CHRISTOPHER ERIC CARTER, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 59392

April 25, 2013 299 P.3d 367

Appeal under NRAP 4(c) from a judgment of conviction, pursuant to a jury verdict, of eight counts of burglary while in possession of a firearm, twelve counts of robbery with the use of a deadly weapon, and one count of coercion. Eighth Judicial District Court, Clark County; Sally Loehrer, Judge.

The supreme court, SAITTA, J., held that: (1) defendant's question ''Can I get an attorney?'' was an unequivocal request for the aid of counsel, triggering the requirement that all interrogation immediately cease; (2) because defendant's confession was an uncounseled response to questioning that occurred after he invoked his right to counsel, it had to be suppressed; and (3) the district court's error in admitting defendant's confession, after he had invoked his right to counsel, was not harmless.

Reversed and remanded.

Karen A. Connolly, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   The supreme court reviews the district court's factual finding concerning the words a defendant used to invoke the right to counsel for clear error, and whether those words actually invoked the right to counsel, de novo. U.S. CONST. amend. 6.
2. CRIMINAL LAW.
   Once a suspect invokes the right to counsel under *Miranda*, he cannot be subject to further interrogation and all questioning must cease until counsel has been made available to him. U.S. CONST. amend. 6.
3. CRIMINAL LAW.
   To determine whether all interrogation must cease once accused invokes right to counsel, a court must first determine whether the accused actually invoked his right to counsel. U.S. CONST. amend. 6.
4. CRIMINAL LAW.
   Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. U.S. CONST. amend. 6.
5. CRIMINAL LAW.
   If the accused invokes his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. U.S. CONST. amend. 6.

6. CRIMINAL LAW.
   Defendant's question ''Can I get an attorney?'' was an unequivocal request for the aid of counsel, triggering the requirement that all interrogation immediately cease; there were no other words modifying the statement that suggested defendant was attempting to clarify the extent of his rights or make a temporal inquiry, and fact that shortly thereafter defendant communicated that he was merely ''concerned'' about an attorney did nothing to alter court's analysis. U.S. CONST. amend. 6.
7. CRIMINAL LAW.
   Once a suspect requests an attorney, *Miranda* does not allow police officers to subtly interrogate the suspect under the guise of clarifying intentions that are already clear. U.S. CONST. amend. 6.
8. CRIMINAL LAW.
   Once a suspect invokes his right to counsel, there may be no further interrogation unless the suspect reinitiates contact with the police, there is a sufficient break in custody, or the suspect is provided the aid of the counsel that he requested. U.S. CONST. amend. 6.
9. CRIMINAL LAW.
   Once an accused expresses his desire to confer with counsel, there are no actions that police officers can take to revive questioning other than honoring that request. U.S. CONST. amend. 6.
10. CRIMINAL LAW.
    Because defendant's confession was an uncounseled response to questioning that occurred after he invoked his right to counsel, it had to be suppressed, regardless of whether his subsequent waiver was otherwise valid. U.S. CONST. amend. 6.
11. CRIMINAL LAW.
    The district court's error in admitting defendant's confession, after he had invoked his right to counsel, was not harmless; defendant's confession was the linchpin in the case against him, and no other physical or testimonial evidence placed defendant at any of the robberies. U.S. CONST. amend. 6.

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

In this appeal, we address whether a suspect who asks, ''Can I get an attorney?'' after he has been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), unambiguously invokes his right to counsel, and if so, whether the State can resume the interrogation of the suspect by reading him a second set of *Miranda* warnings and obtaining an otherwise valid waiver.

We hold that the question ''Can I get an attorney?'' is an unequivocal request for the aid of counsel, triggering the requirement that all interrogation immediately cease. We also hold that once a suspect invokes his right to counsel, there may be no further interrogation unless the suspect reinitiates contact with the police, there is a sufficient break in custody, or the suspect is provided the

aid of the counsel that he requested. For the reasons below, we conclude that appellant's confession was inadmissible, and because the error in admitting the confession is not harmless, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.[1]

FACTS AND PROCEDURAL HISTORY

Appellant Christopher Carter's convictions stem from an investigation by the Las Vegas Metropolitan Police Department (LVMPD), in conjunction with the Federal Bureau of Investigation (FBI), into a series of robberies taking place between October 23, 2003, and February 2, 2005. Law enforcement suspected that the robberies were related due to the similar modus operandi and relatively small geographical area of the crimes, but theorized that more than one man was responsible due to witnesses' varying descriptions of suspects' heights and weights and reports of waiting escape vehicles. Because the suspects' faces were obscured in each robbery, witnesses were unable to give any facial descriptions and were only able to identify them as African-American males. A lead was developed when a witness identified a black Mazda Miata as the escape vehicle for one of the robberies. FBI agents searched DMV records and came up with Carter as a possible suspect.

On February 3, 2005, FBI agents went to Carter's home and examined trash bags placed outside his fence. Inside the bags, they discovered a white T-shirt with apparent eyeholes cut out of it consistent with the description of a mask worn during one of the robberies. Based upon the T-shirt and Carter's identification found in the trash, LVMPD obtained a warrant. On February 19, 2005, SWAT teams entered Carter's home, handcuffed his brother and his mother, and placed him under arrest. Once at the police station, Carter proceeded to confess to multiple robberies, burglaries, and possession of a firearm. Ultimately, a jury found Carter guilty of eight counts of burglary while in possession of a firearm, twelve counts of robbery with the use of a deadly weapon, and one count of coercion.

Carter moved to suppress his confession prior to trial, claiming that interrogation began after he invoked his right to counsel. The district court conducted an evidentiary hearing.[2] At the evidentiary hearing, Detective Joel Martin testified that while escorting Carter to the police station after his arrest, he advised Carter of his rights under *Miranda*. Martin asked Carter ''booking type'' ques-

---

[1]We deny respondent's motion to strike appellant's notice of supplemental authorities. We have considered all relevant authority provided by both parties.

[2]While Senior District Judge Sally Loehrer presided over Carter's trial and sentencing and entered the judgment of conviction in this matter, District Judge Donald M. Mosley heard and decided Carter's suppression motion.

tions but nothing substantively related to the offenses. According to Martin, during the drive, Carter expressed ''concern'' about hiring an attorney, and although Martin could not recall exactly what was said, he did not interpret it as a demand for an attorney. Martin admitted that Carter could have asked, ''Can I get a lawyer?'' or ''Can I get an attorney?''

Carter testified that he asked Detective Martin, ''Can I get a lawyer?'' and Martin replied that they could talk about it later. Carter testified that he also could not remember exactly how he phrased his statement but submitted that he was requesting an attorney.

During argument, the State conceded that Carter asked either ''Can I have a lawyer?''; ''May I have a lawyer?''; or ''Can I have my lawyer?''; and framed the issue before the district court, stating: ''This whole case, or this whole motion, comes down to one thing: Can I have an attorney? Is that question, is that an unequivocal request to I'm not speaking to you unless I have my attorney?'' The district court found that Carter asked ''Can I get an attorney?'' and denied the motion to suppress his confession, concluding that (1) Carter's statement was ambiguous, and (2) there was no substantive questioning until after Carter was given a second set of *Miranda* warnings at the police station and waived his right to counsel.

DISCUSSION

[Headnote 1]

On appeal, Carter contends that the district court erred in denying the motion to suppress his confession, arguing that it was obtained in violation of *Miranda* and was therefore inadmissible as a matter of law. We review ''the district court's factual finding concerning the words a defendant used to invoke the right to counsel'' for clear error, and ''[w]hether those words actually invoked the right to counsel'' de novo. *United States v. Ogbuehi*, 18 F.3d 807, 813 (9th Cir. 1994); *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

[Headnote 2]

In *Miranda*, the Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against self-incrimination required that any interrogation of a suspect in custody ''be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney.'' *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981) (citing *Miranda*, 384 U.S. at 479). In *Edwards*, the Court added a '' 'second layer' '' of protection. *Davis v. United States*, 512 U.S. 452, 458 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)). Under the *Edwards* rule, once a suspect invokes the right to counsel

under *Miranda*, he cannot be subject to further interrogation and all questioning must cease until counsel has been made available to him. *Edwards*, 451 U.S. at 484-85.

[Headnotes 3-5]

To determine whether, under *Edwards*, all interrogation must cease, a court must first ''determine whether the accused actually invoked his right to counsel.'' *Davis*, 512 U.S. at 458 (emphasis and internal quotation marks omitted). ''Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' '' *Id.* at 459 (quoting *McNeil*, 501 U.S. at 178). However, ''if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.'' *Id.* ''Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.'' *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) (internal citations and quotation marks omitted).

Whether Carter invoked his right to counsel

[Headnote 6]

Following *Edwards*, we must first determine whether Carter's statement ''Can I get an attorney?'' is an unequivocal demand for counsel, requiring that all questioning immediately cease until counsel is present, or is merely an ambiguous inquiry into the extent of his rights. Having compared Carter's reference to counsel to that in *Davis*, *Smith*, and other cases, as well as the context in which those words were spoken, we have no difficulty in concluding that Carter's statement was an unambiguous and unequivocal request for the assistance of counsel during questioning. While ''[t]he word attorney has no talismanic qualities'' and ''[a] defendant does not invoke his right to counsel any time the word falls from his lips,'' *Kaczmarek v. State*, 120 Nev. 314, 330, 91 P.3d 16, 27 (2004) (internal quotation marks omitted), there are no circumstances here that would suggest to a reasonable officer anything other than that Carter was asking for the aid of an attorney. It is implausible that Carter was simply asking if he had the theoretical right to an attorney considering that detectives had just told him that he had such a right. There were no other words modifying the statement that suggest Carter was attempting to clarify the extent of his rights or make a temporal inquiry. *See, e.g.*, *Al-*

varez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999) (appellant's question, ''Can I get an attorney *right now, man*?'' was held to be unambiguous in context (emphasis added)); *People v. Harris*, 552 P.2d 10, 11-13 (Colo. 1976) (appellant's question, ''*When* can I get a lawyer?'' was held to be unambiguous (emphasis added)). Carter did not use words like ''might,'' ''maybe,'' ''perhaps,'' or ''should'' or in any way suggest he was unsure of whether he wanted an attorney. *See Smith v. Endell*, 860 F.2d 1528, 1531 (9th Cir. 1988). To hold that a suspect who asks ''Can I get an attorney?'' does not invoke his right to counsel would suggest that no statement phrased as a question could invoke one's right to counsel—a holding contrary to law and lacking a fundamental understanding of the nature of human interaction. *See, e.g.*, *Davis*, 512 U.S. at 461 (noting that under *Miranda* and its progeny ''questioning must cease if the suspect *asks* for a lawyer'' (emphasis added)); *id.* at 470 n.4 (Souter, J., concurring) (''Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant.''). We conclude that it is clear, not only by the words used but also given the circumstances in which they were spoken, that Carter expressed his desire for the assistance of an attorney, and a reasonable officer would have understood it as such.

[Headnote 7]

The fact that shortly thereafter Carter communicated that he was merely ''concerned'' about an attorney does nothing to alter our decision. The Supreme Court has strongly repudiated consideration of a suspect's subsequent statements in order to cast doubt on the clarity of an initial request. *Smith*, 469 U.S. at 100 (1984) (''We hold only that, under the clear logical force of settled precedent, an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.''). Once a suspect requests an attorney, *Miranda* and its progeny do not allow police officers to subtly interrogate the suspect under the guise of clarifying intentions that are already clear. ''In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.'' *Id.* at 98 (alteration in original) (quoting *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983)). Here, Carter expressed in no uncertain terms that he would like the assistance of an attorney in dealing with the police. His words were unequivocal and unambiguous and his request should have been honored.

Whether Carter's waiver was valid

[Headnotes 8-10]

We must next determine whether Carter validly waived his right to counsel. *Id.* at 95. *Edwards* makes abundantly clear that once counsel is requested all questioning must immediately cease, and that the right may only be waived if the accused initiates subsequent communication, there is a break in custody, or he receives the counsel that he asked for—none of which occurred here. *See Kaczmarek*, 120 Nev. at 328-29, 91 P.3d at 26. That nothing substantive was asked until after a second set of *Miranda* warnings were given and Carter waived his rights is of no consequence because his prior request for an attorney precluded any further interrogation under the circumstances presented. Simply put, once an accused expresses his desire to confer with counsel, there are no actions that police officers can take to revive questioning other than honoring that request. Because Carter's confession was an uncounseled response to questioning that occurred after he invoked his right to counsel, it must be suppressed regardless of whether his subsequent waiver was otherwise valid. *Id.* at 329, 91 P.3d at 26 (''If police later initiate an encounter in the absence of counsel and there has been no break in custody, 'the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.' '' (quoting *McNeil*, 501 U.S. at 177)).

[Headnote 11]

Because Carter's confession was the linchpin in the case against him, we cannot say that its admission was harmless. *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) (noting that '' 'before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt' '' (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967), *overruled on other grounds by Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993))). Absent his confession, the entirety of the evidence against Carter is his ownership of a vehicle consistent with one seen leaving the scene of a robbery, his ownership of a firearm consistent with one used during the robberies, and the discovery in bags set out for garbage pickup of a white T-shirt with apparent eyeholes cut out of it consistent with a facial covering used by the suspect at two robberies. No other physical or testimonial evidence placed Carter at any of the robberies.[3] Under the circumstances,

---

[3]Because we reverse Carter's convictions, we need not address his claims that the district court erred by denying his motion to suppress physical evidence seized by the police and that he was denied his constitutional right to a fair and impartial jury.

we cannot say beyond a reasonable doubt that the erroneous admission of Carter's confession did not contribute to his conviction, and therefore we are compelled to reverse the judgment of conviction and remand to the district court for proceedings consistent with this opinion.

PICKERING, C.J., and GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS, and CHERRY, JJ., concur.

THE STATE OF NEVADA, APPELLANT, *v.*
JERMAINE XAVIER FREDERICK, RESPONDENT.

No. 60298

April 25, 2013 299 P.3d 372

Appeal from a district court order granting respondent's post-conviction motion to withdraw his guilty plea. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Defendant was convicted, following guilty pleas before a master, of battery constituting domestic violence and a felony crime stemming from a domestic violence incident. The district court granted defendant's motion to withdraw his guilty plea on the felony charge. State appealed. The supreme court, PARRAGUIRRE, J., held that: (1) statute that delegated to the district court the authority to appoint masters did not violate separation of powers provision of constitution; and (2) the district court rule, which allowed justices of the peace to serve as district court hearing masters, fell within Legislature's grant of authority under statute.

Reversed.

HARDESTY, J., with whom PICKERING, C.J., and CHERRY, J., agreed, dissented in part.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Elizabeth A. Mercer*, Deputy District Attorney, Clark County, for Appellant.

Philip J. Kohn, Public Defender, and *William M. Waters*, Deputy Public Defender, Clark County, for Respondent.

1. CRIMINAL LAW.
   The supreme court reviews questions of law de novo.
2. CONSTITUTIONAL LAW.
   Legislature may delegate to other bodies the power to make rules and regulations supplementing legislation as long as the power given is pre-

scribed in terms sufficiently definite to serve as a guide in exercising that power. Const. art. 3, § 1.

3. CONSTITUTIONAL LAW.
When the Legislature delegates to the judicial branch, it may only delegate duties and powers that are traced back to and derived from the basic judicial powers and functions.

4. CONSTITUTIONAL LAW; CRIMINAL LAW.
Statute that delegated to the district court the authority to appoint masters for criminal proceedings to perform certain subordinate or administrative duties that the Nevada Supreme Court had approved to be assigned to such a master did not violate the separation of powers provision of the Nevada Constitution, although Legislature left the implementation details to the courts; enactment limited a district court master's powers to a specified subset of responsibilities, Legislature articulated the scope of the delegated powers with sufficient definition, and the delegated powers fell within the judicial function. Const. art. 3, § 1(1); NRS 3.245.

5. CONSTITUTIONAL LAW; CRIMINAL LAW.
The district court rule, which allowed justices of the peace to serve as district court hearing masters, fell within Legislature's grant of authority under statute that delegated to the district court the authority to appoint masters for criminal proceedings to perform certain subordinate or administrative duties that the Nevada Supreme Court had approved to be assigned to such a master, although justices of the peace might also have served as district court masters; fact that they might also have served as district court masters was only incidental to their roles as justices of the peace and was not an unconstitutional judicial expansion of the justice court's jurisdiction. NRS 3.245; EDCR 1.48.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we consider whether Eighth Judicial District Court Rule (EDCR) 1.48, which allows justices of the peace to serve as district court hearing masters, violates the Nevada Constitution. We conclude that it does not.

Article 6, Section 8 of the Nevada Constitution grants the Legislature sole authority in determining the jurisdiction of justice courts. Through NRS 3.245, the Legislature has delegated to district courts the authority to designate district court hearing masters and to this court the authority to approve the duties that may be assigned to those hearing masters. Under this delegated authority, EDCR 1.48 allows justices of the peace to act in a separate capacity as district court hearing masters, which includes the taking of felony pleas. Thus, when a justice of the peace who has been appointed as a hearing master performs the duties set forth in EDCR 1.48(k), she is acting pursuant to her authority under EDCR 1.48, not as part of her jurisdiction as a justice of the peace.

BACKGROUND

The Nevada Constitution authorizes the Legislature to set forth the jurisdiction of the state's justice courts. Nev. Const. art. 6, § 6. The Legislature has granted justice courts jurisdiction over misdemeanors. NRS 4.370(3). This leaves district courts with jurisdiction over felonies and gross misdemeanors. *See* Nev. Const. art. 6, § 6(1) (providing that district courts ''have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts''); *see also* NRS 193.120 (setting forth three classifications of crimes—felony, gross misdemeanor, and misdemeanor).

Although a crime that is classified as a felony or gross misdemeanor cannot be tried in the justice court, the Legislature has authorized justice courts to conduct preliminary examinations in those cases. NRS 171.196(2). But the Legislature made clear that ''[i]f an offense is not triable in the Justice Court, the defendant must not be called upon to plead.'' NRS 171.196(1). Even when a defendant charged with a felony or gross misdemeanor waives a preliminary examination in the justice court, he may enter his plea only in the district court. *Id*.

To help alleviate the workload of district court judges, the Legislature amended NRS 3.245 to permit the chief judge of a district court to appoint one or more ''masters'' who, in turn, are authorized ''to perform certain subordinate or administrative duties'' for the district court judges. 2003 Nev. Stat., ch. 47, § 1, at 409. The amendment also authorized this court to approve the duties that these masters may perform. *Id*. To utilize hearing masters as authorized under the statute, the Eighth Judicial District Court presented EDCR 1.48 to this court, which approved the rule. *See* DCR 5 (indicating that local rules for district courts must be approved by supreme court); *In the Matter of the Amendment of Eighth Judicial District Court Rules (EDCR) Regarding Changes to the Rules in Compliance With NRS 3.245 to Provide for the Appointment of Criminal Masters*, ADKT No. 363 (Order Amending EDCR 1.30 and Adopting EDCR 1.48, May 11, 2004).

Among other things, EDCR 1.48 sets forth (1) who may be a master, and (2) the duties that a master may perform. As for who may be a master, EDCR 1.48 provides:

> A criminal division master must be a senior judge or justice, senior justice of the peace, *justice of the peace*, district judge serving in the family division, or a member of the State Bar of Nevada who is in good standing as a member of the state bar and has been so for a minimum of 5 continuous years immediately preceding appointment as a criminal division master.

EDCR 1.48(b) (emphasis added). As for the master's duties, EDCR 1.48 provides a list of 17 duties, one of which includes:

> Conducting arraignments and *accepting pleas of guilty, nolo contendere, and not guilty*, including ascertaining whether the defendant will invoke or waive speedy trial rights.

EDCR 1.48(k)(2) (emphasis added). Thus, under EDCR 1.48, a justice of the peace may be appointed as a criminal division master in the Eighth Judicial District Court and, in that capacity, may accept a defendant's guilty plea to an offense that is triable in the district court. Pursuant to EDCR 1.48, Eighth Judicial District Court Chief Judge Jennifer Togliatti appointed Justice of the Peace Melissa Saragosa as a district court master to accept pleas in cases where the defendant has waived a preliminary examination.

The State charged respondent Jermaine Frederick with both misdemeanor and felony crimes stemming from a domestic violence incident. After his initial appearance, Frederick appeared for a preliminary hearing in the Las Vegas Justice Court, with Judge Saragosa presiding.

Frederick's counsel informed the court that Frederick had entered into a plea agreement with the State wherein Frederick would plead guilty to one misdemeanor charge and one felony charge. Frederick then waived his right to a preliminary examination. He pleaded guilty to a misdemeanor charge of battery constituting domestic violence, and Judge Saragosa sentenced him on that charge. Immediately thereafter, she conducted a plea colloquy on the felony charge, determined that Frederick's plea was voluntary, and accepted his plea to the felony charge. Frederick was then bound over to district court where he received an 18- to 72-month prison sentence.

Subsequently, Frederick filed a motion in the district court to withdraw his felony plea on the ground that it was accepted by a justice of the peace who lacks jurisdiction to accept a felony plea. Without explanation, the district court judge granted Frederick's motion. The State then appealed.

DISCUSSION

[Headnote 1]

At its core, this appeal involves a question of whether justices of the peace may take felony pleas while serving as district court masters. In answering that question, we address: (1) whether NRS 3.245 violates the separation of powers doctrine, and (2) whether EDCR 1.48 falls within the Legislature's grant of authority under NRS 3.245. These are pure questions of law that we review de novo. *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011).

NRS 3.245 does not violate the separation of powers provision of the Nevada Constitution

[Headnotes 2, 3]

Article 3, Section 1 of the Nevada Constitution prohibits the Legislature from delegating certain functions to other branches of government. *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001). However, the Legislature may delegate to other bodies the power to make rules and regulations supplementing legislation as long as ''the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power.'' *Id.* When the delegation is to the judiciary, this court has held that the Legislature may only delegate duties and powers that are traced back to and derived from the basic judicial power and functions. *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). Such a delegation can include administrative or ministerial powers so long as those powers are ''reasonably incidental to the fulfillment of judicial duties.'' *Id.* at 24, 422 P.2d at 245.

[Headnote 4]

With these principles in mind, it is clear that NRS 3.245 is a proper delegation of power to the judiciary to set forth the specific duties of district court masters. The Legislature explicitly delegated to the district court the authority to appoint masters for ''criminal proceedings to perform certain subordinate or administrative duties that the Nevada Supreme Court has approved to be assigned to such a master.'' NRS 3.245. This enactment limits a district court master's powers to a specified subset of responsibilities in a particular class of cases. While the Legislature left the details for implementing NRS 3.245 to the courts, the Legislature articulated the scope of the powers it delegated to the judiciary with sufficient definition.

It is also clear that the powers delegated to the judiciary pursuant to NRS 3.245 fall within the judicial function, which is defined as ''the exercise of judicial authority to hear and determine questions in controversy that are proper to be examined in a court of justice.'' *Galloway*, 83 Nev. at 20, 422 P.2d at 242. We have described ministerial functions as ''methods of implementation to accomplish or put into effect the basic function of each Department.'' *Id.* at 21, 422 P.2d at 243. Examples of ministerial functions that can be traced back to or derived from the basic judicial power and functions include regulating and licensing attorneys and ''prescribing any and all rules necessary or desirable to handle the business of the courts or their judicial functions.'' *Id.* at 23, 422 P.2d at 244. Similarly, allowing the judiciary to determine the subordinate or administrative duties that may be assigned to masters is a ministerial function that can be traced back to or derived from the basic judicial power and functions (*e.g.*, it relates to

how the business of the district courts and their judicial functions are handled).

We conclude that NRS 3.245 is an appropriate delegation of ministerial power to the judiciary, such that it does not violate Article 3, Section 1 of the Nevada Constitution.

EDCR 1.48 falls within the Legislature's grant of authority under NRS 3.245

[Headnote 5]

Having determined that the Legislature properly delegated the power to promulgate EDCR 1.48 to the judicial branch, we now turn to whether allowing justices of the peace to serve as district court hearing masters, under EDCR 1.48, is within the scope of the Legislature's delegation.

The State argues that EDCR 1.48 is proper because the Legislature intended to expand the justice court's jurisdiction when it amended NRS 3.245. We disagree, as there is no evidence that the Legislature intended to expand, nor delegate the power to expand, the jurisdiction of the justice courts. *See Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 899, 34 P.3d 509, 514 (2001) (''[T]he jurisdictional boundaries of Nevada's justice courts are defined by the [L]egislature.''). Furthermore, NRS 171.196(1) unequivocally states that ''[i]f an offense is not triable in the Justice Court, the defendant must not be called upon to plead.'' We must assume that the Legislature would have amended NRS 171.196(1) if it intended NRS 3.245 to permit justice courts to accept felony pleas. *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1156 (2010) (''The presumption is always against the intention to repeal where express terms are not used.'' '' (quoting *State v. Donnelly*, 20 Nev. 214, 217, 19 P. 680, 681 (1888))).[1] The Legislature provided no limitations with regard to who may serve as a master.[2]

---

[1]For the same reasons, we reject the State's argument that the Legislature delegated the determination of the justice courts' jurisdiction to the judicial branch, thereby allowing each district court to determine its own jurisdiction in relation to each justice court.

[2]While the Legislature did not specifically address the possibility of justices of the peace serving as masters, there were repeated discussions regarding the wide degree of deference the Legislature should give the judiciary in setting forth the rules. *See, e.g.*, Hearing on A.B. 133 Before the Assembly Judiciary Comm., 72d Leg. (Nev., March 6, 2003) (statement of then-Judge Hardesty asking for flexibility in allowing the judiciary to determine the rules for masters); Hearing on A.B. 133 Before the Assembly Judiciary Comm., 72d Leg. (Nev., March 11, 2003) (statement of Assemblyman John Oceguera) (''I feel that the Supreme Court would be in a position to take care of their own rule-making process, and I think they have done so in the past. I don't have any problem making rules for them; however, I think, in this case that they should make the rules for the masters.'').

By allowing justices of the peace to be appointed as district court masters, EDCR 1.48 merely permits individuals who are qualified based on their judicial experience to be appointed to serve as district court masters. The fact that justices of the peace might also serve as district court masters is only *incidental to* their roles as justices of the peace and is not an unconstitutional judicial expansion of the justice court's jurisdiction.[3] To this extent, we disagree with our dissenting colleagues' misapprehension that EDCR 1.48 permits justices of the peace to serve as district court masters *by virtue* of their positions as justices of the peace.

In reaching this conclusion, we distinguish this case from our recent opinion, *Hernandez v. Bennett-Haron*, 128 Nev. 580, 287 P.3d 305 (2012). In *Hernandez*, the appellants challenged the constitutionality of a Clark County ordinance requiring the chief judge of the local township to appoint a justice of the peace to preside over inquests involving police officer-involved deaths. *Id.* at 586, 287 P.3d at 308. They argued that the ordinance violated Article 6, Section 8 of the Nevada Constitution because ''only the Legislature has the authority to determine, by law, the jurisdictional limits of the justices of the peace.'' *Id.* at 593, 287 P.3d at 314. In response, the American Civil Liberties Union (ACLU) contended that ''a justice of the peace is acting as a presiding officer of an investigatory body outside the purview of the justice court and is not acting with the authority of a justice court magistrate.'' *Id.* at 593 n.6, 287 P.3d at 314 n.6. We rejected the ACLU's contention, stating:

> The ACLU has pointed to no authority that allows an entity other than the Legislature to assign duties to the justices of the peace, judicial or otherwise; nonetheless, justices of the peace are appointed as presiding officers of the inquest by virtue of their positions as justices of the peace.

Id.

Hernandez is distinguishable for two reasons. First, the Legislature in NRS 3.245 expressly provided for the appointment of district court masters and gave the judiciary the authority to determine who may serve as a district court master. In contrast, the Clark County ordinance at issue in *Hernandez* usurped the Legislature's authority by expanding the official duties of a justice of the peace without a grant of Legislative authority to do so. *Id.* at 596, 287 P.3d at 316. Second, unlike Clark County's ordinance, which required justices of the peace to preside over inquests ''by virtue of their positions as justices of the peace,'' EDCR 1.48 does not expand the jurisdiction of justice courts or assign duties to justices of

---

[3]The practice of justices of the peace serving in dual judicial roles is not unprecedented in Nevada. For example, NRS 5.020(3) allows justices of the peace to simultaneously serve as municipal court judges.

the peace. *Hernandez*, 128 Nev. at 593 n.6, 287 P.3d at 314 n.6. EDCR 1.48 does not permit justices of the peace to take felony pleas by virtue of their positions as justices of the peace, but merely allows a justice of the peace to be appointed to the separate role of a district court master. Accordingly, in this case, Judge Saragosa did not take Frederick's felony plea by virtue of her role as justice of the peace. Instead, she was acting in her role as an appointed district court master under EDCR 1.48.

In conclusion, the Legislature granted this court the broad authority to set forth rules providing for the appointment of district court masters, and this very court approved EDCR 1.48 following a public hearing. Public Hearing on ADKT No. 363 Before the Nevada Supreme Court (Nov. 18, 2003). Given that this court did not usurp the Legislature's power as the county ordinance did in *Hernandez*, we respectfully disagree with our dissenting colleagues' opinion that our conclusion vitiates our prior holding in *Hernandez*.[4]

Because Frederick's guilty plea was accepted by a lawfully appointed district court master in accordance with EDCR 1.48, we reverse the district court's order granting Frederick's motion to withdraw his felony plea.

GIBBONS, DOUGLAS, and SAITTA, JJ., concur.

HARDESTY, J., with whom PICKERING, C.J., and CHERRY, J., agree, concurring in part and dissenting in part:

The Nevada Constitution gives the Legislature exclusive authority to define the jurisdiction of our justice courts. Nev. Const. art. 6, § 8 (''The Legislature shall determine the number of Justices of the Peace to be elected in each city and township of the State, and shall fix by law . . . the limits of their civil and criminal jurisdiction . . . .''). *See also Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 899, 34 P.3d 509, 514 (2001) (''[T]he jurisdictional boundaries of Nevada's justice courts are defined by the [L]egislature.''). NRS 4.370(3) limits the criminal jurisdiction of the justice courts to misdemeanors, ''except as otherwise provided by specific statute.'' Going further, NRS 171.196(1) states, in mandatory terms, ''[i]f an offense is not triable in the Justice Court, the defendant *must not* be called upon to plead.'' (Emphasis added.) Together, the Constitution and statutes deny justices of the peace authority to accept felony pleas.

---

[4]The dissent also makes note of the fact that Judge Saragosa took the felony plea in the same courtroom and in the same robes in which she took the misdemeanor plea. Beyond the incidental convenience afforded to the process, we do not see the particular relevance of this fact to the question of whether EDCR 1.48 allows a justice of the peace to serve separately as a district court master.

The issue in this case is clear. Can the judicial branch, pursuant to local district court rule, give a Nevada justice of the peace authority over felony guilty pleas, when the Legislature has expressly denied that authority?

NRS 3.245 empowers the district court to appoint masters to hear plea negotiations in felony and gross misdemeanor cases. While the majority maintains that NRS 3.245 permits justices of the peace to be appointed as district court masters, they acknowledge that NRS 3.245 does not, by its terms, override the general and express prohibitions in NRS 4.370 and NRS 171.196(1), respectively. Majority opinion *ante* at 256 (the Legislature did not ''intend[ ] to expand, nor delegate the power to expand, the jurisdiction of . . . justice courts'' when it amended NRS 3.245). Indeed, nothing in the legislative history of NRS 3.245 suggests or even implies anything to the contrary.

In the absence of any ''specific'' statutory provision to expand the authority of a justice of the peace to accept felony pleas, the majority turns to EDCR 1.48, which permits qualified judges to serve as masters and claims that the local rule does not unconstitutionally expand the jurisdiction of the justices of the peace. I disagree.

Through EDCR 1.48, the district court allows a justice of the peace, by virtue of his or her status as a justice of the peace, to perform the duties granted to masters under NRS 3.245. In doing so, the court rule grants justices of the peace jurisdiction in felony cases that the Legislature has expressly denied them. To this extent, EDCR 1.48 expands the justice of the peace's jurisdiction, and it is unconstitutional. As this court recently held in *Hernandez v. Bennett-Haron*, only the Legislature can expand the jurisdiction of the justices of the peace. 128 Nev. 580, 596, 287 P.3d 305, 316 (2012) (holding that ''by providing for the participation of justices of the peace in Clark County's inquest proceedings[,] . . . the Clark County Board of County Commissioners has unconstitutionally impinged on the Legislature's constitutionally delegated authority''); *see also* Nev. Const. art. 6, § 8 (''The Legislature shall determine . . . the limits of [a justice of the peace's] civil and criminal jurisdiction . . . .''). As such, I conclude that the district courts cannot expand the jurisdiction of the justices of the peace through a local rule such as EDCR 1.48. To hold otherwise vitiates our holding in *Hernandez*.

The majority's reliance on a justice of peace's judicial qualifications to serve as a master ignores the facts of this case. Frederick appeared in justice court before Judge Saragosa for a preliminary hearing on a misdemeanor charge and a felony charge, after entering into a plea agreement with the State. Frederick pleaded guilty to the misdemeanor charge and was sentenced by Judge Saragosa. Immediately thereafter, wearing the same robes and sit-

ting in the same courtroom, Judge Saragosa conducted a plea colloquy on the felony charge and accepted Frederick's plea. After accepting his plea, she bound Frederick over to district court for sentencing.

In this instance, Frederick tendered his plea to a sitting justice of the peace during the course of his criminal proceeding over which the justice of the peace had only partial jurisdiction. It is unreasonable to argue that Judge Saragosa transformed from justice of the peace to master between the time Frederick entered his plea on the misdemeanor and, a moment later, when he entered his plea on the felony charge.

I take no issue with the Legislature's decision to delegate to district courts the authority to designate district court hearing masters. I also recognize the efficiency to be achieved by expanding the authority of the justices of the peace to take felony-related pleas. However, the Constitution vests the authority to make this decision in the Legislature, not the courts.

Accordingly, I must dissent.

ALEXANDER FALCONI, AN INDIVIDUAL, PETITIONER, *v.* SECRETARY OF STATE OF THE STATE OF NEVADA, RESPONDENT, AND MONICA ANN FARRAR, REAL PARTY IN INTEREST.

No. 59554

April 25, 2013 299 P.3d 378

Original proper person petition for a writ of mandamus challenging the issuance of a fictitious address under NRS 217.462-.471.

Mother applied to Secretary of State for a fictitious address as part of Nevada's fictitious address program for domestic violence victims, and father attempted to challenge the issuance of the fictitious address through a petition for judicial review. The district court denied petition, and appeal was taken. The supreme court affirmed that denial. Father then filed original petition for a writ of mandamus, seeking an order directing the Secretary of State to remove mother from the fictitious address program. The supreme court, CHERRY, J., held that: (1) temporary restraining order constituted sufficient evidence to support mother's application for a fictitious address; (2) as matter of apparent first impression, father could seek the disclosure of mother's fictitious address in the district court by extraordinary writ, and in determining whether to

grant the writ, the district court had to consider whether mother could establish that father was a perpetrator of domestic violence; (3) Secretary of State must be made a party to petitioner's petition for writ of mandamus to compel disclosure of fictitious address; and (4) the district court, rather than the supreme court, was the appropriate tribunal to consider father's petition for mandamus.

Petition denied.

Alexander Falconi, Reno, in Proper Person.

Catherine Cortez Masto, Attorney General, and *C. Wayne Howle*, Solicitor General, Carson City, for Respondent.

Fry & Berning, LLC, and *Kathrine I. Berning*, Reno, for Real Party in Interest.

1. COURTS.
   Extraordinary writ relief is within the supreme court's discretion.
2. COURTS.
   The supreme court may exercise its discretion to consider a writ petition when the petitioner does not have an adequate remedy at law and when an important issue of law needs clarification.
3. MANDAMUS.
   The supreme court would consider father's petition for a writ of mandamus, seeking an order directing the Secretary of State to remove mother from the fictitious address program for domestic violence victims; father presented important legal issues, regarding the fictitious address statutes and a co-parent's ability to seek disclosure of the other parent's address, that needed clarification, and he did not have an adequate remedy at law. NRS 217.462.
4. PROTECTION OF ENDANGERED PERSONS.
   Secretary of State was required to issue fictitious address to mother, under Nevada's fictitious address program for domestic violence victims, upon the presentation of temporary restraining order, which mother had obtained against father a year earlier and which had expired months before decision awarding them joint legal and physical custody of their child born out of wedlock. NRS 217.462(2).
5. PROTECTION OF ENDANGERED PERSONS.
   Fictitious address program for domestic violence victims does not authorize the Secretary of State to investigate or determine whether a protective order was issued based on a finding of domestic violence or on a finding of a potential threat of violence before approving an application. NRS 217.462(4).
6. PROTECTION OF ENDANGERED PERSONS.
   Temporary restraining order, which mother had obtained against father a year earlier and which had expired months before decision awarding them joint legal and physical custody of their child, constituted sufficient evidence to support mother's application for a fictitious address under Nevada's fictitious address program for domestic violence victims, and thus, upon receipt of the application with the required supporting ev-

idence, the Secretary of State was obligated to accept mother into the program and issue her a fictitious address without inquiring into the circumstances underlying the issuance of the temporary restraining order. NRS 217.462(4).

7. CHILD CUSTODY.

Parents who share joint legal custody of a child each have a legal responsibility for their child and for making major decisions regarding the child, including those related to the child's health, education, and religious upbringing, and to make these decisions requires that both parents be informed regarding the child's circumstances and experiences.

8. CHILD CUSTODY.

When a parent who shares joint custody of his or her child enters into the fictitious address program for domestic violence victims, the custodial parenting issues become intertwined with the domestic violence victim's need for protection, and thus, in such a case, the rights of a custodial parent to know where his or her child resides must be balanced against the important state interest in protecting victims of domestic violence served by the state's fictitious address program. NRS 217.464.

9. COURTS; PROTECTION OF ENDANGERED PERSONS.

As a co-parent, father could seek the disclosure of mother's fictitious address, issued in accordance with Nevada's fictitious address program for domestic violence victims, in the district court by extraordinary writ; in determining whether to grant the writ, the district court had to consider whether mother could establish that father was a perpetrator of domestic violence, and, if established, the burden shifted to father to show that, despite the domestic violence, disclosure was in the child's best interest.

10. MANDAMUS.

Because the Secretary of State is charged with keeping a home address of participant in Nevada's fictitious address program for domestic violence victims confidential and of releasing that address only upon court order, the Secretary must be made a party to petitioner's petition for writ of mandamus, to compel disclosure, as a respondent, and the program participant, as the party seeking to maintain confidentiality, must be included as a real party in interest and required to oppose the writ petition if the petitioner establishes an initial right to relief, and in this way, a petition for a writ of mandamus allows the petitioner to give proper notice and bring all interested parties into the proceeding. NRS 217.464(2)(b).

11. MANDAMUS.

When filing a petition for a writ of mandamus to compel disclosure of participant's fictitious address, issued in accordance with Nevada's fictitious address program for domestic violence victims, it is the petitioner's burden to establish that writ relief is warranted. NRS 217.464(2)(b).

12. CHILD CUSTODY.

Custodial parent generally has a right to know where his or her child resides, even when the child is in the other parent's physical custody.

13. PROTECTION OF ENDANGERED PERSONS.

By demonstrating that he or she shares joint legal custody with participant in Nevada's fictitious address program for domestic violence victims, a parent may meet the initial burden of proving that he or she has a right to know the co-parent program participant's home address when the child is living during his or her custodial period with that parent. NRS 217.464.

14. MANDAMUS; PROTECTION OF ENDANGERED PERSONS.
Party seeking to maintain his or her confidential address under Nevada's fictitious address program for domestic violence victims, as the real party in interest, has the burden of proving that the party seeking disclosure was the perpetrator of an act of domestic violence against him or her, or against the parties' child, and that the party fears further domestic violence; if the real party in interest establishes so, the burden shifts back to petitioner, who filed petition for writ of mandamus seeking disclosure, to demonstrate that confidentiality is nonetheless not in the child's best interest under the state's best interest factors; if the court ultimately determines that disclosure is in the child's best interest, the court should order release of the confidential address, and if not, the address may remain confidential. NRS 125.480(4), (5), 217.464.

15. MANDAMUS.
The district court, rather than the supreme court, was the appropriate tribunal to consider father's petition for mandamus, seeking disclosure of mother's fictitious address under Nevada's fictitious address program for domestic violence, because factual determinations were required to be made, and, to the extent possible, such a petition should be filed in the same district court in which any child custody order has been entered. NRS 217.462.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

Monica Ann Farrar and Alexander Falconi share joint legal and physical custody of their minor child. Farrar properly obtained, based on evidence of domestic violence, a fictitious address from the Secretary of State, who cannot disclose Farrar's true address without a court order. The question we must decide is whether Falconi may seek the disclosure of Farrar's home address. We conclude that, as a co-parent, Falconi may seek the disclosure of Farrar's address in the district court by extraordinary writ, and in determining whether to grant the writ, the district court must consider whether Farrar can establish that Falconi was a perpetrator of domestic violence. If established, the burden shifts to Falconi to show that despite the domestic violence, disclosure is in the child's best interest. As this is not the proper court to consider Falconi's petition for extraordinary relief, we deny the petition.

FACTUAL BACKGROUND

Petitioner Alexander Falconi and real party in interest Monica Farrar lived together and had a child, but troubles led to the end of the relationship. On one occasion, Falconi called the police to report a suicide attempt by Farrar, for which she was hospitalized for one week followed by ongoing medical care. Another time, the

police were called to the parties' home to investigate a fight between Falconi and Farrar. In the police report from that incident, Farrar asserted that Falconi had shoved her and thrown her onto the couch. She also reported that she had grabbed his shoe and would not let go, so he pulled her onto the couch, wrapped his legs around her, and then pushed her away. Neither party was arrested as a result of this incident.

Following these events, the parties separated, and Falconi instituted child custody proceedings in the district court to establish the parties' respective custody and visitation rights. One month later, and five months after the aforementioned fight involving the police, Farrar obtained a temporary restraining order from a domestic relations hearing master, which prohibited Falconi from having any contact with Farrar or the parties' child and which gave Farrar temporary custody of the child. The temporary restraining order was issued on a form stating that the court had found ''that an act of domestic violence ha[d] occurred and/or [that Falconi] represent[ed] a credible threat to the physical safety of the above-named Applicant.'' Nothing in the record establishes the specific grounds on which the restraining order was sought or the basis for the grant of the order.

At a subsequent hearing regarding the possible extension of the restraining order, Farrar testified that, at different times, Falconi had pushed her, thrown her down the stairs, kicked her, slapped her, and followed her home from work without her permission. She also asserted that Falconi had ''threatened to take her out'' during a phone conversation. Falconi denied telling Farrar that he would ''take her out'' and denied striking her, although he admitted that he had put his hands on her on one occasion when she tried to block him from leaving. At the conclusion of the hearing, the district court extended the temporary restraining order for an additional two and a half months. Thereafter, Farrar apparently did not seek any further extensions of the temporary restraining order.

Three months after the restraining order expired, the district court awarded the parties joint legal and physical custody of their child. In doing so, the court did not discuss the temporary restraining order or make any findings regarding domestic violence. It does not appear from the record before us that any arguments or evidence were presented to the district court regarding any domestic violence issues or the temporary restraining order.

Five months after the issuance of the child custody order, Farrar applied to respondent Secretary of State for a fictitious address as part of Nevada's fictitious address program for domestic violence victims. *See* NRS 217.462-.471. Although it is not clear from the record what prompted Farrar to take this action, in her application, Farrar stated that she was a victim of domestic assault

and stalking. In support of her application, Farrar submitted the initial form restraining order that she had obtained a year earlier.

Based on her application and submission of the temporary restraining order, the Secretary of State issued Farrar a fictitious address. Initially, Falconi attempted to challenge the issuance of the fictitious address through a petition for judicial review in the district court, which that court denied on the merits. On appeal from that order, this court affirmed that denial, but did so solely on the ground that the district court lacked jurisdiction under Nevada's Administrative Procedure Act to review the Secretary of State's decision. Falconi then filed in this court this original petition for a writ of mandamus, seeking an order directing the Secretary of State to remove Farrar from the fictitious address program.

In his petition, Falconi primarily argues that the Secretary of State should have considered whether the temporary restraining order submitted by Farrar in support of her application was specific evidence that she had been a victim of domestic violence. He further contends that the Secretary should have concluded that the temporary restraining order was insufficient for this purpose, and therefore, denied Farrar's application. In making this argument, Falconi also asserts that he has a fundamental liberty interest in parenting his child that is infringed on by Farrar's use of a fictitious address.

DISCUSSION

[Headnotes 1-3]

Extraordinary writ relief is within this court's discretion. *See Walker v. Eighth Judicial Dist. Court*, 120 Nev. 815, 819, 101 P.3d 787, 790 (2004). We may exercise our discretion to consider a writ petition when the petitioner does not have an adequate remedy at law and when ''an important issue of law needs clarification.'' *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 558-59 (2008). Here, Falconi presents important legal issues, regarding the fictitious address statutes and a co-parent's ability to seek disclosure of the other parent's address, that need clarification, and he does not have an adequate remedy at law. Thus, our consideration of this writ petition is appropriate.

As Falconi's arguments mainly focus on the process through which a fictitious address is obtained, we begin by examining the process and operation of the fictitious address program before turning to Falconi's specific arguments.

Overview of the fictitious address program

Nevada's fictitious address program was enacted in 1997 to help domestic violence victims establish and maintain confidential home

addresses. *See* S.B. 155, 69th Leg. (Nev. 1997) (Bill Summary). To accomplish this goal, the fictitious address program provides that ''[a]n adult person, a parent or guardian acting on behalf of a child, or a guardian acting on behalf of an incompetent person may apply to the Secretary of State to have a fictitious address designated by the Secretary of State serve as the address of the adult.'' NRS 217.462(1).

In order to receive a fictitious address, an individual must submit to the Secretary of State an application containing ''[s]pecific evidence showing that the adult, child or incompetent person has been a victim of domestic violence, sexual assault or stalking before the filing of the application.'' NRS 217.462(2)(a). The relevant statute allows, as examples of specific evidence, ''an applicable record of conviction, a temporary restraining order or other protective order.'' NRS 217.462(4). Once an applicant submits an application accompanied by the required evidence, the Secretary of State *must* approve the application, NRS 217.462(4), making the applicant a participant in the program, and *must* issue the participant a fictitious address. NRS 217.464(1)(a).

Following the issuance of the fictitious address, the Secretary of State forwards any mail received for the participant to the participant at his or her actual address. NRS 217.464(1)(b). The Secretary of State is further prohibited from making records containing the participant's name, confidential address, or fictitious address available for inspection and copying unless the ''address is requested by a law enforcement agency . . . or [t]he Secretary of State is directed to do so by lawful order of a court of competent jurisdiction, in which case the Secretary of State shall make the address available to the person identified in the order.'' NRS 217.464(2).

The Secretary of State may cancel a participant's fictitious address at any time if the participant changes his or her confidential address without properly notifying the Secretary, the Secretary determines that the participant knowingly provided false or incorrect information in the application, or the participant becomes a candidate for public office. NRS 217.468(3). But after four years, a participant's fictitious address will be canceled by the Secretary of State as a matter of course. NRS 217.468(1). To prevent cancellation based on the expiration of time, a participant must demonstrate ''to the satisfaction of the Secretary of State that the participant remains in imminent danger of becoming a victim of domestic violence, sexual assault or stalking.'' NRS 217.468(2). The process for making such a demonstration and seeking to extend the use of the fictitious address is not set forth in the program statutes.

Issuance of the fictitious address to Farrar was proper

[Headnotes 4, 5]

Falconi argues that the temporary restraining order was insufficient to support the issuance of a fictitious address in light of the statutory scheme set forth above. We conclude that contrary to Falconi's assertions, the Secretary of State was required to issue the fictitious address to Farrar upon the presentation of the temporary restraining order. The fictitious address program does not authorize the Secretary of State to investigate or determine whether a protective order was issued based on a finding of domestic violence or on a finding of a potential threat of violence before approving an application. *See* NRS 217.462(4); *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) (explaining that ''when a statute's language is plain and its meaning clear, the courts will apply that plain language'').

The statutes' legislative history reveals that the Legislature specifically declined to authorize the Secretary of State to inquire into the circumstances underlying the evidence presented in support of an application. In fact, early versions of the bill required the Secretary to make a determination as to whether an applicant had actually been a victim of domestic violence, but the bill was ultimately modified to remove any potential decision-making function from the Secretary's role in issuing a fictitious address. *Compare* S.B. 155(2)(4), 69th Leg. (Nev. 1997) (second reprint), *with* S.B. 155(2)(4), 69th Leg. (Nev. 1997) (third reprint); *see also* Hearing on S.B. 155 Before the Assembly Comm. on Ways and Means, 69th Leg. (Nev., June 26, 1997) (expressing concern that the earlier version of the proposed statute required the Secretary of State to exercise judgment and make legal determinations).

[Headnote 6]

In the present matter, Farrar completed the application for entry into the program and attached the temporary restraining order as evidence in support of the application.[1] NRS 217.462(4). Regardless of Falconi's arguments concerning the standards for obtaining a temporary restraining order, because the fictitious address statutes specifically provide that a temporary restraining order constitutes sufficient evidence to support an application for a fictitious address, Falconi's arguments in this regard necessarily fail. *See id.*; *Leven*, 123 Nev. at 403, 168 P.3d at 715. Thus, upon receipt of the application with the required supporting evidence, the

[1]Although we take no position on the fact that the temporary restraining order had expired when Farrar filled out her application, we note that NRS 217.462 is silent as to whether a temporary restraining order must be active in order to constitute specific evidence of domestic violence.

Secretary of State was obligated to accept Farrar into the program and issue her a fictitious address without inquiring into the circumstances underlying the issuance of the temporary restraining order. *See* NRS 217.462(4). As a result, Falconi's argument that the Secretary of State should have evaluated and rejected Farrar's application is not supported by the statute and does not entitle him to writ relief. *See* NRS 34.160 (providing that a petition for a writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (same).

Effect of the fictitious address program on custodial parenting rights

While we conclude that the Secretary of State was required to accept Farrar into the program, Falconi's arguments, especially his focus on the fictitious address's interference with his ability to parent, and the facts of this case highlight potential problems that may arise when a parent who shares joint custody of his or her child is admitted into the fictitious address program; we examine the interplay between the fictitious address program and a party's custodial parenting rights.

Balancing the protection of domestic violence victims with parental rights

[Headnote 7]

Parents who share joint legal custody of a child each have a legal responsibility for their child and for ''making major decisions regarding the child, including [those related to] the child's health, education, and religious upbringing.'' *Rivero v. Rivero*, 125 Nev. 410, 420, 216 P.3d 213, 221 (2009); *see also Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 71, 64 P.3d 1056, 1059 (2003) (recognizing that parents have a ''liberty interest in the care, custody, and management of their children'' that is fundamental but not absolute). To make these decisions requires that both parents be informed regarding the child's circumstances and experiences. *See Rivero*, 125 Nev. at 420-21, 216 P.3d at 221 (discussing that parents in a joint legal custody situation ''must consult with each other to make major decisions regarding the child's upbringing''). Knowing where the child resides allows a parent to have input regarding the environment in which the child is being raised.

[Headnote 8]

When a parent who shares joint custody of his or her child enters into the fictitious address program, the custodial parenting issues become intertwined with the domestic violence victim's need for protection. Thus, in such a case, the rights of a custodial par-

ent to know where his or her child resides must be balanced against the important state interest in protecting victims of domestic violence served by the state's fictitious address program.[2] *See Grant v. Pugh*, 887 N.Y.S. 2d 802, 807-08 (Fam. Ct. 2009) (recognizing that it may be proper to balance an individual's constitutional rights against a state's interest in protecting domestic violence victims).

Procedure for seeking disclosure of a co-parent's confidential address

[Headnote 9]

The Nevada Legislature recognized that such conflicting interests may arise in certain cases, as one of the fictitious address statutes specifically permits a court to order the Secretary of State to disclose a participant's address to a specific party. *See* NRS 217.464(2)(b) (providing that the Secretary of State shall release a participant's address if ''directed to do so by lawful order of a court of competent jurisdiction''); *cf. Sagar v. Sagar*, 781 N.E.2d 54, 59 (Mass. App. Ct. 2003) (explaining that when divorcing parents seek to limit each other's custody rights, the state must act as mediator). This statute does not delineate the procedure by which a court could do so, however, and thus, we take the opportunity to address this issue here. Specifically, we must determine what procedure a court should apply in resolving a request to disclose a program participant's confidential home address. As neither our statutory nor our case authority sheds light on this question, we look to extrajurisdictional authority to guide our determination as to how Nevada courts should approach a custodial parent's request for release of a program participant co-parent's confidential home address.

A majority of states have enacted confidential address statutes,[3] but only one court has addressed a situation similar to the one pre-

---

[2]When domestic violence is alleged to have occurred before the issuance of a custody order, the district court will generally take these competing interests into account in fashioning a custody arrangement. *See* NRS 125.480(4)(k) (requiring a district court to consider whether either parent seeking custody ''has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child''). Nevertheless, the particular facts of this case demonstrate that, in light of the lack of discretion on the part of the Secretary of State in accepting an applicant, as well as the absence of any time limit as to when the evidence supporting the application may have been issued, circumstances may occur where a co-parent, who was previously the subject of a temporary restraining order that is used to support a fictitious address application, may at some point be awarded custody of his or her child.

[3]These states are Arizona, Ariz. Rev. Stat. Ann. § 41-163 (Supp. 2012); California, Cal. Gov't Code § 6206 (West Supp. 2013); Colorado, Colo. Rev. Stat. § 24-30-2105 (2012); Connecticut, Conn. Gen. Stat. § 54-240c (2011); Delaware, Del. Code Ann. tit. 11, § 9613 (Supp. 2012); Florida, Fla. Stat.

sented here. *Sacharow v. Sacharow*, 826 A.2d 710, 714 (N.J. 2003). In *Sacharow*, the New Jersey Supreme Court addressed a situation in which the parties were going through divorce and custody proceedings, and while the case was pending, one party, Cynthia Sacharow, obtained a fictitious address upon the filing of an application attesting that she had reason to believe that she was the victim of domestic violence and that she feared further abuse. *Id*. The applicable New Jersey address confidentiality statute provides that a person may apply in accordance with the procedures set forth by the secretary of state and on a prescribed form to the secretary for a fictional address and that the application must be approved if it ''contains: (1) a sworn statement by the applicant that the applicant has good reason to believe: (a) that the applicant is a victim of domestic violence as defined in this act; and (b) that the applicant fears further violent acts from the applicant's assailant.'' N.J. Stat. Ann. § 47:4-4(a)(1) (West 2003).

In the lower court proceedings regarding the parties' divorce, the Sacharows' stipulated to joint legal custody with Cynthia to have ''sole residential custody,'' but left it to the district court to determine whether she would have to disclose her true residential address as requested by her then husband, Walter Sacharow. *Sacharow*, 826 A.2d at 714. On consideration of that issue, the district court ordered Cynthia to disclose her true address to Walter. *Id*. Cynthia subsequently sought review of the determination requiring disclosure of her true address. *Id*. at 715.

On review, the *Sacharow* court held that courts in general were not bound by the fictitious address program, but concluded that Cynthia may nonetheless have a right to keep her address a secret. *Id*. at 720. In order to balance the competing interests of Cynthia

---

Ann. § 741.403 (West 2010); Idaho, Idaho Code Ann. § 19-5703 (Supp. 2012); Illinois, 750 Ill. Comp. Stat. Ann. 61/15 (West 2009); Indiana, Ind. Code Ann. § 5-26.5-2-2 (LexisNexis 2006); Kansas, Kan. Stat. Ann. § 75-457 (Supp. 2012); Louisiana, La. Rev. Stat. Ann. § 44:52 (2012); Maine, Me. Rev. Stat. tit. 5, § 90-B (2012); Maryland, Md. Code Ann., Fam. Law § 4-522 (LexisNexis 2012); Massachusetts, Mass. Ann. Laws ch. 9A, § 2 (LexisNexis 2012); Minnesota, Minn. Stat. Ann. § 5B.03 (West Supp. 2013); Mississippi, Miss. Code Ann. § 99-47-1 (Supp. 2012); Missouri, Mo. Ann. Stat. § 589.663 (West 2011); Montana, Mont. Code Ann. § 40-15-117 (2011); Nebraska, Neb. Rev. Stat. § 42-1204 (2004); New Hampshire, N.H. Rev. Stat. Ann § 7:43 (2012-13); New Jersey, N.J. Stat. Ann. § 47:4-4 (West 2003); New Mexico, N.M. 2012-13 Stat. Ann. § 40-13-11 (Supp. 2008); New York, N.Y. Exec. Law § 108 (McKinney Supp. 2013); North Carolina, N.C. Gen. Stat. Ann. § 15C-4 (2011); Oklahoma, Okla. Stat. tit. 22, § 60-14 (2003); Oregon, Or. Rev. Stat. § 192.826 (2011); Pennsylvania, 23 Pa. Cons. Stat. Ann. § 6705 (West 2010); Rhode Island, R.I. Gen. Laws § 17-28-3 (2003); Texas, Tex. Code Crim. Proc. Ann. art. 56.83 (West Supp. 2012); Vermont, Vt. Stat. Ann. tit. 15, § 1152 (Supp. 2012); Virginia, Va. Code Ann. § 2.2-515.2 (2011); Washington, Wash. Rev. Code. Ann. § 40.24.030 (West 2012); and West Virginia, W. Va. Code Ann. § 48-28A-103 (LexisNexis 2009).

in having a confidential address and Walter in knowing where his child was living, the *Sacharow* court concluded that a determination must be made as to whether disclosure of Cynthia's address was in the child's best interest, and therefore, the court reversed the district court's order requiring disclosure of Cynthia's address and remanded the matter to the district court for the purpose of addressing that issue. *Id.* at 721-22.

The court directed that, on remand, because Cynthia was seeking to curtail Walter's parental rights, she would have the burden of demonstrating that confidentiality was in the child's best interest. *Id.* at 722. To meet this burden, the *Sacharow* court held that Cynthia must prove that she had been the victim of domestic violence at Walter's hands and that she reasonably feared future violence. *Id.* If she did so, the burden would then shift to Walter to establish that address confidentiality was not in the child's best interest, based, among other things, on the good faith of the parties, their prior history of dealings, their relationship with the child, any efforts by one parent to alienate the child from the other, the effect confidentiality would have on their relationships, and any special needs of the child. *Id.*

We find the reasoning of the *Sacharow* court persuasive because it requires that any decision to compel disclosure of a program participant's true address take into account both the interest of a domestic violence victim in remaining hidden from the person who harmed him or her and the interest of a custodial parent in making decisions regarding his or her child. We therefore adopt this framework for Nevada courts considering a request for disclosure of a confidential address and adapt it to be consistent with Nevada law.

Petition for writ of mandamus

The *Sacharow* court addressed the matter before it in the context of an appeal from an order entered in the parties' divorce and child custody action. Had this issue arisen in the context of the Farrar and Falconi's custody action, Falconi may have been able to file a motion in that action seeking an order compelling disclosure of Farrar's home address. But here, Farrar did not obtain the fictitious address until after the custody order was entered, and thus, we must address the procedure by which Falconi may seek an order compelling disclosure of Farrar's home address outside the context of the custody proceeding.

[Headnote 10]

For a writ of mandamus to issue, the petitioner must have some right to relief. *See* NRS 34.160 (providing that ''[t]he writ may be issued . . . to compel the admission of a party to the use and enjoyment of a right . . . to which the party is entitled and from

which the party is unlawfully precluded by such . . . person''). In challenging confidentiality, the petitioner is claiming that he or she is being barred from the parental right of knowing where his or her child lives. *See Rivero*, 125 Nev. at 420, 216 P.3d at 221; *Kirkpatrick*, 119 Nev. at 71, 64 P.3d at 1059. Because the Secretary of State is charged with keeping a program participant's home address confidential and of releasing that address only upon court order, *see* NRS 217.464(2)(b), the Secretary must be made a party to the writ petition as a respondent. And the program participant, as the party seeking to maintain confidentiality, must be included as a real party in interest and required to oppose the writ petition if the petitioner establishes an initial right to relief. In this way, a petition for a writ of mandamus allows the petitioner to give proper notice and bring all interested parties into the proceeding.

Burden to establish disclosure

[Headnotes 11-13]

When filing a petition for a writ of mandamus to compel disclosure, it is the petitioner's burden to establish that writ relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). A custodial parent generally has a right to know where his or her child resides, even when the child is in the other parent's physical custody. *See Rivero*, 125 Nev. at 420-21, 216 P.3d at 221; *Kirkpatrick*, 119 Nev. at 71, 64 P.3d at 1059; *see also Sacharow*, 826 A.2d at 722. So, by demonstrating that he or she shares joint legal custody, a parent may meet the initial burden of proving that he or she has a right to know the co-parent program participant's home address when the child is living during his or her custodial period with that parent. *See Rivero*, 125 Nev. at 420-21, 216 P.3d at 221; *see also Sacharow*, 826 A.2d at 722.

[Headnote 14]

If the party seeking disclosure meets this initial burden, the analysis discussed in *Sacharow* will then come into play. In particular, the party seeking to maintain the confidential address, as the real party in interest, will have the burden of proving that the party seeking disclosure was the perpetrator of an act of domestic violence against him or her or against the parties' child and that he or she fears further domestic violence. *See Sacharow*, 826 A.2d at 722; *cf.* NRS 125.480(5) (providing that if a court determines ''by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against the child, a parent of the child or any other person residing with the child,'' a rebuttable presumption arises against that parent having sole or joint custody of the child). If the real party in interest establishes so, the burden shifts back to peti-

tioner, who must then demonstrate that confidentiality is nonetheless not in the child's best interest under this state's best interest factors. *See* NRS 125.480(4) (setting forth the factors for a court to consider in determining a child's best interest, including the amount of conflict between the parents, the parents' ability to cooperate to meet the child's needs, the parents' mental and physical health, and any previous parental abuse or neglect of the child); *see also Sacharow*, 826 A.2d at 722. If the court ultimately determines that, under this analysis, disclosure is in the child's best interest, the court should order release of the confidential address. If not, the address may remain confidential.

[Headnote 15]

Under this approach, the court addressing such a petition will necessarily be required to make factual determinations. For this reason, we conclude that the district court, rather than this court, is the appropriate tribunal for seeking this relief. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that ''an appellate court is not an appropriate forum in which to resolve disputed questions of fact,'' and that ''[w]hen disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court''). And in light of the close relationship between child custody issues and the issues implicated in this situation, we conclude that, to the extent possible, such a petition should be filed in the same district court in which any child custody order has been entered. Here, however, because the Secretary of State was required to issue the fictitious address under the program statutes, and because we are not the proper court to determine, in the first instance, whether the Secretary of State should be ordered to disclose Farrar's confidential home address, we deny the petition for a writ of mandamus.[4] *See id.*

HARDESTY and PARRAGUIRRE, JJ., concur.

---

[4]Our denial of this petition does not impair Falconi's right to seek relief in the district court under the procedure outlined in this opinion. Also, because the district court lacked jurisdiction over Falconi's petition for judicial review seeking to overturn the Secretary's admission of Farrar into the fictitious address program and we had not addressed the procedure for compelling disclosure when the district court issued its previous order, the district court's denial of the petition for judicial review in the previous case is not binding on any future determination of this matter.

THE STATE OF NEVADA, DEPARTMENT OF TAXATION, APPELLANT, *v.* CHRYSLER GROUP LLC, RESPONDENT.

No. 58714

May 2, 2013 300 P.3d 713

Appeal from a district court order granting a petition for judicial review in a tax action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Motor vehicle manufacturer sought review of decision of the Nevada Tax Commission denying refunds of the sales taxes that vehicle retailers had collected and remitted when they originally sold two defective vehicles for which manufacturer ultimately reimbursed buyers under the lemon law. The district court found that manufacturer was entitled to refund. The Department of Taxation appealed. The supreme court, HARDESTY, J., held that: (1) manufacturer lacked standing to seek sales tax refund, and (2) Department of Taxation was not required to undertake formal rulemaking in changing its policy that formerly allowed sales tax refunds.

Reversed.

Catherine Cortez Masto, Attorney General, *Deonne E. Contine*, Senior Deputy Attorney General, and *Jedediah R. Bodger*, Deputy Attorney General, Carson City, for Appellant.

Kolesar & Leatham and *Kenneth A. Burns*, Las Vegas; *Akerman Senterfitt* and *Peter O. Larsen*, Jacksonville, Florida, for Respondent.

1. APPEAL AND ERROR.
   Statutory interpretation is a question of law that the supreme court reviews de novo.
2. STATUTES.
   The supreme court must interpret statutes consistent with the intent of the Legislature.
3. STATUTES.
   When a statute's language is plain and unambiguous, the supreme court gives that language its ordinary meaning.
4. TAXATION.
   Motor vehicle manufacturer did not remit the sales tax on vehicles sold by dealership to the Department of Taxation, and thus, manufacturer lacked standing to seek a sales tax refund after it reimbursed purchasers for the vehicles, including sales tax, under the lemon law. NRS 372.630, 372.700, 597.630.
5. TAXATION.
   Motor vehicle manufacturer was not entitled to reimbursement for sales tax that it refunded to vehicle purchasers under the lemon law statute that allowed for such refunds on a full returned merchandise refund in a retail transaction, where manufacturer was not a retailer. NRS 372.025, 597.630.

6. ANTITRUST AND TRADE REGULATION.
   Legislative intent behind Nevada's lemon law is to protect buyers who purchase defective new vehicles. NRS 597.630.
7. TAXATION.
   Vehicle manufacturers are not entitled to a refund of reimbursed sales tax under the lemon law. NRS 597.630.
8. ADMINISTRATIVE LAW AND PROCEDURE.
   Administrative agencies are not bound by stare decisis.
9. ADMINISTRATIVE LAW AND PROCEDURE.
   An agency violates the Administrative Procedure Act (APA) if it engages in rulemaking without following the APA's procedural requirements. NRS 233B.038(1)(a).
10. TAXATION.
    Department of Taxation was not required to undertake formal rulemaking under the Administrative Procedure Act in changing its policy that formerly allowed sales tax refunds to vehicle manufacturers when the manufacturers refunded purchasers under the lemon law; the Department's prior policy was an erroneous interpretation of the law, and upon obtaining an opinion from the Attorney General, the Department noted its erroneous interpretation in a newsletter and stated that its policy change sought to bring the policy into conformity with Nevada's lemon law, and in doing so, the Department did not amend any existing regulations or create a new rule to implement an existing statute, but rather it sought only to correctly implement the existing statute. NRS 597.630.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, HARDESTY, J.:

Respondent Chrysler Group, LLC, a motor vehicle manufacturer, reimbursed two buyers of defective vehicles the full purchase price, including sales tax, pursuant to Nevada's lemon law. Chrysler subsequently sought from appellant Department of Taxation refunds of the sales taxes that the vehicles' retailers had collected and remitted when they originally sold the vehicles to the buyers. Although the Department had previously refunded lemon law sales tax reimbursements to manufacturers, it denied Chrysler's refund requests because the Nevada Attorney General's Office advised the Department that there is no statutory authority for such refunds. In this appeal, we are asked to determine whether Chrysler is entitled to a sales tax refund under NRS 597.630, Nevada's lemon law; NRS 372.630, Nevada's sales and use tax refund statute; and NRS 372.025, Nevada's statute governing gross receipts for retailers, or if Chrysler is otherwise entitled to a refund because the Department previously granted such refunds. Because Nevada law does not allow for such a refund and because the Department is not required to adhere to its prior erroneous interpretation of the law, we conclude that Chrysler is not entitled to a refund.

FACTS AND PROCEDURAL HISTORY

Chrysler's requests for refunds were based on a prior written Department policy in effect since at least 2005 to refund to manufacturers the sales taxes reimbursed under the lemon law. The Department changed this policy in 2009 after being informed by the Nevada Attorney General's Office that refunding the sales tax was not appropriate under Nevada's statutory scheme. Thus, Department auditors denied Chrysler's refund requests because the Department's legal counsel advised the auditors that there was no statutory authority in Nevada permitting the Department to issue the requested sales tax refunds.

Chrysler appealed these decisions to the Department's hearings division, where they were considered together and reversed by an administrative law judge. The administrative law judge found that the tax was an overpayment to the Department because reimbursement of the full purchase price to the buyer resulted in a statutory rescission of the underlying sales contract. As such, the administrative law judge found that Chrysler was entitled to a refund of the sales tax because Chrysler had borne the economic burden of the tax by being required to refund it pursuant to the lemon law.

The Department appealed this decision to the Nevada Tax Commission (NTC), which reversed the hearing division's decision because it concluded that neither the lemon law nor Nevada's tax statutes expressly authorized reimbursing vehicle manufacturers for any taxes repaid to buyers under the lemon law. Chrysler then filed a petition for judicial review of the NTC's decision in the district court. The district court granted the petition for judicial review, concluding that Chrysler was entitled to a refund because, when Chrysler repaid the sales taxes to the buyers, its repayment statutorily rescinded the underlying sales transactions and rendered the sales tax an overpayment to the Department. This appeal followed.

DISCUSSION

The Department contends that the district court erred in overturning the NTC's decision because there is no statutory authority permitting it to provide vehicle manufacturers a refund of sales taxes they reimburse to buyers under Nevada's lemon law. Chrysler asserts that it is entitled to a refund based on taxes it reimbursed to buyers under NRS 597.630, Nevada's lemon law; NRS 372.630, Nevada's sales and use tax refund statute; and NRS 372.025, Nevada's statute governing gross receipts for retailers. Chrysler further argues that it is entitled to a refund given the Department's prior policy of granting such refunds. We disagree with both of Chrysler's contentions.

[Headnotes 1-3]

''Statutory interpretation is a question of law that we review de novo.'' *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 460, 282 P.3d 751, 756 (2012). ''It is well established that the court must interpret statutes consistent with the intent of the [L]egislature.'' *Steward v. Steward*, 111 Nev. 295, 302, 890 P.2d 777, 781 (1995). Thus, when a statute's language is plain and unambiguous, we give that language its ordinary meaning. *Consipio Holding*, 128 Nev. at 460, 282 P.3d at 756.

Under NRS 597.630, Nevada's lemon law, a vehicle manufacturer must replace or repurchase any vehicle that fails to conform to the manufacturer's warranties ''after a reasonable number of [repair] attempts,'' when the vehicle has an irreparable defect that ''substantially impairs the use and value of the motor vehicle.'' NRS 597.630(1). If it elects to repurchase the vehicle, a manufacturer must refund the full purchase price, less a reasonable amount to account for the buyer's use. NRS 597.630(1)(b). The full purchase price includes ''all sales taxes, license fees, registration fees and other similar governmental charges.'' *Id*. NRS 597.630 is silent as to whether a vehicle manufacturer is entitled to a refund for the amount of sales tax it reimburses to a buyer.[1] Accordingly, no refund is directly provided for within that statute.

Notwithstanding the lemon law's silence on the matter, Chrysler argues that it is entitled to a tax refund pursuant to NRS 372.630, Nevada's sales and use tax refund statute. NRS 372.630(1) requires the Department to refund any amount of taxes that were ''paid more than once or . . . erroneously or illegally collected,'' and that ''the excess amount collected or paid must . . . be refunded to the person [who overpaid the tax].'' Thus, under the plain language of NRS 372.630, the only party who can receive a tax refund is the party that paid the tax. Similarly, NRS 372.700 states that only a person who paid the tax may seek a tax refund from the Department. In *State v. Obexer & Son*, we recognized the standing requirement set forth in these statutes when we stated that Nevada's tax refund statutes ''permit recovery only where the taxpayer himself has borne the financial burden of the tax,'' and that ''[i]f the taxpayer making the claim has collected the tax from his customers, he has suffered no loss or injury, and is not entitled to a credit or refund.'' 99 Nev. 233, 238, 660 P.2d 981, 984 (1983).

---

[1]Other state lemon laws expressly address this issue. These states either provide for such a refund, *see, e.g.*, Ariz. Rev. Stat. Ann. § 44-1263(D) (2012) (West); Cal. Civ. Code § 1793.25(a) (West 2013), or require only that manufacturers provide notice or forms to a buyer that assist the buyer in seeking reimbursement of sales taxes from the appropriate tax authority. *See, e.g.*, Md. Code Ann., Com. Law § 14-1503(c) (LexisNexis 2005) (the manufacturer must instruct the consumer to seek a refund from the appropriate agency); N.Y. Gen. Bus. Law § 198-a(c)(2) (McKinney 2012) (same).

[Headnote 4]

Here, Chrysler did not remit the sales tax that it reimbursed to buyers to the Department of Taxation. Furthermore, Chrysler's obligation to reimburse sales tax to buyers is a statutory obligation imposed by NRS Chapter 597, which is wholly separate from a taxpayer's rights and obligations under NRS Chapter 372. Because Chrysler did not remit the sales taxes to the state, Chrysler lacks standing to seek a sales tax refund under NRS 372.630.

[Headnote 5]

Alternatively, Chrysler argues that a full reimbursement pursuant to the lemon law statute is analogous to a full returned merchandise refund in a retail transaction, for which no sales tax is due. Specifically, Chrysler argues that when buyers return vehicles to Chrysler and Chrysler reimburses them for the full purchase price and sales tax, the original sales taxes are no longer considered taxable gross receipts under NRS 372.025 and became refundable overpayments to the Department.

By its own terms, NRS 372.025 only applies to retailers, not manufacturers. The amount of sales tax imposed on a retailer is determined by the ''[g]ross receipts' . . . of the retail sales of *retailers*.'' NRS 372.025(1) (emphasis added); *see also* NRS 372.105. A ''retailer'' is defined as: ''[e]very seller who makes any retail sale or sales of tangible personal property . . .''; ''[e]very person engaged in the business of making sales for storage, use or other consumption . . . of tangible personal property . . .''; or ''[e]very person making more than two retail sales of tangible personal property during any 12-month period.'' NRS 372.055(1)(a)-(c). As Chrysler admits, it is not a retailer, and thus, we conclude that Chrysler cannot rely on NRS 372.025 in conjunction with Nevada's lemon law statute to claim a refund of the sales taxes. Accordingly, we conclude that neither NRS 597.630, nor NRS 372.630, nor NRS 372.025 entitles a vehicle manufacturer that reimburses a buyer with the full purchase price of a vehicle, including sales tax, to a sales tax refund.

Our conclusion is consistent with the approach taken by the Connecticut Supreme Court. Connecticut has a lemon law statute, Conn. Gen. Stat. § 42-179 (1998), containing language similar to Nevada's, which also does not provide manufacturers with refunds of reimbursed sales taxes. In interpreting that statute, the Connecticut Supreme Court held that manufacturers were not entitled to sales tax refunds because its lemon law contains ''no express indication that the legislature intended to permit the manufacturer to recover any of the . . . sales tax required to be refunded to the consumer.'' *DaimlerChrysler Corp. v. Law*, 937 A.2d 675, 686 (Conn. 2007). The Connecticut court reasoned that refunding the sales tax to manufacturers does not advance its lemon law's ''con-

cerns of consumer protection,'' but instead ''undermine[s] the incentive to provide nondefective products to consumers.'' *Id*. at 685.

[Headnotes 6, 7]

We agree with the approach taken by Connecticut and note that the legislative intent behind Nevada's lemon law was to protect buyers who purchase defective new vehicles. *See* Hearing on A.B. 59 Before the Assembly Comm. on Commerce, 62d Leg. (Nev., February 16, 1983); *see also Milicevic v. Mercedes-Benz USA, LLC*, 256 F. Supp. 2d 1168, 1175 (D. Nev. 2003) (noting that Nevada's lemon ''law was designed to protect'' buyers of defective vehicles). Refunding a vehicle manufacturer for reimbursed sales taxes will not create an incentive for the vehicle manufacturer to manufacture nondefective vehicles. The Legislature has not included this remedy in Nevada's lemon law, and Chrysler provides no evidence that the Legislature intended to refund manufacturers for reimbursed sales tax. Accordingly, we decline to read this remedy into the statute, and we conclude that vehicle manufacturers are not entitled to a refund of reimbursed sales tax.[2]

[Headnotes 8-10]

Chrysler also argues, apparently in an attempt to estop the Department from arguing that no refund is due, that the Department violated the Nevada Administrative Procedure Act (APA), NRS Chapter 233B, when it changed its prior policy allowing sales tax refunds for lemon law payments to its current policy denying such refunds.[3] An agency violates the APA if it engages in rulemaking without following the APA's procedural requirements. *Labor Comm'r v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 29 (2007). Rulemaking occurs when an agency ''promulgates, amends, or repeals '[a]n agency rule, standard, directive[,] or statement of general applicability which effectuates or interprets law or policy.' ''

---

[2]Because denial of the sales tax refund is consistent with the remedial purpose of the statute, we reject Chrysler's argument that this improperly transforms the lemon law into a punitive statute. We further reject Chrysler's argument that construing the lemon law to deny manufacturers a refund violates the Separation of Powers Clause of the Nevada Constitution. *See* Nev. Const. art. 3, § 1. By denying such refunds, the Department is not taking any affirmative action under the lemon law, and thus, it is not improperly performing legislative duties. *See id*.

[3]In addition, Chrysler argues that it is entitled to a refund because an administrative law judgment granted one upon similar facts in the past and, because the statutes have not since been amended, there is no legal basis for a different decision. We reject this argument because ''administrative agencies are not bound by *stare decisis*.'' *Motor Cargo v. Public Service Comm'n*, 108 Nev. 335, 337, 830 P.2d 1328, 1330 (1992); *see also Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1058, 944 P.2d 835, 841 (1997) (''[N]o binding effect is given to prior administrative determinations.'').

Id. at 39-40, 153 P.3d at 29 (alteration in original) (quoting NRS 233B.038(1)(a)). Generally, before an agency can engage in rulemaking, it must provide notice to interested parties and give those parties an opportunity to oppose the proposed rule. NRS 233B.060(1)(a); NRS 233B.061(1).

A statement of general applicability is a policy or rule that applies to multiple parties in a similar manner. *See Public Serv. Comm'n v. Southwest Gas*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983) (holding that an administrative order directed at one utility company had ''general applicability'' because it affected ''other gas utilities and their customers''). Here, because the Department's change in policy affects all vehicle manufacturers whose vehicles are sold in Nevada, it is a statement of general applicability. However, we have previously held that ''[t]here is no reason to require the formalities of rulemaking whenever an agency undertakes to enforce or implement the necessary requirements of an existing statute.'' *K-Mart Corporation v. SIIS*, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985).

Additionally, other jurisdictions do not require an agency to use the formal rulemaking process when correcting a policy that is based on an erroneous interpretation of the law. *See, e.g.*, *Amerada Hess Corp. v. State ex rel. Tax*, 704 N.W.2d 8, 18 (N.D. 2005) (''[A]n administrative agency need not use the rulemaking process to correct an erroneous interpretation of a statute.''); *Firearms Import/Export Roundtable Trade Group v. Jones*, 854 F. Supp. 2d 1, 13 (D.D.C. 2012) (holding that an ''Open Letter'' correcting prior policy that did not conform with a statute merely ''corrected a prior misapprehension of the statute rather than [assert] new law promulgated pursuant to the agency's rulemaking authority''); *Schlapp v. Colo. Dep't of Health Care and Policy*, 284 P.3d 177, 179-80, 185 (Colo. App. 2012) (holding that the agency did not violate the APA when it corrected its interpretation of eligibility requirements for Medicaid to conform with the applicable state and federal statutes). These jurisdictions reason that requiring administrative agencies to comply with the formal ''rulemaking requirements of the APA . . . would lock an agency into an erroneous interpretation of its regulations and governing statutes.'' *Schlapp*, 284 P.3d at 185.

As we have concluded today, neither Nevada's lemon law nor the tax statutes provide for sales tax refunds to vehicle manufacturers upon reimbursing a buyer pursuant to the lemon law. Because an agency has no authority to act absent statutory authority, *see Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011), the Department must deny these refunds. Thus, the Department's prior policy of allowing sales tax refunds

to vehicle manufacturers was an erroneous interpretation of the law. Upon obtaining an opinion from the Attorney General, the Department noted its erroneous interpretation in a July 2009 newsletter and stated that its policy change sought to bring the policy into conformity with Nevada's lemon law. In doing so, the Department did not amend any existing regulations or create a new rule to implement an existing statute. Rather, it sought only to correctly implement the existing statute. Since the Department's current tax refund policy is consistent with NRS 597.630 and the applicable provisions of NRS Chapter 372, we conclude that the Department did not violate the APA because it was not required to undertake the formal rulemaking process to correct its prior erroneous policy.[4]

Accordingly, for the reasons set forth above, we reverse the district court's order.

PARRAGUIRRE and CHERRY, JJ., concur.

---

[4]Chrysler further argues that denial of the sales tax refunds (1) is an unconstitutional taking and (2) results in the Department being unjustly enriched. We reject Chrysler's takings argument because Chrysler has no property right in a future tax refund. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006) (''An individual must have a property interest in order to support a takings claim.''); *United States v. Dow*, 357 U.S. 17, 20 (1958) (''Accordingly, [the claimant] can prevail only if the 'taking' occurred while he was the owner.''); *see also United States v. Carlton*, 512 U.S. 26, 33 (1994) (''Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.''). We also reject Chrysler's unjust enrichment argument because the sales tax paid to the State never belonged to Chrysler. *See Mainor v. Nault*, 120 Nev. 750, 763, 101 P.3d 308, 317 (2004) (''[U]njust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another.'' (alteration in original) (internal quotations omitted)).

MARSHALL SYLVER, AN INDIVIDUAL; MIND POWER, INC., A NEVADA CORPORATION; CASA DE MILLIONAIRE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND PROSPERITY CENTER, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANTS, *v.* REGENTS BANK, N.A., A NATIONAL ASSOCIATION, RESPONDENT.

No. 58869

MARSHALL SYLVER, AN INDIVIDUAL; MIND POWER, INC., A NEVADA CORPORATION; CASA DE MILLIONAIRE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND PROSPERITY CENTER, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANTS, *v.* REGENTS BANK, N.A., A NATIONAL ASSOCIATION, RESPONDENT.

No. 59683

May 2, 2013 300 P.3d 718

Consolidated appeals from a district court order confirming an arbitration award and an amended judgment and order of sale. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Lender brought action against borrower for breach of contract and judicial foreclosure. Following arbitration compelled by loan documents, lender moved to confirm arbitration award in its favor. The district court entered order that confirmed award, and judgment and order of sale. Borrower appealed both orders and appeals were consolidated. The supreme court, PARRAGUIRRE, J., held that: (1) borrower did not satisfy his burden to vacate arbitration award, and (2) public policy of the mortgage-licensing requirement did not clearly outweigh the interest in enforcing loan.

Affirmed.

Kolesar & Leatham, Chtd., and *Bart K. Larsen*, Las Vegas, for Appellants.

Sullivan Hill Lewin Rez & Engel and *Christine A. Roberts*, Las Vegas; *Sullivan Hill Lewin Rez & Engel* and *James E. Drummond*, San Diego, California, for Respondent.

1. ALTERNATIVE DISPUTE RESOLUTION.
   The supreme court reviews the district court's confirmation of an arbitration award de novo.
2. ALTERNATIVE DISPUTE RESOLUTION.
   Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation.

3. ALTERNATIVE DISPUTE RESOLUTION.
   The supreme court applies a clear and convincing evidence standard when parties seek to vacate an arbitration award.
4. ALTERNATIVE DISPUTE RESOLUTION.
   A court may vacate an arbitration award under the common-law ground that the arbitrator manifestly disregarded the law.
5. ALTERNATIVE DISPUTE RESOLUTION.
   The best reading of the phrase ''undue means'' pursuant to statute that requires court to vacate an arbitration award if it was procured by corruption, fraud, or other undue means, under the maxim *noscitur a sociis*, is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either. NRS 38.241(1)(a).
6. ALTERNATIVE DISPUTE RESOLUTION.
   To prove that an arbitration award was procured by undue means, pursuant to statute that requires court to vacate an arbitration award if it was procured by corruption, fraud, or other undue means, the party seeking vacatur must typically show that the fraud or corruption was: (1) not discoverable upon the exercise of due diligence before the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence. NRS 38.241(1)(a).
7. ALTERNATIVE DISPUTE RESOLUTION.
   The party seeking to vacate an arbitration award on the basis of undue means, pursuant to statute that requires court to vacate an arbitration award if it was procured by corruption, fraud, or other undue means, is required to prove a causal connection between the undue means and the resulting arbitration award. NRS 38.241(1)(a).
8. ALTERNATIVE DISPUTE RESOLUTION.
   Borrower did not satisfy his burden to have arbitration award vacated under statute that required court to vacate an arbitration award if it was procured by corruption, fraud, or other undue means in lender's action for breach of contract and judicial foreclosure, even if lender was incorrect in its representation that witness was unavailable for arbitration hearing, where borrower did not proffer any specific evidence that lender's conduct was intentional, witness's availability to testify was discoverable through due diligence, and borrower did not show a causal connection between the award and the alleged misconduct. NRS 38.241(1)(a).
9. ALTERNATIVE DISPUTE RESOLUTION.
   Judicial inquiry under the manifest-disregard-of-the-law standard, which is used to review arbitration award, is extremely limited.
10. ALTERNATIVE DISPUTE RESOLUTION.
    A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration.
11. ALTERNATIVE DISPUTE RESOLUTION.
    In analyzing whether an arbitrator manifestly disregarded the law, the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator knowing the law and recognizing that the law required a particular result simply disregarded the law.
12. CONTRACTS.
    A contract is unenforceable on public policy grounds where the policy against enforcement of a contract clearly outweighs the interest in its enforcement; in applying this balancing approach, the supreme court

takes account of the seriousness of any misconduct involved and the extent to which it was deliberate, and the directness of the connection between that misconduct and the term. Restatement (Second) of Contracts § 178(1), (3)(c), (d).

13. BANKS AND BANKING.
Purpose of statute that requires national banks to obtain certificate of exemption from licensing requirement was to avoid predatory lending by out-of-state mortgage bankers and brokers. NRS 645E.910.

14. BANKS AND BANKING; MORTGAGES.
Public policy of mortgage-licensing requirement did not clearly outweigh the interest in enforcing lender's loan to borrower, although lender failed to obtain certificate of exemption from licensing requirement, where lender did not engage in any other mortgage banking activity in Nevada, and Nevada property was used to secure loan that borrower solicited, freely entered into, and on which he later defaulted. NRS 645E.910; Restatement (Second) of Contracts § 178(1), (3)(c), (d).

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we consider whether an arbitration award was obtained through undue means. In resolving this issue, we interpret the meaning of ''undue means'' under NRS 38.241 in line with the interpretation given by other state and federal courts, whereby the challenging party has the burden of proving that the arbitration award was secured through intentionally misleading conduct. Accordingly, we conclude that the district court correctly refused to vacate the arbitration award since the appellant did not satisfy his burden in showing by clear and convincing evidence that the respondent secured the award through intentionally misleading conduct.

We also consider whether the arbitrator's refusal to void a loan in the underlying dispute constituted a manifest disregard of the law. Because the arbitrator did not consciously disregard the applicable legal standard, we conclude that there was no manifest disregard of the law.

FACTS AND PROCEDURAL HISTORY

In 2008, respondent Regents Bank, N.A., issued two loans to appellant Marshall Sylver. The first loan, intended as a bridge loan to purchase a residential property in Las Vegas, was partially secured by a deed of trust in another residential property located in Las Vegas. Sylver planned to sell the first property to pay off this loan. The second loan was a bridge loan to purchase a commercial

building in Las Vegas. Sylver proposed to obtain commercial take-out financing for the second loan with Regents' assistance. With the exception of recordation of a deed of trust in Nevada, all transactions took place in California, where Regents is sitused. Throughout the process of obtaining the loans and seeking long-term financing with Regents, James Hibert was Sylver's point of contact.

When financing failed to materialize, the parties twice adjusted the terms of the second loan's maturity date. Still, Sylver did not repay either loan.

Regents filed a complaint in district court for breach of contract and judicial foreclosure. In his answer, Sylver alleged that Regents breached certain fiduciary duties; that Regents made false representations to Sylver regarding long-term financing; and that the first loan was void because Regents engaged in mortgage banking activity in Nevada without first seeking a certificate of exemption, as required by NRS 645E.910. The district court stayed the proceedings and compelled arbitration as provided in the loan documents.

Both Sylver and Regents designated witnesses who would testify at the arbitration hearing. One witness, James Hibert, was designated by both parties. Prior to arbitration, Regents informed the arbitrator and Sylver that Hibert was unwilling to go to Las Vegas to testify at the arbitration hearing. Regents had recently terminated Hibert and could contact Hibert only through his attorney. Because Hibert's counsel informed Regents that Hibert was unwilling to attend the arbitration hearing in Las Vegas, Regents took Hibert's deposition and used it instead of his live testimony at the hearing. Sylver cross-examined Hibert for two hours during the deposition.

On the second day of the arbitration hearing, Sylver testified that he had a phone conversation with Hibert that morning, wherein Hibert stated that he had never been asked to testify in Las Vegas but would be willing to do so. Nevertheless, Sylver did not ask for a continuance, and the arbitrator ultimately rejected Sylver's arguments and ruled in Regents' favor.

Regents filed a motion to confirm the arbitration award with the district court. Prior to the hearing on Regents' motion, Sylver filed a declaration by Hibert that, contrary to his earlier deposition testimony, supported allegations that Regents made false representations and failed to help secure long-term financing, despite Sylver's diligence throughout the process. In opposition to the motion, Sylver argued that Regents employed undue means in procuring the award by misrepresenting that Hibert was unavailable, and that the arbitrator had manifestly disregarded the law in refusing to void one of the loans. The district court confirmed the arbitration award

and later entered an amended judgment and order of sale. Sylver appealed from both orders.

DISCUSSION

On appeal, Sylver revives the contentions he made before the district court. Specifically, he argues that (1) Regents employed undue means in procuring the award, and (2) the arbitrator manifestly disregarded the law in refusing to void one of the loans.

Standard of review

[Headnotes 1-3]

We review a district court's confirmation of an arbitration award de novo. *Thomas v. City of North Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). In so doing, we consider that ''[s]trong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation.'' *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004). We apply a clear and convincing evidence standard when parties seek to vacate an arbitration award. *Health Plan of Nevada v. Rainbow Med.*, 120 Nev. 689, 695, 100 P.3d 172, 178 (2004).

[Headnote 4]

NRS 38.241 allows a court to vacate an arbitration award procured by fraud, corruption, or undue means. A court may also vacate an arbitration award under the common-law ground that the arbitrator ''manifestly disregarded the law.'' *Clark Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006). Sylver challenges the arbitration award on both grounds.

The arbitration award was not procured by undue means

Sylver argues that the arbitration award was obtained by undue means as a result of Regents' misrepresentation regarding Hibert's availability to testify at the arbitration hearing. Because we have never addressed the definition of ''undue means'' under NRS 38.241, we begin by reviewing and ultimately adopting the definition used by numerous state and federal circuit courts. Applying this definition to the circumstances raised here, we conclude that Sylver has not satisfied his burden for vacating the arbitration award.

Definition of ''undue means''

NRS Chapter 38 embodies Nevada's adoption of the Revised Uniform Arbitration Act. Hearing on S.B. 336 Before the Assembly Judiciary Comm., 71st Leg. (Nev., April 24, 2001). NRS 38.241(1)(a) provides:

> Upon motion to the court by a party to an arbitral proceeding, the court shall vacate an award made in the arbitral proceeding if . . . [t]he award was procured by corruption, fraud or other undue means.

The language of NRS 38.241 closely mirrors the language of 9 U.S.C. § 10(a)(1), which also addresses the standard for vacating an arbitration award.

[Headnotes 5-7]

Numerous federal and state courts have addressed the meaning of ''undue means'' as used in this context.[1] These jurisdictions, in interpreting ''undue means,'' begin with the principle of statutory construction that ''a word should be known by the company it keeps.'' *National Cas. Co.*, 430 F.3d at 499. Accordingly, ''[t]he best reading of the term 'undue means' under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either.'' *Id.*; *see also PaineWebber Group*, 187 F.3d at 991 (''The term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' that precede it in the statute.''); *Amer. Postal Workers Union*, 52 F.3d at 362 (''[U]ndue means must be limited to an action *by a party* that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence.''). Thus, '' 'undue means' has generally been interpreted to mean something like fraud or corruption.'' *Three S Delaware*, 492 F.3d at 529; *see also PaineWebber Group*, 187 F.3d at 991 (citing *Amer. Postal Workers Union*, 52 F.3d at 362, and noting that courts have ''uniformly construed the term undue means as requiring proof of intentional misconduct'').

> Typically, to prove that an award was procured by undue means, the party seeking vacatur ''must show that the fraud [or corruption] was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence.''

MCI Constructors, 610 F.3d 858 (alteration in original) (quoting *A.G. Edwards & Sons*, 967 F.2d at 1404). *MCI Constructors* re-

---

[1]*See, e.g.*, *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849 (4th Cir. 2010); *Three S Delaware v. DataQuick Information Systems*, 492 F.3d 520 (4th Cir. 2007); *National Cas. Co. v. First State Ins. Group*, 430 F.3d 492 (1st Cir. 2005); *PaineWebber Group v. Zinsmeyer Trusts Partnership*, 187 F.3d 988 (8th Cir. 1999); *Amer. Postal Workers Union v. U.S. Postal Service*, 52 F.3d 359 (D.C. Cir. 1995); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401 (9th Cir. 1992); *Spiska Engineering v. SPM Thermo-Shield*, 678 N.W.2d 804 (S.D. 2004).

quires the party seeking to vacate the award to prove a causal connection between the undue means and the resulting arbitration award. *Id.*

Sylver has not established by clear and convincing evidence that the award was procured by undue means

[Headnote 8]

Adopting the above interpretation of ''undue means,'' we conclude that Sylver has not met his burden for vacating the arbitration award.

First, the conduct alleged by Sylver does not rise to the level of intentional bad faith behavior equivalent in gravity to corruption or fraud. *See PaineWebber Group*, 187 F.3d at 991; *Amer. Postal Workers Union*, 52 F.3d at 362. While Sylver claims that Regents was incorrect in its representation that Hibert was unavailable, Sylver does not proffer any specific evidence that Regents' conduct was intentional, stating only that ''[w]hether intentional or inadvertent, Regents' misrepresentations clearly impaired [a]ppellants' ability to present relevant evidence before the arbitrator.''[2]

Second, Hibert's availability to testify was discoverable through due diligence. *See MCI Constructors*, 610 F.3d at 858. Sylver relied on Regents' representation that Hibert was unavailable to testify, despite Sylver listing Hibert as a witness and deposing him for two hours. On the second day of the arbitration hearing, Sylver discovered Hibert was willing and available to testify, yet Sylver did not seek a continuance of the arbitration.

Third, Sylver has not shown any causal connection between the arbitration award and the alleged misconduct. *See id.* Sylver had the opportunity to cross-examine Hibert prior to the arbitration, and Sylver himself admitted in district court that it was only *after* the arbitration that Hibert's potential testimony became so critical to Sylver's case.

Accordingly, the district court correctly refused to vacate the arbitration award based on undue means.

The arbitrator's refusal to void the loan was not a manifest disregard of the law

Sylver argues that the district court erred in confirming the arbitration award, asserting that the arbitrator manifestly disregarded the law by enforcing the loan despite Regents' violation of NRS 645E.910, which requires a national bank to seek a certifi-

---

[2]Sylver seems to insinuate that since Regents paid for Hibert to have independent legal representation, there was collusion between Regents and Hibert's attorney, despite Hibert's own willingness to testify. However, Sylver points to no evidence of such collusion. We therefore do not address this contention. *See* NRAP 28(a)(9)(A).

cate of exemption before engaging in mortgage banking activity in Nevada.[3]

[Headnotes 9-11]

‘‘‘[J]udicial inquiry under the manifest-disregard-of-the-law standard is extremely limited.’ ‘A party seeking to vacate an arbitration award based on manifest disregard of the law may not merely object to the results of the arbitration.’ ’’ *Clark Cnty. Educ. Ass’n*, 122 Nev. at 342, 131 P.3d at 8 (quoting *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004), *disapproved on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006)). In analyzing whether an arbitrator manifestly disregarded the law, ‘‘‘the issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law.’ ’’ *Id*. (quoting *Bohlmann*, 120 Nev. at 547, 96 P.3d at 1158); *see also Health Plan of Nevada*, 120 Nev. at 699, 100 P.3d at 179 (stating that manifest disregard of the law requires a ‘‘conscious disregard of applicable law’’).

NRS 645E.200 requires corporations to receive licenses from the State of Nevada prior to engaging in mortgage banking activity in Nevada. NRS 645E.150 exempts national banks (such as Regents) from the licensing requirement, but NRS 645E.160 requires any such foreign corporations to obtain a certificate of exemption prior to engaging in certain mortgage banking activity in Nevada, and NRS 645E.910 makes it unlawful for a foreign bank to engage in such banking activity if it fails to obtain the certificate of exemption.[4]

Because Regents is a national bank, the arbitrator determined that Regents violated NRS 645E.910 by recording a deed of trust in Nevada without a certificate of exemption. However, because no civil remedy existed at the time for violations of NRS 645E.910, the arbitrator concluded that ‘‘the unintentional violation of Chapter 645E by Regents had no materiality to the issues between the parties in the within action.’’[5]

---

[3]The arbitrator also found that Regents did not violate NRS 645E.900, which makes soliciting or conducting business as a mortgage banker without a proper license or certificate of exemption unlawful. On appeal, Sylver does not present any legal authority or factual basis for challenging the arbitrator’s decision besides a cursory statement alleging that Regents clearly violated NRS 645E.900. Accordingly, we need not address the arbitrator’s decision regarding NRS 645E.900. NRAP 28(a)(9)(A).

[4]NRS 80.015(3)(d) limits the application of NRS 645E.910 to noncommercial property. Thus, only the enforcement of the first loan, secured by the deed of trust in the Las Vegas residential property, is at issue.

[5]Under NRS 645E.950, conducting the business of a mortgage banker without a license or certificate of exemption is potentially a misdemeanor. However, prior to 2009, no civil remedies existed for violations of

On appeal, Sylver argues that even though no statutory civil remedy applies, Nevada courts have long refused to enforce contracts that are illegal or contravene public policy. Sylver refers to other jurisdictions that have found loans void and unenforceable following a lender's failure to comply with licensing requirements. *See, e.g.*, *Klipping v. McCauley*, 354 P.2d 167, 169 (Colo. 1960); *Solomon v. Gilmore*, 731 A.2d 280, 289 (Conn. 1999).

Sylver appears to suggest that loans made in violation of licensing requirements are necessarily unenforceable. While we have previously addressed whether a contract is unenforceable on public policy grounds, we have never addressed whether failure to comply with a licensing requirement necessarily renders a contract unenforceable. We decline to do so now, as the operative standard of review in this case ''does not entail plenary judicial review. . . . The governing law alleged to have been ignored must be well-defined, explicit, and clearly applicable.'' *Graber v. Comstock Bank*, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995). Accordingly, the issue before us on appeal is limited to whether the arbitrator manifestly disregarded existing Nevada law, not whether the common law in Nevada should be extended to conform to other states' holdings.

[Headnote 12]

Under existing Nevada law, a contract is unenforceable on public policy grounds where the policy against enforcement of a contract clearly outweighs the interest in its enforcement. *Picardi v. Eighth Judicial Dist. Court*, 127 Nev. 106, 112, 251 P.3d 723, 727 (2011) (citing Restatement (Second) of Contracts § 178(1) (1981)). In applying this balancing approach, we take account of ''the seriousness of any misconduct involved and the extent to which it was deliberate, and . . . the directness of the connection between that misconduct and the term.'' Restatement (Second) of Contracts § 178(3)(c)-(d) (1981).

[Headnotes 13, 14]

On review, we begin by noting that the purpose behind NRS 645E.910 was to avoid predatory lending by out-of-state mortgage bankers and brokers. Hearing on A.B. 490 Before the Assembly Commerce and Labor Comm., 72d Leg. (Nev., April 4, 2003). Here, the record indicates that Sylver solicited Regents' business, offering the Nevada property as security. Regents did not engage in

---

NRS 645E.910, and the current civil remedies were not given retroactive effect. *See* 2009 Nev. Stat., ch. 200, §§ 20-21, at 747-48 (enacting NRS 645E.920 and NRS 645E.930, respectively); 2009 Nev. Stat., ch. 474, § 84.7, at 2693 (amending NRS 645E.920).

any other mortgage banking activity in Nevada, and the property secured a loan that Sylver freely entered into and later defaulted upon. The arbitrator found that Regents' violation of the licensing statute was unintentional. Sylver does not assert that Regents' failure to obtain a license or exemption to record the deed of trust is in any way related to his failure to repay the loan. We conclude that the public policy of the licensing requirement does not clearly outweigh the interest in enforcing the loan.

Accordingly, Sylver has not overcome the very high hurdle for showing that the arbitrator, '' 'knowing the law and recognizing that the law required a particular result, simply disregarded the law.' '' *Clark Cnty. Educ. Ass'n*, 122 Nev. at 342, 131 P.3d at 8 (quoting *Bohlmann*, 120 Nev. at 547, 96 P.3d at 1158).

CONCLUSION

NRS 38.241 provides for vacatur of arbitration awards procured by corruption, fraud, or undue means. We conclude that to vacate an arbitration award on a theory of ''undue means'' requires the challenging party to prove by clear and convincing evidence that the award was procured through intentionally misleading conduct. The appellant has not satisfied his burden. We further conclude that the arbitrator's refusal to void one of the loans was not a manifest disregard of the law.

For the reasons stated above, we affirm the district court's order confirming the arbitration award and judgment thereon.

HARDESTY and CHERRY, JJ., concur.