THE STATE OF NEVADA, APPELLANT, *v.*
KENT JOSEPH BECKMAN, RESPONDENT.

No. 57928

July 11, 2013 305 P.3d 912

Appeal from a district court order granting a motion to suppress evidence. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Defendant was charged with trafficking, possession for sale, and possession of controlled substances. The district court granted defendant's motion to suppress evidence seized during search of his automobile, and State appealed. The supreme court, PICKERING, C.J., held that: (1) state trooper had probable cause to initiate traffic stop for speeding, (2) trooper's initial detention during course of traffic stop was reasonably tailored to initial investigation of circumstances that justified stop, (3) defendant was ''seized'' after investigation into circumstances that justified initial traffic stop for speeding concluded, and (4) trooper's continued detention of defendant after investigation into justification for traffic stop for speeding concluded was unreasonable.

Affirmed.

Catherine Cortez Masto, Attorney General, Carson City; *Mark Torvinen*, District Attorney, and *Robert J. Lowe*, Deputy District Attorney, Elko County, for Appellant.

Frederick B. Lee, Jr., Public Defender, and *Alina M. Kilpatrick* and *Andrew M. Mierins*, Deputy Public Defenders, Elko County, for Respondent.

1. AUTOMOBILES.
   A traffic stop that is legitimate when initiated becomes illegitimate when the officer detains the car and driver beyond the time required to process the traffic offense, unless the extended detention is consensual, de minimis, or justified by a reasonable articulable suspicion of criminal activity. Const. art. 1, § 18; U.S. CONST. amend. 4.
2. CRIMINAL LAW.
   Suppression issues present mixed questions of law and fact; the findings of fact are reviewed for clear error, but the legal consequences of those facts involve questions of law that the supreme court reviews de novo.
3. CRIMINAL LAW.
   The reasonableness of a seizure is a matter of law reviewed de novo.
4. AUTOMOBILES.
   State trooper had probable cause to initiate traffic stop where he observed defendant driving 72 mph in 65 mph speed zone. Const. art. 1, § 18; U.S. CONST. amend. 4.

5. AUTOMOBILES.

Temporary detention of individuals during a traffic stop constitutes a seizure of persons within the meaning of the United States and Nevada Constitutions; therefore, an automobile stop is subject to the constitutional imperative that it not be unreasonable under the circumstances. Const. art. 1, § 18; U.S. CONST. amend. 4.

6. AUTOMOBILES.

State trooper's initial detention during course of traffic stop for speeding by asking for defendant's driver's license and vehicle registration, which he had dispatch check by computer search, and by asking defendant questions about his travels, was reasonably tailored to initial investigation of circumstances that justified stop. Const. art. 1, § 18; U.S. CONST. amend. 4.

7. AUTOMOBILES.

During the course of a lawful traffic stop, police officers may complete a number of routine tasks: they may ask for a driver's license and vehicle registration, run a computer check, and issue a ticket; they may also inquire about the occupants' destination, route, and purpose, and if necessary, they may conduct a brief, limited investigation for safety purposes. Const. art. 1, § 18; U.S. CONST. amend. 4.

8. AUTOMOBILES.

Defendant was ''seized'' after investigation into circumstances that justified initial traffic stop for speeding concluded, within meaning of United States and Nevada Constitutions, when trooper told defendant he was not free to leave and that he had to wait for drug canine to arrive and perform sniff search. Const. art. 1, § 18; U.S. CONST. amend. 4.

9. ARREST; SEARCHES AND SEIZURES.

A seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. U.S. CONST. amend. 4.

10. AUTOMOBILES.

State trooper's continued detention of defendant after investigation into justification for traffic stop for speeding concluded and trooper told defendant that ''everything checked out'' and to be careful was unreasonable; defendant asked trooper if he was free to leave, to which trooper replied ''absolutely not,'' trooper detained defendant for additional nine minutes while awaiting arrival of drug canine, defendant's nervous appearance and fingerprints observed on trunk of car did not provide trooper with reasonable suspicion of criminal activity, and even if defendant's request to exit vehicle and stretch was unusual, it made sense given his earlier explanation to trooper that he had been driving all night. Const. art. 1, § 18; U.S. CONST. amend. 4.

11. AUTOMOBILES.

A traffic stop that extends beyond the time necessary to effectuate its purpose does not necessarily render it unreasonable. Const. art. 1, § 18; U.S. CONST. amend. 4.

12. AUTOMOBILES.

A prolonged traffic stop that extends beyond the time necessary to effectuate its purpose may be reasonable in three limited circumstances: when the extension of the stop was consensual, the delay was de minimis, or the officer lawfully receives information during the traffic stop that creates a reasonable suspicion of criminal conduct. Const. art. 1, § 18; U.S. CONST. amend. 4.

13. ARREST.
A consensual encounter is not a ''seizure,'' and thus, the Fourth Amendment is not implicated. U.S. CONST. amend. 4.

14. ARREST.
Whether a police officer's articulated reasons for extending the seizure were reasonable must be determined with an objective eye in light of the totality of the circumstances. Const. art. 1, § 18; U.S. CONST. amend. 4.

15. AUTOMOBILES.
A police officer's training and experiences enable the officer to draw inferences that might well elude an untrained person, for the purposes of determining whether a continued detention beyond the justification for an initial traffic stop was supported by reasonable suspicion of criminal activity. Const. art. 1, § 18; U.S. CONST. amend. 4.

16. AUTOMOBILES.
Law enforcement conducting a traffic stop does not need reasonable suspicion of criminal activity before conducting a dog sniff. Const. art. 1, § 18; U.S. CONST. amend. 4.

17. ARREST.
No subsequent events or circumstances can retroactively justify an unlawful seizure. Const. art. 1, § 18; U.S. CONST. amend. 4.

18. CRIMINAL LAW.
The government cannot benefit from evidence that police officers obtained through a clear violation of an individual's Fourth Amendment rights. U.S. CONST. amend. 4.

Before the Court EN BANC.[1]

OPINION

By the Court, PICKERING, C.J.:

Respondent Kent Beckman was stopped for speeding. The highway patrol officer verified Beckman's license and registration, told him ''everything checks good,'' and issued a warning. As Beckman began to leave, the officer ordered him to remain until a drug-sniffing dog and handler team could arrive. When the dog arrived, it alerted for the presence of drugs, which was confirmed by the warrantless search that followed. Beckman was arrested and charged with trafficking, possession for sale, and possession of Schedule I and II controlled substances.

Beckman moved to suppress the evidence of contraband because the highway patrol officer unreasonably prolonged the traffic stop, unlawfully ''seizing'' him, and because exigent circumstances did not justify the warrantless search. The district court granted the motion based on the warrantless search. Because the

[1]This matter was transferred from panel to en banc following oral argument pursuant to IOP Rule 13(b).

seizure presents a threshold issue that requires affirmance as a matter of law irrespective of the warrantless search analysis, we focus on it. *See Picetti v. State*, 124 Nev. 782, 790, 192 P.3d 704, 709 (2008) (district court decision will be affirmed on appeal where court reached correct result).

[Headnote 1]

A traffic stop that is legitimate when initiated becomes illegitimate when the officer detains the car and driver beyond the time required to process the traffic offense, unless the extended detention is consensual, de minimis, or justified by a reasonable articulable suspicion of criminal activity. The prolonged stop in this case met none of these exceptions and violated the United States and Nevada Constitutions. The constitutional violation warrants exclusion of the subsequently discovered evidence.

I.

The essential facts of this case were recorded by videotape and are not disputed. At 7:10 a.m. on a Sunday morning, Trooper Richard Pickers of the Nevada Highway Patrol stopped Beckman on Interstate 80 in Elko, Nevada, for speeding.[2] Trooper Pickers asked for Beckman's license and registration, which Beckman produced. Trooper Pickers questioned Beckman about his travels, and Beckman answered that he had been driving since 10 p.m. and was on his way to Omaha, Nebraska, to visit his son. At 7:13 a.m., Trooper Pickers told Beckman that he would verify Beckman's documents and issue a warning.

When Trooper Pickers returned to his patrol car, he told his passenger, a new dispatch employee in training, that he suspected criminal activity because of fingerprints on the trunk of Beckman's car. He added that Beckman seemed ''overly nervous'' and that he, Trooper Pickers, would not drive continuously through the night. When Trooper Pickers radioed dispatch to check Beckman's documents, he asked dispatch to send a drug-sniffing dog/handler team to the scene of the stop.

At 7:18 a.m., Beckman asked for permission to get out of his car to stretch. Trooper Pickers assented and in turn asked for permission to pat Beckman down for weapons. Beckman consented. Beckman and Trooper Pickers then engaged in friendly conversation, largely about Beckman's job as a wine salesperson. A minute later, Trooper Pickers returned Beckman's license and registration and told him ''everything checks good . . . be careful.'' Beckman handed Trooper Pickers a business card and walked back toward his vehicle to leave.

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[2]There are two additional cases before this court that involve similar stops by Trooper Pickers—*State v. Lloyd* (Docket No. 56706), and *Tucker v. State* (Docket No. 58690).

Pickers then asked if he could ask Beckman ''a couple of questions,'' to which Beckman responded ''yes, sir.'' Trooper Pickers asked if Beckman had anything illegal in his car and if he could perform a vehicle search. Beckman denied having anything illegal but refused consent to the search. At this point, approximately 7:21 a.m., Trooper Pickers told Beckman that he was no longer free to leave and would have to wait for the canine unit to arrive and perform a sniff search. A minute later, Trooper Pickers gave Beckman a modified version of his *Miranda* rights.[3] While waiting for the canine unit, Trooper Pickers and Beckman continued to talk.

Officer Lowry and his drug-sniffing dog, Duchess, arrived at 7:29 a.m. Two minutes later, Duchess signaled the presence of drugs near the driver's side door of Beckman's vehicle. Trooper Pickers informed dispatch that the dog alerted positively, and he would perform a vehicle search. Trooper Pickers then began a search of the vehicle, and found what he determined to be cocaine in the center console. Thereafter, at 7:40 a.m., Trooper Pickers informed Beckman that he was under arrest, placed him in handcuffs, and secured him in the back of the patrol vehicle.

An additional officer arrived as backup, followed by a tow truck at 8:02 a.m. The three officers, with the tow truck driver's assistance, continued the search until 8:58 a.m. and found additional quantities of cocaine, as well as methamphetamine. During the search, Trooper Pickers was asked about a cut on his hand, and he responded, ''That's me getting jazzed up. I don't even feel it. I'm on the search. I'm feeling like there's going to be more.'' After the search ended, Trooper Pickers drove Beckman to the sheriff's station.

The State charged Beckman with several drug-related offenses. Beckman filed a motion to suppress in which he argued that Trooper Pickers unlawfully seized him by unnecessarily extending the stop and that the officers further violated his rights by performing a warrantless search. In opposition to the motion, the State argued that Trooper Pickers had reasonable suspicion for the de minimus continued detention and that extenuating circumstances justified the warrantless search. After an evidentiary hearing, the district court granted the motion in a detailed order focusing on the legality of the warrantless search. The State appeals.

II.

[Headnotes 2, 3]

''Suppression issues present mixed questions of law and fact.'' *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002),

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[3]Trooper Pickers did not read the warning from a card. Instead, he explained the rights in approximate terms.

overruled on other grounds by Nunnery v. State, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011). This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo. *Cortes v. State*, 127 Nev. 505, 509, 260 P.3d 184, 187 (2011); *State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000). The reasonableness of a seizure is a matter of law reviewed de novo. *Id.*; *United States v. Campbell*, 549 F.3d 364, 370 (6th Cir. 2008).

A.

1.

[Headnotes 4, 5]

Using virtually identical words, the United States and Nevada Constitutions both guarantee ''[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'' U.S. Const. amend. IV; *see* Nev. Const. art. 1, § 18; *Cortes*, 127 Nev. at 514, 260 P.3d at 190-91. Temporary detention of individuals during a traffic stop constitutes a ''seizure'' of ''persons'' within the meaning of these constitutional provisions. *Whren v. United States*, 517 U.S. 806, 809-10 (1996); *see Cortes*, 127 Nev. at 510-11, 515 n.7, 260 P.3d at 188-89, 191 n.7. ''An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances.'' *Whren*, 517 U.S. at 810. Trooper Pickers had probable cause to believe that Beckman had violated a traffic law by driving 72 miles per hour in a 65-mile-per-hour zone. Thus, the initial stop was reasonable. *Id.* (''As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'').

[Headnotes 6, 7]

During the course of a lawful traffic stop, officers may complete a number of routine tasks. For example, they may ask for a driver's license and vehicle registration, run a computer check, and issue a ticket. *See United States v. Vaughan*, 700 F.3d 705, 710 (4th Cir. 2012). Officers may also inquire about the occupants' destination, route, and purpose. *United States v. Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005). And if necessary, law enforcement may conduct a brief, limited investigation for safety purposes. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *Dixon v. State*, 103 Nev. 272, 273, 737 P.2d 1162, 1163-64 (1987).

Here, Trooper Pickers correctly tailored the initial investigation to the circumstances justifying the stop. *See* 68 Am. Jur. 2d *Searches and Seizures* § 90 (2010) (''[T]he scope of the detention must be carefully tailored to its underlying justification.''). As with most traffic stops, Trooper Pickers asked for Beckman's driver's license and vehicle registration, which he had dispatch check

by computer search. Although Trooper Pickers asked Beckman questions about his travels, this inquiry was within the scope of the lawful traffic stop and did not improperly extend the duration of that stop. Thus, the first phase of Trooper Pickers' investigation, which lasted from approximately 7:10 to 7:19, satisfied the Fourth Amendment's requirement of reasonableness.

2.

[Headnotes 8, 9]

But a ''seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.'' *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *see also Florida v. Jardines*, 569 U.S. ___, ___, 133 S. Ct. 1409, 1416 (2013) (explaining that the scope of an officer's investigation is limited by the purpose of the investigation). In *Caballes*, a police officer stopped Caballes for speeding, and one of the officer's colleagues on the canine unit immediately headed for the scene. 543 U.S. at 406. A few minutes later, while the officer was still writing out a warning ticket, the dog and handler walked around Caballes's car, where the dog alerted to the presence of drugs. After Caballes challenged the constitutionality of the sniff, the Court explained that a dog sniff during a *lawful* traffic stop does not violate the Constitution so long as the sniff does not prolong the length of the stop. *Id.* at 408-09 (emphasis added). The Court continued that the inverse is also true—if a traffic stop is unreasonably prolonged before a canine is employed, the use of the canine and subsequently discovered evidence are products of an unconstitutional seizure. *Id.* at 407-08. Because the canine unit in *Caballes* arrived while the initial officer was still processing the initial reason for the stop, the canine sniff did not run afoul of the Constitution.

Similarly, in *Gama v. State*, 112 Nev. 833, 837-38, 920 P.2d 1010, 1013 (1996), this court upheld a dog sniff that occurred during a traffic stop. There, police initiated the stop because Gama was speeding and nearly rear-ended another vehicle. *Id.* at 835, 920 P.2d at 1012. A narcotics unit arrived with a drug-sniffing dog before the officer completed a written citation. *Id.* at 837-38, 920 P.2d at 1013. Since the sniff did not extend the length of the traffic stop, we held that Gama had not been unlawfully seized. *Id.* at 838, 920 P.2d at 1013-14.

Here, unlike the officers in *Caballes* and *Gama*, Trooper Pickers extended the length of the traffic stop to await a canine unit.[4] The initial stop for the speeding violation ended around 7:19 a.m. when Trooper Pickers informed Beckman ''everything checks

[4]Per the State, ''There is going to be a little bit of time when you're going to have to get the dog out there, especially in a large county like Elko.''

[out]'' and both parties started walking toward their cars. After Beckman consensually answered a few questions regarding controlled substances, Trooper Pickers seized Beckman again by informing Beckman that he was no longer free to leave and would need to wait for the canine unit to arrive and perform a sniff search. Trooper Pickers also read Beckman his *Miranda* rights. This show of authority restrained Beckman's liberty, *Terry*, 392 U.S. at 19 n.16 (explaining that when an officer uses his authority to detain a citizen, a seizure has occurred), and in view of these circumstances, a reasonable person in Beckman's position would believe that he was not free to leave. *See State v. Stinnett*, 104 Nev. 398, 401, 760 P.2d 124, 127 (1988) (citing *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)) (explaining that a person is seized if he does not believe he is free to leave). The question then becomes whether the prolonged traffic stop was reasonable under the Fourth Amendment.

B.

[Headnotes 10-12]

''[A] traffic stop [that] extends beyond the time necessary to effectuate its purpose does not necessarily render it unreasonable.'' *United States v. Bueno*, 703 F.3d 1053, 1060 (7th Cir.), *vacated as to codefendant's sentencing determination sub nom. Gonzalez-Zavala v. United States*, 569 U.S. ___, 133 S. Ct. 2830 (2013). A prolonged stop may be reasonable in three limited circumstances: when the extension of the stop was consensual, the delay was de minimis, or the officer lawfully receives information during the traffic stop that creates a reasonable suspicion of criminal conduct. *Id.* at 1060-62. ''The ultimate determination of reasonableness . . . is a question of law reviewable de novo.'' *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1258 (10th Cir. 2006); *United States v. Everett*, 601 F.3d 484, 488 (6th Cir. 2010) (''[w]hether a seizure is reasonable under the Fourth Amendment is a question of law that we review de novo'').

[Headnote 13]

First, a prolonged traffic stop is not unreasonable if the encounter becomes consensual. After all, a consensual encounter is not a seizure, and thus, the Fourth Amendment is not implicated. *United States v. Munoz*, 590 F.3d 916, 921 (8th Cir. 2010); *see also United States v. Figueroa-Espana*, 511 F.3d 696, 702 (7th Cir. 2007). Here, Beckman consensually responded to Trooper Pickers' initial questions about contraband from 7:20 until 7:21, but if consent existed, it vanished around 7:21 when Beckman asked, ''can I please go,'' and Trooper Pickers responded, ''absolutely not.'' The continued detention therefore cannot be justified based on consent.

Second, a modest delay may be reasonable, depending on the circumstances surrounding the stop. For example, other jurisdictions have permitted a two-minute delay, *United States v. McBride*, 635 F.3d 879, 883 (7th Cir. 2011); *United States v. Chaney*, 584 F.3d 20, 26 (1st Cir. 2009), and a four-minute delay, *United States v. Alexander*, 448 F.3d 1014, 1017 (8th Cir. 2006), as de minimis intrusions on a driver's liberty. Here, the State argued during oral argument that the continued detention was de minimus and ''not a very long period out of Mr. Beckman's life.'' It further stated that the ''obvious seizure'' did not unreasonably extend the stop because Trooper Pickers ''throughout the whole period act[ed] expeditiously to get the dog there.'' We disagree. The delay was not de minimis because Trooper Pickers detained Beckman for an additional nine minutes, doubling the length of the stop. Accordingly, the additional delay was not permissible as de minimus.

[Headnote 14]

Third, a prolonged stop is permissible if the results of the initial stop provide an officer with reasonable suspicion of criminal conduct, thereby creating a new Fourth Amendment event. *See, e.g.*, *State v. Perez*, 435 A.2d 334, 338 (Conn. 1980) (when ''a police officer's suspicions upon a lawful stop are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances''), *overruled on other grounds by State v. Altrui*, 448 A.2d 837, 846 n.6 (1982); *Estrada v. Rhode Island*, 594 F.3d 56, 64 (1st Cir. 2010) (recognizing that information gathered during a traffic stop may provide reasonable suspicion of criminal conduct that will justify extending the stop). Whether the officer's articulated reasons for extending the seizure were reasonable ''must be determined with an objective eye in light of the totality of the circumstances.'' *Lisenbee*, 116 Nev. at 1128, 13 P.3d at 950.

Here, the State contended that the continued detention was justified by the suspicions that Trooper Pickers related, to wit: Beckman's nervousness, the handprints on the car's trunk lid, and Beckman's request to get out of his vehicle and stretch. But these are all occurrences Trooper Pickers observed *before* he decided to issue a warning and send Beckman on his way. The only noteworthy event that occurred *after* Trooper Pickers released Beckman was Beckman's offer of a business card.

[Headnote 15]

Although an officer's training and experiences enable him to draw inferences that ''might well elude an untrained person,'' *United States v. Cortez*, 449 U.S. 411, 418 (1981), the totality of the circumstances here would not cause a prudent person to have an honest or strong suspicion that Beckman had committed a crime. *Deutscher v. State*, 95 Nev. 669, 681, 601 P.2d 407, 415 (1979). Factors such as nervousness are part of a reasonable sus-

picion analysis but, standing alone, carry little weight because many citizens become nervous during a traffic stop, even when they have nothing to hide. *United States v. Arvizu*, 534 U.S. 266, 275 (2002); *United States v. Richardson*, 385 F.3d 625, 630-31 (6th Cir. 2004). Jurisdictions are divided on the value of handprints on a vehicle. Some have recognized reasonable suspicion where handprints were one of many factors, *e.g.*, *United States v. Thompson*, 408 F.3d 994, 995-96 (8th Cir. 2005), but others have not. *United States v. Salinas*, 940 F.2d 392, 394-95 (9th Cir. 1991) (finding no reasonable suspicion where officers observed handprints on the trunk of an automobile). Although criminals may frequently check contraband in their trunks, many law-abiding citizens also routinely utilize their trunks for non-suspect reasons, such as hauling groceries (or in Beckman's case, wine). Next, even if Beckman's request to stand and stretch was unusual compared to other citizens, it made sense given the fact that Beckman had been driving for hours. And when Beckman sought to exit his vehicle, he requested permission from, and fully cooperated with, Trooper Pickers. Lastly, the business card made sense given that Beckman is a salesperson, and if anything, would likely have tended to make a reasonable person think that Beckman had nothing to hide. Thus, the events that occurred during the traffic stop did not provide reasonable suspicion of criminal activity that made the continued detention reasonable.

[Headnote 16]

For these reasons we conclude as a matter of law that Trooper Pickers unreasonably seized Beckman's person in violation of the United States and Nevada Constitutions before the canine sniff and warrantless search ever occurred. Although law enforcement does not need reasonable suspicion before conducting a dog sniff, *United States v. Place*, 462 U.S. 696, 707 (1983) (concluding that a dog sniff is not a ''search'' for purposes of the Fourth Amendment), the sniff was the ''product of an unconstitutional seizure'' during a ''traffic stop [that was] unreasonably prolonged before the dog [wa]s deployed.'' *Alexander*, 448 F.3d at 1016; *see also* 4 Wayne R. LaFave, *Treatise on Search and Seizure* § 9.3(b) (5th ed. 2012) (''A traffic stop that has been turned into a drug investigation via . . . questioning about drugs, grilling about the minute details of travel plans, seeking consent for a full roadside exploration of the motorist's car, or parading a drug dog around the vehicle[ ] is a far cry from a straightforward and unadorned traffic stop . . . .''). And when the extended seizure '' 'enable[s] the dog sniff to occur,' '' suppression may properly follow. *United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2008) (quoting *Caballes*, 543 U.S. at 408).

III.

[Headnotes 17, 18]

In these circumstances suppression is appropriate because Trooper Pickers' conduct raises '' 'concern[s] about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity.' '' *United States v. Digiovanni*, 650 F.3d 498, 512 (4th Cir. 2011) (quoting *United States v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)).[5] Suppression is not only appropriate because the extended seizure enabled the dog sniff, but also because of the continued seizure and intrusive search that Beckman endured. Even though the subsequent search revealed contraband in Beckman's vehicle, '' 'no subsequent events or circumstances can retroactively justify the seizure.' '' *Lisenbee*, 116 Nev. at 1129, 13 P.3d at 951 (quoting *State v. Stinnett*, 104 Nev. 398, 401, 760 P.2d 124, 126 (1988)). And the government cannot benefit from evidence that officers obtained through a clear violation of an individual's Fourth Amendment rights. *See Jardines*, 569 U.S. ___, ___, 133 S. Ct. 1409, 1417-18 (affirming suppression of evidence where officers gathered the evidence by intruding on an individual's Fourth Amendment rights); *Segura v. United States*, 468 U.S. 796, 815 (1984) (Suppression is justified when the challenged evidence is '' 'the product of illegal governmental activity.' '' (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980))).

Accordingly, the district court appropriately suppressed the evidence. Although the court based its decision on the warrantless search, its conclusion is far more compelling based on the illegal seizure. Unlike the warrantless search that the district court addressed, which involves complex areas of law, the law prohibiting illegal seizures is plain and easily understood. There is no justification for the unconstitutional seizure and its aftermath, including the search that ultimately yielded contraband.

We therefore affirm.

GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

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[5]Our concerns are further heightened by the State's candid disclosure that ''Trooper Pickers made statements that were misleading and or dishonest in his application'' to an agency in Idaho. The dishonesty was severe enough ''that [it] would have been enough to result in his termination'' had he not left the police force on his own accord.

THE STATE OF NEVADA, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE WILLIAM O. VOY, DISTRICT JUDGE, FAMILY COURT DIVISION, RESPONDENTS, AND LOGAN D., A MINOR, REAL PARTY IN INTEREST.

No. 52477

July 25, 2013 306 P.3d 369

Original petition for a writ of prohibition or mandamus challenging an order of the juvenile court granting the real party in interest's motion to declare Assembly Bill 579, enacted as Chapter 485 of the 2007 Statutes of Nevada, unconstitutional as applied to juvenile sex offenders.

Juvenile sought an order in the juvenile court granting his motion to declare Assembly Bill (A.B.) 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, unconstitutional as applied to juvenile sex offenders. The juvenile court concluded that the statute was unconstitutional as applied. The State petitioned for a writ of prohibition or mandamus. The supreme court, DOUGLAS, J., held that: (1) A.B. 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, was rationally related to protect the public from juvenile sex offenders; (2) A.B. 579 did not deny juvenile procedural due process; (3) A.B. 579 was not unconstitutionally vague; (4) A.B. 579 did not conflict with the purpose of the juvenile justice system; and (5) A.B. 579 did not violate ex post facto clauses of the United States or Nevada Constitutions.

Petition granted.

CHERRY, J., with whom HARDESTY and SAITTA, JJ., agreed, dissented.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan VanBoskerck*, Chief Deputy District Attorney, Clark County, for Petitioner.

Philip J. Kohn, Public Defender, and *Howard Brooks* and *Susan Deems Roske*, Deputy Public Defenders, Clark County, for Real Party in Interest.

Margaret A. McLetchie, Las Vegas, for Amicus Curiae American Civil Liberties Union of Nevada.

1. MANDAMUS.
   The supreme court will exercise its discretion to consider petitions for extraordinary writs only when there is no plain, speedy, and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.
2. APPEAL AND ERROR.
   The constitutionality of a statute presents a question of law that the supreme court reviews de novo.
3. CONSTITUTIONAL LAW.
   Statutes are cloaked with a presumption of validity, and the burden is on the challenger to demonstrate that a statute is unconstitutional.
4. CONSTITUTIONAL LAW.
   When undertaking a substantive due process analysis, a statute that does not infringe upon a fundamental right will be upheld if it is rationally related to a legitimate government purpose. U.S. CONST. amend. 14.
5. STATUTES.
   The Legislature need not articulate its purpose in enacting a statute; the statute will be upheld if any set of facts can reasonably be conceived of to justify it.
6. STATUTES.
   The Legislature enjoys broad discretion to make reasonable distinctions when enacting legislation.
7. CONSTITUTIONAL LAW; MENTAL HEALTH.
   Assembly Bill 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, was rationally related for due process purposes to protect the public from juvenile sex offenders. U.S. CONST. amend. 14; NRS 62F.200(1), 179D.095(1)(b).
8. CONSTITUTIONAL LAW; INFANTS.
   A juvenile's right to have his records of juvenile adjudications for sex offenses kept confidential was not a fundamental right protected by the substantive component of the Fourteenth Amendment; thus, since the community notification provisions of the new law were rationally related to the State's interest in protecting the public from juvenile sex offenders, the new law did not violate the juvenile's due process rights. Const. art. 1, § 8(5); U.S. CONST. amend. 14.
9. CONSTITUTIONAL LAW.
   The substantive component of the Fourteenth Amendment to the United States Constitution recognizes certain fundamental rights upon which the government's ability to intrude is sharply limited. U.S. CONST. amend. 14.
10. CONSTITUTIONAL LAW.
    A substantive due process analysis begins with a careful description of the asserted right. U.S. CONST. amend. 14.
11. CONSTITUTIONAL LAW.
    If the asserted right is deeply rooted in tradition and history and so implicit in the concept of ordered liberty that neither liberty nor justice would exist if it were sacrificed, the asserted right is a fundamental one. U.S. CONST. amend. 14.
12. CONSTITUTIONAL LAW.
    The supreme court analyzes substantive due process challenges to a statute that infringes on a fundamental right under a strict scrutiny standard, and the statute will be invalidated unless it is narrowly tailored to serve a compelling state interest. U.S. CONST. amend. 14.

13. CONSTITUTIONAL LAW.

If the statute does not abridge a fundamental due process right, it is reviewed under the rational basis test and will be upheld so long as it bears a rational relationship to a legitimate state interest. U.S. CONST. amend. 14.

14. CONSTITUTIONAL LAW; INFANTS.

Assembly Bill 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, did not deny juvenile procedural due process; the bill imposed registration and community notification requirements on all juveniles age 14 and older who were adjudicated for certain crimes, and no additional facts were relevant to the statutory scheme. U.S. CONST. amend. 14.

15. CONSTITUTIONAL LAW; INFANTS.

Assembly Bill 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, was not unconstitutionally vague on the basis that it granted the juvenile court continuing jurisdiction over juvenile sex offenders, as argued by juvenile; statute provided the juvenile court with continuing jurisdiction over juvenile sex offenders only so that it could provide information to the Central Repository and parents or guardians of juvenile sex offenders, and to keep records from being sealed. U.S. CONST. amend. 14; NRS 62F.220(2).

16. CONSTITUTIONAL LAW.

A statute is unconstitutionally vague if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.

17. STATUTES.

To survive a vagueness challenge, a law must provide explicit standards for those who apply them and give persons of ordinary intelligence a reasonable opportunity to know what is prohibited.

18. CONSTITUTIONAL LAW.

The burden to demonstrate a statute's unconstitutionality rests on the challenger.

19. INFANTS.

The specific provisions of new law that mandated that all juveniles aged 14 and older who were adjudicated for certain sex offenses register as adult sex offenders and be subject to community notification constituted exceptions to the general provisions of statute that provided that registration and community notification were not applicable to juvenile sex offenders. NRS 169.025(2), 179D.010-179D.550.

20. STATUTES.

When two statutory provisions conflict, the supreme court employs the rules of statutory construction and attempts to harmonize conflicting provisions so that the act as a whole is given effect.

21. STATUTES.

When a statutory scheme contains a general prohibition contradicted by a specific permission, the specific provision is construed as an exception to the general one.

22. INFANTS.

Assembly Bill 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, did not conflict with the purpose of the juvenile justice system, as argued by juvenile; the

main purposes the juvenile courts should consider are the best interest of the child and the public interest, and if the two interests conflict, the public interest predominates, and registration and community notification did not conflict with the juvenile justice system's public interest.

23. CONSTITUTIONAL LAW; INFANTS.
Assembly Bill 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, did not violate ex post facto clauses of the United States or Nevada Constitutions; the legislative history indicated that the only intent behind the assembly bill was compliance with Sex Offender Registration and Notification Act in order to avoid the loss of federal funds, and thus the bill's purpose was to create a civil regulatory scheme, and the effect of the bill did not negate the Legislature's intent. Const. art. 1, § 15; U.S. CONST. art. 1, § 10, cl. 1.

24. CONSTITUTIONAL LAW.
To be ex post facto, a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing additional punishment for such conduct. Const. art. 1, § 15; U.S. CONST. art. 1, § 10, cl. 1.

25. CONSTITUTIONAL LAW.
For purposes of ex post facto analysis, a retrospective law is one that changes the legal consequences of acts completed before its effective date. Const. art. 1, § 15; U.S. CONST. art. 1, § 10, cl. 1.

26. CONSTITUTIONAL LAW.
For purposes of ex post facto analysis, a two-part test is utilized to determine whether a given statute imposes a punishment. The court must first determine legislative intent; if the intent was to impose a punishment, the statute is a punishment. But if the intention of the Legislature was to create a civil, nonpunitive regulatory scheme, the court must next determine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Const. art. 1, § 15; U.S. CONST. art. 1, § 10, cl. 1.

27. CONSTITUTIONAL LAW.
For the purpose of ex post facto analysis, seven factors are considered when analyzing the effects of challenged provisions, whether the statutory scheme: (1) has traditionally been regarded as punishment, (2) imposes an affirmative disability or restraint, (3) promotes the traditional goals of punishment, (4) is rationally related to a nonpunitive purpose, (5) is excessive in relation to its nonpunitive purpose, (6) applies only upon a finding of scienter, and (7) applies to behavior that is already a crime. Const. art. 1, § 15; U.S. CONST. art. 1, § 10, cl. 1.

28. INFANTS; JURY.
Assembly Bill 579, which provided for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, did not impermissibly transform the juvenile justice system into a criminal system or implicate the right to a jury trial; even though the bill subjected juvenile sex offenders to registration and notification requirements, juvenile offenders were still not convicted, they could not be sent to prison, and the focus remained on rehabilitating the juvenile. U.S. CONST. amend. 6; NRS 62E.010.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this original writ proceeding, we consider whether Assembly Bill 579, enacted by the 2007 Nevada Legislature, providing for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses, violates the Due Process and Ex Post Facto Clauses of the United States and Nevada Constitutions. We conclude that registration and community notification do not violate the Due Process or Ex Post Facto Clauses. We therefore grant the petition.

FACTS AND PROCEDURAL HISTORY

Real party in interest Logan D. was adjudicated delinquent for one count of lewdness with a minor on October 4, 2006, for an offense alleged to have occurred in August 2006 when he was 17 years old. The law in place at the time of Logan's adjudication provided the juvenile court with discretion to require a juvenile adjudicated for a sexual offense to submit to adult registration and community notification if the court determined at a hearing that the juvenile was not rehabilitated or was likely to pose a threat to public safety. 2005 Nev. Stat., ch. 507, § 26, at 2873-74. Pursuant to that law, the juvenile court scheduled a hearing for September 2009 to determine whether Logan would be required to register as an adult sex offender. Before that hearing took place, however, the Legislature passed Assembly Bill (A.B.) 579. That bill, codified in relevant part in NRS Chapter 62F and NRS Chapter 179D, removed the juvenile court's discretion to determine whether a juvenile sex offender should be subject to registration and community notification as an adult. The new law mandated that all juveniles aged 14 and older who are adjudicated for certain sex offenses register as adult sex offenders and be subject to community notification; the law prohibited the imposition of these requirements on juvenile offenders under the age of 14. NRS 62F.200; NRS 179D.035; NRS 179D.095(1); NRS 179D.441; NRS 179D.475. On December 28, 2007, six months before A.B. 579 was to take effect, 2007 Nev. Stat., ch. 485, § 57, at 2780, Logan and approximately 20 other juveniles filed motions asking the juvenile court to find the bill unconstitutional as applied to juvenile sex offenders. The juveniles asserted that A.B. 579 was unconstitutionally vague and violated procedural and substantive due process as well as the Contracts, Ex Post Facto, and Cruel and/or Unusual Punishment Clauses of the federal and state constitutions.

After full briefing and several hearings, the juvenile court entered an order declaring A.B. 579 unconstitutional as applied

to juvenile sex offenders. The juvenile court concluded that the statutory scheme violated substantive due process because it did not bear a rational relationship to the ''rehabilitation and public safety goals of the Juvenile Court and the Department of Juvenile Justice nor the public safety goals of the Adam Walsh Act.'' The juvenile court determined that prohibiting registration and community notification for high-risk juvenile sex offenders under the age of 14 while mandating those requirements for low-risk juvenile sex offenders over the age of 14 was irrational because such an approach does not serve to prevent recidivism or further rehabilitation.

The State filed an appeal from the juvenile court's order, and the affected juveniles, including Logan D., filed cross-appeals. This court dismissed the appeals for lack of jurisdiction. *In re Logan D., a Minor*, Docket No. 51682 (Order Dismissing Appeals, September 5, 2008). This original petition for a writ of prohibition or, alternatively, mandamus followed.[1]

DISCUSSION

[Headnote 1]

A writ of prohibition is available to halt proceedings occurring in excess of a court's jurisdiction, NRS 34.320, while a writ of mandamus may issue to compel the performance of an act which the law requires ''as a duty resulting from an office, trust or station,'' NRS 34.160, or to control an arbitrary or capricious exercise of discretion, *see Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). This court will exercise its discretion to consider petitions for extraordinary writs ''only when there is no plain, speedy and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration.'' *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005) (internal quotation marks and footnote omitted).

This petition raises important legal issues potentially affecting all persons who have been adjudicated delinquent for certain sex offenses since 1956. And because this court previously determined that the challenged order was not substantively appealable, petitioner has no other remedy at law. We therefore exercise our discretion to consider the merits of this petition.

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[1]In April 2010, this court approved the parties' stipulation to stay this proceeding pending resolution of federal litigation challenging the constitutionality of A.B. 579 as applied to adult sex offenders. That litigation has now been resolved and A.B. 579 determined constitutionally sound as applied to adult offenders. *ACLU of Nev. v. Masto*, 670 F.3d 1046 (9th Cir. 2012). Accordingly, we now lift the stay of this matter.

Background

In 2006, the United States Congress enacted the Adam Walsh Child Protection and Safety Act, which included the Sex Offender Registration and Notification Act (SORNA). 42 U.S.C. §§ 16901-16962 (2006). SORNA was promulgated ''to protect the public from sex offenders and offenders against children, and in response to . . . vicious attacks by violent predators.'' *Id.* § 16901. SORNA mandates, in relevant part, that each state require persons convicted of certain sex offenses to periodically register with authorities and provide specified information, *id.* §§ 16913-16914, maintain a statewide sex offender registry containing specific information pertaining to each registered sex offender, *id.* §§ 16912 & 16914, implement a community notification program, *id.* § 16921, and provide a criminal penalty for sex offenders who fail to comply, *id.* § 16913. SORNA specifically defines the term ''convicted'' as including juveniles adjudicated delinquent for certain sex offenses. *Id.* § 16911(8). A state's failure to timely comply with the Act's requirements in a given fiscal year results in a 10-percent reduction of certain funds from the federal government. *Id.* §§ 16924-16925.

In response to the federal legislation, Nevada passed A.B. 579, with an effective date of July 1, 2008. 2007 Nev. Stat., ch. 485, § 57, at 2780. Under Nevada's version of the law, a ''sex offender'' is defined to include any person who, after July 1, 1956, has been adjudicated delinquent for sexual assault, battery with the intent to commit sexual assault, lewdness with a child, or an attempt or conspiracy to commit any of these offenses, so long as the offender was 14 years or older at the time of the offense. NRS 62F.200(1); NRS 179D.095(1)(b). The ''term does not include an offense involving consensual sexual conduct if the victim was at least 13 years of age and the offender was not more than 4 years older than the victim at the time of the commission of the offense.'' NRS 62F.200(2).

Sex offenders are required to initially register before completing the term of imprisonment for a crime, or if not imprisoned, no later than three business days after sentencing. NRS 179D.445(2). They must provide authorities with the following information: name, aliases, social security number, residence address, name and address of employer, name and address of school, and description and license plate number of all vehicles frequently driven or registered to them. NRS 179D.443(1). Any changes in name, residence, employment, or student status must be reported, in person, within three business days. NRS 179D.447(1). Failure to comply is a category D felony. NRS 179D.550(1).

Sex offenders are classified into three tiers; juvenile sex offenders can fall into any of these categories depending on their offense and prior history. Juveniles adjudicated for sexual assault, battery

with the intent to commit sexual assault, or an attempt or conspiracy to commit these offenses are classified as Tier III offenders. *See* NRS 179D.117(2), (3) & (8). Juveniles can also be classified as Tier III offenders if they are already a Tier II offender and commit another sexual offense or crime against a child. NRS 179D.117(6). Juveniles adjudicated for lewdness with a child or attempted lewdness with a child are classified as Tier II offenders. *See* NRS 179D.115 (defining a Tier II offender as a person convicted of a crime against a child punishable by more than 1 year in prison); *see also* NRS 201.230 (lewdness is a category A felony); NRS 193.330(1)(a)(1) (attempt to commit a category A felony is a category B felony). Tier II assignment may also be made if a juvenile is already a Tier I offender and any of his ''sexual offenses constitute an offense punishable by imprisonment for more than 1 year.'' NRS 179D.115(4). Finally, juveniles adjudicated for conspiracy to commit lewdness with a child are Tier I offenders. *See* NRS 179D.113; *see also* NRS 193.140 (gross misdemeanor punishable by not more than one year in jail); NRS 199.480(3) (conspiracy is a gross misdemeanor).

Each tier has different reporting requirements. Tier III offenders must appear in person every 90 days and allow fingerprints, palm prints, and a photograph to be taken, and update any required information. NRS 179D.480(1)(c). Tier II offenders are required to appear in person every 180 days, and Tier I offenders once per year, for the same purpose. NRS 179D.480(1)(a)-(b). Tier III offenders must register for life; if, however, they are Tier III offenders as the result of a juvenile adjudication, they may petition for relief from the registration requirements after a period of 25 consecutive years without a conviction for a new felony or sexual offense, and successful completion of any probationary or parole terms and a certified sex offender treatment program. NRS 179D.490(2)-(4). Tier II offenders must register for 25 years and Tier I offenders for 15 years. NRS 179D.490(2)(a)-(b). Tier I offenders may, however, petition for release after 10 consecutive years if they meet the same requirements for early release as Tier III offenders. NRS 179D.490(3)(a). There is no early release provision for Tier II offenders.

Juvenile sex offenders are subject to both active and passive community notification. Local law enforcement agencies are required to provide registration information to (1) every school, religious and youth organization, and public housing agency in which the sex offender is a student, worker, or resident; (2) every child welfare agency; (3) volunteer organizations through which contact with vulnerable persons or children may occur; and (4) if the sex offender is classified as a Tier III offender, members of the public likely to encounter the sex offender. NRS 179D.475(2). Further, any person, company, or organization may request registration in-

formation from the Central Repository for Nevada Records of Criminal History. NRS 179D.475(1)(e).

Juvenile sex offenders' information is also available via Nevada's community notification website. NRS 179B.250. Any member of the public may perform a search by name, alias, or zip code, yielding the following information about registered sex offenders: name and aliases; physical description; current photograph; year of birth; residence, school, and employer address; license plate number and description of any vehicle owned or operated by the sex offender; name of, and citation to, the specific statute violated; court convicted in; name convicted under; name and location of every penal institution, hospital, school, mental facility, or other institution committed to; location of offense committed; and assigned tier level. NRS 179B.250(6)(c). The website does not convey information regarding Tier I offenders unless they have been convicted of a sexual offense against a child or a crime against a child. NRS 179B.250(7)(b). It also does not reveal an offender's social security number, the name of an offender's school or employer, arrests not resulting in conviction, and any other registration information not expressly required to be disclosed by paragraph (6)(c) or exempted from disclosure pursuant to federal law. NRS 179B.250(7)(c)-(g).

The public is prohibited from using information obtained from the community notification website, except as allowed by statute, ''for any purpose related to'' insurance; loans; credit; employment; education, scholarships, or fellowships; housing or accommodations; or benefits, privileges, or services from any business. NRS 179B.270. Neither may registration information ''be used to unlawfully injure, harass or commit a crime against any person named in the registry or residing or working at any reported address.'' NRS 179B.250(2)(e). Misuse of information obtained from the website can result in civil and criminal penalties. NRS 179B.280; NRS 179B.285.

The juvenile court's holding

The juvenile court declared A.B. 579 unconstitutional as applied to juvenile sex offenders, concluding that the bill violated substantive due process because it neither bore a rational relationship to the public safety goals of the bill nor furthered the rehabilitation and public safety goals of the juvenile justice system.[2] The juvenile

[2]The juvenile court rejected Logan's contention that the bill should be reviewed under strict scrutiny, finding that it did not impinge upon any fundamental right or affect any suspect class. The juvenile court further rejected Logan's assertion that the bill violated the Contracts, Ex Post Facto, and Cruel and/or Unusual Punishment Clauses of the United States and Nevada Constitutions, as well as his contention that the bill violated his right to procedural due process and was unconstitutionally vague.

court's primary concern with the bill was that it required community notification for all juvenile sex offenders over the age of 14 and adjudicated for certain offenses, regardless of their risk to reoffend, but did not allow community notification for those offenders under the age of 14, even those who represent a high risk to reoffend. We share the juvenile court's concerns regarding the wisdom of this legislation. Nevertheless, we are bound to follow the law, and A.B. 579, as applied to juveniles, easily passes rational basis review.

[Headnotes 2-6]

The constitutionality of a statute presents a question of law that this court reviews de novo. *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011). Statutes are cloaked with a presumption of validity and the burden is on the challenger to demonstrate that a statute is unconstitutional. *Id*. When undertaking a substantive due process analysis, a statute that does not infringe upon a fundamental right will be upheld if it is rationally related to a legitimate government purpose. *Bowers v. Whitman*, 671 F.3d 905, 916-17 (9th Cir.), *cert. denied*, 568 U.S. ___, 133 S. Ct. 163 (2012); *see also Gaines v. State*, 116 Nev. 359, 372, 998 P.2d 166, 174 (2000). The Legislature need not articulate its purpose in enacting a statute; the statute will be upheld if any set of facts can reasonably be conceived of to justify it. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Sereika v. State*, 114 Nev. 142, 149, 955 P.2d 175, 179 (1998). A legislative choice ''may be based on rational speculation unsupported by evidence or empirical data.'' *FCC*, 508 U.S. at 315. And the Legislature enjoys broad discretion to make reasonable distinctions when enacting legislation. *Allen v. State, Pub. Emps. Ret. Bd.*, 100 Nev. 130, 136-37, 676 P.2d 792, 796 (1984).

[Headnote 7]

In line with the stated purpose of its federal counterpart, the Nevada Legislature could have determined that the enactment of A.B. 579 was required to protect the public from sex offenders, unquestionably a legitimate government interest. *See* 42 U.S.C. § 16901 (2006) (stating that the purpose of the act was ''to protect the public from sex offenders and offenders against children''); *Nollette v. State*, 118 Nev. 341, 346, 46 P.3d 87, 90-91 (2002) (concluding that the purpose of Nevada's previous version of sex offender registration and community notification laws was to aid law enforcement in solving crimes and to protect the public). To this end, the Legislature could have determined that juveniles adjudicated for the enumerated offenses, which represent the most serious of sexual offenses, are at a higher risk to reoffend—and thus pose a greater danger to the public—than juveniles adjudicated for other, less serious offenses. *See Helman v. State*, 784 A.2d 1058,

1075 (Del. 2001). And consistent with the Legislature's presumption since 1911 that children aged 14 and older know the wrongfulness of their actions, *see* NRS 194.010(1)-(2) (unchanged since enactment in 1911, *see* Nev. Rev. Laws § 6268 (1912)), it could have also concluded that once a child reaches the age of 14, he or she commits a sex offense with knowledge that it is wrong and therefore poses a greater risk to the public than a younger child who commits the same offense. Given these possible justifications for the distinctions drawn in the legislation, we conclude that the juvenile court erred by concluding that A.B. 579 did not survive rational basis review. *See United States v. Juvenile Male*, 670 F.3d 999, 1009-10 (9th Cir.) (application of SORNA to juvenile sex offenders satisfies rational basis review), *cert. denied*, 568 U.S. ___, 133 S. Ct. 234 (2012); *In re J.R.*, 793 N.E.2d 687, 694-96 (Ill. App. Ct. 2003) (registration and limited community notification as applied to juvenile sex offenders survive rational basis review); *In re Ronnie A.*, 585 S.E.2d 311, 312 (S.C. 2003) (registration of juvenile sex offenders is rationally related to goal of public protection); *In re M.A.H.*, 20 S.W.3d 860, 866 (Tex. App. 2000). *But see In re W.Z.*, 957 N.E.2d 367, 377 (Ohio Ct. App. 2011) (no rational basis for automatic registration of juvenile sex offenders at time of adjudication where, pursuant to state law, court made a determination as to rehabilitation when juvenile turned 21).

Of utmost concern, it does not appear from the legislative history that the Nevada Legislature ever considered the impact of this bill on juveniles or public safety. The body's motivation for passing the bill appears to be compliance with the Walsh Act and avoidance of the reduction in grant monies that would come with noncompliance. *See, e.g.*, Hearing on A.B. 579 Before the Assembly Select Comm. on Corrections, Parole, and Probation, 74th Leg. (Nev., April 10, 2007). Under rational basis review, however, we ''are not limited to consideration of the justifications actually asserted by the legislature,'' *Sereika*, 114 Nev. at 149, 955 P.2d at 179; so long as plausible reasons for an action exist, it is ''constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,'' *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (internal quotation marks omitted); *see also Allen*, 100 Nev. at 134, 676 P.2d at 795 (''The existence of facts which would support the legislative judgment is presumed.''). And ''[t]his is particularly true where the legislature must necessarily engage in a process of line-drawing.'' *Fritz*, 449 U.S. at 179.

Our inquiry does not end, however, with our conclusion that the juvenile court erred by holding that A.B. 579 did not withstand rational basis review. If this court determines that the statutory scheme is unconstitutional for any other reason presented to the juvenile court, we will nevertheless uphold the order declaring the

legislation unconstitutional. *Cf. Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (''If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.''). We therefore examine Logan's other constitutional challenges.

Substantive due process

[Headnote 8]

Logan contends that the community notification provisions of A.B. 579 impinge on juveniles' fundamental right to privacy and are therefore subject to strict scrutiny review. We disagree.

[Headnotes 9-13]

The substantive component of the Fourteenth Amendment to the United States Constitution recognizes certain ''fundamental rights'' upon which the government's ability to intrude is sharply limited. *See, e.g.*, *Paul v. Davis*, 424 U.S. 693, 712-13 (1976). A substantive due process analysis begins ''with a careful description of the asserted right.'' *Reno v. Flores*, 507 U.S. 292, 302 (1993). If the asserted right is ''deeply rooted'' in tradition and history and so ''implicit in the concept of ordered liberty'' that ''neither liberty nor justice would exist if [it] were sacrificed,'' the asserted right is a fundamental one. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted); *see also Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 794 (1969). A statute that infringes on a fundamental right is subject to strict scrutiny and will be invalidated unless it is ''narrowly tailored to serve a compelling state interest.'' *In re Parental Rights as to D.R.H.*, 120 Nev. 422, 427, 92 P.3d 1230, 1233 (2004) (internal quotation marks omitted). If the statute does not abridge a fundamental right, it is reviewed under the rational basis test and will be upheld so long as it bears a rational relationship to a legitimate state interest. *See Allen*, 100 Nev. at 134, 676 P.2d at 794-95.

Logan contends that ''[a]n individual's right to privacy is clearly impacted by community notification.'' Besides this vague reference to the right of privacy, he fails to identify the precise right asserted. Because Logan challenges the community notification provisions of A.B. 579, we conclude that his claim is appropriately stated as the right to have records of juvenile adjudications for sex offenses kept confidential. We further conclude that this is not a fundamental right protected by the substantive component of the Fourteenth Amendment of the United States Constitution, *see* U.S. Const. amend. XIV, § 1, or the due process clause of the Nevada Constitution, *see* Nev. Const. art. 1, § 8(5).

The Supreme Court has identified fundamental rights as including ''the rights to marry, to have children, to direct the education

and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.'' *Glucksberg*, 521 U.S. at 720 (internal citations omitted). Also included may be the right to ''refuse unwanted lifesaving medical treatment.'' *Id*. This court has consistently relied upon the Supreme Court's holdings interpreting the federal Due Process Clause to define the fundamental liberties protected under Nevada's due process clause. *See, e.g.*, *Arata v. Faubion*, 123 Nev. 153, 158-59, 161 P.3d 244, 248-49 (2007); *Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 71, 64 P.3d 1056, 1059-60 (2003).

We conclude that Logan's asserted right, while unquestionably important, does not come within the ambit of the type of rights deemed fundamental by the Supreme Court. Other courts have reached the same conclusion. *See, e.g.*, *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 500 (6th Cir. 2007); *Juvenile Male*, 670 F.3d at 1012-13; *In re J.W.*, 787 N.E.2d 747, 757 (Ill. 2003); *Helman*, 784 A.2d at 1073-74 (rejecting juvenile sex offender's contention that community notification violated his right to privacy); *In re Jeremy P.*, 692 N.W.2d 311, 319-20 (Wis. Ct. App. 2004); *see also Glucksberg*, 521 U.S. at 720 (cautioning that the Supreme Court has ''always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended'' (internal quotation marks omitted)). *But see State v. Bani*, 36 P.3d 1255, 1264-66 (Haw. 2001).

Neither is the right to the confidentiality of juvenile sex offender records so ''deeply rooted'' in Nevada's history as to render confidentiality a fundamental right under our state constitution. Juvenile delinquency records have historically enjoyed general confidentiality in this state. *See, e.g.*, NRS 62H.030(2) (records of juvenile offenders can generally be opened to the public only through court order to those persons with a legitimate interest in the records); NRS 62H.130 (most juvenile delinquents adjudicated for nonsexual offenses may move to seal their records three years after an adjudication, if they remain trouble-free).

Records of juvenile sex offenders, however, have enjoyed less protection than records of other delinquents. Persons subject to juvenile community notification, or adult community notification pursuant to delinquency adjudications, were not eligible to seal their delinquency records. 2003 Nev. Stat., ch. 206, § 192, at 1082. Most significantly, from 1997 until the effective date of A.B. 579 in 2008, juvenile sex offenders were subject to juvenile community notification, 1997 Nev. Stat., ch. 451, § 90.8, at 1675 (repealed by A.B. 579), which entailed almost the identical community notification provisions as the adult version, *compare* Office of the Nev. Attorney Gen., *Nevada's Guidelines and Procedures for Community Notification of Juvenile Sex Offenders*, § 8.10, at 10

(Rev. Feb. 2006) [hereinafter *Juvenile Community Notification Guidelines*], *with* Office of the Nev. Attorney Gen., *Nevada's Guidelines and Procedures for Community Notification of Adult Sex Offenders*, § 8.10, at 12 (Rev. Feb. 2006). Juvenile community notification included distribution of a juvenile sex offender's photograph, a description of his person, his name and aliases, a general location of his residence and workplace, and a description and license number of all vehicles he owned or regularly operated. *Juvenile Community Notification Guidelines*, *supra*, § 8.10(2). If designated as a Tier II offender, law enforcement was required to provide this information to any camps, school districts, youth organizations, day care centers, and other religious or community organizations deemed reasonably likely to encounter the juvenile. *Id.* § 8.00(3). In addition, if a Tier II juvenile offender was adjudicated for a sexual offense against a person under 18 years of age—as it appears many juvenile sex offenders were—law enforcement was also required to notify movie theaters and businesses catering primarily to children and that were reasonably likely to encounter the juvenile offender. *Id.* Records of Tier III juvenile sex offenders were even more broadly publicized; law enforcement was required to notify, in addition to the notification required for Tier II offenders, any members of the community that were reasonably likely to encounter the juvenile sex offenders and who, in law enforcement's discretion, were appropriate persons to receive notification.[3] *Id.* § 8.00(4). And the juvenile court was vested with the discretion to require juvenile sex offenders to register as adult sex offenders and submit to adult community notification. 2005 Nev. Stat., ch. 507, § 26, at 2873-74. Accordingly, no deeply rooted right to the confidentiality of juvenile sex offender records exists in Nevada.

We conclude that Logan fails to demonstrate that A.B. 579 implicates a fundamental right. The bill is therefore reviewed under the rational basis test, which, as discussed above, it passes. Logan's contention that A.B. 579, as applied to juveniles, violates substantive due process lacks merit.[4]

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[3]For Tier I offenders, the information was disseminated only to law enforcement agencies. *Juvenile Community Notification Guidelines*, *supra*, § 8.00(2).

[4]We also reject Logan's assertion that placing juvenile sex offenders ''in the same category as adult sex offenders'' violates his right to equal protection. Neither age nor classification as a sex offender constitutes a suspect classification for purposes of an equal protection analysis. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *Juvenile Male*, 670 F.3d at 1009; *Doe v. Michigan Dep't of State Police*, 490 F.3d 491, 503 (6th Cir. 2007); *Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005); *United States v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001); *In re M.A.H.*, 20 S.W.3d 860, 866 (Tex. App. 2000) (declining to apply strict scrutiny where neither juveniles nor sex offenders constituted a suspect class); *State v. Ward*, 869 P.2d 1062, 1077 (Wash. 1994);

Procedural due process

[Headnote 14]

Logan contends that A.B. 579 denies him procedural due process because it deprives him of a protected privacy interest without procedural protections. We disagree. A.B. 579 imposes registration and community notification requirements on all juveniles age 14 and older who are adjudicated for certain crimes; no additional facts are relevant to the statutory scheme. Even assuming A.B. 579 infringes on a liberty interest, Logan is not entitled to procedural due process to prove a fact that is irrelevant under the statute. *See Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (''[E]ven assuming, *arguendo*, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the . . . statute.''). *But see State v. Guidry*, 96 P.3d 242, 251-52 (Haw. 2004) (concluding that due process clause of state constitution required a hearing to determine risk of future dangerousness because, although statute required imposition of registration on all sex offenders, future dangerousness was relevant to the statutory scheme because its purpose was to protect the public); *In re W.Z.*, 957 N.E.2d 367, 377-80 (Ohio Ct. App. 2011) (concluding that fundamental fairness requires a hearing to determine whether a juvenile sex offender has been rehabilitated before he may be subjected to registration and community notification where statute was based solely on the offense committed).

Vagueness

[Headnote 15]

Logan contends that the statutory scheme is unconstitutionally vague because it grants the juvenile court continuing jurisdiction over juvenile sex offenders and defines them as children for 25 years to a lifetime. He points out that a ''child'' is defined as a person who is subject to the jurisdiction of the juvenile court as a juvenile sex offender pursuant to NRS 62F.200-.260. NRS 62A.030(1)(c). However, the juvenile court cannot end its jurisdiction over a child for the purpose of carrying out the provisions of NRS 62F.200-.260 until the child is no longer subject to registration and community notification as a juvenile sex offender, *see* NRS 62F.220(2), and there is no provision allowing the juvenile court to relieve a child of registration and community notification. Logan contends that this statutory framework raises many questions relating to the scope of the jurisdiction of the juvenile court, which court has jurisdiction over violations of the registration

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State v. Linssen, 126 P.3d 1287, 1290 (Wash. Ct. App. 2006). Thus, A.B. 579 is subject only to rational basis review. As discussed above, A.B. 579 withstands rational basis review.

statute and the supervision of parole and probation, and the ramifications of being defined as a child for a lifetime. This vagueness argument was not made to the juvenile court in Logan's motion to declare A.B. 579 unconstitutional.[5] *See McKay v. City of Las Vegas*, 106 Nev. 203, 207, 789 P.2d 584, 586 (1990) (declining to consider issue not litigated before or ruled upon by the district court), *overruled on other grounds by Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 34 P.3d 509 (2001). Nevertheless, we exercise our discretion to address this issue.

[Headnotes 16-18]

A statute is unconstitutionally vague if it is ''so standardless that it authorizes or encourages seriously discriminatory enforcement.'' *Ford v. State*, 127 Nev. 608, 612, 262 P.3d 1123, 1125 (2011) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). To survive a vagueness challenge, a ''law must . . . provide explicit standards for those who apply them'' and give persons ''of ordinary intelligence a reasonable opportunity to know what is prohibited.'' *In re T.R.*, 119 Nev. 646, 653, 80 P.3d 1276, 1280-81 (2003) (internal citation omitted). The burden to demonstrate a statute's unconstitutionality rests on the challenger. *Ford*, 127 Nev. at 612, 262 P.3d at 1126.

We conclude that Logan fails to demonstrate that A.B. 579 is unconstitutionally vague. NRS 62F.220(2) does appear, as Logan asserts, to give the juvenile court continuing jurisdiction over juvenile sex offenders.[6] The plain language of the statute, however, limits the purpose of the continuing jurisdiction to ''carrying out the provisions of'' NRS 62F.200-.260. These statutes provide, respectively, the definition of a sexual offense; the juvenile court's duty to inform the Central Repository, the child, and the child's parent or guardian that a juvenile sex offender is subject to registration and community notification; and that the juvenile court may not seal a juvenile sex offender's records so long as he or she is subject to registration and community notification. Read in conjunction with NRS 62F.200-.260, NRS 62F.220(2) provides the

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[5]Logan made a vagueness argument to the juvenile court relying upon the same statutory provisions, but contended that the statutory scheme was vague because it failed to clarify which governmental entity had jurisdiction to enforce lifetime supervision and the restrictions imposed by Senate Bill 471, which was passed during the 2007 legislative session.

[6]This conclusion does not conflict with this court's recent statement in *State v. Barren*, 128 Nev. 337, 344, 279 P.3d 182, 187 (2012), that the ''juvenile court's jurisdiction [is limited] to persons less than 21 years of age.'' *Barren* dealt with the juvenile court's jurisdiction to adjudicate juveniles pursuant to the general rule of NRS 62B.410, while the portions of the statutes at issue here deal with the juvenile court's limited continuing jurisdiction to engage in administrative functions relating to registration and community notification pursuant to the exception in NRS 62B.410.

juvenile court with continuing jurisdiction over juvenile sex offenders only so that it may provide information to the Central Repository and parents or guardians of juvenile sex offenders, and to keep records from being sealed. Accordingly, Logan fails to demonstrate that NRS 62F.220(2) determines which court has jurisdiction over a violation of the registration requirements of Chapter 179D, *see* NRS 179D.550 (providing a criminal penalty for any sex offender who fails to comply with the provisions of NRS Chapter 179D), or affects the juvenile court's jurisdiction over delinquents who are on juvenile parole or probation.

Logan also points out that, pursuant to NRS 62A.030(1)(c)—defining a ''child''—a juvenile sex offender could be defined as a child for a lifetime. Although he complains that being defined as a child for a lifetime may have some impact on individuals in the ''sunset years of their lives,'' he does not identify any vagueness in the statute itself. Therefore, we conclude that Logan fails to demonstrate any constitutional infirmity in this regard.

Statutory conflict

[Headnote 19]

Next, Logan points to an alleged conflict between A.B. 579 and the existing statutory scheme, asserts that the rule of lenity should apply, and contends that A.B. 579 should therefore be interpreted to mean that registration and community notification are not applicable to juvenile sex offenders. Specifically, NRS 169.025(2) provides that NRS Title 14, which includes NRS Chapters 169 through 189, does not apply to juvenile delinquency proceedings. A.B. 579, however, requires that juveniles adjudicated of sex offenses submit to registration and community notification pursuant to NRS 179D.010-.550. Despite Logan's failure to present this argument to the juvenile court, we elect to address it. We conclude that this contention lacks merit because the cited statutory provisions can be read in harmony; when so read, registration and community notification do apply to juveniles and the rule of lenity does not apply.

[Headnotes 20, 21]

When two statutory provisions conflict, this court employs the rules of statutory construction, *Williams v. Clark Cnty. Dist. Attorney*, 118 Nev. 473, 484, 50 P.3d 536, 543 (2002), and attempts to harmonize conflicting provisions so that the act as a whole is given effect, *In re Eric L.*, 123 Nev. 26, 31, 153 P.3d 32, 35 (2007). Statutes are interpreted so that each part has meaning. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007). Therefore, when a scheme contains a general prohibition contradicted by a specific permission, ''the specific provision is con-

strued as an exception to the general one.'' *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 566 U.S. ___, ___, 132 S. Ct. 2065, 2071 (2012).

Here, NRS 169.025(2) is a general prohibition, preventing application of Title 14, including Chapter 179D, to juvenile delinquency proceedings. On the other hand, NRS Chapter 179D contains specific provisions mandating its application to certain juveniles adjudicated delinquent—NRS 179D.035 defines ''convicted'' to include certain delinquency adjudications and NRS 179D.095 defines ''sex offender'' to include certain juveniles adjudicated delinquent. The rules of statutory construction dictate that the specific provisions of NRS Chapter 179D be construed as exceptions to the general prohibition of NRS 169.025(2). *See also A Minor v. Juvenile Dep't*, 96 Nev. 485, 611 P.2d 624 (1980) (NRS 169.025(2) does not forbid application of rules of criminal procedure to juvenile proceedings). So read, the provisions are in harmony and none are rendered meaningless. And because they can be read in harmony, the rule of lenity does not apply. *State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011) (the rule of lenity applies only when the other rules of statutory interpretation fail).

Conflict with purpose of juvenile justice system

[Headnote 22]

Logan asserts that registration and community notification and the resulting stigmatization of juveniles conflicts with the traditional goals of the juvenile justice system. We recognize that community notification can have lasting stigmatic effects on juvenile offenders. Logan's argument, however, relies upon an erroneous factual assumption.

From their beginnings in 1899 in Illinois, juvenile courts focused only on the best interest of the child, treating delinquents not as criminals, ''but as misdirected, and misguided and needing aid, encouragement and assistance.'' *In re Seven Minors*, 99 Nev. 427, 431-32, 664 P.2d 947, 950 (1983) (internal quotation marks omitted), *disapproved on other grounds as stated in In re William S.*, 122 Nev. 432, 442 n.23, 132 P.3d 1015, 1021 n.23 (2006). But in 1949, Nevada's Legislature broadened this focus by requiring Nevada's juvenile courts to consider the public interest (including public protection) as well as the best interest of the child. *See id.* at 431-33, 664 P.2d at 950-51. Since then, we have specifically noted that public protection and the best interest of the child sometimes conflict, and concluded that when they do, it is the public interest that should predominate. *Id.* at 433, 664 P.2d at 951. Thus, while the interest of the juvenile offender remains one of the central concerns of the juvenile system, it is no longer the only, or pri-

mary concern. Accordingly, based on Nevada's long-standing recognition of public protection as one of the dual interests of the juvenile system, we conclude that registration and community notification do not inherently conflict with the purposes of Nevada's juvenile justice system.

Other courts have reached analogous conclusions. For example, the Supreme Court of Illinois determined that, given the recent expansion in the purpose of the juvenile court to include public protection and juvenile accountability, requiring juvenile sex offenders to register for life and subjecting them to limited community notification was not at odds with the policy and purpose of its juvenile system. *In re J.W.*, 787 N.E.2d 747, 759 (Ill. 2003); *see also Juvenile Male*, 670 F.3d at 1008 (although SORNA's notification requirement conflicted with the confidentiality provisions of the Federal Juvenile Delinquency Act, Congress clearly intended to limit those confidentiality provisions); *In re Richard A.*, 946 A.2d 204, 212 (R.I. 2008) (noting that the confidentiality generally afforded juveniles is not absolute and must sometimes give way to other legitimate public policies). *But see In re W.Z.*, 957 N.E.2d 367, 376 (Ohio Ct. App. 2011) (community notification ''obscures the foundational principles upon which the juvenile justice system was built'').

Ex post facto

[Headnote 23]

Logan contends that retroactive application of A.B. 579 to juvenile sex offenders violates the Ex Post Facto Clauses of the United States and Nevada Constitutions. We conclude that Logan fails to demonstrate that retroactive application of the legislation is unconstitutional.

[Headnote 24]

Both the federal and state constitutions prohibit the passage of ex post facto laws. U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. This prohibition forbids the passage of laws that impose punishments for acts that were not punishable at the time they were committed or impose punishments in addition to those prescribed at the time of the offense. *Weaver v. Graham*, 450 U.S. 24, 28 (1981). Accordingly, to be ex post facto, a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing additional punishment for such conduct. *Id.*

[Headnote 25]

For purposes of ex post facto analysis, a retrospective law is one that ''changes the legal consequences of acts completed before its

effective date.'' *Id.* at 31. A.B. 579 clearly operates retrospectively because it imposes consequences for conduct occurring before its effective date. *See* NRS 179D.095(1)(b) (defining a ''sex offender'' as a person who has been adjudicated for a sex offense after July 1, 1956). A.B. 579 does not alter the definition of any crime, or, in this case, delinquent act. Therefore, whether the bill is an ex post facto law hinges on whether it imposes an additional punishment for a past delinquent act.

[Headnote 26]

A two-part test is utilized to determine whether a given statute imposes a punishment. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 92 (2003). First, we must determine legislative intent. *See id.* If the intent was to impose a punishment, the statute is a punishment. *See id.* If, however, the intention of the Legislature was to create a civil, nonpunitive regulatory scheme, we must determine whether the statutory scheme is ''so punitive either in purpose or effect as to negate the State's intention to deem it civil.'' *Id.* (internal quotation marks and brackets omitted).

Legislative intent

Logan baldly states that the legislative intent behind A.B. 579 was punitive, but does not support this assertion with any cogent argument or citation to authority or legislative history. The intent of Nevada's prior version of the sex offender registration and community notification scheme was to create a civil regulatory scheme. *Nollette v. State*, 118 Nev. 341, 346, 46 P.3d 87, 91 (2002). And the legislative history indicates that the only intent behind the current version of the scheme was compliance with SORNA in order to avoid the loss of federal funds. As such, Logan has failed to demonstrate that the Legislature intended A.B. 579 to be anything other than a civil regulatory scheme. Therefore, we must proceed to consider whether the effects of A.B. 579 are so punitive in ''effect as to negate the State's intention to deem it civil.'' *Smith*, 538 U.S. at 92 (internal quotation marks and brackets omitted).

Effect of A.B. 579

[Headnote 27]

Seven factors are considered when analyzing the effects of challenged provisions: whether the statutory scheme (1) has traditionally been regarded as punishment, (2) imposes an affirmative disability or restraint, (3) promotes the traditional goals of punishment, (4) is rationally related to a nonpunitive purpose, (5) is excessive in relation to its nonpunitive purpose, (6) applies only upon a finding of scienter, and (7) applies to behavior that is already a crime. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *see also Smith*, 538 U.S. at 97-106 (applying *Mendoza-*

Martinez factors to determine effect of state sex offender registration scheme); *Palmer v. State*, 118 Nev. 823, 829, 59 P.3d 1192, 1196 (2002); *Nollette*, 118 Nev. at 346-47, 46 P.3d at 91. Because the Legislature's intent is given deference, ''only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'' *Smith*, 538 U.S. at 92 (internal quotation marks omitted); *Desimone v. State*, 116 Nev. 195, 199-205, 996 P.2d 405, 407-11 (2000) (applying the ''clearest proof'' test to determine whether tax was punitive in effect despite contrary legislative intent); *State v. Lomas*, 114 Nev. 313, 317-18, 955 P.2d 678, 680-81 (1998) (applying the ''clearest proof'' standard in determining whether driver's license revocation is so punitive in effect as to override legislative intent).

The seminal case applying the *Mendoza-Martinez* factors to sex offender registration and notification laws is *Smith v. Doe*, 538 U.S. 84 (2003). The legislation at issue there imposed retroactive registration requirements and community notification provisions on convicted sex offenders. *Smith*, 538 U.S. at 90. It required offenders to register with local authorities, provide certain personal information, and allow the authorities to fingerprint and photograph them. *Id.* Depending on the number of prior convictions and nature of the current offense, offenders were required to update their registration information either annually for a period of 15 years, or quarterly for life. *Id.* Noncompliance subjected offenders to criminal prosecution. *Id.* A sex offender's name, aliases, date of birth, physical description, photograph, address, place of employment, motor vehicle license and identification numbers, crime convicted of, date, place, court of conviction, and other information were made available to the public on the Internet. *Id.* at 91. The majority in *Smith* concluded that the effects of the challenged legislation did not negate the legislature's intent to establish a civil regulatory scheme. *Id.* at 105-06.

Applying the *Mendoza-Martinez* factors to A.B. 579, we conclude that Logan has failed to demonstrate, by the clearest proof, that its effect negates the Legislature's intent to create a civil regulatory scheme. An analysis of each factor follows.

Historical form of punishment

The first factor is whether registration and community notification have historically been regarded as punishments. *Id.* at 97. Logan asserts that registration and community notification are analogous to the historical punishments of branding and placing criminals in stocks. The Supreme Court, however, rejected this exact argument as applied to adult offenders in *Smith*, concluding

that, unlike historical punishments, publicity and stigma are not ''an integral part of the objective of the regulatory scheme.'' 538 U.S. at 99. And Logan does not distinguish *Smith*'s holding in this regard as applied to juveniles.[7]

Logan also points to the Ninth Circuit's decision in *United States v. Juvenile Male*, 581 F.3d 977, 989 (9th Cir. 2009), wherein the court concluded that publication of a juvenile's delinquency adjudication was a historical form of punishment because information about juvenile offenses was historically only publicized after a juvenile was transferred to adult court for punitive purposes. The opinion in *Juvenile Male* has since been vacated. *United States v. Juvenile Male*, 564 U.S. 932 (2011). Further, the factual basis for the reasoning in *Juvenile Male* does not exist in Nevada; as discussed above, juvenile sex offender records had been subject to community notification for over a decade before A.B. 579, even when cases had not been transferred to adult court.

Finally, we note that registration and community notification requirements are of recent origin and cannot be considered a historical form of punishment. *See Smith*, 538 U.S. at 97. We conclude this factor therefore weighs in favor of the conclusion that A.B. 579 is not a punishment.

Affirmative disability or restraint

Next, we consider whether A.B. 579 imposes an affirmative disability or restraint. *Smith*, 538 U.S. at 97. When inquiring into this factor, we examine the legislation's effect on those subject to it. *Id.* at 99-100.

Logan contends that the registration requirement imposes an affirmative disability or restraint because it requires offenders to physically appear several times per year to register. This contention is foreclosed by our decision in *Nollette*, where we implicitly rejected this contention by concluding that the earlier version of Nevada's registration and community notification provisions ''do[es] not place an affirmative disability or restraint on the sex offender.'' *Nollette*, 118 Nev. at 346, 46 P.3d at 91. The provisions under consideration in *Nollette*, like those challenged here, also required sex offenders to periodically appear in person to update their registration information. *Id.* at 345, 46 P.3d at 90. And to the extent Logan relies on *Smith* for the proposition that an

[7]To the extent Logan asserts that the juvenile court's continued jurisdiction over juvenile sex offenders constitutes a historical form of punishment because it is analogous to lifetime supervision, we conclude this assertion lacks merit. *Cf. Smith*, 538 U.S. at 101-02.

in-person registration requirement imposes an affirmative disability or restraint, that reliance is misplaced because the Supreme Court merely noted the lower court's erroneous determination that the challenged statute contained an in-person registration requirement and did not decide whether such a requirement constituted an affirmative disability. *Smith*, 538 U.S. at 101; *see ACLU of Nev. v. Masto*, 670 F.3d 1046, 1056 (9th Cir. 2012) (the Supreme Court's resolution of a factual error in *Smith* was not a holding that the in-person registration requirement was an affirmative disability).

Logan also asserts that the holdings of *Smith* and *Nollette*—which are based in part on the fact that convictions are a matter of public record—cannot be applied to juvenile offenders whose records of adjudication are not matters of public record. Although the question is close, we disagree for two reasons.

First, juvenile sex offender records were available to the public prior to A.B. 579. As previously discussed, law enforcement was required to disclose some records to certain members of the public via juvenile community notification. And the juvenile court was empowered to allow inspection of unsealed records by any person with ''a legitimate interest in the records.'' NRS 62H.030(2); NRS 62H.170(1). Thus, juvenile sex offender records were available to the public, albeit in limited circumstances, prior to A.B. 579. *See United States v. W.B.H.*, 664 F.3d 848, 856 (11th Cir. 2011) (rejecting juvenile's attempt to distinguish *Smith* based on the fact that juvenile records are not a matter of public record where juvenile court had discretion to permit inspection of the records), *cert. denied*, 568 U.S. ___, 133 S. Ct. 524 (2012).

Second, A.B. 579 itself does not impose an affirmative disability or restraint on juvenile sex offenders. We are fully aware that to the extent juvenile sex offender records were not previously accessible to the public, some negative consequences to juveniles almost certainly result from A.B. 579's community notification provisions. Nevertheless, the notification provisions themselves do not impose any negative consequences; those consequences result indirectly from the public's response to knowledge of the adjudication. *See W.B.H.*, 664 F.3d at 856 & 857 n.5 (any negative consequences resulting from community notification are ''collateral consequence[s] of a legitimate regulation'' (citing *Smith*, 538 U.S. at 99)). *But see State v. C.M.*, 746 So. 2d 410, 418 (Ala. Crim. App. 1999) (finding that subjecting juvenile sex offenders to registration and community notification imposed an affirmative disability or restraint in part because it exposed previously confidential adjudication records to public). And because the statutory scheme expressly prohibits the use of information obtained from the community notification website to discriminate, imposition of such disabilities by the community is also illegal. *See*

NRS 179B.250(2)(e); NRS 179B.270; NRS 179B.280; NRS 179B.285; NRS 179B.290. We conclude that A.B. 579 does not impose an affirmative disability or restraint on juvenile sex offenders and this factor weighs in favor of a finding that the statutory scheme does not impose a punishment.

Traditional aims of punishment

Next, this court must consider whether registration and community notification promote the traditional aims of punishment. *Smith*, 538 U.S. at 97. Logan points out that in *Nollette*, this court acknowledged the possibility that registration could have a deterrent effect but determined that, ''without more,'' that possibility did not render the statute punitive. *See Nollette*, 118 Nev. at 347, 46 P.3d at 91. Something ''more'' is present, he asserts, when the statutes are applied to juveniles.

First, Logan asserts that A.B. 579 is punitive in effect as applied to juveniles because juvenile offenders are assigned to a tier based on the offense committed rather than their individual risk to reoffend. The *Smith* Court rejected the argument that the Alaska statute was excessive because it applied to all offenders regardless of risk of recidivism. 538 U.S at 104. The Supreme Court also rejected the argument that the statutory scheme was retributive because it based the length of the registration period on an offender's crime rather than on his risk of recidivism, concluding that the use of broad categories to determine the length of the registration period was ''consistent with the regulatory objective.'' *Id*. at 102. Like the scheme at issue in *Smith*, we conclude that Nevada's scheme of offense-based tiering is consistent with the statute's goal of protecting the public from recidivist juveniles;[8] it is reasonable to conclude that juvenile offenders who have committed the most severe offenses pose the greatest risk to the public.[9]

Second, Logan notes that offenders are subject to prosecution for failure to comply with the registration requirements. He does not explain how this fact serves a traditional aim of punishment. The *Smith* Court considered the criminal penalty in regard to whether the Alaska scheme imposed an affirmative disability or re-

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[8]Whether risk-based tiering would be a more effective means of protecting the public is beyond the scope of an ex post facto analysis. *See infra* at 515-16.

[9]Relatedly, Logan implies that the statute is retributive because it requires all sex offenders who have been convicted of a crime against a child under the age of 18, which includes nearly all juvenile sex offenders, to register. We decline to consider this assertion because it is not supported by any cogent argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). For the same reason, we decline to consider his assertion that imposition of adult registration and community notification is punitive because the restraint on his liberty ''is increased from a period of approximately 3 years to a lifetime.'' *See also Smith*, 538 U.S. at 104.

straint and rejected the contention, concluding that any prosecution resulting from failure to comply with reporting requirements was separate from the original offense. *Smith*, 538 U.S. at 101-02. Logan does not acknowledge this holding in *Smith* or attempt to distinguish it as applied to juvenile offenders.[10] We conclude that Logan fails to demonstrate that A.B. 579 promotes a traditional aim of punishment as applied to juvenile sex offenders and this factor therefore weighs in favor of a finding that the bill is not punitive.

Rational connection to a nonpunitive purpose

The next factor is whether A.B. 579 is rationally related to a nonpunitive purpose. Logan asserts that the statutory scheme ''cannot be reconciled with any legitimate public purpose'' and is irrational because it is not the most cost-effective means to protect the public. We disagree.

Subjecting juvenile sex offenders to registration and community notification has the legitimate, nonpunitive purpose of protecting the public. *See United States v. Salerno*, 481 U.S. 739, 747 (1987) (public protection is a legitimate regulatory purpose). This purpose is furthered by notifying the community of the presence of juvenile sex offenders so that it may take any protective, nondiscriminatory actions deemed necessary. *See Juvenile Male*, 670 F.3d at 1010-11 (registration and community notification of juvenile sex offenders satisfies rational basis review); *W.B.H.*, 664 F.3d at 859; *see also Doe v. State*, 189 P.3d 999, 1015 (Alaska 2008) (considering statutes as applied to adult offenders); *accord Helman v. State*, 784 A.2d 1058, 1075 (Del. 2001). And the fact that the chosen method is not the most cost-effective does not render it irrational. *See Smith*, 538 U.S. at 103 (''A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aim it seeks to advance.'').

Because the *Smith* Court stated that a rational connection to a nonpunitive purpose ''is a [m]ost significant'' factor, *id.* at 102 (alteration in original) (internal quotation marks omitted), this factor weighs heavily in favor of a finding that the effect of the challenged legislation is not punitive.

Excessiveness

The fifth factor to consider is whether A.B. 579 is excessive in relation to its nonpunitive purpose. *See Smith*, 538 U.S. at 97. The

[10]This court also implicitly rejected this argument in *Nollette*. The statutory scheme under review there provided that noncompliance with the registration provisions constituted a felony offense. *Nollette*, 118 Nev. at 345, 46 P.3d at 90. The court did not specifically discuss that provision, but did not conclude that the statutory scheme served a traditional aim of punishment or weighed in favor of a finding that the scheme was punitive. *Id.* at 346-47, 46 P.3d at 91.

inquiry into whether a statutory scheme is excessive in relation to its regulatory purpose ''is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.'' *Id*. at 105.

Logan contends that A.B. 579 is excessive in relation to its stated purpose because it does not take into consideration juveniles' low recidivism rates and is not cost-effective.[11]

Recidivism

Logan cites to the Supreme Court's conclusion in *Smith* that the Alaska statutory scheme was not excessive because the legislature could have reasonably concluded that sex offenders posed a substantial risk to reoffend. Logan then points to research indicating that the rate of recidivism for juvenile sex offenders is low. According to the literature cited by Logan, juvenile sex offenders are highly amenable to treatment and have low rates of recidivism. *See* Justice Policy Institute, *Youth Who Commit Sex Offenses: Facts and Fiction*, *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08_fac_sornafactfiction_jj.pdf; Justice Policy Institute, *The Negative Impact of Registries on Youth: Why are Youth Different from Adults?*, *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08_fac_sornakidsaredifferent_jj.pdf. The sources cited by Logan, however, indicate that juvenile sex offenders have between a 1.7 and 18 percent chance of conviction for another sex offense. *See also* Center for Sex Offender Management, *Recidivism of Sex Offenders* (May 2001), *available at* http://www.csom.org/pubs/recidsexof.html (noting a 13-percent base rate of overall recidivism for sex offenders but that results differ across studies); Center for Sex Offender Management, *Frequently Asked Questions About Sexual Assault and Sex Offenders*, http://www.csom.org/faq/index.html (last visited May 16, 2012) (reoffense rates for juvenile sex offenders are approximately 12 to 24 percent).

Logan does not provide any statistics regarding recidivism rates for adult sex offenders. This court's own limited research indicates that adult sex offenders have similar rates of recidivism. *See Recidivism of Sex Offenders*, *supra* (noting a 13-percent base rate of overall recidivism for sex offenders but that results differ

[11]Logan also asserts that the statutory scheme conflicts with the purpose of the juvenile court system. He does not provide any argument tying the alleged conflict to the excessiveness of the bill. As discussed above, the imposition of registration and community notification does not conflict with the purpose of Nevada's juvenile justice system.

across studies); Texas Department of Health and Human Services, Council on Sex Offender Treatment, *Treatment of Sex Offenders—Recidivism*, *available at* http://www.dshs.state.tx.us/csot/csot_trecidivism.shtm (last updated April 30, 2012) (average 13-percent recidivism rate for adult offenders); State of Connecticut, Office of Policy and Management, Criminal Justice Policy & Planning Division, *Recidivism among Sex Offenders in Connecticut* (Feb. 15, 2012), *available at* http://www.ct.gov/opm/lib/opm/lib/opm/cjppd/cjresearch/recidivismstudy/sex_offender_recidivism_2012_final.pdf (sex offenders have 3.6-percent arrest rate for new sex-related charges). And the State points to authority stating that research into the rates of juvenile sex offender recidivism is less than comprehensive. *See* Center for Sex Offender management, *Recidivism of Sex Offenders* (May 2001), *available at* http://www.csom.org/pubs/recidsexof.html; *see also* NRS 62H.300(2) (recognizing the need for greater statistical analysis regarding recidivism rates of juvenile sex offenders).

Even assuming that juveniles do have lower recidivism rates than adults, the *Smith* Court flatly rejected the argument that application of registration and notification requirements to an entire class of sex offenders, rather than only to those offenders who posed the highest risk to reoffend, rendered the scheme excessive in scope. *Smith*, 538 U.S. at 104. We conclude that Logan fails to demonstrate that the difference in recidivism rates is so great as to render the Legislature's concern with recidivism of juvenile sex offenders unreasonable. *See W.B.H.*, 664 F.3d at 860 (rejecting argument that lower rates of recidivism for juvenile sex offenders as compared to adult sex offenders renders registration and notification requirements excessive as applied to juvenile offenders).

Cost-effectiveness

Logan also makes a fiscal argument. He points out that A.B. 579 was passed quickly with the expectation that Nevada would receive grant monies from the federal government in return. According to Logan, those monies never materialized. Further, he claims A.B. 579 will require the State of Nevada to spend precious funds in an inefficient manner because it requires the supervision of a large group of low-risk offenders.

Logan presents a compelling policy consideration that warrants serious reflection by the Legislature. But policy considerations are not material to our ex post facto analysis because they are relevant only to whether the statutory scheme is the best manner to achieve legislative goals, and that question is solely in the Legislature's purview. In our ex post facto analysis, we are limited to considering whether the statutory scheme is reasonable in light of its goals,

see Smith, 538 U.S. at 105, and Logan has failed to demonstrate that A.B. 579 is unreasonable in light of the goal of public safety.

Lastly, although not discussed by the parties, we find it significant that A.B. 579 does not subject all juveniles adjudicated for offenses involving sex to registration and notification. Only adjudications for three offenses—sexual assault, battery with intent to commit sexual assault, and lewdness with a child—and attempts or conspiracy to commit those offenses trigger the requirements. NRS 62F.200(1); NRS 179D.095(1)(b). Conversely, adults are subject to registration and notification for a much broader category of offenses. *See* NRS 179D.097. And juvenile offenders are excluded from registration and notification requirements if they were under the age of 14 at the time of the offense or if the offense involved consensual sexual conduct where the victim was at least 13 years old and the offender was not more than 4 years older than the victim. NRS 62F.200(2); NRS 179D.097(2)(b). These restrictions appear to be an attempt to limit the application of A.B. 579 to only those juvenile sex offenders who pose the highest risk of reoffense, and thus undercut Logan's contention that the statutory scheme is excessive. Accordingly, we conclude that A.B. 579 is not excessive as applied to juvenile sex offenders, and this factor weighs in favor of a finding that A.B. 579's effect is not punitive.[12]

Remaining factors

The final factors to consider in our ex post facto analysis are whether the statutory scheme applies to conduct that is already a crime and whether the scheme takes effect only after a finding of scienter. *See Smith*, 538 U.S. at 105. These factors ''are of little weight.'' *Id*. The challenged legislation applies only to conduct that was a delinquent act. This factor thus weighs in favor of a finding that A.B. 579 is punitive. Just as in *Smith*, the statutory requirements are not founded on any ''present or repeated violation''; therefore, no finding of scienter is required to trigger the statutory requirements. This factor weighs in favor of finding that the bill is not punitive. *Id.*; *Helman*, 784 A.2d at 1078.

Considering all the factors, we conclude that Logan has failed to demonstrate by the ''clearest proof'' that the effects of A.B. 579

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[12]Logan relies heavily on the Supreme Court of Alaska's decision in *Doe v. State*, 189 P.3d 999 (Alaska 2008), the Alabama Court of Criminal Appeals' holding in *State v. C.M.*, 746 So. 2d 410 (Ala. Crim. App. 1999), and the Kansas Supreme Court's decision in *State v. Myers*, 923 P.2d 1024, 1041-42 (Kan. 1996), wherein each court determined that registration and community notification requirements were excessive. We are not persuaded by these cases, particularly because they do not conform to the Supreme Court's analysis in *Smith*.

are so punitive as to negate the legislative intent to impose a civil regulatory scheme. Six of the seven factors, including the one to be given the most weight, indicate that the statutory scheme is not punitive, while only one factor, one to be accorded little weight, indicates a punitive effect.[13] Accordingly, we conclude that retroactive application of A.B. 579 to juvenile sex offenders does not violate the Ex Post Facto Clauses of the United States and Nevada Constitutions.[14]

Right to jury trial

[Headnote 28]

Logan next contends that the imposition of registration and community notification on juvenile sex offenders transforms the juvenile system into a criminal system and implicates the right to a jury trial. We disagree.

The fact that A.B. 579 subjects juvenile sex offenders to registration and community notification does not eliminate the many differences between the juvenile and adult justice systems. For example, juvenile sex offenders are not ''convicted,'' cannot be sentenced to prison, and are not subject to the civil disabilities resulting from convictions. NRS 62E.010. The focus on rehabilitation in the juvenile system is much greater than in the criminal system. And when implementing the juvenile code, the child's welfare is a central concern. *See* NRS 62A.360(1)(a); *In re Seven Minors*, 99 Nev. 427, 432-33, 664 P.2d 947, 950-51 (1983), *disapproved on other grounds as stated in In re William S.*, 122 Nev. 432, 442

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[13]In light of our conclusion here, Logan's contention that A.B. 579 imposes cruel and/or unusual punishment on juvenile sex offenders necessarily fails. *See* U.S. Const. amend. VIII; Nev. Const. art. 1, § 6; *Doe v. Weld*, 954 F. Supp. 425, 436 (D. Mass. 1996) (because juvenile sex offender registration requirements are probably not punishment, plaintiff could not succeed on claim that imposition of requirements constituted cruel and unusual punishment); *People ex rel. Birkett v. Konetski*, 909 N.E.2d 783, 799 (Ill. 2009) (concluding that imposition of registration requirements on juvenile offenders was not punishment and thus does not constitute cruel and unusual punishment, and rejecting juvenile's request to reconsider that conclusion in light of Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551 (2005)); *In re D.L.*, 160 S.W.3d 155, 162 (Tex. App. 2005) (because registration and notification are nonpunitive, statutory scheme does not constitute cruel and unusual punishment); *see also, e.g.*, *State v. Guidry*, 96 P.3d 242, 257 (Haw. 2004) (adult sex offender registration requirements are not punishment and thus do not violate state constitution's ban on cruel and unusual punishment); *People v. Adams*, 581 N.E.2d 637, 640-41 (Ill. 1991) (same).

[14]Logan also contends that application of retroactive registration and community notification requirements violates the Contracts Clauses of the United States and Nevada Constitutions. He does not, however, support this assertion with cogent argument or citation to persuasive authority. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). We therefore decline to consider this contention.

n.23, 132 P.3d 1015, 1021 n.23 (2006). There is no corresponding concern with the welfare of adult offenders in the criminal code.

Logan points to authority from other state courts invalidating laws or regulations imposed on juveniles in the absence of a jury trial. The holdings in these cases, however, are based on the conclusion that the challenged legislation subjected juvenile offenders to the same criminal punishments as adults convicted in the criminal system. *See In re C.B.*, 708 So. 2d 391, 399-400 (La. 1998) (invalidating statute and corresponding regulation allowing juvenile delinquents to be housed in adult penal facilities where they were required to perform hard labor); *In re Hezzie R.*, 580 N.W.2d 660, 674 (Wis. 1998) (holding statute providing for the transfer of juvenile delinquents to adult prisons in the absence of a jury trial unconstitutional). Our conclusion that registration and community notification are not punishments forecloses Logan's argument that it is unconstitutional to impose these ''criminal punishments'' on juveniles without the protection of a jury trial. *See, e.g.*, *United States v. Juvenile Male*, 670 F.3d 999, 1014 (9th Cir.), *cert. denied*, 568 U.S. ___, 133 S. Ct. 234 (2012) (fact that juvenile sex offenders are subject to the same requirements as adult sex offenders does not transform juvenile proceedings into criminal proceedings); *In re Jonathon C.B.*, 958 N.E.2d 227, 247 (Ill. 2011) (''[T]he fact that in a narrow set of delineated circumstances delinquent minors face some of the same collateral consequences as convicted adult criminals does not equate a delinquency adjudication with a criminal conviction.''), *cert. denied*, 568 U.S. ___, 133 S. Ct. 102 (2012); *Konetski*, 909 N.E.2d at 797-98 (rejecting juvenile's claim that imposing sex offender registration and limited community notification requirements on juvenile offender in absence of a jury trial violate procedural due process where those requirements were not punishment); *see also McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (discussing due process rights of juvenile offenders and concluding that fundamental fairness does not require a jury trial in juvenile proceedings) (plurality opinion). *But see In re C.P.*, 967 N.E.2d 729, 734, 748-50 (Ohio 2012) (concluding that registration and community notification are punishment and their mandatory imposition on juveniles is fundamentally unfair because it is contrary to the rehabilitative purpose of the juvenile system and the juvenile court lacks discretion regarding imposition of an adult punishment on juvenile offenders).

Despite our decision today upholding the constitutionality of mandatory sex offender registration and community notification for juvenile offenders, we echo the juvenile court's concerns regarding this legislation. Numerous studies and commentators indicate that subjecting juvenile sex offenders to registration and community notification may not be an effective policy decision. *See, e.g.*, Justice Policy Institute, *The Negative Impact of Regis-*

tries on Youth: Why are Youth Different from Adults?, *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08_fac_sornakidsaredifferent_jj.pdf (stigma resulting from sex offender registration undermines treatment and rehabilitation programs for juveniles); Justice Policy Institute, *Youth Who Commit Sex Offenses: Facts and Fiction*, *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08_fac_sornafactfiction_jj.pdf (noting that juveniles are especially amenable to treatment). As noted by Logan, the registration and notification programs are expensive, and there are doubts regarding the effectiveness of community notification in preventing crime. *See, e.g.*, Human Rights Watch, *No Easy Answers* (Sept. 12, 2007), *available at* http://www.hrw.org/node/10685/section/2; Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990's*, 90 Nw. U. L. Rev. 788, 855-56 (1996) (noting that community notification can impede the development of normal social skills, which can, in turn, lead to recidivism); Britney M. Bowater, Comment, *Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences of Juvenile Sex Offenders?*, 57 Cath. U. L. Rev. 817, 836-37 (2008) (noting that the American Bar Association and Coalition for Juvenile Justice strongly oppose requiring juvenile sex offenders to register because of its potential to negatively affect treatment of juvenile offenders).

We agree that the prior statutory scheme, which left the decision to subject juvenile sex offenders to adult registration and community notification requirements to the discretion of the juvenile court based on specified factors, was a superior method of protecting the various interests at stake, including public safety, the welfare of juvenile sex offenders, and conservation of public resources. The juvenile court, relying on extensive information specific to the juvenile and the offense, is in the best position to determine whether adult registration and community notification is necessary in a given case. And, significantly, since passage of A.B. 579, the United States Attorney General exercised his statutory authority ''to provide that jurisdictions need not publicly disclose information concerning persons required to register on the basis of juvenile delinquency adjudications.'' Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630-31, 1632 (Jan. 11, 2011). Accordingly, ''[t]here is no remaining requirement under SORNA that jurisdictions engage in any form of public disclosure or notification regarding juvenile delinquent sex offenders.'' *Id*. Thus, it appears Nevada would suffer no loss of funding if the Legislature removed the provisions of A.B. 579 requiring all juvenile sex offenders to submit to community notifi-

cation. We recognize that these policy considerations are outside the scope of our review of the challenged legislation, *see, e.g.*, *Anthony v. State of Nev.*, 94 Nev. 338, 341, 580 P.2d 939, 941 (1978) (''[T]he judiciary will not declare an act void because it disagrees with the wisdom of the Legislature.''), but nonetheless invite the Legislature to reconsider A.B. 579 and its application to juvenile sex offenders.

We grant the petition for a writ of mandamus and direct the clerk of this court to issue a writ directing the juvenile court to vacate its order declaring A.B. 579 unconstitutional as applied to juvenile sex offenders.

PICKERING, C.J., and GIBBONS and PARRAGUIRRE, JJ., concur.

CHERRY, J., with whom HARDESTY and SAITTA, JJ., agree, dissenting:

I would deny the petition because I conclude that the retroactive application of mandatory sex offender registration and community notification requirements on juvenile sex offenders violates the Ex Post Facto Clauses of the United States and Nevada Constitutions. U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15.

I agree that the Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003), provides the appropriate framework for analysis of this issue. I also agree that Logan fails to demonstrate that the legislative intent of A.B. 579 was to punish. I conclude, however, that the statutory scheme, when applied to juvenile sex offenders, is ''so punitive either in purpose or effect as to negate the State's intention to deem it civil.'' *Id.* at 92 (internal quotation marks and brackets omitted).

Initially, I agree with the majority's conclusions regarding four of the seven factors—that the statutory scheme does not promote the traditional aims of punishment, is rationally related to a legitimate state interest, is not based on a finding of scienter, and applies to conduct that is already a crime. I disagree with the majority's conclusions regarding the remaining factors, however.

Historical form of punishment

First, I conclude that registration and community notification, as applied to juvenile sex offenders, are akin to the historical punishments of branding and shaming. The *Smith* Court rejected this argument, in part, because any resulting stigma arose from the dissemination of accurate information about an offender's criminal record—*the majority of which was already public*—not from any public display for ridicule and shaming. *Id.* at 98. The Court therefore concluded that publication of sex offenders' records on a website is ''more analogous to a visit to an official archive of crim-

inal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality.'' *Id.* at 99. This analogy fails when applied to juvenile sex offenders because juveniles' records are inaccessible to the general public in the absence of a court order. *See* NRS 62H.030(2)-(3).

I recognize that, prior to A.B. 579, juvenile community notification allowed the disclosure of records of Tier II and III juvenile sex offenders. Office of the Nev. Attorney Gen., *Nevada's Guidelines and Procedures for Community Notification of Juvenile Sex Offenders*, Office of the Attorney General, § 8.00(3)-(4) (Rev. Feb. 2006). This disclosure, however, was limited to persons or entities who were ''reasonably likely to encounter the juvenile sex offender.'' *Id.* That is a far cry from the notification provisions of A.B. 579, under which any member of the public, likely to encounter the juvenile or not, must be provided with the juvenile sex offender's registration information upon request.[1] NRS 179B.250; NRS 179D.475. In my opinion, the limited disclosure of juvenile sex offender records that existed prior to A.B. 579 does not allow for the conclusion that the bill's community notification provisions are ''analogous to a visit to an official archive of criminal records.''

Affirmative disability or restraint

Second, I conclude that A.B. 579 imposes an affirmative disability or restraint on juvenile sex offenders. As acknowledged by the *Smith* Court, the public availability of conviction information ''may have a lasting and painful impact on the convicted sex offender.'' 538 U.S. at 101. The Court concluded that community notification did not impose disabilities or restraints on adult offenders because any adverse consequences, such as occupational or housing disadvantages, flow not from community notification provisions, but from the fact of conviction, which is a matter of public record. *Id.* The Court also noted that adverse consequences could have otherwise occurred via the use of routine background checks by employers and landlords. *Id.* at 100.

Such reasoning cannot be applied to juvenile sex offenders, whose records are not generally public. Because juvenile sex offender records were not available to the public in the absence of a court order, NRS 62H.030(2), routine background checks would not reveal these records. As discussed above, A.B. 579's community notification requirements greatly expand the limited disclosure of records that occurred under juvenile community notification.

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[1]Registration records are exempted from disclosure on the community notification website if the sex offender is a Tier I offender and was not adjudicated for a crime against a child. NRS 179B.250(7)(b).

The prior limited disclosure does not justify the conclusion that the bill does not impose an additional affirmative disability or restraint on juvenile sex offenders. I conclude that any occupational or housing disadvantages suffered by delinquent sex offenders result not from the fact of adjudication, but directly from the community notification requirement. *See State v. C.M.*, 746 So. 2d 410, 418 (Ala. Crim. App. 1999) (concluding that subjecting juvenile sex offenders to registration and community notification requirements imposed an affirmative disability or restraint in part because it exposed confidential adjudication records to the public). And I note that such discrimination is particularly burdensome on juveniles who are newly independent and have not yet had the opportunity to establish themselves in the world. *See In re C.P.*, 967 N.E.2d 729, 741-42 (Ohio 2012) (considering stigmatization and other negative consequences of community notification on juvenile offenders in the context of a cruel-and-unusual-punishment claim).

The majority concludes that the notification provisions themselves do not impose any negative consequences because those consequences ''result indirectly from the public's response to knowledge of the adjudication.'' *See* majority opinion *ante* at 514. This conclusion fails to account for the real-world effect of A.B. 579's notification provisions. But for those provisions, the public would have no easy means to access juvenile sex offenders' records. For these reasons, I conclude that A.B. 579 imposes an affirmative disability or restraint on juvenile sex offenders.

Excessiveness

Third, I conclude that A.B. 579 is excessive in relation to its purpose. I am cognizant of the fact that the excessiveness analysis is not an inquiry into ''whether the legislature has made the best choice possible to address the problem it seeks to remedy.'' *Smith*, 538 U.S. at 105. Nevertheless, I conclude that the statutory scheme, as applied to juvenile sex offenders, is not reasonable in light of the Legislature's nonpunitive objective. *See id.* (the excessiveness inquiry focuses on ''whether the regulatory means chosen are reasonable in light of the nonpunitive objective'').

The mandatory application of community notification requirements to juvenile sex offenders is unreasonable in light of the lower recidivism rates among juveniles as compared to adult offenders. *See* majority opinion *ante* at 517-18. And juvenile offenders are highly amenable to treatment. Justice Policy Institute, *The Negative Impact of Registries on Youth: Why are Youth Different from Adults?*, *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/08-08_fac_sornakidsaredifferent_jj.pdf; Affidavit of Dr. Rayna Rogers ¶ 18, Dec. 20, 2007 (noting that ''most youthful offenders can be fully treated'' and their ''re-

cidivism rate is significantly lower than adult offenders'') (exhibit to motion filed in district court on Dec. 28, 2007). Juveniles' amenability to treatment is especially significant because the juvenile justice system is specifically designed to provide juvenile delinquents with needed treatment. *See* NRS 62G.410 (''It is the policy of this state to rehabilitate delinquent children.''); *see also* NRS 62A.360(1)(a) (every child under the jurisdiction of the juvenile court shall receive the guidance, care, and control that is conducive to the best interest of the State and the child's welfare); NRS 62E.280(1)(a) (the juvenile court may order any psychological, psychiatric, or other care or treatment that is in the best interest of the juvenile); NRS 63.180 (juvenile delinquents placed in state facilities receive a program of treatment aimed at altering behavior and attitude so that the juvenile may freely function in his or her regular environment).

Moreover, A.B. 579 imposes mandatory community notification requirements regardless of risk of reoffense and assigns juvenile sex offenders to a tier based solely on the offense committed. NRS 179D.115-.117; NRS 179D.441; NRS 179D.445; NRS 179D.460; NRS 179D.475. Considering juveniles' low recidivism rates and amenability to treatment, it is my opinion that the statutory scheme is grossly overinclusive and needlessly sweeps up children who have a very low risk of recidivism. *See Smith*, 538 U.S. at 116-17 (Ginsburg, J., dissenting); *Doe*, 189 P.3d at 1017. Under this legislation, even juveniles who have successfully completed treatment and been certified as a low risk to reoffend will remain subject to registration and community notification requirements for a minimum of ten years. *See* NRS 179D.490. Further, adults, adjudicated delinquent perhaps decades ago, who have been rehabilitated and successfully reintegrated into society, will now be subject to its requirements. *See* NRS 179D.095(1).

Under the prior version of juvenile community notification, only organizations deemed reasonably likely to encounter a juvenile sex offender were actively notified of a juvenile's presence in the community. Office of the Nev. Attorney Gen., *Nevada's Guidelines and Procedures for Community Notification of Juvenile Sex Offenders*, Office of the Attorney General, § 8.0 (Rev. Feb. 2006). A.B. 579 requires that certain organizations be notified regardless of any likelihood of encountering a juvenile offender. NRS 179D.475(2). Such a broad scope of notification is completely unnecessary considering juveniles' low recidivism rates and amenability to treatment. A.B. 579, as applied to juvenile sex offenders, is excessive in relation to its purpose of public protection.

Balancing all of the factors, I conclude that the imposition of mandatory registration and community notification requirements

on juvenile sex offenders constitutes a punishment. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) (explaining that harsh conditions imposed to achieve goals that can be attained in many alternative, less harsh ways generally supports a finding that the purpose of the conditions is to punish). Therefore, retroactive application of A.B. 579 to juvenile offenders violates the Ex Post Facto Clauses of the Nevada and United States Constitutions.

I wholeheartedly join my colleagues' invitation to the Legislature to reconsider this legislation as applied to juveniles. I urge our legislators to give serious consideration to the concerns raised by the juvenile court and presented in this court's opinion today.

RONNIE DANELLE BRASS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 56146

July 25, 2013 306 P.3d 393

Motion for abatement of conviction.

Defendant was convicted in the district court of conspiracy to commit kidnapping and murder, first-degree kidnapping, and first-degree murder with the use of a deadly weapon. Defendant appealed. Defendant died while appeal was pending, and defense counsel filed suggestion of death and motion for abatement with request for remand to the district court to dismiss charging document. As a matter of first impression, the supreme court, DOUGLAS, J., held that appeal could be prosecuted only if personal representative of defendant's estate was appointed, and motion for substitution of personal representative was filed within 90 days of suggestion of death.

Motion denied; remanded.

David M. Schieck, Special Public Defender, and *JoNell Thomas*, Deputy Special Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *David L. Stanton* and *Nancy A. Becker*, Deputy District Attorneys, Clark County, for Respondent.

1. ATTORNEY AND CLIENT.
Generally, counsel cannot act on a deceased client's behalf; rather, only a properly substituted personal representative of the client's estate may bring a motion on the client's behalf. Restatement (Second) of Agency § 120(1); NRAP 43(a)(1).

2. ABATEMENT AND REVIVAL.
   Upon the death of a party, the action cannot proceed until someone is substituted for the decedent. NRAP 43.
3. ABATEMENT AND REVIVAL.
   If a party to an action dies while the action is pending before any court, the attorney representing the deceased party is required to file a notice of death and a motion for substitution of a party with the court within 90 days of the person's death. NRS 7.075(1).
4. CRIMINAL LAW.
   When a criminal defendant dies after a notice of appeal has been filed, a personal representative must be substituted for the decedent within 90 days of his death being suggested upon the record; otherwise, the supreme court will dismiss the appeal and the decedent's conviction will stand. NRCP 25(a)(1); NRAP 43(a)(1).
5. COURTS.
   The supreme court is not a fact-finding court.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

Ronnie Brass was convicted of conspiracy to commit kidnapping and murder, first-degree kidnapping, and first-degree murder with the use of a deadly weapon. Brass timely appealed, but he died before his appeal was decided. Brass's attorney filed a suggestion of death and a motion for abatement—arguing that this court should abate the conviction and remand the case to the district court with instructions to dismiss the charging document. However, no party has been properly substituted as Brass's personal representative.

We consider whether an attorney may file a substantive motion on a deceased client's behalf in a criminal case when a personal representative has not been substituted as a party to the appeal. We determine that an attorney lacks authority to act on the deceased client's behalf in those circumstances; thus, we deny counsel's motion for abatement. Further, we conclude that if a party dies pending a review of his appeal, the appeal will be dismissed unless the decedent's personal representative is substituted in as a party to the appeal within 90 days of the decedent's death.

DISCUSSION

Brass's counsel raises a novel issue regarding the appropriate remedy when a criminal defendant dies while his appeal from a judgment of conviction is pending. There are three possible approaches in that situation: (1) abatement of the judgment *ab initio*, (2) no abatement and the appeal may be prosecuted, and (3) no abatement and the appeal may not be prosecuted. *Abatement*

of State Criminal Cases by Accused's Death Pending Appeal of Conviction—Modern Cases, 80 A.L.R. 4th 189 (1990). But we decline to consider the issue at this time based on our conclusion that the motion for abatement is not properly before this court.

[Headnotes 1-3]

Generally, counsel cannot act on a deceased client's behalf. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985) (citing Restatement (Second) of Agency § 120(1) (1958)); *United States v. Chin*, 848 F.2d 55, 57 (4th Cir. 1988). Rather, only a properly substituted personal representative of the deceased party may bring a motion on the decedent's behalf.[1] NRAP 43(a)(1) governs the substitution of parties where a party has died while an appeal is pending:

> If a party dies . . . while [an appeal] is pending in the [Nevada] Supreme Court, the decedent's personal representative may be substituted as a party on motion filed by the representative or by any party . . . . A party's motion shall be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court may then direct appropriate proceedings.

As this court observed in *Walker v. Burkham*, ''[u]pon the death of a party . . . the [action] cannot proceed until someone is substituted for the decedent . . . .'' 68 Nev. 250, 253-54, 229 P.2d 158, 160 (1951) (interpreting former Supreme Court Rule 9, a precursor to NRAP 43).

[Headnote 4]

It has been almost one year since counsel suggested Brass's death upon the record. NRCP 25(a)(1), like NRAP 43(a)(1), allows a personal representative to substitute for a deceased party; however, NRCP 25(a)(1) establishes a limitation on the time for filing a motion for substitution. Under NRCP 25(a)(1), a substitution motion must be filed within 90 days of the decedent's death being suggested upon the record, otherwise, ''the action shall be dismissed as to the deceased party.''[2] An unlimited time frame for substitution under NRAP 43 is inconsistent with Nevada's interest

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[1]If a party to an action dies while the action is pending before any court, NRS 7.075(1) requires the attorney who represented the decedent in the pending action to ''file a notice of death and a motion for substitution of a party with the court'' within 90 days of the person's death.

[2]We recognize that, by its terms, NRCP 25(a) only applies in civil cases and that this is a criminal appeal. Nonetheless, criminal judgments carry civil consequences. Also, the court system's need for party input and timely adjudication is no less in criminal than in civil cases.

in the finality of judgments. Consistent with these interests, a motion under NRAP 43 must be filed within a reasonable time after the decedent's death has been suggested on the record. Given the similarities between NRCP 25(a) and NRAP 43(a)(1), we conclude that the time limit set forth in NRCP 25(a)(1) sets a reasonable limit on substitution motions based on a party's death. We now clarify that when a criminal defendant dies after a notice of appeal has been filed, a personal representative must be substituted for the decedent within 90 days of his death being suggested upon the record; otherwise, this court will dismiss the appeal and the decedent's conviction will stand.

[Headnote 5]

Here, this court's process caused the delay in filing the motion for substitution. So, *in this instance only*, we extend the time for filing the substitution motion until 90 days after this opinion is filed. Further, we determine the substitution motion must be filed with the district court because the determination of a proposed personal representative's eligibility may involve fact-finding. We are not a fact-finding court; thus, the district court is best suited to determine who can substitute for the deceased appellant. *See Wade v. State*, 115 Nev. 290, 294, 986 P.2d 438, 441 (1999) (citing *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983)).

Accordingly, we allow 90 days from the date of this opinion for the limited purposes of determining Brass's proper personal representative and for the representative to file a motion for substitution with this court, pursuant to NRAP 43. If no personal representative is substituted within the allotted time, we will dismiss the proceedings on appeal.

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

JAVIER ARMENTA-CARPIO, AKA JAVIER CARPIO ARMENTA, APPELLANT, *v*. THE STATE OF NEVADA, RESPONDENT.

No. 60371

July 25, 2013 306 P.3d 395

Appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of lewdness with a child under the age of 14 years, attempted lewdness with a child under the age of 14 years, and one count of child abuse and neglect. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The supreme court, PARRAGUIRRE, J., held that trial judge had no obligation to canvass defendant concerning concession-of-guilt strategy in order to determine if he knowingly and voluntarily consented to it, overruling *Hernandez v. State*, 124 Nev. 978, 194 P.3d 1235 (2008).

Affirmed.

Benjamin C. Durham, Las Vegas, for Appellant.

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

1. CRIMINAL LAW.
   A concession-of-guilt strategy is not the equivalent of a guilty plea, and therefore the trial judge has no obligation to canvass a defendant concerning a concession-of-guilt strategy, but rather the reasonableness of counsel's performance is a matter to be determined in an appropriate proceeding based on the inquiry that generally applies to ineffective-assistance-of-counsel claims, overruling *Hernandez v. State*, 124 Nev. 978, 194 P.3d 1235 (2008).
2. CRIMINAL LAW.
   Because defendant did not object to the district court's canvass concerning defense counsel's concession strategy, the supreme court would review defendant's claim for plain error affecting his substantial rights.
3. CRIMINAL LAW.
   Defense counsel's strategic decision to concede that there had been some sexual contact between defendant and the victim and to concentrate instead on the extent of the contact and whether the State had charged defendant with more offenses than the evidence could support was a trial strategy and was not the equivalent of a guilty plea, and thus the trial judge had no obligation to canvass the defendant concerning the concession-of-guilt strategy in order to determine if he knowingly and voluntarily consented to it, overruling *Hernandez v. State*, 124 Nev. 978, 194 P.3d 1235 (2008).
4. CRIMINAL LAW.
   A concession of guilt is simply a trial strategy, no different than any other strategy the defense might employ at trial; as such, there is no reason to conduct a mid-trial canvass to determine a defendant's knowledge

of or consent to that particular strategy, and if a defendant is dissatisfied with the strategy, he may challenge the reasonableness of counsel's performance, overruling *Hernandez v. State*, 124 Nev. 978, 194 P.3d 1235 (2008).

5. COURTS.
Under the doctrine of ''stare decisis,'' the supreme court will not overturn precedent absent compelling reasons for so doing.

6. COURTS.
While the supreme court is loath to depart from the doctrine of stare decisis, it also cannot adhere to the doctrine so stridently that the law is forever encased in a straightjacket.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

Appellant Javier Armenta-Carpio went to trial facing strong evidence, including his own admissions, that he had sexual contact with a child. Under the circumstances, defense counsel made a strategic decision to concede that there had been some sexual contact between Armenta-Carpio and the victim and to concentrate instead on the extent of the contact and whether the State had charged Armenta-Carpio with more offenses than the evidence could support. After this strategy became apparent during defense counsel's opening statement, the trial court sua sponte inquired whether defense counsel had discussed the strategy with Armenta-Carpio and whether Armenta-Carpio had agreed to the strategy. The court received affirmative responses to both questions.

[Headnote 1]

On appeal, we are asked whether the district court's inquiry about the concession strategy was sufficient given our decision in *Hernandez v. State*, 124 Nev. 978, 194 P.3d 1235 (2008), that when faced with a concession of guilt by defense counsel during trial, the district court must canvass the defendant to determine whether he knowingly and voluntarily consented to the concession of guilt. Although the district court's inquiry here did not fully comply with *Hernandez*, we conclude that the rationale underlying *Hernandez* is unsound and the opinion therefore must be overruled. We now hold, consistent with *Florida v. Nixon*, 543 U.S. 175, 188 (2004), that a concession-of-guilt strategy is not the equivalent of a guilty plea and therefore the trial judge has no obligation to canvass a defendant concerning a concession-of-guilt strategy; instead, the reasonableness of counsel's performance is a matter to be determined in an appropriate proceeding based on the inquiry that generally applies to ineffective-assistance-of-counsel claims.

Given that holding, any deficiencies in the canvass conducted in this case do not warrant relief from the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Armenta-Carpio was charged with attempted sexual assault of a child under 14 years of age, five counts of lewdness with a child under 14 years of age, attempted lewdness with a child under 14 years of age, and child abuse and neglect. All of the charges involved his daughter and occurred over a five-year period. During opening statement at trial, defense counsel related to the jury that ''[t]hings happen[ed] between my client and his daughter,'' and therefore, according to counsel, the case was not about whether Armenta-Carpio had sexual contact with the victim but whether the State had overcharged the case. Defense counsel explained to the jury that the victim told Child Protective Services about three incidents—not eight as the State charged—and that Armenta-Carpio's police statement was ''pretty consistent'' with what the victim told the police. Thereafter, in a hearing outside the jury's presence, the district court queried Armenta-Carpio about whether he had agreed to counsel's strategy to concede guilt as to some conduct while challenging the number of incidents alleged by the State. Armenta-Carpio responded that he had. Counsel made similar concessions during closing arguments, suggesting to the jury that although Armenta-Carpio had some sexual contact with the victim, it was not as extensive as the State contended. The jury disagreed and found Armenta-Carpio guilty of all the charges. At sentencing, the district court determined that the attempted-sexual-assault count merged with one of the lewdness counts and therefore did not adjudicate Armenta-Carpio on the attempted-sexual-assault count. This appeal followed.

DISCUSSION

[Headnotes 2, 3]

Relying on *Hernandez*, Armenta-Carpio argues that the district court's canvass concerning the concession strategy was inadequate, and therefore, his consent was involuntary and unknowing. Armenta-Carpio acknowledges that he did not object to the district court's canvass. We therefore review his claim for plain error affecting his substantial rights. *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (concluding that failure to object generally precludes appellate review but this court has discretion to address any errors that are plain from record and affect defendant's substantial rights), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011), *cert. denied*, 567 U.S. ___, 132 S. Ct. 2774 (2012).

Hernandez involved an appeal from an order denying a post-conviction habeas petition. One of the ineffective-assistance claims challenged trial counsel's concession that Hernandez was culpable for the victim's murder. 124 Nev. at 989, 194 P.3d at 1242. In particular, Hernandez argued that trial counsel failed to secure his consent to the concession. Relying primarily on *State v. Perez*, 522 S.E.2d 102, 106 (N.C. Ct. App. 1999), this court concluded that ''[a] concession of guilt involves the waiver of a constitutional right that must be voluntary and knowing.'' *Hernandez*, 124 Nev. at 990, 194 P.3d at 1243. Although the issue presented involved counsel's performance, we went beyond that issue ''to address the proper procedure when a defense strategy at trial includes a concession of guilt.'' *Id.* We explained that ''[a]t a minimum,'' the district court should canvass the defendant outside the presence of the jury and the State to ensure and make findings on the record that the defendant understands the strategy behind conceding guilt and advise the defendant that conceding guilt relieves the State of its burden of proof for an offense and that he has the right to challenge the State's evidence. *Id.* at 990-91, 194 P.3d at 1243.

Our conclusion in *Hernandez* that a concession strategy must be voluntary and knowing and the canvass procedures that we embraced find their footing in the reasoning set forth in *Perez*. The *Perez* court reasoned that a concession of guilt is the functional equivalent of a guilty plea because it deprives a defendant of his rights to cross-examination, confrontation, and a trial by jury. *Perez*, 522 S.E.2d at 106. Based on that analogy, the *Perez* court concluded that a concession strategy, like a guilty plea, requires the defendant's knowing and voluntary consent ''after full appraisal of the consequences'' reflected on the record. *Id.*

Significant flaws in the *Perez* court's reasoning are pointed out in a Supreme Court decision issued five years after *Perez*. In *Florida v. Nixon*, the Supreme Court expressly rejected the idea that a concession of guilt at trial is the functional equivalent of a guilty plea. 543 U.S. 175, 188 (2004). The Court explained that unlike a guilty plea, a concession strategy preserves the rights accorded a defendant in a criminal trial: (1) the prosecution is still required to present competent, admissible evidence establishing the essential elements of the charged crimes; (2) the defense retains the right to cross-examine prosecution witnesses and pursue exclusion of prejudicial evidence; and (3) the defense can seek relief on appeal from trial error. *Id.* As the Supreme Court had observed decades earlier, ''[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.'' *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The Supreme Court also rejected the idea that counsel is automatically barred from pursuing a concession strategy just because the de-

fendant, informed by counsel, neither consents nor objects to the course that counsel determines is the best strategy, explaining that the issue in those cases is whether counsel's representation fell below an objective standard of reasonableness and prejudiced the defense. *Nixon*, 543 U.S. at 178-79; *see also Strickland v. Washington*, 466 U.S. 668 (1984).

[Headnote 4]

Although the Supreme Court's decision in *Nixon* was available when we decided *Hernandez*, our opinion makes no mention of it and does not discuss the reasoning underlying *Perez* in any significant degree. That is not necessarily surprising as the parties did not address *Nixon* even though it involved an ineffective-assistance claim based on a concession of guilt. Having now considered our reasoning in *Hernandez* in light of the Supreme Court's decision in *Nixon*, we are persuaded that there are significant differences between a concession strategy at trial and a guilty plea such that a concession strategy does not involve the waiver of a constitutional right that must be knowing and voluntary. A concession of guilt is simply a trial strategy—no different than any other strategy the defense might employ at trial. As such, there is no reason to conduct a mid-trial canvass to determine a defendant's knowledge of or consent to that particular strategy. If a defendant is dissatisfied with the strategy, he may challenge the reasonableness of counsel's performance. Thus, the foundation for the canvass requirements set forth in *Hernandez* is unsound. The question is whether we are compelled to perpetuate *Hernandez*'s canvass procedure despite its unsound foundation.

[Headnotes 5, 6]

''[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing.'' *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnote omitted). While we are loath to depart from the doctrine of stare decisis, we also cannot adhere to the doctrine so stridently that the '' 'law is forever encased in a straight jacket.' '' *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011) (quoting *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974)). In considering the canvass procedures set forth in *Hernandez*, there are two reasons that our departure from the doctrine of stare decisis is warranted. First, the part of *Hernandez* that prospectively adopts procedures that the district court must undertake to ensure that a concession is knowing and voluntary went beyond answering the limited question that was before the court—whether counsel provided constitutionally ineffective assistance by adopting a concession strategy. That part of *Hernandez* therefore was dicta. *See Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009) (''A state-

ment in a case is dictum when it is 'unnecessary to a determination of the questions involved.' '' (quoting *St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009))). Second, the reasoning underlying the canvass procedure set forth in *Hernandez* is clearly erroneous, particularly viewing that reasoning in light of *Nixon*. These foundational problems with *Hernandez* reflect more than a ''[m]ere disagreement'' with that decision, *Burk*, 124 Nev. at 597, 188 P.3d at 1124 (observing that more than ''[m]ere disagreement'' is required to overturn precedent), requiring that we depart from the doctrine of stare decisis to avoid the perpetuation of that error. *See Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (''While courts will indeed depart from the doctrine of stare decisis where such departure is necessary to avoid the perpetuation of error, the observance of the doctrine has long been considered indispensable to the due administration of justice, that a question once deliberately examined and decided should be considered as settled.'' (internal citation and quotation marks omitted)). We therefore overrule *Hernandez* to the extent that it holds that a concession of guilt is the functional equivalent of a guilty plea, triggering the protections and consequences attendant to entering a guilty plea and requiring a canvass by the trial court.

Our decision today does not undermine a defendant's right to challenge the reasonableness of counsel's concession strategy. We are not faced with a challenge to the reasonableness of counsel's performance in this case. Although we have addressed an ineffective-assistance claim based on a concession strategy for the first time on appeal where the concession contradicted the defendant's trial testimony, *see, e.g.*, *Jones v. State*, 110 Nev. 730, 877 P.2d 1052 (1996), Armenta-Carpio did not raise an ineffective-assistance claim and, even if he had, the circumstances here would not allow us to consider such a claim for the first time on appeal.[1]

Because we are persuaded that canvassing a defendant to ensure knowledge of and voluntary consent to a concession strategy is unnecessary, we conclude that Armenta-Carpio is not entitled to relief on the ground that the district court's canvass was inadequate. We therefore affirm the judgment of conviction.

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

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[1]Because we are not faced with an ineffective-assistance claim, we express no opinion as to whether *Nixon* undermines any of our reasoning in *Jones*.

THE STATE OF NEVADA, APPELLANT, *v.*
RICARDO ROBLES-NIEVES, RESPONDENT.

No. 61537

July 25, 2013 306 P.3d 399

Motion for a stay of trial court proceedings pending resolution of an appeal from an order granting a motion to suppress evidence.

The State exercised its statutory right to appeal from an order granting defendant's motion to suppress a confession in a murder case. After several continuances, the district court set a trial date and denied the State's request to stay the trial pending resolution of the appeal. The State renewed its motion for a stay with the supreme court. The supreme court, HARDESTY, J., held that it would, after considering four pertinent factors, grant the State's motion for a stay.

Motion granted.

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

David M. Schieck, Special Public Defender, and *Robert Arroyo*, Deputy Special Public Defender, Clark County, for Respondent.

1. CRIMINAL LAW.
   The four factors, set forth by rule, that govern the supreme court's exercise of discretion in ruling on a stay motion in a civil proceeding are relevant to the supreme court's exercise of discretion to grant a stay of a criminal proceeding pending resolution of an interlocutory appeal from a order granting a motion to suppress evidence. NRS 177.015(2); NRAP 8(c).
2. CRIMINAL LAW.
   Whether the object of the State's interlocutory appeal from an order granting a motion to suppress a confession in a murder case would be defeated if the supreme court denied a stay of trial proceedings pending resolution of the appeal, as a factor to consider in deciding whether to grant a stay, weighed heavily in favor of a stay; the object was to have the confession available for use at trial, that object would be defeated if a stay were denied because trial would proceed without the confession, and the State would lose the opportunity for review that the Legislature intended when it provided for an interlocutory appeal of an order granting a motion to suppress. NRS 177.015(2).
3. CRIMINAL LAW.
   Whether the State would suffer irreparable or serious harm if the supreme court denied a stay of trial proceedings pending resolution of the State's interlocutory appeal from an order granting a motion to suppress a confession in a murder case, as a factor to consider in deciding whether

to grant a stay, weighed in favor of a stay; based on the information provided to the supreme court, it appeared that the State's case was circumstantial at best without the confession and that the confession was particularly probative of defendant's guilt, the charged offense was serious, and the State would not have any recourse if defendant were acquitted. NRS 177.015(2).

4. Criminal Law.

Pursuit by the State of an interlocutory appeal from an order granting a motion to suppress a confession did not infringe on defendant's constitutional right to a speedy trial for murder, and thus defendant did not show that his right would be irreparably harmed if the supreme court granted a stay of trial proceedings pending resolution of the appeal, as a factor to consider in deciding whether to grant a stay, even though defendant promptly and consistently asserted his speedy-trial rights, and defendant had been incarcerated for approximately 18 months; the appeal served a legitimate purpose and was reasonable, time was consumed by defendant's motion to suppress, and nothing indicated that the defense was impaired by the delay. U.S. Const. amend. 6.

5. Criminal Law.

The four *Barker* factors to consider in determining whether continuances have infringed on a defendant's constitutional right to a speedy trial are related and must be considered together with such other circumstances as may be relevant. U.S. Const. amend. 6.

6. Criminal Law.

The four *Barker* factors are relevant when considering whether a stay of trial proceedings during an interlocutory appeal by the State of an order granting a motion to suppress evidence would irreparably harm defendant, as a factor for the supreme court to consider in deciding whether to grant a stay, by infringing on his constitutional right to a speedy trial. U.S. Const. amend. 6; NRS 177.015(2).

7. Criminal Law.

Several factors should be considered in assessing the purpose and reasonableness of an interlocutory appeal by the State of an order granting a motion to suppress, for the purpose of determining whether a defendant would be irreparably harmed, based on his constitutional right to a speedy trial, if the supreme court granted a stay of trial proceedings pending resolution of the appeal, as a factor to consider in deciding whether to grant a stay: the strength of the State's position on the appealed issue, the importance of the issue in the posture of the case, and, in some cases, the seriousness of the crime, *i.e.*, whether it is sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. U.S. Const. amend. 6; NRS 177.015(2).

8. Criminal Law.

Unless an interlocutory appeal by the State of an order granting a motion to suppress evidence is frivolous or involves only a tangential issue, the appeal will be regarded as good cause for delay in bringing a defendant to trial, for the purpose of determining whether a defendant would be irreparably harmed, based on his statutory right to a speedy trial, if the supreme court granted a stay of trial proceedings pending resolution of the appeal, as a factor to consider in deciding whether to grant a stay. NRS 177.015(2), 178.556(1).

9. Criminal Law.

Pursuit of an interlocutory appeal by the State of an order granting a motion to suppress a confession was good cause for a delay in commencing a trial for murder, and thus the delay did not violate defendant's statutory right to a speedy trial, such that the right would not be irreparably harmed if the supreme court granted a stay of trial proceedings

pending resolution of the appeal, as a factor to consider in deciding whether to grant a stay. NRS 177.015(2), 178.556(1).

10. CRIMINAL LAW.

Likelihood that the State would succeed on the merits in its interlocutory appeal of an order granting a motion to suppress a confession in a murder case, as a factor for the supreme court to consider in deciding whether to grant a stay of trial proceedings pending resolution of the appeal, did not weigh strongly either way; the appeal did not appear to be frivolous, and there was at least a fair dispute as to whether a prior decision of the supreme court adopted a rule that the use of extrinsic falsehoods in eliciting a confession was coercive per se. NRS 177.015(2).

11. CRIMINAL LAW.

The supreme court, after considering four pertinent factors, would grant the State's motion for a stay of trial proceedings pending resolution of the State's interlocutory appeal from an order granting a motion to suppress a confession in a murder case; the object of the State's appeal, which was to have the confession available for trial, would be defeated if a stay were denied, and this factor was the most significant of the factors, given the absence of sufficient showings that defendant would be irreparably harmed if the stay were granted or that there was not a likelihood that the State would succeed on the merits. NRS 177.015(2).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Respondent Ricardo Robles-Nieves is in custody awaiting trial on a charge of murder with the use of a deadly weapon. He successfully litigated a pretrial motion to suppress his incriminating statement to police based on a claim that his statement was procured through the use of extrinsic falsehoods. While this court has adopted a rule concerning the use of intrinsic falsehoods in eliciting a confession, the issue of the coercive effect of using extrinsic falsehoods is an issue of first impression in Nevada.

Faced with going to trial absent a key piece of evidence, the State exercised its statutory right to appeal from the order granting the motion to suppress. After several continuances and considering Robles-Nieves' repeated assertion of his speedy-trial rights, the district court set a trial date and denied the State's request to stay the trial pending resolution of its appeal. The State then renewed its motion with this court.

The State's motion provides the opportunity to address the factors that govern our discretionary decision on a motion for a stay in a criminal proceeding. We conclude that the four factors that govern our exercise of discretion in ruling on a stay motion in a civil proceeding under NRAP 8(c) are relevant to our exercise of discretion to grant a stay of a criminal proceeding pending resolution of an interlocutory suppression appeal. Those factors are: (1) whether the object of the appeal will be defeated if the stay is

denied, (2) whether the appellant will suffer irreparable or serious injury if the stay is denied, (3) whether the respondent will suffer irreparable injury if the stay is granted, and (4) whether the appellant is likely to prevail on the merits in the appeal. In the context of an interlocutory suppression appeal, the first factor is the most significant because the appeal will be rendered moot and the State's right to appeal effectively eliminated if the trial proceeds. In that context, the third factor also is significant and may require consideration of the defendant's speedy-trial rights where the defendant has asserted those rights and opposed the motion for a stay. Having considered the relevant factors, we conclude that they weigh in favor of granting a stay in this instance.[1]

DISCUSSION

The State has not always had the right to appeal from an order granting a motion to suppress evidence. *See* 1967 Nev. Stat., ch. 523, § 287, at 1443-44 (adopting NRS 177.015 without provision for interlocutory appeal from an order resolving a motion to suppress evidence); *see also State v. Pearce*, 96 Nev. 383, 609 P.2d 1237 (1980) (observing that the Nevada Legislature gave the State the right to file an interlocutory appeal from an order granting a motion to suppress evidence in 1971 but then deleted the provision the following legislative session); *Cook v. State*, 85 Nev. 692, 694-95, 462 P.2d 523, 526 (1969) (observing that interlocutory appeal from trial court's ruling on motion to suppress evidence ''is not authorized''). Part of the concern with affording the State the right to such an interlocutory appeal was that it would cause delay that would impede the defendant's right to a speedy trial. *See Cook*, 85 Nev. at 695, 462 P.2d at 526 (''An interlocutory appeal from the trial court's ruling on . . . a motion [to suppress evidence] is not authorized because of attendant delay and the desire to avoid the piecemeal handling of cases.''); *Franklin v. Eighth Judicial Dist. Court*, 85 Nev. 401, 404, 455 P.2d 919, 921 (1969) (''Piecemeal review does not promote the orderly handling of a case, and is particularly disruptive in criminal cases where the defendant is entitled to a speedy resolution of the charges against him.''). In 1981, the Nevada Legislature adopted NRS 177.015(2), which grants the State the right to appeal to this court from a district court's pretrial order granting a motion to suppress evidence. 1981 Nev. Stat., ch. 702, § 1, at 1706.

In addition to authorizing an interlocutory appeal from an order granting a suppression order, NRS 177.015(2) expressly authorizes

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[1]We granted the motion and stayed the trial in an order entered on June 10, 2013. Although time constraints prevented us from explaining our decision in a formal opinion at that time, we explained in our order that a formal opinion, setting forth the grounds for our decision, would be forthcoming. *Cf. Indep. Am. Party v. Lau*, 110 Nev. 1151, 1153 n.3, 880 P.2d 1391, 1392 n.3 (1994).

this court to ''enter an order staying the trial for such time as may be required'' if the court decides to entertain the State's appeal or if a stay ''otherwise appears necessary.'' Providing for a stay makes sense given the timing of pretrial suppression motions. Under NRS 174.125(1), motions to suppress evidence generally must be filed before trial and, in the largest judicial districts in this state, the motion may be filed as little as 15 days before the trial date, NRS 174.125(3)(a). Because the motion may be filed such a short time before trial, it is not unreasonable to expect that a stay would be needed if the State exercises its right to an interlocutory appeal from an order granting the motion. Although NRS 177.015(2) acknowledges this situation by allowing for a stay, it does not identify any factors that are relevant to the court's exercise of its discretion to stay the trial. In that void, we turn to Rule 8 of the Nevada Rules of Appellate Procedure, which addresses requests to stay proceedings while an appeal is pending.

Unfortunately, Rule 8 has little to say about stays in criminal cases beyond the procedural requirements for filing the motion such as pursuing relief in the district court in the first instance (which the State did in this case) and what must be included in the motion. NRAP 8(a)(1), (2). When it comes to stays in criminal cases in particular, the rule simply refers to NRS 177.095 and unidentified statutes following it. NRAP 8(e). Those statutes, however, similarly have little to say beyond authorizing or mandating stays in certain circumstances. None of the statutes that provide discretionary authority to grant a stay identify factors that should govern the exercise of that discretion. *See, e.g.*, NRS 177.115; NRS 177.125.

[Headnote 1]

In contrast, Rule 8(c) provides specific factors to be considered when a stay motion has been filed in a civil appeal. Those factors are: (1) whether the object of the appeal will be defeated if the stay is denied, (2) whether the appellant will suffer irreparable or serious injury if the stay is denied, (3) whether the respondent will suffer irreparable or serious injury if the stay is granted, and (4) whether the appellant is likely to prevail on the merits in the appeal. NRAP 8(c). The parties seem to agree that these factors should guide the decision whether to grant a stay under NRS 177.015(2). Because the factors set forth in NRAP 8(c) allow us to take into consideration the interests of both the prosecution and the defense and the legislative concern about delay that is reflected in the short appeal period (two days for filing a notice in the district court and five days for filing a separate notice in this court), *State v. Loyle*, 101 Nev. 65, 67, 692 P.2d 516, 518 (1985) (STEFFEN, J., dissenting) (discussing the reason for the short appeal period in NRS 177.015(2)), we will look to those factors in deciding whether to grant a stay under NRS 177.015(2).

We have not ascribed particular weights to any of the stay factors in the civil context, but we have recognized that depending on the type of appeal, certain factors may be especially strong and counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Our stay analysis in the context of an appeal from an order granting a motion to suppress evidence necessarily reflects the interlocutory nature of the appeal and the concerns about delay that are implicit in NRS 177.015(2). Accordingly, the first and third factors take on added significance in our stay analysis.

Object of the appeal

[Headnote 2]

The parties do not seriously dispute the first factor—whether the object of the State's appeal will be defeated if the stay is denied. The object of the State's appeal is to have the confession available for use at trial. If the stay is denied, that object will be defeated as the trial will proceed without the suppressed evidence. The Legislature has provided for an interlocutory appeal of an order granting a motion to suppress evidence, NRS 177.015(2), which demonstrates the intent to secure review of an order suppressing evidence before trial. If the trial proceeds while the appeal is pending, the State will lose the opportunity for that review. We therefore conclude that this factor weighs heavily in favor of a stay.

Irreparable or serious harm if stay is denied

[Headnote 3]

The second factor is the subject of some dispute—whether the State will suffer irreparable or serious injury if the stay is denied. The State argues that it will be injured if the trial proceeds because its case is not as strong without that evidence and Robles-Nieves may be acquitted as a result. Robles-Nieves suggests that the State will not be harmed because even if it succeeds on some level in this appeal, the district court likely will grant the motion again on other grounds and therefore the State will still be faced with proceeding to trial without the suppressed evidence. Both arguments are somewhat speculative. But based on the information provided to this court, it appears that the State's case absent the suppressed evidence is circumstantial at best and the suppressed evidence is particularly probative of Robles-Nieves' guilt. Considering those circumstances, the seriousness of the charged offense, and the absence of any recourse for the State if Robles-Nieves is acquitted, we conclude that this factor weighs in favor of a stay.

Irreparable or serious harm if stay is granted

The third factor we must consider is whether Robles-Nieves will be irreparably harmed if the stay is granted. Robles-Nieves offers

two arguments: he will remain incarcerated unnecessarily based on a coerced confession, and the delay will infringe his speedy-trial rights. The first argument is somewhat relevant but not controlling in this case since denying the stay would not result in Robles-Nieves' immediate release.[2] The second argument gets to the heart of this factor as the Legislature clearly was concerned about the impact that interlocutory appeals under NRS 177.015(2) would have on the defendant's speedy-trial rights. *See Loyle*, 101 Nev. at 67, 692 P.2d at 518 (STEFFEN, J., dissenting) (observing that NRS 177.015(2)'s ''short [appeal period] reflects a concern for preserving the right to speedy trials for defendants who have successfully moved to suppress evidence''). Because this presents a significant issue, we take this opportunity to provide some guidance on the relationship between a defendant's speedy-trial rights and a stay during an interlocutory appeal under NRS 177.015(2). There are two speedy-trial rights at issue: the constitutional right protected by the Sixth Amendment and a statutory right to a trial within 60 days of arraignment under NRS 178.556(1). We address the constitutional right first.

Irreparable harm based on constitutional right to speedy trial

[Headnotes 4-6]

The United States Supreme Court has adopted a four-part balancing test to determine whether continuances have infringed on a defendant's constitutional right to a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). The four factors are ''related'' and ''must be considered together with such other circumstances as may be relevant.'' *Id.* at 533. The United States Supreme Court has applied the same test ''to determine the extent to which appellate time consumed in the review of pretrial motions should weigh towards a defendant's speedy trial claim.'' *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986). We similarly conclude that these factors are relevant when considering whether a stay during an interlocutory appeal under NRS 177.015(2) will irreparably harm the defendant by infringing on his constitutional right to a speedy trial.

The first speedy-trial factor—length of the delay—is ''a triggering mechanism.'' *Barker*, 407 U.S. at 530. ''[T]here must be a delay long enough to be 'presumptively prejudicial.' '' *Loud Hawk*, 474 U.S. at 314 (quoting *Barker*, 407 U.S. at 530). Here, Robles-Nieves was arrested on the charges on November 23, 2011. Thus far, he has been held approximately 18 months; just over 12

[2]It is not entirely clear from the documents before us, but it appears that Robles-Nieves remains in custody at least in part because he is subject to an immigration hold.

months since his arraignment. Of that time, approximately 8 months is attributable to this appeal (starting from October 17, 2012—the date that the district court first granted a continuance based on the appeal).

[Headnote 7]

Under the second speedy-trial factor—the reason for the delay—different reasons are assigned different weights. *Barker*, 407 U.S. at 531. For example, if the State deliberately delays the trial to hamper the defense, that would weigh heavily against the State, whereas delay due to overcrowded courts generally is weighed less heavily. *Loud Hawk*, 474 U.S. at 315. The Supreme Court has observed that ''[g]iven the important public interests in appellate review, it hardly need be said that an interlocutory appeal by the [State] ordinarily is a valid reason that justifies delay.'' *Id.* (citation omitted). Several factors should be considered in assessing the purpose and reasonableness of an interlocutory appeal by the State: ''the strength of the [State's] position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime,'' *i.e.*, whether it is ''sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal.'' *Id.* at 315, 316. Looking at these factors, the State's interlocutory appeal serves a legitimate purpose and is reasonable. First, the appeal does not appear to be frivolous. That the appeal is not frivolous is reflected by this court's decision to exercise its discretion to entertain the appeal after considering the State's preliminary showing of good cause. *See* NRS 177.015(2) (''The Supreme Court may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained.''). Second, the appellate issue is significant to the case because the confession is a key piece of evidence. Third, the charged offense, first-degree murder, is sufficiently serious to justify the restraints that may be imposed on Robles-Nieves pending the outcome of this appeal. We therefore conclude that the reason for the delay (the State's pursuit of this interlocutory appeal) does not weigh heavily against the State.

The third speedy-trial factor—Robles-Nieves' assertion of the right—would seem to present no great difficulty: he promptly asserted his speedy-trial rights at arraignment in district court and has been consistent in objecting to any continuances and stays (even those that would allow the district court to rule on his suppression motion before the trial). The State, however, asserts that the motion to suppress should be treated as an implied waiver of any speedy-trial right for the time required to finally resolve the motion, apparently including the interlocutory appeal. In this, the

State equates the motion with a pretrial habeas petition, which by statute (NRS 34.700(1)(b)) must include a waiver of speedy-trial rights. Although the filing of the motion may be viewed as conduct that conflicts with the assertion of the speedy-trial right, *see Loud Hawk*, 474 U.S. at 314-15 (noting that although defendants asserted speedy-trial rights, they also ''consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari'' and ''also filled the District Court's docket with repetitive and unsuccessful motions''), we are not convinced that it necessarily implicates a waiver of speedy-trial rights. In this case, the suppression motion appears to be one of the only motions filed by the defense, it was timely filed, and it cannot be characterized as frivolous given the district court's order granting the motion. Tellingly, the record indicates that Robles-Nieves wanted to proceed to trial and objected to a continuance that would have allowed the judge who heard the suppression motion to make a decision on the motion. Thus, at worst, the time consumed by the motion weighs against Robles-Nieves, but we will not treat the motion as a waiver of the right.

The final speedy-trial factor—prejudice to the defendant—is assessed in light of the interests that the speedy-trial right was designed to protect: ''to prevent oppressive pretrial incarceration,'' ''to minimize anxiety and concern of the accused,'' and ''to limit the possibility that the defense will be impaired.'' *Barker*, 407 U.S. at 532. Robles-Nieves focuses on the first of these concerns—he has been incarcerated for approximately 18 months away from his family. We do not take this concern lightly. It is not, however, the most serious of the interests that the speedy-trial right was designed to protect. The most serious of those interests is to limit impairment to the defense caused by delay. *Id*. There is no suggestion that the delay has impaired the defense.

We must balance all of these speedy-trial factors to determine whether the stay requested by the State will irreparably harm Robles-Nieves by infringing his constitutional right to a speedy trial. On balance, we conclude that there has not been a speedy-trial violation.[3] That balance could change because two of the factors are fluid—the length of the delay and the prejudice to the defendant. By taking an interlocutory appeal and requesting a stay, the State takes the risk that at some point the balance may tip against it. But because the balance has not yet tipped, Robles-Nieves has not demonstrated that granting the stay would result in irreparable injury to him.

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[3]Of note, the district court denied a defense motion to dismiss based on a speedy-trial violation a few weeks before the State filed its stay motion in this court.

Irreparable harm based on statutory speedy-trial right

[Headnotes 8, 9]

The asserted harm that will be suffered by Robles-Nieves if a stay is granted also includes the statutory right to a trial within 60 days of arraignment. *See* NRS 178.556(1). We have recognized that the 60-day rule set forth in NRS 178.556 is mandatory only when there is a lack of good cause for the delay. *Huebner v. State*, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987). Here, the good cause for the delay mirrors the second of the *Barker* factors (the reason for the delay). The Legislature has determined that the State should have the right to appeal from an order granting a motion to suppress evidence. NRS 177.015(2). That right would be severely limited, if not effectively eliminated, were the delay attributable to such an appeal not considered good cause for purposes of the 60-day rule. We therefore conclude that unless the appeal is frivolous or involves only a tangential issue, the State's interlocutory appeal under NRS 177.015(2) will be regarded as good cause for delay in bringing a defendant to trial. Thus, similar to the constitutional speedy-trial right, Robles-Nieves' statutory right will not be irreparably harmed if the stay is granted.

Likelihood of success on the merits

[Headnote 10]

The final consideration in whether to grant the motion for a stay is the likelihood that the State will succeed on the merits. In some circumstances, this stay factor is significant. But in the context of an interlocutory appeal under NRS 177.015(2), we conclude that it is far less significant than the first stay factor. As we have already explained, the first stay factor takes on added significance in the context of an interlocutory appeal from an order granting a suppression motion because denying a stay would effectively eliminate the right to appeal afforded by NRS 177.015(2). Because the first stay factor weighs heavily in favor of a stay, the final factor will counterbalance the first factor only when the appeal appears to be frivolous or the stay sought purely for dilatory purposes. *Cf. Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004) (taking similar approach to stay analysis in interlocutory appeal from order refusing to compel arbitration). We have already observed in the context of the speedy-trial analysis related to the third factor that the appeal here does not appear to be frivolous. Regardless of whether we may ultimately agree with the State or Robles-Nieves on the merits of the suppression issue, there is at least a fair dispute as to whether our decision in *Sheriff, Washoe County v. Bessey*, 112 Nev. 322, 914 P.2d 618 (1996), adopted a rule that the use of extrinsic falsehoods in eliciting a confession is coercive per se. As the district court observed in its order granting the motion, *Bessey* adopted the rationale of another state court that

had recognized such a rule but did so in the context of the use of intrinsic falsehoods and no Nevada case addresses extrinsic falsehoods. Under the circumstances, we conclude that this factor does not weigh strongly either way in the stay analysis.

[Headnote 11]

Considering all of the stay factors, we conclude that the first factor is most significant in this case. There has not been a sufficient showing of irreparable harm to Robles-Nieves or that there is not a likelihood of success on the merits to counterbalance that factor—if a stay is denied and the trial commences, the object of the appeal will be defeated as will the purpose of NRS 177.015(2). We therefore grant the State's motion and stay the trial pending resolution of this appeal. In view of the concerns with disrupting a criminal proceeding wherein a defendant has a constitutional and statutory right to a speedy trial, and to the extent our docket permits, we will expedite appeals from orders granting motions to suppress evidence.

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