recognized her as a minority). Batson is predicated not on the potential juror's actual race/ethnicity, but on the prosecutor's perception of that race/ethnicity as the

reason for striking an otherwise qualified venire person. Guerrero, *supra*. This is true because Batson is seeking to cure government misconduct based on racial prejudice, not to simply guarantee an ethnically diverse jury. *See* Batson, 476 U.S. at 85 n.6.

When the judge observed that Witter did not appear to be a person of color, it was because the claim of discrimination was "unusual," not that Batson did not apply for that reason. 4 ROA 804-5. To this end, the judge noted that because Witter appeared to be Caucasian (rather than Hispanic/Hawaiian as counsel represented), "they couldn't have used it [Witter's race] as a reason to preempt this juror. . . So I think you're just reaching, counsel." 4 ROA 806. The judge never said that Witter was precluded from asserting a third-party Batson challenge as to minority jurors, so Witter's reliance on Powers v. Ohio is misplaced. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991) (A defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race).

In short, Witter's counsel never offered any evidence of discrimination at all, either as a prima facie showing or as to the ultimate question of discriminatory intent. The burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike. McCarty v. State, 132 Nev. ___, 371 P.3d 1002, 1007 (2016). Any discussion of a race-neutral reason out of an abundance of caution did not render moot Witter's obligation to prove discriminatory intent. Watson, 335

P.3d at 169; *see also* Hawkins v. State, 127 Nev. 575, 256 P.3d 965 (2011) (the failure to develop pretext in the district court below cannot be cured on appeal). While specific findings are desirable, they are not required and certainly not grounds for reversal. *See* Hawkins, 256 P.3d at 968 ("Although the district court did not make specific findings, the prosecutor's explanations for removing the jurors did not reflect an inherent intent to discriminate, and Hawkins failed to show purposeful discrimination or pretext . . . ."). It is the decision itself to deny a Batson challenge with nothing more that constitutes the "factual finding" that is entitled to deference, not the analysis or articulation of factual considerations. *See* Miller-El v. Cockrell, 537 U.S. 322, 347, 123 S. Ct. 1029 (2003) (explaining that "a state court need not make detailed findings addressing all the evidence before it" to render a proper Batson ruling).

C. Alleged errors in voir dire

1. Standard of review

The scope of voir dire rests within the sound discretion of the district court, whose decision will be given considerable deference by this Court. Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996). The purpose of "jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Id.

/ / /

2. References to the Bible

Witter first argues that the trial judge improperly inflamed passions and prejudices in voir dire by instructing prospective jurors to follow the Bible which supposedly sanctions the death penalty. However, a review of the trial court's statements demonstrate that the purpose of his comments was to thoroughly evaluate the prospective jurors' apprehension towards the imposition of the death penalty based on the juror's professed statements that they could not impose the death penalty for religious reasons. For example, to avoid jury service, Ms. Shay invoked her own religious convictions as the reason why she could not impose the death penalty, while recognizing that her professed religion which was based on the Bible was not specifically against it. 2 AA 407-08. When Ms. York represented that she could not impose the death penalty because of her own spirituality, the judge inquired into the source of her convictions and whether her beliefs were firmly held before excusing her for cause without objection. 2 AA 414-7. Contrary to Witter's argument, the judge did not tell the jurors to impose the death penalty based on the Bible. Instead, he discerned through questioning whether their moral objections were deeply held and based on personal spiritual beliefs or a belief in organized religion.

Although exclusion of a prospective juror on grounds of religious affiliation is improper, inquiry into such affiliation is not forbidden during voir dire. People v.

Williams, 40 Cal. 4th 287, 52 Cal. Rptr. 3d 268, 148 P.3d 47 (2006). In fact, membership in a particular religious denomination or sect may alert the trial court and counsel to a potential bias in favor of or against the death penalty that requires further exploration at voir dire. Id.; State v. Ball, 685 P.2d 1055, 1056 (Utah 1984) (exploration of religious attitudes and convictions in voir dire is permissible to aid in discovering actual bias or prejudice); *see also Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire*, 95 A.L.R.3d 172, 11. Ironically, Witter's own counsel routinely and repeatedly questioned prospective jurors about their belief in the Biblical expression, "an eye for an eye," apparently finding such inquiry both appropriate and helpful to discern bias. *See e.g.*, 3 ROA 498, 516, 564, 637, 643, 667; 4 ROA 782. Witter's case authority is inapposite as it addresses a prosecutor's invocation of religious authority as argument for a particular sentence, not a judge's duty to inquire into religious bias of jurors during voir dire.

3. Life-qualifying the jury

Witter next claims that the district court judge did not allow him to "life-qualify" the jury pursuant to Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222 (1992). In voir dire, Witter was permitted to ask many appropriate life-qualifying questions of jurors to ensure each could consider a life sentence in a variety of circumstances. *See e.g.*, 2 ROA 390-1, 432-3, 437-8, 445; 3 ROA 498-9, 534, 564, 568-9, 596, 619-

20; 4 ROA 731. Many of these questions touched on the anticipated facts of the case including Witter's background, childhood abuse, and alcohol. *See* 2 ROA 424, 448, 457; 3 ROA 478, 481, 496, 514-5, 533, 557, 569-70, 581, 593, 618, 631, 650, 660, 675, 682. When one particular juror revealed that he would vote for death regardless of the facts of the case ("you take a life you forfeit a life"), he was appropriately dismissed for cause consistent with a life-qualified jury. 2 ROA 409-10. So were two other jurors who could not consider life with parole as a sentencing option. 4 ROA 702-5; 4 ROA 773-84. Only when Witter's counsel requested to ask potential jurors whether they would automatically vote for death when one of the aggravating circumstances was a prior crime of violence did the district court curtail the line of questioning. 2 ROA 362-3; 1 ROA 33-5. At no time did the prosecutor attempt to elicit how a juror would vote in light of a specific aggravating circumstance in the case. The court explained, "I don't think it's appropriate for counsel to ask those specific questions that will ask a juror what they are going to rule on and which way they are going to rule when the issue comes before them . . . You're asking to get one leg up on the other side. If you do, then I have to let them do it. . . ." 3 ROA 468, 471.

Certainly, the defense is entitled pursuant to Morgan v. Illinois to ask a potential juror whether they would automatically vote for death regardless of the facts of the case, but the proposed question would have revealed how the potential

juror would vote during the penalty phase in this case giving one side an unfair advantage. *See* U.S. v. McVeigh, 153 F.3d 1166, 1207 (10th Cir. 1998) ("Morgan is designed to illuminate a juror's basic beliefs . . . not to allow defendants to pre-determine jurors' views of the appropriate punishment for the particular crime"); *see also* Richmond v. Polk, 375 F.3d 309, 329-31 (4th Cir. 2004). Specific questions about aggravating circumstances are improper because they seek "to determine what prospective jurors thought of the death penalty in regards to this particular case." Id.; U.S. v. Fell, 372 F.Supp. 2d 766, 770 (D. Vt. 2005) (Stake-out questions are those that "ask a juror to speculate or precommit to how that juror might vote based on any particular facts"). The scope of voir dire rests within the sound discretion of the district court, whose decision will be given considerable deference by this Court on appeal. Johnson v. State, 122 Nev. 1344, 1354-1355, 148 P.3d 767 (2006). Because the court's rulings on the scope of voir dire allowed life-qualifying and death-qualifying questions in fairness to both sides and only prohibited "stake-out" questions, this Court should affirm.

4. Equal consideration of penalties

In voir dire, Witter failed to object to the "equal consideration" language as to the possible penalties and fails now to show plain error. Such language was common at the time in Nevada and not disapproved of by this Court until 2001. Leonard v. State, 117 Nev. 53, 65-66, 17 P.3d 397 (2001). Absent evidence that a prospective

juror was erroneously excused for cause, there is no prejudice and reversal is unwarranted. Id. This is especially true here where the judge even clarified that "equal" consideration was not required so long as the juror could fairly consider all three and select the appropriate punishment. 3 ROA 553-4. The term "equal" has several connotations (including "suitable", "appropriate", and "fair") and was not used by the judge or the parties in a way to disqualify jurors who could otherwise keep an open mind and consider all three options.

5. References to OJ Simpson trial

Witter claims that the trial judge made inappropriate and prejudicial references to the O.J. Simpson trial in voir dire. Witter's counsel did not object to the comments and has failed to establish plain error on appeal. The judicial comments had the intent of informing prospective jurors that unlike the O.J. Simpson trial on television, the jurors would not be sequestered and their time would be respected. 1 ROA 215. Other references involved a brief attempt at levity[4] or were to illustrate to prospective jurors their duty of impartiality. 1 ROA 217; 2 ROA 346, 351.

In Oade v. State, this Court noted that the words and actions of the trial judge are likely to shape the opinion of the jury members to the extent that one party may

[4] Witter's counsel likewise made an O.J. Simpson reference when drawing attention to the fact that one of the jurors was named "Marsha Clark," which dispels any notion that such observations were prejudicial to the defense. 3 ROA 679.

be prejudiced. Oade v. State, 114 Nev. 619, 960 P.2d 336 (1998). While the district court must protect the defendant's right to a fair trial, "[a] trial judge is charged with providing order and decorum in trial proceedings," and must also concern itself with the flow of trial and protecting witnesses. Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572 (2004). None of the district court's comments in this case reflected any animus towards Witter or his counsel; rather, the comments reveal the district court's concern for the orderly process of the trial and the fairness of the jurors. Nor did the district court express an opinion as to Witter's evidence or defense theory, but was fair and impartial to both sides. The district court even instructed the jury that it had no personal interest in the outcome of the case when it ruled on objections. 4 ROA 823. Witter fails to show that any of the brief references to the O.J. Simpson trial demonstrated judicial bias or otherwise deprived him of a fair trial.

6. Comments on individual responsibility

Next, Witter claims that the judge's comments in voir dire regarding individual responsibility for the death penalty warrant reversal. Witter's counsel did not object to the comments and has failed to establish plain error on appeal. Specifically, Witter argues that the judge diluted jurors' responsibility and minimized the gravity of the death penalty in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). 2 ROA 415; 3 ROA 488. But Caldwell did not concern a judge's comments made in the course of pretrial voir dire; it concerned

the arguments a prosecutor made to a jury in closing argument of a death penalty trial. Id.; *see also* Geary v. State, 112 Nev. 1434, 1451, 930 P.2d 719, 730 (1996) (faulting a judge's penalty phase jury instructions for minimizing jury's role). In the present case, the comments were made before the trial ever began in the context of voir dire when the judge was trying to rehabilitate prospective jurors favorable to the defense who did not believe they could impose the death penalty and whom Witter's counsel was fighting to keep. Id. It was the State, not the defense, which might have been prejudiced by comments designed to retain jurors who could not impose the death penalty. The judge's comments in voir dire directed at two specific prospective jurors who were excused for cause did not undermine or minimize the jury which was not instructed and did not deliberate as to the death penalty until more than three weeks later. Furthermore, the judge's comments did not mislead the jury as to the scope of automatic appellate review as in Caldwell, but correctly informed the prospective jurors that the Nevada legislature enacted laws which allow for imposition of the death penalty in appropriate situations and that no one juror could impose the death penalty because the verdict must be unanimous. 2 ROA 415; 3 ROA 488. In Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004 (1994), the Supreme Court clarified the Caldwell holding: "to establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." 512 U.S. at 9. Because the judge's

comments were accurate statements of Nevada law, any perceived minimization of the jury's role in the death penalty did not violate Caldwell.

7. Failure to remove allegedly biased jurors

a. Edward Miller

Witter claims it was error to deny a cause challenge as to prospective juror Miller who did not believe that having a bad childhood was important and would not consider it in mitigation. 4 ROA 724-5. But when the law was explained to him, he was rehabilitated and agreed he would consider it because some childhoods are so difficult that they cannot be overcome. 4 ROA 725-31. "[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her view on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526 (1980)). District courts have "broad discretion" in deciding whether to remove prospective jurors for cause. Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). The trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. Witt, *supra*.

Importantly, a juror is free to reject the proposed mitigating circumstances in a particular case and is only bound to consider the evidence proffered. Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (A jury's rejection of any mitigating factors does not demonstrate the sentence is unreliable or the product of passion or prejudice). While jurors must consider all evidence put before them, they can and often do disagree with defense counsel about the weight and mitigating value that particular evidence has. Burnside v. State, 131 Nev. ___, 352 P.3d 627, 651 (2015) (The jury is not obligated to find a mitigating circumstance merely because unrebutted evidence supports it); Kansas v. Carr, ___U.S.___, 136 S. Ct. 633, 642 (2016) ("Whether mitigation exists . . . is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not."). Any claim of constitutional significance must focus on the jurors who were actually seated, not on excused jurors. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005); Ross v. Oklahoma, 487 U.S. 81, 88-9, 108 S.Ct. 2273 (1988).

b. Marsha Ann Clark

As to prospective juror Marsh Ann Clark, simply voicing support for the death penalty and for having tougher laws does not even arguably "'prevent or substantially impair the performance of [her] duties as a juror in accordance with his instructions and [her] oath.'" 3 ROA 678-9; Wainwright v. Witt, 469 U.S. at 420. Just because an individual may agree with the death penalty as a general matter she "may not be

challenged for cause based on [her] views about capital punishment." Id. Only "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause." White v. Wheeler, ___U.S.___, 136 S.Ct. 456, 460 (2015). Having an opinion about the death penalty, one way or the other, is not grounds for disqualification from jury service. In this case, Clark said that despite her personal opinions in favor of the death penalty and being a victim of crime, she would fairly consider the evidence and could agree with a life with parole sentence in the appropriate circumstances. 3 ROA 679-83. As much as criminal defendants would like to strike for cause all those who favor the death penalty, the law does not allow for such.

D. Instruction on premeditated murder

Witter objected to the Kazalyn instruction given in this case on grounds that it did not adequately define deliberation and offered a California instruction in its place but was denied. 6 ROA 1317; 7 ROA 1384-6; 9 ROA 2062. The Kazalyn instruction was a correct statement of law at the time of Witter's trial although Nevada has since mandated that new additional instructions be given in the future. Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); Powell v. State, 108 Nev. 700, 708-10, 838 P.2d 921, 926-27 (1992). This change was not a matter of constitutional law, but one of state statutory interpretation. Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008). Under the facts of the present case, any failure to separately define

deliberation did not result in any jury confusion or reversible error beyond a reasonable doubt. Witter was prosecuted under alternative theories of premeditated murder and felony-murder. 6 ROA 1318. Although there was no special verdict distinguishing these two theories, because the jury unanimously found Witter guilty of the underlying attempt sexual assault and burglary, the jury must have also agreed unanimously upon the associated felony-murder theories. 6 ROA 1366-7. In Bridges v. State, 116 Nev. 752, 6 P.3d 1000, 1008 (2000), the defendant argued that the jury was improperly instructed as to premeditation and deliberation, but was not entitled to relief where the evidence of first degree murder under a felony murder theory was overwhelming and did not depend upon the premeditation theory. Id.

E. Validity of aggravating circumstances

Witter seems to take for granted that three aggravating circumstances must be stricken because this Court struck them previously even though Witter has argued against application of the law of the case doctrine in regards to other errors. Witter's argument appears focused on this Court's re-weighing or assessing cumulative prejudice with only one aggravator remaining. But if this Court is entertaining the instant appeal on the merits, then prior rulings are not binding and this Court must decide anew the applicability of the aggravators.

A murder is aggravated when it is committed "to avoid or prevent a lawful arrest or to effect an escape from custody." NRS 200.033(5). When this Court struck this aggravator in the prior direct appeal, it did so based on faulty reasoning:

> In this case, Witter attacked [K.C.'s husband] only after [he] told Witter that [K.C.] was his wife and ordered Witter to exit the vehicle. Once Witter killed [him], Witter grabbed [K.C.] and forced her back into the vehicle. Rather than fleeing, or killing [K.C.] to make sure no one could identify him, Witter hid [her husband's] body under his cab and resumed his sexual assault on [K.C.]. The natural inference drawn from these facts is that Witter killed [K.C.'s husband] so that he could continue his assault on [K.C.], not to avoid arrest.

Witter v. State, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996). But these are not mutually exclusive motives. Witter, in fact, did both – he avoided arrest and was then free to continue his assault. Nothing in the language or interpretation of this aggravator requires the defendant to flee the scene as opposed to continuing the assault once arrest is avoided or prevented. The murder is aggravated if committed to avoid or prevent lawful arrest, regardless of whether there was subsequent flight or escape. Rather, the "escape from custody" language is phrased in the alternative to avoiding arrest and is not applicable to this case where Witter was not in custody when he murdered.

The avoid arrest aggravating circumstance is not limited to imminent arrests by law enforcement officers, but encompasses the elimination of witnesses who might inform or report the crime to law enforcement officers. *See e.g.*, Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986); Canape v. State, 109 Nev. 864, 859

P.2d 1023 (1993); Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996). Killing K.C.'s husband, hiding his body under the vehicle, and then physically returning K.C. to the car where he could continue the assault upon her in relative secret, are actions taken to conceal his crime from view in order to avoid apprehension in full satisfaction of this aggravator. Nor is it inconsistent with avoiding arrest that Witter left K.C. alive to identify him or report the crime. Witter did not expect K.C. to survive the injuries he had already inflicted upon her when he told her, "You're probably dead already," and he was apprehended by police before he could finish assaulting and killing her. The jury's factual finding of this aggravator is supported by the evidence and entitled to deference by this Court on appeal.

The burglary and sexual assault aggravators were previously stricken in the second post-conviction proceedings pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). This erroneous decision should be corrected if the instant direct appeal is addressed on the merits. McConnell is fundamentally flawed and remains the law in Nevada only due to stare decisis. State v. Harte, 124 Nev. 969, 976, 194 P.3d 1263, 1267 (2008) (Hardesty concurrence); *see also* State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2017) ("This language [a broadly defined felony murder aggravator] may apply to many murders, but it certainly does not apply to every first-degree murder – which is all the narrowing required . . . ."). At best, McConnell should only have application were the sole aggravating circumstance is a felony

aggravator which fails to genuinely narrow. Lowenfield itself, upon which McConnell relies, only addressed the situation where the "sole aggravating circumstance" duplicated an element of the offense and failed to provide further narrowing. Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546 (1988). But where another aggravating circumstances exists which independently provides the required narrowing, such as Witter's prior violent felony conviction, the Constitution is fully satisfied and narrowing is not an issue. *See e.g.*, Tuilaepa v. California, 512 U.S. 967, 971–72, 114 S.Ct. 2630 (1994) (for death eligibility, only "one" aggravating circumstance must be found, either at the guilt or penalty phase, which must narrowly apply to a subclass of murderers and not be vague).

Should this Court continue to cling to McConnell and again strike the burglary and sexual assault aggravators, then any error should be deemed harmless as both the district court and this Court previously recognized. 25 ROA 5586-91. In several published cases, this Court has considered the prejudicial impact of subsequently invalidated felony-aggravators under McConnell and found the error to be harmless each time. Hernandez v. State, 124 Nev. ___, 194 P.3d 1235 (2008); Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006); Rippo v. State, 122 Nev. 1086, 146 P.3d 279 (2006); Archanian v. State, 122 Nev. 1019, 145 P.3d 1008 (2006). The strength of the prior crime of violence aggravator in this case compared to the relatively unpersuasive mitigation evidence presented warrants the same conclusion.

F. Victim impact evidence

The State's penalty phase witnesses were instructed in advance not to ask for the death penalty and in compliance therewith, none gave the jury their opinion as to the appropriate sentence but focused instead on how the crime had impacted them. 9 ROA 1798. Nonetheless, Witter claims that K.C. and family members provided prejudicial testimony at the penalty hearing outside the scope of admissible victim impact testimony. *See* NRS 176.0153. Because Witter did not object to the first two family witnesses the claim is waived as to their testimony absent plain error. Their comments to the jury that Witter not be allowed to hurt anyone again, that the victim had no chance of self-defense, and a request to impose a strong penalty that fits the crime, do not constitute error at all, much less error that is plain and obvious. 8 ROA 1748, 1750-1, 1778-9. However, after K.C.'s testimony and outside the presence of the jury, Witter objected to her plea for no mercy and moved for a mistrial which was denied. 8 ROA 1796-9.

In Booth v. Maryland, the Court held that the Eighth Amendment bars victim impact evidence at a capital penalty hearing which addresses the emotional distress of the victim's family and the personal characteristics of the victims as well as the family members' emotionally charged characterizations of the crimes and opinions as to what conclusion the jury should draw from the evidence. Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 (1987). The Court reasoned that such information is

irrelevant and creates an unreasonable risk of arbitrary and capricious decision making. Id. Subsequently in Payne v. Tennessee, the Court overruled Booth in part and held that there is no per se Eighth Amendment bar to a capital jury's consideration of evidence related to the victim's personal characteristics or the emotional impact of the crime on the victim's family. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991). The Court reasoned that such evidence serves to level the balance between a defendant's right to show "relevant mitigating evidence" and the government's interest in demonstrating the harm caused by the defendant's acts. Id. Witter also relies upon Bosse v. Oklahoma, which held that Payne only overruled Booth in part and did not alter the Court's preexisting "prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence." Bosse v. Oklahoma, ––– U.S. ––––, 137 S.Ct. 1 (2016). But this is not new law in Nevada where this Court had long since reached the same conclusion. Kaczmarek v. State, 120 Nev. 314, 338–39, 91 P.3d 16, 32–33 (2004).

In totality, K.C.'s testimony in penalty was properly directed at informing the jury of the good-natured characteristics of her deceased husband and the emotional impact the crime had on her and her family in compliance with Payne. 9 ROA 1779-87. Her references to Witter not deserving mercy would have been viewed by the jury in that context as being reflective of how the crime had impacted K.C. rather

than as an inappropriate sentencing recommendation. Even so, the comments were brief and not so unduly prejudicial in context as to deprive Witter of a fair trial.

G. Prosecutorial misconduct claims

To determine whether prosecutorial misconduct occurred, the court "must determine whether the prosecutor's conduct was improper," and then, "determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 97. 196 P.3d 465, 476 (2008). Reversal of a conviction is not warranted if the prosecutorial misconduct amounts to harmless error. Id. For misconduct of a constitutional nature, "we apply the Chapman v. California [, 386 U.S. 18, 24 (1967),] standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Valdez, 124 Nev. at ___, 196 P.3d at 476. When the misconduct is not of a constitutional nature, "we will reverse only if the error substantially affects the jury's verdict." Id. Harmless-error review is only appropriate if the error has been properly preserved for review. Id. at ___, 196 P.3d at 477. Generally, the failure to object to the prosecutorial misconduct at trial precludes appellate review. Id. However, even if the error was not preserved, this Court will consider prosecutorial misconduct under plain error review. Id. This Court will not reverse a conviction under this standard "unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual

prejudice or a miscarriage of justice.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

1. Presumption of innocence

Although there was no objection below, Witter now takes issue on appeal with the prosecutor's comment in closing rebuttal argument of the guilt phase regarding the presumption of innocence. 7 ROA 1455. In Morales, this Court held that, "[a] prosecutor may suggest that the presumption of innocence has been overcome; however, a prosecutor may never properly suggest that the presumption no longer applies to the defendant." Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006). The prosecutor's argument that the evidence in the present case "removed" the cloak of the presumption of innocence was not an improper argument against application of the presumption, but in context was a permissible argument that the evidence "overcomes" the presumption. While it could have been phrased better, there was no risk that the jury in this case was misled or disregarded the instruction that "[t]he defendant is presumed innocent until the contrary is proved." 6 ROA 1337. To the extent the comment was improper, it did not result in actual prejudice or a miscarriage of justice as there was overwhelming evidence of guilt and the jury was properly instructed on the presumption of innocence. Under Morales, such comments are not reversible.

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2. Burden of proof

Witter next claims the prosecutor in closing argument impermissibly commented on Witter's failure to call witnesses when discussing the instruction on voluntary intoxication. 7 ROA 1441-45. Although there had been evidence that Witter's blood alcohol content was .07, the prosecutor correctly noted that neither party had presented evidence of intoxication, specifically how the presence of alcohol affects a person's state of mind. Id. Intoxication was part of Witter's state-of-mind defense. 7 ROA 1452-53.

It is generally outside the boundaries of proper argument to comment on a defendant's failure to call a witness. Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (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." Id.; Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882 (1996) quoting Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105–06 (1990),

In overruling the objection in this case, the judge explained, "The jury knows that there is no burden. He's just saying what was and was not presented at the time of trial." 7 ROA 1443. A reasonable juror would have interpreted the State's argument in the same way. The jury was also correctly instructed that the State bore

the burden of proof. 6 ROA 1337. In fact, the prosecutor had repeatedly embraced that burden in argument and was not trying to shift it to the defense. 7 ROA 1419, 1445-46. Beyond a reasonable doubt, the State's argument did not affect the verdict by shifting the burden of proof.

3. References to "evil" and alleged comparison to an animal

At no time did the State's prosecutor ever directly call Witter "evil". Instead, in opening statement the prosecutor told the jury that eyewitnesses were expected to testify that Witter looked "evil" in appearance, especially in referencing his eyes that night. 4 ROA 843, 849, 856; Watters v. State, 129 Nev. 886, 313 P.3d 243 (2017) ("An opening statement outlines what evidence will be presented . . . ."). Indeed, that is exactly how the witnesses subsequently testified. 5 ROA 977, 1016. The State's comments in opening statement and closing argument simply referenced the testimony in the case and did not constitute misconduct. Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) (referring to defendant and his actions as "evil" did not constitute misconduct).

Witter next claims that the State impermissibly inflamed the passions of the jury by referring to him in animalistic terms. Certainly, comparing a criminal defendant to a "rabid animal" or "mad dog" is impermissible. Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997); Pacheco v. State, 82 Nev. 172, 414 P.2d 100 (1966). But the comments in the present case that Witter was "hunting" his "prey" in the

"jungle" were reasonably based on the evidence of his having used a "hunting knife" and chasing the victim down. 7 ROA 1458; Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 58–59 (2005) (predator-prey terminology acceptable if used to describe the defendant's actual conduct). Hunting prey in the jungle is something that humans do and does not necessarily suggest any kind of animalistic comparison.

4. Other inflammatory arguments

The prosecutor's argument that the death penalty is an expression of society's sense of moral outrage, 10 ROA 2083, is a permissible argument which concerns theories of penology such as the merits of punishment, deterrence and the death penalty. Witter v. State, 112 Nev. 908, 924, 921 P.2d 886, 897 (1996); Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985). Also, the prosecutor's argument about the message the jury's verdict would send to the community, 10 ROA 2120, has been upheld in other cases and is not an improper plea of a duty to society at large. Witter, 112 Nev. at 924-5, 921 P.2d at 897-98; Leslie v. State, 114 Nev. 8, 19, P.2d 966, 974 (1998); Williams v. State, 113 Nev. 1008, 1023, 945 P.2d 438, 447 (1997). In fact, the very argument that imposing anything less than the death penalty would be "disrespectful to the dead and irresponsible to the living," 10 ROA 2122, 2133, has been specifically approved. Domingues v. State, 112 Nev. 683, 698-99,917 P.2d 1364, 1375 (1996). None of these arguments run afoul of Collier which Witter has read too broadly.

Arguing that a capital sentencing hearing must not focus on the defendant to the exclusion of the victim is permissible. While the State may not refer to matters and other cases outside the record, after the objection the prosecutor modified his statement to conform to the facts of this case. 10 ROA 2094. Moreover, the statement did not disparage a legitimate defense tactic, but rather merely attempted to keep the jury's focus on the actual victims of Witter's crime. Indeed, the U.S. Supreme Court has recognized that the very purpose of allowing victim impact testimony is to counteract the one-sided view that defense counsel presents about the defendant which turns the victim into a "faceless stranger." Payne v. Tennessee, 501 U.S. 808, 825, 111 S. Ct. 2597, 2608 (1991) ("[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.").

Witter's reliance upon Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), as condemning speculation about future dangerousness in closing argument is misleading. This Court in Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989), relaxed the rule of Flanagan and found such arguments acceptable where there is record evidence, such as in this case, of defendant's past conduct from which the jury could conclude that the defendant might kill again. Accord, Riley v. State, 107

Nev. 205, 808 P.2d 551 (1991); Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990); Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990).

Finally, rhetorical use of the word "we" or "you", 10 ROA 2125, merely paints a vivid picture and results in no Golden Rule violation. *See, e.g.,* Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997) (Prosecutor stated in summation, "Imagine the pain that they went through both physically and mentally." Court said it did not consider this a "Golden Rule" argument). In context, commenting that the victims need justice, 10 ROA 2098-99, was not an impermissible plea to return a death penalty verdict on behalf of the victims. *See* Howard v. State, 106 Nev. 713, 718-19, 800 P.2d 175, 178 (1990).

H. Use of gang-affiliation evidence during penalty phase

Witter argues the district court erred in allowing evidence of gang affiliation at the penalty hearing. Evidence 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. *See* Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 1097-98 (1992); Lay v. State, 110 Nev. 1189, 1196, 886 P.2d 448, 452-53 (1994); Flanagan v. State, 109 Nev. 50, 53, 846 P.2d 1053, 1055–56 (1993). In Dawson, the United States Supreme Court specifically recognized that "[i]n many cases, . . . associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to

society." 112 S.Ct. at 1098. In Flanagan, this Court stated, "From Dawson, we derive the following rule: Evidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence." 109 Nev. at 53, 846 P.2d at 1056.

In the present case, the judge allowed gang affiliation evidence because Witter himself threatened to kill the arresting officer so as to heighten his reputation and the evidence was relevant to show his future dangerousness to society. 7 ROA 1530. Linking his gang activity to the present crime, Witter bore tattoos, wore clothing, and flashed hand signs indicative of his gang affiliation, including threats to kill an officer to increase his reputation. 8 ROA 1650-55, 1691-93. Additionally, Witter's gang, the Nortenos, was involved in the criminal enterprise of violence, particularly in prison and with other rival gangs, which the defense's own expert agreed suggested Witter's future dangerousness. 8 ROA1649-50; 9 ROA 1880-81, 2046-48. Thus the evidence of Witter's gang affiliation was extremely probative of his future dangerousness to society, and more specifically, to law enforcement including corrections personnel. It was Witter himself who proudly displayed and invoked his gang membership in connection with the instant rape and murder. Consequently, the district court did not abuse its discretion by allowing the introduction of evidence regarding Witter's gang affiliation in the penalty hearing.

The State filed its motion to admit gang affiliation evidence on July 6, 1995, consistent with the court-imposed discovery cut-off deadline for the penalty hearing evidence. 7 ROA 1489-90, 1493, 1536-39. None of Witter's case authority holds that such is inadequate time to prepare, or indeed that Due Process even applies to non-statutory aggravating "other matter" evidence presented at a sentencing hearing. Witter's reliance upon NRS 48.035 for exclusion of evidence where the probative value is substantially outweighed by prejudice is misplaced. Such rules of admissibility of evidence are for trial and do not apply to sentencing hearings. NRS 47.020(3)(c). Instead, at a capital penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, *whether or not the evidence is ordinarily admissible.*" NRS 175.552(3). The decision to admit evidence at a penalty hearing is left to the discretion of the judge except for evidence which is "impalpable or highly suspect." *See e.g.,* Nunnery v. State, 127 Nev. 749, 769, 263 P.3d 235, 249 (2011). The gang affiliation evidence in this case was not impalpable or highly suspect and was within the discretion of the judge to be presented.

I. Use of juvenile conduct evidence during penalty phase

Witter next argues that use of his juvenile record at his penalty hearing violated Due Process pursuant to Roper. 8 ROA 1627; Roper v. Simmons, 543 U.S.

551, 125 S.Ct. 1183 (2005). However, this Court has already rejected this interpretation of Roper and held that juvenile arrests are permissible at a capital penalty hearing:

> The Supreme Court in Roper held that it was "cruel and unusual" to execute offenders who were under 18 years old when they committed their crimes. The Court reasoned that juveniles by their very age and lack of development "cannot with reliability be classified among the worst offenders." However, Roper did not prohibit the admission of juvenile records during a death penalty hearing. Because there is no question that Johnson was not a juvenile when he committed the murders, his reliance upon Roper is misplaced.
>
> Rather, "'[t]he decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion.'"

Johnson v. State, 122 Nev. 1344, 1353-54, 148 P.3d 767, 774 (2005).

J. Unnecessarily gruesome and duplicative photos

As to the admission of "gruesome" photographs, "It is within the district court's discretion to admit photographs where the probative value outweighs any prejudicial effect the photographs might have on the jury." Sipsas v. State, 102 Nev. 119, 123, 716 P.2d 231, 234 (1986). "Despite gruesomeness, photographic evidence has been held admissible when . . . utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction. Accordingly, gruesome photos will be admitted if they aid in ascertaining the truth." West v. State, 119 Nev. 410, 420, 75 P.3d 808, 815 (2003); Browne v. State, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997), (*citing* Theriault v. State, 92 Nev. 185, 193, 547 P.2d

668, 674 (1976)). "The admissibility of gruesome photographs showing wounds 'lies within the sound discretion of the district court and, absent an abuse of that discretion, the decision will not be overturned.'" Flores v. State, 120 P.3d 1170, 1180 (2005), (quoting Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978)).

The photos in the present case were not particularly gruesome considering the nature of the crime and were admitted for specific purposes. Witter's trial counsel objected to some of the photos but acknowledged the objection was not well-taken:

> Mr. Kohn: And to be completely candid with the Court, I said well, I guess I probably have to object, but as photos go, I would ask the Court only to allow him two, but I think as autopsy photos go, they are pretty tame. I thought the State showed great discretion.

5 ROA 958. The photographs were used to show the victim's identity, to depict the number and location of injuries and the size of the wounds. 5 ROA 958-60. Photographs depicting the positioning of the victim's body under the vehicle and covering it with a jacket were directly relevant to intent and consciousness of guilt in concealing evidence. 5 ROA 961-63. The prosecutor had selected the most neutral photographs and elected to not admit other much bloodier photographs in its possession. Id. Under these circumstances, the district court did not abuse its discretion.

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K. Use of Dr. Etcoff's underlying facts and data

Witter argues that the State in the penalty hearing used the facts and data underlying the defense expert's report in impermissible and unconstitutional ways. Witter is mistaken in his reliance upon the Fifth Amendment which bars the government from compelling a person to incriminate oneself and also bars the government from introducing compelled statements into evidence at trial. *See* Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981); Estes v. Smith, 122 Nev. 1123, 146 P.3d 1114 (2006). In this case, there was no court-compelled psychological exam. Where the defendant requests and voluntarily undergoes a psychological exam and then introduces such evidence in his defense, the Fifth Amendment is not implicated:

> If a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan v. Kentucky, 483 U.S. 402, 422-423, 107 S.Ct. 2906 (1987) (Where a defendant raises a defense that places his mental health at issue, he waives his Fifth Amendment privilege against self-incrimination); *see also* Lincoln v. State, 115 Nev. 317, 988 P.2d 305 (1999); Castillo v. State, 114 Nev. 271, 279-80, 956 P.2d 103, 109 (1998) (holding that future dangerousness argument was properly

supported by the evidence, which included defendant's own statements to psychologist).

To the extent Witter invokes NRS 50.305, the State disputes that the rules of evidence have application to a capital penalty hearing. NRS 47.020(3)(c). Case law relied upon by Witter applies NRS 50.305 in the context of a guilt phase trial, not a sentencing hearing as in Witter's situation. Blake v. State, 121 Nev. 779, 121 P.3d 567 (2005). Regardless, even if the evidence code applies, the State's use of Witter's statements made to his own expert witness were independently admissible as a defendant's own statement offered against him. NRS 51.035(3)(a). There is nothing in NRS 50.305 which restricts the admissibility of the underlying facts in support of an expert opinion, when the underlying facts also happen to be the defendant's own statement offered against him which is independently admissible.

L. Limiting scope of cross-examination

Witter claims the trial judge unfairly restricted his cross-examination of a detective regarding Witter's intoxication in violation of his right to confrontation. At trial, the detective testified that he interviewed Witter after arrest and that Witter claimed to have been drinking and that he had a buzz but did not feel that he was drunk. 6 ROA 1189. The detective had experience and was trained in recognizing signs of intoxication and observed that there was no smell of intoxicating liquor upon Witter's breath, his speech was not slurred, and he was able to control his motor

skills including using restroom facilities unassisted. 6 ROA 1187-88. On cross-examination, defense counsel elicited that Witter's blood alcohol content was .07 and that the detective was not looking for evidence of intoxication the same as he would if he were making a DUI arrest. 6 ROA 1211-13. Defense counsel also elicited that Witter did not define exactly what he meant when he said that he had a buzz but was not drunk, and that Witter had also said his recollection was hazy and his eyes were bloodshot which could be additional symptoms of intoxication. 6 ROA 1216-20. On re-direct, the prosecutor inquired whether the detective knew how an individual's tolerance for alcohol would affect his ability to function. 6 ROA 1223. The detective responded that some people cannot function at all at .10 and some people can be .20 and function quite well. Id. The detective testified that he observed that Witter was able to function at .07. Id.

On re-cross, after asking additional questions about Witter's blood alcohol content at the time of the crime, defense counsel inquired whether, "alcoholics can function better after consuming alcohol," and the prosecutor objected on grounds that it called for speculation and because the detective was not an expert on alcoholism. 6 ROA 1225. The objection was sustained but defense counsel was permitted to inquire further into the detective's experience. Id. The detective responded that he knew that people with a higher tolerance for alcohol can function better than someone who has a low tolerance, but that he had no basis or knowledge

to say whether they could function better than with no alcohol in their body. 6 ROA 1226. When defense counsel persisted in asking whether an alcoholic could function better at a .07 than a person who is not an alcoholic, the prosecutor objected and the judge sustained on grounds that the question was too far afield and the detective was not an expert on alcohol. 6 ROA 1227.

Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed de novo. Mendoza v. State, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006). Importantly, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Farmer v. State, 133 Nev. ___, 405 P.3d 114, 123 (2017), *citing* Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Expert witnesses may only testify to matters within the scope of their specialized knowledge. NRS 50.275. "[T]he Confronation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006).

In this case, the defense was permitted broad leeway to inquire about intoxication with the detective. It was only the inquiry about alcoholics functioning

better at a .07 than a person who is not an alcoholic that was beyond the scope of the detective's limited knowledge. This was not a limitation on cross-examination (or re-cross in this case) which excluded evidence the defendant had a right to elicit or which showed favoritism to the prosecution. It was simply a question beyond the scope of knowledge and expertise of the detective.

M. Jury instructions

1. Reasonable doubt

In Nevada, the definition of reasonable doubt is specified by statute and, under NRS 175.211(2), no other jury instruction on reasonable doubt is permitted. This codified instruction was given in this case without objection and has been repeatedly upheld as constitutional. 7 ROA 1412; 9 ROA 1907; Garcia v. State, 121 Nev. 327, 339-340, 113 P.3d 836 (2005); Noonan v. State, 115 Nev. 184, 189-190, 980 P.2d 637 (1999). In fact, the specific language concerning an "abiding conviction," has been federally endorsed as a correct formulation of the standard. Ramirez v. Hatcher, 136 F.3d 1209, 1214 (9th Cir. 1998), quoting Victor v. Nebraska, 511 U.S. 1, 14–15, 114 S. Ct. 1239, 1247 (1994) ("The jurors were told that they must have 'an abiding conviction of the truth of the charge,' i.e., of defendant's guilt, a correct formulation of the government's burden of proof under Victor, 511 U.S. at 14-15, 114 S.Ct. at 1247-48"). Where the U.S. Supreme Court has approved of this precise

language, it is unnecessary to address Witter's obscure and nonbinding case authority from Wisconsin in 1901 and Pennsylvania in 1891.

2. Penalty phase instructions

a. Failure to instruct on character evidence

The jury in this case was not specifically instructed pursuant to NRS 175.552(3) on the proper use of character evidence in the penalty hearing because Witter made no such request and such instructions were not *sua sponte* required by this Court until five years after the trial took place in 1995. *See* Hollaway v. State, 116 Nev. 732, 746-747, 6 P.3d 987 (2000), *modified by* Lisle v. State, 131 Nev. ___, 351 P.3d 725, 733 (2015). Although the prosecutor certainly used the character evidence to argue to the jury that "history repeats itself," this was only in rebuttal in support of an argument for future dangerousness and selection of an appropriate sentence, not for establishing the existence of an aggravating circumstance. 10 ROA 2118, 2122, 2127, 2129, 2132. When the prosecutor discussed the existence of the aggravating circumstances and death eligibility, no improper use of character evidence was made. 10 ROA 2086-90. In fact, the defense conceded the existence of an aggravating circumstance, so death eligibility was not an issue. 10 ROA 2111. When character evidence was discussed, it was in reference to the selection of an appropriate sentence which was the only contested issue, not the constitutional narrowing required for death eligibility. 10 ROA 2086-99. Because there is no risk

in this case that the jury used "other matter" evidence to undermine the constitutional narrowing process in the finding of an aggravating circumstance which was not even in dispute, the failure to specifically instruct on that point was at most harmless.

b. Failure to instruct on unanimity

The jury in this case was not explicitly instructed to find aggravators unanimously and that mitigators required no consensus because Witter made no such request and such instructions were not *sua sponte* required by this Court until three years after the trial took place in 1995. *See* Geary v. State, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998). In Geary, this Court set forth new instructions to be given prospectively "to forestall future uncertainty on the issues . . . ," but the omission was harmless because a reasonable jury would have understood the requirement for unanimity from the instructions that were given. Id.; *see also* Jimenez v. State, 112 Nev. 610, 624, 918 P.2d 687 (1996) (failure to specifically instruct that a single juror could find and give effect to mitigating evidence was harmless where reasonable jury would have so understood from the totality of the instructions); Nika v. State, 124 Nev. 1272, 1297-1298, 198 P.3d 839 (2008) (same result).

As in Geary, Jimenez, and Nika, any failure in the present case to specifically instruct the jury on these matters was harmless because there is no risk the jury would have misunderstood the requirements. The jury was instructed in the penalty hearing that, "Your verdict must be unanimous." 9 ROA 1913. The special verdict form

required the aggravators be established "beyond a reasonable doubt," and found by "We, the jury." 9 ROA 1916-17, 2061; Geary, *supra*, ("a reasonable jury would properly understand that the phrase 'we, the jury' required a unanimous finding of the aggravating circumstances".) Additionally, the individual jurors were polled and all unanimously acknowledged their verdicts as read. 10 ROA 2139-42. The instructions imposed the beyond-a-reasonable-doubt standard to the finding of aggravating circumstances but no such condition was attached to the finding of mitigating circumstances. 9 ROA 1905-6. In fact, as in Jimenez, the instructions placed no constraint at all on the right of individual jurors to find mitigators. 9 ROA 1909-10. Witter points to nothing in argument or in the record anywhere that would have confused the jury or caused them to misunderstand their duty under the law. Under these circumstances, the failure to more specifically instruct the jury on unanimity did not result in prejudice and at most was harmless.

c. Failure to instruct on weighing beyond a reasonable doubt

Witter argues that the trial court erred in failing 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 pursuant to Hurst *infra*. Witter also faults this Court for reweighing after striking aggravating circumstances in the past. Witter misunderstands the law. In Nevada, the beyond-a-reasonable-doubt standard does not apply to the weighing of aggravating and mitigating circumstances, because

weighing is not factfinding and pertains to sentence selection not death eligibility. McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009); Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011); Lisle v. State, 131 Nev. ___, 351 P.3d 725, 732 (2015). Witter's reliance on Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), is misplaced. Hurst did nothing more than apply Ring v. Arizona, 536 U.S. 584 (2002) to Florida's death penalty scheme and does not require that weighing be beyond a reasonable doubt. Jeremias v. State, 134 Nev. ___, 412 P.3d 43 (2018). Nor does Hurst overturn appellate reweighing. *See* Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct. 1441 (1990) (holding that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review").

N. Arbitrary and capricious capital punishment scheme

This Court has repeatedly rejected the claim that Nevada's capital penalty scheme is arbitrary and capricious and fails to perform its constitutional function. Thomas v. State, 122 Nev. at 1361, 1373, 148 P.3d 727, 735-36 (2006); Weber v. State, 121 Nev. 554, 585, 119 P.3d 107, 128 (2005); Hernandez v. State, 118 Nev. 513, 50 P.3d 1100 (2002); Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); Thomas v. State, 122 Nev. at 1361, 1373, 148 P.3d 727, 735-36 (2006); Middleton v. State,

114 Nev. 1089, 1116-17, 968 P.2d 296, 314-15 (1998). Since this Court has repeatedly found that Nevada's death penalty scheme sufficiently narrows the class of persons eligible for the death penalty and Witter has failed to present any new or persuasive arguments in support of overturning this precedent, his claim must be denied.

O. Elected judges

The Nevada Supreme Court has repeatedly rejected the argument that judges are impartial or that a criminal defendant is prejudiced by having a popularly elected trial judge. Haberstroh v. Warden, 119 Nev. 173, 182, 69 P.3d 676, 685 (2003); McConnell v. State, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009), *citing* *Nevius v. Warden*, 113 Nev. 1085, 1086–87, 944 P.2d 858, 859 (1997) (denying disqualification of supreme court justice where justice commented during election campaign that he favored death penalty in appropriate cases and had voted to uphold death penalty 76 times). In addition, a judge is presumed not to be biased and the burden is on the party making the challenge to show that a judge will not be fair in carrying out their duties. Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988).

P. Cumulative error

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). When evaluating a claim of cumulative

error, 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." Id. Witter asks this Court to analyze the "total impact of errors" without regard to whether the individual errors were preserved. *See* Jeremias v. State, 134 Nev. ___, 412 P.3d 43, 55 (2018).

Although the gravity of the crime charged was great, Witter's counsel admits the issue of guilt was not close. Opening Brief, p. 195. Witter then references seven guilt phase errors warranting cumulative consideration. However, there was no prima facie evidence of a Batson violation as to prospective juror Elois Brown who did not even appear to the judge or prosecutor to be a minority. Other instances of alleged voir dire error were unpreserved and did not even constitute error at all. Although the Kazalyn instruction is no longer in use, it was and always has been a correct statement of Nevada law that did not result in any unconstitutional presumption in this case. The alleged prosecutorial misconduct either did not occur or in context was not an improper argument and resulted in no prejudice. The crime scene photographs were not overly gruesome under the circumstances. If Witter's cross or re-cross examination of the expert witness was at all restricted it was because his questions were beyond the scope of the witness's expertise. Finally, the reasonable doubt instruction was a correct statement of law.

As it concerns penalty, the State disagrees that any of the aggravators need be stricken as argued above. Any error under McConnell is without prejudice as a matter of law because the required constitutional narrowing is performed by the prior violent felony aggravator irrespective of the felony murder aggravators. No objection was made to the scope of victim impact testimony which was constitutionally permissible under the circumstances. There is nothing improper or erroneous about the way in which gang and juvenile conduct was presented in this case. The instructions given on character evidence, unanimity, and weighing were sufficient under the circumstances and no evidence suggests the jury was misled or confused about its duty under the law. Nevada's capital punishment scheme is constitutional. Where the jury found in favor of all four aggravators and what mitigating evidence was presented was minimal and not compelling, the death sentence should not be reversed based on the cumulative effect of relatively minor errors or non-errors. *See* U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Q. Any error was harmless

This Court has an affirmative duty to review errors for harmlessness. Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." *See also* Knipes v. State, 124 Nev. 927, 935,

192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001). To the extent the State inadvertently neglected to assert harmlessness in regard to any of the specific issues addressed above or raised in Witter's brief, the State does so now. All alleged errors were harmless under the applicable standard due to the overwhelming evidence of guilt and strength of the penalty evidence in aggravation as argued herein.

WHEREFORE, the Court should dismiss the instant appeal for lack of jurisdiction or in the alternative affirm the judgment.

Dated this 29th day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 17,953 words and does not exceed 80 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.

Dated this 29th day of October, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 29, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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