NRS 21.200; 21.210; 21.220, allowing the property's value to be applied to the first security interest's outstanding loan amount. The full adjudication of the rights between the pertinent parties and as to the property, including the association, the owner, and the first security interest, as well as any other pertinent party, combined with the statutory protections afforded with a judicial foreclosure, further demonstrate that judicial foreclosure on an association's lien is necessary to trigger its superpriority effect under NRS 116.3116(2).

JOHN MATTHIAS WATSON, III, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 56721

October 2, 2014 335 P.3d 157

Appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Defendant was convicted in the district court of first-degree murder and first-degree kidnapping, and was sentenced to death. Defendant appealed. The supreme court, GIBBONS, C.J., held that: (1) State's exercise of six of its nine peremptory challenges to remove women from venire, without more, was insufficient to establish prima facie case of discrimination; (2) defendant did not make prima facie case of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986); (3) evidence was sufficient to support convictions; (4) denial of defendant's motion for self-representation did not amount to structural error; (5) mitigation instruction did not impermissibly limit jury's consideration of mitigating circumstances to factors that extenuated or reduced defendant's moral culpability; (6) denial of motion to continue penalty phase was not abuse of discretion; (7) reevaluation of defendant's competency to proceed to sentencing after he was found guilty was not warranted; (8) evidence supported jury's findings of aggravating circumstance that murder was committed in course of first-degree kidnapping and that torture or mutilation was involved; and (9) death was not excessive sentence.

Affirmed.

CHERRY and SAITTA, JJ., dissented in part.

Philip J. Kohn, Public Defender, and *Howard S. Brooks*, Deputy Public Defender, Clark County, for Appellant.

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

1. Constitutional Law.
   The supreme court evaluates an equal-protection challenge to the exercise of a peremptory challenge using the three-step analysis set forth by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986): first, the opponent of the peremptory challenge must make out a prima facie case of discrimination; second, the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge; and finally, the district court must decide whether the opponent of the challenge has proved purposeful discrimination. U.S. Const. amend. 14.
2. Criminal Law.
   The supreme court affords great deference to the district court's factual findings regarding whether the proponent of a peremptory strike has acted with discriminatory intent, and it will not reverse the district court's decision unless clearly erroneous.
3. Jury.
   To establish a prima facie case of discrimination in the exercise of peremptory strikes, under *Batson v. Kentucky*, 476 U.S. 79 (1986), the opponent of the strike must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose.
4. Jury.
   The standard under *Batson v. Kentucky*, 476 U.S. 79 (1986), for establishing a prima facie case of discrimination in the exercise of peremptory strikes is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof; rather, the opponent of the strike must provide sufficient evidence to permit the trier of fact to draw an inference that discrimination has occurred.
5. Jury.
   Under *Batson v. Kentucky*, 476 U.S. 79 (1986), defendant was not required to show pattern of peremptory strikes by State against women, in order to make prima facie case of gender discrimination, in trial for first-degree murder and kidnapping.
6. Jury.
   The opponent of a peremptory strike is not required to establish a pattern of strikes against members of the targeted group to establish a prima facie case of discrimination, under *Batson v. Kentucky*, 476 U.S. 79 (1986), because the exclusion of even one veniremember based on membership in a cognizable group is a constitutional violation. U.S. Const. amend. 14.
7. Jury.
   Where there is no pattern of peremptory strikes against members of the targeted group to give rise to an inference of discrimination, the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group, in order to establish a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986); in other words, the mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination—something more is required.
8. Jury.
   In determining whether a party has made a prima facie showing of discrimination in the exercise of peremptory strikes, under *Batson v. Ken-*

tucky, 476 U.S. 79 (1986), aside from a pattern of strikes against members of a targeted group, circumstances that might support an inference of discrimination include, but are not limited to, the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias.

9. JURY.

There is no magic number of challenged jurors that will show a pattern of peremptory strikes giving rise to an inference of discrimination that establishes a prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), which shifts the burden to the government to provide a neutral explanation for its actions.

10. JURY.

In determining whether an opponent has established a prima facie case of gender discrimination in the exercise of peremptory strikes based on a pattern of strikes, under *Batson v. Kentucky*, 476 U.S. 79 (1986), the better approach would be to compare the percentage of the peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire; the theory underlying this method is that, if targeted-group membership is irrelevant to the *Batson* respondent's use of peremptory challenges, then the portion of those strikes used against the targeted-group members ought to roughly parallel the portion of the venire that consists of members of that targeted group.

11. JURY.

State's exercise of six of its nine peremptory challenges to remove women from venire, without more, did not give rise to inference of gender discrimination, and thus, was insufficient to establish prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), in trial for first-degree murder and first-degree kidnapping; roughly five out of nine members of venire remaining after for-cause challenges, or 56 percent of venire remaining after for-cause challenges, were women, and therefore, percentage of women remaining on venire after for-cause challenges was roughly parallel to percentage of State's use of strikes against women.

12. JURY.

The district court's request, out of abundance of caution, that State provide race-neutral reason for exercise of peremptory strike against African-American prospective juror did not render moot the district court's finding that defendant failed to establish prima facie case of race discrimination in State's exercise of peremptory strikes, under *Batson v. Kentucky*, 476 U.S. 79 (1986), in trial for first-degree murder and first-degree kidnapping.

13. JURY.

When the district court has concluded that a prima facie showing of discrimination in the exercise of peremptory strikes has not been made, the request for and provision of neutral explanations for the strikes does not convert a first-step *Batson v. Kentucky*, 476 U.S. 79 (1986), case into a third-step case.

14. JURY.

Defendant did not make prima facie case of race discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on State's exercise of peremptory strike against African-American prospective juror, in trial for first-degree murder and first-degree kidnapping, when three African-Americans remained on venire after State exercised its strikes, and therefore, there was no pattern of strikes against African-Americans that gave rise to inference of discrimination.

15. KIDNAPPING.

Evidence was sufficient to show that defendant lured victim, his wife, to Las Vegas for purpose of killing her, as required to support conviction for first-degree kidnapping; defendant told friend in month before victim disappeared that he believed victim was going to leave him and take half of his life savings, that he was mad enough to kill her, and that he knew places he could hide her body where it would never be found; he booked three hotel rooms at two hotels in Las Vegas—one of which was booked under an alias, he threw a surprise birthday party for victim and lured her to Las Vegas as a present for her birthday, he drove to Las Vegas with a firearm, while victim flew to Las Vegas on following day, and victim was never seen again. NRS 200.310(1).

16. HOMICIDE.

Victim's murder was premeditated, deliberate, and willful, as required to support conviction for first-degree murder; defendant told friend in month before victim disappeared that he believed victim, who was defendant's wife, was going to leave him and take half of his life savings, that he was mad enough to kill her, and that he knew places he could hide her body where it would never be found; he booked three rooms at two hotels in Las Vegas—one under an alias, he gave victim trip to Las Vegas as a birthday present, wife's blood was found in vehicle he drove to Las Vegas, and a significant amount of her blood was found in hotel room he had booked under an alias, police followed defendant to area where they discovered plastic that smelled of decomposition and was stained with victim's blood, and defendant was apprehended during apparent attempt to flee country. NRS 200.010(1), 200.030(1)(a), (b).

17. CRIMINAL LAW.

On a challenge to the sufficiency of the evidence to support a conviction, the supreme court reviews the evidence in the light most favorable to the prosecution and determines whether any rational juror could have found the elements of the crime beyond a reasonable doubt.

18. CRIMINAL LAW.

In reviewing a challenge to the sufficiency of the evidence to support a conviction, the supreme court does not reweigh the evidence or determine credibility, as those functions belong to the jury.

19. CRIMINAL LAW.

Denial of defendant's motion for self-representation did not rise to level of structural error in trial for first-degree murder and first-degree kidnapping; defendant's request was equivocal, in that he asked to proceed as co-counsel and assured the district court that he could handle all aspects of defense, except for "details," deadlines, and ministerial tasks, and stated that he would ask for continuance if he found he could not represent himself, and motion, filed roughly one month before scheduled trial date, was untimely, insofar as he stated that he would need continuance if motion was granted. U.S. CONST. amend. 6.

20. CONSTITUTIONAL LAW; CRIMINAL LAW.

The Sixth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees a defendant the right to self-representation. U.S. CONST. amends. 6, 14.

21. CRIMINAL LAW.

The right to self-representation is not absolute because it necessitates the relinquishment of another constitutional right—the right to counsel. U.S. CONST. amend. 6.

22. CRIMINAL LAW.

Before allowing a defendant to waive his or her right to counsel, a district court must conclude that a defendant is competent to waive the right

to counsel and that he or she has made a knowing and voluntary waiver of this right. U.S. Const. amend. 6.

23. Criminal Law.
A district court may deny a request for self-representation that is untimely, equivocal, or made for the purpose of delay. U.S. Const. amend. 6.

24. Criminal Law.
A defendant who has exercised the right to self-representation does not have a right to standby or advisory counsel. U.S. Const. amend. 6.

25. Criminal Law.
If it is clear that a defendant's request to represent himself or herself comes early enough to allow the defendant to prepare for trial without the need for a continuance, the request should be deemed timely. U.S. Const. amend. 6.

26. Sentencing and Punishment.
Mitigation instruction did not limit jury's consideration of mitigating circumstances to factors that extenuated or reduced defendant's moral culpability, in sentencing for capital murder; although jury was instructed to consider those factors as extenuating or reducing his moral culpability, jury was also instructed to consider any aspect of his character or record and any circumstances of offense that defendant proffered as basis for sentence less than death.

27. Criminal Law.
Generally, the failure to clearly object on the record to a jury instruction precludes appellate review absent plain error affecting the defendant's substantial rights.

28. Criminal Law.
The threshold question in considering a challenge to a jury instruction is whether the instruction is a correct statement of the law.

29. Criminal Law.
The supreme court reviews de novo a challenge to a jury instruction to determine whether the instruction given was a correct statement of the law.

30. Sentencing and Punishment.
The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence at sentencing. U.S. Const. amend. 8.

31. Sentencing and Punishment.
In sentencing for first-degree murder, mitigation evidence includes any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death; accordingly, mitigation is not limited to evidence that would tend to support a legal excuse from criminal liability. NRS 200.035.

32. Criminal Law.
Defendant's culpability relates to the crime and whether defendant is blameworthy.

33. Sentencing and Punishment.
Defendant's moral culpability is not the sole consideration in determining whether he is worthy of a death sentence; therefore, an instruction that limits mitigating circumstances to factors that extenuate or reduce a defendant's moral culpability misstates the law.

34. Sentencing and Punishment.
Any possible error in mitigation evidence instruction to extent it could be read as limiting jury's consideration of mitigating evidence to factors that extenuated or reduced defendant's moral culpability did not rise to

level of plain error, in sentencing for capital murder, given arguments of counsel that focused on defendant's background, character, and other circumstances unrelated to the crime.

35. Sentencing and Punishment.
Denial of motion to continue penalty phase of capital murder trial was not abuse of discretion; defendant had adequate time to prepare, in that he was represented by trial counsel roughly one year before trial began, he had been represented by other attorneys over several years that case had been pending before trial counsel became involved in case, and defendant failed to demonstrate how he was prejudiced by denial of continuance.

36. Sentencing and Punishment.
Reevaluation of defendant's competency to proceed to sentencing for capital murder after he was found guilty, in order for defendant to present decades-old psychiatric records, was not warranted; defendant was found competent to stand trial approximately one year before trial, he responded appropriately when questioned by the district court during pretrial proceedings, and he did not exhibit any behavior during proceedings that called into doubt his ability to understand nature of proceedings or to assist counsel.

37. Sentencing and Punishment.
In sentencing for capital murder, evidence supported jury's finding of aggravating circumstance that murder was committed in course of first-degree kidnapping; defendant had told friend about his desire to kill victim, his wife, whom he believed was going to leave him and take half of his life savings, he booked hotel rooms at two different hotels in Las Vegas around the same time—one under an alias, he threw a surprise birthday party for her approximately one month later, which was unusual for him, and he gave her a trip to Las Vegas as a present, he drove to Las Vegas with a firearm, while victim met him there on following day, victim was never seen after that, and victim's blood was discovered in room that he had booked under an alias. NRS 200.310(1).

38. Sentencing and Punishment.
In sentencing for capital murder, evidence supported jury's finding of aggravating circumstance that defendant's murder of his wife during trip to Las Vegas involved torture or mutilation; defendant wrote letters to his children in which he admitted dismembering her body and cooking parts of the body in order to conceal her death, pan and utensils were recovered from defendant's hotel room, he purchased band saw, plastic bags, and cleaners on day after he told his son that she went missing, and large amount of wife's blood was found and had soaked through carpet in hotel room that he had booked under an alias.

39. Criminal Law.
The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.

40. Criminal Law.
A defendant is not entitled to a perfect trial, merely a fair one.

41. Sentencing and Punishment.
Death sentence for capital murder committed during first-degree kidnapping was not excessive in view of defendant's careful planning of murder of his wife for approximately one month before she disappeared, dismemberment of her body, and jury's failure to find any mitigating circumstances. U.S. Const. amend. 8.

Before the Court En Banc.

OPINION

By the Court, GIBBONS, C.J.:

A jury found appellant John Watson, III, guilty of first-degree kidnapping and first-degree murder of his wife and sentenced him to death for the murder. In this appeal from the judgment of conviction, we focus primarily on two of Watson's claims.

First, we consider whether the district court erred in concluding that Watson failed to demonstrate a prima facie case of discrimination for the purpose of a *Batson*[1] challenge to the State's use of peremptory challenges to remove female veniremembers. We hold that the district court did not clearly err in concluding that the State's use of six of its nine peremptory challenges to remove female veniremembers did not give rise to an inference of discrimination where the percentage of the State's peremptory strikes used against female veniremembers was not so disproportionate to the percentage of females in the venire as to give rise to an inference of purposeful discrimination and the defense offered no other circumstances supporting such an inference.

Second, we consider whether the district court plainly erred in instructing the jury that mitigating circumstances are those circumstances which "reduc[e] the degree of the Defendant's moral culpability." Although mitigating circumstances are not limited to those that reduce a defendant's moral culpability and jury instructions should not convey otherwise, we are not convinced that there is a reasonable likelihood that the jury understood the instruction in this case to limit the scope of mitigating circumstances. Because we conclude that these and Watson's other claims of error do not warrant relief, we affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Watson told family members that his wife, Evirelda "Evey" Watson, went missing while they were on a trip to Las Vegas following her birthday in July 2006. The ensuing investigation of Evey's reported disappearance led to evidence that Watson planned the trip to Las Vegas for the purpose of killing Evey and that he killed her in a Las Vegas hotel room and disposed of her body. Evey's body was never found. Watson was charged with first-degree kidnapping, first-degree murder with the use of a deadly weapon, and robbery. The State filed a notice of intent to seek the death penalty.

Guilt phase

In June 2006, Watson told a friend that he believed that Evey was going to leave him and take half of his life savings. He said that he

[1]*Batson v. Kentucky*, 476 U.S. 79 (1986).

was mad enough to kill her and claimed to know of places he could hide her body where it would never be found.

On July 9, 2006, Watson threw a surprise birthday party for Evey's 50th birthday. He had also planned a trip to Las Vegas as a present for Evey. After the party, Watson drove to Las Vegas. He checked into three rooms at two different hotels on July 10, 2006. At the Circus Circus, he checked in under his own name, but he checked into the Tuscany Suites under the name Joe Nunez. He had booked the room at the Tuscany Suites weeks earlier. When making the reservation, he had requested a specific room—N120—but that room was not available and he was given room N114. At the time of his arrival, Watson also booked another room (N118) at the Tuscany Suites for Sal Nunez and checked into that room as well. Evey flew to Las Vegas the following day, July 11, 2006, to join Watson. The next day, Watson called his son, Michael, and said that Evey had befriended a woman from Henderson and was missing.

Watson stayed in Las Vegas for three more days. On July 13, 2006, the day after he called Michael, Watson used his credit card to purchase antifreeze at a Walmart. In a separate cash transaction, he procured bleach, an incense holder, and incense. In a nearby home improvement store, Watson paid cash for a band saw and the tools necessary to assemble it. The next day, July 14, 2006, Watson requested a move to room N120 at the Tuscany Suites—the room he had requested when he made his reservation. After he moved to that room, he declined maid service. He checked out of both hotels the next day.

Watson then contacted Evey's cousin, Mira Alvarez. During a phone call, he told her that Evey walked away from him after an argument and he did not know where she was. He said that he did not file a missing person report because he believed that the police would suspect him of foul play. He added that Evey had cut her finger in the back of his Jeep while opening a flashlight package. Watson showed up at Alvarez's home on July 16, 2006. At that time, he claimed that Evey had called and told him that she was getting a ride with a woman she had met. Watson's son, Juan, came to Alvarez's house while Watson was there. Watson told Juan that he and Evey had a fight in front of the Four Queens casino. He also showed Alvarez and Juan a letter allegedly written by Evey that he had found in his car. The letter indicated that Evey went to Guatemala because her sister, Rose, had been in an accident. Alvarez doubted the letter's authenticity. According to her, Rose had not been in an accident, and the letter did not appear to be written by Evey.

Juan reported Evey missing that day, and later in the day, Watson was taken into custody. During the arrest, police confiscated identification bearing Watson's photograph and the name "Joseph Ernest Nunez, Jr." A search of Watson's Jeep Cherokee revealed several

blood spots in the vehicle and evidence that it had been cleaned with a bleach-based cleanser. Blood found on the seatbelt, rear bumper, and cardboard in the vehicle had a DNA profile that was consistent with Evey's DNA. In addition, the Jeep contained bleach, cleaners, rubber gloves, a roll of plastic tarp, paperwork from Circus Circus, a Circus Circus casino card, and a card from Tuscany Suites. A search of Watson's home revealed a box of trash bags, from which 17 bags were missing; a box cutter with blood stains matching Evey's DNA, and a plastic bag with a blood stain consistent with Evey's and Watson's DNA. Juan later found a gun in the Watson home and turned it in to the police. Blood spots on the gun barrel matched Evey's DNA.

Evidence was also located in room N120 at the Tuscany Suites. In turning over the room, housekeeping staff had collected several kitchen utensils and a Teflon pan, which they turned over to the police. The bed sheets were also missing and the room contained trash from stores, scissors, and incense. The scissors appeared to have brown stains on them. In addition, staff noted an overwhelming odor. A housekeeper at Tuscany Suites testified that the guest in room N120 had asked her for a large trash bag on the day he left. Crime scene analysts discovered Evey's DNA in blood found in several stains recovered from the bathroom of room N120. Investigators also collected a piece of carpet from the room that was stained with blood matching Evey's DNA. The blood stain on the carpet had soaked through the carpet and padding and had stained the cement subfloor.

Watson was released from custody in late July and was placed under surveillance. Officers observed Watson drive around the mountain roads in the area of Kern County, California. Near Lake Isabella, Watson was observed turning onto a dirt road, stopping his car, and walking away from it. Officers searched this area, commonly known as the Fairview dump, and discovered an area of the ground that appeared to have been recently disturbed with plastic protruding from it. The plastic recovered from the hole matched the type and tear pattern of a roll of plastic tarp recovered from Watson's Jeep. DNA found on the plastic matched Evey's DNA profile. Investigators who recovered the plastic bundle from the hole noted that it smelled of decomposition.

On August 10, 2006, Watson was arrested at a Denny's in Claremont, California. He was in possession of a wig, false mustache, and glue. He also had a bus ticket to El Paso, Texas, a map of El Paso, cash, traveler's checks, driver's licenses in his name and the name of Zach Watson, a cell phone, and a list of phone numbers. Michael spoke to Watson after his arrest, and Watson implied that if Michael put money in Watson's jail fund then he would tell Michael of a general area where Evey's body could be found.

After hearing this evidence, a jury found Watson guilty of first-degree kidnapping and first-degree murder with the use of a deadly

weapon. The jury unanimously agreed that the murder was willful, deliberate, and premeditated and occurred during the commission of the kidnapping offense. The jury acquitted Watson of robbery.

Penalty phase

The State alleged three aggravating circumstances to support a death sentence: (1) the murder occurred while Watson was engaged in the crime of first-degree kidnapping with the use of a deadly weapon, (2) the murder was committed for pecuniary value, and (3) the murder involved torture or mutilation. In addition to the evidence introduced during the guilt phase, the State introduced letters that Watson had written to his children in which he stated that Evey had shot herself in the hotel room and Watson, believing he would be held responsible for her death, attempted to conceal her death. Watson admitted in the letters that he cut up Evey's body, cooked parts of it, wrapped the pieces in plastic, and disposed of them. He could not remember exactly where he disposed of her body. The State also presented evidence of Watson's violent character, including that he had been charged with threatening President Nixon when he was 29 years old and had been charged with extortion for taking his young child from his prior wife and demanding money from her parents to return the child. In addition, the State introduced evidence that Watson, when in an argument with his prior wife, had boasted that he had raped and killed a hitchhiker but that an investigation into that statement did not yield any evidence of a murder and no charges were filed.

In mitigation, Watson introduced records from his admissions to psychiatric hospitals and his adjudication of insanity in 1958, when he was 18 years old. The records showed that Watson had been admitted to Parkland Memorial Hospital on August 23, 1957. Doctors had tentatively diagnosed him with schizophrenia and later diagnosed him with sociopathic personality disorder. The records noted that Watson was repeatedly referred to juvenile authorities for thefts, burglaries, and other similar crimes between 1951 and 1955. He ran away from home in 1956 with the intent to commit suicide. In 1957, he exposed himself to a secretary at a radio station and threatened her with a knife, which led to the commitment at Parkland. After he was discharged from Parkland, Watson committed another crime and was adjudicated insane on July 26, 1958. Watson was admitted to Rusk State Hospital on October 31, 1958, and discharged on November 1, 1960. He spent the last ten months of his admission on furlough. Watson also spoke in allocution, expressing his desire to be given the death penalty in accordance with his Muslim faith.

The jury found that the murder occurred while Watson was engaged in the crime of first-degree kidnapping and that the murder involved the torture and mutilation of the victim. None of the jurors

found any mitigating circumstances. The jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death for Evey's murder.

DISCUSSION

Watson argues that numerous errors occurred during the guilt and penalty phases of the trial. Although we address all of the claimed errors, we focus on two in particular. As to the guilt phase, we focus on his claim that the district court erred in rejecting his *Batson* challenge to the State's use of three peremptory challenges. As to the penalty phase, we focus on his challenge to the instruction defining mitigating circumstances.

Guilt-phase issues

Juror challenges

In exercising its nine peremptory challenges, the State struck six women and three men and one of the State's peremptory challenges was used to remove an African-American veniremember. Watson asserted a *Batson* objection to the State's use of three peremptory challenges—two against female veniremembers and the one against an African-American veniremember. The district court rejected his objections and Watson claims on appeal that the district court erred as to one of the women and the African-American veniremember. We first address the gender-based *Batson* claim and then the race-based *Batson* claim.

[Headnotes 1, 2]

In *Batson v. Kentucky*, the United States Supreme Court held that the use of peremptory challenges "is subject to the commands of the Equal Protection Clause," and therefore a party may not "challenge potential jurors solely on account of their race." 476 U.S. 79, 89 (1986). The Court later expanded the scope of *Batson* to prohibit striking jurors solely on account of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-43 (1994). We evaluate an equal-protection challenge to the exercise of a peremptory challenge using the three-step analysis set forth by the United States Supreme Court in *Batson*. *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004); *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995); *J.E.B.*, 511 U.S. at 144-45. First, "the opponent of the peremptory challenge must make out a prima facie case of discrimination." *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). "[T]he production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge." *Id.* Finally, "the trial court must . . . decide whether the opponent of the challenge has proved purposeful discrimination." *Id.*; *see Johnson v. California*, 545 U.S. 162, 171 (2005) (noting the "burden of persuasion 'rests with, and never

shifts from, the opponent of the strike'" (quoting *Purkett*, 514 U.S. at 768)). This court affords great deference to the district court's factual findings regarding whether the proponent of a strike has acted with discriminatory intent, *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008), and we will not reverse the district court's decision "unless clearly erroneous." *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30.[2]

[Headnotes 3, 4]

The district court rejected Watson's gender-based *Batson* objection after determining that Watson had failed to make out a prima facie case of discrimination—the first step of the *Batson* analysis. To establish a prima facie case under step one, the opponent of the strike must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. This standard is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under *Batson*. *Johnson*, 545 U.S. at 170 (rejecting California's "more likely than not" standard to measure the sufficiency of a prima facie case). Rather, the opponent of the strike must provide sufficient evidence to permit the trier of fact to "draw an inference that discrimination has occurred." *Id.*; *see also State v. Martinez*, 42 P.3d 851, 857-58 (N.M. Ct. App. 2002). "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" *Johnson*, 545 U.S. at 168 n.4 (quoting *Black's Law Dictionary* 781 (7th ed. 1999)).

[Headnotes 5, 6]

Watson takes issue with the district court's determination that he had not made a prima facie showing because he had not demonstrated a pattern of strikes against women. He argues that he is not required to show a pattern in order to make the prima facie showing required under *Batson*'s first step. Watson is correct—the opponent of a strike is not *required* to establish a pattern of strikes against members of the targeted group because the exclusion of even one veniremember based on membership in a cognizable group is a

[2]There is a split of authority as to whether the finding of a prima facie case of discrimination (step one of the *Batson* analysis) should be reviewed deferentially. It appears that a majority of the federal circuit courts of appeal, including the Ninth Circuit, have held that the "appellate court should review a trial court's *Batson* prima facie determination deferentially." *Tolbert v. Page*, 182 F.3d 677, 684-85 (9th Cir. 1999) (citing decisions of the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits); *see also United States v. Martinez*, 621 F.3d 101, 109-10 (2d Cir. 2010) (deciding to apply abuse-of-discretion standard). *But see Valdez v. People*, 966 P.2d 587, 590-91 (Colo. 1998) (discussing split and adopting mixed standard of review that gives deference to factual findings but applies de novo standard to whether opponent of strike established a prima facie case as a matter of law). The parties have not asked us to reconsider the standard of review used by this court.

constitutional violation. *See generally Batson*, 476 U.S. at 96-97; *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994). But Watson still must make the prima facie showing required under *Batson*'s first step.

[Headnotes 7, 8]

Where there is no pattern of strikes against members of the targeted group to give rise to an inference of discrimination, the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group. *Vasquez-Lopez*, 22 F.3d at 902. In other words, the mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under *Batson*'s first step; "something more" is required. *State v. Rhone*, 229 P.3d 752, 756 (Wash. 2010) (rejecting bright-line rule that peremptory challenge used against member of racially cognizable group is sufficient to establish a prima facie case under *Batson* because such a rule would be inconsistent with *Batson* as it "would negate this first part of the analysis and require a prosecutor to provide an explanation every time a member of a racially cognizable group is peremptorily challenged" and would be inconsistent with what Washington court and other courts have held); *see also Vasquez-Lopez*, 22 F.3d at 902 ("The one fact supporting [the defendant's] *Batson* claim was the juror's status as the sole Black prospective juror. More was required."); *People v. Howard*, 175 P.3d 13, 25 n.10 (Cal. 2008) (noting that defendant is not required to show a pattern in order to make out a prima facie showing of discrimination but that the absence of a pattern is "significant" where the defense "provided no other basis for inferring discriminatory intent"). Aside from a pattern of strikes against members of a targeted group, circumstances that might support an inference of discrimination include, but are not limited to, the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias. *Batson*, 476 U.S. at 96-97 (prosecutor's questions and statements during voir dire); *Tolbert v. Page*, 182 F.3d 677, 683 (9th Cir. 1999) ("Whether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire."); *Vasquez-Lopez*, 22 F.3d at 902 (impact of government's challenge on composition of jury and disparate treatment); *Martinez*, 42 P.3d at 855 (observing that courts may also consider whether a cognizable group has been eliminated from the jury altogether, was substantially underrepresented, or the case itself was sensitive to bias).

Watson suggests that the number of peremptory challenges that the State used to remove women (6 of its 9 peremptory challenges) constitutes a pattern of strikes that gives rise to an inference of gender-based discrimination and therefore establishes a prima facie case of gender discrimination. He offers no supporting authority or analysis.

[Headnote 9]

In a case involving a *Batson* claim based on gender discrimination, this court observed that "[w]hen a significant proportion of peremptories exercised by the State is used to remove members of a cognizable group, it tends to support a finding of purposeful discrimination." *Libby v. State*, 113 Nev. 251, 255, 934 P.2d 220, 223 (1997). Although there is " 'no magic number of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions,' " *Turner v. Marshall*, 63 F.3d 807, 812 (9th Cir. 1995) (quoting *United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir. 1989)), *overruled in part on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999), in *Libby*, this court concluded that the use of seven of nine peremptory challenges to remove female veniremembers established a prima facie case of discrimination based on gender. 113 Nev. at 255, 934 P.2d at 223.

There are some flaws with *Libby*'s method of determining whether there is a pattern of strikes against members of a targeted group that gives rise to an inference of discrimination. *Libby* tallies the number of peremptory challenges used against members of the targeted group to determine whether there is a pattern of strikes against members of that group. The first problem with that method is that "the raw number of peremptory challenges used against targeted-group members is meaningless without some point of reference." Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 476 (1996). *Libby* did provide one point of reference—the total number of peremptory challenges used by the State. That point of reference has little meaning, however, without additional information such as the number of targeted-group members remaining in the venire after the for-cause challenges. *Id.* ("[F]ive peremptory challenges against targeted-group members might be dispositive if only five such individuals had previously populated the venire, but they might be entirely unremarkable if virtually the entire venire had consisted of people in that group."). Although two of the cases discussed in *Libby* included information about this additional point of reference, *United States v. De Gross*, 913 F.2d 1417, 1425 (9th Cir. 1990) (seven of defendant's eight strikes used against male jurors and when defendant sought to use final peremptory strike to remove another male juror there were only two male jurors in the

jury box and one remaining in the venire); *Haynes v. State*, 103 Nev. 309, 316, 739 P.2d 497, 502 (1987) (strikes exercised against the only African Americans on the panel), this court did not include that information with respect to Libby's venire. The second problem with the method used in *Libby* is that "it does not complete its task" because "it does not tell us how many such peremptory challenges constitutes a prima facie case." Melilli, *supra*, at 476. That flaw can lead to inconsistent decisions. *Id.*

[Headnote 10]

The method used in *Libby* is just one of many "methods of quantifying the results of the peremptory challenges used by the *Batson* respondent." *Id.* at 471-72 (describing eight methods). While the method used in *Libby* has some relevance and may be sufficient to make out a prima facie showing of discrimination in some cases, there is another method that is better suited to gender-based *Batson* claims given the limited number of gender groups. A better approach would be to "compare[ ] the percentage of the *Batson* respondent's peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire." *Id.* at 472. "The theory underlying this method is that, if targeted-group membership is irrelevant to the *Batson* respondent's use of peremptory challenges, then the portion of [those] strikes used against the targeted-group members ought to roughly parallel the portion of the venire which consists of members of that targeted group." *Id.*; *see also State v. Ouahman*, 58 A.3d 638, 642 (N.H. 2012) (addressing *Batson* challenge involving the exclusion of men and observing that where the panel against whom peremptory challenges could be exercised consisted of more men than women, there is a "higher likelihood that the State would strike male jurors"). We conclude that this method is preferable to the one used in *Libby*.

[Headnote 11]

Here, the State used six of its nine peremptory challenges to remove women from the venire. This tally is close to, but not exactly the same as, the tally that established a prima facie case in *Libby* (seven out of nine peremptory challenges). When additional reference points are considered, the number of peremptory challenges used against women becomes less significant. The remaining venire, after all for-cause challenges were resolved, had more women (18) than men (14). It therefore would not be unexpected that neutrally exercised peremptory challenges would affect women more than men. Women constituted 56 percent of the venire after the for-cause challenges and the State used 67 percent of its strikes to remove women. In other words, roughly five out of nine members of the venire remaining after for-cause challenges were women, and the State used six of its nine strikes on women. Although there is some

disparity between these percentages, they are roughly parallel, and the disparity is not as great as that in other cases where courts have found that a prima facie case had been established. *See, e.g.*, *Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) (prima facie case established where at the time of the *Batson* objection, the prosecutor had used 29 percent of his peremptory challenges to remove 57 percent of the Hispanic veniremembers, who only constituted 12 percent of venire); *Turner v. Marshall*, 63 F.3d 807, 813-14 (9th Cir. 1995) (prima facie case established where prosecutor used 56 percent of peremptory challenges to remove African-American veniremembers, who were only 30 percent of the venire that had been passed for cause), *overruled in part on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). Thus, the State's use of six of its nine peremptory challenges against women, standing alone, was not sufficient to give rise to an inference of discrimination based on gender. *Cf. United States v. Martinez*, 621 F.3d 101, 110-11 (2d Cir. 2010) (concluding that defendant did not make prima facie showing where government exercised first four strikes against men where more than half of the prospective jurors were men at the start of the peremptory challenge stage, and by the time the government exercised its third and fourth challenges, the defense had removed seven women, making the odds nearly two to one that a male juror would be stricken). Watson does not identify any other evidence or circumstance that demonstrates a prima facie case of discrimination. We therefore conclude that he has not demonstrated that the district court clearly erred in determining that he failed to make out a prima facie case of gender discrimination.

Next, Watson contends that the district court erred in rejecting his *Batson* claim as to the State's use of a peremptory challenge to exclude an African-American veniremember. He argues that the State's removal of this veniremember violated *Batson* because its race-neutral reason related to the veniremember's religion.

[Headnotes 12, 13]

We need not address Watson's argument because the district court correctly rejected Watson's *Batson* claim based on the first step of the analysis. The district court agreed with the State that Watson had not established a pattern of strikes against African Americans that would be sufficient to make out a prima facie showing of discrimination. Despite that determination, the district court asked the State to give its reasons for removing the veniremember "out of an abundance of caution." The district court's cautionary request that the State give its explanation for the peremptory challenge was laudable, but where the district court has "conclude[d] that a prima facie showing has not been made, the request for and provision of explanations does not convert a [first-step *Batson*] case into a [third-step] case." *People v. Howard*, 175 P.3d 13, 26 (Cal. 2008) (observing

that although the court has "encouraged trial courts to ask prosecutors to give explanations for contested peremptory challenges, even in the absence of a prima facie showing," doing so does not make the first step of the analysis moot where the trial court has concluded that a prima facie showing has not been made). Because the district court asked the State to provide its explanation for the peremptory challenge solely out of an abundance of caution after the court had determined that Watson failed to make a prima facie case, the first step of the *Batson* analysis was not rendered moot. *Id.* at 25 ("When the trial court expressly states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied."); *cf. Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006) (recognizing that first step of *Batson* analysis is moot where State "gave its reasons for its peremptory challenges before the district court determined whether the opponent of the challenge made a prima facie showing of discrimination").

[Headnote 14]

We agree with the district court's assessment of the first step. This is not a case where the State used all of its strikes to remove African Americans, used a percentage of its strikes to remove African Americans that was significantly greater than the percentage of African Americans in the venire, or used its strikes to remove all African Americans. Rather, the State used one peremptory challenge to remove an African-American veniremember, leaving three African Americans on the venire after the State exercised its strikes. Accordingly, there was no pattern of strikes against African Americans that would give rise to an inference of discrimination. Although Watson was not required to establish a pattern, he was required to establish facts or circumstances sufficient to support an inference of discrimination based on race. He failed to do so below or on appeal. Because Watson did not demonstrate an inference of discrimination and therefore failed to meet the first step of the *Batson* analysis, we conclude that the district court did not clearly err in denying the *Batson* objection.

Sufficiency of the evidence

[Headnotes 15, 16]

Watson contends that there was insufficient evidence adduced at trial to convict him of first-degree murder and first-degree kidnapping. He argues that the conclusion that he lured his wife to Las Vegas with the purpose of killing her is based on speculation. He also asserts that, as Evey's body was not recovered, the circumstantial evidence produced at trial could only suggest, not conclusively prove, his involvement in Evey's death. We disagree.

[Headnotes 17, 18]

We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). In doing so, we do not reweigh the evidence or determine credibility as those functions belong to the jury. *McNair*, 108 Nev. at 56, 825 P.2d at 573.

The jury heard the following evidence. Watson expressed a desire to kill his wife in the month before her disappearance. He then booked a hotel room in Las Vegas under an alias. The next month, Watson and Evey traveled to Las Vegas as a purported gift for her birthday. Watson drove to Las Vegas with a firearm, and Evey flew to the city the next day. Before Evey arrived, Watson checked into hotel rooms at Circus Circus under his name and Tuscany Suites under an alias. Evey was not heard from again. After Evey's disappearance, Watson purchased tools and cleaning supplies. Watson's rooms at the Tuscany Suites were left in disarray: sheets missing, discarded packaging, used incense, and a strong odor. Significant amounts of Evey's blood was found in the rooms at Tuscany Suites, including a large stain that had soaked through to the subfloor, and her blood was found in Watson's vehicle and on his gun. Officers also followed Watson to an area where they later discovered plastic that smelled of decomposition and was stained with Evey's blood. In addition, Watson had fabricated a note from Evey to explain her absence. Finally, he was apprehended in an apparent attempt to leave the country: he was near a bus station with a ticket to a border town and was in possession of another's identification as well as disguise elements. This is substantial evidence from which a rational juror could reasonably infer that: (1) Watson lured Evey to Las Vegas for the purpose of killing her and therefore was guilty of first-degree kidnapping, NRS 200.310(1); and (2) Watson unlawfully killed Evey with malice aforethought and the killing was willful, deliberate, and premeditated and/or committed in the perpetration of a kidnapping, and therefore Watson was guilty of first-degree murder, NRS 200.010(1); NRS 200.030(1)(a), (b). *See Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction). We therefore will not disturb the jury's verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Motion for self-representation

[Headnote 19]

Watson contends that the district court erred in denying his motion to dismiss counsel and represent himself. He asserts that this was structural error that warrants reversal of his convictions.

[Headnotes 20-23]

The Sixth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees a defendant the right to self-representation. *See Faretta v. California*, 422 U.S. 806, 819-20 (1975) ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."). We have protected a competent defendant's Sixth Amendment "right not to have counsel forced upon him," even in instances where a defendant facing the death penalty opts to present no defense or mitigating evidence. *Bishop v. State*, 95 Nev. 511, 516-17, 597 P.2d 273, 276 (1979); *see also Colwell v. State*, 112 Nev. 807, 811-12, 919 P.2d 403, 406 (1996). However, the right to self-representation is not absolute because it necessitates the relinquishment of another constitutional right—the right to counsel. *See Faretta*, 422 U.S. at 835. Before allowing a defendant to waive his right to counsel, a district court must conclude that a defendant is competent to waive his right to counsel and that he has made a knowing and voluntary waiver of this right. *See id.*; *see also Godinez v. Moran*, 509 U.S. 389, 400-01 (1993). A district court nonetheless may deny a request for self-representation that is untimely, equivocal, or made for the purpose of delay. *O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 44 (2007) (quoting *Tanksley v. State*, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997)).

[Headnote 24]

Watson's request for self-representation was equivocal. He had filed a motion to act as co-counsel and would not fully accept responsibility for his legal representation; he assured the district court that he could handle all aspects of his defense, except for the "details," deadlines, and ministerial tasks, and he indicated that he would ask for a continuance if he found he could not represent himself. These conditions on self-representation show that he never definitively acknowledged that he wanted to act as his own sole legal representative.[3]

[Headnote 25]

Watson's motion also was untimely. "If it is clear that the request comes early enough to allow the defendant to prepare for trial without need for a continuance, the request should be deemed timely." *Lyons v. State*, 106 Nev. 438, 446, 796 P.2d 210, 214 (1990), *abrogated in part on other grounds by Vanisi v. State*, 117 Nev. 330, 341 & n.14, 22 P.3d 1164, 1172 & n.14 (2001). Watson filed his mo-

[3]A defendant who has exercised his right to self-representation does not have a right to standby or advisory counsel. *See United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994) (providing accused has no constitutional right to advisory counsel); *see also Wheby v. Warden*, 95 Nev. 567, 568-69, 598 P.2d 1152, 1153 (1979), *overruled on other grounds by Keys v. State*, 104 Nev. 736, 766 P.2d 270 (1988).

tion roughly one month before the scheduled trial date, and Watson stated at the hearing that he would need a continuance if the court granted his request. He asserts that because the subsequent appointment of substitute counsel necessitated a continuance, his motion could not be untimely. However, the continuance was not granted until after the district court denied his motion and appointed new counsel. Considering the lateness of Watson's equivocal request, the district court did not abuse its discretion in denying his motion to represent himself. *See Harris v. State*, 113 Nev. 799, 802, 942 P.2d 151, 153-54 (1997) (noting that this court gives deference to district court's determination of whether a defendant understands the risks and disadvantages of self-representation).

Penalty-phase issues

Mitigation instruction

[Headnotes 26, 27]

Watson argues that the district court erred in giving the following instruction regarding the definition of mitigation:

> Mitigating circumstances are those factors which, while they do not constitute a legal justification or excuse for the commission of the offense in question, may be considered, in the estimation of the jury, in fairness and mercy, as extenuating or reducing the degree of the Defendant's moral culpability.
>
> You must consider any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffer[s] as a basis for a sentence less than death.
>
> In balancing aggravating and mitigating circumstances, it is not the mere number of aggravating circumstances or mitigating circumstances that controls.

He suggests that the jury would have understood the term "moral culpability" in the first paragraph as a reference to his guilt or blameworthiness and therefore would have ignored any mitigating evidence unrelated to his moral culpability for committing the crime, such as aspects of his character or record that were unrelated to the crime. Watson did not object to this instruction at trial. "Generally, the failure to clearly object on the record to a jury instruction precludes appellate review" absent plain error affecting the defendant's substantial rights. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[Headnotes 28, 29]

The threshold question is whether the instruction is a correct statement of the law. Our review is de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). We start that review by looking at the scope of mitigating circumstances.

[Headnotes 30, 31]

"The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence." *Boyde v. California*, 494 U.S. 370, 377 (1990). Mitigation evidence includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see* NRS 200.035; accordingly, mitigation is not limited to evidence "which would tend to support a legal excuse from criminal liability," *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982). *See Browning v. State*, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) (acknowledging that capital penalty hearing is focused on defendant's character, record, and circumstances of offense); *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998) (same).

The challenged instruction's first paragraph focuses on circumstances that speak to the defendant's "moral culpability." The original source of the language in that paragraph seems to be the definition of "mitigating circumstances" found in an early edition of *Black's Law Dictionary*: " 'Mitigating circumstances' are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." *Black's Law Dictionary* 780-81 (1st ed. 1891). Although this definition appeared in a death penalty case as early as 1928, *see, e.g.*, *People v. Leong Fook*, 273 P. 779, 781 (Cal. 1928), its use in death penalty cases in Nevada seems to be of more recent vintage. For example, the language was used in an instruction defining mitigating circumstances during a Clark County capital trial in 1994.[4] *See Evans v. State*, 112 Nev. 1172, 1185, 1203 n.31, 926 P.2d 265, 274, 285 n.31 (1996).[5] The defendant in that case did not object to the instruction, and we observed that the instruction "clarified any possible confusion" that the jury might have had concerning the meaning of mitigating circumstances based on the initial instruction that the jury received.[6] *Id.* at

[4]We are not aware of any instances of this definition being used in Nevada capital trials before 1994, and the parties have not identified any such instances.

[5]In *Evans*, the jury requested a "Black's Law or proper definition" of mitigating circumstances during penalty-phase deliberations. 112 Nev. at 1203, 926 P.2d at 285. The district court responded by giving an instruction that is similar to the first paragraph of the instruction challenged in this case: " 'Mitigating circumstances are things which do not constitute a justification or excuse of the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability.' " *Id.* at 1203 n.31, 926 P.2d at 285 n.31.

[6]The initial instruction given in *Evans* read, in part: "Any aspect of the defendant's character or record and any of the circumstances of the offense, including any desire you may have to extend mercy to the defendant, which a jury believes is a basis for imposing sentence less than death may be considered a mitigating factor." 112 Nev. at 1204, 926 P.2d at 285 (emphasis omitted).

1204, 926 P.2d at 286. This court has not addressed whether the term "moral culpability" as used in the instruction misstates the law as to the scope of mitigating circumstances.[7]

[Headnotes 32, 33]

The term "culpability" is defined as "blameworthiness" or "guilt" in both legal and ordinary usage. *Black's Law Dictionary* 435 (9th ed. 2009); *Webster's Third New International Dictionary* 552 (2002). Thus understood, "culpability" relates to the crime and whether the defendant is blameworthy, *see Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (using "culpability" in reference to crime), which describes the inquiry at the guilt phase of a capital trial. The inquiry at the penalty phase of a capital trial is different—whether the defendant is worthy of a death sentence. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 22-27 (1997). This is not to say that circumstances that extenuate or reduce a defendant's moral culpability but are not sufficient to justify or excuse the offense for purposes of guilt are irrelevant to the jury's determination whether to impose a sentence less than death. *See Skipper*, 476 U.S. at 13-14 ("Evidence concerning *the degree of the defendant's participation in the crime*, or his age and emotional history, thus bear directly on the fundamental justice of imposing capital punishment." (emphasis added)). In fact, several such circumstances are included as statutory mitigating circumstances in Nevada. *See* NRS 200.035.[8] But the defendant's moral culpability is

[7]This court's opinion in *Thomas v. State* refers to an instruction that includes the "moral culpability" language, but it does so in the court's analysis of a prosecutorial-misconduct claim; the opinion does not address the issue presented in this case. 122 Nev. 1361, 1370, 148 P.3d 727, 733 (2006).

The State suggests that the challenged instruction was approved by the United States Supreme Court in *Kansas v. Marsh*, 548 U.S. 163 (2006). We disagree. The *Marsh* opinion merely mentioned the Kansas instruction and did not specifically approve of it or address the issue presented here. *Id.* at 176-77. Additionally, the instruction mentioned in *Marsh* is phrased differently than the instruction used in this case; it defined mitigating circumstances as any circumstances that "may be considered as extenuating or reducing the degree of moral culpability or blame *or* which justify a sentence of less than death." *Id.* at 176 (emphasis added) (internal quotation marks omitted).

[8]NRS 200.035 provides as follows:

> Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> 1. The defendant has no significant history of prior criminal activity.
>
> 2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> 3. The victim was a participant in the defendant's criminal conduct or consented to the act.
>
> 4. The defendant was an accomplice in a murder committed by another person and the defendant's participation in the murder was relatively minor.

not the sole consideration; therefore, an instruction that limits mitigating circumstances to factors that extenuate or reduce a defendant's moral culpability misstates the law.

The instruction given in this case is subject to two interpretations. Read as a whole, the instruction requires the jury to consider factors that extenuate or reduce the defendant's moral culpability *and* any aspect of the defendant's character or record and any circumstances of the offense. In particular, the breadth of possible mitigation evidence is conveyed in the second paragraph of the instruction: "You must consider any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffer[s] as a basis for a sentence less than death." Alternatively, the phrasing of the first paragraph, which refers to mitigating circumstances as those factors that "extenuat[e] or reduc[e] the degree of the Defendant's moral culpability," could be understood to limit the jury to consideration of only those factors that are offense-related and therefore extenuate or reduce the defendant's guilt or blameworthiness. Given these competing interpretations, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant [mitigating] evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). A "reasonable likelihood" is more than a mere possibility that the jury misunderstood the law, but a defendant "need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." *Id.*

[Headnote 34]

We are not convinced that there is a reasonable likelihood that the jury misunderstood the first paragraph of the instruction to preclude it from considering any aspect of Watson's character or record as a mitigating circumstance regardless of whether it reflected on his moral culpability. First, the interpretation that would result in a misunderstanding of the law is not a natural reading of the instruction as a whole. Nothing in the language of the instruction would readily suggest that the language in the first paragraph required the jury to ignore the broad second paragraph. Second, it seems unlikely that a jury would read the first paragraph as suggested by Watson when courts have used "culpability" in the penalty context without expressing any concern that it limits the jury to consideration of circumstances that are related to the crime and the defendant's guilt. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007) ("[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral cul-

5. The defendant acted under duress or under the domination of another person.

6. The youth of the defendant at the time of the crime.

7. Any other mitigating circumstance.

pability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense."); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant . . . .'" (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). As the Supreme Court has observed, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. Finally, although "arguments of counsel generally carry less weight with a jury than do instructions from the court," *id.* at 384, given the arguments of counsel during the penalty phase that focused on background, character, and other circumstances unrelated to the crime, it is unlikely that the jury would have believed that that evidence could not be considered. These reasons also suggest that any possible error in the instruction is not "so unmistakable that it reveals itself by a casual inspection of the record," *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks omitted); therefore, Watson has not demonstrated plain error.[9]

Motion to continue

[Headnote 35]

Watson argues that the district court erred in denying a motion to continue. He asserts that the continuance was necessary to permit him more time to prepare his case in mitigation because counsel did not obtain records related to his previous psychiatric hospitalization until the day that the jury returned its guilty verdicts.

The decision to deny a motion for a continuance is reviewed for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). There was no such abuse in this case. The district court's decision did not leave the defense with inadequate time to prepare for the penalty hearing, *see Higgs v. State*, 126 Nev. 1, 9,

[9]We encourage district courts to revise the challenged instruction to avoid the possibility of an erroneous interpretation. For example, the following language could be used in place of the first and second paragraphs:

> A mitigating circumstance is any factor which you believe is a basis for imposing a sentence less than death. Such circumstances may include, but are not limited to: any aspect of the defendant's character, background, or record; any factor that extenuates or reduces the degree of the defendant's moral culpability, regardless of whether it constitutes a legal justification or excuse for the offense; any circumstances of the offense; or any desire you may have to extend mercy to the defendant.

222 P.3d 648, 653 (2010) ("This court has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves the defense with inadequate time to prepare for trial."); Watson's trial attorneys began representing him roughly one year before his trial began, he had been represented by other attorneys over the several years that the case had been pending before his trial counsel became involved in the case, and Watson could have revealed the information at issue to counsel had he chosen to do so. Watson also fails to demonstrate that he was prejudiced by the denial of the continuance, *see Rose*, 123 Nev. at 206, 163 P.3d at 416 ("[W]hen a defendant fails to demonstrate that he was prejudiced by the denial of a continuance, the district court's decision denying a continuance is not an abuse of discretion."), where he had consistently maintained that his religious beliefs mandated that he not pursue a case in mitigation, *see Detrich v. Ryan*, 677 F.3d 958, 977 (9th Cir. 2012) (recognizing "a defendant's informed wishes can justify failing to present mitigating evidence" (emphasis omitted)), *vacated in part on other grounds and remanded*, 740 F.3d 1237 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2662 (2014), counsel was able to use the records during the penalty hearing, and the records indicated that Watson had been diagnosed and treated for mental illness several decades before the instant crime, which involved a carefully planned and executed murder. The district court did not abuse its discretion.

Competency

[Headnote 36]

Watson argues that the district court erred in denying his request for a competency evaluation following the guilt phase of the trial because none of the prior evaluators had access to his extensive history of mental illness. We disagree.

Roughly one year before trial, Watson was found competent to stand trial. The record shows that he responded appropriately when questioned by the court during pretrial proceedings and that he drafted his own pleadings. In addition, Watson responded appropriately during questioning by the court during the *Faretta*[10] canvas. The discovery of decades-old psychiatric records and insinuation that stress from the guilty verdict rendered him incompetent were insufficient to cast reasonable doubt on his competency given that he did not exhibit any behavior during the prior proceedings that called into doubt his ability to understand the nature of the proceedings or assist counsel. *See Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 122, 206 P.3d 975, 977 (2009) (holding that a defendant

[10]*Faretta v. California*, 422 U.S. 806 (1975).

is competent to stand trial if he has the "ability to understand the nature of the criminal charges and the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding"). While Watson's decision to forgo the presentation of mitigation evidence may seem irrational to some, that decision was his alone, *see Detrich*, 677 F.3d at 977, and it was one that he had consistently maintained throughout the proceedings. Nothing in the record indicates that Watson did not understand the nature and purpose of the penalty hearing or that he was unable to assist his counsel during the proceeding. Because Watson failed to demonstrate reasonable doubt as to his competency to stand trial, *see Olivares v. State*, 124 Nev. 1142, 1147-48, 195 P.3d 864, 868 (2008); *see also* NRS 178.400(1) ("A person may not be tried or adjudged to punishment for a public offense while incompetent."), the district court did not abuse its discretion in denying the request for further competency proceedings, *see Olivares*, 124 Nev. at 1147-48, 195 P.3d at 868.

Aggravating circumstances

[Headnotes 37-40]

Watson contends that there was insufficient evidence to support the two aggravating circumstances found by the jury. We disagree. There was sufficient evidence that the murder occurred in the commission of a first-degree kidnapping. The evidence shows that Watson inveigled Evey to travel to Las Vegas for the purpose of killing her. *See* NRS 200.310(1). In particular, Watson had verbalized his desire to murder Evey in order to protect his life savings; he then threw a surprise birthday party for her, which was an unusual thing for him to do, and, as part of the birthday celebration, planned a trip to Las Vegas for the couple; he booked two hotel rooms, one under his own name and the other, at a separate hotel, where Evey's blood was discovered, under an alias for which he had false identification; and although Evey flew to Las Vegas, Watson traveled separately with a firearm. As to the torture and mutilation aggravating circumstance, the State introduced letters that Watson had written to his children in which he admitted to dismembering Evey and cooking parts of her body in an attempt to conceal her death. This admission was corroborated by the pan and utensils recovered from Watson's hotel room; evidence that Watson purchased a band saw, plastic bags, and cleaners; and the large amount of Evey's blood that had soaked through the carpet in the hotel room. This evidence was sufficient for the jury to conclude that the murder involved "mutilation beyond the act of killing itself" that "cut off or permanently destroy[ed] a limb or essential part of [Evey's] body." *Smith v. State*,

114 Nev. 33, 39, 953 P.2d 264, 267 (1998) (internal quotation marks omitted); *Deutscher v. State*, 95 Nev. 669, 677, 601 P.2d 407, 412-13 (1979).[11]

Mandatory review

[Headnote 41]

NRS 177.055(2) requires that this court review every death sentence and consider whether: (1) sufficient evidence supports the aggravating circumstances found; (2) the verdict was rendered under the influence of passion, prejudice, or any other arbitrary factor; and (3) the death sentence is excessive. First, as explained above, sufficient evidence supported the two aggravating circumstances found. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice, or any arbitrary factor. And third, considering the calculated nature in which Watson planned the murder and dismemberment of his wife and the evidence in mitigation, we conclude that Watson's death sentence was not excessive.

Because review of this appeal reveals no errors that would warrant a new trial or penalty hearing, we affirm the judgment of conviction.

Pickering, Hardesty, Parraguirre, and Douglas, JJ., concur.

Cherry and Saitta, JJ., dissenting in part:

In our view, the district court plainly erred in defining mitigating circumstances as those circumstances that reduce the defendant's degree of moral culpability. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (reviewing unobjected-to jury instruction for plain error affecting the defendant's substantial rights). The instruction is not properly rooted in Nevada statutory authority to provide necessary direction to the jury. We further conclude that this error affected Watson's substantial rights and we would reverse the judgment of conviction and remand for a new sentencing hearing.

In 1972, the United States Supreme Court held that the death penalty, as it had been applied, violated the Eighth and Fourteenth Amendments of the United States Constitution because the procedures employed to sentence defendants created "a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980); *Anderson v. State*, 90 Nev. 385, 528 P.2d 1023 (1974) (citing *Furman v. Georgia*,

[11]Watson argues that the cumulative effect of the errors committed during his trial warrant reversal of his conviction and sentence. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). However, a defendant is not entitled to a perfect trial, merely a fair one. *Ennis v. State*, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Because we have found no error, there is nothing to cumulate.

408 U.S. 238 (1972)). The nation's hiatus from the death penalty was short-lived. State legislatures amended their statutes in an attempt to restore the punishment to constitutionality and, by 1976, the United States Supreme Court approved of the penalty schemes in Florida and Georgia. *Gregg v. Georgia*, 428 U.S. 153, 198-207 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976). To survive constitutional scrutiny, capital sentencing procedures must "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). The jury must be free to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Our Legislature amended the capital punishment scheme in 1977 to address the concerns of *Furman* and *Gregg* and limit the jury's discretion in imposing death sentences. *See Deutscher v. State*, 95 Nev. 669, 676, 601 P.2d 407, 412 (1979). The statutes generally limit the discretion afforded the jury, but "are constitutional because they 'provide for a consideration of any mitigating factor the defendant may want to present.'" *Id.* at 676-77, 601 P.2d at 412 (quoting *Bishop v. State*, 95 Nev. 511, 517, 597 P.2d 273, 277 (1979)); *see Gregg*, 428 U.S. at 196-97. Any instruction to the jury concerning the use of mitigation evidence must be born of these statutes in order to guide the discretion of the jury in a constitutional manner. But that was not the case here.

Instead, the moral culpability instruction given in this case came from a dictionary, *see* Henry Campbell Black, *Dictionary of Law* 780-81 (1st ed. 1891) ("Mitigation . . . . 'Mitigating circumstances' are such as do not constitute a justification or excuse of the offense in question, but which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."), and had originated from an action for slander, Black, *Dictionary of Law* 785 (2d ed. 1910) (citing *Heaton v. Wright*, 10 How. Pr. 79, 82 (N.Y. 1854)). Despite its origin in civil law, courts adopted the instruction for their most serious cases as early as 1928. *See generally People v. Leong Fook*, 273 P. 779, 781 (Cal. 1928); *Commonwealth v. Williams*, 160 A. 602, 609 (Pa. 1932). Many jurisdictions have modified the language to reflect a definition of mitigating circumstances that extends beyond moral culpability to any circumstances that warrant a sentence less than death. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 176 (2006) (Kansas instructions use "reducing the degree of moral culpability or blame *or which justify a sentence of less than death*" (internal quotations omitted) (emphasis added)); *Buchanan v. Angelone*, 522 U.S. 269, 285 (1998) (Virginia instructions use "reduce the degree of moral culpability *and punishment*" (internal quota-

tions omitted) (emphasis added)); *State v. Breton*, 663 A.2d 1026, 1052 & n.46 (Conn. 1995) (Connecticut instructions use "reduce the degree of his culpability or blame for the offense *or to otherwise constitute a basis for a sentence less than death*" (internal quotations omitted) (emphasis added)); *State v. Brett*, 892 P.2d 29, 61 (Wash. 1995) (Washington instructions use "reducing the degree of moral culpability *or which justifies a sentence of less than death*" (internal quotations omitted) (emphasis omitted) (emphasis added)); *State v. Moose*, 313 S.E.2d 507, 518 (N.C. 1984) (North Carolina's definition includes, "reducing the moral culpability of killing *or making it less deserving of the extreme punishment* than other first-degree murders" (emphasis and internal quotation omitted)); *see also State v. Holloway*, 527 N.E.2d 831, 835 (Ohio 1988) ("[M]itigating factors under [Ohio law] are not related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether an offender . . . should be sentenced to death."). Although we have referenced a similar instruction in three published cases, this court has never specifically addressed the "moral culpability" language in the instruction. *See Nunnery v. State*, 127 Nev. 749, 782, 263 P.3d 235, 257 (2011) (explaining that instruction grants jurors the discretion to find mitigating circumstances); *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 733 (2006) (explaining that State's improper causation argument was not prejudicial because instruction does not require causation between mitigating factors and the crime); *Evans v. State*, 112 Nev. 1172, 1204, 926 P.2d 265, 285-86 (1996) (referencing instruction but citing a different definition of mitigating circumstances with approval).

It is no small task to ask a jury to decide whether to impose a death sentence. Given the weight of their decision, jurors are entitled to instructions that clarify the law authorizing the penalty to guide their discretion in imposing the punishment. In light of this concern, the instruction's history, United States Supreme Court precedent, and statutory amendments to the death penalty procedure, the district court plainly erred in giving the instruction. The instruction is simply inconsistent with the statutory language defining mitigating circumstances. It defined mitigating circumstances as factors which "extenuat[e] or reduc[e] the degree of the Defendant's moral culpability." Admittedly, most of the enumerated factors in the statute relate to the facts of the crime and, therefore, the defendant's moral culpability. *See* NRS 200.035. But the statute is broader; its definition of mitigating circumstances includes facts concerning the defendant or any other circumstance that the jury might find mitigating. *See* NRS 200.035(1), (7); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982) (noting mitigation evidence not limited to evidence "which would tend to support a legal excuse from criminal liability"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (defining mit-

igation evidence as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). Moreover, unlike the given instruction, the statute includes specific, concrete examples that are necessary to guide the jury in its deliberations.

The given instruction likely confused the jury and improperly limited its consideration of mitigating evidence. *See Boyde v. California*, 494 U.S. 370, 377-78 (1990) ("The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence."); *see also Browning v. State*, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008) (acknowledging that capital penalty hearing is focused on defendant's character, record, and circumstances of offense); *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998) (same). The majority acknowledges that "culpability" relates to whether the defendant is blameworthy and that the first paragraph of the instruction could be viewed as restricting the jury's consideration of mitigation evidence. However, it concludes that the second paragraph was sufficient to direct the jury to consider all evidence relevant to mitigating circumstances. We do not agree with this conclusion. The first paragraph clearly characterized mitigating evidence as only offense-related evidence. The second paragraph directs the jury to consider aspects of the defendant's character or record, but does not brand that information as mitigating evidence. Thus, the facts about the defendant's character stand apart from the mitigation evidence in the minds of the jurors and it is likely that the jury would not consider those facts in weighing the aggravating and mitigating circumstances. Pursuant to the given instruction, the jury could readily and incorrectly assume the facts related to the defendant's character or record were mere "other matter" evidence to be considered after the weighing process was complete. *See Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (explaining that evidence unrelated to defendant's culpability is still mitigating because it "might serve 'as a basis for a sentence less than death.'" (quoting *Lockett*, 438 U.S. at 604)); *People v. Lanphear*, 680 P.2d 1081, 1083 (Cal. 1984) (en banc) (finding constitutional error when "no sympathy" instruction was combined with instruction suggesting that only circumstances that lessen moral culpability are to be considered as mitigating circumstances); *see also Nevius v. State*, 101 Nev. 238, 250-51, 699 P.2d 1053, 1061 (1985) (citing *Lanphear* and implying that an instruction would be erroneous if it suggested that only circumstances that lessen moral culpability should be considered as mitigation). The majority contends that because the phrase "moral culpability" has been used so broadly, albeit incorrectly, in the past, it was unlikely the jury felt limited in what evidence it could consider. We believe the jury's sentencing decision is too important to accept refuge in ambiguity. It is our view that the jury likely applied

the instruction in a way that prevented it from considering relevant evidence and that the district court plainly erred in instructing the jury using language that reasoned jurists and attorneys have used with such imprecision. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007) ("[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense."); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant . . . .'" (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). We should not expect jurors "to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005).

We further conclude that the erroneous instruction affected Watson's substantial rights. *See* NRS 178.602; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Watson presented documentation showing that he had suffered from mental illness and had received psychiatric treatment. The jury, however, found no mitigating circumstances present. The majority contends that this could suggest that the mitigation evidence was not sufficiently compelling; however, considering the breadth of time between Watson's diagnosis and the crime, the jury most likely did not consider it to be evidence in mitigation as defined by the given instructions. Therefore, we would conclude that there was "a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380; *see Ayers v. Belmontes*, 549 U.S. 7, 16-17 (2006).

EDWIN HUMBERTO ARTIGA-MORALES, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 60172

October 2, 2014 335 P.3d 179

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery with a deadly weapon causing substantial bodily harm. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

The supreme court, PICKERING, J., held that defendant established neither a constitutional nor statutory basis for the supreme court to reverse his conviction based on the district court's denial of his motion to compel disclosure of prosecution-gathered juror background information.

Affirmed.

[Rehearing denied November 25, 2014]

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

Jennifer L. Lunt, Alternate Public Defender, and *Cynthia Lu*, Deputy Alternate Public Defender, Washoe County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Respondent.

Arthur E. Mallory, Fallon, for Amicus Curiae Nevada District Attorneys Association.

T. Augustas Claus, Henderson; *Robert Arroyo*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

1. CRIMINAL LAW.
   Nevada's disclosure statute, governing disclosure by prosecuting attorney of evidence relating to prosecution, does not mandate disclosure of prosecution-developed juror background information. NRS 174.235.
2. CRIMINAL LAW.
   Defendant established neither a constitutional nor statutory basis for the supreme court to reverse his conviction based on the district court's denial of his motion to compel disclosure of prosecution-gathered juror background information; Nevada's disclosure statute did not mandate disclosure of prosecution-developed juror background information, and even if prosecution came to court with information about prospective jurors that defendant did not have and could not get beforehand, the information was revealed during voir dire. NRS 174.235.
3. JURY.
   Detention of prospective juror's son in jail on gang-related charges established a race-neutral, nonpretextual reason for the prosecution's peremptory challenge of her.

4. Criminal Law.

Prosecutor's use of defendant's photograph during closing argument with the word "guilty" across the front did not constitute reversible error; photo was briefly displayed during closing argument, the defense conceded that the prosecution's limited use of the power point photograph during closing argument was proper, and the district court sustained the defense's objection to the photograph the second time it was shown.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

Artiga-Morales appeals his conviction for battery with a deadly weapon causing substantial bodily harm. His principal argument is that the district court erred in denying his pretrial motion for "an order mandating the prosecutor provide a summary of any jury panel information gathered by means unavailable to the defense." The record does not include a complete transcript of the oral argument on this motion; what we have suggests the parties focused on the criminal histories the prosecution admitted having run on the venire, which revealed "[s]ome prior misdemeanors, that was it." The district court denied the motion on two grounds: (1) "the prosecution's choice not to disclose potential juror information will not create an unfair trial or impartial [sic] jury [since d]efense counsel will have adequate opportunity to examine each potential juror during voir dire," and (2) Artiga-Morales "has not established that the potential juror information he seeks cannot be obtained by the defense investigator or through other reasonable avenues." Our review is for an abuse of discretion, *People v. Jones*, 949 P.2d 890, 913 (Cal. 1998); *see Lamb v. State*, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011), and finding none, we affirm.

Almost without exception, courts have declined to find reversible error in a trial court denying the defense access to juror background information developed by the prosecution. *See* Jeffrey F. Ghent, Annotation, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors*, 86 A.L.R.3d 571 (1978 & Supp. 2014) (collecting cases). Most courts have held that, in the absence of a statute or rule mandating disclosure, no such disclosure obligation exists. *Albarran v. State*, 96 So. 3d 131, 157-58 (Ala. Crim. App. 2011) ("arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* [*v. Maryland*, 373 U.S. 83 (1963)]" (alteration in original) (internal quotation marks omitted)); *State v. Mathews*, 373 S.E.2d 587, 590-91 (S.C. 1988)

(without a statute or court rule requiring disclosure, due process did not require disclosure of state-assembled juror background information); *see generally Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one.").

Other courts struggle with the disparity between the prosecution, which has ready access to criminal history and other government databases on prospective jurors, and the defense, which does not. *E.g.*, *People v. Murtishaw*, 631 P.2d 446, 465-66 (Cal. 1981), *superseded by statute on other grounds as stated in People v. Boyd*, 700 P.2d 782, 790 (Cal. 1985). But the clear majority of these courts as well have found no reversible error in a trial court's denial of access to prosecution-developed juror background information, concluding, as we do here, that the injury, if any, in the particular case was speculative and/or prejudice was not shown.

Murtishaw is typical. In *Murtishaw*, the California Supreme Court announced that, while not compelled by the constitution, statute, or rule, trial courts in future cases may compel disclosure of prosecution-developed juror background materials. *Id.* Even so, the court acknowledged that "in any individual case it is entirely speculative whether denial of access caused any significant harm to the defense." *Id.* at 466. Thus, *Murtishaw*'s holding, as distinct from its dictum, was that the trial court's refusal to order disclosure "does not require us to reverse the conviction in the present case" because, absent a showing of "prejudice . . . the denial of access is not reversible error." *Id.*; *see Tagala v. State*, 812 P.2d 604, 613 (Alaska Ct. App. 1991) (opining that "the prosecutor should disclose to the defense, upon request, criminal records of jurors, at least in cases where the prosecution intends to rely on them," but declining to reverse because "[i]t is difficult to say how [the defense] was harmed by the fact that [the defendant] did not have access to the prosecutor's report" and noting, as the district court did here, "[n]othing prevented [the defense] from asking the jurors about their criminal records"); *State v. Goodale*, 740 A.2d 1026, 1031 (N.H. 1999) (while opining that "fundamental fairness requires that official information concerning prospective jurors utilized by the State in jury selection be reasonably available to the defendant," holding that "[w]e nonetheless affirm the defendant's conviction in this case, as he has failed to demonstrate that he was in fact prejudiced by the trial court's ruling"); *cf. Commonwealth v. Smith*, 215 N.E.2d 897, 901 (Mass. 1966) (declining to reverse based on the trial court's denial of access to prosecution juror background materials—"[w]hether there was any advantage as to any juror is speculative"—but noting its concern with disparate access to background information and suggesting that "[t]he subject could appropriately be dealt with in a rule of Court").

[Headnotes 1, 2]

Like the defendants in *Murtishaw*, *Tagala*, *Goodale*, and *Smith*, Artiga-Morales does not connect his theoretical argument to the facts in his case. Nevada's disclosure statute, NRS 174.235, does not mandate disclosure of prosecution-developed juror background information.[1] Lacking statutory authority, Artiga-Morales turns to constitutional precepts. But he does not argue, much less establish, that "any of the jurors who sat in judgment against him were not fair and impartial." *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125-26 (2005). Without this showing, his claim that he was denied his constitutional right to a fair and impartial jury fails. *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988); *see State v. Grega*, 721 A.2d 445, 450 (Vt. 1998) (finding no error in the trial court's refusal to order disclosure of criminal background checks the prosecution ran on prospective jurors where voir dire was conducted on juror's criminal backgrounds and the "[d]efendant does not claim that any of the jurors gave inaccurate or incomplete information, nor has he shown that the impaneled jury was biased in any way").

[Headnote 3]

Artiga-Morales makes a more focused argument as to prospective juror Lazaro. He maintains that, but for its superior access to juror background information, the prosecution would not have known to question her about her son's detention in the Washoe County jail on gang-related charges and then been able to defend its peremptory challenge of her on that basis. But this argument does not hold up. In the first place, he does not explain how the prosecution's access to juror Lazaro's criminal history would have produced information about her son's criminal history. Second, and more fundamentally, Lazaro's son's detention in the Washoe County jail on gang-related charges established a race-neutral, nonpretextual reason for the prosecution's peremptory challenge of her. *See Hawkins v. State*, 127 Nev. 575, 577-78, 256 P.3d 965, 966-67 (2011). Thus, no *Batson v. Kentucky*, 476 U.S. 79 (1986), violation occurred. And, even accepting that the prosecution came to court with information about Lazaro that Artiga-Morales didn't have and couldn't get beforehand, the information was revealed during voir dire—indeed, the district court offered Artiga-Morales additional voir dire of prospective juror Lazaro, which he declined. Again, Artiga-Morales does not connect the injury of which he complains—unequal access to juror background information—to cognizable prejudice affecting his case.

Artiga-Morales thus has established neither a constitutional nor statutory basis for us to reverse his conviction based on

[1]Subparagraph 2 of NRS 174.235 protects the prosecution's work product, an issue not developed here.

the district court's denial of his motion to compel disclosure of prosecution-gathered juror background information. "If policy considerations dictate that defendants should be allowed to see [prosecution-developed jury] dossiers, then a court rule should be proposed, considered and adopted in the usual manner." *People v. McIntosh*, 252 N.W.2d 779, 782 (Mich. 1977), *overruled on other grounds by People v. Weeder*, 674 N.W.2d 372 (Mich. 2004); *Smith*, 215 N.E.2d at 901.[2] Such a formal rule-making procedure is implicitly authorized by NRS 179A.100(7)(j) and better suited to the job of assessing the scope of the disparity, the impact on juror privacy interests, the need to protect work product, practicality, and fundamental fairness than this case, with its limited record and arguments.

[Headnote 4]

We have considered Artiga-Morales's remaining assignments of error and find them without merit. The prosecutor's use of Artiga-Morales's photograph during closing argument with the word "guilty" across the front presents an issue analogous to that in *Watters v. State*, 129 Nev. 886, 313 P.3d 243 (2013). But the photo was briefly displayed during closing argument, not extensively displayed during opening statement as in *Watters*; the defense conceded that the prosecution's limited use of the power point photograph during closing argument was proper; and the court sustained the defense's objection to the photograph the second time it was shown. Impropriety and prejudice of the sort demonstrated in *Watters* thus does not appear.

We affirm.

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

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

The majority fails to recognize that this court has inherent supervisory authority over criminal procedure within Nevada's trial

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[2]Examples provided by other jurisdictions and commentators suggest a variety of approaches, ranging from declaring such information off-limits to the prosecution except on motion with the results to be shared with the defense, *see State v. Bessenecker*, 404 N.W.2d 134, 139 (Iowa 1987) (of note, Artiga-Morales did not argue to the district court or on appeal that the prosecution's accessing the jurors' criminal histories exceeded its authority under NRS 179A.100), to adopting a variant of Massachusetts General Law, ch. 234A § 33 (2009), which authorizes "[t]he court, the office of jury commissioner, and the clerk of court . . . to inquire into the criminal history records of grand and trial jurors for the limited purpose of corroborating and determining their qualifications for juror service," to adopting a variant of Rule 421 of the Uniform Rules of Criminal Procedure, which makes it the duty of the prosecuting attorney, on the defendant's written request, to allow access to various materials, including "reports on prospective jurors," to doing nothing at all given the depth and range of publicly available information on the Internet today.

courts. *See Halverson v. Hardcastle*, 123 Nev. 245, 261-62, 163 P.3d 428, 440 (2007) (indicating that this court has "inherent power to prevent injustice and to preserve the integrity of the judicial process"); *State v. Second Judicial Dist. Court*, 116 Nev. 953, 968, 11 P.3d 1209, 1218 (2000) (holding that this court has inherent authority to regulate procedure in criminal cases). Under this authority, when a practice or procedure creates an inequality between adverse parties that reflects on the fairness of the criminal process, we have the inherent duty to correct such disparity.

The instant case demonstrates the prejudice and lack of fairness that results when the prosecution fails to disclose veniremember information. During voir dire, the prosecution used its exclusive knowledge regarding the criminal history of a veniremember's son as the basis for her examination and subsequent peremptory challenge. Meanwhile, defense counsel, without access to the same information, was unable to verify the truthfulness of the veniremember's answers or develop independent questions suggested by the omitted information. I am at a loss to explain why the prosecution should be granted such an advantage over the defense; principles of fairness and justice require that it be provided to defense counsel.

A growing number of jurisdictions permit defense counsel to review veniremember information available exclusively to the prosecution. *Tagala v. State*, 812 P.2d 604, 612 (Alaska Ct. App. 1991) ("Our sense of fundamental fairness requires placing defendant upon an equal footing . . . ." (internal quotation omitted)); *People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) ("[A] trial judge will have discretionary authority to permit defense access to jury records and reports of investigations available to the prosecution."), *superseded on other grounds by statute as stated in People v. Boyd*, 700 P.2d 782, 790 (Cal. 1985); *Losavio v. Mayber*, 496 P.2d 1032, 1035 (Colo. 1972) ("The requirements of fundamental fairness and justice dictate" allowing defense counsel access to criminal histories of veniremembers.); *State v. Bessenecker*, 404 N.W.2d 134, 138 (Iowa 1987) ("[C]onsiderations of fairness and judicial control over the jury selection process requires" equal access to juror information.); *Commonwealth v. Smith*, 215 N.E.2d 897, 901 (Mass. 1966) ("The public interest in assuring the defendant a fair trial is, we think, equal to the public interest in assuring such a trial to the Commonwealth."); *State v. Goodale*, 740 A.2d 1026, 1031 (N.H. 1999) ("We disagree that the defendant had no interest in knowing the criminal histories of the potential replacement jurors."). I believe that Nevada should follow suit.

I am extremely concerned about the unintended consequences that the majority disposition produces. It is not uncommon for the criminal defense bar as well as the Nevada prosecutors to read, reread, digest, and analyze every disposition, whether opinion or order

of this court, to facilitate preparation of their tactics and strategies for their upcoming trials. What the majority disposition will cause is extensive use of jury questionnaires in many more cases than are used today, extensive use of Facebook, Google, and the like to find out "who is that person on the petit jury panel," investigators talking to and interviewing neighbors and coemployees of potential jurors, and even the use of a "war room" that is portrayed in John Grisham's book and movie *Runaway Jury*. Is this what will occur to "even the playing field" and bring basic fairness to the administration of the criminal justice system in our state? Even the majority concedes that other jurisdictions have mandated the sharing of jury information in criminal cases. Why should Nevada be different when it comes to basic fairness?

For these reasons, I would reverse Artiga-Morales's conviction and grant him a new trial.

PAUL GUILFOYLE, AN INDIVIDUAL; AND CITYPOINT, LLC, A NEW YORK LIMITED LIABILITY COMPANY, APPELLANTS, *v.* OLDE MONMOUTH STOCK TRANSFER CO., INC., RESPONDENT.

No. 60478

October 2, 2014 335 P.3d 190

Appeal from a district court order granting summary judgment. Eighth Judicial District Court, Clark County; Kathleen Delaney and Susan Scann, Judges.

Stockholder filed action against stock transfer agent, alleging claims for violations of statutes governing transfer of securities, negligent and fraudulent misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy. The district court granted summary judgment in favor of agent. Stockholder appealed. The supreme court, PICKERING, J., held that: (1) stockholder did not present request that restrictive legend be removed, as was required by statute; (2) agent did not make negligent or fraudulent misrepresentation; and (3) stockholder failed to establish that there was an agreement between corporation and agent to harm stockholder, as was required for conspiracy claim.

Affirmed.

Gordon Silver and *Michael N. Feder* and *Joel Z. Schwarz*, Las Vegas; *Goodwin Procter, LLP*, and *Lloyd Winawer*, Menlo Park, California, for Appellants.

Lionel Sawyer & Collins and *Charles H. McCrea, Jr.*, and *Ketan D. Bhirud*, Las Vegas, for Respondent.

1. Appeal and Error.
   When the district court resolves a case on summary judgment, the supreme court's review is de novo, and it takes the facts and the reasonable inferences to be drawn from them in the light most favorable to the nonmoving party. NRCP 56.
2. Appeal and Error.
   In reviewing the grant of summary judgment, the supreme court will affirm if the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law; conjecture and speculation do not create an issue of fact. NRCP 56.
3. Corporations and Business Organizations.
   Stockholder did not present request that stock transfer agent remove restrictive legend from shares, and thus agent did not violate statute requiring agent to, on proper request, register transfer of securities without unreasonable delay, even though broker had called agent to request name of corporate counsel from whom legal opinion regarding removal of legend could be sought and agent failed to disclose internal procedures for deeming requests approved without opinion from corporate counsel; stockholder and broker did not present shares to agent or ask that restrictive legend be removed, broker did not identify stockholder or his circumstances, agent furnished requested counsel information, and failure to disclose internal procedures was not legal equivalent of failure to timely process a request to remove a legend. NRS 104.8401, 104.8407.
4. Fraud.
   Stock transfer agent, who gave truthful answer to broker's request for name of corporate counsel from whom agent would accept legal opinion regarding removal of restrictive legend from stockholder's shares, did not make negligent or fraudulent misrepresentation when agent failed to tell broker about internal procedures for deeming requests approved without opinion from corporate counsel; information regarding internal procedures did not need to be volunteered during short telephone call with broker, who did not identify herself, evidence was presented that agent had processed several requests to have legends removed during relevant time period and that it would have processed stockholder's request in the same way if it had received such a request, and there was no special relationship giving rise to duty of full disclosure between the parties. Restatement (Second) of Torts § 551(2)(a), (c), (d).
5. Fraud.
   Negligent misrepresentation and fraudulent misrepresentation both require that the defendant supply false information or make a false representation.
6. Fraud.
   Even if corporation breached a fiduciary duty to stockholder, stockholder failed to establish that stock transfer agent knowingly and substantially participated in or encouraged corporation's breach, as was required for stockholder's claim for aiding and abetting breach of fiduciary duty; stockholder presented no evidence that agent knew about corporation's lack of responsiveness to stockholder, let alone that it knowingly participated in or encouraged corporation's actions.

7. Fraud.
   Aiding and abetting the breach of a fiduciary duty has four required elements: (1) there must be a fiduciary relationship between two parties, (2) that the fiduciary breached, (3) the defendant third party knowingly and substantially participated in or encouraged that breach, and (4) the plaintiff suffered damage as a result of the breach.
8. Conspiracy.
   Stockholder failed to present direct or circumstantial evidence of agreement between corporation and stock transfer agent to harm stockholder, and thus agent's alleged actions in misleading stockholder regarding procedures for removing restricted legend from shares could not constitute conspiracy with corporation; even though evidence was presented that corporation asked agent to restrict certain shareholders from transferring shares, stockholder was not one of those shareholders, and there was no evidence in record suggesting that agent would not have processed a legend removal request on stockholder's behalf in due course, as it had for several other shareholders during the relevant time period.
9. Conspiracy.
   Actionable civil conspiracy arises where two or more persons undertake some concerted action with the intent to accomplish an unlawful objective for the purpose of harming another, and damage results; thus, a plaintiff must provide evidence of an explicit or tacit agreement between the alleged conspirators.
10. Judgment.
    Summary judgment is appropriate in an action for civil conspiracy if there is no evidence of an agreement or intent to harm the plaintiff.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

We consider the liability of a stock transfer agent to a stockholder for giving an allegedly incomplete and misleading answer to a question about its requirements for removing a restrictive legend on his stock. Under NRS 104.8401 and NRS 104.8407 a transfer agent must, on proper request, register a transfer of securities without unreasonable delay. But these statutes do not support liability here because the stockholder did not ask the transfer agent to remove the legend and reissue him clean shares and, without a request to act, the agent's statutory duty to register a requested transfer does not arise. The stockholder's common law claims also fail, because they are not supported by competent evidence. We therefore affirm summary judgment for the transfer agent.

I.

Appellants Paul Guilfoyle and Citypoint, LLC (collectively Guilfoyle), held stock in Pegasus Wireless Corp., a Nevada corporation.

Respondent Olde Monmouth Stock Transfer Co., Inc. was the transfer agent for Pegasus. Guilfoyle's stock carried the following legend restricting its sale: "The shares represented by this certificate have not been registered under the Securities Act of 1933, as amended and may not be sold or transferred without registration under said Act or an exemption therefrom." Guilfoyle believed that he had held the stock long enough and met the other requirements needed to qualify his stock for an exemption from registration under Securities and Exchange Commission (SEC) Rule 144,[1] and he asked John Lechner, a restricted securities client advisor at Deutsche Bank Securities, Inc. (DBS), about removing the restrictive legend so the stock could be resold. Lechner in turn asked Barbara Walters, a DBS employee, to look into it. Walters located a telephone number and email address for Pegasus and left word that she wanted "their corporate counsel information . . . [s]o that we [could] request an opinion to remove the legend."

Key to this appeal, Walters also called and spoke to someone at Olde Monmouth, Pegasus's transfer agent. Walters' call to Olde Monmouth was essentially anonymous. She did not identify herself, the company she worked for, or Guilfoyle, saying only that she was calling from a brokerage firm about a client holding restricted Pegasus stock. Olde Monmouth has no record of the call, and Walters has given varying accounts of it. In her deposition, Walters testified that she said "we were looking to locate corporate counsel" information for Pegasus; in the affidavit she furnished Guilfoyle, Walters avers that she asked Olde Monmouth "to provide the name of counsel from whom it would accept a legal opinion that the restrictive legends could be removed from Pegasus stock certificate." Either way, Olde Monmouth responded by giving her the name and contact information for a lawyer named John Courtade, whom Pegasus had written Olde Monmouth several weeks earlier to designate as its counsel for legend removals under SEC Rule 144.

According to Walters, her telephone conversation with Olde Monmouth was brief, lasting "[m]aybe longer than a minute, not longer than five." When the call ended, Walters called Courtade. He expressed surprise that someone at Olde Monmouth had given her his name and said he could not provide an opinion letter unless directed to do so by Pegasus. Walters did not call Olde Monmouth back to tell them about Courtade's rebuff or communicate with Olde Monmouth again concerning Pegasus stock.

Olde Monmouth has internal written "procedures for removing legends under Rule 144," which, not surprisingly, draw on the

[1]Rule 144 provides a safe harbor under section 4(1) of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq*., and permits shareholders to sell their restricted securities, provided they meet certain conditions, including volume and holding period limitations, and adequate public information is available. 17 C.F.R. § 230.144 (2013).

Uniform Commercial Code (UCC) provisions governing securities transfers and SEC Rule 144 as written at the time the events in this case occurred. *See infra* note 2. The procedures require that a registered broker/dealer present the share certificates, properly endorsed, to Olde Monmouth with supporting signature guarantees and documents, including "a completed copy of signed and filed Forms 144," and a seller's certification "stating that the shareholder is not an affiliate of the issuer, nor has been for the preceding 90 days, and that the shares have been beneficially held for at least one year." Additionally, "[t]he share certificate(s) should be accompanied by a legal opinion from the Issuer['s] SEC attorney (stating that the sale is not in violation but in fact is in compliance with the exemption from registration requirements of Federal Securities laws)." If all criteria are met, Olde Monmouth "shall immediately remove the legend from the shares and transfer the shares into 'street name.'" If the request arrives otherwise complete but with no supporting legal opinion, the procedures direct that it be forwarded to the issuer's SEC attorney with a request for "the appropriate legal opinion." Should a request arrive supported by "a legal opinion from someone other than the Issuer's SEC Attorney (an 'outside opinion')," again, the procedures direct that Olde Monmouth "forward all [the] documents to and request [the appropriate] legal opinion from the Issuer's SEC Attorney." Finally, if "the Issuer's SEC Attorney has not responded to the request for approval of the outside legal opinion after 15 days," Olde Monmouth will process the legend removal request based on the outside opinion.

Olde Monmouth did not disclose these internal procedures to Walters or mention that Courtade was the fourth in a series of lawyers Pegasus had designated as SEC counsel over the past year. But DBS client adviser Lechner was a "major player in restricted securities" and Walters, whose job was to "assist in obtaining legend removals from stock," already knew that a Rule 144 opinion from outside counsel might be used to support a request for legend removal. This is shown by Walters' email to Lechner sent the day she spoke to Olde Monmouth and Courtade, wherein Walters relates her lack of success rousing anyone at Pegasus, her unhelpful conversation with Courtade, and a pending dispute between Pegasus and an affiliate's co-founder, Tsao, over Tsao's restricted stock. Noting the lack of industry consensus at that time (2006) over legend removal not connected to an actual sale, she suggests Guilfoyle (and Citypoint) "may want to solicit their own counsel to render an opinion to remove the legend under 144(k)."[2]

[2]In February 2008, subsection 144(k) was eliminated and substantively similar provisions were added to other parts of SEC Rule 144. *See* 17 C.F.R. § 230.144(b)(1)(i) (2013). The facts giving rise to this suit predated these amendments.

Guilfoyle never submitted his shares to Olde Monmouth with a request to remove the legend. Nor, from what appears, did he bring his shares to his broker, DBS, or complete DBS's form "request for removing a restrictive legend," so DBS could initiate the process. He also did not pursue a Rule 144 opinion from independent counsel. DBS's records show that Walters and another DBS employee called and emailed Pegasus several more times, to no avail. Meanwhile, Pegasus stock plummeted, rendering Guilfoyle's stock essentially valueless.

Sometime later, the SEC learned that two of the principal officers of Pegasus had defrauded investors by, among other things, issuing shares to their relatives and falsely reporting that the shares went to pay off outstanding promissory notes that, in fact, were backdated and bogus, thus diluting the value of legitimate investors' shares. The SEC pursued the officers civilly and criminally, ultimately obtaining a consent decree and convictions.

Guilfoyle sued Pegasus and its defalcating officers and recovered judgment against them. When Pegasus filed bankruptcy, Guilfoyle commenced suit against Olde Monmouth. His theory was (and is) that Olde Monmouth misled Walters into believing only an opinion letter from Pegasus's corporate counsel would do when, in fact, Olde Monmouth would have accepted an opinion letter from independent counsel and removed the legend if Pegasus proved nonresponsive; removing the legend, Guilfoyle alleges, would have enabled him to sell his shares before their value fell. He also faults Olde Monmouth for not advising Walters that Courtade had only recently been named and was the fourth in a series of counsel Pegasus had designated over the preceding year. On these bases, Guilfoyle asserted claims for: (1) violation of NRS 104.8401 and NRS 104.8407; (2) negligent and fraudulent misrepresentation; (3) aiding and abetting Pegasus's officers' breach of fiduciary duty; and (4) conspiracy.

After discovery and amendment of the pleadings, the district court granted Olde Monmouth's motion for summary judgment. Guilfoyle appeals.

II.

[Headnotes 1, 2]

Because the district court resolved this case on summary judgment, our review is de novo and we take the facts and the reasonable inferences to be drawn from them in the light most favorable to the nonmoving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). We will affirm if the record, viewed in that light, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. NRCP 56. "Conjecture and speculation do not create an issue of fact." *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 247, 255 P.3d 209, 212 (2011).

A.

At common law, "a transfer agent [could not] be held liable to a stockholder in damages for . . . failure to act to remove [restrictive] legends," or refusal to register a requested stock transfer. *Kenler v. Canal Nat'l Bank*, 489 F.2d 482, 485 (1st Cir. 1973). "Such failure or refusal was merely nonfeasance for which the . . . agent was liable to the corporation alone, and for which [the corporation] in turn was liable to those injured thereby, because a stock transfer agent owed no duty to a shareholder." 12 William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 5525 (2004). Article 8 of the UCC, enacted in Nevada as NRS 104.8101 through NRS 104.8511, partially abrogates the common law as to transfer agents. *See* UCC § 8-407 cmt. 1 (1994). It makes a transfer agent's duty the same as an issuing corporation's in performing the statutory functions involved in processing a request to register a transfer of securities. NRS 104.8407.[3]

[Headnote 3]

Guilfoyle asserts that Olde Monmouth violated its statutory duties to him under the UCC. Since NRS 104.8407 defines a transfer agent's duty in terms of an issuer's, we look to NRS 104.8401, entitled "[d]uty of issuer to register transfer," in assessing Guilfoyle's UCC claim. Under NRS 104.8401, "[i]f a certificated security in registered form is presented to an issuer with a request to register transfer," the issuer "shall register the transfer" provided the following criteria are met:

> (a) Under the terms of the security, the person seeking registration of transfer is eligible to have the security registered in his or her name;
>
> (b) The endorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;
>
> (c) Reasonable assurance is given that the endorsement or instruction is genuine and authorized;
>
> (d) Any applicable law relating to the collection of taxes has been complied with;
>
> (e) The transfer does not violate any restriction on transfer imposed by the issuer in accordance with NRS 104.8204;
>
> (f) A demand that the issuer not register transfer has not become effective under NRS 104.8403, or the issuer has

[3]Like UCC § 8-407 (1994), NRS 104.8407 provides: "A person acting as . . . transfer agent . . . for an issuer in the registration of a transfer of its securities, in the issue of new security certificates or uncertificated securities or in the cancellation of surrendered security certificates has the same obligation to the holder or owner of a certificated or uncertificated security with regard to the particular functions performed as the issuer has in regard to those functions."

> complied with subsection 2 of that section but no legal process or indemnity bond is obtained as provided in subsection 4 of that section; and
>
> (g) The transfer is in fact rightful or is to a protected purchaser.

"If any of the preconditions do not exist, there is no duty to register transfer." UCC § 8-401 cmt. 1 (1994); *see also Catizone v. Memry Corp.*, 897 F. Supp. 732, 736 (S.D.N.Y. 1995) (a transfer that violates the federal securities laws "cannot be considered rightful," meaning that a transfer agent "has no duty to register a transfer" in that instance). But if the statutory terms are met, so that "[the] issuer is under a duty to register a transfer of a security, the issuer is liable to the person presenting a certificated security . . . or his or her principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer." NRS 104.8401(2).

The phrase "request to register transfer" in NRS 104.8401(1) applies to a request to remove a restrictive legend from a person's shares, equally with its more obvious object of a request to register a transfer of shares from one person to another. The "realities of the securities transfer process" are such that "[w]here certificated stock is transferred, the issuance of a new certificate to the transferee is normally an integral step in that process. And where the stock is restricted, the issuance of a new, clean certificate to the transferor is normally the essential first step." *Bender v. Memory Metals*, *Inc*., 514 A.2d 1109, 1115 (Del. Ch. 1986). Thus, "even without a request to register a transfer of the underlying stock, the issuer's duty"—and, by extension, a transfer agent's duty—"to register a transfer of shares under Section 8-401 extends to a request to issue to the owner a new clean certificate for the same amount of shares." J. William Hicks, *Resales of Restricted Securities* § 4:5 (2014) (discussing UCC § 8-401 (1994)).

While NRS 104.8401(1) *can* apply to legend removal requests, it does not apply here because Walters' brief telephone call with Olde Monmouth did not meet the statute's requirements for a "request to register transfer." The statutory "duty to register transfers exists only if: a registered security is presented to it; the certificate is accompanied by a request to register the transfers; and the requestor has satisfied the preconditions that subsection 8-401(1) authorizes the issuer to impose before registering the transfer." 7 Frederick H. Miller, *Hawkland Uniform Commercial Code Series* § 8-401:02 (2013). Presentation of a properly supported "request to register transfer" (or here, request to remove a legend) is the sine qua non of an NRS 104.8401 claim: "Perhaps the most obvious requirement that must be satisfied before the . . . duty to register a transfer arises [is] that the certificate be presented." *Id.* And, the other conditions

stated in NRS 104.8401(1) must be satisfied as well. *See Kolber v. Body Central Corp.*, 967 F. Supp. 2d 1061, 1066 (D. Del. 2013) (the issuer was not obligated to respond to a shareholder's emails before the shareholders actually requested legend removal backed by a Rule 144 opinion as required by the restrictive legend in that case); *Schloss v. Danka Bus. Sys., PLC*, No. Civ. 0817 (DC), 2000 WL 282791, at *7 (S.D.N.Y. Mar. 16, 2000) (dismissing complaint where the shareholders "did not allege that they presented the stock certificates in transferable form[;] there was no duty on defendants to transfer shares with restrictive legends on them"); *Merkens v. Computer Concepts Corp.*, 76 F. Supp. 2d 245, 250 (E.D.N.Y. 1999) (under Delaware law, which adopts the UCC, the issuer is not required to register a transfer until it receives the signature guarantee required by Del. Code Ann. tit. 6, §§ 8-401(1)(b) and 8-402 (1995));[4] *Nash v. Coram Healthcare Corp.*, No. 96 Civ. 0298 (LMM), 1996 WL 363166, at *3 (S.D.N.Y. June 28, 1996) (dismissing shareholder complaint alleging breach of duty to register a securities transfer where the shares were not presented for transfer).

Here, Guilfoyle did not meet *any* of the requirements of NRS 104.8401(1). Neither he nor his broker, DBS, presented his Pegasus shares to Olde Monmouth or asked Olde Monmouth to remove their restrictive legend. During her call with Olde Monmouth, Walters did not identify Guilfoyle or his circumstances, so Olde Monmouth would have had no way of knowing whether Guilfoyle could meet the requirements in NRS 104.8401(1) (much less the registration exemption requirements in SEC Rule 144). Viewing the facts in the light most favorable to Guilfoyle, the most that can be said is that Walters asked for "the name of counsel from whom it would accept a legal opinion that the restrictive legends could be removed" from an unknown number of Pegasus stock certificates. In response, Olde Monmouth furnished contact information for Pegasus's designated SEC counsel. Olde Monmouth was not statutorily obligated to do more. *See Kolber*, 967 F. Supp. 2d at 1066 (the issuer was not liable to the stockholder under the UCC where, after providing contact information for the issuer's attorney, it did not answer follow-up emails asking about specific procedures; the issuer did timely provide an opinion from corporate counsel).

Olde Monmouth's failure to disclose its internal procedures for dealing with outside counsel's opinions is not the legal equivalent of a refusal to timely process a request to register a transfer or remove a legend. The cases on which Guilfoyle relies for that proposition, principally *Bender* and *American Securities Transfer, Inc. v. Pantheon Industries, Inc.*, 871 F. Supp. 400, 403-04 (D. Colo. 1994),

[4]Del. Code. Ann. Tit. 6, § 8.401(1)(b) (1995) was renumbered in 1997 (71 Del. Laws, c. 75, § 1, eff. Jan. 1, 1988) to § 8.401(a)(3); the operative language remains identical.

are distinguishable. In both, the shareholder requested that the restrictive legend be removed and tendered the stock certificates for reissuance. *Bender*, 514 A.2d at 1118 (noting that "Bender presented her shares to [the issuer] to register the transfer"); *Pantheon*, 871 F. Supp. at 402 (noting that the shareholder "submitted the certificate to [the transfer agent] and requested that a new stock certificate be issued . . . without the restrictive legend"). The dispute was whether, given the competing demands and conflicting legal opinions, the transfer qualified as "rightful" in the meaning of UCC § 8-401(1). *Bender*, 514 A.2d at 1116-17; *Pantheon*, 871 F. Supp. at 402. In this case, by contrast, Guilfoyle and his broker, DBS, never engaged the statutory transfer process by submitting a transfer request. *Cf. Nash*, 1996 WL 363166, at *3 (distinguishing *Bender* and similar cases because "the shares in this instance were neither in registered form nor presented to the issuer" for transfer). Summary judgment on Guilfoyle's NRS 104.8401 and NRS 104.8407 claim thus was proper.

B.

As noted above, at common law a transfer agent's duty in respect to registering a transfer ran to the corporation, not the shareholder, so the transfer agent was not liable to the shareholder for mere nonfeasance. But "misfeasance," as distinguished from nonfeasance, "was at common law, and remains, a recognized basis for a lawsuit by a shareholder against a transfer agent." *Campbell v. Liberty Transfer Co.*, No. CV-02-3084, 2006 WL 3751529, at *17 (E.D.N.Y. Dec. 19, 2006).[5] Guilfoyle's negligent and fraudulent misrepresentation, aiding and abetting, and conspiracy claims arguably assert misfeasance, so we turn to them next.

1.

[Headnotes 4, 5]

In Nevada, negligent misrepresentation and fraudulent misrepresentation both require that the defendant supply "false information," *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) (stating the elements of a negligent misrepresentation claim, citing Restatement (Second) of Torts § 552 (1977)), or make a "false representation." *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (stating the elements of a fraudulent misrepresentation claim). Here, Olde Monmouth gave

[5]We express no opinion as to whether NRS 104.8401 and NRS 104.8407 displace the common law remedies available against a transfer agent for misfeasance. *Cf. Clancy Sys. Int'l, Inc. v. Salazar*, 177 P.3d 1235, 1239 (Colo. 2008) (holding that Colorado's UCC-based counterpart to NRS 104.8401 displaces common law claims against an issuer for wrongful delay or failure to process a request to register a transfer of securities).

a truthful answer to Walters' telephone inquiry for "the name of counsel from whom it would accept a legal opinion": John Courtade was Pegasus's designated counsel for SEC Rule 144 opinions; per its written internal procedures, Olde Monmouth (a) would not process a transfer request without soliciting approval from him as Olde Monmouth's designated SEC counsel; and (b) would accept an SEC 144 exemption opinion from Courtade.

Except for Courtade's contact information, Walters' phone conversation with Olde Monmouth approximates what Guilfoyle could have learned by consulting the SEC's website:

> Even if you have met the conditions of Rule 144, you can't sell your restricted securities to the public until you've gotten the legend removed from the certificate. Only a transfer agent can remove a restrictive legend. *But the transfer agent won't remove the legend unless you've obtained the consent of the issuer—usually in the form of an opinion letter from the issuer's counsel—that the restrictive legend can be removed*.

U.S. Securities and Exchange Commission, *Rule 144: Selling Restricted and Control Securities*, https://www.sec.gov/investor/pubs/rule144.htm (last visited Sept. 9, 2014) (emphasis added). Walters did not request more information and Olde Monmouth did not provide Walters "false information" or make a "false representation of fact" in response to the generic inquiry she made. That Olde Monmouth provided Walters correct information dispositively distinguishes *Nevada National Bank v. Gold Star Meat Co.*, *Inc.*, 89 Nev. 427, 430, 514 P.2d 651, 653 (1973), on which Guilfoyle relies, wherein the defendant bank's officer had attested as to a company's creditworthiness, even though the company was "not in fact a depositor in his bank and . . . he had no accurate means of assessing [its] credit status."

The "deemed approved" mechanism in Olde Monmouth's internal procedures for situations where an issuer's counsel ignores a forwarded request for legend removal based on an outside opinion for more than 15 days was not information Olde Monmouth needed to volunteer during a five-minute phone call from an unidentified brokerage firm employee. Guilfoyle suggests that Olde Monmouth deliberately sent Walters on a wild goose chase by giving her contact information for Courtade. But the uncontroverted evidence belies this allegation. Olde Monmouth presented competent evidence establishing that (1) it processed 26 requests to have legends removed from Pegasus shares during the relevant time period, 23 of which it honored and three of which it rejected as incomplete or assertedly not qualifying under SEC Rule 144; (2) it would have done the same for Guilfoyle if DBS had presented a request on his behalf; and (3) it had no agreement, tacit or express, with Pegasus not to process leg-

end removal requests from persons not part of its officers' fraudulent scheme. The high turnover in corporate counsel at Pegasus, while unusual, does not support that, when Walters called, Olde Monmouth knew or had reason to know that Courtade would refer her back to Pegasus and that Pegasus would not respond.[6] Guilfoyle's argument that, when Olde Monmouth spoke to Walters it knew it needed to disclose more than Courtade's name and contact information to prevent its statement from being misleading is conjectural and therefore fails. *Cf.* Restatement (Second) of Torts § 551(2)(b) (1977) (imposing a duty on a "party to a business transaction . . . to exercise reasonable care to disclose to the other before the transaction is consummated . . . matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading"). To the extent Guilfoyle relies on events that occurred after Walters' call to impose a duty to supplement its original response, he cannot prevail because, among other reasons, Walters did not identify herself or Guilfoyle to Olde Monmouth so Olde Monmouth could contact her. She also did not call Olde Monmouth again to ask for help when she ran into problems with Pegasus. *See id.* § 551(2)(c) & (d) (discussing duties of updated disclosure with respect to subsequently acquired facts).

Guilfoyle argues that Olde Monmouth and he, through Walters, had a special relationship giving rise to a duty of full disclosure. *See id.* § 551(2)(a) (stating duty of disclosure that arises by virtue of "a fiduciary or other similar relation of trust and confidence between" parties). The record offers no evidence to support this claim. Olde Monmouth did not step outside its role of transfer agent, *cf. Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152 (1972) (if the "bank had functioned merely as a transfer agent, there would have been no duty of disclosure here"); there was no "special relationship" by which Guilfoyle or Walters "reasonably impart[ed] special confidence in the defendant and the defendant would reasonably know of this confidence." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1486, 970 P.2d 98, 110 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001).

2.

[Headnotes 6, 7]

Aiding and abetting the breach of a fiduciary duty has four required elements: (1) there must be a fiduciary relationship between two parties, (2) that the fiduciary breached, (3) the defendant third party knowingly and substantially participated in or encouraged that

[6]The several transfer requests supported by outside opinions that Olde Monmouth forwarded to Courtade, to which Courtade did not object, were not acted on until after the Walters call.

breach, and (4) the plaintiff suffered damage as a result of the breach. *In re Amerco Derivative Litig.*, 127 Nev. 196, 225, 252 P.3d 681, 701-02 (2011); *Mahlum*, 114 Nev. at 1490, 970 P.2d at 112. Assuming Pegasus breached a fiduciary duty to Guilfoyle, Guilfoyle failed to present evidence that Olde Monmouth knowingly and substantially participated in or encouraged that breach. Guilfoyle presented no evidence to show that Olde Monmouth knew about Pegasus's lack of responsiveness to Walters, let alone that Olde Monmouth knowingly participated in or encouraged Pegasus's actions. Summary judgment thus was proper on Guilfoyle's civil aiding or abetting a breach of fiduciary duty claim.

3.

[Headnotes 8-10]

Finally, the record reveals no genuine issue of material fact as to Guilfoyle's civil conspiracy claim. Actionable civil conspiracy arises where two or more persons undertake some concerted action with the intent "to accomplish an unlawful objective for the purpose of harming another," and damage results. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). Thus, a plaintiff must provide evidence of an explicit or tacit agreement between the alleged conspirators. *Mahlum*, 114 Nev. at 1489, 970 P.2d at 112. Summary judgment is appropriate if there is no evidence of an agreement or intent to harm the plaintiff. *Consol. Generator-Nevada*, 114 Nev. at 1311, 971 P.2d at 1256.

Guilfoyle presented evidence that Pegasus asked Olde Monmouth to restrict certain shareholders (chiefly, the former co-founder of an affiliate, Tsao, and those related to him) from transferring shares, because, according to Pegasus, they did not qualify for exemption from the federal securities registration laws. In return, Pegasus agreed to indemnify Olde Monmouth for any damages arising out of Olde Monmouth's failure to lift the restrictive legend on these specific shareholders' stock certificates. However, Guilfoyle was not one of the shareholders Pegasus listed as restricted and nothing in the record suggests that Olde Monmouth would not have processed a legend removal request on his behalf in due course, as it did for more than 20 other Pegasus shareholders during the relevant time period.

Thus, even considering this evidence in the light most favorable to Guilfoyle, it does not show an issue of fact as to Guilfoyle's conspiracy claim. Although direct evidence of an agreement to harm the plaintiff is not required, Guilfoyle has presented no circumstantial evidence from which to infer an agreement between Pegasus and Olde Monmouth to harm Guilfoyle. *See Consol. Generator-Nevada*, 114 Nev. at 1307, 1311, 971 P.2d at 1253, 1256 (affirming summary judgment on the plaintiff's conspiracy claim because there was no

evidence that the two defendants had agreed and intended to harm the plaintiff, even where the defendants were aware that there were problems with the product purchased by plaintiff).

We therefore affirm the district court's grant of summary judgment in favor of Olde Monmouth.

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

KRISTIN E. HENSON, APPELLANT, *v.*
HOWARD HALE HENSON, RESPONDENT.

No. 62654

October 2, 2014 334 P.3d 933

Appeal from a district court order modifying a qualified domestic relations order and denying appellant's motion for a judgment on pension payment arrearages. Second Judicial District Court, Family Court Division, Washoe County; Bridget Robb Peck, Judge.

Husband sought to modify a qualified domestic relations order (QDRO), and former wife opposed the motion and moved for a judgment awarding her community property pension payments from the time husband became eligible to retire. The district court granted husband's motion to modify, and denied wife's motion for judgment. Wife appealed. The supreme court, CHERRY, J., held that: (1) the district court's amended QDRO did not constitute an impermissible modification of the divorce decree's division of the community property interests in husband's Public Employees Retirement System (PERS) pension benefits, and (2) former wife was not eligible to receive her portion of former husband's PERS pension benefits.

Affirmed.

[Rehearing denied December 16, 2014]

Todd L. Torvinen, Reno; *Richard F. Cornell*, Reno, for Appellant.

Rodney E. Sumpter, Reno, for Respondent.

1. DIVORCE.

The district court's amended qualified domestic relations order (QDRO) did not constitute an impermissible modification of the divorce decree's division of the community property interests in husband's Public Employees Retirement System pension benefits; the divorce decree did not specifically award former wife a survivor beneficiary interest, and thus, the original QDRO improperly designated former wife as husband's survivor beneficiary, and the amended QDRO correctly effectuated the divorce decree's division of property. NRS 286.551, 286.6768.

2. Divorce.

Because a district court's interpretation of a divorce decree presents a question of law, the supreme court reviews such an interpretation de novo.

3. Divorce.

Pursuant to the time rule set forth in *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), the district court must state in the divorce decree what interest, if any, the nonemployee spouse is to receive in a nonvested retirement pension and must direct when the interest shall be paid; the time rule permits the nonemployee spouse to receive his or her community share of the employee spouse's pension based upon the percentage of time the employee spouse was married and earning the pension.

4. Divorce.

The wait and see approach dictates that the community receives an interest in the pension ultimately received by the employee spouse, not simply the pension that would be recovered were the spouse to retire at the time of divorce; thus, the formula provided for under the time rule does not apply until the pension is distributed.

5. Divorce.

Former wife was not eligible to receive her portion of former husband's Public Employees Retirement System pension benefits because former wife never filed a motion requesting immediate payment of her portion of the benefits.

6. Divorce.

A nonemployee spouse seeking immediate payment of his or her share of the employee spouse's pension benefits must file a motion in the district court requesting to immediately begin receiving payment of his or her portion of the pension benefits; the district court must then determine the present value of the employee spouse's pension plan benefits, depending upon when the nonemployee makes his or her election, before determining the amount the nonemployee spouse will receive.

Before the Court En Banc.[1]

OPINION

By the Court, Cherry, J.:

In this appeal, we are asked to consider whether a nonemployee spouse is entitled to survivor benefits if, in a divorce decree, he or she is allocated a community property interest in the employee spouse's Public Employees Retirement System (PERS) pension plan. We are also asked to consider whether the nonemployee spouse must file a motion in the district court to immediately begin receiving his or her community property interest in the PERS pension plan when the employee spouse has reached retirement eligibility but has not yet retired.

We hold that, unless specifically set forth in the divorce decree, an allocation of a community property interest in the employee spouse's pension plan does not also entitle the nonemployee spouse

[1]The Honorable James W. Hardesty, Justice, voluntarily recused himself from participation in the decision of this matter.

to survivor benefits. We further conclude that, because there are varying times at which a nonemployee spouse may elect to begin receiving his or her portion of the community property interest in the employee spouse's pension benefits, the nonemployee spouse must first file a motion in the district court requesting immediate receipt of those benefits.

FACTS AND PROCEDURAL HISTORY

Howard Henson and Kristin Henson were married in September 1984. The parties filed for divorce in November 1992, and in July 1995, the district court entered a divorce decree resolving community property and support issues. Of interest in this case, the court applied the "time rule" and the "wait and see" approach, in accordance with *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990), to divide Howard Henson's PERS pension equally between the parties. The parties, however, did not provide to PERS, at that time, documentation or information so that Kristin's interest in Howard's PERS retirement account could eventually be disbursed.

At the request of Kristin and without notice to Howard, the district court entered a qualified domestic relations order (QDRO) pursuant to NRS 286.6768 on January 21, 1999, regarding Kristin's interest in Howard's PERS pension benefits. The QDRO recognized Howard as the participant in PERS, Kristin as the alternate payee, and the existence of the alternate payee's right to receive a portion of Howard's benefits. Paragraph 8, section B of the QDRO also mandated that PERS pay Kristin, in accordance with NRS 286.590(1), "FIFTY PERCENT (50%) multiplied by the number of the Participant's years of credited service in PERS earned during the marriage divided by the number of his total years of credited service." Under paragraph 8, Kristin was allocated a portion of Howard's pension, including a survivor beneficiary interest, upon a selection of Option 2 under NRS 286.590.

Paragraph 10 of the QDRO further provided that "[i]f the Participant dies before the Alternate Payee begins receiving benefits in accordance with the Plan selected and a distribution of contributions is available from the account of the Participant, the Alternate Payee shall receive 50 [percent] of the available distributed refund." Finally, paragraph 11 of the QDRO provided that the district court would retain "jurisdiction to amend th[e QDRO] for the purpose of establishing or maintaining its qualification, or for purposes of subsequent modification or amendment as required."

Howard has remarried, and the language in the QDRO precludes him from designating his current spouse as his survivor beneficiary. Therefore in 2011, Howard filed a motion to modify the QDRO. Howard argued that the QDRO originally entered by the district court in 1999 did not effectuate the division in the divorce decree

because it gave Kristin a survivor beneficiary interest. Kristin opposed the motion and moved for a judgment awarding her the community property pension payments she could have received since the time Howard became eligible to retire. Kristin claimed that Howard was eligible to retire and receive his PERS benefits in June 2003 but he elected not to retire at that time, and therefore, he was required to pay her the portion of his PERS benefits that she would have received since June 2003. The district court granted Howard's motion to modify the QDRO and denied Kristin's motion for judgment. This appeal followed.

DISCUSSION

In resolving this appeal, we must consider whether the district court's amended QDRO was an impermissible modification of the divorce decree's division of community property. We further consider whether the district court erred when it denied Kristin's motion to reduce to judgment the amount she could have received as her community property interest in Howard's PERS pension benefits since he was eligible to retire in 2003.

The amended QDRO was not an impermissible modification of the divorce decree's division of property

[Headnote 1]

The parties disagree over whether the divorce decree allowed Kristin to be named as Howard's survivor beneficiary, and thus, the parties disagree whether the district court's modifications to the QDRO impermissibly altered the divorce decree's property division. Kristin argues that the divorce decree intended her to be the alternate payee and the survivor beneficiary because the order specifically applied the "time rule" and "wait and see" approaches. Kristin further contends that NRS 286.6703, the statute setting forth the requirements for a QDRO, permits a former spouse to be named as a survivor beneficiary and that NRS 286.6768, which addresses the PERS requirements for survivor benefits, only requires that the employee spouse have 10 years of service at death, not at the time the QDRO is entered.[2] Howard argues that the divorce decree did not designate Kristin as the survivor beneficiary, and that the district court's order amending the QDRO effectuated the divorce de-

[2]NRS 286.6768 states, in pertinent part, as follows:

> 1. Except as otherwise provided in subsection 2 and as limited by subsection 4, the survivor beneficiary of a deceased member who had 10 or more years of accredited contributing service is entitled to receive a monthly allowance equivalent to that provided by:
>
> . . . .
>
> (b) Option 2 in NRS 286.590, if the deceased member had 15 or more years of service on the date of the member's death.

cree.[3] Howard further contends that the first QDRO did not conform to the divorce decree because the election of Option 2 under NRS 286.6768(1)(b) expanded Kristin's interest into a lifetime benefit and precluded him from designating his new spouse as his survivor beneficiary.

The relevant portion of the divorce decree provides as follows:

> [T]he PERS account is divided equally between the parties. Unless the parties agree otherwise, the pension will be divided in accordance with the "time rule" and the "wait and see" approach set forth in *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989) and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[Headnote 2]

Because a district court's interpretation of a divorce decree presents a question of law, this court reviews such an interpretation de novo. *See Ormachea v. Ormachea*, 67 Nev. 273, 291-92, 217 P.2d 355, 364-65 (1950) (providing that a district court's construction and interpretation of the legal operation and effect of one of its divorce decrees presents a question of law); *Nev. Classified Sch. Emps. Ass'n v. Quaglia*, 124 Nev. 60, 63, 177 P.3d 509, 511 (2008) ("We review questions of law de novo."); *see also In re Georgakilas*, 956 A.2d 320, 321 (N.H. 2008) ("In interpreting the meaning of a divorce decree, we review the decree *de novo*.").

[Headnotes 3, 4]

Pursuant to the "time rule" set forth in *Gemma*, the district court must state in the divorce decree what interest, if any, the nonemployee spouse is to receive in a nonvested retirement pension and must "direct[ ] when the interest shall be paid." 105 Nev. at 461-62, 778 P.2d at 431. The "time rule" permits the nonemployee spouse to receive his or her community share of the employee spouse's pension based upon the percentage of time the employee spouse was married and earning the pension.[4] *Id*. at 461, 778 P.2d at 431. The

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[3]Howard also argues on appeal, and the district court found, that Kristin failed to serve him with proper notice when the QDRO was initially entered. We agree. NRCP 5(a) requires that "every written motion . . . , and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties." And, while the district court entered the amended QDRO because it concluded that Howard did not receive proper notice or have time to respond when the QDRO was entered, that the QDRO contained legal and factual errors, and that PERS was enforcing the QDRO in a manner that was both inequitable and outside the scope of the divorce decree, "[t]his court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

[4]The community share of retirement benefits under the "time rule" is usually calculated by taking the actual pension plan, multiplying it by a fraction—the numerator is the number of months married and the denominator is total number

"wait and see" approach dictates that the community receives "an interest in the pension *ultimately received by the employee spouse*, not simply the pension that would be recovered were the spouse to retire at the time of divorce." *Fondi*, 106 Nev. at 859, 802 P.2d at 1266 (citing *Gemma*, 105 Nev. at 462, 778 P.2d at 432). Thus, the formula provided for under the "time rule" does not apply until the pension is distributed. *Id.*

When modifying the QDRO here, the district court cited NRS 125.155(1) in concluding that the value of the community property interest in the PERS pension benefits must be based upon the number of years Howard was employed and earning the pension and not on the value of "'any estimated increase in the value'" (quoting NRS 125.155(1)). The district court further reasoned that, pursuant to NRS 286.6768, Kristin could not have a survivorship interest in the pension because Howard did not accrue a survivor beneficiary interest during the marriage. Therefore, the amended QDRO provides that PERS is to pay Kristin "as if [Howard] selected 'Option 1' with regard to his pension benefit. However, [Howard] can choose a retirement option and beneficiary, upon retirement, with the benefit to [Kristin] being calculated based on an unmodified benefit."

Initially, we note that the district court improperly relied on NRS 125.155(1) in amending the QDRO because that statute was not in effect when the divorce decree was entered.[5] Therefore, we must consider whether the divorce decree awarded Kristin a survivor beneficiary interest because a QDRO must conform to the divorce decree. *Shelton v. Shelton*, 201 S.W.3d 576, 580 (Mo. Ct.

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of months worked and earning the pension—and then dividing the resulting number by two. *Gemma v. Gemma*, 105 Nev. 458, 460 n.1, 461, 778 P.2d 429, 430 n.1, 431 (1989).

[5]NRS 125.155 became effective on July 5, 1995, which was after the parties' divorce decree was entered in June 1995 but before entry of the QDRO in January 1999. 1995 Nev. Stat., ch. 576, § 1, at 1968. NRS 125.155(3) provides that "[i]f a party receives an interest in or an entitlement to a pension or retirement benefit which the party would not otherwise have an interest in . . . if not for a [divorce] disposition . . . , that interest or entitlement terminates upon the death of either party." The only exceptions to this rule are when, pursuant to "[a]n agreement of the parties[,] or . . . [a]n order of the court, a party who is a participant in [PERS] . . . provides an alternative to an unmodified service retirement allowance." NRS 125.155(3)(a)-(b). Thus, under NRS 125.155(3), any interest in a PERS pension plan will terminate upon death unless a survivorship interest is specifically awarded.

Nevertheless, because statutes apply prospectively unless clearly indicated otherwise by the Legislature, *Madera v. State Industrial Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998), and nothing in the legislative history suggests that the Legislature intended NRS 125.155 to apply retrospectively, NRS 125.155 does not apply here, and the division of the community property interests in the PERS pension benefits is controlled by the divorce decree. Therefore, the underlying issue of whether a former spouse can take a survivor beneficiary interest in a PERS pension plan only arises in divorce decrees entered before July 5, 1995.

App. 2006). We have previously concluded that a former spouse is entitled to a percent of the pension "*ultimately received by the employee spouse*," *Fondi*, 106 Nev. at 859, 802 P.2d at 1266, and neither the divorce decree nor the QDRO here based its award on an "estimated increase in value." The divorce decree did not specifically award Kristin a survivor beneficiary interest; rather, the divorce decree specified that the pension would be "divided in accordance with the 'time rule' and the 'wait and see' approaches pursuant to *Gemma* and *Fondi*." Thus, Kristin would have only been entitled to a survivor beneficiary interest in Howard's pension under the divorce decree if we were to interpret the term "pension" in this case to also include a survivor beneficiary interest. We decline to do so.

Pursuant to NRS 286.551, PERS first calculates the employee spouse's unmodified service retirement allowance—the amount the retired employee will receive monthly from PERS for the rest of his or her life. The employee spouse is permitted, as was the case in 1995, to select a number of alternatives to the unmodified service retirement allowance, some of which may include a survivor beneficiary interest. NRS 286.590. If the employee spouse selects an option with a survivor beneficiary interest, then the employee spouse's monthly retirement allowance decreases. *See, e.g.*, NRS 286.590(1) (providing that an employee can choose a reduced monthly service retirement allowance that will continue to be paid to the employee's beneficiary after the employee's death). The employee spouse, however, is not required to select an option with a survivor beneficiary interest. *See* NRS 286.590. Thus, neither the employee nor the nonemployee spouse automatically receives a survivor beneficiary interest, and the only pension benefit the nonemployee spouse is guaranteed to receive is his or her community property interest in the unmodified service retirement allowance calculated pursuant to NRS 286.551 and payable through the life of the employee spouse.

In this situation, in order for the QDRO to effectuate the divorce decree, Kristin's community property interest in Howard's pension should have been calculated pursuant to the formula set forth in *Gemma*, 105 Nev. at 461, 778 P.2d at 431. If Howard elects to choose an option that includes a survivor beneficiary other than Kristin, and therefore lower his monthly retirement allowance, it should have no impact on the amount Kristin receives as her portion of the community property interest in Howard's PERS benefits. Because the divorce decree did not explicitly provide Kristin with a survivor beneficiary interest, she is not entitled to one, and thus, the original QDRO improperly designated Kristin as Howard's survivor beneficiary. Therefore, we conclude that the amended QDRO correctly effectuates the divorce decree's division of property.[6]

[6]Because we conclude that the district court's amended QDRO did not modify the parties' interests in the community property as provided in the divorce

The district court did not err in denying Kristin's motion for judgment [Headnote 5]

Kristin argues that the district court erred when it denied her motion to reduce to judgment the amount that she was entitled to receive of her interest in Howard's PERS pension benefits since 2003. She contends that Howard was required to pay her those benefits upon his retirement eligibility pursuant to *Sertic v. Sertic*, 111 Nev. 1192, 1194, 901 P.2d 148, 149-50 (1995) (stating that an alternate payee former spouse may claim his or her interest in the employee spouse's pension when the employee spouse is eligible to retire). Howard argues that *Sertic* is inapplicable because Kristin was asking for arrearages in payments that Howard was not required to pay.

This court has previously addressed when a nonemployee former spouse has a right to his or her share of the community property portion of the employee former spouse's pension and concluded that the nonemployee spouse may receive his or her share at the time of the divorce trial, when the employee spouse is eligible to retire even if the employee spouse does not retire, or when the employee spouse actually retires. *Gemma*, 105 Nev. at 460 n.1, 778 P.2d at 430 n.1; *Fondi*, 106 Nev. at 860, 802 P.2d at 1266; *Sertic*, 111 Nev. at 1194, 901 P.2d at 149. In *Sertic*, this court considered whether the district court erred when it valued and distributed to the nonemployee spouse his community property interest in the employee spouse's pension at the time of the divorce trial instead of valuing the pension as received by the employee spouse when she first became eligible to retire. 111 Nev. at 1194, 901 P.2d at 149. The *Sertic* court concluded that the district court may allow a nonemployee spouse to receive his or her community property interest in the pension plan at the time of the divorce trial if: (1) the district court can determine with reasonable certainty the party's present community share of the pension plan, (2) the district court can determine whether there are sufficient existing funds, and (3) the parties agree that the distribution would be the final distribution. *Sertic*, 111 Nev. at 1194, 901 P.2d at 149. Because in *Sertic* the district court failed to consider these requirements, this court remanded the matter to the district court, stating that, if the court determined that the requirements were not met, it

> may order distribution to [the nonemployee spouse] his community share of the pension as received by [the employee

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decree, we need not address Kristin's argument that the district court lacked jurisdiction to enter the amended QDRO. *See generally In re Water Rights of the Humboldt River*, 118 Nev. 901, 906, 59 P.3d 1226, 1229 (2002) (explaining that a court has an inherent power to enforce its orders); *see also Smith v. Smith*, 100 Nev. 610, 614, 691 P.2d 428, 431 (1984). Further, as the district court has jurisdiction to enter an order enforcing its previous orders, we need not address Kristin's argument regarding the timeliness of Howard's motion to modify the QDRO.

> spouse] upon her first eligibility to retire. If she does not elect to retire when she first becomes eligible, she shall be obligated to pay to [the nonemployee spouse] what he would have received if she had retired.

111 Nev. at 1194, 901 P.2d at 149.

In remanding, the *Sertic* court relied on this court's conclusion in *Gemma* that upon the employee spouse's eligibility to retire, "[the employee spouse] must pay to the [nonemployee former spouse], if [the nonemployee former spouse] *so demands at that time* and whether or not the [employee spouse] has retired . . . , the [nonemployee former spouse's] community property interest in the subject pension plan." 105 Nev. at 460 n.1, 778 P.2d at 430 n.1 (emphasis added). Because the nonemployee spouse is required to demand payment if the employee spouse has yet to retire, the employee spouse does not have to pay the nonemployee spouse his or her interest in the pension plan until such demand is made. *Id.* Further, because the pension benefit at the time of the employee spouse's retirement will have likely increased, *see Fondi*, 106 Nev. at 860, 802 P.2d at 1266, the nonemployee spouse may choose to wait until the employee spouse retires to share in the increased value of the pension plan. *See In re Marriage of Gillmore*, 629 P.2d 1, 7 (Cal. 1981) (explaining that the nonemployee spouse may choose to wait and "thereby ensure some protection for the future and may be able to share in the increased value of the pension plan").

Therefore, the value of the pension plan is calculated at the time of distribution. Because the nonemployee spouse may elect to receive his or her community interest in the pension plan at different times, we now take this opportunity to clarify in what manner a former nonemployee spouse can elect to immediately begin receiving his or her portion of the employee spouse's pension benefits upon the employee spouse's retirement eligibility, and how the district court should determine the community property interest in the employee spouse's pension plan.

The California Supreme Court has concluded that a nonemployee spouse has no right to payment of his or her community interest in the employee spouse's pension benefits prior to making a motion for disbursement of these benefits. *In re Marriage of Cornejo*, 916 P.2d 476, 479 (Cal. 1996). The *Cornejo* court considered four possible dates upon which the nonemployee spouse would be entitled to immediate payment of his or her share of the pension benefits:

> (1) the date of the employee spouse's eligibility to retire; (2) the date of a demand by the non-employee spouse preceding the filing of a motion seeking immediate payment; (3) the date

> of the filing of such a motion; and (4) the date of the issuance of an order passing thereon.

Id. The court reasoned that the employee spouse will be liable for pension payments to the nonemployee spouse on the date that the nonemployee spouse files a motion with the court seeking immediate payment of his or her portion of the benefits because the motion "clearly constitutes the non-employee spouse's choice of immediate payment. And it clearly puts the employee spouse on notice." *Id.* The court concluded that filing the motion was a formal, unambiguous act, which would provide a fixed date from which the court could order direct immediate payment. *Id.* at 479-80.

[Headnote 6]

We are in agreement with California's approach to the distribution of a nonemployee spouse's portion of his or her community interest in an employee spouse's pension plan benefits. We thus conclude that the nonemployee spouse must file a motion in the district court requesting to immediately begin receiving payment of his or her portion of the employee spouse's pension benefits. The district court must then determine the present value of the employee spouse's pension plan benefits, depending upon when the nonemployee makes his or her election, before determining the amount the nonemployee spouse will receive.

In this case, Kristin never filed a motion in the district court requesting immediate payment of her portion of Howard's pension benefits before she moved for judgment based on Howard's failure to pay those benefits.[7] Because Howard was under no duty to pay Kristin her portion of his pension benefits until she filed a motion to receive her share, the district court did not err in denying Kristin's request to reduce to judgment the amount of Howard's PERS pension benefits she would have received since June 2003.

CONCLUSION

We conclude that the district court's amendment of the QDRO was not an impermissible modification since it correctly effectuates the divorce decree's division of property. We also clarify that the nonemployee spouse must file a motion in the district court requesting immediate payment of his or her portion of the employee spouse's pension benefits before he or she is eligible to receive payment, if the employee spouse has yet to retire. Thus, we conclude that the district court correctly denied Kristin's motion for judgment because Howard was under no duty to pay Kristin her portion of his

[7]Based on our conclusions in this opinion, we do not address Howard's arguments regarding Kristin's miscalculation of her portion of his pension.

pension benefits until Kristin filed a motion requesting immediate payments.[8]

Accordingly, we affirm the district court's order modifying the QDRO and denying Kristin's motion for judgment.

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

RENOWN REGIONAL MEDICAL CENTER, A NEVADA CORPORATION, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE BRENT T. ADAMS, DISTRICT JUDGE, RESPONDENTS, AND MICHAEL WILEY, AN INDIVIDUAL, REAL PARTY IN INTEREST.

No. 62666

October 2, 2014 335 P.3d 199

Original petition for a writ of mandamus challenging a district court order granting partial summary judgment in an action regarding a hospital lien.

Patient brought putative class action against health care provider regarding provider's lien practices. The district court granted partial summary judgment in favor of patient. Provider petitioned for writ of mandamus. The supreme court, CHERRY, J., held that the district court was not permitted to grant summary judgment in favor of patient on two claims of relief that were not argued in summary judgment briefing or in oral argument.

Petition granted in part and denied in part.

Holland & Hart, LLP, and *Jeremy J. Nork, Frank Z. LaForge*, and *Stephan J. Hollandsworth*, Reno, for Petitioner.

Snell & Wilmer, LLP, and *William E. Peterson* and *Janine C. Prupas*, Reno; *Leverty & Associates* and *Vernon Eugene Leverty* and *Patrick R. Leverty*, Reno, for Real Party in Interest.

Matthew L. Sharp, Ltd., and *Matthew L. Sharp*, Reno, for Amicus Curiae Nevada Justice Association.

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[8]Having considered the parties' remaining arguments concerning waiver, the lack of an evidentiary hearing, Howard's failure to join PERS as a party to his motion, and the parties' prior settlement agreement, we conclude that they lack merit.

1. JUDGMENT.
   The district court was not permitted to grant summary judgment in favor of patient on two claims of relief that were not argued in summary judgment briefing or in oral argument in lien dispute between patient and health care provider, where, although district courts have inherent authority to enter summary judgment sua sponte, that power is contingent upon giving the losing party notice and an opportunity to be heard. NRCP 56.
2. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. MANDAMUS.
   The decision to entertain an extraordinary writ petition lies within the supreme court's discretion.
4. MANDAMUS.
   Generally, the availability of appeal after final judgment is considered an adequate and speedy remedy that precludes mandamus relief from orders granting partial summary judgment.
5. MANDAMUS.
   The supreme court will exercise its discretion to consider petitions for mandamus relief when an important area of law needs clarification and judicial economy is served by considering the writ petition.
6. APPEAL AND ERROR.
   The supreme court reviews issues of law de novo.
7. JUDGMENT.
   A district court's inherent power to enter summary judgment sua sponte is contingent upon giving the losing party notice that it must defend its claim. NRCP 56.
8. JUDGMENT.
   A district court must not elevate promptness and efficiency over fairness and due process by entering summary judgment before claims are properly before it for decision. U.S. CONST. amend. 14; NRCP 56.

Before the Court EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

A district court may grant summary judgment sua sponte if it gives the defending party notice and an opportunity to defend. In this case, the district court granted summary judgment to the plaintiff on two claims for relief that were not argued in the summary judgment briefing or in oral argument. The district court did not give notice to the defendant that it intended to do so. We conclude that the district court erred by granting summary judgment on those two causes of action and grant, in part, this petition for a writ of manda-

[1]THE HONORABLE KRISTINA PICKERING, Justice, did not participate in the decision of this matter.

mus. We decline to consider the other issues and arguments raised by the parties and therefore deny the remainder of the petition.

FACTS AND PROCEDURAL HISTORY

Real party in interest Michael Wiley was injured in a motorcycle accident for which he was not at fault. Wiley was treated for his injuries at Renown Regional Medical Center. Renown did not bill Wiley's health insurance plan administrator, Cigna, for the treatment. Instead, it recorded a hospital lien against Wiley's potential tort recovery. Nevertheless, Wiley sent his medical bills to Cigna. Cigna sent payment to Renown in the amount of the special, discounted rates that Cigna had previously negotiated with Renown. Cigna's discounted rates were set by its provider agreement with Renown in which Cigna agreed to send patients to Renown and Renown agreed to provide Cigna and its members with discounted rates. Renown did not accept this payment because it believed that Cigna did not actually cover injuries caused by a third party's negligence.

Wiley and the tortfeasor's insurer subsequently reached a settlement. The insurer delivered two checks to Wiley. The first was made out to Wiley. The second was made out to Renown in the amount of Renown's standard, nondiscounted rates in order to satisfy Renown's hospital lien. Wiley refused to give the check made out to Renown to Renown. He believed that he was entitled to the full settlement payment and that Renown should have accepted Cigna's payment as full and final instead of recovering via the hospital lien. Because Wiley did not deliver the check, Renown did not release its lien. Wiley was later refused a loan on account of the outstanding lien.

Wiley brought a putative class action against Renown regarding its lien practices. Wiley alleged, among other things, that Renown's lien violated Nevada's hospital lien statutes, NRS 108.590 and NRS 449.757, that Renown breached its provider agreement with Cigna, and that Renown intentionally interfered with Wiley's policy with Cigna. Renown moved for summary judgment, arguing that Wiley's Cigna policy did not cover Wiley's treatments, that Wiley could not assert breach of the provider agreement because he was not a third-party beneficiary to the agreement, and that Renown did not violate NRS 108.590 or NRS 449.757.

The district court initially held that there were issues of material fact and therefore denied the motion. Renown's arguments, however, appear to have concerned entirely legal issues, not factual ones. Renown requested a status conference, which the district court granted. At the status conference, the district court asked that the parties stipulate to the facts relevant to the legal issues raised in Renown's initial motion for summary judgment and then resubmit those issues

in cross-motions for summary judgment.[2] The district court wished to resolve, before class discovery, the dispositive, preliminary legal issues, including whether Wiley was a third-party beneficiary who could enforce the provider agreement and whether Wiley's policy covered his injuries. The full merits of Wiley's claims for breach of the provider agreement and intentional interference with his Cigna policy were not at issue in the summary judgment proceedings.

In accordance with the district court's request, Renown filed a second motion for summary judgment, again arguing that Wiley's Cigna policy did not cover Wiley's treatments, that Wiley was not a third-party beneficiary to the provider agreement, and that Renown did not violate NRS 108.590 or NRS 449.757. Wiley also filed a motion for summary judgment, arguing that Renown violated NRS 108.590 and NRS 449.757.

The district court held a hearing on the summary judgment motions and subsequently denied Renown's motion and granted Wiley's motion. The court found, among other things, that Renown's lien practices violated NRS 108.590 and NRS 449.757, that Wiley was a third-party beneficiary to the provider agreement, and that Renown was not permitted to decide whether Wiley's injuries were covered by his Cigna policy. Notably, the court also found in favor of Wiley on his breach of contract and intentional interference with contract claims, even though the full merits of these claims were not specifically argued in the cross-motions for summary judgment or at the hearing.

The district court stayed the remainder of the case so that Renown could seek writ relief in this court. Renown then filed this petition for mandamus relief challenging the district court's order.

DISCUSSION

[Headnotes 1-5]

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see* NRS 34.160. "Ultimately, the decision to entertain an extraordinary writ petition lies within our discretion." *Davis v. Eighth Judicial Dist. Court*, 129 Nev. 116, 118, 294 P.3d 415, 417 (2013). "Neither a writ of mandamus nor a writ of prohibition will issue if the petitioner has a 'plain, speedy and adequate remedy in the ordinary course of

[2]The parties stipulated to a set of hypothetical facts solely for summary judgment purposes. We do not here opine on the propriety of the district court accepting such stipulations.

law.'" *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 356, 167 P.3d 421, 426 (2007) (quoting NRS 34.170, NRS 34.330). Generally, the availability of appeal after final judgment is considered an adequate and speedy remedy that precludes mandamus relief from orders granting partial summary judgment. *See id.* However, we will exercise our discretion to consider petitions for such writ relief when an important area of law needs clarification and judicial economy is served by considering the writ petition. *See id.*; *see also Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559.

[Headnote 6]

In this case, the district court granted partial summary judgment in Wiley's favor on his claims for breach of contract and intentional interference with contract. These claims were nowhere mentioned in the six summary judgment briefs. And Wiley did not argue his contract claims in the day-long hearing. Whether the district court acted appropriately in granting summary judgment on these claims is an important issue of law needing clarification and judicial economy is served by our consideration of this petition. *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559. We therefore exercise our discretion to consider that portion of this writ petition that concerns the district court's summary judgment on claims for which no party sought summary judgment. We consider this issue of law de novo, *id.* at 198, 179 P.3d at 559, and we decline to consider the other issues raised in Renown's writ petition.

[Headnotes 7, 8]

We have previously held that "[a]lthough district courts have the inherent power to enter summary judgment *sua sponte* pursuant to [NRCP] 56, that power is contingent upon giving the losing party notice that it must defend its claim." *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). And we have called it "troubling" when a district court grants summary judgment sua sponte without having taken evidence in the form of affidavits or other documents. *Sierra Nev. Stagelines, Inc. v. Rossi*, 111 Nev. 360, 364, 892 P.2d 592, 594-95 (1995). A district court must not elevate "promptness and efficiency" over fairness and due process by entering summary judgment before claims are properly before it for decision. *Id.* at 364, 892 P.2d at 595. Thus, we take this opportunity to reiterate that the defending party must be given notice and an opportunity to defend itself before a court may grant summary judgment sua sponte. *See Soebbing*, 109 Nev. at 83, 847 P.2d at 735; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence."); *Norse v. City of Santa Cruz*, 629 F.3d 966, 971-72 (9th Cir. 2010) (same).

Here, without briefing, argument, or even notice, the district court granted summary judgment in favor of Wiley on his contract claims. This amounts to the type of sua sponte summary judgment of which this court and federal courts have disapproved. We therefore conclude that the district court erred in granting summary judgment on Wiley's fifth and eighth causes of action for breach of contract and intentional interference with contract, respectively. Accordingly, we grant Renown's petition, in part, and order the clerk of this court to issue a writ of mandamus directing the district court to vacate that portion of its order granting summary judgment to Wiley on his fifth and eighth causes of action. We decline to consider the other issues and arguments presented in Renown's writ petition and therefore deny the remainder of the petition. *Davis*, 129 Nev. at 118, 294 P.3d at 417.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, and SAITTA, JJ., concur.