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.

JOON S. MOON; AND PATTERSON LABORATORIES, INC., A MICHIGAN CORPORATION, APPELLANTS, *v.* MCDONALD, CARANO & WILSON LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP, RESPONDENT.

No. 58720

August 1, 2013 306 P.3d 406

Appeal from a district court judgment dismissing appellants' complaint in a legal malpractice action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Client brought legal malpractice action against attorney stemming from representation of client as a creditor in bankruptcy proceeding. The district court granted attorney's motion to dismiss. Client appealed. The supreme court, HARDESTY, J., held that representation of creditor in non-adversarial portion of bankruptcy did not constitute litigation that tolled legal malpractice claim.

Affirmed.

Carl M. Hebert, Reno, for Appellants.

Piscevich & Fenner and *Margo Piscevich* and *Mark J. Lenz*, Reno, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews de novo a district court's order granting a motion to dismiss.
2. APPEAL AND ERROR.
   A district court's order granting a motion to dismiss will not be upheld unless it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle the plaintiff to relief.
3. LIMITATION OF ACTIONS.
   Representation of a creditor in the non-adversarial parts of a bankruptcy proceeding did not constitute litigation, so as to toll statute of limitations for legal malpractice action stemming from representation until conclusion of litigation, where creditor's claim was resolved without the filing of a complaint in the bankruptcy action. NRS 11.207(1).
4. LIMITATION OF ACTIONS.
   The timely filing of a professional malpractice claim may be subject to the ''litigation malpractice tolling rule,'' which states that, in the context of litigation damages arising from legal malpractice committed in the representation of a party to a lawsuit, damages do not begin to accrue until the underlying legal action has been resolved.

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

OPINION

By the Court, HARDESTY, J.:

The statute of limitations for a professional malpractice claim against an attorney commences on the date the plaintiff discovers, or through due diligence should have discovered, the material facts that constitute the cause of action. NRS 11.207(1). The statutory limitation period for a claim of legal malpractice involving the representation of a client during litigation does not commence until the underlying litigation is concluded. *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002). In this appeal, we must determine whether an attorney's alleged negligence in representing a creditor in the non-adversarial parts of a bankruptcy proceeding constitutes litigation malpractice causing the so-called *Hewitt* litigation tolling rule to apply. We conclude that it does not.

FACTS AND PROCEDURAL HISTORY

Appellant Patterson Laboratories, Inc. (PLI), operated a manufacturing facility in Phoenix, Arizona, and expanded its operations with the purchase of land and a building in Goodyear, Arizona. PLI later conveyed the Goodyear building and real property to its president and principal shareholder, appellant Joon S. Moon. Patterson West, Inc. (West), purchased PLI's Goodyear operations; however, Moon retained ownership of the facility and real property, and West agreed to lease the Goodyear facility from Moon.

West executed a promissory note for $1,410,000, secured by certain equipment, inventory, and other personal property sold to

West and located at the Goodyear facility. West, which changed its name to Sierra International, Inc. (Sierra), later defaulted on the promissory note and the lease with Moon. Sierra filed a Chapter 7 voluntary petition in bankruptcy court in 2001, and appellants hired respondent McDonald Carano Wilson LLP (MCW) in July 2002 to represent them in Sierra's bankruptcy action.

In the bankruptcy case, appellants instructed MCW to have the collateral removed from the Goodyear facility so that the facility and real property could be sold without the equipment on the premises. Allegedly, unbeknownst to appellants, MCW negotiated with the bankruptcy trustee and counsel for Sierra to permit PLI to take possession of the personal property secured as collateral. Later, in November 2002, pursuant to a stipulation by the attorneys and trustee, the lease of the Goodyear facility was terminated, and PLI was permitted to take possession of the collateral. MCW's representation of appellants ended in February 2003, and on October 21, 2008, the bankruptcy court entered its final decree and Sierra's bankruptcy case was closed.

Moon also filed a district court action seeking relief for breach of the promissory note executed by West and indemnity for an action filed by the City of Goodyear against Moon based on a chemical spill that occurred while Sierra was operating the Goodyear facility. Sierra and the other defendants in that action filed a motion for partial summary judgment, requesting that the amount owed on the promissory note and guarantee be offset by the value of the collateral located at the Goodyear facility that had been returned to PLI. Subsequently, on April 27, 2006, the district court issued an order stating that upon appellants' possession of the collateral, they were required to dispose of the collateral in a commercially reasonable manner, and all related proceeds were to offset the remainder of the debt owed on the note. The district court ultimately awarded damages to appellants, less the offset for the value of the collateral returned to PLI. Appellants appealed, and this court dismissed the matter pursuant to the parties' stipulation on February 17, 2009.

Meanwhile, on November 3, 2006, appellants filed an action against MCW, alleging professional negligence, breach of contract, and vicarious liability (first complaint) arising from its representation of appellants in Sierra's bankruptcy action. In 2008, the district court dismissed the lawsuit without prejudice because appellants had failed to comply with the requirements of NRCP 16.1(e)(2). Appellants appealed that decision, and this court affirmed.

On October 20, 2010, appellants filed a second action against MCW (second complaint), reasserting the claims in their first complaint. In March 2011, MCW filed a motion to dismiss the second complaint pursuant to NRCP 12(b)(5), arguing that the case

was time-barred under the applicable statute of limitations, NRS 11.207(1). MCW argued that NRS 11.207(1) governs appellants' professional malpractice claim, and, based on the record, the appropriate accrual date is November 3, 2006, the date of the filing of the first complaint. In their opposition, appellants argued that *Hewitt* governs the claim, and the appropriate accrual date is either February 17, 2009, the date of the dismissal of the appeal in the district court case, or October 21, 2008, the date of the final decree in the bankruptcy case.

In April 2011, the district court granted MCW's motion. In its order, the district court rejected February 17, 2009, as the accrual date because the alleged action constituting malpractice did not occur as part of the state court case. It also rejected October 21, 2008, as the accrual date, citing *Cannon v. Hirsch Law Office, P.C.*, 213 P.3d 320, 328 (Ariz. Ct. App. 2009), and holding that *Hewitt* was inapplicable because a bankruptcy proceeding does not constitute litigation. It then held that November 3, 2006, was the appropriate accrual date because NRS 11.207(1) governed the claim and appellants were cognizant of the material facts that made up their current malpractice action as early as that date. Because appellants filed their second complaint on October 20, 2010, the district court concluded that the complaint was untimely and the statute of limitations barred its consideration. This appeal followed.

DISCUSSION

[Headnotes 1, 2]

''This court reviews de novo a district court's order granting a motion to dismiss, and such an order will not be upheld unless it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief.'' *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 923, 267 P.3d 771, 774 (2011) (alterations in original) (internal quotations omitted).

The district court did not err by granting MCW's motion to dismiss based upon NRS 11.207(1)

[Headnotes 3, 4]

NRS 11.207(1) sets forth the statute of limitations for a professional malpractice claim and contains a so-called ''discovery rule'': ''[a]n action against an attorney . . . to recover damages for malpractice . . . must be commenced . . . within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action.'' The timely filing of a professional malpractice claim may be subject to the litigation malpractice tolling rule. In *Hewitt v. Allen*, this court held that

> [i]n the context of litigation malpractice, that is, legal malpractice committed in the representation of a party to a lawsuit, damages do not begin to accrue until the underlying legal action has been resolved. Thus, when the malpractice is alleged to have caused an adverse ruling in an underlying action, the malpractice action does not accrue while an appeal from the adverse ruling is pending.

118 Nev. at 221, 43 P.3d at 348 (footnote omitted).

On appeal, appellants argue that the district court erred by holding that a bankruptcy proceeding does not constitute litigation. They rely on *Guillot v. Smith*, 998 S.W.2d 630 (Tex. App. 1999), in support of their argument.[1] MCW contends that, based on *Cannon*, the district court properly ruled that bankruptcy proceedings do not constitute litigation. Alternatively, it argues that appellants' reliance on *Guillot* is misplaced.

Non-adversarial bankruptcy proceedings do not constitute litigation for purposes of the litigation malpractice tolling rule

Whether bankruptcy proceedings constitute litigation for purposes of the litigation malpractice tolling rule is an issue of first impression for this court, and we thus examine how other jurisdictions have addressed the issue.

In *Cannon*, an attorney was retained to protect a creditor's interests in a Chapter 13 bankruptcy action. 213 P.3d at 322. After the bankruptcy action ended, the creditor filed a complaint against the attorney, asserting a claim of professional malpractice based on the attorney's allegedly improper representation in the bankruptcy proceedings. *Id.* at 323. Like Nevada, Arizona has a general discovery rule and a litigation malpractice tolling rule. *Id.* at 323-24. The trial court applied the discovery rule and dismissed the creditor's complaint as untimely. *Id.* at 323.

On appeal, the *Cannon* court recognized that bankruptcy proceedings may contain both adversarial and non-adversarial portions and held that ''an attorney's alleged negligence while representing a creditor in the *non-adversarial portions* of bankruptcy proceedings does not occur in the course of 'litigation,' as that term is used for purposes of the accrual of an attorney malpractice action.'' *Id.* at 325, 327-28 (emphasis added). It further held that ''[t]here is a bright-line test to distinguish between the non-adversarial and ad-

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[1]Appellants also cite to two other cases to support their argument that other jurisdictions have virtually all held that bankruptcy proceedings constitute litigation. However, our review of those cases reveals that only one of the cited cases supports their argument. *See Kellogg v. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.*, 807 So. 2d 669, 672 (Fla. Dist. Ct. App. 2001) (applying the litigation malpractice rule to a professional malpractice claim arising from bankruptcy proceedings).

versarial portions of a bankruptcy proceeding: adversarial proceedings begin when a creditor files a complaint in a bankruptcy action.'' *Id*. at 328 (citing Fed. R. Bankr. P. 7003 (''Commencement of Adversary Proceeding'')). It then affirmed the trial court's decision to apply the discovery rule because, although the bankruptcy action was converted into a Chapter 7 proceeding, the creditor never filed a complaint in the bankruptcy proceeding. *Id*. at 322-23, 328.

Although MCW, as counsel for appellants, rejected the unexpired lease, the record here indicates that the rejection of the unexpired lease was resolved by stipulation of the parties and no adversarial proceeding was filed. By definition, the proceedings are non-adversarial. Thus, the proceeding constitutes an uncontested matter because MCW and the appellants resolved the rejection without the filing of a complaint in the bankruptcy action.[2]

We conclude that the lease rejection did not constitute an adversarial proceeding. Thus, applying the *Cannon* court's analysis we adopt today to the facts of this case, we conclude that Sierra's bankruptcy action did not constitute an adversarial proceeding. The district court therefore properly granted MCW's motion to dismiss pursuant to the discovery rule articulated in NRS 11.207(1). *See Cannon*, 213 P.3d at 322-23, 328 (upholding application of the discovery rule in the absence of a complaint).

Appellants rely on *Guillot*, arguing that the district court erred by holding that a bankruptcy proceeding does not constitute litigation. In *Guillot*, the Texas Court of Appeals was not presented with the question of whether a bankruptcy proceeding constituted ''litigation'' for purposes of the litigation malpractice tolling rule. 998 S.W.2d at 632 n.2. Nevertheless, it noted that

> a bankruptcy proceeding is ''litigation'' [because] . . . [t]he client would still be forced to assert inconsistent positions in the bankruptcy and malpractice action, and be left to either hire new counsel or continue to allow an attorney who may have committed malpractice to represent him in the underlying action.

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[2]Additionally, appellants argue that under the Federal Rules of Bankruptcy Procedure (FRBP) Sierra's bankruptcy action was adversarial in nature, and thus constituted litigation. Appellants refer to the rejection of the lease and specifically contend that under FRBP 6006, ''[a] proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014,'' and Rule 9014 sets forth the procedures for seeking relief ''[i]n a contested matter.'' We determine that these rules that appellant relies on address the procedure for bankruptcy proceedings that are contested. However, because we determine that the rejection of the lease was not a contested matter and thus this was not a contested bankruptcy proceeding, this argument lacks merit.

Id. The court held that ''the statute of limitations on [the client's] malpractice claim against [the attorney] was tolled during the pendency of [the attorney's] representation of [the client] in an ongoing bankruptcy proceeding.'' *Id*. at 633.

Appellants contend that *Guillot* supports their argument that their malpractice claims were tolled until the February 17, 2009, dismissal of the appeal in the district court case or the October 21, 2008, final decree in the bankruptcy case. We determine that appellants' reliance upon *Guillot* is misplaced. The *Guillot* court's discussion of the potential application of the litigation malpractice tolling rule in that case was based on a presumption of the attorney's continued representation of the client. It is undisputed by the parties that MCW only represented appellants in Sierra's bankruptcy action from July 2002 to February 2003, when it was disqualified from representing appellants by the bankruptcy court. Appellants' professional malpractice claim would therefore not be tolled by the litigation malpractice tolling rule after February 2003, even if this court were to conclude that the bankruptcy proceeding in this case qualified as litigation.

For the foregoing reasons, we conclude that the district court did not err by granting MCW's motion to dismiss pursuant to NRS 11.207(1), and we thus affirm the district court's judgment.[3]

PICKERING, C.J., and SAITTA, J., concur.

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[3]On appeal, appellants also argue that the district court abused its discretion by granting MCW's motion to dismiss based upon the doctrine of judicial estoppel. Appellants assert that MCW waived the argument of judicial estoppel below by raising it for the first time in its reply in support of its motion to dismiss. *See Francis v. Wynn Las Vegas, L.L.C.*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (''[A]rguments raised for the first time in [a] reply brief need not be considered.''). However, we determine that MCW did not waive the argument of judicial estoppel. Based on the record, MCW's judicial estoppel argument was made in response to an argument made by appellants in their opposition to MCW's motion to dismiss.

Regardless, we conclude that the doctrine of judicial estoppel is inapplicable to this matter because the record indicates that the district court dismissed appellants' first complaint on procedural grounds, and, therefore, appellants never successfully asserted their first position. *See S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. 276, 285-86, 255 P.3d 231, 237 (2011) (holding that judicial estoppel may apply only if a party was successful in asserting its first position). Thus, we determine that the district court abused its discretion by granting MCW's motion to dismiss based upon the doctrine of judicial estoppel. Nevertheless, because the district court properly granted MCW's motion to dismiss based on NRS 11.207(1), such abuse was harmless error. *See Wyeth v. Rowatt*, 126 Nev. 446, 451, 244 P.3d 765, 769 (2010) (an error is harmless if the party cannot ''demonstrate that their substantial rights were affected so that, but for the error, a different result may have been reached'').

MUHAMMAD Q. KHAN, AN INDIVIDUAL; AND MAIMOONA Q. KHAN, AN INDIVIDUAL, APPELLANTS, *v.* QADIR BAKHSH, AN INDIVIDUAL, RESPONDENT.

No. 60262

August 1, 2013 306 P.3d 411

Appeal from a district court judgment after a bench trial in a contract and tort action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Vendor brought breach-of-contract action against proposed purchasers of restaurant. Following bench trial, the district court entered judgment in vendor's favor, and purchasers appealed. The supreme court, CHERRY, J., held that: (1) statute of frauds did not bar oral evidence regarding existence and terms of written buy-and-sell agreement that was allegedly lost or destroyed by vendor, (2) parol evidence rule did not bar testimony offered as evidence that agreement was procured by fraud, and (3) liquidated damages clause was an unenforceable penalty.

Reversed and remanded with instructions.

Michael H. Singer, Ltd., and *Michael H. Singer*, Las Vegas, for Appellants.

Agwara & Associates and *Liborius I. Agwara* and *George A. Maglares*, Las Vegas, for Respondent.

1. FRAUDS, STATUTE OF.
   Statute of frauds did not bar proposed purchasers' oral evidence in breach-of-contract action regarding existence and terms of a written buy-and-sell agreement for restaurant that was allegedly subsequently lost or destroyed by vendor. NRS 111.205(1).
2. FRAUDS, STATUTE OF.
   The admissibility of evidence concerning a written agreement is not affected by the subsequent loss or destruction of such an agreement; its loss or destruction does not render it ''unwritten'' and the evidence of its existence and terms barred by the statute of frauds. NRS 111.205(1).
3. FRAUDS, STATUTE OF.
   When one party allegedly stole or destroyed a written agreement, that party may not use the statute of frauds to sanction his obliteration of the agreement to the detriment of the other party. NRS 111.205(1).
4. EVIDENCE.
   Parol evidence rule did not bar testimony that was inconsistent with terms of a written buy-and-sell agreement for a restaurant but that was offered as evidence that the agreement was procured by fraud or that a subsequent agreement was reached, memorialized in writing, but later lost or destroyed.
5. EVIDENCE.
   The parol evidence rule generally bars extrinsic evidence regarding prior or contemporaneous agreements that are contrary to the terms of an integrated contract; extrinsic or oral evidence, however, is admissible to

prove fraud in the inducement of an agreement, to establish a subsequent alteration of an agreement, or to prove the existence and terms of a written, but lost or destroyed, agreement.

6. DAMAGES.
Liquidated damages clause in buy-and-sell agreement for restaurant, which required breaching party to pay damages of ''150% of actual damages,'' was an unenforceable penalty where actual damages were ascertainable.

7. DAMAGES.
Liquidated damage provisions are prima facie valid and serve as a good-faith effort to fix the amount of damages when contractual damages are uncertain or immeasurable.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

At the bench trial in this case, Muhammad Q. and Maimoona Q. Khan presented evidence of an allegedly written, but lost or destroyed, agreement between the Khans and Qadir Bakhsh to purchase a certain restaurant and land from Bakhsh. The district court excluded this evidence under the statute of frauds because the Khans failed to produce the written agreement. The question in dispute is whether the district court erred when it applied the statute of frauds to preclude consideration of the Khans' evidence regarding the existence and terms of the allegedly lost or destroyed written agreement. We conclude that the statute of frauds does not apply to a writing that is subsequently lost or destroyed, and oral evidence is admissible to prove the existence and terms of that lost or destroyed writing. Thus, we reverse the district court's order and remand this matter to the district court for further proceedings.

FACTS

Respondent Qadir Bakhsh owned a restaurant and the real property on which it was located, which appellants Muhammad Q. and Maimoona Q. Khan agreed to purchase. The parties' first buy-and-sell agreement provided that the Khans would purchase the property for $600,000 by paying off Bakhsh's outstanding first and second mortgages. Both parties agreed that subsequent second and third agreements existed, and the third agreement set a purchase price of $990,000, wherein the Khans would pay off the $600,000 outstanding first and second mortgages and execute a $390,000 promissory note in favor of Bakhsh. This third agreement and promissory note proceeded through escrow and, according to Bakhsh, was the operative agreement between the parties. The Khans never made any payments on the $390,000 promissory

note, and Bakhsh eventually initiated the underlying suit against the Khans to recover the principal and unpaid interest.

At the bench trial, the Khans presented evidence that a fourth agreement existed, which again set the purchase price for the property at $600,000. According to the Khans, the only executed copy of this agreement was given to a third party, Tahir Abbas Shah, for safekeeping. After relations between Bakhsh and the Khans deteriorated, Bakhsh's brother allegedly stole the signed copy of the fourth agreement from Shah. Shah testified that when he confronted Bakhsh about the stolen fourth agreement, Bakhsh initially agreed to return it, but never did so.

Bakhsh contended that the fourth agreement never existed, and that the third agreement and the promissory note, under which the purchase proceeded through escrow, contained the agreed-upon purchase price and terms of the sale. The Khans maintained that the fourth agreement, while stolen and allegedly destroyed by Bakhsh or his brother, was the actual agreement between the parties, or alternatively that the third agreement was fraudulently induced.

In its order after the bench trial, the district court refused to consider most of the evidence that the Khans presented. The court found that the Khans' evidence of the destroyed fourth agreement was barred by the statute of frauds because it was an ''unwritten'' agreement for the purchase of property. The district court also found that Muhammad Khan's testimony about terms that differed from the terms of the third agreement was barred by the parol evidence rule. After declining to consider this evidence, the district court found that the Khans breached the third agreement and entered judgment in favor of Bakhsh. The district court awarded Bakhsh monetary damages of $390,000 plus interest for the Khans' failure to pay the $390,000 promissory note, $20,000 for Bakhsh's remaining interest in the restaurant, $585,000 in liquidated damages pursuant to a provision in the third agreement, and $1,359.77 in costs. The Khans appealed.

DISCUSSION

We begin our review of the issues presented in this appeal by examining the district court's application of the statute of frauds and the parol evidence rule, before addressing the damages award.

Application of evidentiary rules

Statute of frauds

[Headnote 1]

The Khans argue that the district court erred when it applied the statute of frauds to bar their evidence of a fourth written contract that they alleged was later stolen and destroyed. We agree with the

Khans that the statute of frauds does not bar oral evidence of such a contract.

Nevada's statute of frauds provides that every contract for the sale of land is void unless the contract is in writing, and thus, oral agreements to convey real property cannot be enforced. NRS 111.205(1); *see also Butler v. Lovoll*, 96 Nev. 931, 934-35, 620 P.2d 1251, 1253 (1980). Because the Khans did not present a writing evidencing the fourth agreement, the district court deemed it an ''unwritten'' agreement and applied the statute of frauds to bar the Khans' evidence of the fourth agreement. But the Khans did not allege that the fourth agreement was oral or unwritten. Instead, they presented testimony, from themselves and Shah, and documentary evidence regarding the existence and terms of a fourth *written* agreement, which was allegedly subsequently lost or destroyed by Bakhsh. Because this evidence pertained to the existence and terms of an allegedly *written* agreement, the statute of frauds is satisfied and this evidence is admissible. *See Lutz v. Gatlin*, 590 P.2d 359, 361 (Wash. Ct. App. 1979).

[Headnotes 2, 3]

The admissibility of evidence concerning a written agreement is not affected by the subsequent loss or destruction of such an agreement. Its loss or destruction does not render it ''unwritten'' and the evidence of its existence and terms barred by the statute of frauds. *Id.* Indeed, when one party allegedly stole or destroyed the agreement, as the Khans allege Bakhsh did here, that party may not use the statute of frauds to sanction his obliteration of the agreement to the detriment of the other party. *See Baker v. Mohr*, 826 P.2d 111, 113 (Or. Ct. App. 1992). Thus, in this case, the district court erred when it found that the statute of frauds barred the Khans' evidence of the existence and terms of the alleged fourth written agreement. *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1033, 923 P.2d 569, 574 (1996) (stating that the district court's application of the statute of frauds is a question of law, which this court reviews de novo). Accordingly, the Khans were entitled to present parol or other evidence to prove the existence and contents of the allegedly lost or destroyed fourth agreement. *Joseph E. Seagram & Sons, Inc. v. Shaffer*, 310 F.2d 668, 674-75 (10th Cir. 1962); *Mark Keshishian & Sons, Inc. v. Wash. Square, Inc.*, 414 A.2d 834, 840 (D.C. Ct. App. 1980). We therefore reverse that portion of the district court's judgment.

Parol evidence

[Headnotes 4, 5]

The Khans also argue that the district court abused its discretion by applying the parol evidence rule to bar Muhammad Khan's and Shah's testimony regarding terms contrary to the third agreement

to show that the third agreement was induced by fraud. The parol evidence rule generally bars extrinsic evidence regarding prior or contemporaneous agreements that are contrary to the terms of an integrated contract. *Crow-Spieker No. 23 v. Robinson*, 97 Nev. 302, 305, 629 P.2d 1198, 1199 (1981). Extrinsic or oral evidence, however, is admissible to prove fraud in the inducement of an agreement, *Golden Press, Inc. v. Pac. Freeport Warehouse Co.*, 97 Nev. 163, 164, 625 P.2d 578, 578 (1981), to establish a subsequent alteration of an agreement, *M.C. Multi-Family Dev. v. Crestdale Assocs. Ltd.*, 124 Nev. 901, 914, 193 P.3d 536, 545 (2008), or to prove the existence and terms of a written, but lost or destroyed, agreement. *See, e.g.*, *Joseph E. Seagram & Sons*, 310 F.2d at 674-75. Thus, the district court's application of the parol evidence rule to exclude testimony that was inconsistent with the terms of the third agreement, but that was offered as evidence that the third agreement was procured by fraud or that the subsequent fourth agreement was reached and memorialized in writing, but later lost or destroyed, was an abuse of discretion. *M.C. Multi-Family Dev.*, 124 Nev. at 913-14, 193 P.3d at 544-45 (providing that the district court's application of the parol evidence rule is reviewed for an abuse of discretion). We therefore reverse the district court's order to the extent that it excluded this evidence. Because we address only the district court's error in excluding admissible evidence, on remand, the district court should independently weigh the admissible evidence and enter a new judgment accordingly.

Liquidated damages

[Headnotes 6, 7]

While we reverse and remand this case based upon the evidentiary errors, we also address the Khans' argument that the district court improperly awarded liquidated damages to Bakhsh because the liquidated damages provision was a penalty. ''[L]iquidated damage provisions are prima facie valid,'' *Haromy v. Sawyer*, 98 Nev. 544, 546, 654 P.2d 1022, 1023 (1982), and serve as a good-faith effort to fix the amount of damages when contractual damages are uncertain or immeasurable. *Joseph F. Sanson Inv. Co. v. 268 Ltd.*, 106 Nev. 429, 435, 795 P.2d 493, 496-97 (1990).

In this case, the liquidated damages provision in the third agreement required the breaching party to pay additional damages of ''150% of actual damages.'' Thus, by its very terms, this liquidated damages clause requires ascertaining actual damages and imposes additional damages as a penalty for breach. Such a penalty for breach of an agreement is an unenforceable penalty. *See Mason v. Fakhimi*, 109 Nev. 1153, 1156-57, 865 P.2d 333, 335 (1993); *Joseph F. Sanson Inv. Co.*, 106 Nev. at 435, 795 P.2d at 497. Applying the de novo review appropriate to liquidated damages awards, *Dynalectric Co. of Nev., Inc. v. Clark & Sullivan Con-*

structors, Inc., 127 Nev. 480, 483, 255 P.3d 286, 288 (2011), we conclude that the district court erred in awarding liquidated damages to Bakhsh because actual damages were ascertainable and the provision here operated as a penalty. *Am. Fire & Safety, Inc. v. City of N. Las Vegas*, 109 Nev. 357, 359-60, 849 P.2d 352, 354 (1993) (providing that the interpretation of contractual provisions, including liquidated damages, are reviewed de novo unless the interpretation turns on the credibility of extrinsic evidence). We therefore reverse this determination.

CONCLUSION

The district court incorrectly applied the statute of frauds to exclude evidence concerning the existence and terms of a fourth written, but allegedly lost or destroyed, agreement. Likewise, it improperly excluded evidence concerning whether the third agreement was induced by fraud or modified by a subsequent agreement because the parol evidence rule does not preclude such evidence. In addition, because actual damages were ascertainable and the liquidated damages provision operated as a penalty, the district court erred by awarding liquidated damages. For these reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

HARDESTY and PARRAGUIRRE, JJ., concur.

THE STATE OF NEVADA, APPELLANT, *v.*
DELBERT M. GREENE, RESPONDENT.

No. 61674

August 1, 2013 307 P.3d 322

Appeal from a district court order granting respondent's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Petitioner, whose convictions for burglary while in possession of a deadly weapon, conspiracy to commit robbery, and robbery with the use of a deadly weapon were affirmed on appeal, and who had previously sought post-conviction relief four times, the denial of which was affirmed on appeal, sought for the fifth time a writ of habeas corpus. The district court granted petition. State appealed. The supreme court, CHERRY, J., held that petitioner failed to demonstrate good cause and prejudice sufficient to overcome procedural bars to consideration of petition.

Reversed and remanded.

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

Delbert M. Greene, Ely, in Proper Person.[1]

1. HABEAS CORPUS.
   The district court improperly delegated its duty to articulate specific grounds for its ruling granting petition for habeas corpus relief before empowering petitioner's counsel to draft findings, where the court did not make any express findings in support of its determination and provided no guidance for the prevailing party.
2. HABEAS CORPUS.
   Petitioner for writ of habeas corpus failed to demonstrate good cause and prejudice sufficient to overcome procedural bars to consideration of his fifth such petition, which was filed more than six years after his conviction was affirmed on direct appeal and, thus, was untimely, where petition was successive, and petitioner failed to demonstrate that an impediment external to the defense prevented him from complying with the procedural-default rules. NRS 34.726(1).
3. HABEAS CORPUS.
   The district court could not determine that there was merit to habeas corpus petitioner's claim of ineffective assistance of counsel at resentencing hearing without first reviewing a transcript of the resentencing hearing or conducting an evidentiary hearing on the petition. U.S. CONST. amend. 6.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

The district court determined that respondent Delbert M. Greene received ineffective assistance of counsel at his resentencing hearing and granted his untimely and successive fifth post-conviction petition for a writ of habeas corpus. The district court also directed Greene's counsel to draft the order granting the petition but refused to provide an explanation for its decision. We take this opportunity to reiterate that when the district court directs a prevailing party to draft an order resolving a post-conviction petition for a writ of habeas corpus, it must provide sufficient direction regarding the basis for its decision to enable the prevailing party to draft the order. Because we also conclude that the district court erroneously determined that Greene established good cause sufficient to excuse the procedural bars to a consideration of his

[1]Respondent Delbert Greene was assisted by counsel, Marc Picker, in the proceedings below. After briefing by counsel was completed in this appeal, we granted Picker's motion to withdraw as counsel for Greene.

petition on the merits, we reverse the order granting his petition and affording him a new sentencing hearing.

I. Background

On June 7, 2002, Greene participated in the robbery of a change attendant at a grocery store in Las Vegas, and after a three-day jury trial, he was convicted of burglary while in the possession of a deadly weapon (count I), conspiracy to commit robbery (count II), and robbery with the use of a deadly weapon (count III).[2] At the sentencing hearing, the trial court imposed a prison term of 36-156 months for count I, a consecutive prison term of 18-60 months for count II, and a prison term of 48-180 months plus an equal and consecutive term for the deadly weapon enhancement for count III; the court, however, erroneously ordered the sentence for count III to run concurrently with count I but consecutively to the sentence for count II even though the sentence for count II was ordered to run consecutively to the sentence for count I. Additionally, the written judgment of conviction failed to mention the sentence imposed for the deadly weapon enhancement. We identified these errors on direct appeal from the judgment of conviction and remanded the case to the trial court for a new sentencing hearing. *Greene v. State*, Docket No. 42110 (Order Affirming in Part and Remanding, May 18, 2004).

On remand, the trial court imposed the prison terms for the three counts to run consecutively and entered an amended judgment of conviction. Greene appealed. We rejected Greene's claims and affirmed the amended judgment of conviction. *Greene v. State*, Docket No. 43628 (Order of Affirmance, August 24, 2005). Notably, neither party at the time provided this court with the transcript of the resentencing hearing for review.

While Greene's appeal from the amended judgment of conviction was pending, he filed his first, and only timely, post-conviction petition for a writ of habeas corpus in district court.[3] Greene filed the petition in proper person and raised several ineffective-assistance-of-counsel claims and direct-appeal claims, including an issue that he previously raised on direct appeal (the admission of a letter that he wrote to his former codefendant),[4] but

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[2]The Honorable Valerie Adair, District Judge, presided over the trial.

[3]For unknown reasons, Greene filed the same petition again three days later. This is why, in subsequent proceedings both below and in this court, there is reference to Greene's petitions filed on February 4, 2005, and February 7, 2005.

[4]The direct-appeal claims were waived. *See* NRS 34.810(1)(b); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (''[C]laims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.''), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

he did not raise any issues pertaining to the resentencing hearing or amended judgment of conviction. The petition was considered by the judge who presided over the trial. The judge declined to appoint counsel to represent Greene or conduct an evidentiary hearing, *see* NRS 34.750(1); NRS 34.770, and with very little discussion of the issues raised, entered an order denying his petition. We affirmed the order. *Greene v. State*, Docket No. 45127 (Order of Affirmance, September 16, 2005).

Nearly three years later, Greene filed his second post-conviction petition for a writ of habeas corpus in district court. Like the first petition, this one was filed in proper person. This time, Greene raised issues pertaining to his resentencing hearing. Among other things, Greene claimed that his appointed counsel failed to appear for the resentencing hearing and, instead, sent an associate who was not prepared or familiar with his case. Greene also claimed that his sentence was improperly increased by the amended judgment of conviction. To excuse the procedural bars to the petition, Greene claimed he was unaware that his collateral challenge to the conviction in federal court had been resolved or that he could proceed in state court while the federal proceeding was pending. Once again, the petition was heard by the judge who presided over the trial, and the judge declined to appoint counsel to represent Greene or conduct an evidentiary hearing, and denied his petition after finding ''it is time barred with no good cause shown for [the] delay'' or its successiveness. *See* NRS 34.726(1); NRS 34.810(1)(b), (2)-(3). On appeal, we agreed that Greene failed to demonstrate that an impediment external to the defense prevented him from complying with the procedural default rules, *see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *see also Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. 192, 197 n.2, 275 P.3d 91, 95 n.2 (2012), however, we also identified a clerical error in the amended judgment of conviction. The amended judgment of conviction ordered ''Count III TO RUN CONSECUTIVE to Counts II and III'' rather than consecutively to counts I and II. Therefore, while we affirmed the order denying Greene's petition, we remanded the matter to correct the clerical error as permitted by NRS 176.565. *Greene v. State*, Docket No. 52584 (Order of Affirmance and Remand to Correct Judgment of Conviction, August 25, 2009).

Approximately one week later, the trial court entered a second amended judgment of conviction clarifying that ''COUNT 3 is to run CONSECUTIVE to COUNTS 1 & 2, NOT as to Counts 2 & 3 as stated in the Amended Judgment of Conviction.'' Sure enough, Greene filed two more post-conviction petitions for writs of habeas corpus in the district court raising several issues related to the entry of the second amended judgment of conviction. Both

petitions were filed in proper person and were heard by the trial judge who again declined to appoint counsel to represent Greene or conduct an evidentiary hearing and summarily denied the petitions without any discussion of the claims raised or his good cause arguments. We consolidated the cases on appeal and affirmed the order. *Greene v. State*, Docket Nos. 56013/56546 (Order of Affirmance, November 8, 2010). We determined that Greene's petitions were untimely, successive, and an abuse of the writ, *see* NRS 34.726(1); NRS 34.810(1)(b)(2), (2), and we expressly rejected Greene's good cause and prejudice arguments. We noted that the correction of the clerical mistake did not provide Greene with good cause. *See Sullivan v. State*, 120 Nev. 537, 540-41, 96 P.3d 761, 764 (2004). We concluded that (1) Greene was not entitled to counsel when the error was corrected because the proceeding did not implicate any substantial rights, *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967); (2) the proceeding to correct the error did not amount to a sentencing hearing requiring his presence and there was no demonstration of prejudice, *see Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011); and (3) the second amended judgment did not improperly increase his sentence. We also concluded that Greene failed to demonstrate that he was denied his right to a direct appeal from the second amended judgment of conviction. *See Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

II. The instant petition

On April 3, 2012, more than six and a half years after we affirmed his amended judgment of conviction, Greene filed the instant petition—his fifth post-conviction petition for a writ of habeas corpus. For the first time, the petition was filed with the assistance of counsel. Like the three petitions that preceded it, this petition was untimely, successive, and an abuse of the writ. *See* NRS 34.726(1); NRS 34.810(1)(b)(2), (2). The petition, however, failed to allege good cause and prejudice to excuse those procedural bars. Instead, the petition focused on the substantive issue of counsel's performance at the resentencing hearing, claiming that counsel ''sent an associate attorney who openly admitted to having no knowledge of the case and made no argument of any kind on Mr. GREENE's behalf against the District Court adding an additional twenty-eight (28) years to his sentence.'' The petition provided no basis for this claim or the characterization of trial counsel's performance: it did not provide a citation to the resentencing hearing transcript or include a copy of that transcript. Even though Greene was never represented by counsel in connection with his first four petitions, the new petition erroneously asserted that prior ''counsel'' failed to raise the issues set forth in the fifth petition. And the

petition failed to acknowledge that the claim about counsel's performance at the resentencing hearing was raised in Greene's second habeas petition. Without cogent argument or citation to any legal authority, Greene's post-conviction counsel asserted that as a result of the resentencing, Greene's sentence was improperly enhanced by ''two different offenses . . . on the basis of the same fact of the presence of a weapon,'' thus violating ''the Fifth Amendment prohibition against double jeopardy.'' The gist of his argument, it seems, was that the resentencing changed Greene's parole eligibility dates. In its motion to dismiss the petition, the State argued laches and pointed out that the same issues were raised in Greene's second petition. In his response to the State's motion to dismiss, Greene extended his double-jeopardy claim to include issues related to the correction of the clerical error and entry of the second amended judgment of conviction. Greene also conceded that his claims were ''arguably successive.''

III. The hearing and first appellate issue

For the first time, one of Greene's habeas petitions would not be heard by the judge who presided over the trial. This time, the habeas petition was heard by the Honorable James M. Bixler, District Judge. When the district court held a hearing on the petition, Greene was not present and his attorney appeared telephonically. After the court briefly summarized Greene's ineffective-assistance argument and heard a few introductory remarks from Greene's counsel, the court immediately rejected Greene's double-jeopardy claim, stating, ''I don't think that's ever going to have any legs to it, to be honest with you.'' After further discussion, the court noted that the untimely and successive nature of Greene's petition was ''problematic,'' and the good-cause argument articulated at the hearing by Greene's counsel—that prior counsel's deficient performance at the resentencing hearing was never ''appropriately'' addressed and is not ''attributable'' to him—was not sufficient. Nevertheless, the court asked Greene's counsel, ''[H]ow do you write this up so that you can defend at the Supreme Court my decision that you have established good cause for the granting of the writ?'' Counsel answered that ''the spin'' would be that the delay in filing the petition was not Greene's fault ''and that he will be unduly prejudiced by the dismissal of this petition.'' The State argued that ''the one thing you cannot put a spin on is the fact [that] in order to show good cause, you have to show an impediment external [to the] defense,'' and ''there is no way to get around'' the fact that ''the one person throughout this entire proceeding [who] has clearly known what his sentence was, is [Greene].''

The district court concluded, ''I am going to regret this, but I am granting your petition. . . . It is not [the] correct thing, but it

is the right thing.'' The State asked the judge if he could ''just articulate the grounds under which you are granting the petition.'' The judge refused to provide a reason, explaining, ''I am going to wait to [see] the language in the order. I don't know that I am going to be able to articulate it sufficiently.'' The district court then directed Greene's counsel to draft the order, and stated, ''[I]f I agree, I will sign that order.'' The district court scheduled a third sentencing hearing for Greene approximately four and a half months later because ''I have a feeling you are going to be hearing more about this case before November.''

[Headnote 1]

On appeal, the State contends that the district court erred by directing Greene's counsel to draft the order granting the petition while refusing to explain its ruling. The State argues that ''[t]his was an improper delegation of the Court's duty to articulate specific grounds for its ruling before empowering the prevailing party to draft Findings.'' We agree. As we stated in *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007), ''the district court should have . . . either drafted its own findings of fact and conclusions of law *or* announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order.'' (Emphasis added.) Here, the district court did not make any express findings in support of its determination and provided no guidance for the prevailing party, and we conclude that this was improper.

IV. The district court's order and second appellate issue

The State contends that the district court erred by finding that Greene demonstrated good cause and prejudice sufficient to overcome the procedural bars to a consideration of his habeas petition on the merits. We agree.

[Headnote 2]

To reiterate, Greene's petition is subject to several procedural bars. Greene filed his fifth habeas petition more than six and a half years after this court affirmed his amended judgment of conviction on direct appeal and issued its remittitur. Thus, Greene's petition was untimely. *See* NRS 34.726(1). Greene's petition was also successive because he previously filed habeas petitions on at least four occasions, and the instant petition seeks to relitigate claims related to his resentencing hearing that were raised in his second habeas petition, which itself was untimely and successive. *See* NRS 34.810(2). The order granting Greene's fifth petition states that the grounds were not previously raised ''due to ineffective assistance of prior counsel'' even though Greene filed all of his prior peti-

tions in proper person and Greene conceded in his response to the State's motion to dismiss that the claims were ''arguably successive.'' The order fails to address the successive nature of Greene's petition,[5] the relitigation of previously raised claims,[6] or the State's argument that laches precluded consideration of Greene's petition on the merits, *see* NRS 34.800(2).

Most importantly, we conclude that the district court erred by finding that Greene demonstrated good cause sufficient to excuse the procedural bars to his petition. *See State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012) (''We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo.''); *see also* NRS 34.810(3)(a). The order based its good-cause determination on several factual inaccuracies and representations that are not supported by or contained within the record. For example, the order notes that Greene's fifth petition was untimely but determines that ''Defendant has shown good cause . . . based upon the ineffective assistance of prior counsel to raise these issues in prior petitions.'' We noted in the paragraph above the errors contained within this statement. The district court also found that ''several revisions to Defendant's Judgment of Conviction have occurred which is further good cause for the delay.'' That finding, however, does not explain Greene's failure to include issues related to his resentencing hearing in his first, timely habeas petition, or the fact that he waited another three years before raising those issues in his second habeas petition. To the extent that ''several revisions'' includes issues related to the entry of the second amended judgment of conviction, we note that we already concluded in his appeal from the denial of his third and fourth petitions that the correction of the clerical error did not provide Greene with good cause. Our decision is the law of the case on that point. *See Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975). Because Greene failed to demonstrate that an impediment external to the defense prevented him from complying with the procedural-default rules, the district court abused its discretion by considering the merits of his

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[5]The order only mentions Greene's first, timely habeas petition and the claims raised therein. There is no mention or reference to the three untimely and successive petitions denied by Judge Adair. The order *does* list four additional petitions filed in federal court, three purportedly dismissed for procedural reasons and one ''being held in abeyance pending outcome of the instant Petition.''

[6]To the extent that any part of Greene's argument below could be construed as newly raised, he failed to demonstrate cause for the failure to raise the argument earlier and, therefore, we conclude that it constitutes an abuse of the writ. *See* NRS 34.810(1)(b)(2), (2).

claims. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

[Headnote 3]

We also conclude that the district court erred by determining that there was merit to Greene's ineffective-assistance claim. There is no indication in the record that the district court reviewed a transcript of the resentencing hearing, no evidentiary hearing on Greene's petition was conducted, therefore, no testimony from Greene or former counsel was heard. We also note that a transcript of the resentencing hearing was never provided to us for consideration. Regardless of the merits of Greene's claim, based on all of the above, we conclude that the district court erred by granting Greene's petition and ordering a third sentencing hearing. Accordingly, we reverse the order of the district court and remand for proceedings consistent with this opinion.

HARDESTY and PARRAGUIRRE, JJ., concur.

DEYUNDREA ORLANDO HOLMES, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 58947

August 22, 2013 306 P.3d 415

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder and robbery, both with the use of a deadly weapon. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

The supreme court, PICKERING, C.J., held that: (1) defendant's gangsta rap lyrics constituted a statement that was relevant and thus admissible, (2) probative value of lyrics was not outweighed by unfair prejudice, (3) unreported sidebar conference without specific objection did not preserve challenge to admission of coconspirator's out-of-court statement under hearsay exception, (4) admission of coconspirator's statement was not plain error, and (5) defendant was not in custody for *Miranda* purposes when he made statement in his out-of-state parole officer's office.

Affirmed.

[Rehearing denied September 20, 2013]

[En banc reconsideration denied November 22, 2013]

SAITTA, J., dissented.

Law Office of Richard F. Cornell and *Benjamin D. Cornell*, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent.

1. Criminal Law.
   Claims of evidentiary error are reviewed under an abuse of discretion standard.
2. Criminal Law.
   In determining the relevance and admissibility of evidence, a district court's discretion is considerable.
3. Criminal Law.
   A decision to admit or exclude evidence will not be reversed on appeal unless it is manifestly wrong.
4. Criminal Law.
   Violent lyrics from ''Drug Deala,'' which the supreme court recognized as a gangsta rap song defendant wrote in a California jail while awaiting extradition to Nevada, described a scenario matching the facts and circumstances surrounding alleged murder and robbery, and thus, the lyrics amounted to a statement that was relevant and admissible; the lyrics depicted defendant as someone who would ''jack'' people in a parking lot for their jewelry while wearing a ski mask, and the similarities between the lyrics and the facts of the charged robbery, as established by the evidence and the timing of the composition after defendant's arrest, met the threshold test of relevance. NRS 48.025(1), 48.045(2), 51.035(3)(a).
5. Criminal Law.
   Probative value of violent lyrics from ''Drug Deala,'' a gangsta rap song defendant wrote in a California jail while awaiting extradition to Nevada, was not substantially outweighed by danger of unfair prejudice, and thus, evidence was admissible at trial, in prosecution for first-degree murder and robbery; the lyrics relayed facts quite similar to the crime charged, and trial court crafted and gave an appropriate limiting instruction. NRS 48.035.
6. Criminal Law.
   Although rap lyrics written by a defendant may employ metaphor, exaggeration, and other artistic devices and can involve abstract representations of events or ubiquitous storylines, these features do not exempt such writings from jury consideration where the lyrics describe details that mirror the crime charged.
7. Criminal Law.
   When deciding whether to admit or exclude song lyrics written by a defendant, courts should be unafraid to apply firmly rooted canons of evidence law, which have well protected the balance between probative value and prejudice in other modes of communication.
8. Criminal Law; Witnesses.
   Rap lyrics often convey a less than truthful accounting of the violent or criminal character of the performing artist or composer, but there are certain circumstances where the lyrics possess an inherent and overriding probative purpose, such as where the lyrics constitute an admission of guilt, but others would include rebutting an offered defense and impeaching testimony; although there is no definitive line that demarcates

the amount or content of lyrics that may be used appropriately, reasonableness should govern.

9. CRIMINAL LAW.
   All evidence offered by the prosecutor is prejudicial to the defendant; there would be no point in offering it if it were not.
10. CRIMINAL LAW.
    Evidence is ''unfairly'' prejudicial if it encourages the jury to convict the defendant on an improper basis. NRS 48.035.
11. CRIMINAL LAW.
    Unreported sidebar conference after which trial court stated to jury, ''rather than the defense attorney interposing objections throughout the testimony we have agreed that the court will explain to you that some of these statements are coming in under a legal theory of a co-conspirator, [about which] you will receive further legal instruction,'' was insufficient for defendant to preserve for appellate review his challenge to the admission of the testimony under hearsay exception for statements made by a coconspirator in furtherance of the conspiracy, and thus, the issue was subject to review for plain error, in prosecution for first-degree murder and robbery. NRS 47.040(1)(a), 51.035(3)(e).
12. CRIMINAL LAW.
    Admission of witness's testimony relaying the out-of-court statement of a coconspirator, under hearsay exception for statements made by a co-conspirator in furtherance of the conspiracy, was not plain error, in first-degree murder and robbery prosecution; although the coconspirator made the statement after the incident and away from the scene, the conversation between the witness and the coconspirator occurred less than two hours after the murder and robbery, while police and ambulance crews were still at the crime scene. NRS 51.035(3)(e).
13. CRIMINAL LAW.
    For error to be plain, the complained-of error must be so unmistakable that it reveals itself by a casual inspection of the record.
14. CRIMINAL LAW.
    For a statement to qualify for hearsay exception as a statement made by a coconspirator in furtherance of the conspiracy, the duration of a conspiracy is not limited to the commission of the principal crime, but extends to affirmative acts of concealment. NRS 51.035(3)(e).
15. CRIMINAL LAW.
    Defendant was not in custody for *Miranda* purposes when he made unwarned statement to detectives at his California parole officer's office, and thus, the statement was admissible, in prosecution for first-degree murder and robbery.

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

OPINION

By the Court, PICKERING, C.J.:

Appellant Deyundrea ''Khali'' Holmes appeals his conviction of first-degree murder and robbery. He argues that the fairness of his trial was compromised by the district court's erroneous admission into evidence of: (1) inflammatory rap lyrics Holmes wrote while in jail in California; (2) a coconspirator's out-of-court statement that Holmes ''went off'' and ''just started shooting''; and (3) un-

warned statements that Holmes made to the Nevada detectives who interviewed him in California before his arrest. We reject these and Holmes's other assignments of error and affirm.

I.

Kevin ''Mo'' Nelson was a drug dealer who operated out of a recording studio in Reno, Nevada. Holmes plotted with Max Reed and others, including Jaffar ''G'' Richardson, to steal drugs and money from Nelson. The night of the robbery, Holmes and Reed went to the studio. No one was there, so Reed called Richardson, who regularly did business with Nelson, and asked Richardson to call Nelson and lure him to the studio on the pretense of a methamphetamine sale. Soon after Richardson made the call, Nelson arrived with a friend, Kenny Clark.

Two men wearing ski masks and black clothes (later identified as Holmes and Reed) accosted Nelson and Clark in the studio's parking lot. Nelson tried to fight them off. At one point the fight moved into Clark's SUV, where Nelson managed to stash his money and drugs under the passenger seat. In the fight, Nelson's pockets were ''bunny-eared'' (turned inside out). His assailant tore off Nelson's shirt and chain necklace, pistol-whipped him, and then tried to drag Nelson from the parking lot into the studio without success. Frustrated, Nelson's assailant removed his ski mask and said, ''I'm going to shoot this f@#$ing guy,'' which he did. Nelson staggered, then fell and died. Clark managed to call 911 and flee.

The police investigated and took witness statements from Clark and other eyewitnesses, but could not initially identify the two assailants. They did find a fresh, unweathered cigarette butt near the scene, from which the crime lab extracted a DNA sample. But the sample did not produce a database match, so the case went cold.

Three years later, a routine database search matched the DNA from the cigarette to a sample Holmes gave California parole authorities. Nevada detectives traveled to California to interview Holmes at his parole officer's office. Holmes denied having been to Reno except once for ''Hot August Nights''—Nelson was killed on a snowy November night. The detectives arrested Holmes and charged him with murder and robbery. While in jail awaiting extradition, Holmes wrote 18 rap songs, a stanza from one of which was admitted, over objection, at his trial.

The State presented its case through detectives, eyewitnesses, including Clark,[1] and various associates of Holmes and Reed. The

[1]Clark identified Holmes in court as the shooter, stating that he got a clear look at him after he removed his ski mask and shot Nelson. Holmes initially challenged this eyewitness identification as suspect but abandoned the challenge in his reply brief based on *Perry v. New Hampshire*, 565 U.S. ___, 132 S. Ct. 716 (2012).

evidence established that Holmes came to Reno from Oakland two months before, and vanished right after the crime. A young woman testified that she drove Holmes and Reed from her brother's house to Nelson's studio that night. After dropping them off, she waited for them, as requested, on a side street nearby. When Holmes and Reed returned, they were agitated and urged her to ''go, go.'' On the ride back to the brother's house, Holmes kept muttering, ''he wouldn't quit moving''; she also overheard Reed place a cell phone call and say, ''come get me, something [bad] just went down.'' The young woman's brother, who was on house arrest, testified that when his sister returned with Holmes and Reed, Holmes had a chain necklace wrapped around his hand and a cell phone, neither of which he'd had before. The brother also testified that he overheard Holmes call Richardson and say, ''Man it's all bad, I need to get up out of here.'' Not long after, Richardson arrived, then left with Reed.

Richardson also testified. He did so pursuant to a plea agreement, under which he was convicted of, and served time for, conspiring with Holmes and Reed to rob Nelson, and other, unrelated crimes. Richardson was a generation older than Reed and Holmes. He testified that he, Reed, and Holmes had discussed robbing Nelson and that, at Reed's request, he called Nelson to lure him (and his cash and drugs) to the studio the night of the crime. According to Richardson, he went to the getaway driver's brother's house after the murder/robbery because Reed called, said that, ''It went wrong,'' and asked to talk ''face to face.'' Richardson then drove Reed past Nelson's studio to view the scene; police and ambulance personnel were still there when they drove by. In the car, Reed told Richardson that ''Khali [Holmes] went off and he don't know what happened. Khali just started shooting him.'' Richardson also testified that the morning after the shooting, he drove Holmes to the Greyhound bus station and gave him money to leave town. Richardson testified that Holmes told him not to trust Reed.

The jury found Holmes guilty of robbery and first-degree murder, both with the use of a deadly weapon. Holmes timely appealed.

II.

[Headnotes 1-3]

We review Holmes's claims of evidentiary error under an abuse of discretion standard. *Lamb v. State*, 127 Nev. 26, 41 n.7, 251 P.3d 700, 710 n.7 (2011). ''[I]n determining the relevance and admissibility of evidence,'' a district court's discretion is ''considerable.'' *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004) (internal quotations omitted). A decision ''to admit or exclude evidence will not be reversed on appeal unless it is manifestly

wrong.'' *Archanian v. State*, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006).

A.

[Headnotes 4, 5]

Holmes's first claim of evidentiary error focuses on the district court's admission of lyrics from ''Drug Deala,'' a rap song Holmes wrote in jail awaiting extradition to Nevada. The lyrics read:

> But now I'm uh big dog, my static is real large. Uh neighborhood super star. Man I push uh hard line. My attitude shitty nigga you don't want to test this. I catching slipping at the club and jack you for your necklace. Fuck parking lot pimping. Man I'm parking lot jacking, running through your pockets with uh ski mask on straight laughing.

The district court determined that the jury could reasonably view the lyrics as factual, not fictional, and that, if it did, the jury could find that the lyrics amounted to a statement by Holmes, *see* NRS 51.035(3)(a) (party statements are non-hearsay when offered against the party who made them), that tended to prove his involvement in the charged robbery. So viewed, the lyrics would be both relevant, *see* NRS 48.015 (''relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence''), and presumptively admissible, NRS 48.025(1) (with certain exceptions, ''[a]ll relevant evidence is admissible'').

The district court acknowledged that admitting gangsta rap carries the risk of it being misunderstood or misused as criminal propensity or ''bad act'' evidence. *See* Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 18, 22, 25-26 (2007) (''gangsta'' is a subgenre of rap that ''purports to reflect life in the inner city,'' draws on devices such as metaphor, braggadocio, and exaggeration for effect, and uses words that may be offensive and prone to misinterpretation by jurors and courts unfamiliar with rap). But it determined that the ''probative value'' of the ''Drug Deala'' lyrics was not ''substantially outweighed by the danger of unfair prejudice.'' NRS 48.035(1). Partly answering Holmes's concerns, the district court instructed the jury that, ''Statements of the defendant [that] have been admitted in evidence . . . may be confessions, admissions, or neither.'' It also gave the jury a limiting instruction:

> You have heard testimony about certain ''rap'' song lyrics allegedly written by the defendant while in custody awaiting extradition to Nevada. The evidence of these rap lyrics is not to

> be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit a crime.[2]

The limiting instruction reiterated that, ''You may . . . consider if the above lyrics are confessions, admissions, o[r] neither.''

[Headnote 6]

We recognize, as did the district court, that defendant-authored rap lyrics ''may employ metaphor, exaggeration, and other artistic devices,'' Dennis, *supra*, at 14, and can involve ''abstract representations of events or ubiquitous storylines.'' *Id.* at 26. But these features do not exempt such writings from jury consideration where, as here, the lyrics describe details that mirror the crime charged. *See United States v. Stuckey*, 253 F. App'x 468, 482 (6th Cir. 2007) (''Stuckey's lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street—precisely what the Government accused Stuckey of doing [to the victim] in this case''; thus, the district court did not abuse its discretion in deeming the lyrics relevant and admissible); *Daniels v. Lewis*, No. C 10-04032 JSW, 2013 WL 183968, at *10, *12 (N.D. Cal. Jan. 17, 2013) (''The details set forth in the lyrics were sufficiently close to the evidence of the crimes that [they] could be viewed as autobiographical''; they ''were fairly admitted as admissions because they constitute direct evidence of [defendant's] involvement in the crimes charged.'' (first alteration in original) (internal quotations omitted)); *see* Dennis, *supra*, at 8 (''[o]verwhelmingly, courts admit defendant-composed rap music lyrical evidence'' if direct relevance is shown). It is one thing to exclude defendant-authored fictional accounts, be they rap lyrics or some other form of artistic expression, when offered to show a propensity for violence, as in *State v. Hanson*, 731 P.2d 1140 (Wash. Ct. App. 1987), on which Holmes relies. It is quite another when the defendant-authored writing incorporates details of the crime charged. As *Stuckey* notes, ''If, in *Hanson*, the defendant's writ-

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[2]The district court also deemed the lyrics admissible under the permissible, nonpropensity-purposes list in NRS 48.045(2), which provides that ''[e]vidence of other crimes, wrongs or acts is not admissible to prove'' bad character or criminal propensity but may be admitted ''for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'' This was error. The State offered the lyrics to show that Holmes committed the charged crimes, not as evidence of *other* crimes, wrongs, or acts. *See Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006). Also, if one or more of NRS 48.045(2)'s permissible, nonpropensity purposes applied, the district court should have identified the purpose(s) in its ruling and the limiting instruction, rather than reflexively reciting the full list of permissible purposes contained in NRS 48.045(2). *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013).

ings had stated that he robbed a 7-11 and shot the clerk in the abdomen (as the defendant had been accused of doing), surely the case would have come out differently.'' 253 F. App'x at 483.

[Headnotes 7, 8]

Nor can we accept Holmes's view that a trial court's decision to admit or exclude defendant-authored rap lyrics is so fraught with risk of misinterpretation and prejudice that a special rule imposing heightened admissibility requirements is needed. ''Rap is no longer an underground phenomenon'' but has become ''a mainstream music genre.'' *Stuckey*, 253 F. App'x at 484. In this arena, as others, courts should be

> . . . unafraid to apply firmly-rooted canons of evidence law, which have well-protected the balance between probative value and prejudice in other modes of communication. Undoubtedly, rap lyrics often convey a less than truthful accounting of the violent or criminal character of the performing artist or composer. . . . [But t]here are certain circumstances . . . where the lyrics possess an inherent and overriding probative purpose. One circumstance would be where the lyrics constitute an admission of guilt, but others would include rebutting an offered defense and impeaching testimony. Although there is no definitive line that demarcates the amount or content of lyrics that may be used appropriately, reasonableness should govern.

Hannah v. State, 23 A.3d 192, 204-05 (Md. 2011) (Harrell, J., concurring).

It was not unreasonable for the district court to admit the short stanza from ''Drug Deala'' that it did. Like the lyrics in *Stuckey* and *Daniels*, the stanza included details that matched the crime charged. ''Jacking'' is slang for robbery, *The Rap Dictionary*, http://www.rapdict.org/Jack (last visited May 23, 2013)—one of the charges Holmes faced. The lyrics' reference to ''jack[ing] you for your necklace'' may fairly refer to Holmes stealing Nelson's chain necklace during the robbery. Police never recovered the necklace, but Holmes had a chain necklace after the crime that he did not have before; his knowledge of the necklace as reflected in the lyrics suggests that he knew Nelson and may have participated in the crime. The lyrics also discuss ski masks, a parking-lot jacking of a ''drug deala,'' and emptying a victim's pockets—facts about the crime that the State established, particularly through eyewitness Clark.

Holmes counters that these features of ''Drug Deala'' are so clichéd that they do not distinguish the robbery his lyrics describe from other rapped-about, garden-variety robberies. The lyrics' lack of originality may reduce but does not eliminate their proba-

tive value. The extent of the lyrics' probative value was a matter for cross-examination, argument, or even, perhaps, expert testimony. *See* Dennis, *supra*, at 35-36. But so long as evidence has ''any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence,'' it is ''relevant.'' NRS 48.015. Here, the similarities between the lyrics and the facts of the charged robbery, as established by the evidence and the timing of the composition after Holmes's arrest, met the threshold test of relevance.

[Headnotes 9, 10]

No doubt the lyrics carried the potential for prejudice. But ''[a]ll evidence offered by the prosecutor is prejudicial to the defendant; there would be no point in offering it if it were not.'' *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991). The real question is whether the lyrics' probative value was substantially outweighed by the danger of *unfair* prejudice. NRS 48.035; *see Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 46, 910 P.2d 271, 273 (1996) (the ''substantially outweigh'' requirement ''implies a favoritism toward admissibility''). Evidence is ''unfairly'' prejudicial if it encourages the jury to convict the defendant on an improper basis. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011).

Holmes identifies two potential sources of unfair prejudice: first, jurors unversed in rap may misuse the lyrics as evidence of bad character or criminal propensity, which NRS 48.045(2) forbids; second, jurors may misunderstand the genre and too readily accept artistic expression (read, exaggeration) as autobiographical fact. Unlike *Hannah,* where the prosecutor examined the defendant about a series of ten rap lyrics he had written, seemingly for no purpose other than to demonstrate that he had a propensity for violence, 23 A.3d at 192-93, 202, only a single stanza from ''Drug Deala'' was admitted against Holmes—and the stanza that was admitted relayed facts quite similar to the crime charged. Also, the district court crafted and gave an appropriate limiting instruction. *Schlotfeldt*, 112 Nev. at 46, 910 P.2d at 273; *see People v. Wallace*, 873 N.Y.S.2d 403, 404 (App. Div. 2009) (affirming conviction based in part on admission of rap lyrics because the trial court gave a limiting instruction to alleviate the potential for unfair prejudice). Thus, the jurors were told that they could consider Holmes's statements, including the ''Drug Deala'' lyrics, as ''confessions, admissions *or neither*'' and that they could not use the lyrics as evidence of bad character or criminal propensity. So, if the jurors followed the instructions, as we presume they did, *Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997), they only would have considered the lyrics if they found that the lyrics were

autobiographical, like a diary or journal entry, and they would not have allowed their feelings about rap music—good, bad, or indifferent—to influence their verdict. Even though the lyrics were prejudicial, the district court did not abuse its discretion in determining that the risk they carried of unfair prejudice did not substantially outweigh their probative value. *See Elvik v. State*, 114 Nev. 883, 897, 965 P.2d 281, 290 (1998).

B.

[Headnotes 11, 12]

Holmes's second claim of evidentiary error focuses on Richardson's testimony that Reed told Richardson after the crime that Holmes ''went off'' and ''just started shooting.'' Holmes contends that this did not qualify as a non-hearsay statement by a coconspirator under NRS 51.035(3)(e), because Reed did not make the statement to Richardson ''during the course and in furtherance of the conspiracy,'' as the statute requires. We reject this claim for two reasons. First, the record does not establish that the error was adequately preserved. Second, the record does not establish an abuse of discretion by the district court in ruling as it did. *See Fields v. State*, 125 Nev. 785, 795, 220 P.3d 709, 716 (2009) (en banc) (''whether proffered evidence fits an exception to the hearsay rule [is reviewed] for abuse of discretion'').

Some context is helpful. The challenged testimony came toward the end of a series of questions by the prosecutor eliciting what Reed said to Richardson, on the phone and in person, the night of the crime. Initially, the prosecutor asked Richardson what Reed said when he called to see if Richardson could persuade Nelson to come to the studio, to which Holmes interposed a general hearsay objection. The prosecutor responded that ''[t]hese are all statements of a coconspirator,'' and thus not hearsay; Holmes offered no response, and his objection was overruled. *See* NRS 51.035(3)(e) (a statement offered against a party is not hearsay when made ''by a coconspirator of a party during the course and in furtherance of the conspiracy''). The prosecutor next asked Richardson, without objection, what Reed said to him when he called him after the crime—Richardson responded that Reed said that ''[i]t went wrong . . . he couldn't really talk right then, just wanted to see me face to face.'' Richardson proceeded to say that he picked Reed up, drove him by Nelson's studio, and talked to him about ''[w]hat happened at the studio.'' The prosecutor then asked, without objection: ''What did he [Reed] tell you?,'' to which Richardson replied, ''He said Khali [Holmes] went off and he don't know what happened. Khali just started shooting.'' After two more questions and answers, defense counsel asked to approach the bench. At this point, the record goes dark. It says only: ''unreported discussion at the bench between court and

counsel.'' The record resumes with a statement by the court that, ''rather than the defense attorney interposing objections throughout the testimony we have agreed that the court will explain to you that some of these statements are coming in under a legal theory of a co-conspirator, [about which] you will receive further legal instruction.''

NRS 47.040(1)(a) states that ''error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection.'' The State argues that ''a timely objection'' was not made, *see* 2 *Wharton's Criminal Evidence* § 8:32 (15th ed. 1998) (as a general rule, ''[i]t is incumbent on counsel to state an objection to a question before the answer is given'' because ''the question usually indicates if the answer is objectionable or not''); also, that no ''motion to strike appears of record.'' *See* 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5037.7, at 749 (2d ed. 2005) (even a permissibly delayed objection ''alone does not suffice to preserve an error''; the objector should also move to strike). We would probably reject the State's argument, if the record adequately established ''the specific ground of objection,'' NRS 47.040(1)(a), but it does not. This leaves us to speculate as to whether error, still less an abuse of discretion, occurred.

Nevada's hearsay statute, like its federal counterpart, ''contains at least four possible bases for [a hearsay] objection to proffered co-conspirators' testimony: that the declarant was not a co-conspirator; that the party against whom the statement is offered was not a co-conspirator; that the statement was not made 'in the course' of the conspiracy; that the statement was not made 'in furtherance of' the conspiracy.'' *United States v. Burton*, 126 F.3d 666, 673 (5th Cir. 1997) (addressing FRE 801(d)(2)(E)). All the record shows here is that Holmes objected—even, perhaps, moved to strike—based on hearsay. In response, the prosecution invoked the coconspirator exception to the hearsay rule. We do not know what Holmes argued to overcome the State's invocation of NRS 51.035(3)(e), *see* 21 *Federal Practice and Procedure*, *supra*, § 5036.1, at 645 (''if in response to a hearsay objection, the opponent invokes a hearsay exception, the objector will probably have to explain to the judge why the exception does not apply in order to preserve the error for appeal'' (interpreting FRE 103, the counterpart to NRS 47.040(1)(a))), nor as in *Burton*, 126 F.3d at 673, can we say whether Holmes objected that Reed's statement to Richardson was not ''in the course'' or ''in furtherance'' of the conspiracy. And unless the argument made on appeal appears in the record below, this court lacks a satisfactory basis for assessing prejudicial error. *See Fish v. State*, 92 Nev. 272, 276, 549 P.2d

338, 340-41 (1976) (objection on the grounds that a coconspirator's statements ''were not made during the course or in furtherance of the conspiracy'' was not adequately preserved by an objection to the adequacy of the proof of the conspiracy). Our review, therefore, is limited to plain error. *Burton*, 126 F.3d at 673-74; *see Fish*, 92 Nev. at 276, 549 P.2d at 341.

[Headnotes 13, 14]

For error to be plain, the complained-of error must be '' 'so unmistakable that it reveals itself by a casual inspection of the record.' '' *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (quoting *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995)). Holmes argues that Reed's statements to Richardson about the shooting could not have been made ''during the course and in furtherance of the conspiracy'' because, by the time he spoke to Richardson, the robbery was over and Nelson was dead. But *Crew v. State*, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984), holds that, under NRS 51.035(3)(e), ''the duration of a conspiracy is not limited to the commission of the principal crime, but extends to affirmative acts of concealment.'' Thus, in *Crew*, we upheld admission of statements by a coconspirator about plans to move buried bodies in case the party against whom the statements were admitted, who was being interviewed by the police at the time the statements were made, divulged the bodies' location to the police. This was deemed ''in furtherance of the conspiracy to commit the crime and to 'get away with it.' '' *Id.*; *see* 30B Michael H. Graham, *Federal Practice and Procedure* § 7025, at 289 (interim ed. 2011) (''Statements in furtherance of [a] conspiracy include statements made to . . . induce further participation, prompt further action, reassure members, allay concerns or fears, keep conspirators abreast of ongoing activities, [or] avoid detection,'' though ''mere conversations or narrative declarations of past events are not in furtherance of the conspiracy.'').

Richardson's conversation with Reed occurred less than two hours after the murder and robbery, while police and ambulance crews were still at the crime scene. It appears that Reed was updating Richardson, on whom both Reed and Holmes relied for advice and help, on the situation—though it can also be argued (it was not, at least not on the record we have) that Reed's remarks amounted to self-serving blame-shifting. We know that Reed and Holmes did not get the drugs and money they hoped for from Nelson and that Richardson gave Holmes money at the bus station so he could leave town hours after he talked to Reed. But with no record discussion of the ''during the course and in furtherance of the conspiracy'' requirements of NRS 51.035(3)(e) as they might apply to what Reed said to Richardson about the shooting, it is not

possible to say whether the conversation was to ''keep conspirators abreast of ongoing activities [or] avoid detection'' (admissible) or ''mere conversations or narrative declarations of past events'' (inadmissible). Assuming objection, argument, perhaps an offer of proof, a ruling could legitimately have gone either way. Given this record, an abuse of discretion amounting to plain error does not appear.[3]

III.

[Headnote 15]

Holmes argues that the district court should have suppressed the unwarned statement he made to the Nevada detectives who interviewed him at his California parole officer's office. This argument fails under *Howes v. Fields*, 565 U.S. ___, ___, 132 S. Ct. 1181, 1192-94 (2012), because the interrogation was not custodial, *see also Minnesota v. Murphy*, 465 U.S. 420, 431 (1984), and thus did not require a warning under *Miranda v. Arizona*, 384 U.S. 436 (1966). Also, the district court's finding of voluntariness was correct. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

Holmes's remaining assignments of error also fail. The detectives testified about their investigation, not witness veracity, and as such, the district court had no reason to limit the scope of the testimony, *Cordova v. State*, 116 Nev. 664, 669-70, 6 P.3d 481, 484-85 (2000). Finally, the statements made in the prosecutor's closing argument do not warrant reversal because, while improper, they did not substantially affect the jury's verdict. *Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008).

Accordingly, we affirm.

HARDESTY, J., concurs.

SAITTA, J., dissenting:

I respectfully dissent. In my view, the district court abused its discretion in admitting the lyrics from Holmes' song ''Drug Deala'' because the lyrics were of limited, if any, probative value and their limited probative value was substantially outweighed by the danger of unfair prejudice. I further conclude that the error was not harmless and therefore I would reverse the judgment of conviction and remand for a new trial.

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[3]Holmes also argues that the admission of Reed's statement to Richardson violated his rights under the Confrontation Clause. This argument fails, since coconspirator statements to one another or even to a governmental informant are ''nontestimonial statements that fall[ ] outside the requirements of the Confrontation Clause.'' *United States v. Hargrove*, 508 F.3d 445, 449 (7th Cir. 2007) (citing and discussing *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006)).

Admission of the lyrics

Relevant evidence is inadmissible when ''its probative value is substantially outweighed by the danger of unfair prejudice.'' NRS 48.035(1). I suggest that the lyrics were not probative for two reasons: they are not clearly an admission rather than artistic expression, and they are not sufficiently specific as to be relevant to the charged crimes.

First, the lyrics appeared more a product of artistic expression consistent with the ''gangsta rap'' genre of music than an admission. ''Gangsta rap'' describes a variation of rap music that addresses gang culture, race conflict, and poverty. Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 Temp. Pol. & Civ. Rts. L. Rev. 25, 25 n.1 (1994). In an attempt to broaden the audience for early rap music, the recording industry exploited the fascination of the suburban middle class with inner-city life by promoting music that ''afforded a glimpse into a dark world of violence, crime, poverty and death.'' Sean-Patrick Wilson, Comment, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA Ent. L. Rev. 345, 349-50 (2005). Companies responded to audience demand by promoting images for signed artists that featured ever-increasing depictions of violence and criminal activity. *See id.* at 350-52. ''As demand for more coarse lyrics grew, rappers were compelled to latch onto any negative image that would sell records.'' *Id.* at 353. Because the perception of an artist's authenticity was also correlative to commercial success, ''[m]any rappers present[ed] themselves as gangsters, drug dealers, or pimps because it help[ed] sell.'' Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 Rutgers L.J. 479, 516 (2009); *see* Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 16 (2007) (''Artists' images are constructed and marketed for maximal financial profit.''). While many artists maintain that their lyrics accurately represent their lives, the depictions may be something from their past or whole or partial fabrications. Dennis, *supra*, at 17-19; *see also United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991) (recognizing that rap lyrics may portray a fictional character). Therefore, even an amateur artist such as Holmes would feel compelled to mimic more successful artists. *See* Dennis, *supra*, at 17 (''Aspiring artists will model their more successful counterparts. It is fair to say that few in the rap industry want to be starving artists.'').

The majority relies on the Sixth Circuit's decision, *United States v. Stuckey*, 253 F. App'x 468 (6th Cir. 2007), in which the federal

district court admitted lyrics after observing, ''[y]ou can certainly not say when somebody writes about killing snitches, that it doesn't make the fact that they may have killed a snitch more probable.'' *Id*. at 482 (internal quotations omitted). This reasoning is troublesome as it does not account for the nature of the artistic expression or of the market forces that act upon it. *See* Dennis, *supra*, at 17 (''One consequence of commercialization is that artist images and lyrical narratives are not necessarily truthful—whether in whole or in part.''). Violent imagery finds its way into lyrics because that is what the audience craves and the industry rewards, not necessarily because the artist has a propensity to engage in the acts depicted. As the premise upon which the federal district court based its conclusion is mistaken, this court should not rely on the *Stuckey* court's decision to affirm that conclusion.

Second, the lyrics are not sufficiently specific as to suggest that the description contained therein was that of the charged crime. *See Brooks v. State*, 903 So. 2d 691, 699-700 (Miss. 2005) (concluding rap lyrics discussing murder with firearm not sufficiently probative to trial for murder conducted with a meat fork). Holmes was tried for a single robbery and murder in the parking lot of a recording studio and was alleged to have stolen a necklace and rifled through the victim's pockets. Conversely, the lyrics seemingly describe two robberies: the theft of a necklace in a night club and a masked robbery in a parking lot. In neither robbery do the lyrics reference any sort of shooting. While both of the described robberies share similarities with the charged crime, they also describe rather routine criminal behavior that is frequent fodder for rap lyrics. *See, e.g.*, 2BRoy, *Parking Lot Jacking*, *on* Belizean Girl (Jah Bless Music & Films 2011) (describing assailant robbing club patrons of jewelry and other property in parking lot); Ya Boy, *Robbery*, *on* The Best of #1 (Indie Music Group 2010), *lyrics available at* http://www.cloudlyrics.com/ya-boy-lyrics-robbery.html (describing armed robberies by a masked assailant where jewelry and other property taken); 50 Cent, *Ski Mask Way*, *on* The Massacre (Shady Records/Aftermath Records/Interscope Records 2005), *lyrics available at* http://rapgenius.com/50-cent-ski-mask-way-lyrics (similar).

As the lyrics were not appreciably probative, any unfair prejudice would render them inadmissible. Gangsta rap lyrics are prone to unfairly prejudice the defendant in the eyes of the jury, *see* Powell, *supra*, at 517 (''Part of rap's charm is its ability to produce discomfort.''), and several courts have made note of how coarse and violent lyrics may prejudice a defendant, *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir.) (recognizing rap video was very prejudicial because it contained ''violence, profanity, sex,

promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle''), *cert. denied*, 565 U.S. ___, ___, 132 S. Ct. 826, 826 (2011); *Boyd v. City & County of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009) (recognizing that lyrics advocating prostitution were unfairly prejudicial); *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001) (holding that admission of lyrics was unfairly prejudicial as they included only a vague reference to the criminal acts at issue but otherwise described the defendant's propensity for violence). In a study conducted by Dr. Stuart Fischoff, participants found a hypothetical defendant who wrote gangsta rap lyrics more likely to have committed murder than a hypothetical defendant who did not write such lyrics. Wilson, *supra*, at 371-73. The study further revealed ''that potential jurors were 'significantly inclined' to judge a gangsta rap lyricist *not* accused of murder more harshly and with more disdain than a non-gangsta rapper who *was* accused of murder.'' *Id*. The study findings indicate that the music industry has been successful in marketing rap artists as criminals. As the industry and its artists translate this appearance of authenticity into record sales, they have no financial interest in debunking this myth. The reactions reflected in the Fischoff study demonstrate the kind of unfair prejudice that may result from consideration of rap lyrics. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (explaining that unfair prejudice includes decisions based on improper grounds, such as emotion, bias, sympathy, anger, or shock, rather than proof specific to the charged offense).

The *Stuckey* court overlooked this potential for unfair prejudice from the admission of rap lyrics. In affirming the failure to give a limiting instruction for the admission of the lyrics, the court observed that ''[r]ap is no longer an underground phenomenon and is a mainstream music genre. Reasonable jurors would be unlikely to reason that a rapper is violent simply because he raps about violence.'' *Stuckey*, 253 F. App'x at 484. The court failed to consider that much of the public, even the district court judge who observed that Stuckey's lyrics demonstrated that it was more likely that he engaged in the behavior described, *see id*. at 482, is not aware of lore that the recording industry perpetuates in marketing its artists, *see* Dennis, *supra*, at 13 (''Despite the present-day ubiquity and popularity of rap music, the existence and use of methods governing the composition of lyrics are not part of the public's everyday learning and experience.''); Wilson, *supra*, at 352 (''Whatever ties existed between rap music and the real inner-city, suburban America perceived them as gospel truths.''). In light of its failure to fully appreciate the potential for unfair prejudice in the admission of such lyrics, this court should not rely on the *Stuckey* decision.

I conclude that although the district court made a thorough evaluation of and gave careful consideration to the admission of the lyrics here, the court nonetheless abused its discretion in admitting the rap lyrics at trial. The lyrics were not sufficiently probative as the crimes depicted in the lyrics were dissimilar from the crime alleged. The lyrics did not reflect knowledge of the specific event any more than they describe routine criminal behavior. Moreover, the scant probative value of the lyrics was far outweighed by the danger of unfair prejudice that they presented.

Harmless error

I further conclude that admitting the lyrics was not harmless. *See Fields v. State*, 125 Nev. 776, 784-85, 220 P.3d 724, 729 (2009) (reviewing erroneous admission of evidence for harmless error). In considering whether the erroneous admission of evidence had a '' 'substantial and injurious effect or influence in determining the jury's verdict,' '' *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), this court considers ''whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'' *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This case is impacted heavily by two of the factors. The character of the error was significantly damaging. As noted in the Fischoff study, an individual who writes violent rap songs is viewed with more distaste than an accused murderer who did not write violent rap songs. While the question of guilt or innocence is not exceptionally close in this case, the purported confession in the form of a disparaged and often misunderstood form of expression likely had a significant impact on the jury's determination of guilt. Lastly, Holmes was charged with first-degree murder with the use of a deadly weapon, which exposed him to two possible consecutive life sentences, and robbery with the use of a deadly weapon, which exposed him to two possible consecutive sentences of 15 years. *See* 2003 Nev. Stat., ch. 470, § 4, at 2944-45 (NRS 200.030(4)(b)); 2003 Nev. Stat., ch. 137, § 7, at 770-71 (NRS 200.030(4)(b)); NRS 200.380(2); 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165).

Accordingly, I would reverse the judgment of conviction and remand for a new trial.

GEANIE BRADFORD, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SANDRA L. POMRENZE, DISTRICT JUDGE, RESPONDENTS, AND KEVIN BRADFORD, REAL PARTY IN INTEREST.

No. 61129

August 29, 2013 308 P.3d 122

Original petition for a writ of mandamus or prohibition challenging a district court order dismissing a divorce complaint.

Wife filed original petition for a writ of mandamus or prohibition, challenging a district court order finding that she and her husband were never legally married. The supreme court, HARDESTY, J., held that appeal from the district court's order, dismissing wife's divorce complaint because there was no valid marriage, was an adequate legal remedy, and thus, mandamus relief was inappropriate.

Petition denied.

Abrams Law Firm, LLC, and *Jennifer V. Abrams* and *Vincent Mayo*, Las Vegas, for Petitioner.

James M. Davis Law Office and *James M. Davis*, Las Vegas, for Real Party in Interest.

1. COURTS.
   The supreme court has discretion to entertain a petition for extraordinary writ relief.
2. PROHIBITION.
   The right to appeal is generally an adequate legal remedy that precludes consideration of a writ petition.
3. PROHIBITION.
   Writ petition is not a substitute for an untimely appeal.
4. MARRIAGE.
   Both Nevada's statute and the de facto officer doctrine provide that a marriage performed by a person without actual authority to solemnize the marriage is nevertheless valid if both parties shared a good-faith belief that the person had the required authority. NRS 122.090.
5. JUDGMENT.
   Incorrect legal conclusion does not render a judgment invalid or void.
6. JUDGMENT.
   Judgment's validity depends on whether the district court had jurisdiction, not whether it reached the correct legal result.
7. DIVORCE.
   Custody case was a separate action, not a continuation of the divorce case, and thus, the district court order dismissing the divorce complaint was a final, appealable judgment.

8. MANDAMUS.
   To determine whether an appeal is an adequate legal remedy, for mandamus purposes, the supreme court considers whether an appeal will permit the court to meaningfully review the issues presented.
9. MANDAMUS.
   Appeal from district court's order, dismissing wife's divorce complaint because there was no valid marriage, was an adequate legal remedy, and thus, mandamus relief was inappropriate.

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

OPINION

By the Court, HARDESTY, J.:

In this original petition for a writ of mandamus or prohibition, petitioner Geanie Bradford challenges a district court order finding that she and real party in interest Kevin Bradford were never legally married. Although it appears that the district court may have been in error, Geanie never appealed the court's order. We must determine whether Geanie's failure to timely appeal the order precludes writ relief. In doing so, we must consider whether the validity of the parties' marriage is an issue that we would have an opportunity to meaningfully review on appeal. We conclude that it is and that an appeal would have been an adequate legal remedy. Accordingly, writ relief is precluded.

FACTS

Geanie and Kevin were married on December 27, 2008, by newly elected district court judge Bryce Duckworth. Although Judge Duckworth had sworn his oath of office four days earlier, on December 23, 2008, he was not authorized to take the bench until January 5, 2009. Nev. Const. art. 6, § 5.

Geanie filed for divorce from Kevin in 2011. In her divorce complaint, she sought custody of the couple's minor child born on September 18, 2007. At the divorce hearing, the district court sua sponte questioned whether Judge Duckworth had authority to solemnize the marriage and thus whether the parties were legally married. Although the parties neither briefed this issue nor were given an opportunity to formally argue it before the district court, the district court concluded that a judge does not have authority to solemnize a marriage until his or her term actually starts because simply being sworn in does not confer any actual authority. Because the court found as a result that there was no valid marriage, the court dismissed Geanie's divorce complaint as moot. Although the record is unclear as to when a separate custody case was initiated, the district court's dismissal order stated that the custody is-

sues would be resolved in a separate companion custody case. Geanie did not appeal the district court's dismissal order, and she failed to seek any other relief until one year later, when she filed her writ petition with this court.

DISCUSSION

[Headnotes 1-3]

This court has discretion to entertain a petition for extraordinary writ relief. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). But we have consistently recognized that writ relief is available only ''when there is no plain, adequate and speedy legal remedy.'' *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004); *see Cnty. of Washoe v. City of Reno*, 77 Nev. 152, 155, 360 P.2d 602, 603 (1961); *State ex rel. Brown v. Nev. Indus. Comm'n*, 40 Nev. 220, 225, 161 P. 516, 517 (1916); *see also* NRS 34.170; NRS 34.330. Generally, the right to appeal is an adequate legal remedy that precludes consideration of a writ petition. *Pan*, 120 Nev. at 224, 88 P.3d at 840-41. Moreover, a writ petition is not a substitute for an untimely appeal. *Id.* at 224-25, 88 P.3d at 841 (citing *Rim View Trout Co. v. Dep't of Water Res.*, 809 P.2d 1155, 1156-57 (Idaho 1991); *State ex rel. Hulse v. Montgomery Circuit Court*, 561 N.E.2d 497, 498 (Ind. 1990); *State ex rel. Boardwalk Shopping Ctr., Inc. v. Court of Appeals for Cuyahoga Cnty.*, 564 N.E.2d 86, 88 (Ohio 1990)).

Geanie argues that writ relief is appropriate because the district court's order dismissing her complaint as moot was not appealable as a valid, final judgment. *See* NRAP 3A(b)(1) (stating that final judgments are appealable). She contends that the order was not valid because the district court reached the wrong legal conclusion and that it was not final because a companion custody case is ongoing and addresses issues that were involved in the divorce case. We disagree.

[Headnotes 4-6]

It appears that the district court's conclusion that Geanie and Kevin were never legally married may have been in error. Both NRS 122.090 and the de facto officer doctrine provide that a marriage performed by a person without actual authority to solemnize the marriage is nevertheless valid if both parties shared a good-faith belief that the person had the required authority. NRS 122.090; *State ex rel. Busteed v. Harmon*, 38 Nev. 5, 6-7, 143 P. 1183, 1184 (1914). Regardless, an incorrect legal conclusion does not render a judgment invalid or void. *See generally State ex rel. Smith v. Sixth Judicial Dist. Court*, 63 Nev. 249, 256-57, 167 P.2d

648, 651 (1946) (noting that a judgment rendered when jurisdiction exists may be valid even though erroneous), *overruled on other grounds by Poirier v. Bd. of Dental Exam'rs*, 81 Nev. 384, 387, 404 P.2d 1, 2-3 (1965), *overruled on other grounds by Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 648-49, 5 P.3d 569, 570-71 (2000); 46 Am. Jur. 2d *Judgments* § 29 (2006) (''A judgment is not void simply because it is erroneous.''). A judgment's validity depends on whether the district court had jurisdiction, not whether it reached the correct legal result. *State Tax Comm'n of Utah v. Cord*, 81 Nev. 403, 407, 404 P.2d 422, 424 (1965). Here, the district court had jurisdiction to consider the divorce complaint before it.[1] NRS 125.020.

[Headnote 7]

In addition, the pending separate custody suit does not render ongoing the issues involved in the divorce proceeding. The custody case is a separate action, not a continuation of the divorce case. Thus, the district court order dismissing the divorce complaint was a final, appealable judgment. *See Simmons Self-Storage Partners, L.L.C. v. Rib Roof, Inc.*, 127 Nev. 86, 87, 247 P.3d 1107, 1108 (2011) (stating that ''[a] final judgment is generally defined as one that resolves all of the parties' claims and rights in the action, leaving nothing for the court's future consideration except for post-judgment issues'').

[Headnotes 8, 9]

Because the district court's order was a valid, final, and appealable judgment, we must determine whether an appeal would have constituted an adequate legal remedy. To determine whether an appeal is an adequate legal remedy, this court considers '' 'whether [an] appeal will permit this court to meaningfully review the issues presented.' '' *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1151 (2013) (quoting *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736 (2007)). Although this court will not consider arguments that are raised for the first time on appeal, *In re AMERCO Derivative Litigation*, 127 Nev. 196, 217 n.6, 252 P.3d 681, 697 n.6 (2011), the validity of the parties' marriage was raised sua sponte by the district court below and was the ground for dismissal of the divorce complaint. We see no reason why Geanie would not have been able to argue, and we would not have

[1]We reject Geanie's argument that mandamus relief is required because the district court refused to take jurisdiction over Geanie's divorce complaint. The district court did not dismiss Geanie's divorce complaint on jurisdictional grounds; it dismissed the complaint as moot because it found that the parties were never validly married and thus could not obtain a divorce.

been able to consider, the validity of her marriage on appeal. Therefore, we conclude that writ relief is inappropriate because an appeal would have been an adequate legal remedy.

We recognize that Geanie's failure to timely appeal or move to set aside the district court's order leaves her without legal recourse to challenge the district court's conclusion. However, as noted, ''writ relief is not available to correct an untimely notice of appeal,'' *Pan*, 120 Nev. at 224-25, 88 P.3d at 841, and her failure to timely challenge the district court's order by appeal, NRCP 60(b) motion, or otherwise has resulted in both parties relying on the validity of the order in their subsequent pursuits. Accordingly, we decline to exercise our discretion to entertain this writ petition, and it is thus denied.

PICKERING, C.J., and SAITTA, J., concur.