IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73444

WILLIAM WITTER,

Appellant,

v.

STATE OF NEVADA,

Respondent.

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

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Jurisdiction exists for this appeal

1. The State does not dispute Witter's argument that this appeal does not present an occasion for this Court to revisit its decision in *Slaatte v. State*

In his Opening Brief, Witter explained that he was appealing from a final judgment of conviction. OB at 16–18.

The State does not dispute that the Third Amended Judgment is final. The State also acknowledges that the judgment that was replaced, the Second Amended Judgment, contained an uncertain amount of restitution, AB at 25, which means that it was not final. *See Slaatte v. State*, 129 Nev. 219, 220-22, 298 P.3d 1170, 1170-71 (2013). Consequently, Witter argued that this appeal did not present an occasion for this Court to decide what impact its decision in *Slaatte* had for any of the *prior* judgments of conviction entered in this case. OB at 16-18.

The State does not address or controvert Witter's arguments, nor could it, given that this was the very same reason it argued to the Court for why an extraordinary writ was its *only* remedy in Case No. 75417. The State's failure to address this fundamental point operates as a

concession that any discussion of *Slaatte* by this Court would constitute a prohibited advisory opinion, as it would not affect the disposition of this appeal.

The State also fails to address or discuss Witter's contention that further consideration of *Slaatte* is barred by the doctrines of invited error and waiver. OB at 18.

The State's concessions above undermine its argument that there is no jurisdiction for the Court to entertain Witter's appeal. AB at 12. Witter did precisely what was allowed in such circumstances by filing "a new notice of appeal to challenge the judgment of conviction." *Miller v. State*, 417 P.3d 1129, at *1 (Nev. 2018) (unpublished).

2. The final judgment of conviction that exists here was adverse to Witter and statutory jurisdiction exists for this appeal

The State argues, citing civil cases, that the change from a non-final to final criminal judgment deprives Witter of statutory jurisdiction under NRS 177.015(3), because the change purportedly favored him. AB at 12-14. But the judgment of conviction was undoubtedly adverse to

Witter as it contains jury verdicts and sentences for capital and non-capital offenses.

The State previously filed a motion with this Court to dismiss this appeal, raising the very same argument that Witter was not adversely affected by entry of the Third Amended Judgment. Document No. 17-37741. There, as here, the State's argument was based on citations to inapposite civil cases. AB at 14. This Court denied the State's motion. Document No. 18-07121. The State's reliance on its prior argument provides no basis upon which to arrive at a different conclusion.

The State cites no authority for the proposition that an appellate court loses statutory jurisdiction that otherwise exists under NRS 177.015(3) when a defendant obtains a final judgment in place of a non-final one. And there is none. Moreover, there is no basis for drawing a distinction between cases where restitution is originally indeterminate, and later deleted, versus replaced by a definite amount. Accepting the State's argument as true would deprive the former category of criminal defendants of any and all right to a direct appeal from a judgment of conviction. The serious constitutional concerns that would be implicated

by such an interpretation of NRS 177.015(3) require the rejection of the State's argument. *See, e.g.*, *State v. Douglass*, 46 Nev. 121, 208 P. 422, 424 (1922) ("avoiding the determination of questions as to the constitutionality of statutes except as necessary in deciding litigated cases").

3. The State's argument regarding the purported limited scope of the issues available in this appeal misapprehends the legal effect of having an indeterminate amount of restitution

The State argues that Witter is confined to appealing only the issues that are changed with an amended judgment. AB at 15–16. However, the State's argument conflates clerical errors under NRS 176.565, which constrain issues on appeal, with missing/indeterminate terms under NRS 176.105, which renders a judgment non-final. The cases cited by the State clearly differentiate between clerical errors and indeterminate terms. It is the lack of finality associated with the latter category of cases that requires the difference in treatment.

For example, in *Sullivan v. State*, 120 Nev. 537, 96 P.3d 761 (2004), the clerical error that was corrected pertained to an erroneous deadly weapon enhancement. This error was not within the category of

those that affect this Court's appellate jurisdiction. Instead, *Sullivan* makes clear that this error does not affect the finality of the case, as the question there was "whether the district court's entry of an amended judgment of conviction provided good cause to extend the one-year limitations set forth in NRS 34.726(1)." *Id.* at 538, 96 P.3d at 762. In contrast, in *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012), a judgment of conviction that failed to "set an amount of restitution, in violation of Nevada statutes, is not final and therefore does not trigger the one-year time limit for filing a post-conviction petition for writ of habeas corpus." *Id.* at 260-61, 285 P.3d at 1054. The distinction between these two circumstances is why the question presented in *Sullivan* was good cause to excuse any untimely petition whereas in *Whitehead* it was the absence of finality which meant the statute of limitations had not yet begun. *Accord Johnson v. State*, 134 Nev. __, 402 P.3d 1266, 1270-71 (2017) (when death sentence is vacated on direct appeal "there no longer is a final judgment that triggers the one-year time period set forth in NRS 34.726(1) for filing a post-conviction petition for a writ of habeas corpus").

In *Jackson v. State*, 133 Nev. __, 410 P.3d 1004, 1005 (Nev. App. 2017), a judgment of conviction was amended from a sentence of 364 days in jail to 300 days. The court of appeals limited the issues on appeal to those arising from the amendment made to the original judgment of conviction. *Id. Jackson* was merely a straightforward application of *Sullivan* as the court of appeals reaffirmed "the limited nature of an appeal taken from an amended judgment of conviction." *Id.* at __, 410 P.3d at 1005. As in *Sullivan*, the rule remains that a definite term that is in error or is later modified is not in the same category as errors with a judgment of conviction that contain uncertain/indefinite terms under NRS 176.105. *Compare Miller v. State*, 417 P.3d 1129, at *1 (Nev. 2018) (unpublished) (dismissing an appeal from a judgment with uncertain restitution), *with Silva v. State*, 403 P.3d 378, at *1 (Nev. 2016) (unpublished) (judgment final when it "did not impose any . . . items in uncertain terms").

4. This Court should not overrule *Slaatte*

As explained above, the instant appeal does not present an occasion for this Court to re-visit its decision in *Slaatte*. But even if it

did, this Court should not entertain the State's arguments because they are not sufficiently explained to warrant further consideration. The State does not discuss the plain language of NRS 177.015(3) or describe how the statutory scheme would operate the way it urges if this Court overruled *Slaatte*. It also does not ask the Court to overrule *Whitehead*, even though that case is also inconsistent with its arguments. *See also Johnson*, 134 Nev. __, 402 P.3d at 1271-73 (applying *Whitehead*). Instead, the State advances a contorted argument that uncertain restitution only has a legal effect on the finality of the judgment if this Court happens to notice the error on direct appeal. AB at 17.[1]

In addition, the State argues that *Slaatte* should have only prospective application. AB at 17-18. Finally, the State argues that this Court should embrace the law that applies in other jurisdictions permitting serial notices of appeal. AB at 18-24.

[1] The State appears to acknowledge the existence of jurisdiction for this appeal if *Slaatte* remains intact.

a. The State does not address Witter's arguments showing that *Slaatte's* interpretation of NRS 176.105(1) must be applied retroactively

In his Opening Brief, Witter explained that *Slaatte* must be applied to him because it was the first time that this Court construed the plain language of NRS 176.105(1). OB at 18–19. He also argued that this Court has already determined its interpretation of restitution statutes will be applied retroactively. *Id.* at 19–20. Finally, he argued that principles of separation of powers, and the province of the judiciary branch of government, required this Court to apply *Slaatte* to Witter. *Id.* at 20. The State does not address any of these points.

Instead, the State argues that this Court should infer that the law was different in 1996 due to the instances where this Court accepted jurisdiction but then reversed for entry of a certain amount of restitution. AB at 17–18. However, *Slaatte* acknowledges that none of those "prior decisions addressed whether a judgment was final given its failure to comply with NRS 176.105(1)." *Slaatte*, 129 Nev. at 221, 298 P.3d at 1171. It is axiomatic that prior cases cannot stand for propositions not decided. There is therefore no factual or legal basis for

finding that NRS 176.105(1) meant something different in 1996 than it did after *Slaatte*.

b. This Court must reject the State's request to substitute the statutory scheme of other jurisdictions for the one that exists in Nevada

Without finding support under state law, the State argues that this Court should apply statutes that exist in other jurisdictions but not Nevada. AB at 19-24. The State posits the existence of a "conflict" between the decisions of this Court and the courts of other jurisdictions.[2] The State's argument is a non sequitur. This appeal does not present an occasion to engage in a policy debate about what type of statutory scheme is better. Rather, in each case, a court applies the statutory scheme that exists in the relevant jurisdiction.

The federal cases cited by the State are distinguishable based on the statutory scheme created by Congress. In *Corey v. United States*, 375 U.S. 169, 174-75 (1963), the Supreme Court held that a defendant

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[2] *See* AB at 18 (arguing *Slaatte* "is contrary to the weight of Supreme Court authority"); *id.* at 20 (arguing that the Supreme Court "soundly rejected the premise of *Slaatte*"); *id.* at 24 (arguing *Slaatte* "should be reconsidered in light of Supreme Court authority to the contrary"); *id.* at 26 (arguing this Court should "adopt the reasoning of the Supreme Court").

has the option of pursuing appellate review after either an original or amended judgment. However, specific statutory provisions contemplated that multiple judgments would issue. In *Corey*, the defendant was initially sentenced to an indeterminate period of confinement pursuant to 18 U.S.C. § 4208(b) while a sentencing recommendation was prepared. 375 U.S. at 170. An initial judgment was issued. Months later, a new sentencing hearing was held making the defendant's sentence definite, whereupon a new judgment was issued. *Id.* The Supreme Court held that the specific statutory scheme at issue contemplated two separate final judgments for a convicted defendant, and therefore allowed two separate appeal periods. 375 U.S. at 171 ("But under the provisions of 18 U.S.C. § 4208(b) the trial judge sentences a convicted defendant not once, but twice.").

Today, federal statutes separate sentencing events into parts. The first is the sentence, *see* 18 U.S.C. § 3582(b), and the second is the determination of restitution. *See* 18 U.S.C. § 3664(o). The cases cited by the State, *Dolan v. United States*, 560 U.S. 605, 618 (2010), and

Manrique v. United States, 137 S. Ct. 1266, 1272 (2017), are merely an application of the federal statutory scheme.

The dual track sentencing schemes under federal law have no analogue in Nevada. A more apposite example to Nevada's statutory scheme is the one in Kansas. *E.g., State v. Hall*, 319 P.3d 506, 511-12 (Kan. 2014) (until restitution decided, sentence not final or appealable). With respect to the State's policy arguments, as explained below, those are better addressed by the Legislature as they were in Colorado.

Prior to 2000, Colorado's restitution statute required that "the amount of restitution shall be fixed by the court at the time of sentencing…" C.R.S. 16-11-102(4) (1986). Accordingly, a judgment in which the amount of restitution was uncertain was not a final, appealable judgment. *People v. Johnson*, 780 P.2d 504, 508 (Colo. 1989) (en banc); *see also People v. Rosales*, 134 P.3d 429, 431-32 (Colo. App. 2005) ("sentencing is not final until restitution is ordered. Therefore, we first conclude that until the court entered the statutorily required order of restitution on February 5, 2003, sentencing was not complete, and judgment was not final.").

In 2000 this changed. The Colorado General Assembly adopted a new restitution statute under which restitution could either be ordered immediately, as part of the sentence, or deferred until it could more accurately be determined. This new language "made clear [the General Assembly's] intent that the amount of the defendant's liability no longer [is] a required component of a final judgment of conviction." *Sanoff v. People*, 187 P.3d 576, 578 (Colo. 2008) (en banc).

In summary, the experience in Colorado shows that if a policy debate should occur it should occur in the Legislature. For present purposes, this Court is obligated to apply the law as it exists and to decline the State's invitation to adopt the statutory procedures that exist in other jurisdictions.

c. This appeal does not present an occasion to consider policy arguments against the final judgment rule

Finally, the State argues that this Court should adopt its position due to the existence of policy considerations cutting against rigid adherence to the final judgment rule. AB at 21-23. However, the cases it cites for support do not implicate this Court's subject matter jurisdiction. To the contrary, in *State v. Harris*, 131 Nev. __, 355 P.3d

791 (2015), jurisdiction existed because "the Legislature plainly afforded the State" the right to "appeal from a prejudgment order granting a motion for new trial[.]" *Id.* at __, 355 P.3d at 793-94 (citing NRS 177.015(1)(b)). It was only after acknowledging jurisdiction existed that this Court embarked on a discussion of policy considerations. In the absence of jurisdiction, however, the rule remains that "[t]his court's jurisdiction is defined by Nevada law, and, notably, this court cannot expand its jurisdiction based on general principles of fundamental fairness." *State v. Lewis*, 124 Nev. 132, 137, 178 P.3d 146, 149 (2008) (citation omitted).

Even if this Court felt inclined to consider policy arguments, it would not result in a decision in the State's favor. First, the State does not cite any factual support for its argument that there are a multitude of non-final judgments lurking in the district courts. AB at 18, 26. Second, leaving a non-final judgment in place would not serve the interests of finality urged by the State because such a judgment is vulnerable to collateral attack. *See, e.g.*, *Application of Alexander*, 80 Nev. 354, 358-59, 393 P.2d 615, 617 (1964); NRS 34.500(1), 174.105(3).

The discharge of a habeas petitioner from custody would obviously upset interests in finality to a much greater degree than entry of a final judgment as it would require the State to conduct an entirely new trial. The policy considerations raised by the State would therefore not be served by adopting the ruling it requests.

B. The State ignored all but one of Witter's law of the case arguments

When this Court denied the State's Motion to Dismiss this appeal, it indicated that the parties may discuss "issues related to the law of the case doctrine . . . ." in the briefing. *See* Document No. 18-07121, *Witter v. State*, Case No. 73444 (February 23, 2018). Thus, in the Opening Brief, OB at 21, Witter addressed the law of the case doctrine globally, as well as a discussion of the doctrine for each discrete issue.

In its Answering Brief, the State addressed only one of Witter's law of the case arguments. AB at 42. In addressing Witter's arguments regarding *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), the State argued that "if this Court is entertaining the instant appeal on

the merits, then prior rulings are not binding" and that *McConnell* should be overruled.

The State's Answering Brief operates as a concession that Witter's law of the case doctrine arguments are correct on two levels. First, because the State failed to address the remaining law of the case arguments, these failures should operate as concessions that Witter is correct on each of these arguments. *See Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 360 (2010) (explaining that the failure to address a significant issue raised in the appeal may be interpreted as a confession of error under NRAP 31(d)). Second, the State explicitly says that if this Court treats this direct appeal as such, then its previous decisions are "not binding." AB at 42. This is in line with Witter's global law of the case argument. OB at 21.

Lastly, the State's arguments that non-application of this Court's previous decisions mean Witter's *McConnell* arguments fail are incorrect. *McConnell* itself mandates this outcome, regardless of whether the law of the case doctrine applies. *McConnell* was correctly decided, and should not be overruled. The State's complaint that

McConell "remains the law in Nevada only due to stare decisis" is not persuasive as that describes all binding precedent in Nevada. *See* AB at 44. By failing to raise cogent arguments regarding why *McConnell* should be overruled, the State's contention should be summarily disregarded. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

In sum, the law of the case doctrine does not bar Witter from relief on direct appeal, and the State has admitted as such.

C. This Court must reverse due to the trial court's botched handling of Witter's *Batson* objection and because the State's race-neutral reason is demonstrably pretextual

This Court recently expressed its frustration with how district courts have handled *Batson* objections. *Williams v. State*, 134 Nev. ___, ___, 429 P.3d 301, 306 (2018) ("District courts continue to shortchange *Batson* challenges and scrimp on the analysis and findings necessary to

support their *Batson* determinations. We take this opportunity to, yet again, urge district courts to follow the three-step *Batson* procedure.").

The way Witter's *Batson* challenge was handled should similarly frustrate this Court. In Witter's Opening Brief, he explained how the State's reason for striking juror Elois Brown was pretextual, as established by the voir dire transcripts and a subsequent deposition of the prosecutor. OB at 23–24, 31–35. He also explained how the trial court failed to conduct an adequate *Batson* inquiry due to its erroneous belief that *Batson* did not apply because the court believed Witter was a White man. OB at 28–31.

In its Answering Brief, the State focuses almost exclusively on the first step of the *Batson* inquiry. AB at 27–31. The State argues that the trial court resolved the first step of *Batson* in the State's favor because the court did not realize the potential juror was Black. AB 29–30.[3]

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[3] Witter notes that the State makes no attempt to reconcile the prosecutor's proffered reason that juror Brown was "incapable of making a decision" with the record, which demonstrates the opposite. Because the State failed to address these arguments in its Answering Brief, these failures should count as concessions that the State's proffered reason was pretextual. *See Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 360 (2010) (explaining that the failure to address a

However, a plain reading of the transcripts and this Court's precedents debunk each of the State's arguments.

1. *Williams v. State* reaffirms the importance of following this Court's *Batson* precedents and mandates reversal in this case.

Williams issued shortly before the State filed its Answering Brief, but the State does not address it. Because it is directly on point, Witter outlines the case here, which reaffirms and provide further support for the arguments urged in the Opening Brief.

First, *Williams* reiterated this Court's holdings that "[w]here, as here, the State provides a race-neutral reason for the exclusion of a veniremember before a determination at step one, the step-one analysis becomes moot and we move to step two." *Williams*, 134 Nev. at ___, 429 P.3d at 307. The second step is where the State offers its race-neutral reason for striking the juror. *Id.* Then, "[i]n the final step, the district court must determine whether the defendant has proven purposeful discrimination" *Id.* During that third step, the court should conduct a

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significant issue raised in the appeal may interpreted as a confession of error under NRAP 31(d)).

"sensitive inquiry" into relevant considerations, such as the answers given by other non-minority jurors. *Id.*

Like in Witter's case, the trial court in *Williams* denied the *Batson* challenge for a legally irrelevant reason. Williams's trial judge denied the challenge summarily, noting that the defendant struck a Black juror first. *Williams*, 134 Nev. at ___, 429 P.3d at 307. Indeed, the State here makes similar arguments, suggesting that it was actually defense counsel who was racist for making the *Batson* challenge in the first place. *See* AB at 29 (quoting defense counsel's concern that the State was striking Black jurors because of their beliefs on capital punishment before asserting that "[t]his blatant expression of racist beliefs and bias came from the mouth of Witter's counsel. Not the prosecutor.").

Williams reversed because the trial court failed to conduct the sensitive inquiry required by *Batson*. *Williams* also noted that "the record does not allow meaningful, much less deferential review" due to

the lack of factual findings. *Williams*, 134 Nev. at ___, 429 P.3d at 308.[4] This is the exact argument Witter raises on appeal. OB at 29.

Williams noted that one of the State's arguments appeared pretextual because it was clearly rebutted by the transcripts and the answers given by other jurors. Again, Witter's case is no different. *See* OB at 31–35. If this Court applies the well-reasoned analysis in *Williams* to Witter's case, then reversal is mandated, even considering the "substantial" costs of retrial. *Williams*, 134 Nev. at ___, 429 P.3d at 311.

2. A plain reading of the transcript reveals that the court did not believe *Batson* applied because of Witter's race

Even if *Williams* alone were not enough to compel reversal here, *Brass v. State* is. As explained in the Opening Brief, *Brass v. State*, 128 Nev. 748, 750, 291 P.3d 145, 147 (2012) holds that "it is structural error to dismiss [a] challenged juror prior to conducting the *Batson* hearing because it shows the district court predetermined the challenge before actually hearing it." That is precisely what happened below—Witter's

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[4] In another recent case, *Cooper v. State*, 134 Nev. Adv. Op. 104, *9 (Dec. 27. 2018), this Court refused to affirm on an incomplete factual record.

trial judge denied the challenge immediately and stated repeatedly that he did not believe *Batson* even applied because Witter was not Black.

In its Answering Brief, the State ignores *Brass*, instead arguing that the trial court denied Witter's *Batson* challenge because it found Witter could not establish the first step, a prima facie case of discrimination. AB at 27. The State argues the court found that Witter could not establish a prima facie case because no one else remembered that juror Brown was a Black woman. AB at 29. Respectfully, a plain reading of the transcript reveals that is simply not what happened. *See* 4ROA803–08. Witter believes that even a cursory reading of the relevant pages will reveal to this Court that Witter's trial judge denied the challenge due to Witter's race.[5] This flat-out denial at the outset constituted structural error, mandating reversal under *Brass*.

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[5] Should a deeper analysis of the record prove helpful to this Court, it is telling that the trial court's immediate response to Witter's *Batson* challenge was "No. This isn't an African American defendant." 4ROA803. After Witter explained why he was raising a *Batson* challenge, the court called the challenge "unusual" because "the defendant isn't a person of color." 4ROA804. There followed a conversation about whether anyone besides Witter's counsel knew Witter was Mexican. 4ROA805. The only time the trial court discussed the race of the struck juror was to explain that it was not paying

3. The first *Batson* step is moot

This Court has long held that if the parties proceed to the second step of the *Batson* inquiry, then the first step is moot. *See Kaczmarek v. State*, 120 Nev. 314, 322, 91 P.3d 16, 29 (2004). This Court recently reaffirmed this in *Williams*, 134 Nev. at ___, 429 P.3d at 306–307. The State's sole argument is that the first step is not moot because the trial court actually decided the first step in the State's favor. The State insists that because there was no "pattern" of discriminatory strikes, and because the prosecutor and trial court did not remember the struck juror was Black, that means the trial court determined that Witter failed to prove a prima facie case of discrimination. AB at 27–29. The State argues that when the trial court asked for the state's race-neutral reason (step two), it did so simply "out of an abundance of caution." AB 30.

Again, a plain reading of the exchange belies the State's arguments about what occurred below. *See* 4ROA803-807, *supra* n. The

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attention to *any* of the jurors' races because "We didn't think it's an issue." 4ROA807.

trial court flat-out rejected the challenge, and then "let the State put on their reasons." 4ROA804. The State did so. *Id.*[6] This rendered *Batson's* first step moot, and consequently renders the State's arguments on the first step irrelevant.

In an attempt to overcome this difficulty, the State cites *United States v. Guerrero*, 595 F.3d 1059 (9th Cir. 2010), a Ninth Circuit panel decision with a dissent. In that case, the trial court denied a *Batson* challenge on step-one grounds after it was raised belatedly by trial counsel, and counsel was unsure what the challenged juror's race was. 595 F.3d at 1061. The *Guerrero* court affirmed the conviction on appeal, explaining that it was "particularly significant that both sides accepted the panel as drawn, the oath was administered to empanel the jury, and only then was the issue belatedly raised by defense counsel after jeopardy attached." *Id.* at 1062.

Witter's situation is fundamentally different from *Guerrero* because his counsel timely raised the *Batson* challenge and articulated

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[6] As explained in the Opening Brief, these reasons are demonstrably pretextual. OB 31–35.

his concern over a Black juror being struck. This alone was sufficient to establish step one. *Williams*, 134 Nev.at ___, 429 P.3d at 306 (describing the step-one *Batson* burden as "not onerous"); *see* also *Cooper v. State*, 134 Nev. Adv. Op. 104 at *5–7 (Dec. 27. 2018) (noting that "[t]here is no one way to satisfy step one" before holding that the trial court clearly erred by determining the defendant had not established a prima facie case). Moreover, in Witter's case, the trial court denied the challenge because of Witter's race—not because of the race of the struck juror. *Guerrero* is inapposite and this Court's binding precedent provides more clarity on Witter's situation.

Because the trial court advanced to step two (the State's race-neutral reasons) without making any factual findings or determinations as to step one (the prima facie case), the first step is moot under both *Kaczmarek* and *Williams*. The State's arguments on this issue fail, and reversal is necessary.

4. This Court has no record to defer to, and factual findings are required

Lastly, the State insists that the lack of factual findings does not require reversal because this Court should defer to the final "fact" that

the trial court denied the challenge altogether. AB at 31. The Opening Brief provides extensive argument on why affirmance on this record would be inappropriate. OB at 28–31. In addition to those arguments, it should be noted that Witter's situation is similar to *Williams* in that "this record does not allow meaningful much less deferential review." *Williams*, 134 Nev. at ___, 429 P.3d at 308. What happened at Witter's trial constituted structural error, and reversal is warranted to retry Witter with a constitutionally-sound jury.

5. Conclusion

As articulated in the Opening Brief, the State violated *Batson* when it struck potential juror Elois Brown, and the trial court erred in its ruling on Witter's *Batson* challenge. A plain reading of the transcripts, comparative juror analysis, and additional evidence discovered in post-conviction all demonstrate that the State's proffered race-neutral reason for striking Brown was pretextual. The State makes no effort to address these disturbing facts and distorts the proceedings below to support its procedural arguments. But the inescapable fact remains that the district court erroneously concluded that *Batson* did

not apply because Witter was not Black. This violated *Batson*, flew in the face of *Powers v. Ohio*, 499 U.S. 400 (1991), and constitutes structural error mandating reversal under this Court's precedent in *Williams, Kaczmarek*, and *Brass*.

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

As argued in the Opening Brief, the trial court violated Witter's right to a fair and impartial jury. OB at 36–76.

1. The State mischaracterizes the nature of the trial court's Biblical questioning

In its Answering Brief, the State downplays what occurred at voir dire, arguing that the trial court simply "evaluate[d] the prospective jurors' apprehension towards the death penalty based on the juror's professed statements that they could not impose the death penalty for religious reasons." AB at 32. Thus, the State seeks to replace what the court did below—berate jurors about their religious beliefs—with a straw man—that the court was "inquiring" into the source and strength of religious beliefs.

But the trial court berating Juror Shay for holding the wrong views on the Bible and seeking to correct her is not tantamount to "inquir[ing] into the source of her convictions and whether her beliefs were firmly held." AB at 32. The record reveals that the district court did more than "inquire" into Shay's beliefs. It explicitly told Shay that "[t]he Bible isn't against the death penalty," that the death penalty was not the kind of "vengeance" prohibited by the Bible, and that the Bible's highest authority was for her to "follow the laws of this State." 2ROA407–08.

Similarly, the State argues that the court "inquired" into the source of Juror York's convictions, and whether they were deeply held. AB at 32. But again, the transcript tells a different story. The trial court actually told York it was going to "trap" her into realizing her beliefs on the Bible were wrong. 2ROA414. The court also told York that the Bible directed her to follow the laws of the State. 2ROA415.

Contrary to the State's assertions, the trial court did not inquire into the particularities of either Shay or York's religious beliefs. Instead, it sought to show them both that they were wrong about the

Bible. This occurred in front of several other jurors, including a juror who was ultimately empaneled and appears to have been influenced by this conversation. *See* OB at 45; 4ROA788 (Juror Becker explaining that he used to be against the death penalty but "then *understanding it's the law of the land* and bringing home a close to home situation made me re-examine my convictions.") (emphasis added).

After setting up its straw man, the State correctly asserts that inquiry into religious grounds is not prohibited during voir dire. AB at 32. Witter never argued to the contrary. What Witter argued, and the State does not actually answer, is that it is plain error for a trial court judge to tell a panel of jurors that the Bible explicitly sanctions the death penalty and demands they follow the laws of the State. As explained in the Opening Brief, precedent on this matter compels reversal. OB 46–48.

2. The trial court improperly curtailed Witter's right to life qualify the jury

Witter argued that the trial court violated his right to life-qualify prospective jurors, recognized in *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Witter properly requested permission to ask prospective jurors if

they could return a life sentence knowing that one of the aggravating circumstances was a prior crime of violence. 2ROA363. The State objected, and the court sided with the State, refusing to even read or consider *Morgan v. Illinois*. 3ROA469.

In its Answering Brief, the State points to other places where Witter's counsel was allowed to ask about potential mitigating evidence. AB at 33–34. The State then characterizes Witter's request to life-qualify the jurors as an attempt to "stake-out" the jurors' positions on the case. AB at 35.

But, as explained in the Opening Brief, the State asked jurors about mitigation evidence. *See* OB at 52. Witter had a right under *Morgan* to question jurors about aggravating circumstances to ensure that potential jurors were not precommitted to a death verdict. *See* OB at 52–54. And Witter did not request permission to question jurors as to the specific nature of the crime, or even the nature underlying the aggravating circumstance. Instead, Witter sought to inquire whether jurors would automatically impose death in *any* case where the defendant had previously been convicted of a violent offense. This kind

of question does not ask a juror to commit to a position, and does not require analysis of any particular facts from the case.

In addition to the wealth of case law from the Opening Brief supporting Witter's position, the Louisiana Supreme Court recently issued a decision that is instructive on this issue. *See State v. Turner*, 2018 WL 6423990 (La., Dec., 5 2018) *reh'g denied* (Jan. 30, 2019). In *Turner*, the Louisiana Supreme Court reversed a death sentence on a "reverse-*Witherspoon*" challenge similar to Witter's. *Id.* at *1.

Turner held that the trial court abused its discretion when it prevented defense counsel from asking potential jurors if they would consider a life sentence "in a case involving a double murder committed during the course of armed robbery." *Id.* at *9. The court reasoned that because the defense questioning did not provide a detailed narrative of the crime, and instead focused on "one or two circumstances which might play a critical role in the trial," such questioning should have been permitted. *Id.* at *28 (*quoting State v. Ball*, 824 So.2d 1089, 1110 (La. 2002)).

In this case, Witter's proposed questioning was even less detailed than the questioning in *Turner*, and properly focused on a critical part of the State's evidentiary presentation in aggravation at sentencing. This was proper—indeed mandated—under *Morgan*, and the trial court's erroneous ruling violated Witter's rights and demands reversal.

3. The trial court's "equal consideration" language misled the jury and resulted in improper excusals for cause

Witter explained how the trial court's statements to the panel that they must "equally consider" the three penalties Witter faced misstated Nevada law. OB at 59. In response, the State argues that the misstatement was not plain error, and that reversal is not warranted unless a juror was erroneously excused for cause based on their response to the misstatement. AB at 35–36. The State also argues that "equal" has other connotations that would not mislead the jury as to Nevada law. AB at 36.

Although this Court declined to find plain error in *Leonard v. State*, 117 Nev. 53, 17 P.3d 397 (2001), the trial court's actions in this case were more egregious. In Witter's case, the trial court admitted the

question was improper but continued to ask it anyway. *See* OB at 58–59. Moreover, unlike in *Leonard*, Witter can point to jurors that were excused for cause because they could not "equally consider" the death penalty alongside the other two punishments.

Potential juror Hanson was excused after he said he couldn't consider the death penalty equally. 3ROA486 (defense asks juror Hanson if he could consider all three penalties and Hanson answers "Equally? No I couldn't.") Similarly, Lenda Joyce Jones called her feelings on the death penalty "diversified" and that it would be "very difficult for me to say that I would put someone to death." 2ROA345, 347. But after saying she would consider all three sentences, the court kept questioning her and Jones said imposing death would require her to "have to do a lot of soul searching." 2ROA348. Upon further court questioning, Jones said she didn't "think" she could impose death, and the court excused her for cause.

Had the court been clear throughout voir dire that death is not an "equal" punishment to the two life sentence options, there is a likelihood that Jones and Hanson would have understood that they could have

reservations about imposing the death penalty and still serve. Indeed, it appeared that reservations are exactly what the jurors were trying to express: they did not consider the death penalty to be an equal penalty to the other options.

Other jurors seemed similarly confused by the judge's use of "equally." *See* 2ROA390 (Juror Wilcox explaining he has a problem with the word "equally" because "[t]here might be a tendency to have a little bit unbalanced, you know, sitting here right now, thinking about it."); 2ROA416 (juror York saying she couldn't equally consider the death penalty and "would hold back"); 3ROA553–54 (juror Phillips taking issue with the word equally, and the court admits that it's using the word improperly). Thus, Witter has established plain error and is entitled to reversal on this issue.

4. The cumulative effect of the many references to the O.J. Simpson trial prejudiced Witter—regardless of whether the judge was biased

Witter argued that the trial court failed to address his concerns

about the contentious media climate during the time of his trial, yet continued to make inappropriate references to the O.J. Simpson trial specifically. OB at 61–68.

The State argues that the trial court's referrals to the O.J. case were simply to tell the jury they would not be sequestered, that their time would be respected, to remind the jury of their need for impartiality, and that such comments were a "brief attempt at levity." AB at 36.

In response to the first three arguments, Witter believes the arguments and record cites in the Opening Brief demonstrate that the trial court's comments were inappropriate and plainly prejudicial. OB at 61–68.

However, as to the last argument, it bears emphasizing that attempts at levity during voir dire were exactly why this Court reversed in *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 367, 892 P.2d 588, 589 (1995). In Witter's case, the situation is far graver than *Parodi*, where only money was at stake. Witter's very life was at stake, and

this Court should consider the cumulative prejudice of the court's comments during voir dire and reverse Witter's death sentence.

Next, the State argues that because defense counsel referred to a juror being named "Marsha Clark" once, that "dispels the notion that such observations were prejudicial to the defense." AB at 36, n.4. However, the State does not explain how or why a single statement from defense counsel would eradicate the prejudice caused by a trial judge's inappropriate comments. *Cf. Lakeside v. Oregon*, 435 U.S. 333, 341–42 (1978) ("It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.").

Lastly, the State argues that Witter cannot show that the trial court was biased against him. AB at 37. But in arguing this issue, Witter never claimed the judge was biased against him—nor is that the central inquiry. The question is whether there is an intolerable danger that the trial court's comments influenced Witter's jury, in violation of his right to fair trial under both United States and Nevada constitutions. *See Oade v. State*, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998) (reversing a conviction on fair-trial grounds because of the

cumulative effect of a trial judge's inappropriate comments). The trial judge's repeated comments about one of the most infamous and hotly-contested criminal trials of all time were inappropriate, and their cumulative effect prejudiced Witter.

5. The trial court's comments on individual responsibility prejudiced Witter

Witter argued that the trial court improperly told two potential jurors that their individual responsibility would be lessened if they imposed the death penalty, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 328–29 (1985). OB at 66–68.

In its Answering Brief, the State argues that *Caldwell* is distinguishable because the offending comments there were made by a prosecutor, and not a judge. AB at 36–37. However, the fact that a trial judge made the comments to Witter's potential jurors makes his situation worse than *Caldwell*, not better. *See Quercia v. United States*, 289 U.S. 466, 470 (1933) ("The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling.") (internal quotations and citations omitted).

Next, the State argues that it was actually the State who was prejudiced by "comments designed to retain jurors who could not impose the death penalty." AB at 38. But Witter did not argue that those jurors were improperly dismissed, he argued that the trial court told other jurors present that their responsibility for imposing death was diluted. *See* OB at 66–67. As pointed out in the Opening Brief, a juror who decided Witter's fate witnessed this exchange. OB at 66. Thus, it remains Witter who suffered prejudice from these comments.

Lastly, the State argues that the trial court's statements did not improperly describe the jury's role. AB at 38–39. The State argues that *Romano v. Oklahoma*, 512 U.S. 1 (1994) interpreted *Caldwell v. Mississippi*, 472 U.S. 320 (1985) to require an inaccurate statement of law. AB at 38. But in affirming *Romano*, the United States Supreme Court held that the *evidence* complained of in that case was not factually inaccurate and did not "even pertain to the jury's role in the sentencing process." 512 U.S. at 9. Thus, *Romano* is distinguishable from Witter's case because, unlike *Romano*, Witter was not prejudiced by factually-accurate evidence.

Instead, Witter was prejudiced by comments from the judge that directly pertained to the jury's sentencing role. *See*, *e.g.*, 2ROA488 (trial court telling a potential juror that if she chose death, such a decision would be "diluted by 12 ways"). As a result, these comments were of a "certain type[] of comments—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Id.* (internal quotations and citations omitted). These comments prejudiced Witter, and his death sentence is invalid.

6. The court's failure to remove biased jurors prejudiced Witter because it left him with a juror who harbored pro-prosecution bias

Witter argued that the district court improperly denied Witter's challenges for cause to two biased jurors—jurors Miller and Clark. OB at 68–76. Witter explained at trial that he was forced to use a peremptory challenge on Miller, and that he had another juror he wanted to strike. 4ROA827.

As for juror Miller, the State insists in its Answering Brief that Miller was rehabilitated. AB at 39. But the record reveals that Miller

remained equivocal throughout his voir dire questioning and expressed confusion. *See*, *e.g.*, 4ROA727 (Miller telling the court "You've lost me."). The State also argues that Miller's biases do not matter because he was not actually seated. AB at 40. This ignores Witter's argument that he was forced to use a peremptory against Miller, leaving another biased juror on his panel—juror Clark. *Cf. Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793 (1996) (denying relief where defendant claimed he "wasted" a peremptory challenge but did not point to other biased jurors).

As for juror Clark, the State argues in its Answering Brief that Clark simply had a "personal opinion about the death penalty" and that she was ultimately rehabilitated. AB at 40–41. This downplays the vociferous support for the death penalty Clark voiced during her voir dire questioning, and it ignores her statements evincing a pro-prosecution bias overall. *See* OB at 75–76. Additionally, although the State points out that defendants cannot strike all those who merely agree with the death penalty, the United States Supreme Court has stated that a jury cannot be "uncommonly willing to condemn a man to

die." *See Witherspoon v. State of Ill.*, 391 U.S. 510, 521 (1968). Clark was such a juror, and should have been removed for cause.

E. The trial court incorrectly instructed the jury regarding first-degree murder

Over trial counsel's objection, the district court gave the *Kazalyn* instruction, thereby blurring "the distinction between first- and second-degree murder." *Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Nevertheless, the State argues: (1) "the *Kazalyn* instruction was a correct statement of law at the time of Witter's trial" and the instruction caused no jury confusion or reversible error; (2) the *Byford* court's decision to mandate proper first-degree murder instructions "was not a matter of constitutional law, but one of state statutory interpretation;" (3) the jury "must have" agreed on the felony murder theories because it found the underlying offenses. AB at 41–42. The State's arguments fail because *Byford* applies to Witter's non-final conviction, the *Kazalyn* instruction omitted an essential element of the offense, and the jury's findings on felony-murder charges don't cure the instructional error.

1. Witter is entitled to *Byford* instructions because his conviction is not final

The State's argument that "the *Kazalyn* instruction was a correct statement of law at the time of Witter's trial" fails because Witter's non-final conviction gets the benefit of *Byford*. AB at 41. As the State admits, this Court "mandated" that juries after *Byford* receive "new additional instructions." AB at 41. Witter's conviction remains non-final in this direct appeal. Thus, he gets the benefit of *Byford* regardless of whether *Kazalyn* was accepted at the time of his trial. *Nika v. State*, 124 Nev. 1272, 1287, 198 P.3d 839, 850 (2008) (due process requires "the change effected in *Byford* [to] appl[y] to convictions that were not yet final at the time of the change").

2. The *Kazalyn* instruction removed the element of deliberation

The State's argument that the *Kazalyn* instruction lacked constitutional consequences fails. AB at 41. As argued in Witter's Opening Brief, the *Kazalyn* instruction violated the Due Process Clause by removing the element of deliberation. OB at 78–79; *see Byford*, 116 Nev. at 235, 994 P.2d at 713; *Nika*, 124 Nev. at 1287, 198 P.3d at 850.

This Court has recognized the constitutional implications of the *Kazalyn* instruction and Witter is entitled to the benefit of such precedent. *Id.*

3. Federal law requires *Byford* apply retroactively as a substantive rule of law

Assuming *Byford* doesn't otherwise apply to Witter, the Court must apply *Byford* retroactively. The United States Supreme Court's recent decisions in *Montgomery* and *Welch* invalidated this Court's approach to statutory interpretation cases. *See Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), *Welch v. United States*, 136 S.Ct. 1257 (2016). Under *Montgomery* and *Welch*, state courts are now constitutionally required to retroactively apply a decision narrowing the interpretation of a substantive criminal statute under the "substantive rule" exception to non-retroactivity. *Teague v. Lane*, 489 U.S. 288 (1989).

In *Teague*, the United States Supreme Court set forth a framework for retroactivity in cases on collateral review. Under *Teague*, a new rule does not apply, as a general matter, to convictions that were final when the new rule was announced. *Montgomery*, 136 S. Ct. at 728.

However, *Teague* recognized two categories of rules that are not subject to its general retroactivity bar. First, courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Id.*

Second, and the exception at issue in this case, courts must give retroactive effect to new substantive rules. *Id.* "'A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

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

This Court has, in substantial part, adopted the *Teague* framework for determining the retroactive effect of new rules in Nevada state courts. *Clem v. State*, 119 Nev. 615, 621, 628, 81 P.3d 521, 530–31

(2003); *Colwell v. State*, 118 Nev. 807, 819–20, 59 P.3d 463, 471–72 (2002). As explained in *Colwell*, this Court's retroactivity standard is supposedly even more accommodating to defendants than the federal standard. *Id.*

Unlike the United States Supreme Court, this Court has held that decisions interpreting a criminal statute fall outside its retroactivity framework and have no retroactive application. *Nika v. State*, 124 Nev. 1272, 1288–89, 1301, 198 P.3d 839, 850–51, 859 (2008). It has reasoned that only constitutional rules raise retroactivity concerns and that decisions interpreting a statute are solely matters of state law. *Id.* at 1288–89, 1301, 198 P.3d at 850–51, 859. The only question with respect to who gets the benefit of a narrowing statutory interpretation is whether it represents a "clarification" or a "change" in state law. *Id.* at 1287, 198 P.3d at 850.

a. *Montgomery* requires this Court to apply the "substantive rule" exception like the United States Supreme Court

In *Montgomery*, the United States Supreme Court, for the first time, constitutionalized the "substantive rule" exception to *Teague*. The

consequence of this step is that state courts are now required to apply the "substantive rule" exception in the manner in which the United States Supreme Court applies it. *See Montgomery*, 136 U.S. at 727 ("States may not disregard a controlling constitutional command in their own courts."); *Colwell v. State*, 118 Nev. 807, 818, 59 P.3d 463, 471 (state courts must "give federal constitutional rights at least as broad a scope as the United States Supreme Court requires"). Thus, the United States Supreme Court's interpretation of the substantive rule exception provides the constitutional floor for how this new constitutional rule must be applied by state courts.

b. *Welch* requires this Court to apply the "substantive rule" exception to its decision in *Byford*

In *Welch*, the United States Supreme Court made clear that the federal constitutional "substantive rule" exception applies to statutory interpretation cases. The *Welch* Court was explicit: the substantive rule *Teague* exception "includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Welch*, 136 S. Ct. at 1264–65; *accord id.* at 1267 ("A decision that modifies the elements of an

offense is normally substantive rather than procedural." (quoting *Schriro*, 542 U.S. at 354)).

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

This conclusion is also readily apparent in *Welch*'s discussion of its prior decision in *Bousley v. United States*, 523 U.S. 614 (1998). Like *Welch*, *Bousley* involved a question about retroactivity: whether an earlier Supreme Court decision, *Bailey v. United States*, 516 U.S. 137 (1995), which narrowly interpreted a federal criminal statute, would apply to cases on collateral review.

As *Welch* put it, "The Court in *Bousley* had no difficulty concluding that Bailey was substantive, as it was a decision 'holding that a substantive federal criminal statute does not reach certain conduct.'" *Welch*, 136 S.Ct. at 1267 (quoting *Bousley*, 523 U.S. at 620).

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

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

The Court held, for the first time, that a new rule is substantive so long as it has "a substantive function." *Welch*, 136 S.Ct. at 1266. A rule has a "substantive function" when it "alters the range of conduct or class of persons that the law punishes." *Id.* As the Court explained in *Welch*, when a decision narrows the scope of a criminal statute, it has such a substantive function, and is therefore retroactive. *Id.* at 1265–67.

In light of *Welch*, the distinction between a "change" and "clarification" is no longer operative for determining who gets the benefit of a narrowing statutory interpretation.

Welch made clear that the only relevant question with respect to the retroactivity of such an interpretation is whether the new interpretation meets the definition of a substantive rule. If it meets the definition of a substantive rule, it does not matter whether that narrowing statutory interpretation is labeled a "change" or a "clarification," because both types of decisions have "a substantive function." *Welch*, 136 S.Ct. at 1266.

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

c. *Welch* provides good cause to reconsider this Court's prior approach to retroactivity

Even if this Court disagrees with Witter's position that *Welch* imposes a constitutional requirement that the states give full retroactive effect to narrowing statutory interpretation decisions, *Welch* still provides good cause for this Court to reconsider its prior approach to retroactivity. It is clear from *Welch* in which direction this area of law is moving. That decision is a strong signal from the Supreme Court as to the broad retroactive impact of decisions narrowing the interpretation of a substantive criminal statute. With *Montgomery*, *Welch* must be viewed, at the very least, as an indication the Supreme Court will require uniform retroactive application of substantive rules amongst the States.

Nevada's complete bar on the retroactive application of a narrowing interpretation is inconsistent with the Supreme Court's approach. It is also an extreme outlier. Indeed, Nevada is the only jurisdiction to have adopted such a bar. In addition to the United States Supreme Court, the overwhelming majority of states to consider the issue (twelve of the fifteen) allow for full retroactive application of this

type of narrowing interpretation. *See State v. Robertson*, 839 Utah Adv. Rep. 42, 2017 WL 2123459 at *16-17 & *16 n.137 (Utah May 15, 2017) (following federal rule and majority of state jurisdictions that recognize full retroactivity, listing cases). The other two states to have addressed the issue allow for retroactivity for most narrowing interpretations. *See Luuertsema v. Comm'r of Corr.*, 299 Conn. 740, 12 A.3d 817, 832 (2011) (general presumption in favor of full retroactivity); *Policano v. Herbert*, 7 N.Y.3d 588, 825 N.Y.S.2d 678, 859 N.E.2d 484, 495-95 (2006) (new precedent applies retroactively based, primarily, upon purpose to be served by new standard).

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

Supreme Court, that "it is only [the legislature], and not the courts, which can make conduct criminal." *Id.*

This Court should follow this reasoning. A decision that modifies the elements of an offense, such as *Byford*, strikes at the very core of what makes a new rule substantive. They are precisely the type of rules that alter the range of conduct the statute punishes as first-degree murder. The timing or the characterization of the decision should not matter. A court does not legislate, it merely interprets. If a narrowing interpretation excludes a defendant, that defendant, no matter when the conviction became final, should receive the benefit of that interpretation.

d. *Branham* doesn't apply

In a published opinion, the Court of Appeals rejected this argument. See *Branham v. Baca*, __ Nev. __, 2018 WL 6609578 (Nev. App. December 13, 2018). The Court of Appeals concluded *Montgomery* and *Welch* did not alter *Teague*'s "threshold requirement that the new rule at issue must be a constitutional rule." *Id.* at 6-7. Mirroring this Court's prior precedent, the court reasoned *Byford* was not a

constitutional rule, so it did not need to be applied retroactively under *Teague*. *Id.* This reasoning is contrary to the express language of *Welch*. As discussed above, *Welch* made explicitly clear the "substantive rule" exception includes narrowing interpretations of criminal statutes:

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. *Welch*, 136 S.Ct. at 1264-65 (internal citations omitted). And this is just one of several explicit statements indicating the same. *E.g., id.* at 1267 (stating in a parenthetical that "[a] decision that modifies the elements of an offense is normally substantive rather than procedural"). As that case indicates, determining whether a statutory interpretation decision is substantive is a "*Teague* inquiry." *Id.* at 1267.

Branham does not acknowledge the Supreme Court's express language or explain why it doesn't control here. Its failure to grapple with these clear statements in *Welch* is not sustainable.

4. The jury's findings on the other felony charges don't erase *Kazalyn*'s harm

The State argues "because the jury unanimously found Witter guilty of the underlying attempt sexual assault and burglary, the jury must have also agreed unanimously upon the associate felony-murder theories." AB at 42. But a unanimous finding of an underlying felony does not erase the prejudice caused by the *Kazalyn* instruction because it is unclear which theory the jury relied upon when convicting Witter.

The State bases its argument – that a unanimous verdict on the underlying felonies in turn means a unanimous verdict based upon the felony-murder theory – purely on speculation. The trial prosecutor argued almost exclusively premeditation in closing argument. *See* OB at 80–83. As argued in Witter's Opening Brief, the prosecutor displayed a blow-up of the *Kazalyn* instruction and read the instruction aloud to the jury. 7ROA1435–36. Furthermore, a jury can be inconsistent when it finds the predicate felony but declines to find felony murder. *Kansas v. Ventris*, 556 U.S. 586, 589 (2009) (a jury acquitted the defendant of felony murder but returned a guilty verdict on aggravated burglary and aggravated robbery).

This Court held that harmless error review applies when a general verdict rests on either a legally valid or invalid alternative theory. *Cortinas v. State*, 124 Nev. 1013, 1032, 195 P.3d 315, 328 (2008). The Court upheld a conviction, reasoning the Court is "not confined to considering whether the jury actually determined guilt under a valid theory, but may look beyond what the jury actually found to what a rational jury would have found if properly instructed." *Id.* at 1029, 195 P.3d 315, 325.

However, in *Riley*, the Ninth Circuit found prejudice where evidence of intoxication may have created reasonable doubt as to the element of deliberation, the prosecutor relied on the *Kazalyn* instruction during closing argument, the jury was instructed as to both premeditation and felony-murder theories, and a general verdict form was used. *Riley v. McDaniel*, 786 F.3d 719, 727 (9th Cir. 2015). In *Riley*, the Ninth Circuit Court of Appeals had "grave doubt" about whether the jury found the defendant deliberated prior to the murder and held the *Kazalyn* instruction constituted harmful error. *Id.* at 725. The Ninth Circuit reasoned that the jury "was presented with significant evidence

of [the defendant's] cocaine intoxication and emotional agitation" including evidence that he smoked crack cocaine immediately before the murder and before forming the intent to kill. *Id.* Evidence of intoxication could "have created a reasonable doubt as to whether the murder was committed with deliberation." *Id.* The prosecutor also heavily relied on the *Kazalyn* instruction, reading the instruction to the jury in his closing argument and highlighting examples of successive thoughts of the mind. *Id.* at 726.

The Ninth Circuit rejected the State's argument that the jury could have found the defendant guilty under a felony-murder rule, as the jury completed only a general verdict form. *Id.* As such, there was no "reason to believe that the jury in fact decided to convict the defendant based on a felony-murder theory rather than on the more traditional first-degree murder charge." *Id.* at 727. Therefore, the Ninth Circuit held, in light of intoxication evidence, the prosecutor "repeatedly returning to the language of the [*Kazalyn*] instruction itself," and because "the general verdict form does not allow [the court] to determine that the jury based its conviction on a different theory

[felony-murder]," the defendant was prejudiced by the *Kazalyn* instruction. *Id.*

The use of the *Kazalyn* instruction prejudiced Witter. Like the evidence in *Riley*, here, the evidence presented at trial supported a defense that Witter acted in a sudden drunken rage, which is inconsistent with the element of deliberation. OB at 83. Witter was intoxicated, emotionally distraught, and irrational. *Id.* Witter's intoxication could have created a reasonable doubt as to whether the element of deliberation was satisfied in this case. The prosecutor here, like the prosecutor in *Riley*, used the *Kazalyn* instruction as a focal point, going as far as to blow-up the *Kazalyn* instruction for use as a demonstrative exhibit and highlighting numerous examples of what constitutes successive thoughts of the mind. OB at 81.

Despite the jury in Witter's case being instructed as to both felony murder and premeditation, the use of a general verdict form means it is mere speculation to find that because the jury unanimously found the underlying felonies, the jury also unanimously found Witter guilty under a felony-murder theory.

F. Three invalid aggravating circumstances should remain stricken and their aggregate prejudice considered

Because this Court struck three aggravators as invalid, it should decline to consider their validity anew. This Court struck NRS 200.033(5)'s avoiding arrest aggravator because the facts showed Witter was not avoiding arrest, but continuing a separate crime. *Witter v. State*, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996). Furthermore, two aggravators for murder during a burglary and a sex assault were struck under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004). 25ROA5585-98. Nevertheless, the State argues the Court should abandon the sound reasoning in *McConnell* to strike these three aggravators. AB at 42. The State's argument fails because this Court properly struck the invalid aggravators in the first place, and their invalidity clearly prejudiced Witter.

1. The avoiding arrest aggravator should remain stricken because this Court already found the State failed to prove it

This Court struck this aggravator because the facts established that Witter killed the victim "so that he could continue his assault" and

"not to avoid arrest." *Witter*, 112 Nev. at 929, 921 P.2d at 900. This was supported factually in the record below, and this Court should come to the same conclusion.

The State argues the Court used "faulty reasoning" when it struck NRS 200.033(5)'s avoiding arrest aggravator. AB at 43. The State argues NRS 200.033(5) applies because Witter intended to both avoid arrest and continue an assault. AB at 43. But that is not what the State argued at trial. Instead, the State argued exclusively that Witter harmed the victim's husband to avoid arrest. 10ROA2090 (State arguing the husband "presented a problem, a chance that William Witter might be caught, might have to pay for his crime."). At trial, the State never argued that the avoid arrest aggravator applied because Witter had dual motives. *Id.* The State should not receive the benefit of this new argument, raised on appeal for the first time. *See Walch v. State*, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996) (explaining that, besides prejudicial error to the defense, the general rule is that "if a party fails to raise an issue below, this court need not consider it on appeal.").

In addition, the State argues for an overbroad reading of NRS 200.033(5). According to the State: "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." AB at 43. But NRS 200.033(13) specifically provides an aggravator for murder in the commission of a sex assault. Both subsections of NRS 200.033 cannot be read to doubly punish Witter for the same underlying conduct because a capital sentencing scheme must genuinely narrow the class of death eligible defendants. *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *see also McConnell v. State*, 120 Nev. 1043, 1063, 102 P.3d 606, 620 (2004). The narrowing function would fail if the Court accepted the State's overbroad reading of NRS 200.033(5).

2. The burglary and sex assault aggravators should remain stricken because this Court must follow *McConnell*

The State argues the burglary and sex assault aggravators should stand because "*McConnell* is fundamentally flawed and remains the law in Nevada only due to stare decisis." AB at 44.

As to the State's stare decisis argument, stare decisis remains a touchstone of this Court's jurisprudence. *See State v. Harte*, 124 Nev. 969, 977, 194 P.3d 1263, 1268 (2008) (Hardesty, J., concurring) ("The doctrine of stare decisis is an indispensable principle necessary to this court's jurisprudence and to the due administration of justice").

As to the State's argument that *McConnell* is fundamentally flawed, as recently as August 2, 2018, the Court has cited *McConnell* as valid Nevada law. *See Rippo v. State*, 134 Nev. __, 423 P.3d 1084, 1092 (2018).

But the State continues to take issue with *McConnell*, arguing that "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." AB at 45. This argument fails because *McConnell* already specifically rejected it. *McConnell v. State*, 120 Nev. 1043, 1065, 102 P.3d 606, 622 (2004)("although the felony aggravator is somewhat narrower than felony murder generally, we conclude that the aggravator does not provide sufficient narrowing to satisfy

constitutional requirements."). If the *McConnell* court wanted to carve out the exception the State argues, it would have. But it didn't. Instead, *McConnell* carved out an exception only "where the State relies solely on a theory of deliberate, premeditated murder to gain a conviction of first-degree murder." *McConnell v. State*, 120 Nev. 1043, 1069, 102 P.3d 606, 624 (2004). It is undisputed that the State relied on a felony murder theory for Witter's conviction.

Accordingly, the State's "mere disagreement does not suffice" and the State failed to offer "weighty and conclusive reasons" for negating *McConnell*. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (declining to disturb rules of precedent).

3. The jury's consideration of three invalid aggravators cannot be dismissed as "harmless error"

The State argues "any error should be deemed harmless" and that this Court should still uphold Witter's death sentence, even if it strikes all three aggravators. AB at 45. But the State fails to address the prejudice from the Court's failure to: (1) consider the three invalid aggravators' impact together under its "mandatory review," NRS

177.055(2)(c)–(d); and (2) apply close appellate scrutiny after it struck the invalid aggravators. *See* OB at 96–97. The State's failure to address these arguments in its Answering Brief should operate as concessions. *Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 360 (2010).

This Court's failure to provide close appellate scrutiny of the cumulative effect of the invalid aggravating circumstances was prejudicial because it deprived Witter of an individualized sentencing determination. *Parker v. Dugger*, 498 U.S. 308, 321 (1991). And, as argued in the Opening Brief, when this Court performs its mandatory review and applies close appellate scrutiny to the sole remaining aggravator, it must conclude that there is a "reasonable doubt" that the jury would have imposed death. *See Rippo v. State*, 122 Nev. 1086, 1093, 146 P.3d 279, 284 (2006) (explaining that after striking aggravators the question becomes "whether we can conclude beyond a reasonable doubt that the jurors would have found that the mitigating circumstances did not outweigh the aggravating circumstances"). Here, Witter's compelling mitigation evidence more than outweighs the

remaining aggravating circumstance, and his death sentence must be vacated.[7]

G. The trial court erroneously admitted unduly prejudicial victim impact evidence

The trial court abused its discretion by admitting victim impact evidence that violated Witter's constitutional rights. OB at 98–110. In its Answering Brief, the State advances two main arguments. *See* AB at 46–48. First, the State argues that Witter's trial counsel only preserved error as to Ms. Cox's testimony. AB at 46. As for the other family members, the State provides no argument other than asserting the errors were not plain and were therefore "waived." *Id.*

But as explained in the Opening Brief, error was preserved for all family members. *See* OB at 108, n. 11. Because Witter's trial counsel objected to victim impact evidence at the first opportunity, and because the trial court heard arguments from the State regarding all three family members, all three have been preserved for this Court's review. Accordingly, the State has failed to carry its *Chapman* burden to show

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[7] Witter details the impropriety of reweighing under *Hurst* in his Opening Brief and in this Reply. *See* OB at 179.

that these errors were harmless beyond a reasonable doubt. *See* OB at 105–106 (explaining why the other three family members' testimonies were impermissible and unduly prejudicial).

Second, the State argues that Ms. Cox's requests that Witter receive "no mercy" did not violate Witter's rights because they were "reflective of how the crime had impacted K.C. rather than an inappropriate sentencing recommendation." AB at 47–48.

To accept the State's argument would eviscerate the holdings of *Booth*, *Payne*, and *Bosse* altogether. *See Booth v. Maryland*, 482 U.S. 496, 508 (1987) (upholding a ban on family members' opinions and characterizations of the crimes and defendant); *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991) (allowing family member testimony about the victim's life, but noting that opinions about the crime, the defendant, or the appropriate sentence were still prohibited); *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016) (clarifying that state courts "remain[] bound by *Booth's* prohibition on characterizations and opinions from a victim's family members about the crime, the defendant and the appropriate sentence . . . .").

In other words, if the State is allowed to reframe sentencing recommendations by a victim as "impact" evidence, then sentencing recommendations would always be allowed. As would comments about the crime and the defendant. Such an interpretation would render the United States Supreme Court's repeated, blanket prohibition of such testimony meaningless. After all, under the State's logic, a family member's most explicit requests for the death penalty—like what happened here—could be held up as an example of how the crime impacted the victim. This cannot be correct.

Because the State fails to meet its *Chapman* burden and demonstrate, beyond a reasonable doubt, that these preserved errors did not contribute to the penalty verdict, Witter's death sentence must be reversed.

H. Pervasive and egregious prosecutorial misconduct throughout opening statements and closing arguments violated Witter's constitutional rights

As argued in the Opening Brief, the State violated Witter's constitutional rights by filling its statements to the jury with improper opinions and statements. OB at 110–127.

1. Shifting the burden of proof constitutes plain and prejudicial error

Witter explained how the prosecutor undermined his presumption of innocence by insisting that Witter's "cloak" of innocence "was removed," and by telling the jury that Witter "sits there now in his naked guilt." OB at 112–13; 7ROA1455.

In its Answering Brief, the State concedes that the prosecutor's arguments "could have been phrased better," before insisting that any error was harmless. AB at 49. However, the State does not address Witter's argument that this misconduct accumulates with the other instances of misconduct. Although Witter maintains that such an argument alone is sufficient for reversal under *Morales v. State*, 122 Nev. 966, 143 P.3d 463 (2006), he also points to the prejudicial effect

this comment had in conjunction with the other instances of misconduct.

2. The State cannot show that the prosecutor's improper comments on Witter's failure to call a witness are harmless beyond a reasonable doubt

Witter explained how the prosecutor improperly shifted the burden of proof by commenting on his failure to call an expert witness on alcohol impairment. OB at 114–16.

In response, the State argues that a reasonable juror would have interpreted the prosecutor's comments as a simple reference to what was and was not presented at trial. AB at 50. The State further argues that the comments were harmless because the prosecutor bookended its argument with brief references to the burden of proof and the jury instructions also referred to that burden of proof. AB at 50–51.

The State fails to meet its *Chapman* burden for two reasons. First, in *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996), this Court reversed on this issue without reference to any ameliorative effects of jury instructions or other prosecutorial argument. Thus, the mere presence of proper instructions or brief references to them during

argument do not necessarily cure any prejudice to Witter. Second, the State does not adequately explain how its improper comment on Witter's failure to call an expert witness was harmless beyond a reasonable doubt. The prohibition on such comments stems from the very real danger that a jury will draw improper inferences from a defendant's right to hold the State to its burden of proof. *See id.* at 502, 915 P.2d at 882. ("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.") (internal quotations and citations omitted). Thus, the prosecutor's comment on Witter's failure to call an expert witness on his main theory of defense was prejudicial because it implied to the jury that Witter had the burden to do so and failed.

The State has not demonstrated that this preserved error was harmless beyond a reasonable doubt, and reversal is required.

3. The prosecutor's repeated references to Witter being "evil" and "hunting prey" in a "jungle" were improper

In his Opening Brief, Witter recounted several examples of the prosecutor calling him evil throughout opening and closing arguments. OB at 117–18. Witter also argued that the prosecutor compared him to an animal by saying Witter hunted the victim like prey in a jungle. *Id.* at 118.

In response, the State denies that it "ever directly call[ed] Witter 'evil.'" AB at 51. The State also argues that "predatory-prey" terminology has been approved in *Miller v. State*, 121 Nev. 92, 110 P.3d 53 (2005). Lastly, the State argues that "hunting prey in the jungle is something that humans do and does not necessarily suggest any kind of animalistic comparison." AB at 52.

First, the State does not address all the instances the prosecutor referred to Witter as evil. Although the State is correct that some of the witnesses testified that Witter "looked 'evil' in appearance," AB at 51, that testimony resulted from direct questions from the prosecutor, asking witnesses how Witter's eyes looked. *See* 5ROA977, 1016. The

State does not address the other instances of the prosecutor calling Witter evil. *See* 4ROA849, 861, 1454.

Second, this case is distinguishable from *Miller*. In *Miller*, the defendant argued that it was improper for the State to say he preyed on vulnerable persons because there was no evidence to support that argument. *Id.* at 100, 110 P.3d at 58–59. This Court disagreed and held there was sufficient evidence to support that argument. *Id.* Here, Witter is not making a sufficiency of the evidence argument—he is arguing that the way the prosecutor referred to him in animalistic terms was inflammatory and unduly prejudicial. OB at 119. Thus, the sufficiency of the evidence analysis in *Miller* is irrelevant to Witter's argument on appeal.

Third, the State's argument that a phrase like "hunting prey in a jungle" does not encourage animalistic comparisons fails. While it is technically true that humans may sometimes hunt prey in a jungle, the same could be said of other animalistic comparisons, of which this Court has disapproved. For example, it is technically true that humans could be considered animals and can have rabies—but it is still improper to

compare defendants to rabid animals. *See Jones v. State*, 113 Nev. 454, 937 P.2d 55 (1997).

These improper statements calling Witter evil and describing him as hunting prey in a jungle were plainly prejudicial and require reversal.

4. The prosecutor's numerous improper comments during the penalty-phase closing compel reversal

Witter argued four different ways the prosecutor made improper comments at penalty-phase closing argument: 1) the prosecutor improperly referred to a duty to society at large; 2) the prosecutor referred to matters outside the record to disparage a legitimate defense; 3) the prosecutor repeatedly warned the jury that Witter would kill again if not put to death; and 4) the prosecutor invoked the "Golden Rule" to encourage the jurors to put themselves in the victim's shoes. OB at 120–26. Witter also argued that the cumulative impact and timing of the prosecutor's misconduct rendered his trial fundamentally unfair. OB at 126.

In its Answering Brief, the State argues that referring to the duty to society at large has been upheld in other cases, that a prosecutor can

refer to the victims at closing, that the prosecutor was free to argue Witter's future dangerousness, that the prosecutor did not violate the Golden Rule, and that the prosecutor did not impermissibly plead for a death sentence for the victims. AB at 52–54.

As to the first area of improper argument, *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985), supports reversal because the references to moral duties here were far worse than in *Collier*.

In *Collier*, this Court reversed and warned prosecutors they may not "blatantly attempt to inflame a jury by urging that, if they wish to be deemed 'moral' and 'caring,' then they must approach their duties in anger and give the community was it 'needs.'" *Id.* at 479, 705 P.2d at 1130. What happened here is worse—the State told the jury the death penalty was important to the "image of the criminal justice system," that it is "an expression of society's sense of moral outrage," that jurors had "a right to feel that outrage," and also that imposing anything less than death would be "disrespectful to the dead and irresponsible to the living." 10ROA2083, 2122, 2133. Telling a jury they would be disrespecting a murder victim by not imposing the death penalty is far

worse than the conduct in *Collier*, and that comment alone justifies reversal.

As to the second area of improper argument, the State argues that because victim-impact evidence is admissible under *Payne v. Tennessee*, 501 U.S. 808 (1991), the State is allowed to "keep the jury's focus on the actual victims of Witter's crime" during argument. AB at 53.

But that conclusion does not follow from the holding of *Payne*. Holding that victim-impact evidence is admissible is not tantamount to holding that the State can disparage a legitimate defense by referring to defense attorneys at large, as happened here. *See* 10ROA2094 (prosecutor arguing to the jury that defense attorneys "try and make you forget about [the victims]. The whole case gets turned upside down and they twist things around until they can portray the vic—the defendant, William Witter, as if he is the victim.") Moreover, the State fails to address the several other cases Witter relies on in his Opening Brief, which establish that the State cannot disparage a defendant's

presentation of mitigating evidence. OB at 123–24. Such improper arguments to the contrary were plainly prejudicial and require reversal. As to the third area of improper argument, the State argues that *Haberstroh v. State*, 105 Nev. 739, 782 P.2d 1343 (1989), "relaxed" the rule set forth in *Flanagan v. State*, 104 Nev. 105, 754 P.2d 836 (1988) (holding that "repeated references to Flanagan's improbable rehabilitation and future killings" put "undue pressure on the jury" to return a sentence of death). AB at 53.

Haberstroh did no such thing. *Haberstroh* cites to *Flanagan* and *Collier* before holding that "the prosecutor did not, in this instance, violate the dictates of *Collier*." 105 Nev. at 742, 782 P.2d at 1345. Thus, while this Court concluded that Haberstroh's case was factually distinguishable from *Flanagan*, the rule in *Flanagan* still stands. In Witter's case, the prosecutor's repeated warnings placed undue pressure on Witter's jury to impose the death penalty, and his death sentence must be reversed.

As to the fourth area of improper argument, the State argues that there was no Golden Rule violation and that the prosecutor did not ask

the jury to return a death-penalty verdict on behalf of the victims. AB 54.

The record belies the State's arguments. The State put Witter's jurors directly into the victim's shoes by saying "how aggravating is it to sit there and this man gets in your car, the vehicle that you own, and begin to perpetrate these crimes on you?" 10ROA2125. This kind of argument is plainly improper. *See Howard v. State*, 106 Nev. 713, 718, 800 P.2d 175, 178 (1990) ("We have held that arguments asking the jury to place themselves in the shoes of a party or the victim (the Golden Rule argument) are improper.").

Additionally, the record reveals that the prosecutor repeatedly told the jury that sentencing Witter to anything less than death would be "disrespectful" to the victim and the victims "need justice." 10ROA2122, 2133, 2098–99. These were improper pleas to return a death sentence on behalf of the victims, and also encouraged the jury to vote in favor of potential future victims. *See Howard*, 106 Nev. at 718–719, 800 P.3d at 178 ("improper are pleas to return a death penalty verdict on behalf of the victims [. . .] it is equally improper to ask the

jury to vote in favor of future victims and against the defendant.") (internal quotations and citations omitted). Such arguments prejudiced Witter's rights and require reversal.

As argued in the Opening Brief, even if any one of the above instances of misconduct could be deemed harmless individually, the cumulative effect of the misconduct deprived Witter of his constitutional rights and reversal is necessary.

I. The State violated *Dawson v. Delaware* when it introduced evidence of Witter's gang involvement

In his Opening Brief, Witter explained how the State violated *Dawson v. Delaware*, 503 U.S. 159 (1992), by introducing gang evidence against him that did not meet any of *Dawson's* exceptions. OB at 140–43. Witter also explained how the probative value of the gang evidence was substantially outweighed by unfair prejudice, in violation of NRS 48.035. OB at 143–45. Lastly, Witter argued that the State's lack of notice that it would be using gang evidence violated his Due Process rights. OB at 146–48.

In response, the State argued that the gang evidence was relevant to establish Witter's future dangerousness. AB at 55. The State also argues that the evidence was related to the murder itself because: "[l]inking 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." AB at 55. The State further argues that Witter provided no authority for asserting its notice of gang evidence was untimely and that NRS 48.035 and the Due Process clause do not apply to "other matter evidence" introduced during capital sentencing hearings. AB at 46.

As to the State's future dangerousness argument, it ignores *Dawson's* ruling that evidence of future dangerousness based on gang affiliation must be relevant to a specific ideology that creates an identifiable danger where the inmate will be housed. *See Dawson*, 503 U.S. at 165–66. The State did not explain at trial, nor does it explain on appeal, how the evidence it proffered regarding a California gang's behavior in California prisons meets this test. It cannot do so, as such

evidence is simply the kind of "general character evidence" prohibited in *Lay v. State*, 110 Nev. 1189, 1196, 886 P.2d 448, 452 (1994).

The State's second argument, that Witter's gang ties were directly relevant to the charged crime, is squarely belied by its position at Witter's trial. At Witter's trial, for the guilt-phase proceedings, the State reassured the trial court that it would "strongly admonish[]" its witnesses to avoid the topic of gangs and that "[n]o mention will be made of any gang affiliation." 5ROA957. The State cannot now assert that uncharged gang activity conduct is suddenly relevant to its guilt-phase theory when it disavowed it below. *Cf. Clark Cty. v. State*, 65 Nev. 490, 506, 199 P.2d 137, 144 (1948) ("It has long been a rule of this Court that a party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below.").

As to the remaining arguments, Witter explained how the late notice from the State was highly prejudicial and undermined his rights to a fair sentencing. OB at 56. As to the State's argument that no prejudice or due process standard applies to "other matter evidence,"

this Court ruled in *Holloway v. State*, 116 Nev. 732, 6 P.3d 987 (2000), that "other matter" evidence "is restricted in its scope and use. It must be relevant, and its danger of unfair prejudice must not substantially outweigh its probative value." *Id.* at 476, 6 P.3d at 997. In sum, Witter was prejudiced by the State ambushing him with evidence of his gang affiliation at sentencing, and his death sentence should be vacated.

J. *Roper v. Simmons* and its progeny show that the use of Witter's juvenile criminal history was improper

In his Opening Brief, Witter argued that the Supreme Court's ruling in *Roper v. Simmons*, 543 U.S. 551 (2005), established that the State's use of his juvenile criminal history violated his right to due process, equal protection, and a reliable death sentence. OB at 149–50. In response, the State asserts that this Court rejected this argument in *Johnson v. State*, 122 Nev. 1344, 148 P.3d 767 (2005). AB at 56–57.

However, *Johnson v. State* incorrectly held that juvenile conduct was relevant to show propensity for violence, character, and "amenability to rehabilitation." *Id.* at 1354, 148 P.3d at 774. But these are considerations that the *Roper* court found to be fundamentally unsound. The Supreme Court banned execution of youthful offenders

precisely because one develops throughout adolescence, noting that "the character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 570. The Supreme Court has further extended this line of reasoning through *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the Eighth Amendment prohibits imposition of life without parole on juvenile offenders with non-homicide convictions), and *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences for juvenile offenders violates the Eighth Amendment). Thus, the Supreme Court has made clear that a juvenile's character is not set in stone, and that rehabilitation must always be an option. In light of this line of Supreme Court cases, *Johnson's* holding on juvenile evidence should be overruled.

K. The district court improperly admitted gruesome photos

Witter argued in his Opening Brief that the district court abused its discretion by admitting gruesome photos of the crime scene that did not aid in establishing any contested issue. OB at 151–53. The State responds that the photos were not gruesome, and were important to

establish the victim's identity, the number, location, and size of the wounds, as well as "consciousness of guilt in concealing evidence." AB at 58.

This Court recently reiterated that the proper test governing the admission of gruesome photos is whether the potential for prejudicial effect substantially outweighs the photos probative value. *Harris v. State*, 134 Nev. __, __, 432 P.3d 207, 210 (2018). This Court ruled that where photographs do not aid in determining a contested issue, the probative value of the photos will be low. *Id.* at __, 432 P.3d at 212. In this case, Witter did not contest the manner of death or the identity of the victim, and thus the photos depicting stab wounds did not aid the jury in determining any contested issue. Thus, given the low probative value of the photos, the trial court abused its discretion in determining that they were not unduly prejudicial.

L. The State's unconstitutional use of Dr. Etcoff's data

In his Opening Brief, Witter explained how the State violated Witter's rights by improperly using data and statements underlying Dr.

Etcoff's expert report before anyone called Dr. Etcoff as a witness. OB at 154–62. In response, the State argued that are there no constitutional concerns because Dr. Etcoff's examination was not court-compelled, that NRS 50.305 does not apply at sentencing, and that Witter's statements were admissible under NRS 51.035(3)(a). AB at 59–60.

As a preliminary matter, the State does not address Witter's arguments that the use of Dr. Etcoff's testimony before he was called was improper. Because the State failed to address these arguments in its Answering Brief, these failures should operate as concessions that the State improperly introduced this evidence. *See Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 360 (2010) (assuming an error was not harmless where the State failed to address harmlessness and relied on statutory evidence arguments only).

The State's other arguments fail because statutory rules of evidence do not trump a Witter's constitutional rights. *Cf. California v. Green*, 399 U.S. 149, 156 (1970) (explaining that, in the Sixth Amendment context, "we have more than once found a violation of confrontation values even though the statements in issue were admitted

under an arguably recognized hearsay exception."); *see also Polk*, 126 Nev. 180 at 181, 233 P.3d at 358 (reversing on Sixth Amendment grounds where the findings of an expert who did not testify at trial were improperly admitted even though an evidentiary statute arguably allowed for it).

Moreover, the State's argument that all constitutional and evidentiary protections evaporate at a capital sentencing proceeding is unfounded. *See, e.g., Holloway v. State*, 116 Nev. 732, 476, 6 F.3d 987, 997 (2000) (holding that "other matter" evidence used at capital sentencing "is restricted in its scope and use. It must be relevant, and its danger of unfair prejudice must not substantially outweigh its probative value."); *Lord v. State*, 107 Nev. 28, 44, 806 P.2d 548, 558 (1991) (holding that Confrontation Clause protections from *Bruton v. United States*, 391 U.S. 123, 137 (1968) apply to capital sentencing proceedings because "the right of cross-examination and the need for accuracy are as important, indeed more important, in the penalty phase than in the guilt phase.").

Lastly, the Fifth Amendment protects defendants unless and until they decide to present a psychiatric defense. *See Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987). The fact that Witter decided to undergo a psychiatric examination does not give the State carte blanche to use his underlying statements before the defense has presented a psychological defense. Indeed, *Buchanan* took pains to note that it was allowing evidence regarding "general observations" and not any statements of the defendant. *Id.* at 423. So did this Court in allowing certain psychiatric evidence in *Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002) (*abrogated on other grounds by Grey v. State*, 124 Nev. 110, 178 P.3d 154 (2008)). In *Floyd*, this court allowed psychiatric evidence that was offered in rebuttal, was restricted to standardized test results, "did not describe any statements by Floyd dealing with his crimes which could incriminate him or aggravate the crimes[,]" and did not reveal that the source of the evidence was a defense expert. 118 Nev. at 170, 42 P.3d at 258–59. None of these factors are present in Witter's case, the evidence was improperly admitted, and its admission was prejudicial to the jury's penalty-phase verdict.

M. Witter was deprived of his right to confront the State's expert

The district court thwarted trial counsel's cross-examination of the State's expert, violating the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *see Chavez v. State*, 125 Nev. 328, 338, 213 P.3d 476, 483 (2009). Nevertheless, the State argues trial counsel's question about an alcoholic's functioning compared to non-alcoholic's functioning "was simply a question beyond the scope of knowledge and expertise of the detective." AB at 62. The State's argument relies on a faulty premise: the ability to testify about alcohol's effect on behavior cannot extend to alcohol's effect on an alcoholic's behavior.

1. At trial, the State elicited expert testimony about how alcohol changes behavior

The district court and the State conceded that the State's expert opined regarding "signs of intoxication," "Witter's blood alcohol content," and "how an individual's tolerance for alcohol would affect his ability to function." AB at 60–61. Nonetheless, the district court prevented Witter from asking the expert if alcohol changed an alcoholic's behavior differently than a non-alcoholic's behavior.

6ROA1225, 6ROA1227. These two things are the same: (1) how an *individual's* tolerance for alcohol would affect his ability to function and (2) how an *alcoholic's* tolerance for alcohol would affect his ability to function. This is because individuals are also alcoholics. Alcoholics are also individuals.

To the extent the State argues an *individual's* tolerance for alcohol is different from an *alcoholic's* tolerance for alcohol, the State highlights why the district court should've let the expert testify. Nothing in the record suggests the expert's training and experience enabled him to only testify about an individuals' tolerance to alcohol—but not individuals who are alcoholics.

2. The district court recognized the expert was allowed to testify and the State exploited this at trial

The district court acknowledged that it allowed expert testimony on how alcohol changes behavior. The State argued at trial that "Detective Thowsen testified, in his experience, he's seen people with a .20 blood alcohol who don't show it. Other people would be falling down drunk; some people can hold their alcohol and not have it show." 7ROA1444; 6ROA1227; *see* OB at 163–66. These facts support the claim

that Witter's inability to cross-examine Detective Thowsen deprived him of his Sixth Amendment right to confront witnesses against him. The State failed to address these arguments in its Answering Brief. These failures operate as concessions. *Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 360 (2010).

N. The district court gave improper instructions to the jury

At both phases of Witter's trial, the district court instructed the jury improperly. At the guilt phase, the district court gave a flawed reasonable doubt instruction and refused to record the settling of instructions. At the penalty phase, the district court gave improper instructions on character evidence and aggravating circumstances. Witter's convictions and death sentence cannot stand on these flawed and misleading instructions.

1. Guilt phase instructional errors

a. Under *McAllister* and *Miller*, the reasonable doubt instruction minimized the State's burden of proof

The district court minimized the State's burden of proof when it characterized reasonable doubt as an "abiding conviction of the truth of the charge." 7ROA1412; 9ROA1907. *Cf.*, *McAllister v. State*, 88 N.W.

212, 214-15 (Wis. 1901); *Commonwealth v. Miller*, 21 A. 138, 140 (Penn. 1891); *contra Lord v. State*, 107 Nev. 28, 40, 806 P.2d 548, 555-56 (1991); *Ramirez v. Hatcher*, 136 F.3d 1209, 1210-15 (9th Cir. 1998). Nevertheless, the State argues the Court should ignore *McAllister* and *Miller*. AB at 64.

The reasonable doubt definition impermissibly minimized the standard of proof of beyond a reasonable doubt and is prejudicial per se. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993). Because of this, the Court should address the arguments underlying *McAllister* and *Miller* and find the reasonable doubt instruction invalid.

2. Penalty phase instructional errors

a. The State profited unfairly from the district court's failure to instruct on character evidence

The State can offer character evidence "for only one purpose: for jurors to consider in deciding on an appropriate sentence after they have determined whether the defendant is or is not eligible for death." *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000). The State admits the trial prosecutor "certainly" used character evidence

improperly. Still, the State argues character evidence couldn't have impacted death eligibility because aggravators remained undisputed. AB at 64. But the reason that invalid aggravators are prejudicial is because they are weighed against mitigation before the jury can even consider the death penalty. The State also admits the district court never instructed the jurors that they could consider character evidence only *after* finding death eligibility. AB at 64. But the State still argues "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." AB at 64.[8]

1) The trial prosecutor used character evidence improperly

The State argues "death eligibility was not an issue" because Witter's trial counsel conceded an aggravator. AB at 64. As a preliminary matter, counsel doesn't have the power to find an

[8] Such changes highlight the capital scheme's arbitrariness and capriciousness. Had Witter been tried in 1995, different rules may have resulted in a non-capital sentence. *See* Liliana Segura, "*Relic of Another Era": Most people on North Carolina's death row would not be sentenced to die today*, The Intercept (October 17, 2018), https://theintercept.com/2018/10/17/north-carolina-death-penalty/.

aggravator, the jury has exclusive power over that determination. *Hollaway v. State*, 116 Nev. 732, 745, 6 P.3d 987, 996 (2000), overruled by *Lisle v. State*, __ Nev. __, 351 P.3d 725 (2015) ("the *jury* must find unanimously and beyond a reasonable doubt that at least one enumerated aggravating circumstance exists") (emphasis added). That trial counsel conceded an aggravator didn't compel the conclusion that Witter was death eligible.

The rest of the State's argument turns on a misleading principle: If aggravators remain undisputed, death eligibility is assumed. Death eligibility does not automatically follow from trial counsel's failure to dispute aggravators, and *Holloway* proves this. In *Holloway*, like in Witter's penalty phase, aggravators went undisputed. In fact, in Holloway's penalty phase, he disputed no aggravators and instead "implied that he might kill again." *Hollaway v. State*, 116 Nev. 732, 740, 6 P.3d 987, 993 (2000). But undisputed aggravators do not cure a district court's failure to instruct properly. Even where aggravators remain undisputed, jurors must decide the second step of death eligibility where mitigation is weighed against statutory aggravating

circumstances. *Hollaway v. State*, 116 Nev. 732, 743, 6 P.3d 987, 995 (2000) (reversing and remanding for instructional error).

2) This Court may address errors even if trial counsel didn't

According to the State, character evidence instructions "were not *sua sponte* required by this Court until five years after the trial took place in 1995." AB at 64. The State improperly argues trial counsel's failure to request character evidence instructions defeats Witter's claim. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." NRS 178.602. Importantly, "[o]n direct appeal of any judgment of conviction, this court has discretion to review instances of plain error despite the failure to preserve an issue at trial or the failure to raise the issue on appeal." *Pellegrini v. State*, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001). Assuming trial counsel didn't request character evidence instructions, this Court can still address the district court's failure to give them. *E.g.*, *Butler v. State*, 120 Nev. 879, 895, 102 P.3d 71, 82 (2004). This plain error undermined Witter's substantial right to a fair sentencing hearing and should be addressed in this direct appeal. Further, the State's

argument shows why the law of the case does not apply because *Holloway* was issued after Witter's trial. *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 729–30 (2007); *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 729 (Nev. 2017).

b. The district court's failure to give a unanimity instruction violated Witter's rights

The district court never instructed Witter's jury to find aggravators unanimously and that mitigators required no unanimity. 10ROA2077; *see Geary v. State*, 114 Nev. 100, 105, 952 P.2d 431, 433 (1998). Nevertheless, the State argues: (1) Witter should've requested a unanimity instruction and "such instructions were not *sua sponte* required by this Court until three years after the trial took place in 1995;" and (2) the failure to instruct on unanimity was harmless. AB at 65.

1) This Court may address errors even if trial counsel didn't

Like the prior instruction, the State again argues trial counsel's failure to request unanimity instructions defeats Witter's claim. This argument fails for the same reasons as articulated above in § (a)(2).

Further, this plain error undermined Witter's substantial right to a fair sentencing hearing and should be addressed in this direct appeal. Furthermore, the State's argument shows that the law of the case does not apply because *Geary* was issued after Witter's trial. *Hsu v. Cty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 729–30 (2007); *Franchise Tax Bd. of State of California v. Hyatt*, 407 P.3d 717, 729 (Nev. 2017).

2) Failure to instruct on unanimity was harmful

The State argues the failure to instruct on unanimity caused no harm because the special verdict form included "We, the jury," and that language told the jury to find aggravators unanimously. AB at 66 (citing 9ROA1916-17). However, the special verdict form only related to "the aggravating circumstance or circumstances." 9ROA1916–17. Nothing indicates if the jury understood "We, the jury" not to mean that they had to unanimously find mitigators, like the aggravators. If the State is right that "We, the jury" told jurors they had to make a unanimous finding, the absence of that language muddies whether the jury knew it didn't need to unanimously find mitigators. In fact, despite getting instructions on four mitigators, the jurors were never instructed

they could consider a mitigator that a fellow juror didn't think existed. 10ROA1909. The prejudice from this error was magnified because individual jurors were deprived of the opportunity of weighing mitigation that was not unanimously found against statutory aggravating circumstances.

c. The district court didn't properly instruct the jury about weighing and this Court shouldn't have reweighed after striking aggravators

The district court never instructed the jury to find beyond a reasonable doubt that mitigators did not outweigh the aggravators. Moreover, this Court twice overstepped the jury's role by reweighing mitigators and aggravators.

As to the weighing instruction, the State relies on *Jeremias v. State*, 134 Nev. ___, 412 P.3d 43 (2018). The State argues "the beyond-a-reasonable-doubt standard does not apply to the weighing of aggravating and mitigating circumstances." AB at 66. As to this Court's reweighing, the State argues *Hurst* does not "overturn appellate reweighing." AB at 67.

The State's interpretation of *Jeremias* goes too far. *Jeremias* relies on a version of Alabama's sentencing scheme that Alabama's legislature governor rendered obsolete. *See* OB at 177 n.15. Setting *Jeremias* aside, *Hurst* holds that a jury (not a court) must do the weighing determination after striking aggravators. The Florida Supreme Court, on remand from *Hurst*, interpreted its own statutes and the United States Supreme Court's decision to mean that all eligibility findings, including the outweighing determination, are factual and subject to the beyond-a-reasonable-doubt standard. *Hurst v. State*, 202 So. 3d 40, 53–58 (Fla. 2016), *cert. denied sub nom. Florida v. Hurst*, 137 S. Ct. 2161 (2017).

O. Electoral pressures caused judges to handle Witter's case unfairly

Because Nevada's death penalty scheme has significant discretionary elements, it must still operate in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause. Death is different; for that reason, more process is due. *See Lockett v. Ohio*, 438 U.S. 586, 608 (1978). Nevertheless, the State

argues this Court previously rejected Witter's claim and "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." AB at 68. However, in his Opening Brief, Witter presented recent cases and statistical data demonstrating pressures preventing elected judges and justices from reviewing capital cases fairly. See OB at 181–89.

This new information warrants this Court re-visiting this issue and vacating Witter's convictions and death sentence. The errors in Witter's case accumulate to a denial of a fair trial.

P. The errors in Witter's case accumulate to a denial of a fair trial

In his Opening Brief, Witter explained in detail how the errors at his trial—even if deemed harmless individually—accumulate to deny him a fair trial. OB at 191–98.

In response, the State argues there were no errors, or that any error was not prejudicial individually. *See* AB at 69 ("alleged prosecutorial misconduct either did not occur or in context was not an

improper argument and resulted in no prejudice."); at 70 ("any error under *McConnell* is without prejudice . . ."); *id.* ("the death sentence should not be reversed based on the cumulative effect of relative minor errors or non-errors.").

However, it does not matter that one error may be deemed harmless by itself. Indeed, the doctrine of cumulative error recognizes that combined error can "render[] the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (*citing Chambers v. Mississippi*, 410 U.S. 284 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996)). And, as detailed throughout the Opening Brief and this Reply brief, Witter's trial was plagued with error.

These errors alone compel reversal, but combined and considered cumulatively, the errors demonstrate that Witter's trial was fundamentally unfair. Accordingly, the State cannot meet its burden of showing that the accumulation of constitutional error was harmless beyond a reasonable doubt.

II. CONCLUSION

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

DATED this 26th day of February, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

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

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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.

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CERTIFICATE OF ELECTRONIC SERVICE

In accordance with NRAP 25(c)(1)(D), the undersigned hereby certifies that APPELLANT'S REPLY BRIEF was filed electronically with the Nevada Supreme Court on February 26, 2019. Electronic service of the foregoing APPELLANT'S REPLY BRIEF shall be made in accordance with the service list as follows:

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