> (c) Direct a hearing de novo before the juvenile court if, not later than 5 days after the master provides notice of the master's recommendations, a person who is entitled to such notice files with the juvenile court a request for a hearing de novo before the juvenile court.

(Emphasis added.)

[Headnote 3]

We conclude that based upon a plain reading, NRS 62B.030(4) does not require the district court to conduct a hearing de novo every time a party requests one. NRS 62B.030(4)'s use of the word "shall" means that the district court is required to choose one of the three options laid out in NRS 62B.030(4): (a) accept the master's recommendation in whole or in part, (b) reject the master's recommendation in whole or in part, or (c) conduct a hearing de novo if one is timely requested. As long as the district court chooses one of these three options, it has complied with the statute. *See Trent v. Clark Cnty. Juvenile Court Servs.*, 88 Nev. 573, 577, 502 P.2d 385, 387 (1972) (concluding that under NRS 62B.030's predecessor, NRS 62.090, a district court is not required to conduct a hearing de novo when requested under subpart (c)). Accordingly, the district court did not violate NRS 62B.030(4) by denying P.S.'s request for a hearing de novo because NRS 62B.030(4) grants the district court discretion to decide whether to grant such a hearing. We therefore affirm the district court's order.

SAITTA and PICKERING, JJ., concur.

DEMARLO ANTWIN BERRY, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 66474

December 24, 2015 363 P.3d 1148

Appeal from a district court order dismissing a postconviction petition for writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The supreme court, PICKERING, J., held that: (1) declaration by individual who confessed to murder and robbery was not belied by the record, so as to dispense with need to hold evidentiary hearing on habeas corpus petition that alleged actual innocence as basis for asserting procedurally defaulted claims; and (2) it was more likely than not that no reasonable jury would convict habeas petitioner, such that he was entitled to an evidentiary hearing.

Reversed and remanded.

Weil & Drage, APC, and *John T. Wendland*, Henderson; *Richards Brandt Miller Nelson* and *Lynn S. Davies, Craig C. Coburn, Joel K. Kittrell*, and *Steven H. Bergman*, Salt Lake City, Utah, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Christopher F. Burton*, Deputy District Attorney, Clark County, for Respondent.

1. Habeas Corpus.
   A habeas petitioner may secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice; this standard is met when petitioner makes a colorable showing he is actually innocent of the crime.
2. Habeas Corpus.
   To satisfy "actual innocence" standard for securing review on the merits of defaulted claims, habeas petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.
3. Habeas Corpus.
   A habeas petition supported by a convincing gateway showing under *Schlup v. Delo*, 513 U.S. 298 (1995), raises sufficient doubt about petitioner's guilt to undermine confidence in the result of the trial without the assurance that that was untainted by constitutional error; hence, a review of the merits of the defaulted constitutional claims is justified.
4. Habeas Corpus.
   In determining whether a habeas petition meets the "actual innocence" standard for review of procedurally defaulted claims, the district court must make its determination concerning petitioner's innocence in light of all the evidence; it must review both the reliability of the new evidence and its materiality to the conviction being challenged, which in turn requires an examination of the quality of the evidence that produced the original conviction.
5. Habeas Corpus.
   The district court's function, in determining whether a habeas petition meets the "actual innocence" standard for reviewing of procedurally defaulted claims, is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors; since the jury did not hear the new evidence, the district court should assess how reasonable jurors would react to the overall, newly supplemented record.
6. Habeas Corpus.
   Unlike in summary judgment proceedings, the district court may make some credibility determinations based on new evidence in determining whether to conduct an evidentiary hearing on a habeas corpus petition asserting actual innocence as basis for review of procedurally defaulted claims.
7. Habeas Corpus.
   Confidence in petitioner's trial must be undermined before he is entitled to a hearing for the purpose of developing the evidence needed to pass his procedurally defaulted habeas claims through the actual innocence gateway.

8. Habeas Corpus.

The supreme court reviews for an abuse of discretion the district court's denial of a habeas petitioner's request for an evidentiary hearing on a petition that alleges actual innocence as a basis for asserting procedurally defaulted claims.

9. Habeas Corpus.

The district court need not hold an evidentiary hearing on a habeas petition asserting actual innocence as basis for a procedurally defaulted claim when a claim or allegation is repelled or belied by the record, or necessarily false.

10. Habeas Corpus.

A claim in a habeas petition asserting actual innocence is not belied by the record, so as to permit not holding an evidentiary hearing, just because a factual dispute is created by the pleadings or affidavits filed during the postconviction proceedings; a claim is belied when it is contradicted or proven to be false by the record as it existed at the time the claim was made.

11. Habeas Corpus.

Declaration in which individual confessed to murder and robbery was not belied by the record, so as to dispense with need to hold evidentiary hearing on habeas corpus petition that alleged actual innocence as basis for asserting procedurally defaulted claims; omissions in declaration, such as not mentioning assailant's initial contact with cashier at fast-food restaurant and fact that assailant fled in waiting car, did not affirm or deny those events, declarant's assertion that he shot victim near the safe in restaurant was not necessarily false, even though crime scene photographs and trial testimony established that victim died in back of restaurant, and declaration was given more than 20 years after the events in question.

12. Habeas Corpus.

In denying without evidentiary hearing a habeas petition alleging actual innocence as basis for asserting procedurally defaulted claims, the district court incorrectly discounted, as naked allegations, a declaration in which witness claimed that she saw an individual other than petitioner soon after the murder, that the individual confessed that he had committed the murder with the help of his brother, and that the individual stated that he was the one who shot the victim, whom he named.

13. Habeas Corpus.

In denying without evidentiary hearing a habeas petition alleging actual innocence as basis for asserting procedurally defaulted claims, the district court incorrectly discounted, as naked allegations, an affidavit in which a former cellmate gave the names of detectives who allegedly approached him after he briefly spoke with petitioner in holding cell, stated the detectives told him information about the murder and encouraged him to state that petitioner had confessed to him during brief conversation in holding cell, gave name of district attorney who allegedly approached him for same purpose and allegedly agreed to recommend suspended sentence on pending charge in exchange for false testimony, and stated that he testified falsely as instructed at petitioner's trial and that petitioner never confessed to him.

14. Habeas Corpus.

It was more likely than not that no reasonable jury would convict habeas petitioner on first-degree murder and other charges, such that he was entitled to an evidentiary hearing on petition alleging actual innocence as basis for procedurally defaulted claims; newly presented evidence in form of declarations of individual who confessed to murder and robbery at is-

sue, and affidavit of witness who claimed that the individual in question confessed to the crimes soon after they occurred, could lead a reasonable jury to seriously question the reliability of eyewitness accounts, the recantation by a former cellmate significantly weakened his original claim that petitioner had confessed to him, and trial evidence consisted of multiple eyewitness accounts alleging petitioner was the murderer but no physical evidence linking him to the crime.

Before SAITTA, GIBBONS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

Demarlo Berry appeals from an order dismissing his third post-conviction petition for a writ of habeas corpus. The district court dismissed Berry's petition as procedurally barred, without allowing discovery or conducting an evidentiary hearing. Berry supported his petition with declarations under penalty of perjury that, if true, may establish a gateway claim of actual innocence. We conclude that the district court improperly discounted the declarations offered in support of Berry's petition, which were sufficient in form and content to merit discovery and an evidentiary hearing on Berry's gateway actual innocence claim. We therefore reverse and remand.

I.

A.

Shortly after 8 p.m. on April 24, 1994, Charles Burkes was murdered in the course of a robbery at the Carl's Jr. fast-food restaurant in Las Vegas where Burkes worked as a manager. On that night, an African-American male entered the Carl's Jr., went behind the front counter, and pulled a gun on the cashier, Rae Metz, demanding that she open the cash registers. As Metz started to comply, the robber passed behind her and she escaped out a side door. Outside, Metz encountered another Carl's Jr. employee, who was on a cigarette break. The two ran to a nearby bar, the Long Branch Saloon, to call 9-1-1. They then left the bar, followed by several bar patrons. The group saw a man come out of the Carl's Jr., who brandished a gun at them, jumped the low wall separating the Carl's Jr. parking lot from the Blue Angel Motel parking lot next door, and got into a waiting black Cadillac, which drove off.

Burkes was found lying face-down near the rear of the Carl's Jr. He died from a single gunshot wound through the back of his left shoulder. Two shots were heard by an employee who had gone into the restroom to hide while the crime was in progress. Burkes's autopsy recovered a single .357 or .38 caliber projectile. A second

projectile, matching that recovered during the autopsy, was found on the floor near the safe.

In April of 1994, when the murder occurred, appellant Demarlo Berry was 18 years old, weighed 140 to 145 pounds, and was 5′8″ or 5′9″ tall. Six of the eyewitnesses the police interviewed immediately after the crime—including Metz who had the best, although most terrifying look at him—described the man they believed to be the perpetrator as between 5′10″ and 6′ tall and weighing 175 to 200 pounds. Another eyewitness, who had had approximately 12 beers that night, described the man he saw run away as 5′6″ tall.

The police received phone calls providing information about possible culprits, and eventually Berry became a suspect. The police created a photographic lineup that included a picture of Berry and showed it to Metz and three other eyewitnesses. Metz positively identified Berry; the others were less committal but stated that his picture resembled that of the perpetrator. Their certainty grew over time, and by trial, each identified Berry as the perpetrator, as did a fifth eyewitness.

The police had difficulty locating Berry, who before the crime had been a regular customer of the Carl's Jr. and was often seen hanging out by the Long Branch Saloon. When they found Berry, he was uncooperative. Berry was arrested and at some point briefly shared a holding cell with a number of other arrestees, including a man named Richard Iden. Iden had been arrested in Ohio, where he was attending to his critically ill father, and brought back to Nevada to face bad-check charges dating back to 1990. Iden testified for the State at Berry's trial, stating that, while the two were in the holding cell together, Berry confessed to him that he had committed the robbery/murder at the Carl's Jr.

Iden had been employed by the Sheriff's Office in Knox County, Ohio, before becoming addicted to crack cocaine and resorting to theft and crimes of deception to finance his habit. He was cross-examined extensively at trial about his criminal history and the timing and details of the plea deal he received, by which he was given probation despite his numerous convictions. Iden was also examined about the inconsistencies in his accounts of Berry's confession—first, he told police that Berry told him that he and two others robbed "this guy," possibly at a restaurant, and killed him when he failed to cooperate; in a second statement, Iden said Berry told him that he and two others murdered the "assistant manager" while robbing "the Carl's [Jr.] on the corner of Eastern and Fremont Street," as another person stayed outside, and he alleged that Berry said he was facing Burkes when he shot him; finally, at trial, Iden could not recall if Berry stated the crime occurred at a restaurant. These details conflict with the eyewitness testimony, which reported two perpetrators—the gunman and the getaway driver—and the physical facts,

which establish that Burkes was shot in the shoulder from the back, not facing his assailant.

Berry testified in his own defense at trial. He denied any involvement in the crime, except as a witness. Specifically, Berry testified that he and a friend, Larry Walker, had been walking up and down Fremont Street that night selling drugs. They separated near the Blue Angel Motel, so Berry could go to the Carl's Jr. to get something to eat. As he neared the front door of the restaurant, he saw a man behind the counter who was not wearing a Carl's Jr. uniform, and a scared-looking female employee, presumably Metz. Berry stayed outside to watch. The man and the woman left his view, and then he saw the man come out and run away. Berry recognized the man as Steven "Sindog" Jackson, the leader of the San Bernardino Crips gang. Berry left the scene without giving a statement to the police and rejoined Walker. The pair watched the police activity from a distance and, roughly 40 minutes to an hour after the shooting, were approached by a K-9 officer who patted them down and asked if they knew what had happened. When Berry responded that they did not, the officer told them to go home.

Berry denied confessing to Iden and disputed Iden's repeated assertions that he and Berry knew each other from 1990, when Iden testified he was in Las Vegas and bought drugs from Berry. Berry explained that he did not volunteer information about Jackson to the police, or cooperate with them initially, because he feared retaliation against him and his family by the Crips. Berry called a San Bernardino police officer at trial who testified that Jackson was the leader of the San Bernardino "Tre 57" Crips, and dangerous.

Jackson's name also was reported to the police in the phone calls and tips they received after the crime. Like Berry, Jackson is African-American. At the time of the crime, he stood 6′0″ and weighed 235 pounds. The police created a separate photographic lineup that included a picture of Jackson—his picture was not in the photographic lineup that included Berry's picture—but they did not show the lineup with Jackson's picture to the eyewitnesses they showed Berry's photographic lineup to. The police explained that their information suggested Jackson was the getaway driver, not the gunman, and that they could not find the eyewitness who could have placed Jackson as the driver of the getaway car. Marriage license records confirmed that Jackson was in Las Vegas to get married several weeks before the crime occurred.

The police never found the murder weapon. They collected 32 latent fingerprints and palm prints from the crime scene, none of which were a match for Berry's. On the second to last day of trial, the State presented a witness who had been asked during trial to attempt to compare Jackson's prints to those collected at the crime scene. While the comparison did not produce a match, this result

was inconclusive because the examiner was working from fax copies and there was confusion over whether the set used for comparison purposes belonged to Jackson or Jackson's brother, "D-Dog," also a Crip.

B.

Berry was charged with burglary, robbery, and first-degree murder, with the use of a deadly weapon, and the State filed a notice of intent to seek the death penalty. After the guilt phase of the trial, the jury deadlocked 11-1. They did not report whether the 11-person majority favored conviction or acquittal. The State agreed to withdraw its notice of intent to seek the death penalty if Berry would stipulate to waive his right to a unanimous jury verdict as to guilt. He did, and the jury returned an 11-1 verdict finding him guilty of all charges. A penalty phase followed as to whether Berry should receive life with, or life without, the possibility of parole, on which the jury again deadlocked. The district judge discharged the jury. Berry waived his right to have a three-judge panel decide his sentence on the murder charge in exchange for the State agreeing not to seek life without the possibility of parole. Berry was sentenced to 10 years on the burglary count, 15 years on the robbery count, and life with the possibility of parole for first-degree murder, the robbery and life sentences carrying equal and consecutive terms for the deadly weapon enhancement, and all running consecutively to each other.

Berry timely filed a notice of appeal. This court affirmed his conviction, *Berry v. State*, Docket No. 27585 (Order Dismissing Appeal, June 17, 1997), and the remittitur issued on February 9, 1998. There followed a timely postconviction petition for a writ of habeas corpus, in which Berry asserted his trial counsel had been ineffective in counseling him to stipulate to a non-unanimous verdict. The petition was denied, and the denial was affirmed on appeal to this court. *Berry v. State*, Docket No. 35201 (Order of Affirmance, April 6, 2001). Acting pro se, Berry filed a second postconviction petition for a writ of habeas corpus on September 17, 2008, asserting that he received a flawed jury instruction on the elements of first-degree murder under *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), a decision from which this court retreated in *Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713-14 (2000). The petition was denied, and this court again affirmed. *Berry v. State*, Docket No. 52905 (Order of Affirmance, September 23, 2009).

C.

In 2005, an investigator working on Berry's behalf contacted Steven "Sindog" Jackson in prison in California, attempting unsuccessfully to secure a confession from him. In 2011, Berry contacted the Rocky Mountain Innocence Center (RMIC), which in 2012 agreed

to take his case. On May 2, 2014, Berry filed his third postconviction petition for a writ of habeas corpus, alleging newly discovered evidence and asserting the following nine claims: (1) the new evidence, considered with the trial evidence, demonstrates that Berry is actually innocent; (2) the State elicited and failed to correct perjured testimony from Richard Iden, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and also failed to disclose transcripts of meetings with him at which he was coached, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) the police engaged in misconduct by not adequately investigating Jackson; (4) the State's misconduct as set forth in claims 2 and 3 rendered Berry's trial fundamentally unfair, in violation of his due process rights; (5) judicial error in giving the *Kazalyn* instruction; (6) that the judge who presided over Berry's trial had a conflict of interest in that he also sentenced Iden, precluding a fair trial; (7) the non-unanimous verdict was unconstitutional; (8) ineffective assistance of counsel in mishandling the issues described in claims 6 and 7; and (9) cumulative error.

Chief among the evidence Berry offered to support his petition were four declarations. The first was from Jackson. In his declaration, Jackson confesses to the crimes and states: "I committed the robbery that resulted in the murder of Charles Burkes. DeMarlo Berry did not commit this crime, nor did he have any involvement in the commission of this crime." The Jackson declaration runs three handwritten, single-spaced pages and describes the crime in fair detail, including what he was wearing, his directions to Burkes to open the safe, Burkes's fumbling with the locks on the safe, and his fear that Burkes was stalling for time for help to arrive, whereupon, after directing Burkes to "hurry up," he shot him.

The second declaration was from Richard Iden. In his declaration, Iden recants his trial testimony about Berry's jailhouse confession and states, among other things, that "I testified falsely . . . at Demarlo Berry's murder trial in 1995 . . . Demarlo Berry never confessed to me. All of the details of my testimony were given to me by Detective Good, her partner, D.A. Booker, and/or the D.A.'s investigator." After addressing the details of his plea bargain, the Iden declaration discloses that, "[i]n addition, the State paid my airfare to return to Ohio and back to Las Vegas twice. They also paid a per diem and hotel/meals during the course of the trial." Iden ends his declaration by admitting, as Berry has maintained throughout, that his testimony that Berry and he first met in 1990 when Iden bought drugs from Berry in Las Vegas was false: "I had never met Demarlo Berry prior to my brief conversation with him in [the] holding [cell]."

The third declaration came from Elizabeth Fasse, the RMIC lawyer who conducted the interview of Jackson that produced his confession. The Fasse declaration describes the Jackson interview in detail, and narrates that, after stating that he "had become a Jeho-

vah's Witness and 'wanted to get this off his chest and clear his conscience' . . . . Mr. Jackson then proceeded to describe the facts and events leading up to and including the Crimes in significant detail and his direct involvement therein, interrupted only by occasional clarifying questions," adding that "[a]t no time during Mr. Jackson's narrative did we relay any information to Mr. Jackson about the Crimes."

The fourth declaration came from a woman named Maisha Mack, who attests that she "was acquaintances with Steven Jackson (aka 'Sindog') in 1993-1994." The Mack declaration reports that, "shortly after the murder . . . on April 24, 1994," she was with Sindog and his brother in the "Sierra Vista area of Las Vegas" when "Mr. Jackson confessed to me that he, with the help of his brother, committed the murder . . . . Specifically, Mr. Jackson said he was the one who shot the victim, Charles Burke[s], which killed him."

The district court dismissed Berry's petition on motion, without allowing discovery or conducting an evidentiary hearing.[1] It determined that the declarations in which Jackson confessed and Iden recanted his testimony that Berry confessed were "belied by the record." Addressing the Jackson declaration, the district court stated that it was "troubled by the number of omissions and their significance to the narrative," citing as examples the omission of any reference to Metz, whom the robber first encountered, or the black Cadillac, in which he fled. Of note, the district court's written decision does not acknowledge or address the Fasse declaration, which recited some of the details Jackson brought up during their interview, including the presence of two other Carl's Jr. employees in the restaurant besides Burkes (Metz and the employee who hid in the bathroom) and the fact that Jackson refused to name the getaway driver, which may explain the lack of reference to the black Cadillac. The district court also questioned whether Jackson could have shot Burkes by the safe, when trial photographs showed Burkes's body was found some distance away with no blood trail leading back to the safe.

Addressing the Iden declaration, the district court found the plea deal and Iden's "tenuous credibility" to have been thoroughly explored at trial, quoting Iden's trial testimony "that he would do or say anything to get money for his next high." As noted, the district court also deemed the Iden declaration, like the Jackson declaration,

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[1]The district court resolved this case by written "decision" rather than a document entitled "findings of fact and conclusions of law." *But see* NRS 34.830 ("Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court."). After this appeal was filed, the State obtained an expanded ruling from the district court entitled "findings of fact and conclusions of law." Berry appealed, and the appeal was dismissed on the State's agreement that the findings should be stricken from the record. *Berry v. State*, Docket No. 66877 (Order Dismissing Appeal, March 20, 2015).

"belied by the record," and further dismissed both the Iden declaration and the Mack declaration as containing nothing more than "naked allegations." The decision concludes:

> The Petition for Writ of Habeas Corpus fails to set forth any newly discovered evidence of actual innocence that is not belied by the record. Because the evidence of actual innocence fails, the Petition's procedurally barred by NRS 34.726 and NRS 34.810. Moreover, Petitioner fails to overcome the prejudice to the State pursuant to NRS 34.800. Therefore, this Court DENIES Mr. Berry's Petition without an evidentiary hearing and GRANTS the State's Motion to Dismiss.

II.

A.

Berry filed the petition underlying this appeal on May 2, 2014, more than 15 years after this court's February 9, 1998, issuance of remittitur from his direct appeal. Therefore, Berry's petition is untimely. *See* NRS 34.726(1). As this is Berry's third petition, it is successive. *See* NRS 34.810(2). Also, since the State affirmatively pleaded laches, Berry must overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

[Headnotes 1-3]

A habeas petitioner may overcome these bars and secure review of the merits of defaulted claims by showing that the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995); *Mitchell v. State*, 122 Nev. 1269, 1274, 149 P.3d 33, 36 (2006); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). This standard is met when the "petitioner makes a colorable showing he is actually innocent of the crime." *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. This means that "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. "[A] petition supported by a convincing *Schlup* gateway showing 'raises[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that was untainted by constitutional error'; hence, 'a review of the merits of the constitutional claims' is justified." *House v. Bell*, 547 U.S. 518, 537 (2006) (quoting *Schlup*, 513 U.S. at 317).[2]

[2]Schlup's gateway claim of actual innocence was "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315 (internal quotations omitted). Nevada's postconviction habeas statute permits a petitioner to challenge a conviction that was obtained in violation of the United States or Nevada Constitutions or state law.

Here, Berry requests an evidentiary hearing on whether he is actually innocent so that he may pass through the *Schlup* gateway and have his procedurally defaulted claims heard on the merits.[3] This court "has long recognized a petitioner's right to a postconviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

We see no reason to depart from the *Mann* standard in determining whether Berry is entitled to an evidentiary hearing on the gateway issue of actual innocence. We have not limited the use of the *Mann* standard to the grounds for relief in a habeas corpus petition. For instance, we have used this standard in deciding whether a petitioner may receive an evidentiary hearing to establish good cause to overcome the procedural bar in NRS 34.726(1). *See Hathaway v. State*, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003) (reversing and remanding for an evidentiary hearing on the petitioner's good cause allegations because he had "raised a claim supported by specific facts not belied by the record, which if true, would entitle him to relief").

Further, federal circuit courts similarly hold that an evidentiary hearing regarding actual innocence is required where the new evidence, "if credited," would show that it is more likely than not that no reasonable jury would find the petitioner guilty beyond a reasonable doubt. *See Coleman v. Hardy*, 628 F.3d 314, 319-20 (7th Cir. 2010) (holding that within the context of 28 U.S.C. § 2254(e)(2)(B) an evidentiary hearing "should be granted if it could enable a habeas applicant to prove his petition's factual allegations, which, if true, would entitle him to federal habeas relief"); *Jaramillo v. Stewart*, 340 F.3d 877, 883 (9th Cir. 2003) (remanding for an evidentiary hearing to resolve whether the evidence proffered to show actual innocence was credible because that "evidence if credible, and considered in light of all the evidence, demonstrate[d] that it [was] more likely than not that no reasonable juror would have convicted [the petitioner] of the charged offenses"); *Amrine v. Bowersox*, 128 F.3d 1222, 1229 (8th Cir. 1997) (providing petitioner made a sufficient

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NRS 34.724. Our case law does not resolve whether a state habeas petitioner, who passes through the *Schlup* actual innocence gateway, may have his procedurally defaulted *non-constitutional* claims heard on the merits, as well as defaulted *constitutional* claims. The parties suggest but do not adequately brief this issue, resolution of which is unnecessary given the reversal and remand here.

[3]Berry's petition suggests that he is making a free-standing actual innocence claim, in addition to a gateway actual innocence claim. This court has yet to address whether and, if so, when a free-standing actual innocence claim exists. *See also McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (stating that the Supreme Court also has not "resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"); note 2, *supra*.

showing to require an evidentiary hearing on his actual innocence allegation because, "if credited, his evidence could establish actual innocence").

B.

Applying this standard means that Berry would be entitled to an evidentiary hearing on his gateway actual innocence claim if he has presented specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the new evidence. This requires the district court to evaluate whether the new evidence presents specific facts that are not belied by the record and then, if so, to evaluate whether the new evidence, considered in light of all the evidence at trial, would support a conclusion that the petitioner has met the actual-innocence test—the caveat being that the district court must assume the new evidence is true when determining whether to conduct an evidentiary hearing.

[Headnotes 4, 5]

Above, we provided a recitation of the facts to emphasize that this is a highly factual inquiry, even at the stage of determining whether the petitioner should be granted an evidentiary hearing on his actual innocence claim. *See Schlup*, 513 U.S. at 301-13 (setting forth, in great detail, the facts supporting the petitioner's requested relief). The district court "must make its determination concerning the petitioner's innocence in light of all the evidence." *Id.* at 328. It must review both the reliability of the new evidence and its materiality to the conviction being challenged, which in turn requires an examination of the quality of the evidence that produced the original conviction. *See House*, 547 U.S. at 538 ("*Schlup* makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial. Based on this total record, the court must make a probabilistic determination about what reasonable, properly instructed jurors would do." (internal quotations omitted)); *Schlup*, 513 U.S. at 331-32 ("[T]he District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial."). Still, the "court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. Since the jury did not hear the new evidence, the district court should "assess how reasonable jurors would react to the overall, newly supplemented record." *Id.*

[Headnote 6]

Unlike in summary judgment proceedings, the district court may make some credibility determinations based on the new evidence in

determining whether to conduct an evidentiary hearing. *See Schlup*, 513 U.S. at 332 ("[T]he court may consider how . . . the likely credibility of the affiants bear on the probable reliability of that evidence."). For instance, an affidavit from a death row inmate confessing to a defendant's crime may have less probative force than an affidavit from a disinterested witness who claims to have seen the inmate commit the crime. *See House*, 547 U.S. at 552 (recognizing that the claim of two eyewitnesses, with no motive to lie, that the husband spontaneously confessed to murdering his wife after the defendant was convicted had more probative value than "incriminating testimony from [fellow] inmates, suspects, or friends or relations of the accused"). Though a district court would be required to assume that the death row inmate's confession was true, it still must determine how reasonable jurors would react to the overall record. Thus, if there was strong evidence at trial linking the defendant to the crime, such as DNA or video evidence, a reasonable jury may convict the defendant, even in light of the inmate's confession, because the strength of the other evidence may still lead a reasonable jury to convict the defendant beyond a reasonable doubt.

[Headnote 7]

Finally, it bears emphasizing that the actual-innocence "standard is demanding and permits review only in the extraordinary case." *Id.* at 538 (internal quotations omitted). Confidence in the petitioner's trial "must be 'undermined' before he is entitled to a hearing 'for the purpose of developing the evidence needed to pass his procedurally defaulted habeas claims through the actual innocence gateway.'" *Sibley v. Culliver*, 377 F.3d 1196, 1206 (11th Cir. 2004) (quoting *Davis v. Gammon*, 27 F. App'x 715, 717 (8th Cir. 2001)).

C.

[Headnotes 8-10]

With these principles in mind, we turn to the district court's denial of Berry's request for an evidentiary hearing, which we review for an abuse of discretion. *See Rubio v. State*, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). The district court need not hold an evidentiary hearing where a claim or allegation is repelled or belied by the record, or "necessarily false." *Mann*, 118 Nev. at 354-55, 46 P.3d at 1230. But a claim "is not 'belied by the record' just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings. A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Id.* at 354, 46 P.3d 1230.

[Headnote 11]

The district court determined that Jackson's declaration was belied by the record, in part, because the declaration made no mention

of the assailant's initial contact with the Carl's Jr. cashier, Metz, and the fact that, after the robbery and murder, the assailant fled in a waiting black Cadillac. These omissions do not render the averments in the Jackson declaration "belied by the record" because the declaration does not affirm or deny the encounter with Metz or his departure in the Cadillac; the declaration is merely silent on both points. Jackson does aver that after leaving the restaurant he jumped over the brick wall and fled. This leaves open the possibility that Jackson fled in the Cadillac. Had he said he fled on foot, or by motorcycle, it would be more problematic. Additionally, the Fasse declaration, which the district court did not acknowledge, arguably explains the Jackson declaration's failure to mention the Cadillac—Jackson's insistence that he not implicate anyone else involved in the crime, here, the getaway driver, which the Mack declaration suggests was Jackson's brother. A declaration cannot be expected to contain every detail of a crime that occurred more than 20 years ago and, as noted above, Jackson's declaration, on the whole, was fairly detailed. The omissions may be fodder for cross-examination at an evidentiary hearing but they do not render the Jackson declaration's averments "belied by the record."

The district court was also troubled that Jackson's declaration stated that he shot the victim near the safe, while crime scene photographs and trial testimony established that Burkes died in the back of the restaurant, away from the safe, with no blood trail showing that the victim moved or was moved. But, again, the Jackson declaration is not necessarily false in light of the record because the victim did not have an exit wound and the crime scene photos show a bullet casing by the safe, which supports Jackson's statement that he fired his gun from that area (two shots were fired, not one). Thus, Jackson's affidavit creates one or more factual disputes: whether the victim could have moved without creating a blood trail, and whether the assailant could have shot him from the area by the safe as the victim fled to the back of the restaurant.[4] The district court abused its discretion by resolving this dispute with its finding that the lack of a trail of blood necessarily means that the victim could not have been shot as the Jackson declaration describes. *See Vaillancourt v. Warden*, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974) ("Where . . . something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing.").

We do not discount the district court's concern with allowing one inmate's confession to exonerate another inmate, years after the crime. But in this case, exploring these issues at an evidentiary hearing is more appropriate than rejecting the evidence of actual

[4]The district court observed that there was "blood around the victim's shoulder, on his hand, and coming from his mouth."

innocence out of hand. The Jackson declaration provides specific details about the crime that were corroborated by other witnesses, such as one customer entering and leaving the restaurant as soon as he realized something was amiss, Jackson demanding that the manager open up the safe, and Jackson running away from a crowd and jumping over a wall between the Carl's Jr. and the Blue Angel Motel. Though Jackson is currently imprisoned on a life sentence in California, his admission to this crime opens up the possibility of the death penalty—something he was aware of when he confessed. And Mack's affidavit supports that Jackson committed the murder and there is nothing in the record that indicates she has an ulterior motive for her statement. Additionally, Berry maintained at trial that Jackson was the murderer and there was no physical evidence presented at trial that indicated Berry committed the murder. Therefore, since the Jackson affidavit states specific factual allegations that are not belied by the record and is supported by other evidence, it was an abuse of discretion for the district court to discredit it without conducting an evidentiary hearing.

[Headnotes 12, 13]

The district court also incorrectly discounted the Mack and Iden affidavits as naked allegations even though they both contained specific factual assertions. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (noting that a petitioner's allegation that certain witnesses could establish his innocence "was not accompanied by the witness[es]' names or descriptions of their intended testimony" and thus was just a bare or naked claim without any specific factual assertions). Mack's affidavit stated that: she was acquainted with Jackson from 1993-1994; she saw him with his brother in Las Vegas soon after the crime; at that time, Jackson "confessed to me that he, with the help of his brother, committed the murder of Charles Burkes at Carl's Jr. on April 24, 1994"; and "Mr. Jackson said he was the one who shot the victim, Charles Burkes, which killed him." The affidavit of Iden, who originally stated Berry confessed to him while in the holding cell, contains specific factual allegations, such as: the names of the detectives who approached him after he briefly spoke with Berry in the holding cell; that the detectives told Iden information about the murder and encouraged him to state that Berry had confessed to him during the brief conversation in holding; the name of the district attorney who approached him "for the same purpose" and who agreed to recommend a suspended sentence on a pending charge in exchange for the false testimony; that the detectives and district attorney coached him multiple times before he testified; and that he "testified falsely as instructed" at Berry's trial and "Berry never confessed to me." Thus, these affidavits present specific factual allegations of Berry's innocence that are not belied by the record.

To be sure, Iden has changed his story multiple times and is now claiming that everything he said on the stand was a lie. Standing alone, his recantation and allegations of prosecutorial misconduct would be difficult to credit. However, the material part of the affidavit for these proceedings—that his testimony that Berry confessed to him was a complete fabrication—is not without other evidentiary support. Berry testified at trial that he did not confess to Iden and that Jackson, not Berry, committed the crime. Now, Jackson admits to murdering the victim, and Mack claims that Jackson told her he killed the victim, shortly after murdering him. Furthermore, nothing in the record indicates that Iden currently has a reason to lie. Thus, Iden's affidavit cannot be completely discredited without an evidentiary hearing.

Finally, the district court considered the fact that it took 20 years for the declarants to come forward and exonerate Berry. *See McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) ("Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing."); *Schlup*, 513 U.S. at 300 (stating that the district court "may consider how the submission's timing . . . bear[s] on the probable reliability of that evidence"). The district court was not persuaded by Berry's explanation that Jackson found religion while serving his sentence or that Iden, who was "scheduled to be released from incarceration in another state . . . may want a clean start." However, the district court was not required to be persuaded by the offered explanations. Rather, the district court had to determine how the delay affected the reliability of the evidence or why it prevented Berry from meeting the high standard of an actual innocence claim. For instance, in *McQuiggin*, the state was concerned that a "prisoner might lie in wait and use stale evidence to collaterally attack his conviction . . . when an elderly witness has died and cannot appear at a hearing to rebut new evidence." 569 U.S. at 399-400. The Court noted that the timing of such a petition "should seriously undermine the credibility of the actual-innocence claim." *Id.* Presumably, this is because waiting provided the petitioner with an advantage. No concerns similar to those at issue in *McQuiggin* have been suggested in this case. Although the declarants' decisions to wait 20 years to exonerate a potentially innocent man in this case is regrettable, to say the least, we fail to see how it undermines the credibility of Berry's actual innocence claim or makes his evidence of actual innocence so unreliable that he does not deserve discovery and an evidentiary hearing.

D.

[Headnote 14]

After determining that Berry has presented specific factual allegations of his innocence that are not belied by the record and assuming

that the new evidence is credible, we must decide what a reasonable juror would have done if presented with the trial evidence and this new evidence in order to determine whether Berry was entitled to an evidentiary hearing. The trial evidence consisted of multiple eyewitness accounts alleging Berry was the murderer, but no physical evidence, such as fingerprints or DNA evidence, linking Berry to the crime. With these eyewitness accounts, the hypothetical jury hearing the new evidence would have also heard a confession by Jackson, whom Berry testified at trial was the real perpetrator; an uninterested witness's statement that Jackson confessed to her that he committed the murder soon after it occurred; and Iden's testimony that Berry did not confess to him and the prosecution, along with police detectives, who instructed him to testify falsely (or, possibly, Iden's testimony would not have been admitted at all). A jury considering such a record—assuming the truth of the newly presented evidence, as we must at this stage—would likely have reasonable doubt that Berry committed the murder. Jackson's confession, Mack's support for the confession, and Berry's trial testimony that it was Jackson who committed the murder would likely lead to the jury finding that Jackson was the murderer, not Berry. We emphasize again that it is not only the strength of the new evidence that is material. A district court should examine the evidence that led to the original conviction and especially whether the new evidence diminishes the strength of the evidence presented at trial.

Here, the testimony of Jackson and Mack could lead a reasonable jury to seriously question the reliability of the eyewitness accounts. Obviously, Iden's recantation significantly weakens his original claim that Berry confessed to him. Thus, it's clear that the new evidence, if true, supports the allegation that Jackson committed the murder and it casts serious doubt on the central evidence that led to the original conviction. Therefore, we are satisfied that this new evidence, *if true*, shows that it is more likely than not that no reasonable jury would convict Berry beyond a reasonable doubt. As such, the district court abused its discretion by denying Berry an evidentiary hearing, and we remand for an evidentiary hearing on whether Berry is actually innocent, such that the procedural bars no longer apply, and Berry can have his procedurally defaulted claims heard on the merits.

Next, the State argues that even if Berry succeeds on his fundamental miscarriage of justice claim at the evidentiary hearing, he still must show "that the petition is based on grounds of which [Berry] could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred," NRS 34.800(1)(a), to overcome the presumption of prejudice to the State. Berry responds that a fundamental miscarriage of justice overcomes all procedural bars, including NRS 34.800(1)(a). The declarations Berry has filed demonstrate that his petition de-

pends in large measure on Jackson's confession. Jackson was interviewed by Berry's investigator in 2005 and refused to cooperate, so presumably his confession was unavailable to Berry before then. It was only in 2013, after Jackson became a Jehovah's Witness, that his confession was forthcoming. The delay in obtaining Jackson's confession was due to Jackson, not Berry's failure to exercise reasonable diligence.

Finally, we note that the district court did not address Berry's alternative arguments of good cause and prejudice. *See Pellegrini*, 117 Nev. at 886, 34 P.3d at 537 ("To overcome the procedural bars of NRS 34.726 and NRS 34.810, Pellegrini had the burden of demonstrating good cause for delay in bringing his new claims or for presenting the same claims again and actual prejudice."). The district court's order recognizes only that Berry asserts the actual innocence excuse for his otherwise barred claims. It is unnecessary for the district court to address Berry's alternative arguments because if Berry cannot show a fundamental miscarriage of justice at the evidentiary hearing, then his claim will be barred by laches and a showing of good cause and actual prejudice will be immaterial. Thus, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

SAITTA and GIBBONS, JJ., concur.

PATRICK NEWELL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 66552

December 24, 2015 364 P.3d 602

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon and attempted assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

The supreme court, SAITTA, J., held that: (1) the use of deadly force in response to a felony is only justified when the person poses a threat of serious bodily injury, and (2) conviction for attempted assault based on the intentional placement of another person in fear of immediate bodily harm is not legally impossible.

Affirmed.

[Rehearing denied February 1, 2016]

Philip J. Kohn, Public Defender, and *Howard Brooks* and *Scott L. Coffee*, Deputy Public Defenders, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson,* District Attorney, *Steven S. Owens* and *Jonathan VanBoskerck*, Chief Deputy District Attorneys, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   The district court has broad discretion to settle jury instructions, and the supreme court reviews the district court's decision for an abuse of that discretion or judicial error.
2. Criminal Law.
   Whether a jury instruction was an accurate statement of law is reviewed de novo.
3. Statutes.
   When the words of a statute are clear and unambiguous, they will be given their plain, ordinary meaning, and the supreme court need not look beyond the language of the statute; however, when the literal, plain meaning interpretation leads to an unreasonable or absurd result, the supreme court may look to other sources for the statute's meaning.
4. Homicide.
   Statute stating that homicide is justified in response to a reasonable apprehension of the commission of a felony or in the actual resistance of an attempted felony authorizes the use of deadly force not only in resistance of felonies committed upon the slayer but also in response to felonies committed in the resistance of a felony in the slayer's presence or when the felony is upon the slayer's dwelling. NRS 200.160.
5. Assault and Battery.
   The use of deadly force in response to a felony is only justified when the person poses a threat of serious bodily injury; otherwise, the amount of force used must be reasonable and necessary under the circumstances. NRS 200.160.
6. Assault and Battery.
   Conviction for attempted assault based on the intentional placement of another person in fear of immediate bodily harm is not legally impossible. NRS 200.471(1)(a)(2).

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Saitta, J.:

The plain language of NRS 200.160 states that homicide is justified in response to a reasonable apprehension of the commission of a felony or in the actual resistance of an attempted felony, but it does not specify the type of felony. This opinion addresses whether there is any limitation as to the use of deadly force in response to the commission of a felony under NRS 200.160. We extend our holding in *State v. Weddell*, 118 Nev. 206, 43 P.3d 987 (2002), to require that the use of deadly force in response to a felony is only justified when the person poses a threat of serious bodily injury; otherwise,

the amount of force used must be reasonable and necessary under the circumstances.

FACTUAL AND PROCEDURAL HISTORY

In 2012, appellant Patrick Newell sprayed Theodore Bejarano with gasoline and lit Bejarano on fire during an altercation at a gas station. Newell also threatened Bejarano with a small pocket knife, although Bejarano could not later recall this incident. Newell was charged with Count 1: attempted murder with the use of a deadly weapon; Count 2: battery with the use of a deadly weapon; Count 3: assault with the use of a deadly weapon; and Count 4: performance of an act in reckless disregard of persons or property. Count 3 was later amended to attempted assault with the use of a deadly weapon.

At trial, Newell claimed that his actions were a justifiable battery because he reasonably believed that Bejarano was committing felony coercion against him at the time of the incident. Newell proposed the following instruction on justifiable battery:

> Justifiable battery is the battery of a human being when there is reasonable ground to apprehend a design on the part of the person battered to commit a felony and there is [imminent] danger of such a design being accomplished. This is true even if deadly force is used. . . .

The district court, over Newell's objection, added the following language to the instruction based on our decision in *State v. Weddell*, 118 Nev. 206, 43 P.3d 987 (2002):

> The amount of force used to effectuate the battery must be reasonable and necessary under the circumstances. Deadly force cannot be used unless the person battered poses a threat of serious bodily injury.

The jury found Newell guilty of Counts 2, 3, and 4. Count 4 was later dismissed by the district court. On appeal, Newell argues that the district court abused its discretion by giving a jury instruction that was an incorrect statement of Nevada law and that his conviction for attempted assault is legally impossible.

DISCUSSION

The district court did not abuse its discretion in giving the jury instruction

Newell argues that the plain language of NRS 200.160 does not require the amount of force used in defense of a felony to be reasonable and necessary or that the person battered pose a threat of serious bodily injury in order for deadly force to be used. Therefore, he

contends that the district court abused its discretion by adding those requirements to the instruction on justifiable battery.

[Headnotes 1, 2]

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Whether an instruction was an accurate statement of law is reviewed de novo. *Davis v. State*, 130 Nev. 136, 141, 321 P.3d 867, 871 (2014).

[Headnote 3]

"[W]hen the words of a statute are clear and unambiguous, they will be given their plain, ordinary meaning," and we need not look beyond the language of the statute. *State v. Friend*, 118 Nev. 115, 120, 40 P.3d 436, 439 (2002). However, when the "literal, plain meaning interpretation" leads to an unreasonable or absurd result, this court may look to other sources for the statute's meaning. *Id*. at 120-21, 40 P.3d at 439.

The plain meaning of the justifiable battery statutes do not require that the amount of force used be reasonable and necessary or in response to a threat of serious bodily injury

Battery is justified in any circumstance that justifies homicide. NRS 200.275. Justifiable homicide is defined by NRS 200.120 through NRS 200.190. At issue in the current case is NRS 200.160, which provides for "[a]dditional cases of justifiable homicide." NRS 200.160 states that homicide is justifiable when committed

> 1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
> 2. In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode in which the slayer is.

The plain language of NRS 200.160 does not require that the amount of force used be reasonable and necessary in order to be justified or state that deadly force may only be used in response to a threat of serious bodily injury. Rather, the statute requires that in order to be justified, the homicide must be in response to a reasonable apprehension of a felony or in the actual resistance of an attempted felony, regardless of the type of felony. *See Davis*, 130 Nev. at 144,

321 P.3d at 873 ("The plain language of [NRS 200.160] does not differentiate between the types of felonies from which a person may defend himself."). Thus, a plain reading of NRS 200.160 and NRS 200.275 appears to justify any battery committed in the reasonable apprehension of *any* felony or in resistance of an attempt to commit *any* felony, regardless of the amount of force used or whether the person battered poses a threat of serious bodily injury. Because such an interpretation is unreasonable and absurd, we look to other sources for the statutes' meaning. See *Friend*, 118 Nev. at 121, 40 P.3d at 439.

State v. Weddell

In drafting the jury instruction at issue, the district court relied on our holding in *Weddell*, 118 Nev. at 214, 43 P.3d at 992. At issue in *Weddell* was whether a private party could use deadly force to arrest a fleeing felon. *Id.* at 208, 43 P.3d at 988. Nevada had previously codified the common-law rule permitting a private person to use deadly force to apprehend a felon but later repealed it. *Id*. at 212, 43 P.3d at 990. In the same bill repealing Nevada's codification of this common-law rule, the Legislature enacted NRS 171.1455, a statute limiting a police officer's use of deadly force against a fleeing felon. *Id*. However, the new statute made no mention of limiting a private party's use of deadly force. *Id*.

The *Weddell* court, relying on the United States Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), concluded that the policy rationale that existed at common law for allowing deadly force to be used in apprehending a felon had been eroded. *Weddell*, 118 Nev. at 211, 43 P.3d at 990. It reasoned that "[t]he rule was developed at a time when felonies were only the very serious, violent or dangerous crimes and 'virtually all felonies were punishable by death'"; therefore, the killing of a fleeing felon resulted in no greater punishment than the felon would receive if arrested. *Id*. (quoting *Garner*, 471 U.S. at 13). The *Weddell* court noted that, in contrast, "the modern distinction between felonies and misdemeanors is 'minor and often arbitrary'" and that

> [s]ociety would not tolerate the use of deadly force to prevent the commission of any of these crimes or to apprehend someone suspected of any of these crimes. The modern arbitrary and expanded classification of crimes as felonies has undermined the rationale for the old common law fleeing-felon rule, which . . . was to prevent the escape of a felon by inflicting the punishment that was inevitably to come.

Id. at 211-12, 43 P.3d at 990 (quoting *Garner*, 471 U.S. at 14). Thus, because of the "legislature's evident disapproval of the fleeing-felon

doctrine," and because "the rationale for the rule at common law no longer exists," the *Weddell* court held that

> a private person may only use the amount of force that is reasonable and necessary under the circumstances. Further, we hold that the use of deadly force is, as a matter of law, unreasonable, unless the arrestee poses a threat of serious bodily injury to the private arrestor or others.

Id. at 214, 43 P.3d at 992. Thus, *Weddell*'s holding is almost identical to the language that the district court added to Newell's justifiable battery instruction. *See id.*

Weddell's reasoning is applicable to our interpretation of the justifiable homicide statutes

Although *Weddell* dealt with the issue of the fleeing-felon rule, we find that its reasoning is nonetheless applicable to our interpretation of NRS 200.160. Similar to *Weddell*, this case deals with a common-law rule allowing the use of deadly force against a felon or someone committing a felony without distinguishing the type of felony committed. *See Weddell*, 118 Nev. at 212, 43 P.3d at 990 (fleeing-felon statute held to be a codification of the common law); *see also People v. Ceballos*, 526 P.2d 241, 245 (Cal. 1974) (holding that a justifiable homicide statute similar to NRS 200.160 was a codification of the common law). Thus, we find that in both *Weddell* and the current case the "rationale for the rule at common law no longer exists" because "the modern distinction between felonies and misdemeanors is 'minor and often arbitrary.'" *Weddell*, 118 Nev. at 211, 214, 43 P.3d at 990, 992 (quoting *Garner*, 471 U.S. at 14).

[Headnote 4]

Likewise, we believe that "[s]ociety would not tolerate the use of deadly force to prevent the commission of any [nonviolent felony]." *Id.* at 211, 43 P.3d at 990. Newell argues that by the plain language of NRS 200.160(2), in order for a homicide to be justifiable, a felony must be committed *upon* the slayer. Thus, Newell argues that a literal construction of NRS 200.160 would not create absurd results, as it would not allow for nonviolent felonies such as bribery of a judicial officer or forgery to be met with deadly force. However, we do not find the plain language of NRS 200.160 to be so constrained. The plain language of NRS 200.160(2) authorizes the use of deadly force not only in resistance of felonies committed upon the slayer but also in response to felonies committed in the resistance of a felony *in the slayer's presence* or when the felony is *upon the slayer's dwelling*. Thus, the plain language of NRS 200.160(2) permits justifiable homicide in response to *any* felony committed in the slayer's

presence or upon the slayer's dwelling. Under this reading, deadly force could be justifiably used in response to a drug transaction committed in the slayer's presence. *See* NRS 200.160(2). To allow deadly force to be used in such circumstances is both intolerable to society and inconsistent with the original intent of the Legislature when it first enacted NRS 200.160.

[Headnote 5]

Therefore, we extend our holding in *Weddell* to NRS 200.160 and require that in order for homicide in response to the commission of a felony to be justifiable under that statute, the amount of force used must be reasonable and necessary under the circumstances. Furthermore, deadly force cannot be used unless the person killed poses a threat of serious bodily injury to the slayer or others. By extension, the amount of force used in a battery must also be reasonable and necessary in order to be justified, and deadly force cannot be used unless the person battered poses a threat of serious bodily injury to the slayer or others. Because the district court correctly included these requirements in its justifiable battery jury instruction, we hold that it did not abuse its discretion.

Attempted assault under NRS 200.471(1)(a)(2) is not legally impossible

Newell argues that because at common law assault was an attempted battery, attempted assault is a legally impossible double inchoate crime.

In Nevada, assault is broader than at common law. It includes:

> (1) Unlawfully attempting to use physical force against another person; or
>
> (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm.

NRS 200.471(1)(a). Thus, Nevada law codifies assault as two distinct activities: (1) the attempt to commit battery or (2) the intenti-onal placement of another person in fear of immediate bodily harm. Only the first is the equivalent of the common-law offense.

[Headnote 6]

Here, Newell was convicted of attempted assault under NRS 200.471(1)(a)(2): the intentional placement of "another person in reasonable apprehension of immediate bodily harm." While we agree that the attempt to attempt a crime is legally impossible, *see Lamb v. State*, 613 A.2d 402, 419 (Md. Ct. Spec. App. 1992) ("There can be no such offense as an 'attempt to attempt' a crime." (internal quotation marks omitted)), NRS 200.471(1)(a)(2) is not a crime of attempt. Therefore, we hold that Newell's conviction for attempted assault under NRS 200.471(1)(a)(2) was not legally impossible.

CONCLUSION

Because the district court correctly based its justifiable battery instruction on our holding in *Weddell*, it did not abuse its discretion. Furthermore, attempted assault under NRS 200.471(1)(a)(2) is not legally impossible. Therefore, we affirm Newell's judgment of conviction.

GIBBONS and PICKERING, JJ., concur.

THE STATE OF NEVADA, APPELLANT, *v.*
ANDRE D. BOSTON, RESPONDENT.

No. 62931

December 31, 2015 363 P.3d 453

Appeal from a district court order granting a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Prisoner petitioned for writ of habeas corpus, challenging 1988 convictions as a juvenile for, inter alia, burglary, lewdness with minor, battery, kidnapping sexual assault, and robbery on grounds that he effectively received sentence of life without parole and attorney rendered ineffective assistance. The district court denied petition. Prisoner appealed. The supreme court affirmed in part, reversed in part, and remanded. After evidentiary hearing following remand, the district court granted petition. State appealed. The supreme court, CHERRY, J., held that: (1) the United States Supreme Court decision in *Graham v. Florida*, 560 U.S. 48 (2010), prohibits aggregate sentences that constitute life without the possibility of parole for a nonhomicide offense committed by a juvenile; and (2) nonhomicide juvenile offenders are eligible for parole after serving 15 calendar years.

Vacated and remanded for further proceedings.

[Rehearing denied January 6, 2016]

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan VanBoskerck*, Chief Deputy District Attorney, and *Parker P. Brooks*, Deputy District Attorney, Clark County, for Appellant.

Law Offices of Martin Hart, LLC, and *Martin Hart*, Las Vegas, for Respondent.

1. COURTS.

The United States Supreme Court decision in *Graham v. Florida*, 560 U.S. 48 (2010), which held that a sentence of life without the possibility

of parole for a nonhomicide offense committed when the defendant was a juvenile constitutes cruel and unusual punishment, applied retroactively because it was a new rule that fell within one of the exceptions to the general rule of nonretroactivity in that it prohibited a specific punishment for a class of persons. U.S. Const. amend. 8.

2. Criminal Law.

Petitioner demonstrated good cause for late filing of successive petition for post-conviction relief, which asserted that petitioner effectively received sentence of life without parole for offenses that were committed while he was a juvenile, where petition was filed after filing of the United States Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), which held that a sentence of life without the possibility of parole for a nonhomicide offense committed when the defendant was a juvenile constituted cruel and unusual punishment, and *Graham* decision applied to aggregate sentences that were the functional equivalent of life without the possibility of parole. U.S. Const. amend. 8; NRS 34.726(1), 34.810(1)(b), (3).

3. Sentencing and Punishment.

The United States Supreme Court decision in *Graham v. Florida*, 560 U.S. 48 (2010), which held that a sentence of life without the possibility of parole for a nonhomicide offense committed when the defendant was a juvenile constitutes cruel and unusual punishment, prohibits aggregate sentences that constitute life without the possibility of parole for a nonhomicide offense committed by a juvenile; decision does not specifically limit its holding to offenders who were convicted for a single nonhomicide offense, and defendant in *Graham* received the functional equivalent of life without parole under a sentencing scheme in which parole was not provided for one offense. U.S. Const. amend. 8.

4. Sentencing and Punishment.

Under the Eighth Amendment, juvenile offenders must have a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. U.S. Const. amend. 8.

5. Pardon and Parole.

Statute prohibiting district courts from sentencing nonhomicide juvenile offenders to life without parole and addressing the parole eligibility of nonhomicide juvenile offenders makes a nonhomicide juvenile offender eligible for parole after serving 15 calendar years of incarceration on his or her aggregate sentences.

Before the Court En Banc.

OPINION

By the Court, Cherry, J.:

The Clark County District Court sentenced Andre Boston, a juvenile at the time he committed his crimes, to serve 14 consecutive life terms with the possibility of parole, plus a consecutive term of 92 years in prison. Boston subsequently filed a post-conviction petition for a writ of habeas corpus. The district court granted the petition based on *Graham v. Florida*, 560 U.S. 48 (2010), wherein the United States Supreme Court concluded that a sentence of life without the possibility of parole for a nonhomicide offense committed when the

defendant was a juvenile constitutes cruel and unusual punishment. In this case, we consider whether the holding in *Graham* applies when an aggregate sentence imposed against a juvenile defender convicted of more than one nonhomicide offense is the equivalent of a life-without-parole sentence. We hold that it does. We further conclude that the decision in *Graham* provides good cause and actual prejudice for Boston's untimely and successive petition. Additionally, we conclude A.B. 267 remedies Boston's unconstitutional sentence.

FACTS AND PROCEDURAL HISTORY

In 1983, 16-year-old Andre Boston committed a number of horrific crimes against a 12-year-old victim, a 15-year-old victim, and their stepmother. Boston was convicted, pursuant to a jury verdict, of first-degree kidnapping with the use of a deadly weapon, six counts of sexual assault with the use of a deadly weapon, robbery with the use of a deadly weapon, and attempted dissuading a victim/witness from reporting a crime with the use of a deadly weapon for the crimes committed against the 15-year-old victim. He was also convicted of burglary, lewdness with a minor with the use of a deadly weapon, assault with the use of a deadly weapon, and battery with the use of a deadly weapon, for the acts committed against the 12-year-old victim and her stepmother. The district court sentenced Boston to 14 life sentences with the possibility of parole, plus a consecutive 92 years in prison. Thus, Boston will have to serve approximately 100 years in prison before he is eligible for parole.

Boston appealed from his judgment of conviction, and this court dismissed the appeal. *Boston v. State*, Docket No. 19607 (Order Dismissing Appeal, October 24, 1989). The remittitur issued on November 14, 1989.

In 1990, Boston filed a petition for post-conviction relief pursuant to NRS 177.315. The district court denied the petition without an evidentiary hearing, and this court remanded for an evidentiary hearing. *Boston v. State*, Docket No. 21871 (Order of Remand, September 30, 1991). After holding an evidentiary hearing, the district court again denied Boston's petition. Boston untimely appealed the district court's denial, which this court dismissed for lack of jurisdiction. *Boston v. State*, Docket No. 26034 (Order Dismissing Appeal, October 7, 1994).

In 2011, Boston filed a pro se post-conviction petition for a writ of habeas corpus in the district court. Boston claimed that his sentence constituted cruel and unusual punishment pursuant to *Graham v. Florida*, 560 U.S. 48 (2010). The district court denied the petition without considering Boston's good cause argument, and Boston appealed. This court affirmed in part, reversed in part, and remanded the case to the district court to consider whether *Graham* prohibits

aggregate sentences that are the functional equivalent of life without the possibility of parole and whether *Graham* provided good cause to excuse the procedural defects. *Boston v. State*, Docket No. 58216 (Order Affirming in Part, Reversing in Part and Remanding, February 3, 2012). Following an evidentiary hearing, the district court determined that *Graham* prohibited aggregate sentences that were the functional equivalent of life without the possibility of parole and that *Graham* also provided good cause and prejudice to overcome the procedural bar. Accordingly, the district court granted Boston's petition and ordered a new sentencing hearing. The State appeals from the order granting the petition.

While Boston's instant appeal was pending before us, the Nevada Legislature passed Assembly Bill No. 267. A.B. 267, 78th Leg. (Nev. 2015). A.B. 267 amended NRS 176.025 and NRS Chapter 213, and took effect on October 1, 2015. *Id.* As of October 1 of this year, NRS 176.025 prohibits sentences of life imprisonment without the possibility of parole if the offender was a juvenile at the time he or she committed the crime. *Id.* A.B. 267 also adds a new subsection to NRS Chapter 213, which makes prisoners eligible for parole after 15 years if their sentences were for nonhomicide crimes committed while they were juveniles. *Id.*

Based on the new law, we issued an Order Directing Supplemental Briefing and Inviting Amicus Briefing. *Boston v. State*, Docket No. 62931 (Order Directing Supplemental Briefing and Inviting Amicus Briefing, June 19, 2015). In accordance with our order, the State, Boston, and amici filed supplemental briefs.

DISCUSSION

Procedural bars

Boston filed his petition on January 5, 2011—more than 21 years after this court issued the remittitur from his direct appeal. Thus, Boston's petition was untimely. *See* NRS 34.726(1). Boston's petition was also untimely because he filed it nearly 17 years after the effective date of NRS 34.726. *See* 1991 Nev. Stat., ch. 44, §§ 5, 33, at 75-76, 92; *Pellegrini v. State*, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001). Furthermore, Boston's petition was successive, as he previously filed a post-conviction petition for a writ of habeas corpus. *See* NRS 34.810(1)(b)(2). Accordingly, Boston's petition is procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

[Headnotes 1, 2]

Boston asserts that the U.S. Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), constitutes good cause to overcome the procedural bars. We have recognized that good cause may be established where the "legal basis for the claim was not reasonably

available" for a prior, timely petition. *Bejarano v. State*, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006). The Supreme Court did not decide *Graham* until 2010, and Boston filed his petition within one year of the Court's decision. Therefore, Boston has demonstrated good cause for the late filing if *Graham* applies to aggregate sentences that are the functional equivalent of life without the possibility of parole.[1] To demonstrate actual prejudice, Boston must show error that worked to his actual and substantial disadvantage. *See Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

Graham v. Florida

Boston argues that *Graham* prohibits aggregate sentences that constitute life without the possibility of parole for a nonhomicide offense committed by a juvenile. We agree.

In *Graham*, Graham, at the age of 16, pleaded guilty to armed burglary with assault or battery and attempted armed robbery. 560 U.S. at 53-54. The Florida court initially placed Graham on probation. *Id.* at 54. Within six months, Graham was arrested for committing additional robberies and other infractions, in violation of his probation. *Id.* at 54-55. After revoking probation, the court sentenced Graham to life in prison for the armed burglary conviction and 15 years for the attempted robbery conviction. *Id.* at 57. Because Florida abolished its parole system, the sentence required that Graham spend the rest of his life in prison unless he received a grant of executive clemency. *Id.*

On review, the U.S. Supreme Court considered whether a juvenile offender could receive a sentence of life without the possibility of parole for a nonhomicide offense. *Id.* at 52-53. The Court held that such a sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 74. In reaching its decision, the Court surveyed every state that allowed a juvenile to be sentenced to life without the possibility of parole and noted that there were only 123 juvenile nonhomicide offenders serving life without the possibility of parole in this country; the Court reported five in Nevada. *Id.* at 62-64. This information led the Court to believe that there is a national consensus *against* sentencing juvenile

[1]We also recognize that the decision in *Graham* would only apply in this case if *Graham* applied retroactively. *See Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). Using our well-established retroactivity analysis, we conclude that *Graham* applies retroactively because it is a new rule that falls within one of the exceptions to the general rule of nonretroactivity because the decision in *Graham* prohibits a specific punishment for a class of persons. *See Colwell v. State*, 118 Nev. 807, 817, 59 P.3d 463, 470 (2002); *see also Moore v. Biter*, 725 F.3d 1184, 1190-91 (9th Cir. 2013) (concluding that *Graham* established a new rule that was retroactive on collateral review).

nonhomicide offenders to life without the possibility of parole. *Id.* at 67.

The Supreme Court reasoned that "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.* at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). Moreover, juveniles who receive a sentence of life without the possibility of parole will spend a greater percentage of their lives in prison than adults serving the same sentence. *Id.* at 70. Consequently, the Court concluded that "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for imposing such a sentence against a nonhomicide juvenile offender. *Id.* at 71 (internal citation omitted). The Court's rule "prohibit[s] States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.* at 75. The Court also concluded that "[a] State is not required to guarantee eventual freedom to a juvenile offender[,]" but the State must give "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.*

Applying Graham to aggregate sentences

Since the Supreme Court's decision, courts have inconsistently decided whether the *Graham* holding prohibits sentences that, when aggregated, constitute the functional equivalent of life without the possibility of parole. Several jurisdictions have concluded that *Graham* prohibits sentences that constitute the functional equivalent of life without the possibility of parole. *See, e.g.*, *Moore*, 725 F.3d at 1191, 1193-94 (explaining that *Graham* focused on sentences that, "regardless of the underlying nonhomicide crime," "mean[ ] that a juvenile is incapable of returning to society," and holding that an aggregate 254-year sentence was the functional equivalent of life without the possibility of parole); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding that a 110-year-to-life sentence was the functional equivalent of a sentence of life without the possibility of parole); *Floyd v. State*, 87 So. 3d 45, 45 (Fla. Dist. Ct. App. 2012) (holding that an 80-year sentence was the functional equivalent of life without the possibility of parole and unconstitutional). These courts concluded that to allow the functional equivalent of a sentence of life without the possibility of parole for juvenile nonhomicide offenders would frustrate the Supreme Court's reasoning regarding a juvenile's opportunity to demonstrate growth and maturity. *Caballero*, 282 P.3d at 295; *Moore*, 725 F.3d at 1192-93. The juvenile would not have a realistic opportunity for release from prison because the opportunity to receive parole would not arise during the juvenile's natural life expectancy. *Caballero*, 282 P.3d at 295; *Moore*, 725 F.3d at 1194.

In contrast, other courts have concluded that aggregate sentences that constitute the functional equivalent of life without the possibility of parole do not violate the *Graham* rule. *See, e.g.*, *Bunch v. Smith*, 685 F.3d 546, 550 (6th Cir. 2012), *cert. denied sub nom. Bunch v. Bobby*, 569 U.S. 947 (2013); *State v. Kasic*, 265 P.3d 410, 414-15 (Ariz. Ct. App. 2011). These courts (i.e., the *Bunch* and *Kasic* courts) focus on a passage in *Graham*, which states that "[t]he instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." 560 U.S. at 63; *see also Bunch*, 685 F.3d at 551; *Kasic*, 265 P.3d at 414. These courts further note that in determining that a national consensus existed, the Supreme Court relied on data regarding juveniles who were specifically sentenced to life in prison without the possibility of parole. *Bunch*, 685 F.3d at 551-52. The *Bunch* court determined that because the Supreme Court did not consider the number of juveniles who received the functional equivalent of life without the possibility of parole, these cases do not fall within the categorical ban enunciated in *Graham*. *Bunch*, 685 F.3d at 552.

The most significant concern for a non-functional-equivalent court is that *Graham* provides no direction on how to determine when aggregate sentences are the functional equivalent of a sentence of life without the possibility of parole. Instead of applying *Graham* to an aggregate sentence, one court observed that the proper focus was " 'on the sentence imposed for each specific crime, not the cumulative sentence.'" *Kasic*, 265 P.3d at 415 (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)). Under this reasoning, if each individual sentence offers the juvenile nonhomicide offender the opportunity for parole, the aggregate sentence is acceptable according to *Graham*.

[Headnote 3]

In the instant case, the State advocates for the non-functional-equivalent approach, arguing that the Supreme Court's holding in *Graham* applies solely to a single sentence for a nonhomicide offense. The State asserts that for *Graham* to apply, three factors must be present: (1) the offender must have been a juvenile when he or she committed the offense; (2) the sentence imposed must be for a single, nonhomicide offense; and (3) the district court must have sentenced the defendant to life without the possibility of parole. We disagree and are persuaded that the *Graham* rule applies to aggregate sentences that are the functional equivalent of a sentence of life without the possibility of parole.

Nowhere in the *Graham* decision does the Supreme Court specifically limit its holding to offenders who were convicted for a *single* nonhomicide offense, and the State does not cite to any language in the case to support its claim that the *Graham* decision does. Consequently, the State's argument does not comport with *Graham*: Gra-

ham did not receive the specific sentence of life without parole; he received the sentence of life in a jurisdiction that abolished its parole system. *Graham*, 560 U.S. at 57. Therefore, just like Boston, Graham received the functional equivalent of life without parole. *See id.*

This court recognizes that the Florida court sentenced Graham to life under a sentencing scheme in which parole is not provided for one offense, *id.*, however, we conclude that if we were to read the Supreme Court's holding as the State argues we should, we would undermine the Court's goal of "prohibit[ing] States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.* at 75. As this court has previously stated, a sentence of life without the possibility of parole for a juvenile offender "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944, 944 (1989); *see Graham*, 560 U.S. at 70 (quoting *Naovarath*, 105 Nev. at 526, 779 P.2d at 944); *see also Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) ("Life in prison without the possibility of parole gives [a juvenile] no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." (quoting *Graham*, 560 U.S. at 79)). The functional-equivalent approach best addresses the concerns enunciated by the U.S. Supreme Court and this court regarding the culpability of juvenile offenders and the potential for growth and maturity of these offenders.

[Headnote 4]

Nothing in our opinion today requires the State to ensure that nonhomicide juvenile offenders are given "eventual freedom." *See Graham*, 560 U.S. at 75. But juvenile offenders must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See id*. We therefore hold that a district court violates the prohibition of cruel and unusual punishment when it sentences a nonhomicide juvenile offender to the functional equivalent of life without the possibility of parole. Because the decision in *Graham* applies to juvenile offenders with aggregate sentences that are the functional equivalent of life without the possibility of parole, we conclude that Boston demonstrates good cause and actual prejudice to overcome the procedural bars, and his ground for relief has merit.

We recognize that our holding today raises complex and difficult issues, not the least of which is when will aggregate sentences be determined to be the functional equivalent of a sentence of life without the possibility of parole. We need not answer this question today for two reasons. First, Boston's aggregate sentences, which require him

to serve approximately 100 years before being eligible for parole, are without a doubt the functional equivalent of a sentence of life without the possibility of parole. Second, we need not answer this question because the Legislature has made Boston parole-eligible.

Assembly Bill No. 267

In 2015, the Legislature addressed the concerns of juvenile sentencing raised in *Graham* in a significant way in A.B. 267. A.B. 267 prohibits the district courts from sentencing nonhomicide juvenile offenders to life without parole and addresses the parole eligibility of nonhomicide juvenile offenders.[2] A.B. 267, 78th Leg. (Nev. 2015). Amendments to NRS Chapter 176 direct trial courts to "consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles . . . and the typical characteristics of youth." *Id.* A.B. 267 also amended NRS 176.025 to preclude the district courts from sentencing nonhomicide juvenile offenders to life without parole:

> A sentence of death ***or life imprisonment without the possibility of parole*** must not be imposed or inflicted upon any person convicted of a crime now punishable by death ***or life imprisonment without the possibility of parole*** who at the time of the commission of the crime was less than 18 years of age. As to such a person, the maximum punishment that may be imposed is life imprisonment . . . ***with*** the possibility of parole.

A.B. 267 § 2, 78th Leg. (Nev. 2015) (emphasis in original to indicate amendments to statute).

The Legislature further added a new section to NRS Chapter 213, which allows for parole eligibility, after serving 15 years of incarceration, for those who committed nonhomicide crimes as juveniles:

> **1. Notwithstanding any other provision of law, except as otherwise provided in subsection 2 or unless a prisoner is subject to earlier eligibility for parole pursuant to any other provision of law, a prisoner who was sentenced as an adult for an offense that was committed when he or she was less than 18 years of age is eligible for parole as follows:**
>
> **(a) For a prisoner who is serving a period of incarceration for having been convicted of an offense or offenses that did not result in the death of a victim, after the prisoner has served 15 calendar years of incarceration, including any time served in a county jail.**

[2]If the juvenile's offense results in the death of one victim, the juvenile offender, regardless of the district court's sentence, will be eligible for parole after serving 20 years of imprisonment. A.B. 267; NRS 213.1235.

Id. § 3(1) (emphasis in original to indicate amendments to statute); NRS 213.12135. Regardless of the minimum prison sentence that the trial court sets for eligibility, the juvenile offender will be parole-eligible after serving a minimum sentence of 15 years.[3] *Id.* § 3(1). These amendatory provisions apply retroactively. *Id.* § 5.

The State argues that *aggregate* sentences that constitute the functional equivalent of life without the possibility of parole are included with the amendments set forth in A.B. 267. We agree. Although the record does not reflect whether Boston has ever elected to aggregate his sentences pursuant to NRS 213.1212, the statutory provision recently enacted through A.B. 267 does just that.

[Headnote 5]

The new statutory provision to be set forth in NRS Chapter 213 gives a juvenile offender parole eligibility after 15 years of incarceration "for having been convicted of an offense or *offenses* that did not result in the death of a victim." *Id.* (emphasis added). The plural form of "offense" demonstrates the Legislature's intent to allow parole eligibility after 15 years when a juvenile defendant is convicted of more than one nonhomicide offense and the sentences therefore aggregate. Thus, we conclude that the legislative changes set forth in A.B. 267 apply to aggregate sentences and a nonhomicide juvenile offender is eligible for parole after serving 15 calendar years of incarceration on his or her aggregate sentences.

The district court originally sentenced Boston on October 20, 1988, meaning that he has been incarcerated for at least 27 years and is therefore eligible for parole under A.B. 267. The Legislature has provided all that *Graham* requires—a meaningful opportunity for Boston to obtain release within his lifetime. Accordingly, although we agree with the district court's reasoning—that *Graham* precludes aggregate sentences that constitute the functional equivalent of life without the possibility of parole against nonhomicide juvenile offenders—we nonetheless vacate its order and remand this case to the district court to deny Boston's petition because the judiciary cannot provide him with a better solution than that which the Legislature has already provided.

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

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[3]A.B. 267 does *not* guarantee that nonhomicide juvenile offenders will be released on parole after serving 15 years of imprisonment. A.B. 267 solely makes these offenders *eligible* for parole after serving 15 years.

ERNESTO MANUEL GONZALEZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64249

December 31, 2015 366 P.3d 680

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to engage in an affray, carrying a concealed weapon, discharging a firearm in a structure, murder in the first degree with the use of a deadly weapon with a gang enhancement, and conspiracy to commit murder. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

The supreme court, SAITTA, J., held that: (1) when jury's question suggests confusion or lack of understanding of a significant element of applicable law, an exception exists to bright-line rule that judge's refusal to answer a jury's question is not error if judge is of opinion that instructions already given are adequate, correctly state law, and fully advise jury on procedures to follow; (2) the district court judge abused her discretion in refusing to answer jury's question relating to conspiracy; (3) instruction that included an instruction on both defense of others and self-defense was erroneous but was not plain error; (4) the district court abused its discretion in refusing to give accomplice-distrust instruction; (5) guilt phase of a trial must be bifurcated from gang-enhancement phase; and (6) cumulative effect of errors denied defendant his right to a fair trial.

Reversed and remanded.

[Rehearing denied March 25, 2016]

Richard F. Cornell, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent.

1. CRIMINAL LAW.
   The supreme court reviews the refusal to respond to jury inquiries for an abuse of discretion.
2. CRIMINAL LAW.
   When jury's question suggests confusion or lack of understanding of a significant element of the applicable law, an exception exists to the bright-line rule that a judge's refusal to answer a jury's question during deliberation is not error if judge is of the opinion that instructions already given are adequate, correctly state the law, and fully advise the jury on the procedures the jury is to follow.
3. CRIMINAL LAW.
   The district court abused its discretion in prosecution for offenses, including conspiracy to commit murder, in refusing to answer jury's question

as to whether a person was guilty of conspiracy if that person had no knowledge of a conspiracy but that person's actions contributed to someone else's plan; question went to the heart of the offense and suggested confusion or a lack of understanding of the central element requiring a knowing agreement to act in furtherance of an unlawful act.

4. Conspiracy.
   Conspiracy is a knowing agreement to act in furtherance of an unlawful act.
5. Conspiracy.
   When a defendant does not know that he or she is acting in furtherance of an unlawful act, there can be no conspiracy.
6. Criminal Law.
   The district court did not abuse its discretion in refusing to answer jury question as to whether a person could only be guilty of second-degree murder or first-degree murder, or whether a person could be guilty of both; question did not suggest confusion or the lack of understanding of a significant element of either offense.
7. Criminal Law.
   Whether a jury instruction accurately states the law is reviewed de novo.
8. Homicide.
   When a jury instruction concerns a defendant's right to self-defense, the issue of whether it correctly states the law is of constitutional magnitude.
9. Criminal Law.
   If the defendant did not object to an instruction, the instruction is reviewed for plain error.
10. Criminal Law.
    The district court has the duty to instruct on general principles of law relevant to the issues raised by the evidence and has the correlative duty to refrain from instructing on principles of law that not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.
11. Criminal Law.
    Before a jury can be instructed that it may draw a particular inference, evidence must appear in the record that, if believed by the jury, will support the suggested inference.
12. Criminal Law.
    Instruction in first-degree murder prosecution that contained both an instruction on defense of others and an instruction on self-defense was erroneous, when no evidence was submitted at trial that defendant was in, or believed he was in, imminent danger of serious bodily harm or death when he shot victim, such that included self-defense instruction was irrelevant to issues raised by the evidence and had effect of confusing jury. NRS 200.200.
13. Criminal Law.
    Jury instructions that are unduly confusing may be erroneous.
14. Criminal Law.
    Error in including a self-defense instruction along with defense-of-others instruction, in murder prosecution in which no evidence was submitted at trial to support a finding that defendant was in, or believed he was in, imminent danger of serious bodily harm or death when he shot victim, was not plain error; the given jury instruction, while confusing, did not appear to be an incorrect statement of Nevada law. NRS 200.200.

15. Criminal Law.
Plain error review considers whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights.

16. Criminal Law.
The district court is required to give a cautionary jury instruction when an accomplice's testimony is uncorroborated.

17. Criminal Law.
If accomplice testimony is corroborated, a cautionary instruction is favored, but failure to grant it is not reversible error.

18. Criminal Law.
An "accomplice-distrust instruction" advises the jury that it should view as suspect incriminating testimony given by those who are liable to prosecution for the identical charged offense as the accused.

19. Criminal Law.
The district court has an affirmative obligation to cooperate with defendant to correct a proposed instruction, and the failure to do so in the case of an accomplice-distrust instruction is error.

20. Criminal Law.
The district court abused its discretion, in prosecution for first-degree murder and conspiracy to commit same murder, in refusing to give accomplice-distrust instruction because material portions of testimony by accomplice, who was also charged with conspiracy, were uncorroborated; fact that some of accomplice's testimony was corroborated by casino video showing clash between two biker gangs during which fatal shooting occurred did not corroborate his testimony about alleged conspiracy to kill victim.

21. Criminal Law.
The supreme court normally reviews decisions regarding bifurcation of enhancement portions of a trial for an abuse of discretion.

22. Sentencing and Punishment.
The guilt phase of a trial must be bifurcated from the gang-enhancement phase because the admission of highly prejudicial evidence to prove a gang enhancement that would not otherwise be admissible to prove the underlying crime compromises a defendant's right to a fair trial.

23. Criminal Law.
If the cumulative effect of errors committed at trial denies appellant his right to a fair trial, the supreme court will reverse the conviction.

24. Criminal Law.
Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.

25. Criminal Law.
Cumulative effect of errors in refusing to respond to jury's question that suggested it was confused regarding significant element of conspiracy to commit murder, in refusing to give an accomplice-distrust instruction regarding accomplice's uncorroborated testimony, and refusing to bifurcate guilt and gang-enhancement phases of defendant's trial, denied defendant his right to a fair trial on first-degree murder and other charges, requiring reversal of convictions and remand for new trial.

Before the Court En Banc.

OPINION

By the Court, SAITTA, J.:

In the instant case, appellant challenges his conviction arguing that the district court abused its discretion when it refused to answer two questions from the jury during deliberations, when it gave a defense-of-others jury instruction that was unduly confusing and not supported by the evidence, when it refused to give his proffered accomplice-distrust jury instruction, and when it refused to bifurcate the gang-enhancement portion of the trial from the guilt phase. We agree with appellant in several respects and hold that in situations where a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the judge has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion. We also hold that, to provide the defendant with a fair trial, the guilt phase of trial must be bifurcated from the gang-enhancement phase. Because the district court failed to answer the jury's question regarding a significant element of conspiracy, refused to bifurcate the guilt and gang-enhancement portions of Gonzalez's trial, and committed other errors, we hold that the cumulative effect of these errors deprived appellant of his right to a fair trial. We therefore reverse Gonzalez's judgment of conviction and remand for a new trial.

FACTUAL AND PROCEDURAL HISTORY

In 2011, a brawl between members of two motorcycle gangs, the Vagos and the Hell's Angels, occurred in a Sparks casino. The fight was instigated by Stuart Rudnick, a member of the Vagos. During the fight, another member of the Vagos, appellant Ernesto Manuel Gonzalez, shot and killed Jethro Pettigrew, a member of the Hell's Angels.

Rudnick was initially charged as a coconspirator, but he pleaded guilty to reduced charges and ultimately testified against Gonzalez. Although Rudnick pleaded guilty prior to Gonzalez's trial, he was not sentenced until after he testified against Gonzalez. At trial, Rudnick testified that he and Gonzalez had a meeting prior to the fight with the president of the international chapter of the Vagos. Rudnick further testified that the president put out a "green light" on Pettigrew, meaning that Pettigrew was to be killed, and that Gonzalez said he would kill Pettigrew. No other witnesses testified to the existence of this conspiracy to kill Pettigrew.

The jury found Gonzalez guilty on all counts. The district court merged the convictions of challenge to fight resulting in death with the use of a deadly weapon and second-degree murder with the conviction of first-degree murder with the use of a deadly weapon. Although the jury found the alleged deadly-weapon and gang en-

hancements, the district court only imposed sentences for the weapons enhancement. *See* NRS 193.169(1) (providing that additional enhancement sentence may be imposed for only one enhancement "even if the person's conduct satisfies the requirements for imposing an additional term of imprisonment pursuant to another one or more" of the enhancement statutes).

DISCUSSION

On appeal, Gonzalez argues, among other claims, that the district court abused its discretion: (1) when it refused to answer two questions from the jury during deliberations, (2) when it gave a defense-of-others jury instruction that was unduly confusing and not supported by the evidence, (3) when it refused to give his proffered accomplice-distrust jury instruction, and (4) when it refused to bifurcate the gang-enhancement portion of the trial from the guilt phase.

The district court's refusal to answer jury inquiries during deliberations

[Headnote 1]

This court reviews the refusal to respond to jury inquiries for an abuse of discretion. *Tellis v. State*, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968).

During jury deliberations, a juror sent two questions to the district court judge. The first question stated:

> Legal question:
>
> Looking at Instruction no. 17: If a person has no knowledge of a conspiracy but their actions contribute to someone [else's] plan, are they guilty of conspiracy?

The second question stated:

> People in here are wondering if a person can only be guilty of 2nd degree murder or 1st. Can it be both?

Both Gonzalez's attorney and the State agreed that the answers to both questions were no. The district court refused to answer the first question, instead stating:

> It is improper for the Court to give you additional instruction on how to interpret Instruction no. 17. You must consider all the instructions in light of all the other instructions.

The district court also refused to answer the second question, stating:

> You must reach a decision on each count separate and apart from each other count.

We create an exception to the rule in Tellis in situations where the jury's question suggests confusion or lack of understanding of a significant element of the applicable law

The current law regarding a judge's duty to answer a jury's questions was promulgated in *Tellis*:

> The trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberation. If he is of the opinion the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, his refusal to answer a question already answered in the instructions is not error.

84 Nev. at 591, 445 P.2d at 941.

Here, because Gonzalez does not allege that the given jury instructions were inadequate or incorrectly stated the law, under our decision in *Tellis*, the district court did not abuse its discretion by refusing to answer the jury's questions. However, we are of the opinion that *Tellis* does not go far enough in describing a judge's duty to answer questions from the jury during deliberations.

[Headnote 2]

We do not wish to completely overturn *Tellis*. However, we believe that there should be an exception to the bright-line rule in *Tellis* regarding situations where the jury's question suggests confusion or lack of understanding of a significant element of the applicable law. *See United States v. Southwell*, 432 F.3d 1050, 1053 (9th Cir. 2005) ("Because it is not always possible, when instructing the jury, to anticipate every question that might arise during deliberations, the district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." (internal quotations omitted)); *see also Harrington v. Beauchamp Enters.*, 761 P.2d 1022, 1025 (Ariz. 1988) (holding that when jurors "express confusion or lack of understanding of a significant element of the applicable law, it is the court's duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion"); *State v. Juan*, 242 P.3d 314, 320 (N.M. 2010) ("[W]hen a jury requests clarification regarding the legal principles governing a case, the trial court has a duty to respond promptly and completely to the jury's inquiry."). In such situations, the court has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion. *See Southwell*, 432 F.3d at 1053; *Harrington*, 761 P.2d at 1025; *Juan*, 242 P.3d at 320. This is true even when the jury is initially given correct instructions. *People v. Brouder*, 523 N.E.2d 100, 105 (Ill. App. Ct. 1988); *see also Harrington*, 761 P.2d at 1025 (holding that the court has a duty to respond to the jury even when "the original instructions were complete and clear").

[Headnotes 3-6]

Here, the jury's question on conspiracy went to the very heart of that offense. Conspiracy is a knowing agreement to act in furtherance of an unlawful act. *Bolden v. State*, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005). When a defendant does not know that he or she is acting in furtherance of an unlawful act, there can be no conspiracy. Because the jury's first question suggested confusion or a lack of understanding of this central element of the crime of conspiracy, we hold that the district court abused its discretion when it refused to answer the question. However, because the jury's second question did not suggest confusion or the lack of understanding of a significant element of first- or second-degree murder, the district court did not abuse its discretion when it refused to answer that question.

The defense-of-others jury instruction

[Headnotes 7-9]

Whether a jury instruction accurately states the law is reviewed de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). When the instruction concerns a defendant's right to self-defense, the issue is of constitutional magnitude. *See United States v. Sayetsitty*, 107 F.3d 1405, 1414 (9th Cir. 1997) (stating that "a defendant has a constitutional right to have the jury consider defenses [that] negate [criminal liability]"); *State v. Walden*, 932 P.2d 1237, 1239 (Wash. 1997) (indicating that an erroneous instruction on self-defense is an error of constitutional magnitude); *see also Harkins v. State*, 122 Nev. 974, 989-90, 143 P.3d 706, 716 (2006) (although not identifying the error as one of constitutional magnitude, reviewing whether an erroneous self-defense jury instruction was harmless beyond a reasonable doubt, which is a review that is performed for constitutional errors). However, if the defendant did not object to an instruction, the instruction is reviewed for plain error. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

The defense-of-others jury instruction improperly contained an instruction on self-defense that was not supported by the record

[Headnotes 10, 11]

The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence and has the correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues. It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.

People v. Alexander, 235 P.3d 873, 935 (Cal. 2010) (citations omitted) (internal quotations omitted).

Jury Instruction 34 states:

> The killing of another person in self-defense or defense of another is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or any other person in his presence or company or cause great bodily injury to him or any other person in his presence or company; and
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense or defense of another force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself or any other person in his presence or company.
>
> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense or defense of another, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.
>
> An honest but unreasonable belief in the necessity for self-defense or defense of another does not negate malice.
>
> The right of self-defense or defense of another is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance, or fault, to create a real or apparent necessity for making a felonious assault.
>
> However, where a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat when faced with the threat of deadly force.
>
> Actual danger is not necessary to justify a killing in self-defense or defense of another. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he or another in his presence, is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and

3. A reasonable person in a similar situation would believe himself or another in his presence to be in like danger.

The killing is justified even if it develops afterward that the person was mistaken about the extent of the danger.

If evidence of self-defense, or defense of others is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense or defense of others. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense or defense of others, you must find the defendant not guilty.

[Headnote 12]

Thus, the defense-of-others instruction contained both an instruction on defense of others *and* an instruction on self-defense. However, Gonzalez never attempted to assert that he acted in self-defense when he shot Pettigrew, and the evidence in the record does not support that defense. No evidence was submitted at trial to support a finding that Gonzalez was in, or believed he was in, imminent danger of serious bodily harm or death when he shot Pettigrew. *See* NRS 200.200 (defining self-defense). Therefore, we hold that because the included self-defense instruction was irrelevant to the issues raised by the evidence and had the effect of confusing the jury, it was erroneous. *See Alexander*, 235 P.3d at 935.

Intertwining the self-defense and defense-of-others instructions was unduly confusing to the jury

[Headnote 13]

Jury instructions that are unduly confusing may be erroneous. *United States v. Kalama*, 549 F.2d 594, 596 (9th Cir. 1976).

Here, instructions on self-defense and defense of others were bizarrely combined into a single instruction in a way that could be confusing to the jury. By intertwining the two defenses, the instruction was made unwieldy and unnecessarily confusing for the jury who was then expected to untangle the resulting amalgamation. It could also have misled the jury as to what defense Gonzalez was actually asserting. Therefore, we hold that because the defense-of-others instruction was unduly confusing, it was erroneous.

The district court did not commit plain error

[Headnote 14]

However, Gonzalez failed to object to the defense-of-others jury instruction. Therefore, we must review this instruction for plain error. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[Headnote 15]

Plain error review considers "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Id*. Here, while we find that the given defense-of-others instruction was erroneous, we are not convinced that it amounted to plain error. The given jury instruction, while confusing, does not appear to be an incorrect statement of Nevada law. Therefore, we hold that the district court did not commit plain error by giving its defense-of-others jury instruction.

The district court abused its discretion by refusing to give an accomplice-distrust instruction

[Headnotes 16-18]

The district court is required to give a cautionary jury instruction when an accomplice's testimony is uncorroborated. *Howard v. State*, 102 Nev. 572, 576, 729 P.2d 1341, 1344 (1986). If the testimony is corroborated, a cautionary instruction is favored, but failure to grant it is not reversible error. *Id*. An accomplice-distrust instruction "advises the jury that it should view as suspect incriminating testimony given by those who are liable to prosecution for the identical charged offense as the accused." *Riley v. State*, 110 Nev. 638, 653, 878 P.2d 272, 282 (1994).

At trial, Gonzales proffered the following jury instruction with regard to the State's witness, Rudnick:

> You have heard testimony from _____, a witness who had criminal charges pending against him. That testimony was given in the expectation that he would receive favored treatment from the government in connection with his case;
>
> For this reason, in evaluating the testimony of _____, you should consider the extent to which or whether his testimony may have been influenced by this factor. In addition, you should examine the testimony of _____ with greater caution than that of other witnesses.

The district court rejected the instruction, stating that it was "unnecessary given [the jury instruction on the duty of weighing the witnesses' credibility]" and it is "inappropriate to single out any one witness, especially in a case where most of the witnesses, the lay witnesses certainly had interests other than solely being a lay witness here."

[Headnote 19]

The district court is incorrect in its belief that it is inappropriate to single out any one witness as less reliable than others. That is, in fact, the entire purpose behind our requirement that an

accomplice-distrust instruction be given when the accomplice's testimony is uncorroborated. *See Riley*, 110 Nev. at 653, 878 P.2d at 282. Here, it is uncontroverted that Rudnick was an accomplice of Gonzalez's because they were both charged with conspiracy to commit the same murder. Therefore, if Rudnick's testimony was uncorroborated, the district court was required to give an accomplice-distrust jury instruction as to his testimony, and failure to do so was error.[1]

Rudnick's testimony was uncorroborated

[Headnote 20]

The State argues that because Rudnick's testimony was partially corroborated by such things as the casino video of Gonzalez shooting Pettigrew, a cautionary instruction was not required. While it is true that parts of Rudnick's testimony were corroborated by the casino's video recordings of the fight between the Vagos and Hell's Angels and the subsequent killing of Pettigrew by Gonzalez, Rudnick's testimony about the alleged conspiracy, which formed the basis for several of Gonzalez's convictions, was uncorroborated by any other witnesses or evidence.

Furthermore, one of the central issues in this case was whether Pettigrew's death was part of a premeditated conspiracy or occurred in the course of a spontaneous clash between two biker gangs. It would be absurd to conclude, as the State urges, that because some of an accomplice's testimony is corroborated by video that is publicly known to exist and is uncontroverted by the defendant, the entirety of the accomplice's testimony is considered to be corroborated for the purposes of *Howard*. Therefore, we hold that because material portions of Rudnick's testimony were uncorroborated, the district court abused its discretion by refusing to give an accomplice-distrust instruction.

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[1]We agree with the State that Gonzalez's proffered jury instruction was broader than the typical accomplice jury instruction in that it cautioned the jury against the testimony of any person with criminal charges pending against them in exchange for favorable treatment, and not just accomplices. A more appropriate instruction would be one similar to that proffered in *Howard*. 102 Nev. at 576, 729 P.2d at 1344 ("The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in light of all the evidence in the case." (internal quotations omitted)). However, the district court nonetheless has "an affirmative obligation to cooperate with the defendant to correct the proposed instruction," *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005) (internal quotations omitted), and the failure to do so in the case of an accomplice-distrust instruction is error.

The district court abused its discretion by refusing to bifurcate the presentation of gang-enhancement evidence from the guilt phase of the trial

[Headnote 21]

We normally review decisions regarding bifurcation of enhancement portions of a trial for an abuse of discretion. *See People v. Hernandez*, 94 P.3d 1080, 1085 (Cal. 2004) (reviewing district court's refusal to bifurcate gang-enhancement portion of trial from guilt phase for abuse of discretion). However, we have held that in situations where a failure to bifurcate compromises a defendant's right to a fair trial, bifurcation is mandatory. *See Brown v. State*, 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998) (holding that severance is mandatory in multicount indictments where one count is of possession of a firearm by an ex-felon); *see also Morales v. State*, 122 Nev. 966, 970, 143 P.3d 463, 465 (2006) (holding that bifurcation procedure accomplishes the same policy goals as the severance mandated in *Brown*).

"[I]nstitutional values such as judicial economy, efficiency, and fairness to criminal defendants often raise competing demands." *Brown*, 114 Nev. at 1126, 967 P.2d at 1131. However, in balancing these demands, ensuring that a defendant's right to a fair trial is not compromised is paramount. *Id*. We have previously held that when the State seeks convictions on multiple counts, including a count of possession of a firearm by an ex-felon, the prejudice to the defendant of introducing evidence of prior convictions in order to establish that the defendant is an ex-felon requires the severance of the counts. *Id*.

The State attempts to distinguish *Brown* from the current case by alleging that evidence of a prior conviction is uniquely prejudicial. However, we are not so certain. Is evidence of a prior conviction more prejudicial than the evidence presented here by a gang expert—namely, that Gonzalez was a member of a criminal gang whose members in Arizona commonly sell narcotics, possess stolen property, and commit assault and homicide? Is it more prejudicial than the evidence presented by another gang expert that Gonzalez is a member of a criminal gang that moves firearms, tries to set up robberies on dope dealers, tries to extort motorcycles from people, traffics in narcotics, and commits rape? This, among other highly prejudicial evidence used to prove the existence of a criminal gang, is a type of evidence that would generally not be admissible during a guilt phase of a trial but is statutorily admissible in order to prove a gang enhancement. *See* NRS 193.168(7)(a)-(g).

This is not to say that evidence of gang affiliation is not still admissible for other purposes, such as to show motive. *See Butler v.*

State, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004) ("This court has repeatedly held that gang-affiliation evidence may be relevant and probative when it is admitted to prove motive."). However, such evidence will not be admissible in the guilt phase of a trial solely for the purpose of proving a gang enhancement. Here, while some of the evidence admitted to prove the gang enhancement would have also been admissible for other purposes in Gonzalez's trial, other evidence, such as the evidence discussed above of the types of crimes commonly committed by members of the Vagos, would not have been. Although the gang enhancement in this case was ultimately not imposed, the admittance of this evidence allowed the State to tie Gonzalez to unrelated crimes committed by other members of the Vagos.

[Headnote 22]

Therefore, because the admission of highly prejudicial evidence to prove a gang enhancement that would not otherwise be admissible to prove the underlying crime compromises a defendant's right to a fair trial, we hold that the guilt phase of a trial must be bifurcated from the gang-enhancement phase. Thus, we conclude that the district court abused its discretion by refusing to bifurcate the guilt and gang-enhancement portions of the trial.

Cumulative error

[Headnotes 23, 24]

"[I]f the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction." *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id*. (internal quotations omitted).

[Headnote 25]

Here, the errors directly affected Gonzalez's convictions for conspiracy and, by extension, undermined his affirmative defense that he was acting in defense of others. Furthermore, the crimes he was convicted of were grave. Therefore, we hold that the cumulative effect of these errors has denied Gonzalez the right to a fair trial.

CONCLUSION

The district court abused its discretion when it refused to answer the jury's question that suggested the jury was confused or lacked understanding of a significant element of conspiracy to commit murder. It also abused its discretion when it refused to give an

accomplice-distrust instruction regarding Rudnick's uncorroborated testimony and refused to bifurcate the guilt and gang-enhancement phases of Gonzalez's trial. Therefore, because the district court's errors cumulatively denied Gonzalez of his right to a fair trial, we order his judgment of conviction reversed and remand to the district court for a new trial.[2]

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

ALI PIROOZI, M.D., AND MARTIN BLAHNIK, M.D., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES M. BIXLER, DISTRICT JUDGE, RESPONDENTS, AND TIFFANI D. HURST; AND BRIAN ABBINGTON, JOINTLY AND ON BEHALF OF THEIR MINOR CHILD, MAYROSE LILI-ABBINGTON HURST, REAL PARTIES IN INTEREST.

No. 64946

December 31, 2015 363 P.3d 1168

Original petition for a writ of mandamus in a medical malpractice action.

Parents, jointly and on behalf of their infant daughter, brought professional negligence action against several health-care providers. The district court granted parents' motion in limine to bar nonsettling providers from arguing comparative fault of settling providers at trial and including their names on jury verdict forms. Providers petitioned for a writ of mandamus. The supreme court, HARDESTY, C.J., held that providers were entitled to argue settling providers' percentage of fault and to include their names and an assignment of their percentage of fault on jury verdict forms.

Petition granted.

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

Cotton, Driggs, Walch, Holley, Woloson & Thompson and *John H. Cotton* and *Christopher G. Rigler*, Las Vegas, for Petitioner Ali Piroozi, M.D.

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[2]Because we hold that the district court's errors discussed above were enough to cumulatively warrant reversal, we do not reach the other issues raised by Gonzalez.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody and *Robert C. McBride* and *Heather S. Hall*, Henderson, for Petitioner Martin Blahnik, M.D.

Eglet Prince and *Dennis M. Prince*, Las Vegas; *Eisenberg Gilchrist & Cutt* and *Jacquelynn D. Carmichael, Robert G. Gilchrist*, and *Jeff M. Sbaih*, Salt Lake City, Utah, for Real Parties in Interest.

1. MANDAMUS.
   The supreme court exercises its discretion to consider a petition for a writ of mandamus only when there is no plain, speedy, and adequate remedy in the ordinary course of law, or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration. NRS 34.160.
2. APPEAL AND ERROR; MANDAMUS.
   Issues of statutory interpretation, even when raised in a writ petition, are reviewed de novo.
3. HEALTH.
   Nonsettling defendants in health-care provider professional negligence action were entitled to argue settling defendants' percentage of fault and to include those settled defendants' names and an assignment of their percentage of fault on jury verdict forms; statute abrogating joint and several liability pursuant to Keep Our Doctors in Nevada (KODIN) ballot initiative entitled nonsettling defendants to argue settling defendants' comparative fault and controlled, as special more recent statute, over statute that prohibited jury from considering comparative negligence of settled defendants and the settlement amounts. NRS 41.141(3), 41A.045.
4. HEALTH.
   An injured plaintiff in a health-care provider professional negligence action can recover only defendant's share of the injured plaintiff's damages. NRS 41A.045.
5. STATUTES.
   When a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls.
6. STATUTES.
   When statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

On November 2, 2004, Nevada voters approved the Keep Our Doctors in Nevada (KODIN) ballot initiative. KODIN included the adoption of NRS 41A.045, which makes health-care provider defendants severally liable in professional negligence actions for economic and noneconomic damages. In this opinion, we address

whether, in a health-care provider professional negligence action, NRS 41A.045 allows a defendant to argue the percentage of fault of settled defendants and to include those settled defendants' names on applicable jury verdict forms. Based on the plain language of the statute, we hold that the provision of several liability found in NRS 41A.045 entitles a defendant in a qualifying action to argue the percentage of fault of settled defendants and to include the settled defendants' names on the jury verdict form where the jury could conclude that the settled defendants' negligence caused some or all of the plaintiff's injury.

BACKGROUND

This petition arises out of a professional negligence action. Real parties in interest, Tiffani Hurst and Brian Abbington, jointly and on behalf of their infant daughter MayRose, filed a complaint against several health-care providers, alleging that the providers' professional negligence caused MayRose to suffer permanent brain damage. All defendants settled with Hurst and Abbington, except for petitioners Dr. Ali Piroozi and Dr. Martin Blahnik.

During pretrial proceedings below, Hurst and Abbington filed a motion in limine to bar petitioners from arguing the comparative fault of the settled defendants at trial and including those defendants' names on jury verdict forms. Relying on NRS 41.141[1] and *Banks ex rel. Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004), which interprets NRS 41.141, the district court granted the motion. Petitioners now ask this court to issue a writ of mandamus ordering the district court to allow petitioners to argue the comparative fault of the settled defendants and to place those defendants' names on the jury verdict forms.

DISCUSSION

Consideration of the writ petition

[Headnote 1]

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court exercises its discretion to consider a petition for a writ of mandamus only "when there is no plain, speedy and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order

[1]NRS 41.141 is a comparative negligence statute that governs the liability of multiple defendants in actions asserting a comparative negligence defense.

to promote judicial economy and administration." *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005) (internal quotation marks omitted). Generally, an appeal from a final judgment or order is an adequate remedy precluding such writ relief. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558.

We exercise our discretion to consider this writ petition in light of the important legal issues raised concerning whether NRS 41.141 or NRS 41A.045 applies and the corresponding effect on trials involving professional negligence by a health-care provider. We believe that consideration of this petition will promote judicial economy and administration in this case and other health-care provider professional negligence cases pending before the Nevada district courts because the resolution of the issues presented will promote settlements and reduce the time and expense of professional negligence trials involving comparative defense or other settling defendants. Accordingly, we conclude that this writ petition warrants our consideration.

Merits of the writ petition

[Headnotes 2, 3]

Issues of statutory interpretation, even when raised in a writ petition, are reviewed de novo. *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. Petitioners contend that the district court abused its discretion by relying on NRS 41.141(3), which prohibits a jury from considering the comparative negligence of settled defendants and the settlement amounts, when a remaining defendant asserts a comparative negligence defense. Petitioners argue that NRS 41.141 does not apply in professional negligence actions because it invalidates NRS 41A.045's abrogation of joint and several liability by preventing petitioners from arguing the liability of settled defendants. We must resolve the conflict created when these separate statutes are read together.

The district court began its analysis with NRS 41.141. Notwithstanding its other limitations, NRS 41.141 applies only to actions where a defendant asserts comparative negligence as a defense. NRS 41.141(1); *see Café Moda, LLC v. Palma*, 128 Nev. 78, 80-81, 272 P.3d 137, 139 (2012). When NRS 41.141 does apply, a settling defendant's comparative negligence cannot be admitted into evidence or considered by the jury. NRS 41.141(3). Here, although a comparative negligence defense asserted against minor plaintiff MayRose would not be a bona fide issue, *see Buck by Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989), petitioners' comparative negligence assertions against plaintiffs Hurst and Abbington are bona fide issues triggering the application

of NRS 41.141. *See* NRS 41.141(1). Thus, initially, NRS 41.141(3) appears to apply to Hurst and Abbington's claims.

We now turn to the application of NRS 41A.045. NRS 41A.045 states:

> 1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.
>
> 2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

[Headnote 4]

We have repeatedly stated that if the plain language of a statute is clear on its face, we will not look beyond that language when construing the provision, "unless it is clear that this meaning was not intended." *See Szydel v. Markman*, 121 Nev. 453, 456-57, 117 P.3d 200, 202 (2005) (internal quotation omitted). NRS 41A.045(1) unequivocally provides that defendants in professional negligence actions are severally liable for economic and noneconomic damages. This means that an "injured person may recover only the severally liable person's comparative-responsibility share of the injured person's damages," Restatement (Third) of Torts: Apportionment of Liab. § 11 (2000), which is "the portion of the judgment which represents the percentage of negligence attributable to the defendant." NRS 41A.045(1). Therefore, pursuant to NRS 41A.045, we hold that an injured plaintiff in a health-care provider professional negligence action can recover only the defendant's share of the injured plaintiff's damages.

Although the aforementioned approach places the risk of an insolvent or immune defendant on the plaintiff, several liability schemes are designed to protect individual defendants from liability exceeding the defendant's fault. *See Sowinski v. Walker*, 198 P.3d 1134, 1151 (Alaska 2008). That the voters of Nevada intended this meaning is evident not only by the plain language of NRS 41A.045, but also by the ballot initiative's explanation section, stating that the provision "imposes the risk of nonpayment to the injured party if a defendant is not able to pay his percentage of damages." Statewide Ballot Questions 2004, Question No. 3, Explanation.

Based on these conclusions, if defendants can be held responsible only for their share of an injured plaintiff's damages, it follows that defendants must be allowed to argue the comparative fault of the settled defendants and the jury verdict forms must account for the settled defendants' percentage of fault. *See Le'Gall v. Lewis Cnty.*, 923 P.2d 427, 430 (Idaho 1996) (explaining that "[i]f the jury could

conclude, based on the evidence, that an actor negligently contributed to the plaintiff's injury, then the actor must be included on the special verdict form"); Restatement (Third) of Torts: Apportionment of Liab. § B19 (2000).[2]

[Headnotes 5, 6]

Consequently, NRS 41.141 and NRS 41A.045, when applied in cases where the comparative negligence defense is raised, conflict. NRS 41.141 precludes admitting a settling defendant's comparative negligence into evidence, whereas NRS 41A.045 presumes admission of evidence allocating damages based on proportionate liability. "Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls." *Laird v. State Pub. Emps. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982); *see also State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 129 Nev. 775, 778, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute." (internal quotation omitted)). Because NRS 41A.045 is a special statute focusing specifically on professional negligence of a provider of health care, it governs here.[3] Thus, when applicable, NRS 41A.045 displaces NRS 41.141.

Based on the foregoing analysis, the district court was required to permit petitioners the opportunity to argue the comparative fault of the settled defendants and include those defendants' names and an assignment of their percentage of fault on the jury verdict forms. Thus, we grant the petition and order the clerk of this court to issue a

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[2]Section B19 of the Restatement (Third) of Torts: Apportionment of Liability (2000), provides as follows:

> If one or more defendants may be held severally liable for an indivisible injury, and at least one defendant and one other party, settling tortfeasor, or identified person may be found by the factfinder to have engaged in tortious conduct that was a legal cause of the plaintiff's injury, each such party, settling tortfeasor, and other identified person is submitted to the factfinder for an assignment of a percentage of comparative responsibility.

See also id. § 11 cmt. a (2000) ("[B]ecause liability is limited to defendants' several share of damages, other nonparties may be submitted to the factfinder for an assignment of a percentage of comparative responsibility . . . [,] not to adjudicate their liability, but to enable defendants' comparative share of responsibility to be determined."); *id.* § B19 cmt. h (2000) ("If a jury is the factfinder, the court submits a verdict form seeking a determination of the total damages suffered by the plaintiff and the responsibility assigned to each party and each other person having legal responsibility for plaintiff's damages."); *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 903 A.2d 969, 980 (N.H. 2006) ("[A] rule of law limiting a jury or court to consideration of the fault of only the parties to an action would directly undermine the New Hampshire legislature's decision to assign only several liability . . . .").

[3]Furthermore, "when statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment." *Laird*, 98 Nev. at 45, 639 P.2d at 1173. The Legislature added section 3 of NRS 41.141 to the statute in 1987; Nevada voters adopted NRS 41A.045 in 2004.

writ of mandamus directing the district court to vacate the portion of its pretrial order that conflicts with this decision and to enter a new order holding that petitioners may argue to the jury that a portion of Hurst and Abbington's damages was caused by the settled defendants and include those defendants' names on the jury verdict form for the purpose of allocating liability among all defendants.[4]

PARRAGUIRRE, SAITTA, and PICKERING, JJ., concur.

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

I respectfully disagree with the majority's analysis as to the application of NRS 41A.045. NRS 41A.045 is ambiguous and does not abrogate NRS 17.245's offset provision, making it improper to introduce any evidence of settlement into the proceedings.

Ambiguity

"A statute is ambiguous when it is capable of being understood in two or more senses by reasonably informed persons or it does not otherwise speak to the issue before the court." *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 680-81 (2008) (internal quotation marks omitted).

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[4]We note that the dissent appears to rely on NRS 17.245, yet NRS 17.245 was not argued at the district court, was not discussed in the district court's order, and was not argued on appeal by the parties. Indeed, the district court based the settlement offset on NRS 41.141—not NRS 17.245—which was in itself an error. NRS 41.141(3) provides for a settlement offset in cases where the defendant raised comparative negligence as a defense, not in cases where the defendants' liability is several. Further, our dissenting colleague incorrectly states that NRS 17.245, which offsets a defendant's judgment by the settlement amount, would create a windfall. However, because the petitioners are only severally liable for their portion of the apportioned negligence damages, they are not entitled to an offset. *See* NRS 17.225(2) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability . . . ."). NRS 17.225(2) is taken almost verbatim from the Uniform Contribution Among Tortfeasors Act § 1(b) (2008), and the purpose of this act was to make each tortfeasor liable for "his or her percentage of fault and no more." *John Munic Enters., Inc. v. Laos*, 326 P.3d 279, 283 (Ariz. Ct. App. 2014) (internal quotation marks omitted); *see* Restatement (Third) of Torts: Apportionment of Liab. § 23(b) (2000) ("A person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility."); *id.* § 11 cmt. c (2000) ("[S]everally liable defendants will not have any right to assert a contribution claim."); *see also Target Stores, a Div. of Dayton Hudson Corp. v. Automated Maint. Servs., Inc.*, 492 N.W.2d 899, 904 (N.D. 1992) (holding that defendant was only severally liable for its negligence, so it did not have a contribution claim). Finally, the dissent makes a conclusory statement that NRS 41A.045 is discordant with NRS 17.245 but offers no legislative history to support this argument.

NRS 41A.045 states:

> 1. In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff for economic damages and noneconomic damages severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.
> 2. This section is intended to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence.

NRS 41A.045 contains at least two meaningful points of ambiguity. First, the use of "each defendant" could be read to either limit several liability to actions with multiple defendants or permit several liability, even when there is only one defendant. Second, when NRS 41A.045 applies, "each defendant is liable . . . severally only . . . for that portion of the judgment which represents the percentage of negligence attributable to the defendant." It is unclear whether the percentage of negligence attributable to the defendant for which she is liable is based only in relation to other defendants in the action, if there are any, or in relation to all persons at fault, including settled defendants. Based on these two points of ambiguity, it is necessary to consider legislative history, public policy, and reason in construing NRS 41A.045.

Single or multiple defendants

To determine the voter intent of a law that was enacted by a ballot initiative, this court has considered that ballot's explanation and argument sections.[1] *See Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 63, 65-66, 128 P.3d 452, 460-61 (2006); *see also Guinn v. Legislature of State of Nev.*, 119 Nev. 460, 467, 76 P.3d 22, 26 (2003). The explanation section of the ballot questionnaire relevant to NRS 41A.045 states that "[c]urrent law provides that each one of multiple defendants in medical malpractice actions is severally, but not jointly liable for noneconomic damages," and that the proposed law would extend several liability to economic damages. Statewide Ballot Questions 2004, Question No. 3, Explanation. Thus, voters understood that the then current law,

[1]Examining the ballot materials to determine voter intent is appropriate because "[t]hose materials are the only information to which all voters unquestionably had equal access." Patrick C. McDonnell, Note, *Nevada's Medical Malpractice Damages Cap: One for All Heirs or One for Each*, 13 Nev. L.J. 983, 1009 (2013).

NRS 41A.041,[2] applied only to actions with multiple defendants, and that NRS 41A.045 did not propose to change this aspect of the law. Accordingly, this court can reasonably conclude that Nevada voters intended NRS 41A.045 to apply only to medical malpractice actions with multiple defendants. As evident in the next subsection, such an interpretation comports with canons of statutory construction, public policy, and reason.

Several liability in relation to whom

Requiring multiple defendants for NRS 41A.045 to apply allows the court to resolve the second ambiguity with a canon of statutory interpretation. Specifically, "[w]hen a legislature adopts language that has a particular meaning or history, rules of statutory construction . . . indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004). To the extent that this court applies this canon to voters adopting language that has a particular meaning, NRS 41A.045 arguably imposes several liability only in relation to remaining defendants, and not settled defendants.

As to settled defendants, one must harmonize NRS 17.245 (effects of release or covenant not to sue) with NRS 41A.045. Allowing for several liability as between all tortfeasors, including settled defendants, would be discordant with NRS 17.245(1)(a), which requires a district court to reduce any judgment against tortfeasors by all amounts paid by settled defendants that were liable in tort for the same injury or wrongful death. Specifically, if a defendant could argue a theory of comparative negligence as to settled defendants, then she would only be liable for her proportional fault in relation to them. Because the judgment issued against this defendant would amount to her exact liability, she would then receive a windfall when NRS 17.245(1)(a) reduced that judgment by all settlement amounts. Such an interpretation should be avoided because it would conflict with NRS 17.245(1)(a)'s function and lead to absurd results. *See Szydel v. Markman*, 121 Nev. 453, 457, 117 P.3d 200, 202-03 (2005) (explaining that when two statutes conflict, this court will attempt to read the conflicting provisions in harmony to the extent that it does not violate legislative intent); *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998) (stating that statutory interpretation should avoid absurd results).[3]

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[2]Repealed by Statewide Ballot Questions 2004, Question No. 3, effective November 23, 2004.

[3]When statutes are in conflict and cannot be read harmoniously, "the one more recent in time controls over the provisions of an earlier enactment." *Laird v. State of Nev. Pub. Emp. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982).

NRS 41A.041 and NRS 41A.045's legislative history also supports this interpretation. NRS 41A.041's legislative history warrants consideration because NRS 41A.045 was written in response to and borrowed language from NRS 41A.041. NRS 41A.041's legislative history indicates that the Legislature did not intend for the statute to displace NRS 17.245(1)(a)'s provision for offsetting a judgment against a defendant by any settlement amounts from joint tortfeasors. NRS 41A.041's legislative history also suggests that its purpose was to allow for the same several liability found in NRS 41.141(4) in all medical malpractice actions, regardless of whether comparative negligence was asserted as a defense.[4] Given NRS 41A.045's narrow purpose of extending existing law[5] to include several liability for economic damages, any legislative intent behind NRS 41A.041 unrelated to that purpose arguably transfers into the new statute.[6]

Based on the foregoing, it should be construed that NRS 41A.045 prohibits a defendant from arguing the comparative negligence of settled defendants. That interpretation would not preclude a defendant from arguing that a settled defendant was 100 percent at fault.[7] *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). With this in mind, I submit that the district court

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Thus, if the court determines that NRS 41A.045 was intended to allow for several liability as between all tortfeasors, including settled defendants, then NRS 17.245(1)(a) would likely not apply in situations when NRS 41A.045 applied.

[4]The Legislature and voters were silent as to whether a defendant could introduce evidence of the comparative negligence of a settled defendant and the settlement amount.

[5]What existing law was at that time is unclear because this court never construed NRS 41A.041. However, relying on NRS 41A.041's legislative history, it seems likely that the Legislature did not intend to create a system allowing apportionment of fault to settled defendants because that would undermine NRS 17.245(1)(a). *See Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 85, 225 P.3d 1265, 1271 (2010) (stating that this court presumes that, when enacting statutes, the Legislature has a "full knowledge of existing statutes relating to the same subject" (internal citations omitted)). Thus, it likely follows that the voters' intent in enacting NRS 41A.045 would be similar.

[6]Although "KODIN stops 'double-dipping' by informing juries if plaintiffs are receiving money from other sources for the same injury," this provision does not appear to include individual settlement amounts; it may include organizational and corporate settlements. *See* NRS 42.021.

[7]Although comporting with existing law, this seems counterintuitive. A defendant cannot assert comparative negligence against a settled defendant, but she can argue that a settled defendant is 100 percent negligent. Any unsuccessful effort made by a defendant to show that a settled defendant is 100 percent at fault is essentially an argument of comparative negligence. While this only becomes relevant if settled defendants' names are on the jury verdict forms and the jury is directed to apportion fault, it is likely that this leads to some jury speculation and affects judgments.

did not abuse its discretion in its order granting the Hursts' motion in limine.

NRS 17.245

As to NRS 17.245 (effects of release or covenant not to sue), it states:

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (b) It discharges the tortfeasor to whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor.
>
> 2. As used in this section, "equitable indemnity" means a right of indemnity that is created by the court rather than expressly provided for in a written agreement.

In association with NRS 17.245(1)(a), this court has stated that "to prevent improper speculation by the jury, the parties may not inform the jury as to either the existence of a settlement or the sum paid." *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. at 843-44, 102 P.3d at 67 (citing *Moore v. Bannen*, 106 Nev. 679, 680-81, 799 P.2d 564, 565 (1990)).[8] NRS 41A.045 does not allow for comparative fault theories as to settled defendants and has no effect on NRS 17.245, thus, the district court properly applied the law and did not abuse its discretion by forbidding any discussion as to a settlement occurring and the settlement amount.[9]

Defendants' names on jury verdict forms

Lastly, "[t]his court reviews a district court's decision to give a jury instruction for abuse of discretion." *See FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012).[10] Here, the district

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[8]Note that while this rule was mentioned in the context of NRS 41.141, the court expressly stated that this rule was not based on that statute. *Moore*, 106 Nev. at 681 n.2, 799 P.2d at 566 n.2.

[9]As stated above, if the settlement was with an organization or corporation, it is possible that NRS 42.021 might dictate a different outcome.

[10]Nevada has no law regarding the standard of review for jury verdict forms; however, the Fifth Circuit has stated that, like jury instructions, it reviews verdict forms for an abuse of discretion. *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 506 (5th Cir. 2012).

court did not abuse its discretion by refusing to place settled defendants' names on the jury verdict forms because that decision is consistent with the law that the jury may not be informed of settlement or the sum paid. *Moore*, 106 Nev. at 681-82, 799 P.2d. at 566.

Therefore, I would sustain the district court as to the non-inclusion of settled defendants.

WILLIAM ALLEN SCOTT, Petitioner, *v.* THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CARSON CITY; and THE HONORABLE JAMES TODD RUSSELL, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 67331

December 31, 2015 363 P.3d 1159

Original petition for a writ of certiorari challenging Carson City Municipal Code 8.04.050(1) as unconstitutionally overbroad and vague.

Defendant appealed his conviction for violating municipal ordinance making it unlawful for any person to hinder, obstruct, resist, delay, or molest any member of the sheriff's office in the discharge of his or her official duties. The district court affirmed. Defendant petitioned for writ of certiorari. The supreme court, Gibbons, J., held that: (1) ordinance was unconstitutionally overbroad, and (2) ordinance was unconstitutionally vague.

Petition granted.

Hardesty, C.J., with whom Pickering, J., agreed, dissented in part.

Karin K. Kreizenbeck, State Public Defender, and *Sally S. DeSoto*, Chief Appellate Deputy Public Defender, Carson City, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Jason D. Woodbury*, District Attorney, and *Melanie Porter*, Deputy District Attorney, Carson City, for Real Party in Interest.

1. Criminal Law.
   The supreme court reviews the constitutionality of a statute or ordinance de novo.
2. Constitutional Law.
   Whether a statute is overbroad depends on the extent to which it lends itself to improper application to protected conduct; specifically, the

overbreadth doctrine invalidates laws that infringe upon First Amendment rights. U.S. Const. amend. 1.

3. Constitutional Law.
   The overbreadth doctrine applies to statutes that have a seemingly legitimate purpose but are worded so broadly that they also apply to protected speech. U.S. Const. amend. 1.
4. Constitutional Law; Obstructing Justice.
   Municipal ordinance prohibiting any conduct that may "hinder, obstruct, resist, delay, or molest" a police officer in the discharge of the officer's official duties, regardless of intent, was unconstitutionally overbroad on its face, in violation of First Amendment, where the ordinance encompassed protected speech and was not narrowly tailored to prohibit only disorderly conduct or fighting words. U.S. Const. amend. 1.
5. Constitutional Law.
   The void-for-vagueness doctrine is predicated on a statute's repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. 14.
6. Constitutional Law.
   A criminal statute can be invalidated for vagueness if it: (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages seriously discriminatory enforcement; first prong of test is concerned with guiding those who may be subject to potentially vague statutes, while the second, and more important, prong is concerned with guiding the enforcers of statutes. U.S. Const. amend. 14.
7. Constitutional Law; Obstructing Justice.
   Municipal ordinance prohibiting any conduct that in any way may "hinder, obstruct, resist, delay, or molest" a police officer in the discharge of the officer's official duties, regardless of intent, was unconstitutionally vague, in violation of due process; ordinance was worded so broadly that sheriff's deputies were given unfettered discretion to arrest individuals for words or conduct that annoyed or offended the deputies. U.S. Const. amend. 14.
8. Constitutional Law.
   When a city ordinance does not enumerate circumstances for which a person could be arrested, the enforcing officer has discretion over deciding whether a particular unenumerated circumstance supplies the necessary probable cause for arrest, and thus, such an ordinance is unconstitutionally vague, in violation of due process. U.S. Const. amend. 14.

Before the Court En Banc.

OPINION

By the Court, Gibbons, J.:

In this opinion, we consider whether Carson City Municipal Code (CCMC) 8.04.050(1) (2008) is unconstitutionally overbroad and vague. Petitioner William Scott was arrested and convicted for violating CCMC 8.04.050, which makes it "unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct,

resist, delay or molest any . . . member of the sheriff's office . . . in the discharge of his official duties." We grant Scott's petition for a writ of certiorari and conclude that CCMC 8.04.050(1) is both unconstitutionally overbroad and vague on its face.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 4:15 a.m., a Carson City sheriff's deputy pulled over a vehicle for running a stop sign. The vehicle had three occupants. When questioning the driver, the deputy smelled alcohol coming from the vehicle. The deputy asked the driver if he would submit to a voluntary field sobriety test. Before the driver could answer, petitioner William Scott, who was a passenger in the vehicle, interrupted the deputy. The deputy continued to question the driver, and according to the deputy, Scott interrupted him a second time and told the driver not to do anything the deputy said. Scott allegedly went on to state "that his dad [was] a lawyer and he knows all about the law." After the second interruption, the deputy threatened Scott with arrest "for obstructing and delaying a peace officer" if he did not remain quiet.

After a third interruption, the deputy ordered Scott out of the vehicle. The deputy arrested Scott and called for backup. Scott cooperated during the arrest. A second deputy transported Scott to jail, and the first deputy resumed his DUI investigation of the driver.

The State charged Scott with obstructing a public officer in violation of CCMC 8.04.050. After a bench trial in Carson City Justice Court, Scott was convicted of obstructing a public officer in violation of CCMC 8.04.050.

Scott appealed his conviction to the district court. On appeal, Scott argued that CCMC 8.04.050(1) is unconstitutionally overbroad and vague because it restricts constitutional speech. The district court, however, affirmed the conviction, concluding that CCMC 8.04.050 is constitutional. Specifically, the district court concluded that the deputy did not arrest Scott for his *speech*, but rather for his *conduct*, i.e., the *act* of speaking in a way that interrupted the deputy's investigation. This petition for a writ of certiorari followed.

DISCUSSION

[Headnote 1]

In this writ petition, Scott argues that CCMC 8.04.050(1) is both unconstitutionally overbroad and vague.[1] We review the constitu-

[1]Although the State charged Scott under CCMC 8.04.050 and uses language from 8.04.050(2) to describe Scott's interference, we limit our review to CCMC 8.04.050(1) because at oral argument Scott conceded that his constitutional challenge was limited to section 1 of the ordinance.

tionality of a statute or ordinance de novo. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). The municipal code at issue, CCMC 8.04.050, states:

> 1. It is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any city officer or member of the sheriff's office or fire department of Carson City in the discharge of his official duties.

CCMC 8.04.050(1) is unconstitutionally overbroad

Scott argues that CCMC 8.04.050(1) is unconstitutionally overbroad because it criminalizes speech that is protected by the First Amendment of the United States Constitution. We agree.

[Headnotes 2, 3]

"Whether or not a statute is overbroad depends upon the extent to which it lends itself to improper application to protected conduct." *N. Nev. Co. v. Menicucci*, 96 Nev. 533, 536, 611 P.2d 1068, 1069 (1980). Specifically, "[t]he overbreadth doctrine invalidates laws . . . that infringe upon First Amendment rights." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 297, 129 P.3d 682, 687 (2006). In other words, the overbreadth doctrine applies to statutes that have a seemingly legitimate purpose but are worded so broadly that they also apply to protected speech. *See id*. We have held that "[e]ven minor intrusions on First Amendment rights will trigger the overbreadth doctrine." *Id.* at 297-98, 129 P.3d at 688. At the same time, however, we have warned that "the overbreadth doctrine is strong medicine and that a statute should not be void unless it is substantially overbroad in relation to the statute's plainly legitimate sweep." *Id.* at 298, 129 P.3d at 688 (internal quotations omitted).

The United States Supreme Court considered whether laws similar to CCMC 8.04.050(1) were overbroad in *Colten v. Kentucky*, 407 U.S. 104 (1972), and *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987), and in doing so reached different results. In *Colten*, the defendant was arrested for violating Kentucky's disorderly conduct statute, which made it illegal for a person "*with intent to cause* public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [t]o [c]ongregate[ ] with other persons in a public place and refuse[ ] to comply with a lawful order of the police to disperse." *Id.* at 108 (emphasis added). Due in part to the statute's specific intent requirement, the Court affirmed the lower court's determination that the statute was not overbroad. *Id.* at 108-09, 111.

In *Hill*, however, the Court determined that an ordinance similar to the statute in *Colten* was facially invalid. 482 U.S. at 467. The ordinance made it "unlawful for any person to . . . in any manner

oppose, molest, abuse or interrupt any policeman in the execution of his duty." *Id.* at 461 (internal quotation omitted).[2] Ultimately, the Court concluded that the challenged language was unconstitutionally overbroad for two reasons. First, the Court concluded that the ordinance did not deal "with core criminal conduct, but with speech." *Id.* at 460. The Court reasoned that the challenged portion of the ordinance—making it unlawful to "oppose, molest, abuse or interrupt" an officer—dealt with speech because it prohibited "verbal interruptions of police officers." *Id.* at 461 (internal quotation omitted).

Second, the Court concluded that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Id.* The Court recognized, however, that the First Amendment does not protect "fighting words," or words "that by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 461-62 (internal quotations omitted). Thus, the Court concluded that the ordinance was facially invalid because its application to speech was not limited to "fighting words." Instead, the ordinance criminalized *all* speech that interrupts a police officer. *Id.* at 462. The Court reasoned that "[t]he Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462-63. In sum, the Court found that the ordinance was unconstitutionally overbroad because it was "not narrowly tailored to prohibit only disorderly conduct or fighting words." *Id.* at 465.

[Headnote 4]

While the statute in *Colten* and the ordinance in *Hill* feature similar language, we conclude that CCMC 8.04.050(1) aligns more closely with the ordinance in *Hill*. Unlike the statute in *Colten*, which required specific intent, CCMC 8.04.050(1) does not contain a specific intent requirement.[3] Like the ordinance in *Hill*, CCMC

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[2]The Court reasoned that the portions of the ordinance that clearly dealt with *conduct*—making it unlawful to "assault" or "strike" an officer—were preempted by state law and therefore did not address that portion of the ordinance. *Hill*, 482 U.S. at 461 n.9.

[3]Our dissenting colleagues would read an intent requirement into CCMC 8.04.050 to save the ordinance. However, the inclusion of an intent requirement alone will not render CCMC 8.04.050 constitutional. CCMC 8.04.050(1) makes it unlawful to "*threaten* to hinder, obstruct, resist, delay or molest" a sheriff's deputy in the discharge of his or her duties. (Emphasis added.) For example, an individual may *threaten* to *delay* a sheriff's deputy in the discharge of his duties by stating that she intends to exercise her *Miranda* rights or by advising a counterpart to do so—thereby delaying the deputy. As such, reading an intent requirement into CCMC 8.04.050(1) will not render the law constitutional.

8.04.050(1) prohibits *any* conduct that may "hinder, obstruct, resist, delay, [or] molest" a police officer, regardless of intent.[4] Under CCMC 8.04.050(1), inadvertent, constitutionally protected speech or conduct is sufficient to trigger liability should it hinder or obstruct a police officer in any way. For example, if a sheriff's deputy is conducting an investigation in a public area and a passerby inadvertently obstructs the deputy's view of a suspect, the passerby could be arrested for hindering or delaying the deputy's investigation—despite lacking the intent to do so.

We conclude that CCMC 8.04.050(1) is unconstitutionally overbroad on its face for the same two reasons recognized in *Hill*. First, CCMC 8.04.050(1) applies to speech. The State argues that Scott was not arrested for his *speech*, but rather for his *conduct*, i.e., the *act* of speaking in a way that interrupted the deputy's investigation. We deem this narrow distinction unpersuasive under the facts. CCMC 8.04.050(1) makes it "unlawful for any person to hinder, obstruct, resist, delay, [or] molest" a police officer. Indeed, like the ordinance in *Hill*, CCMC 8.04.050(1) clearly affects speech because Scott was convicted under it for his "verbal interruptions" of the sheriff's deputy. *Hill*, 482 U.S. at 461. Moreover, CCMC 8.04.050(1) makes it unlawful to even "*threaten* to hinder, obstruct, resist, delay or molest" a police officer. (Emphasis added.) Criminalizing mere threats further implicates speech as opposed to conduct.

Second, like in *Hill*, where the ordinance's application to speech was not limited to "fighting words," CCMC 8.04.050(1) prohibits *all* speech that "hinder[s], obstruct[s], resist[s], delay[s], [or] molest[s]" a police officer. Scott stated that "he knows all about the law" and told the driver that he was not required to cooperate with the deputy. These statements cannot be construed as "fighting words," or words "that by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Hill*, 482 U.S. at 461-62 (internal quotations omitted). Yet, Scott was still arrested and convicted under CCMC 8.04.050(1). Indeed, "[t]he Constitution does not allow [Scott's verbal challenge to the deputy's authority] to be made a crime." *Hill*, 482 U.S. at 462.

In sum, CCMC 8.04.050(1) encompasses protected speech and "is not narrowly tailored to prohibit only disorderly conduct or fight-

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[4]Our dissenting colleagues express concern that invalidating CCMC 8.04.050(1) will effectively invalidate similar provisions in other Nevada municipalities. This concern is misplaced. The State could have charged Scott for his interference under NRS 199.280. Unlike CCMC 8.04.050, the state statute is explicitly limited by an intent requirement. Under NRS 199.280, it is a crime when one "*willfully* resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his or her office." (Emphasis added.) As such, NRS 199.280 provides a corollary under which one may be charged for the same or similar willful conduct.

ing words." *Id*. at 465. As such, we conclude that it is unconstitutionally overbroad on its face.

CCMC 8.04.050(1) is unconstitutionally vague

Scott argues that CCMC 8.04.050(1) is unconstitutionally vague because (1) ordinary people cannot tell what conduct or speech is prohibited, and (2) its lack of guidelines allows the sheriff to enforce it in an arbitrary and discriminatory fashion.

[Headnotes 5, 6]

"The void-for-vagueness doctrine is predicated upon a statute's repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Silvar*, 122 Nev. at 293, 129 P.3d at 684-85. A criminal statute can be invalidated for vagueness "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *State v. Castaneda*, 126 Nev. 478, 481-82, 245 P.3d 550, 553 (2010) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). Although similar, "[t]he first prong is concerned with guiding those who may be subject to potentially vague statutes, while the second—and more important—prong is concerned with guiding the enforcers of statutes." *Silvar*, 122 Nev. at 293, 129 P.3d at 685. Additionally, "[a] statute containing a criminal penalty is facially vague when vagueness permeates the text of the statute." *Flamingo Paradise*, 125 Nev. at 507, 217 P.3d at 550 (recognizing that while the two-factor test for vagueness challenges applies to both civil and criminal statutes, criminal statutes are held to a higher standard).[5]

CCMC 8.04.050(1) authorizes arbitrary and discriminatory enforcement

[Headnotes 7, 8]

We conclude that under the second prong—arbitrary and discriminatory enforcement—CCMC 8.04.050(1) is unconstitutionally vague. The second prong requires guidelines for when a criminal statute will be enforced. When a city ordinance "does not enumerate circumstances for which a person could be arrested[,] . . . the enforcing officer has discretion over deciding whether a particular unenumerated circumstance supplies the necessary probable cause for arrest." *Silvar*, 122 Nev. at 295, 129 P.3d at 686. "This standard

[5]"Under the higher standard, the question becomes whether vagueness so permeates the text that the statute cannot meet these requirements in most applications; and thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid *if void in most circumstances*." *Flamingo Paradise*, 125 Nev. at 513, 271 P.3d at 554 (emphasis added) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983)).

could shift from officer to officer or circumstance to circumstance because the ordinance lacks definitive guidelines." *Id.* Although drafting precise laws is often difficult, the United States Supreme Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Hill*, 482 U.S. at 465.

In the present case, CCMC 8.04.050(1) "lacks specific standards," and thus, sheriff's deputies are allowed to enforce the law in an arbitrary and discriminatory fashion. *Silvar*, 122 Nev. at 293, 129 P.3d at 685. Specifically, the municipal code is worded so broadly that sheriff's deputies are given "unfettered discretion to arrest individuals for words or conduct that annoy or offend them." *Hill*, 482 U.S. at 465. As stated above, the plain language of CCMC 8.04.050(1) criminalizes *any* conduct or speech that in *any way* "hinder[s], obstruct[s], resist[s], delay[s], molest[s] or threaten[s] to hinder, obstruct, resist, delay or molest" a sheriff's deputy "in the discharge of his official duties." For example, if a sheriff's deputy is directing traffic at an intersection, and a pedestrian politely asks the deputy for directions, the pedestrian could be arrested for hindering or delaying the deputy's ability to direct traffic. Vagueness permeates the text of CCMC 8.04.050(1) because, as in this case, it is entirely within the deputy's discretion to determine what conduct violates the ordinance and at what point that conduct—including speech—reaches a level that "hinder[s], obstruct[s], resist[s], delay[s], or molest[s]" him or her in the discharge of their duties. It is obvious that the prohibitions in CCMC 8.04.050(1) are "violated scores of times daily, . . . yet only some individuals—those chosen by the police in their unguided discretion—are arrested." *Hill*, 482 U.S. at 466-67.

The dissent would read CCMC 8.04.050(1) to have "a core of constitutionally unprotected expression to which it might be limited," unlike the ordinance in *Hill*. *Id*. at 468 (internal quotation omitted). However, not only is the language used in CCMC 8.04.050(1) strikingly similar to the language used in *Hill*, it explicitly includes speech.[6] *See id.* at 461 (making it unlawful to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty" (internal quotation omitted)). The language in CCMC 8.04.050(1) makes it unlawful to "hinder, obstruct, resist, delay, molest or *threaten* to hinder, obstruct, resist, delay or molest" a sheriff's deputy in the discharge of his or her duties. (Emphasis added.) We find the dissent's distinction between the language in these laws un-

[6]Both the ordinance in *Hill* and CCMC 8.04.050 use the term "molest." *Compare* 482 U.S. at 461 *with* CCMC 8.04.050(1). Further, CCMC 8.04.050 uses the term "resist," which is defined as "[t]o oppose," whereas the ordinance in *Hill* used the term "oppose." *Compare Resist*, *Black's Law Dictionary* (6th ed. 1990), *and Hill*, 482 U.S. at 461, *with* CCMC 8.04.050(1).

persuasive. Further, CCMC 8.04.050(1) explicitly applies to speech and is not in any way limited to fighting words. A verbal "threat" to exercise a constitutional right that may delay an arrest would clearly constitute an unlawful act. The Supreme Court could not read the ordinance in *Hill* to find a core of criminal conduct, and we are unable to do so with CCMC 8.04.050(1).

Further, despite the State's argument to the contrary, it is inconsequential that an adjudicative body can determine, after the fact, whether CCMC 8.04.050(1) was applied in an arbitrary or discriminatory fashion. *See id.* at 465-66 ("As the Court observed over a century ago, '[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'" (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876))). Consequently, we conclude that CCMC 8.04.050(1) is unconstitutionally vague because it lacks sufficient guidelines and gives the sheriff too much discretion in its enforcement.[7]

CONCLUSION

CCMC 8.04.050(1) is unconstitutionally overbroad because it "is not narrowly tailored to prohibit only disorderly conduct or fighting words." *Hill*, 482 U.S. at 465. CCMC 8.04.050(1) is unconstitutionally vague because it lacks sufficient guidelines and gives the sheriff too much discretion in its enforcement. Accordingly, we grant Scott's petition and direct the clerk of this court to issue a writ of certiorari instructing the district court to vacate its order denying Scott's appeal. We further remand to the district court with instructions to enter an order reversing Scott's conviction in part on the grounds that CCMC 8.04.050(1) is unconstitutional on its face and to determine whether Scott may properly be charged under the remainder of CCMC 8.04.050.

Parraguirre, Douglas, Cherry, and Saitta, JJ., concur.

Hardesty, C.J., with whom Pickering, J., agrees, concurring in part and dissenting in part:

I concur only in the majority's decision that Scott's petition should be granted; I dissent because I disagree that CCMC 8.04.050(1) is unconstitutionally overbroad and vague on its face.

Pursuant to CCMC 8.04.050(1), it is illegal for a "person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, re-

[7]We do not address whether the ordinance fails to provide a person of ordinary intelligence fair notice of what is prohibited because, as we clarified in *Castaneda*, a statute is unconstitutionally vague if it fails either prong of the vagueness test. 126 Nev. at 481-82, 245 P.3d at 553. It is sufficient that the ordinance permits arbitrary and discriminatory enforcement.

sist, delay or molest" an officer from performing his duties. The majority's decision to facially invalidate CCMC 8.04.050(1) ignores reasonable constitutional construction rules that would resolve the overbreadth and vagueness claims.

CCMC 8.04.050(1) should be narrowly construed

While I recognize that CCMC 8.04.050(1) may be ambiguous and as a result suggests overbreadth and vagueness issues, I disagree with the majority's conclusion that it is facially unconstitutional thereby voiding it. Many municipalities in this state have similar provisions to CCMC 8.04.050(1).[1] Because the majority facially invalidates it, their decision almost certainly makes analogous laws around the state unconstitutional.[2]

Moreover, voiding CCMC 8.04.050(1) is contrary to the established requirement " 'that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). We have consistently recognized that "[e]nough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute." *Id*. at 483, 245 P.3d at 553 (internal quotations omitted); *see also City of Houston, Tex. v. Hill*, 482 U.S. 451, 467-68 (1987) (noting that "limiting constructions" can be adopted by state courts to bring ambiguous laws within constitutional bounds). Accordingly, the majority is required to interpret the ordinance in a constitutional manner.

Of course, before we interpret a law, we first must determine whether "the language of [the ordinance] is plain and unambiguous,

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[1]*See, e.g.*, Las Vegas Municipal Code 10.04.010 (2009) ("Any person who shall interfere with, resist, molest or threaten to molest any Peace Officer of the Las Vegas Metropolitan Police Department in the exercise of his official duties shall be guilty of a misdemeanor."); North Las Vegas Municipal Code 9.08.010 (2015) ("Any person who shall interfere with, obstruct, resist, molest, strike or threaten to molest or strike any peace officer of the city of North Las Vegas, while in the exercise of his official duties, shall be guilty of a misdemeanor."); Fallon Municipal Code 9.02.010(A) (2010) ("It is unlawful for any person within the corporate limits of the city . . . [t]o hinder, obstruct, resist, molest or attempt to hinder, obstruct, resist or molest any city officer or member of the police department in the discharge of his or her official duties.").

[2]The majority argues that concern over the constitutionality of other municipality ordinances is misplaced because NRS 199.280 prevents the same conduct. Majority opinion *ante* p. 1020 n.4. NRS 199.280 states that it is a misdemeanor or felony to "willfully resist[ ], delay[ ] or obstruct[ ] a public officer in discharging or attempting to discharge any legal duty of his or her office." Notably, "resist," "delay," and "obstruct" appear in both NRS 199.280 and CCMC 8.04.050(1). The only difference between the two provisions is that NRS 199.280 mandates willfulness—in other words requiring intent. Thus, the majority either (1) tacitly concedes that interpreting an intent requirement into CCMC 8.04.050(1) renders it constitutional, or (2) points to a statute that under the majority's analysis is also facially unconstitutional.

such that it is capable of only one meaning." *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 228-29, 209 P.3d 766, 769 (2009). If the language is unambiguous, we must give effect to the ordinance's plain meaning. *Id*. at 228, 209 P.3d at 769. But if the ordinance "is susceptible to differing reasonable interpretations, [it] should be construed consistently with" the enabling body's intent. *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006) (internal quotations omitted).

I concede for purposes of this analysis that CCMC 8.04.050(1) is ambiguous, but that does not result in the ordinance becoming unconstitutionally vague. *See City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 866-67, 59 P.3d 477, 482-83 (2002) (implying that the difference between an ambiguous statute and an unconstitutionally vague statute is the level of ambiguity), *abrogated on other grounds by Castaneda*, 126 Nev. at 482 n.1, 245 P.3d at 553 n.1. Rather, "every reasonable construction must be resorted to, in order to save [the ordinance] from unconstitutionality." *Castaneda*, 126 Nev. at 481, 245 P.3d at 552 (internal quotations omitted); *see also Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("[W]hen a statute is reasonably susceptible of two interpretations, by one of which it is unconstitutional and by the other valid, the court prefers the meaning that preserves to the meaning that destroys."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 66 (2012) ("An interpretation that validates outweighs one that invalidates . . . .").

Here, the majority chooses to invalidate CCMC 8.04.050(1) despite there being reasonable unambiguous constructions that would make the ordinance constitutional. There are two such reasonable constructions, which together easily render CCMC 8.04.050(1) constitutional: (1) interpret it as applying only when physical conduct or fighting words interfere with an officer's job duties, and (2) require an intent to interfere with an officer, which would substantially narrow and clarify the ordinance's meaning.

Interpreting CCMC 8.04.050(1) to require core criminal conduct—physical assaults or fighting words—is consistent with the United States Supreme Court's decision in *Hill*, the ordinance's language, and proper statutory construction principles. In *Hill*, the Court was asked to determine the constitutionality of a Houston ordinance that stated that "[i]t shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." 482 U.S. at 455 (internal quotations omitted). The Court determined that the ordinance could not be reasonably "limited to 'core criminal conduct'" because the words "assault" and "strike" were preempted by Texas law. *Id*. at 468. Thus, the Court invalidated the ordinance, determining that the remaining language in the ordinance "simply has no core of consti-

tutionally unprotected expression to which it might be limited."[3] *Id*. (internal quotations omitted).

Here, the crux of the majority's argument is that the words "hinder, obstruct, resist, delay, [or] molest" unreasonably restrict persons from exercising their constitutional right to expression when an officer is discharging his duties. Majority opinion *ante* pp. 1019-23. But, I believe that a reasonable reading of these words "has [a] core of constitutionally unprotected expression to which it might be limited." *Hill*, 482 U.S. at 468 (internal quotation omitted). None of the phraseology in subsection 1 is preempted by state law, unlike in *Hill*; thus all can be considered. The plain meanings of hinder, obstruct, resist, delay, and molest[4] can be reasonably construed to include physical conduct or fighting words. Additionally, all five verbs are associated in a common list, so the canon of construction *noscitur a sociis* ("it is known by its associates") should be considered. Scalia & Garner, *supra*, at 195. The canon stands for the proposition that "[a]ssociated words bear on one another's meaning." *Id.* As such, it is entirely reasonable to construe the five verbs as only applying where there is core criminal conduct—physical interference with an officer or spoken fighting words.[5] While I believe that this construction, by itself, saves CCMC 8.04.050(1) from a facial constitutional challenge, next I discuss a second construction that can further limit the subsection's reach.

The second construction is outlined in *Hill*'s concurrence and dissent, where the dissenting justices determined that the Houston ordinance at issue did not have a mens rea term but that a Texas statute required all criminal laws to mandate some form of culpability. 482 U.S. at 473-74 (Powell, J., concurring in part and dissenting in part). Justice Powell noted that Texas courts could read an intent

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[3]The Supreme Court of Iowa did exactly this in *State v. Bower*, where the relevant statute prohibited conduct that "willfully prevents or attempts to prevent any public officer . . . from performing the officer's . . . duty." 725 N.W.2d 435, 442 (Iowa 2006). "[T]o avoid the risk of constitutional infirmity," the court construed the statute "to prohibit only physical conduct and fighting words that hinder or attempt to hinder an officer from performing an officer's duty." *Id.* at 444. In so holding, the court relied exclusively on the *Hill* analysis. *Id.* at 443-44.

[4]"Hinder" is defined as "to impede, delay, or prevent." *Hinder*, *Black's Law Dictionary* (10th ed. 2014). "Obstruct" is defined as "[t]o block or stop up (a road, passageway, etc.); to close up or close off, esp[ecially] by obstacle." *Obstruct*, *Black's Law Dictionary* (10th ed. 2014). "Resist" is defined as "[t]o oppose. This word properly describes an opposition by direct action and *quasi* forcible means." *Resist*, *Black's Law Dictionary* (6th ed. 1990). "Delay" is defined as "[t]he act of postponing or slowing." *Delay*, *Black's Law Dictionary* (10th ed. 2014). "Molest" is defined as "to annoy, disturb, or persecute esp[ecially] with hostile intent or injurious effect." *Molest*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2011).

[5]Fighting words are words by which "their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

requirement into the ordinance based on the Texas statute. *Id*. at 474. Furthermore, Texas courts could determine that the ordinance required intent to interfere with an officer's duties, not simply an intent to speak. *Id*. Should a Texas court construe the ordinance in such a way, Justice Powell surmised:

> "This interpretation would change the constitutional questions in two ways: it would narrow substantially the scope of the ordinance, and possibly resolve the overbreadth question; it also would make the language of the ordinance more precise, and possibly satisfy the concern as to vagueness."

Id.

Similarly, in *Colten v. Kentucky*, 407 U.S. 104 (1972), the Court considered a Kentucky statute that criminalized an "intent to cause public inconvenience, annoyance or alarm." *Id*. at 108 (internal quotations omitted). The statute was challenged as being unconstitutionally overbroad and vague, despite a Kentucky court narrowly construing the statute to apply only "where there is no bona fide intention to exercise a constitutional right or where the interest to be advanced by the individual's exercise of the right is insignificant in comparison" to its burden. *Id*. at 104. The Court held that because of the intent requirement and narrow construction, the Kentucky "statute comes into operation only when the individual's interest in expression, judged in the light of all relevant factors, is minuscule compared to a particular public interest in preventing that expression or conduct at that time and place." *Id.* at 111 (internal quotations omitted).

Like the Houston ordinance in *Hill*, CCMC 8.04.050(1) does not have a mens rea term. Additionally, Nevada, like Texas, requires that "[i]n every crime or public offense there must exist a union, or joint operation of act and intention." NRS 193.190. This court should construe CCMC 8.04.050(1) pursuant to NRS 193.190 and conclude that "[i]t is unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest," CCMC 8.04.050(1), only if the person commits a physical act or speaks fighting words, and has an intent to interfere with an officer's duties.[6] Such a construction would resolve the claims of

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[6]The majority in *Hill* did note that an intent requirement, by itself, would not bring the Houston ordinance within constitutional bounds. 482 U.S. at 469 n.18. However, the majority did not indicate that an intent requirement would not narrow and clarify the statute, so as to bring it at least closer to being within constitutional parameters. Therefore, when the intent requirement is read in conjuncture with the core criminal conduct requirement, there is little doubt that CCMC 8.04.050(1) withstands constitutional scrutiny.

Notably, the majority only mentions this limiting construction by stating that "an intent requirement alone will not render CCMC 8.04.050 constitutional." Majority opinion *ante* p. 1019 n.3. As discussed in footnote 2 above, the majority's conclusion is inconsistent with its contention that NRS 193.280 is constitutional because it contains the word "willful."

overbreadth and vagueness because the ordinance would only come into operation when the right to expression "is 'minuscule' compared to" the public's interest in a functioning police force. *Colten*, 407 U.S. at 111. Moreover, this construction would narrow the application of CCMC 8.04.050(1) to those acts that are proven to violate NRS 193.190.

For these reasons, I would grant the petition and instruct the district court to vacate its order denying Scott's appeal and remand the matter to the lower court for a new trial.

JUDY PALMIERI, Appellant, *v.* CLARK COUNTY, a Political Subdivision of the State of Nevada; and DAWN STOCKMAN, CEO96, Individually and in Her Official Capacity as an Officer Employed by the County of Clark, Respondents.

No. 65143

December 31, 2015 367 P.3d 442

Appeal from a district court order granting summary judgment in a civil rights and a torts action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Homeowner brought § 1983 action against county animal control officer, alleging violations of her Fourth and Fourteenth Amendment rights premised on assertion that search warrant for search of her home, which led to criminal charges being brought against her for violations of county code's provisions for health and welfare of animals, improperly relied on tips provided by informant who gave false identity. The district court granted defendant summary judgment on the basis of qualified immunity. Homeowner appealed. The court of appeals, Silver, J., held that: (1) *Franks v. Delaware*, 438 U.S. 154 (1978), standard would be applied by court of appeals in civil context when analyzing officer's qualified immunity claim; (2) homeowner failed to show that officer included informant's fictitious name in search warrant affidavit with a reckless disregard for the truth, as required to challenge veracity of affidavit in effort to negate officer's qualified immunity defense; (3) search warrant at issue was an administrative, rather than criminal, search warrant; and (4) evidence supported finding of reasonable suspicion needed for issuance of administrative search warrant.

Affirmed.

Potter Law Offices and *Cal J. Potter, III*, and *Cal J. Potter, IV*, Las Vegas, for Appellant.

Steven B. Wolfson, District Attorney, and *Matthew J. Christian*, Deputy District Attorney, Clark County, for Respondents.

1. Appeal and Error.
   The court of appeals reviews a district court's decision granting or denying summary judgment de novo.
2. Judgment.
   Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. NRCP 56(c).
3. Civil Rights.
   Section 1983 provides a check against the abuse of state power by creating a cause of action against state and local officials who violate an individual's federal rights while acting within the scope of their duties. 42 U.S.C. § 1983.
4. Civil Rights.
   To successfully assert a claim under § 1983, the plaintiff must establish that the conduct complained of (1) was committed by a person acting under color of state law, and (2) deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.
5. Civil Rights.
   When a state or local official's discretionary act does not violate clearly established federal statutory or constitutional rights, the doctrine of qualified immunity affords that official protection from civil liability in a § 1983 action. 42 U.S.C. § 1983.
6. Civil Rights; Judgment.
   Because qualified immunity provides an entitlement not to stand trial or face the other burdens of litigation, courts should resolve qualified immunity defenses at the earliest possible stage in litigation, and, therefore, a finding of qualified immunity is an appropriate basis for granting summary judgment in a § 1983 action. 42 U.S.C. § 1983.
7. Civil Rights.
   In determining whether a government official is entitled to summary judgment based on qualified immunity in a § 1983 action, the court of appeals considers whether the facts, when taken in the light most favorable to the party asserting the injury, show that officer's conduct violated a constitutional right, and whether, at the time of the alleged violation, the right was clearly established; the court of appeals need not follow the rigid sequential approach, but rather, may determine which prong to address first based upon the specific context of the case before the court. 42 U.S.C. § 1983.
8. Civil Rights.
   If no constitutional violation occurred, even where the facts are taken in the light most favorable to the § 1983 plaintiff, or if the constitutional right was not clearly established at the time of the alleged constitutional violation, then the defendant is entitled to qualified immunity and summary judgment is appropriate. 42 U.S.C. § 1983.
9. Searches and Seizures.
   Even when a search warrant affidavit includes a false statement within the contemplation of *Franks v. Delaware*, 438 U.S. 154 (1978), an evidentiary hearing is not required if, after the false statement is purged, the search warrant affidavit remains sufficient to support a finding of probable cause. U.S. Const. amend. 4.

10. Searches and Seizures.

The *Franks v. Delaware*, 438 U.S. 154 (1978), standard applicable to determining the validity of a search warrant affidavit in the criminal context would be applied by the court of appeals in civil context of analyzing qualified immunity claim of county animal control officer with respect to homeowner's § 1983 action against officer for allegedly relying on information provided by informant who provided false identity in search warrant affidavit for search of her home. U.S. Const. amend. 4; 42 U.S.C. § 1983.

11. Civil Rights.

In the qualified immunity context, bare allegations of malice are insufficient to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery in a § 1983 action. 42 U.S.C. § 1983.

12. Civil Rights.

If a § 1983 plaintiff whose claim is premised on a search warrant containing false information both makes the requisite substantial showing and establishes that the issuing court would not have issued the search warrant without false information, then, and only then, does the question of whether the government official's conduct was intentional or reckless become a factual determination for the jury when analyzing a defense claim of qualified immunity. U.S. Const. amend. 4; 42 U.S.C. § 1983.

13. Searches and Seizures.

Reckless disregard for the truth may be shown, when seeking a *Franks v. Delaware*, 438 U.S. 154 (1978), hearing challenging the veracity of a search warrant affidavit, by establishing that the warrant affiant entertained serious doubts with regard to the truth of the search warrant affidavit's allegations. U.S. Const. amend. 4.

14. Searches and Seizures.

A party attacking the veracity of a search warrant affidavit and seeking a *Franks v. Delaware*, 438 U.S. 154 (1978), hearing may establish reckless disregard for the truth inferentially from circumstances evincing obvious reasons to doubt the veracity of the allegations in the search warrant affidavit. U.S. Const. amend. 4.

15. Searches and Seizures.

Under *Franks v. Delaware*, 438 U.S. 154 (1978), conclusory assertions and allegations of negligence or innocent mistake are insufficient to warrant an evidentiary hearing on a challenge to the veracity of a search warrant affidavit. U.S. Const. amend. 4.

16. Searches and Seizures.

A criminal defendant seeking to attack a search warrant affidavit cannot rely on the false statements of any nongovernmental informant but, rather, must limit his or her challenge to the deliberate falsity or reckless disregard of the affiant. U.S. Const. amend. 4.

17. Civil Rights.

Homeowner failed to show that county animal control officer included informant's fictitious name in search warrant affidavit with a reckless disregard for the truth, as required to challenge veracity of affidavit underlying search of home, which led to criminal charges for violating county code provisions governing health and welfare of animals, in effort to negate officer's defense of qualified immunity in homeowner's § 1983 action; while person whose name was provided as being informant later signed affidavit indicating she never made or signed complaint against homeowner, had never been to homeowner's residence, and believed former coworker was responsible for filing complaint, such alleged falsehood was attributable to informant, not officer. U.S. Const. amend. 4; 42 U.S.C. § 1983.

18. Searches and Seizures.
In evaluating an issuing court's decision to issue a search warrant, the court of appeals does not conduct a de novo review; instead, it considers whether the evidence, taken together, demonstrated a substantial basis for the issuing court's probable cause determination, remaining mindful that a grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. U.S. Const. amend. 4.

19. Criminal Law.
The court of appeals reviews a district court's legal conclusions regarding a search's constitutionality de novo. U.S. Const. amend. 4.

20. Searches and Seizures.
Probable cause is the standard by which a search's reasonableness is tested, and the type of probable cause necessary to support a search warrant differs depending on the objective of the search. U.S. Const. amend. 4.

21. Searches and Seizures.
Criminal search warrants require a stronger showing of probable cause, whereas administrative search warrants generally are supportable by a lesser showing of probable cause. U.S. Const. amend. 4.

22. Searches and Seizures.
A warrant or probable cause is not the sole measure of reasonableness of a search where such requirements would undermine the governmental purpose underlying the search. U.S. Const. amend. 4.

23. Searches and Seizures.
The title affixed to a search warrant is not determinative of the legal standard by which its reasonableness is assessed. U.S. Const. amend. 4.

24. Appeal and Error.
As a general rule, issues not raised before the district court or in the appellant's opening brief on appeal are deemed waived.

25. Appeal and Error.
The court of appeals has discretion to consider issues of constitutional dimension sua sponte notwithstanding the parties' failure to raise such issues before the district court or on appeal.

26. Appeal and Error.
Because the issue of whether administrative probable cause supported search warrant leading to criminal charges being brought against homeowner who was subject of search presented an important constitutional question, the court of appeals would address such issue sua sponte, on homeowner's appeal from grant of summary judgment to county animal control officer in § 1983 action against officer for alleged violation of Fourth and Fourteenth Amendment rights, despite parties' failure to raise such issue at trial or on appeal. U.S. Const. amend. 4; 42 U.S.C. § 1983.

27. Searches and Seizures.
An administrative warrant is generally a warrant issued by a judge authorizing an administrative agency to conduct a search to determine whether physical conditions exist that do not comply with minimum standards prescribed in local regulatory ordinances. U.S. Const. amend. 4.

28. Searches and Seizures.
Unlike a criminal search warrant that authorizes a search for evidence of criminal conduct, an administrative search warrant merely authorizes a routine inspection for regulatory compliance. U.S. Const. amend. 4.

29. Searches and Seizures.
Because an administrative search warrant only authorizes a routine inspection of the physical condition of private property, an inspection pursu-

ant to such a warrant is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. U.S. Const. amend. 4.

30. Searches and Seizures.
When a warrant is required to conduct a search, the objective of the search determines whether an administrative or a criminal warrant is required. U.S. Const. amend. 4.

31. Searches and Seizures.
If the primary objective of a search is to gather evidence of criminal conduct, then a criminal search warrant is required. U.S. Const. amend. 4.

32. Searches and Seizures.
An administrative search warrant is required where the primary objective of the search is to ascertain compliance with the minimum standards set forth in regulatory ordinances. U.S. Const. amend. 4.

33. Searches and Seizures.
During a valid administrative search, authorities may seize evidence of criminal conduct in plain view; authorities may not use that evidence as a justification to expand the scope of the initial administrative search, but they may use evidence seized under the plain-view doctrine to obtain a criminal search warrant. U.S. Const. amend. 4.

34. Searches and Seizures.
Primary objective of search warrant for search of home was to protect the health and welfare of animals on homeowner's property, such that search warrant was an administrative search warrant rather than criminal search warrant, even though a person who committed animal cruelty or otherwise violated county code could be subject to criminal penalties; warrant was entitled "administrative search and seizure warrant" and did not authorize search of property to uncover evidence of criminal conduct, but instead instructed officers to ascertain whether animals on property were unhealthy, held in violation of county code, or kept in a cruel condition. U.S. Const. amend. 4.

35. Searches and Seizures.
An administrative search warrant based on specific evidence of a violation does not require criminal probable cause. U.S. Const. amend. 4.

36. Searches and Seizures.
To establish administrative probable cause based on evidence of a specific violation, a search warrant affidavit must show specific evidence sufficient to support a reasonable suspicion of a violation. U.S. Const. amend. 4.

37. Searches and Seizures.
In comparison to criminal probable cause, reasonable suspicion of a violation needed for administrative probable cause is a less demanding standard because it does not require information possessing the same quality or content as criminal probable cause, and because it can be established with information that is less reliable than that required to demonstrate criminal probable cause. U.S. Const. amend. 4.

38. Searches and Seizures.
In considering the totality of the circumstances to determine whether probable cause exists to issue a search warrant, the court of appeals analyzes both the content of information possessed by police and its degree of reliability. U.S. Const. amend. 4.

39. Searches and Seizures.
Because the totality of the circumstances approach is concerned with the quantity and quality of information, a tip that has a relatively high degree of reliability will require less corroborating information to establish

the requisite quantum of administrative probable cause needed for issuance of an administrative search warrant. U.S. CONST. amend. 4.

40. SEARCHES AND SEIZURES.
Informant's tip, which indicated that homeowner was engaging in animal abuse on her property, as corroborated by affiant, a county animal control officer, exhibited sufficient indicia of reliability to support reasonable suspicion for issuance of administrative search warrant for home; informant provided name and telephone number, affiant returned informant's call and spoke with informant on telephone, making informant an identified citizen, informant indicated that she had firsthand observations of violations of county code in home, providing a detailed description of those violations and reporting that she saw several animals in the home and garage who looked unhealthy and thin and appeared to have matted fur and fecal matter all over them, and affiant verified owner of home and reviewed owner's prior records. U.S. CONST. amend. 4.

41. SEARCHES AND SEIZURES.
The reasonableness of a search warrant is not assessed based on information acquired subsequent to a search, but rather, must be considered based on information provided to the magistrate in the search warrant affidavit. U.S. CONST. amend. 4.

Before GIBBONS, C.J., TAO and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

Appellant Judy Palmieri was criminally charged after a search of her residence revealed several violations of the Clark County Code's provisions for the health and welfare of animals. In obtaining the warrant to search Palmieri's residence, respondents Dawn Stockman and Clark County relied in part on a tip from an informant who, Palmieri later alleged, provided a false identity when she filed a complaint against Palmieri. After Palmieri obtained the evidence underlying her allegation that the informant provided a false identity, Palmieri sued Stockman and Clark County, asserting a 42 U.S.C. § 1983 claim, a *Monell*[1] claim, and several state law causes of action. Respondents moved for summary judgment, which the district court granted.

On appeal, the primary issue is whether the district court erred by granting summary judgment with respect to Palmieri's § 1983 claim against Stockman based on a finding that Stockman was entitled to qualified immunity.[2] We hold that Stockman was entitled to quali-

[1]*Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[2]Palmieri also challenges the portions of the district court's order granting Clark County summary judgment on her *Monell* claim and Stockman summary judgment on her claims for negligent and intentional infliction of emotional distress, conspiracy, and malicious prosecution. We have considered these arguments, and they lack merit because, as fully discussed below, we conclude that there was administrative probable cause sufficient to support

fied immunity for the following reasons: (1) Palmieri failed to make a substantial showing that Stockman knowingly and intentionally, or with a reckless disregard for the truth, included a false statement in the search warrant affidavit supporting the search warrant for Palmieri's residence; and (2) Palmieri failed to establish a genuine issue of material fact as to whether probable cause existed to support an administrative search warrant for her residence. Therefore, we conclude the district court appropriately granted Stockman and Clark County's motion for summary judgment. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Individuals significant to this case

Respondent Dawn Stockman is a licensed veterinary technician and animal control officer for Clark County Animal Control—an agency of respondent Clark County. At the time of the events underlying this appeal, Stockman had been an animal control officer for a little more than three years. Appellant Judy Palmieri is a pet store owner and a resident of Clark County; her home was searched pursuant to a warrant obtained by Stockman. Kaitlyn Nichols is not a party to this case, but someone used her name to file a complaint against Palmieri with animal control. Prior to the events giving rise to this appeal, Nichols worked at one of Palmieri's pet stores.

The complaint and investigation

On May 10, 2010, an animal control supervisor with the City of Las Vegas, Richard Molinari, received a complaint from a woman who identified herself as Kaitlyn Nichols (the Informant) against Palmieri for alleged animal abuse. Because Palmieri is a Clark County property owner and outside the jurisdiction of the City of Las Vegas, Molinari forwarded the Informant's complaint to Clark County Animal Control. Clark County Animal Control assigned the complaint to Stockman, who called the Informant on May 10, 2010, to discuss her complaint. During the conversation, Stockman requested that the Informant prepare a written complaint. The Informant subsequently prepared a signed written statement and faxed it to Stockman. After receiving the written statement from the Informant, Stockman called the Informant once again to confirm that she received everything that the Informant had sent.

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an administrative search warrant. For the same reason, we need not reach Palmieri's argument that the district court improperly concluded that Stockman was entitled to discretionary act immunity. Although Palmieri's complaint presented additional claims, she does not challenge the district court's grant of summary judgment with respect to those claims on appeal, and, therefore, we do not address them today. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

Stockman later provided the following account of her conversation with the Informant in a search warrant affidavit:

> [Nichols] then told me that she use[d] to work for Mrs. Palmieri at Meadow[s] Pets. She was asked to help Mrs. Palmieri move some boxes at her place of residence. She arrived at [Palmieri's residence]. Once Ms. Nichols was inside the residence she saw several animals in the house. Ms. Nichols also told me there w[ere] several animals kept in the garage in kennels. The animals on the property looked very thin and several appeared to have mats and fecal [matter] all over them. Ms. Nichols said a lot of the animals appeared to be unhealthy. Ms. Nichols then went on to tell me Mrs. Palmieri breeds the dogs and sells them at her pet shop. Ms. Nichols also stated Mrs. Palmieri also houses animals that are sick or too young for the pet shop in her house.

To corroborate the Informant's complaint, Stockman checked property records to confirm Palmieri owned the residence identified by the Informant, and she reviewed Clark County Animal Control's records for previous citations against Palmieri. The search revealed that Palmieri owned the residence identified by the Informant, Palmieri owned a pet store, Clark County Animal Control had responded to Palmieri's residence in January 2006 regarding allegations that Palmieri had a dead animal in her garage,[3] and Clark County Animal Control had received numerous health and welfare complaints regarding one of Palmieri's pet stores, Bark Avenue, including a complaint in September 2007.[4] Stockman did not investigate the Informant's complaint further or solicit additional information from the Informant.[5]

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[3]Jason Elff, an animal control officer for Clark County Animal Control, responded to Palmieri's residence regarding the dead animal complaint. Officer Elff reported that he smelled a foul odor but could not confirm whether it was a dead animal. Palmieri would not permit Officer Elff on the property without a warrant and advised him to leave. Knowing that Palmieri previously refused to allow an animal control officer to enter her property without a warrant, Stockman elected to seek a search warrant after receiving the Informant's complaint.

[4]It is unclear from the record exactly how many citations Palmieri's pet stores have received. During her deposition, Palmieri acknowledged that in 2000 she received an 18-count indictment related to violations at one of her pet stores. Palmieri also acknowledged she received citations in December 2009 for violations at one of her pet stores; however, she alleges that the basis for the citations was false. Regarding Bark Avenue, the search warrant affidavit only details the September 2007 complaint, and the record does not indicate why Stockman did not provide details regarding the other complaints against Palmieri's businesses.

[5]Before becoming an animal control officer and veterinary technician, Stockman worked at one of Palmieri's pet stores. As such, she had independent knowledge that Palmieri owned a pet store at one time. But Stockman did not include that information in the search warrant affidavit.

The warrant

Based on the complaint and investigation, Stockman decided to seek a warrant authorizing the search of Palmieri's residence. Stockman prepared an "Administrative Search and Seizure Warrant" and an "Application and Affidavit for Administrative Search and Seizure Warrant," which included the above account of her conversation with the Informant and the corroborating information that Stockman gathered. Two of Stockman's supervisors and a deputy district attorney subsequently reviewed and approved Stockman's proposed search warrant and search warrant affidavit, and a district court judge signed the search warrant and authorized the search on May 18, 2010, after Stockman swore to the truth of the contents of the affidavit.

The search

Stockman executed the search warrant together with another animal control officer and an officer of the Las Vegas Metropolitan Police Department on May 19, 2010.[6] During the search, the officers found 24 adult dogs and 5 puppies in Palmieri's house and garage. Palmieri could not provide proof that any of the animals had received a rabies vaccination or been spayed or neutered as required by Clark County Code. The officers found that Palmieri provided the animals a sanitary environment and adequate food and water. However, because two elderly dogs looked sickly and because Palmieri could not provide proof the dogs had been to a veterinarian's office recently, the officers impounded those dogs for a welfare check by a veterinarian. The officers also impounded the five puppies because Palmieri did not have a breeding permit. As a result of the search, the officers cited Palmieri for failing to provide proof of rabies vaccination, failing to obtain a permit for intact dogs, and failing to provide proof of medical care.[7]

After the search, Palmieri questioned Stockman regarding the warrant and the Informant's complaint. In response, Stockman

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[6]The group knocked and announced at Palmieri's front door, but Palmieri did not answer. The group then walked around Palmieri's house to a garage where they knocked on the garage door and heard dogs barking. After gaining access to Palmieri's backyard, the group entered Palmieri's house and announced their presence again. Palmieri, who had been in the shower when the officers first arrived, subsequently appeared from around the corner.

As Stockman and the other animal control officer began searching the house, the LVMPD officer instructed Palmieri to go outside where she could read the warrant. According to Palmieri, she was not permitted to enter her residence for approximately 20 to 30 minutes. During that time, Palmieri was not handcuffed, but "[she] was in [her] pajamas, had no underwear on, no makeup, [and] no shoes."

[7]The Clark County District Attorney's office subsequently brought five charges against Palmieri in Las Vegas Justice Court. For reasons that are unclear from the appendix, the justice court dismissed those charges.

showed Palmieri the Informant's signed complaint, and Palmieri acknowledged that the signature on the complaint looked like Kaitlyn Nichols' signature.[8] According to Palmieri, Stockman told her "animal control ha[d] never been able to get anything on [her] until now."[9]

The aftermath of the search

Approximately five months after the search of Palmieri's residence, Kaitlyn Nichols signed an affidavit averring that she never made a complaint regarding Palmieri to Clark County Animal Control or signed any such complaint. Nichols further indicated that she had never been to Palmieri's residence and that she believed a former coworker "who ha[d] previously stolen [her] identity and forged [her] name[ ] on bank checks" was responsible for filing the complaint against Palmieri.[10]

Palmieri subsequently sued Stockman and respondent Clark County. Palmieri's complaint included four claims for relief: (1) a 42 U.S.C. § 1983 claim against Stockman for violation of her constitutional rights under the Fourth and Fourteenth Amendments, (2) a *Monell* claim asserting § 1983 liability against Clark County, (3) a claim against Stockman encompassing several state law causes of action, and (4) a separate claim against Stockman and Clark County for "illegal search and illegal warrant."

Palmieri's deposition

During her deposition, Palmieri acknowledged that the Clark County Code requires a homeowner to obtain a special permit or a zoning variance to possess more than 3 dogs, and she acknowledged she did not obtain such a permit or variance before housing 29 animals at her residence. Palmieri also stated that, for approximately 18 years, she had been bringing animals home from her pet stores and keeping them at her residence for short periods. Palmieri further acknowledged she had been charged numerous times for health- and welfare-related violations of the Clark County Code—both personally and through her businesses.

Although Palmieri acknowledged that Clark County was not involved with all of her previous violations, she stated that "the head

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[8]During her deposition, Palmieri explained that she was familiar with Nichols because Nichols worked at one of her pet stores, Frisky Pet Emporium.

[9]At her deposition, Palmieri stated she understood Stockman's statement to mean "on the very day the [breeding permit] ordinance went into effect, that they waited with a warrant till that day so that if they could find anything, they could add more charges to it, and that this way it would be their hopes of finally getting something."

[10]During her deposition, Palmieri stated that the former coworker identified by Nichols was one of Palmieri's former employees and that Nichols lived with the former coworker that she identified.

of Animal Control has had [her] on his particular list for many years." According to Palmieri, she is on the head of Animal Control's list because he "doesn't like women, and . . . [he does not] like[ ] women involved in pet stores." She believes Clark County wants "to see [her] out of business. . . . [and that] the county doesn't appreciate pet stores or business—viable businesses in the county. And that's kind of their quest." Palmieri, however, explained that she did not believe Stockman was part of the conspiracy or that Stockman acted with malice against her. Instead, Palmieri suggested Stockman "came in as an officer instructed to go ahead and serve th[e] warrant and see what she could come up with." Palmieri also stated she believes Stockman actually received the complaint, but she thinks a former employee called Clark County Animal Control, pretending to be Nichols.

Summary judgment

After the close of discovery, Clark County and Stockman moved for summary judgment, arguing Palmieri failed to provide sufficient evidence to support her claims, and the district court granted that motion in its entirety. This appeal followed.

ANALYSIS

In this appeal, we primarily address whether the district court appropriately granted Stockman summary judgment on Palmieri's § 1983 claim. Palmieri contends that she established a genuine issue of material fact as to whether Stockman was entitled to qualified immunity, and, therefore, she asserts that the district court improperly granted Stockman summary judgment on her § 1983 claim. Stockman disagrees.

Standard of review

[Headnotes 1, 2]

This court reviews a district court's decision granting or denying summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*; NRCP 56(c).

Qualified immunity

[Headnotes 3-6]

Section 1983 provides a check against the abuse of state power by creating a cause of action against state and local officials who violate an individual's federal rights while acting within the scope

of their duties. *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 153, 42 P.3d 233, 242 (2002). To successfully assert a claim under § 1983, the plaintiff must establish that "the conduct complained of: (1) was committed by a person acting under color of state law, and (2) deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 153, 42 P.3d at 241. However, where a state or local official's discretionary act does not violate clearly established federal statutory or constitutional rights, the doctrine of qualified immunity affords that official protection from civil liability. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007). Because qualified immunity provides " 'an entitlement not to stand trial or face the other burdens of litigation,' " courts should resolve qualified immunity defenses "at the earliest possible stage in litigation," and, therefore, "a finding of qualified immunity is an appropriate basis for granting summary judgment." *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

[Headnotes 7, 8]

In determining whether a government official is entitled to summary judgment based on qualified immunity, this court considers (1) whether the facts, when "[t]aken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right," and (2) whether, at the time of the alleged violation, the right was clearly established. *Saucier*, 533 U.S. at 201; *Butler*, 123 Nev. at 458-59, 168 P.3d at 1061-62 (applying the *Saucier* test). We need not follow the rigid sequential approach set forth in *Saucier*, but rather, may determine which prong to address first based upon the specific context of the case before this court. *See Pearson*, 555 U.S. at 236. If no constitutional violation occurred, even where the facts are taken in the light most favorable to the § 1983 plaintiff, or if the constitutional right was not clearly established at the time of the alleged constitutional violation, then the defendant is entitled to qualified immunity and summary judgment is appropriate. *Butler*, 123 Nev. at 458-59, 168 P.3d 1061-62 (citing *Saucier*, 533 U.S. at 201-02).

On appeal, Palmieri argues that Stockman was not entitled to qualified immunity because the search of her residence violated her constitutional rights under the Fourth and Fourteenth Amendments. With regard to Palmieri's argument that Stockman violated her constitutional rights, we address two issues: first, we consider whether Palmieri may challenge the validity of the search warrant based on the veracity of the search warrant affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978); and second, we examine whether, even without a *Franks* violation, the search warrant affidavit was

insufficient to establish probable cause. We consider each of these constitutional issues in turn.

Franks v. Delaware and the Informant's fictitious name

Palmieri asserts that Stockman searched her residence pursuant to an invalid search warrant because Stockman included the Informant's fictitious name in the search warrant affidavit, and thereby "knowingly and intentionally, or with reckless disregard for the truth," submitted a fictitious search warrant affidavit. By contrast, Stockman argues that she was not required to investigate the Informant's identity; that Palmieri did not raise a genuine issue of material fact as to whether Stockman knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the search warrant affidavit; and that, even if the Informant's name is purged from the search warrant affidavit, it was nevertheless sufficient to establish probable cause.

[Headnote 9]

Franks, a criminal case, is the seminal decision addressing a challenge to the validity of a search warrant based on the veracity of the supporting search warrant affidavit. In considering whether a criminal defendant may challenge the validity of the search warrant by attacking the search warrant affidavit, the *Franks* Court confirmed that search warrant affidavits are entitled to a presumption of validity. 438 U.S. at 171. But the *Franks* Court reasoned that if search warrant affidavits were not subject to impeachment, then the probable cause requirement would be a nullity, as government officials could deliberately falsify information with impunity. *Id.* at 168. Thus, the *Franks* Court concluded an evidentiary hearing is required where (1) "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and (2) "the allegedly false statement is necessary to the finding of probable cause." *Id.* at 155-56; *see also United States v. DeLeon*, 979 F.2d 761, 763-64 (9th Cir. 1992) (applying *Franks* to omissions of material fact). Even when a search warrant affidavit includes a false statement within the contemplation of *Franks*, an evidentiary hearing is not required if, after the false statement is purged, the search warrant affidavit remains sufficient to support a finding of probable cause. *Franks*, 438 U.S. at 171-72.

[Headnote 10]

While the Nevada Supreme Court has consistently applied the standard set forth in *Franks* in the criminal context, *see, e.g.*, *Garrettson v. State*, 114 Nev. 1064, 1068, 967 P.2d 428, 430 (1998), it has not considered the applicability of *Franks* to § 1983 claims.

This court, however, can discern no reason not to apply *Franks* in the civil context; whether a criminal defendant or a civil plaintiff raises *Franks*, the conduct under attack is identical. Moreover, nearly every circuit of the federal courts of appeal has applied *Franks* in addressing defenses of qualified immunity from civil liability.[11] Therefore, we take this opportunity to clarify that *Franks* applies in the civil context.

In the criminal context, *Franks* issues generally arise prior to trial during suppression hearings where the trial court is necessarily the finder of fact. Because the jury is generally the finder of fact in civil cases, such as this one, we must consider what role the judge plays in resolving a *Franks* issue on summary judgment given the United States Supreme Court's qualified immunity jurisprudence and the requirement in *Franks* that the party moving for an evidentiary hearing make a substantial preliminary showing. *Franks*, 438 U.S. at 155, 170. To resolve that question, we look to the United States Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and persuasive caselaw from the Ninth Circuit of the United States Court of Appeals.

[Headnote 11]

To prevent excessive disruption of government and facilitate the resolution of meritless claims on summary judgment, the Supreme Court held in *Harlow* that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. That standard places the focus of the qualified immunity analysis on the objective reasonableness of the government official's conduct as measured by clearly established law. *Id.* Thus, in the qualified immunity context, bare allegations of malice are insufficient "to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

[Headnote 12]

The Ninth Circuit has observed that a tension exists "between *Harlow*'s emphasis on 'objective reasonableness' and cases in

[11]*See, e.g.*, *Whitlock v. Brown*, 596 F.3d 406, 410 (7th Cir. 2010); *Miller v. Prince George's Cnty.*, 475 F.3d 621, 627 (4th Cir. 2007); *Kohler v. Englade*, 470 F.3d 1104, 1113 (5th Cir. 2006); *Burke v. Town of Walpole*, 405 F.3d 66, 82 (1st Cir. 2005); *Pierce v. Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004); *Hunter v. Namanny*, 219 F.3d 825, 829 (8th Cir. 2000); *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997); *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994); *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991); *Forster v. Cnty. of Santa Barbara*, 896 F.2d 1146, 1148 (9th Cir. 1990); *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989).

which the 'clearly established law' at issue contains a subjective element, such as motive or intent." *Branch v. Tunnell*, 937 F.2d 1382, 1385 (9th Cir. 1991), *overruled on other grounds by Galbraith v. Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Based on that tension, the Ninth Circuit has adopted a standard for overcoming summary judgment that parallels the threshold showing that a criminal defendant must make to establish entitlement to a *Franks* hearing. *Hervey v. Estes*, 65 F.3d 784, 788-89 (9th Cir. 1995). Specifically, the Ninth Circuit concluded that

> a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can *both* establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant.

Id. at 789. If a § 1983 plaintiff both makes the requisite substantial showing and establishes that the issuing court would not have issued the warrant without the false information, then, and only then, does the question of whether the government official's conduct was intentional or reckless become a factual determination for the jury. *Id.* We find the Ninth Circuit's reasoning in *Branch* and *Hervey* persuasive, and, therefore, we adopt *Hervey*'s standard for deciding *Franks* claims in the summary judgment context. We address each prong in turn below.

Deliberate falsehood or reckless disregard

The evidence here does not support the proposition that Stockman made a knowing and intentional false statement in her affidavit. To the contrary, Palmieri conceded in her deposition that Stockman did not harbor malice against her, that Stockman actually received the complaint, and that Stockman was merely doing her job in serving the search warrant. Nevertheless, the question of whether Stockman showed reckless disregard for the truth still requires analysis and elaboration.

[Headnotes 13, 14]

Reckless disregard for the truth may be shown by establishing that the warrant affiant entertained serious doubts with regard to the truth of the search warrant affidavit's allegations. *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)) (concluding that the First Amendment definition of reckless disregard for the truth is applicable in the *Franks* context). A party attacking the veracity of a search warrant affidavit may also establish reckless disregard for the truth inferentially "from circumstances evincing 'obvious reasons to

doubt the veracity' of the allegations" in the search warrant affidavit. *Id.* (quoting *St. Amant*, 390 U.S. at 732).

[Headnotes 15, 16]

Under *Franks*, conclusory assertions and allegations of negligence or innocent mistake are insufficient to warrant an evidentiary hearing. 438 U.S. at 171. And a criminal defendant seeking to attack a search warrant affidavit cannot rely on the false statements of *any nongovernmental informant* but, rather, must limit his or her challenge to the deliberate falsity or reckless disregard of the *affiant*. *Id.* ("The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.").

[Headnote 17]

Here, in support of her challenge to the veracity of the search warrant affidavit, Palmieri provided an affidavit from Nichols in which Nichols averred that she never made or signed a complaint against Palmieri, she had never been to Palmieri's residence, and she believed a former coworker was responsible for filing the complaint. For purposes of summary judgment, we view the facts in the light most favorable to Palmieri and assume the Informant provided Stockman a false name—Kaitlyn Nichols. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (providing that courts must consider the facts in the light most favorable to the party asserting that his or her constitutional rights were violated when considering whether to grant summary judgment based on qualified immunity), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). But, although Stockman included the Informant's fictitious name in the search warrant affidavit, the alleged falsehood is attributable to the Informant, rather than Stockman, and Palmieri cannot use *Franks* to impeach the Informant. *See Franks*, 438 U.S. at 171 (explaining that a challenge to a search warrant affidavit may not be based on a nongovernmental informant's deliberate falsehood or reckless disregard).

Palmieri's only direct allegation relevant to whether Stockman recklessly disregarded the truth is that Stockman should have known that the Informant provided a false identity. That allegation assumes that an officer has a duty to investigate and confirm an informant's identity prior to obtaining a search warrant based on an informant's tip. But Palmieri did not present, and our research has not revealed, any legal authority to support that assumption. To the contrary, the United States Supreme Court has considered whether officers may rely on tips from anonymous informants and concluded that a tip from an anonymous informant can form at least part of the basis for reasonable suspicion or even probable cause. *See Alabama v. White*, 496 U.S. 325 (1990) (discussing an anonymous tip in the reasonable

suspicion context); *see also Illinois v. Gates*, 462 U.S. 213 (1983) (considering an anonymous tip in the probable cause context).

Because the anonymity of an informant affects the weight of the various indicia of reliability accompanying the informant's tip, *see Gates*, 462 U.S. at 237, the real issue in the present case is whether the Informant is properly classified as an anonymous informant or an identified citizen informant for purposes of assessing the reasonableness of the search warrant. And, as discussed more below, where a citizen informant provides a tip via telephone and states his or her occupation or name and home and cellular telephone numbers, courts have found that such information is sufficient to categorize the informant as an identified citizen informant whose tip should be credited with a greater degree of reliability than that of an anonymous informant. *See, e.g.*, *Maumee v. Weisner*, 720 N.E.2d 507 (Ohio 1999) (cataloging relevant cases, rejecting an argument that an informant who provided a tip via telephone may have provided a false identity, and concluding that the informant, who provided a name and home and cellular telephone numbers, was an identified citizen informant whose tip should be recognized as more reliable than that of an anonymous informant).

The evidentiary basis for Palmieri's argument is also lacking. Palmieri presented no evidence to suggest that Stockman knew the Informant provided a false identity or entertained serious doubts as to the Informant's identity. *See Williams*, 737 F.2d at 602 (concluding that reckless disregard for the truth may be established through evidence establishing that the warrant affiant entertained cast serious doubts regarding the allegations in the search warrant affidavit). Nor did she present evidence from which a fact-finder could infer an obvious reason to doubt the veracity of the allegations in the search warrant affidavit. *Id.* (holding that reckless disregard for the truth may be proven inferentially through evidence establishing an obvious reason to doubt the allegations in the search warrant affidavit). By contrast, Stockman testified that she believed and continues to believe that Nichols was the Informant, and Palmieri did not dispute that testimony. Palmieri, therefore, did not make the substantial preliminary showing necessary to survive a motion for summary judgment based on qualified immunity.

In reality, Palmieri's allegation assumes that Stockman should have known or suspected that the Informant provided a false identity without providing a basis for that assumption, and, therefore, her assertion amounts to a conclusory allegation of negligence, and such an allegation does not constitute a substantial showing that Stockman acted with a reckless disregard for the truth when she included the Informant's false name in the search warrant affidavit. *See Franks*, 438 U.S. at 171 (explaining that conclusory allegations and allegations of negligence are insufficient to warrant an evidentiary hearing); *see also Hervey*, 65 F.3d at 789 (explaining that a plaintiff

must make the same showing to reach a jury in a § 1983 action as would be required of a criminal defendant to obtain an evidentiary hearing under *Franks*). As Palmieri's offer of proof is insufficient to satisfy the first prong of *Franks*, we conclude she cannot challenge the search warrant based on the search warrant affidavit's veracity.

Because Palmieri failed to demonstrate that Stockman included the Informant's fictitious name in the search warrant affidavit with a reckless disregard for the truth, we need not proceed to the second prong of *Franks*. *See Hervey*, 65 F.3d at 788-89 (providing that to survive summary judgment on a *Franks* issue, a plaintiff must make a substantial showing of a deliberate falsehood or reckless disregard for the truth and establish that the search warrant affidavit was insufficient to establish probable cause without the false information). But because Palmieri raises a number of issues regarding the sufficiency of the search warrant and because all of Palmieri's arguments regarding the district court's grant of summary judgment turn on probable cause, we proceed to consider whether the search warrant affidavit established probable cause to search Palmieri's residence such that Stockman is entitled to qualified immunity under *Saucier*. In considering whether the search warrant was supported by probable cause, we review the issuing court's probable cause determination based on the search warrant affidavit as written, given Palmieri's failure to make the requisite substantial preliminary showing sufficient to overcome summary judgment with regard to her *Franks* argument. *See Franks*, 438 U.S. at 171-72 (providing that where a party satisfies the *Franks* test, the reviewing court must purge the false statements from the search warrant affidavit and assess probable cause based on the modified affidavit).

Probable cause

Palmieri contends the judge who issued the "Administrative Search and Seizure Warrant" lacked an adequate basis for doing so because Stockman did not investigate the Informant's identity, and, therefore, the "Application and Affidavit for Administrative Search and Seizure Warrant" provided no indicia of the Informant's reliability. She further complains that the search warrant affidavit contains no indication that Stockman corroborated the Informant's complaint.[12] Stockman, on the other hand, argues probable cause existed because she received specific, credible information indicating that animals on Palmieri's property were kept in a condition that jeopardized their health and welfare, and because she corroborated the identity and residence of the alleged wrongdoer.

[12]We have considered Palmieri's remaining arguments with regard to whether the search warrant was supported by probable cause, and, for the reasons discussed below, we conclude that under the totality of the circumstances, the search warrant was supported by administrative probable cause.

[Headnotes 18, 19]

In evaluating an issuing court's decision to issue a search warrant, we do not conduct a de novo review; instead, we consider whether the evidence, taken together, demonstrated a substantial basis for the issuing court's probable cause determination. *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 67 (1994); *see also West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 959 (11th Cir. 1982) (explaining that for both administrative and criminal search warrants, appellate courts apply the same standard of review). And we are mindful that "[a] grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Nevertheless, we review a district court's legal conclusions regarding a search's constitutionality de novo. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013).

[Headnotes 20-22]

The Fourth Amendment to the United States Constitution and Article 1, Section 18 of the Nevada Constitution prohibit unreasonable searches and seizures. Probable cause is the standard by which a search's reasonableness is tested, and the type of probable cause necessary to support a search warrant differs depending on the objective of the search.[13] *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978); *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967). As relevant to this case, criminal search warrants require a stronger showing of probable cause, whereas administrative search warrants generally are supportable by a lesser showing of probable cause. *E.g.*, *Marshall*, 436 U.S. at 320 (holding that "[p]robable cause in the criminal law sense is not required" to support an administrative search warrant); *see also Michigan v. Clifford*, 464 U.S. 287 (1984) (discussing administrative probable cause in the context of a search of a private residence).

[Headnotes 23-26]

The search warrant here is entitled "Administrative Search and Seizure Warrant," but the title affixed to a search warrant is not determinative of the legal standard by which its reasonableness is as-

[13]We are cognizant that a warrant or probable cause is not the sole measure of reasonableness where such requirements would undermine the governmental purpose underlying the search. *E.Z. v. Coler*, 603 F. Supp. 1546, 1558 (N.D. Ill. 1985), *aff'd sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). For example, in child welfare law, it has been recognized that the fastest way to verify an allegation of abuse or neglect is to access the home and observe the child, and that to require officials to corroborate allegations through independent sources prior to executing a search warrant may not only be impractical, but may unnecessarily delay examination of a child's situation, possibly resulting in harm or death to the child. *Id*. at 1558-59.

sessed. *See Clifford*, 464 U.S. at 294 (providing that the objective of the search determines whether an administrative or a criminal warrant is required). As a preliminary matter, therefore, we consider whether the search warrant in the present case is properly classified as an administrative or a criminal search warrant.[14]

[Headnotes 27-29]

Generally, an administrative warrant is a warrant issued by a judge authorizing an administrative agency to conduct a search "to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances." *See Camara*, 387 U.S. at 530 (discussing administrative searches in the context of a constitutional challenge to a warrantless administrative search); *see also Administrative Warrant*, *Black's Law Dictionary* (10th ed. 2014) ("A warrant issued by a judge at the request of an administrative agency that seeks to conduct an administrative search."), *and Administrative Search*, *Black's Law Dictionary* (10th ed. 2014) ("The inspection of a facility by one or more officials of an agency with jurisdiction over the facility's fire, health, or safety standards."). Unlike a criminal search warrant that authorizes a search for evidence of criminal conduct, an administrative search warrant merely authorizes a routine inspection for regulatory compliance. *See Camara*, 387 U.S. at 530. Because an administrative search warrant only authorizes "a routine inspection of the physical condition of private property," an inspection pursuant to such a warrant "is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." *Id.*

[Headnotes 30-33]

Where a warrant is required to conduct a search, the objective of the search determines whether an administrative or a criminal war-

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[14]Clark County did not argue before the district court that the search warrant was supported by administrative probable cause, and on appeal, it did not raise the issue in its opening or reply briefs. As a general rule, issues not raised before the district court or in the appellant's opening brief on appeal are deemed waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that issues not raised on appeal are deemed waived). But this court has discretion to consider issues of constitutional dimension sua sponte notwithstanding the parties' failure to raise such issues before the district court or on appeal. *See Desert Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 95 Nev. 640, 643-44, 600 P.2d 1189, 1191 (1979) (providing that an appellate court may raise constitutional issues sua sponte on appeal).

During oral argument, this court raised the issue of administrative probable cause and permitted the parties an opportunity to discuss that issue. Because the issue of whether administrative probable cause supported the search warrant presents an important constitutional question, we have determined to address it sua sponte. *See id.*

rant is required. *Clifford*, 464 U.S. at 294. If the primary objective of a search is to gather evidence of criminal conduct, then a criminal search warrant is required. *Id.* On the other hand, an administrative search warrant is required where the primary objective of the search is to ascertain compliance with the minimum standards set forth in regulatory ordinances. *See id.*; *see also Camara*, 387 U.S. at 530. The United States Supreme Court, however, has acknowledged that, notwithstanding the underlying objective of an administrative search warrant, discovery of a regulatory violation during an administrative search may lead to criminal penalties.[15] Specifically, the Supreme Court has observed:

> Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.

Camara, 387 U.S. at 531 (footnotes omitted); *see also Bd. of Cnty. Comm'rs v. Grant*, 954 P.2d 695, 701 (Kan. 1998) (concluding that a potential "criminal penalt[y] is not a constitutional obstacle to obtaining an administrative search warrant for routine inspections").

Title 10 of the Clark County Code governs the care and control of animals in Clark County. As relevant to this appeal, Title 10 sets forth standards to protect the health and welfare of animals in Clark County—for example, it includes numerous provisions prohibiting various forms of animal cruelty. Clark County Code §§ 10.32.010-10.32.250 (2010). To ensure compliance with the regulatory framework, Title 10 authorizes searches of private property. Specifically, Clark County Code § 10.24.060 (2010) provides as follows:

> The animal control officer and any police officer in the county while on duty, for just cause, shall have the right to enter upon private property or public property in the county in order to examine or capture any animal thereon or therein; provided, however, that no such officer or employee shall have the right to enter a house or structure which is in use as a residence without having first secured a search warrant.

[15]During a valid administrative search, authorities may seize evidence of criminal conduct in plain view. *Clifford*, 464 U.S. at 294. Authorities may not use that evidence as a justification to expand the scope of the initial administrative search, but they may use evidence seized under the plain-view doctrine to obtain a criminal search warrant. *Id.*

And Clark County Code § 10.40.040(b) (2012) provides that persons who violate Title 10 are subject to civil or criminal penalties.

[Headnote 34]

In the present case, Stockman obtained a warrant to search Palmieri's residence, as authorized by Clark County Code § 10.24.060. The warrant was entitled "Administrative Search and Seizure Warrant." Consistent with its title, the search warrant did not authorize a search of Palmieri's private property to uncover evidence of criminal conduct, but rather, instructed officers to ascertain the condition of the animals on Palmieri's property. Specifically, the search warrant instructed officers to determine whether the animals on Palmieri's property were unhealthy, held in violation of Clark County Code Title 10, or kept in a cruel condition. And if officers determined that any animals on Palmieri's property were unhealthy or kept in a cruel condition, the search warrant authorized the officers to seize and hold such animals until their release was ordered by the district court or until Palmieri complied with conditions set forth by the officers. If determined necessary by a veterinarian, the search warrant also provided for the immediate euthanasia of any animals seized.

Although a person who commits animal cruelty or otherwise violates Clark County Code Title 10 may be subject to criminal penalties, *see* NRS 574.100, the primary objective of the search of Palmieri's property, as demonstrated by the warrant authorizing the search, was to protect the health and welfare of Palmieri's animals. As the primary objective of the search warrant in the present case was to protect the health and welfare of animals on Palmieri's property, we conclude the search warrant constituted an administrative search warrant. And given our conclusion that the search warrant constituted an administrative search warrant, we next consider whether probable cause existed to support an administrative search warrant.

The probable cause requirement as applied to administrative search warrants was first discussed by the United States Supreme Court in *Camara*. There, the Court noted that where an administrative search is undertaken pursuant to a neutral inspection scheme, the heightened showing of probable cause required for a criminal search is impractical and unnecessary because many violations could not be corroborated absent a search and because the privacy invasion associated with an administrative search is limited. *Camara*, 387 U.S. at 537.

Since *Camara*, the Supreme Court has determined that probable cause to support an administrative search warrant may be based either on a neutral inspection scheme or on specific evidence of a violation. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978). And, interpreting *Marshall*, lower courts have held that, even where an

administrative search arises from specific evidence of a violation, rather than as part of a neutral inspection scheme, traditional criminal probable cause is not required.[16]

For example, in *Commonwealth v. DeLuca*, the court upheld an administrative search warrant allowing officials to search a home for code violations regarding the home's condition and habitability. 6 Pa. D. & C. 5th 306, 324-25 (Pa. Ct. C.P., Del. Cnty. 2008). There, probable cause sufficient to support the warrant existed based upon the specific allegations regarding the property's condition, the property's history of similar complaints, and officials' observations of trash and graffiti outside and in the home. *Id*. at 310, 326. The court observed "that an administrative search warrant does not require as high a level of probable cause as a criminal search warrant." *Id*. at 323. It further noted the search was driven by public health and welfare considerations, and the defendants' invasion of privacy was negligible when balanced with the city's need to inspect the property. *Id*. at 325-26.

[Headnote 35]

Although an administrative search warrant based on specific evidence of a violation does not require criminal probable cause, that proposition does not provide guidance as to the quantum of specific evidence necessary to establish administrative probable cause. In *West Point-Pepperell, Inc. v. Donovan*, the United States Court of Appeals for the Eleventh Circuit considered the showing necessary to establish administrative probable cause. 689 F.2d 950, 957-58 (11th Cir. 1982). There, the Eleventh Circuit reasoned that even though a lesser showing of probable cause is required for an administrative search warrant given the limited intrusion associated with an administrative search, the administrative search warrant must still satisfy the Fourth Amendment's basic purpose, "which is 'to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" *Id.* at 958 (quoting *Marshall*, 436 U.S. at 312).

[Headnote 36]

To satisfy that requirement, the Eleventh Circuit observed that an administrative search must not subject individuals "to the unbridled discretion of 'executive and administrative officers, particularly those in the field, as to when to search and whom to search.'" *Id.*

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[16]*See, e.g.*, *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1339 (7th Cir. 1979); *In re Alameda Cnty. Assessor's Parcel Nos. 537-801-2-4 & 537-850-9*, 672 F. Supp. 1278, 1287 (N.D. Cal. 1987); *Pieper v. United States*, 460 F. Supp. 94, 97-98 (D. Minn. 1978), *aff'd* 604 F.2d 1131 (8th Cir. 1979); *In re Inspection of Titan Tire*, 637 N.W.2d 115, 123 (Iowa 2001).

(quoting *Marshall*, 436 U.S. at 323). Thus, the Eleventh Circuit concluded that administrative probable cause may be found where "the proposed inspection is based upon a reasonable belief that a violation has been or is being committed" and that the belief is supported "by a showing of specific evidence sufficient to support a reasonable suspicion of a violation." *Id.* We agree with the Eleventh Circuit's rationale in *Donovan* and conclude that to establish administrative probable cause based on evidence of a specific violation, a search warrant affidavit must show specific evidence sufficient to support a reasonable suspicion of a violation.

[Headnotes 37, 38]

To determine whether reasonable suspicion exists, courts look to the totality of the circumstances. *Alabama v. White*, 496 U.S. 325, 330-31 (1990) (applying the totality of the circumstances test to determine whether an anonymous informant's tip established reasonable suspicion to justify an investigatory stop); *see also State v. Rincon*, 122 Nev. 1170, 1173-74 (2006) (explaining that to assess whether an investigatory stop was supported by reasonable suspicion, courts look to the totality of the circumstances). In considering the totality of the circumstances, we analyze both the "content of information possessed by police and its degree of reliability." *White*, 496 U.S. at 330 (comparing quanta of proof required for reasonable suspicion and probable cause analyses). But, in comparison to criminal probable cause, reasonable suspicion is a less demanding standard because it does not require information possessing the same quality or content as criminal probable cause, and because it can be established with information that is less reliable than that required to demonstrate criminal probable cause. *Id.*

[Headnote 39]

In the present case, we consider whether the Informant's tip, as corroborated, exhibited sufficient indicia of reliability to support reasonable suspicion for a search warrant for Palmieri's residence. *See Jones v. United States*, 362 U.S. 257, 269 (1960) (concluding hearsay may support a search warrant "so long as a substantial basis for crediting the hearsay is presented"), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980). Because the totality of the circumstances approach is concerned with the quantity and quality of information, a tip that has a relatively high degree of reliability will require less corroborating information to establish the requisite quantum of administrative probable cause. *See White*, 496 U.S at 330. In considering the reliability of an informant's tip, numerous federal and state courts have determined that a tip from an *identified* citizen informant is presumably reliable because an

identified citizen that witnesses and reports a crime has no apparent motive to falsify information.[17]

When categorizing informants as anonymous or identified, courts are flexible in assessing the type and amount of information necessary to identify an informant. *See City of Maumee v. Weisner*, 720 N.E.2d 507, 514 (Ohio 1999) (considering whether an identified informant's tip established reasonable suspicion). For example, in *Weisner*, the Supreme Court of Ohio considered whether an informant who provided a tip via telephone would be considered identified for the purpose of assessing the informant's credibility. *Id.* at 509, 513. There, the informant called 9-1-1 to report a suspected drunk driver. *Id.* at 509. During the call, the informant provided the dispatcher with his name and cellular and home telephone numbers, and he remained on the telephone with the dispatcher to assist the responding officer in locating the suspected drunk driver. *Id.* Based on those facts, the *Weisner* court specifically rejected the suspected drunk driver's contention that the informant was anonymous because the informant may have fabricated his identity. *Id.* at 514. Instead, the court concluded that the informant was sufficiently identified to warrant recognizing the informant's tip as more reliable than that of an anonymous informant, noting that it was undisputed that the informant provided his name and cellular and home telephone numbers. *Id.* The *Weisner* court also reasoned that, because the informant maintained continuous contact with the dispatcher during the reported incident, he considered face-to-face contact a possibility and was unlikely to falsify a report given the potential repercussions. *Id.*

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[17]*See Fabrikant v. French*, 691 F.3d 193, 216 (2d Cir. 2012) (reasoning that "'information provided by an identified bystander with no apparent motive to falsify has a peculiar likelihood of accuracy, and . . . an identified citizen informant is presumed to be reliable'") (quoting *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006)); *Ewing v. City of Stockton*, 588 F.3d 1218, 1224 (9th Cir. 2009) (concluding an identified witness "was a citizen witness, not an informant, and such witnesses are generally presumed reliable"); *United States v. Martinelli*, 454 F.3d 1300, 1307 (11th Cir. 2006) (observing that "[t]he courts have traditionally viewed information drawn from an ordinary witness or crime victim with considerably less skepticism than information derived from anonymous sources"); *Edwards v. Cabrera*, 58 F.3d 290, 294 (7th Cir. 1995) (noting that an identifiable "citizen informant is inherently more reliable than the usual police informants who are often mired in some criminal activity themselves"); *United States v. Pasquarille*, 20 F.3d 682, 689 (6th Cir. 1994) (holding that a citizen informant's tip was presumptively reliable because the citizen informant was an identified eyewitness to the alleged crime); *Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985) (noting "the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness"); *United States v. Philips*, 727 F.2d 392, 397 (5th Cir. 1984) (concluding that "[w]hen information is received from an identified bystander or victim-eyewitness to a crime, . . . reliability need not be established in the officer's affidavit") (internal quotation marks omitted).

And *Weisner* is not the only case in which courts have been flexible with regard to the type and amount of information necessary to categorize an informant as identified. In *United States v. Pasquarille*, 20 F.3d 682, 683, 687 (6th Cir. 1994), the court categorized an informant as an identified citizen informant where the informant did not provide his name, but rather identified himself as a transporter of prisoners. Similarly, in *Edwards v. Cabrera*, 58 F.3d 290, 294 (7th Cir. 1995), the court treated an unnamed informant as an identified citizen informant where the police were aware the informant was a bus driver.

[Headnote 40]

Here, Palmieri argues the Informant was anonymous and the information was, therefore, unreliable. We disagree. As reported to the issuing judge, the Informant initially contacted Richard Molinari, an animal control supervisor with the City of Las Vegas, to file a complaint and provided the name Kaitlyn Nichols. After Molinari forwarded the complaint to Clark County Animal Control, Stockman spoke with the Informant by phone, and the Informant again provided the name Kaitlyn Nichols.[18] Based on the sequence of events reported by Stockman, which Palmieri does not dispute, the issuing judge could have inferred that the Informant provided a telephone number at which Clark County Animal Control could reach the Informant. And, similar to *Weisner*, the issuing judge could have inferred that the Informant's continued participation in the reporting process suggested that the Informant considered the possibility of face-to-face contact and was unlikely to fabricate a report given the potential consequences. Arguably, the information the Informant provided could have subjected the Informant to prosecution for perjury, a category D felony under NRS 199.130, for "caus[ing] to be made, executed or signed, any false or fictitious affidavit . . . for the purpose of securing a warrant for the searching of the premises . . . of any other person." As such, the Informant provided Stockman the type and amount of information needed to identify the Informant, and Stockman provided that information to the issuing judge in the search warrant affidavit.

[Headnote 41]

We are mindful, of course, of the requirement that this court must consider "the evidence, and any reasonable inferences drawn from it . . . in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Accordingly, we assume that the Informant, in identifying herself as

[18]Notably, Palmieri acknowledged that she believes that Stockman received the tip from an informant who identified herself as Kaitlyn Nichols. And Palmieri acknowledged that the signature on Stockman's complaint appeared to be Kaitlyn Nichols' signature.

Kaitlyn Nichols, provided Stockman a false name. But the reasonableness of a search warrant is not assessed based on information acquired subsequent to a search, but rather, must be considered based on information provided to the magistrate in the search warrant affidavit. *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). As discussed above, Palmieri did not establish a genuine issue of material fact with regard to whether Stockman knew or should have known that the Informant provided a false identity. As known at the time of issuance of the search warrant, the Informant was identified, and, therefore, we conclude her tip, at the time, was entitled to a presumption of reliability.

Our categorization of the Informant as an identified citizen informant is not the only basis for concluding that her tip, as perceived by Stockman and the issuing judge, demonstrated significant indicia of reliability. Where an informant's tip is based on personal knowledge, and includes an explicit, detailed description of alleged criminal activity, the informant's tip is entitled to greater weight than the weight accorded to a secondhand description. *Illinois v. Gates*, 462 U.S. 213, 234 (1983). In the present case, the Informant indicated that she observed violations of the Clark County Code in Palmieri's residence firsthand, and she provided a detailed description of those violations, reporting that she saw several animals in Palmieri's house and garage, that the animals looked unhealthy and thin and appeared to have matted fur and fecal matter all over them, and that Palmieri keeps animals at her house that are too sick or young to be housed at her pet store.[19] Because the Informant's tip was detailed and based on firsthand observation and because the Informant's reported relationship to Palmieri provided an objectively reasonable explanation for the Informant's opportunity to observe those violations, we conclude that the basis of the Informant's knowledge provides additional support for the Informant's presumed reliability. Moreover, the Informant's allegations did not relate to an isolated incident, but rather, to unhealthy conditions that develop over a lengthy period of time. Thus, the Informant's allegations provided reason to believe that there was an ongoing violation of Clark County's standards for the health and welfare of animals in Palmieri's residence.

And Stockman did not merely rely on the Informant's complaint; she also corroborated the Informant's report by verifying that Palmieri owned the reported residence and reviewing records that revealed Clark County Animal Control had previously received health and welfare complaints regarding Palmieri's residence and businesses. Neither before the district court nor before this court has Palmieri suggested that Stockman did not actually verify this infor-

[19]We note that Palmieri does not argue that Stockman did not accurately describe the substance of the Informant's report in the search warrant affidavit.

mation, which Stockman stated she verified in the search warrant affidavit.

Given the foregoing, we conclude that the Informant's specific, detailed allegations regarding ongoing animal cruelty in Palmieri's residence, combined with the Informant's reliability and basis of knowledge and the corroborating information gathered by Stockman were sufficient to support a reasonable suspicion that Palmieri was endangering the health and welfare of animals on her property.[20] We reiterate that our review of the issuing court's probable cause determination is not de novo, but rather, is limited to an evaluation of whether the evidence as a whole, including the Informant's presumed reliability, the Informant's personal knowledge and detailed description of violations, and the corroborating information provided by Stockman, provided a substantial basis to conclude administrative probable cause existed to search Palmieri's residence. *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 67 (1994). Our holding today simply recognizes that under these facts, the totality of the circumstances supported a finding of administrative probable cause to believe there was evidence in Palmieri's residence of animal cruelty or a violation of Clark County's codes for the health and welfare

[20]The actual scope of the search and the results of the search do not affect our probable cause determination, *Maryland v. Garrison*, 480 U.S. 79, 85 (1987) ("The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate."). However, we note that Stockman and the accompanying animal control officer limited the scope of their search as required by the administrative search warrant, and that the search revealed that (1) Palmieri kept 29 dogs in her house and garage, (2) two dogs appeared sickly, (3) Palmieri could not provide proof that the dogs received rabies vaccinations, and (4) Palmieri did not have a permit to possess intact dogs.

We are cognizant that the search was an unpleasant experience for Palmieri. But the search did not exceed the limited scope of the administrative search warrant. Moreover, it only took the officers one to one-and-a-half hours to search Palmieri's residence, to observe 29 dogs, to request that Palmieri provide the relevant paperwork, and to remove 7 dogs from Palmieri's residence. Although Palmieri was not detained based on suspicion of criminal behavior, we note that the 20 to 30 minute period during which Palmieri was removed from her residence, but not restrained, was well within the one-hour limit for temporary detentions. *See* NRS 171.123(4) ("A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes.").

We also note that the manner of the search in the present case did not approach the intrusiveness of the methods frequently used for searches related to criminal conduct. *See, e.g.*, *Muehler v. Mena*, 544 U.S. 93, 95-96, 100, 102 (2005) (upholding a search of a residence where a Special Weapons and Tactics team was used to secure a residence that was subject to a search warrant, and the inhabitants of the residence were handcuffed and detained in a garage for two to three hours during the ensuing search). In perspective, the invasion of Palmieri's privacy interest was low compared to the regulatory need to ensure code compliance and protect the health and welfare of the many dogs on Palmieri's property.

of animals.[21] *See Alabama v. White*, 496 U.S. 325, 330-31 (1990); *see also West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982) (providing that administrative probable cause may be established with evidence sufficient to support a reasonable suspicion of a violation). Consequently, Palmieri failed to demonstrate a genuine issue of material fact as to whether Stockman violated her clearly established constitutional rights.[22] *See Mullenix v. Luna*,

[21]The concurrence questions whether the Nevada Supreme Court's decision in *Owens v. City of North Las Vegas*, 85 Nev. 105, 450 P.2d 784 (1969), imposed a requirement that officers must first seek permission to enter a property before obtaining an administrative search warrant. In *Owens*, the supreme court relied on the United States Supreme Court's decision in *Camara v. Municipal Court*, 387 U.S. 523 (1967), to resolve a challenge to the validity of an administrative search warrant. There, the *Owens* court suggested that, as a practical matter, officers should seek permission to inspect a property before turning to the warrant process. But, the language used by the *Owens* court closely follows the United States Supreme Court's decision in *Camara*. *Compare Owens*, 85 Nev. at 111, 450 P.2d at 787-88 ("As a practical matter, in view of the Fourth Amendment's requirement that a warrant describe the property to be searched, warrants should normally be sought only after the entry has been refused, absent some compelling reason for securing immediate entry."), *with Camara*, 387 U.S. at 539-40 ("[A]s a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry."). We are not aware of any legal authority interpreting *Camara* to require that an officer must request permission to enter a property before seeking a search warrant, *cf. Ciarlone v. City of Reading*, 489 F. App'x 567, 571-72 (3d Cir. 2012) (rejecting an argument that, under *Camara*, an opportunity to consent must be provided before officers may seek a search warrant), and we do not read *Owens*, which relied on *Camara*, to impose such a requirement in Nevada.

Moreover, even if *Owens* imposed such a requirement, Stockman specifically averred in the search warrant affidavit that, during a prior animal-welfare investigation, Palmieri refused to consent to a search of her residence and demanded that a Clark County Animal Control officer leave her property until such time as he obtained a search warrant. Based on that information, the issuing judge could have reasonably concluded that efforts to procure a consensual search of Palmieri's residence would have been fruitless. And, although she did not elaborate further in her search warrant affidavit, we note that Stockman later testified in her deposition that she sought a search warrant after receiving the Informant's complaint due to Palmieri's previous refusal to consent to a search of her residence.

[22]Notwithstanding our conclusion, we are aware that Stockman could have done more to corroborate the information provided by the Informant—for example, Stockman could have observed Palmieri's residence in person and listened for barking dogs. Simply stated, Stockman's search warrant affidavit does not evince a model of investigative work. That Stockman could have done more, however, does not necessarily mean that the search warrant was invalid. While this is a close case, we are satisfied that, under the facts of this case, administrative probable cause existed to search Palmieri's residence for evidence of animal cruelty or a violation of Clark County's codes for the health and welfare of animals.

577 U.S. ___, 136 S. Ct. 305, 308 (2015) ("The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal quotation marks omitted)).

CONCLUSION

Palmieri failed to make a substantial showing that Stockman knowingly and intentionally, or with a reckless disregard for the truth, included a false statement in the administrative search warrant affidavit, and Palmieri failed to establish a genuine issue of material fact with regard to whether the administrative search warrant was supported by probable cause to search Palmieri's residence.[23] Because Palmieri failed to establish that Stockman violated her constitutional rights, Stockman is entitled to qualified immunity, *see Butler*, 123 Nev. at 458-59, 168 P.3d at 1061-62, and, therefore, we conclude the district court did not err by granting Stockman's summary judgment on Palmieri's § 1983 claim. And, as previously discussed, absent a violation of Palmieri's constitutional rights by Stockman, Palmieri's remaining arguments regarding her *Monell* claim and her state law tort claims lack merit. Accordingly, we affirm the district court's order granting summary judgment in its entirety.

GIBBONS, C.J., concurs.

TAO, J., concurring:

Although based upon one of the shortest federal statutes on the books (or maybe because of it), civil rights claims under 42 U.S.C. § 1983 can be complex beasts, requiring courts to sort through a mixture of substantive criminal law, criminal procedure, and civil procedure, along with the doctrine of qualified immunity, which hangs over everything and requires examination before a court can even reach the merits of a claim. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (question of whether qualified immunity bars § 1983 claim should normally be resolved early in the case).

In a case like this, the doctrine of qualified immunity implicates two related but different questions: whether the search was valid,

[23]In reviewing Stockman's motion for summary judgment, the district court concluded that criminal probable cause supported the search warrant for Palmieri's residence. Because we conclude that administrative probable cause supported the administrative search warrant in the present case, we express no opinion as to whether criminal probable cause existed. But we affirm the district court because it reached the correct result, albeit under the wrong standard. *See Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (explaining that an appellate court will affirm a district court's decision if the district court reached the correct result, but for the wrong reason).

and whether the executing officer reasonably believed that it was valid. If the answer to both of those inquiries is yes, then as a matter of law the officer's actions are protected by qualified immunity. If the answer to both of those inquiries is no, then as a matter of law the officer's actions are not. In some cases, the answers to those two questions may diverge: a search can be invalid, yet the searching officer may have reasonably believed it to be valid and may therefore nonetheless be immune from civil liability.

The majority concludes both that the warrant was valid and also that Officer Stockman reasonably believed it to be valid. I write separately because I believe that a more serious and unsettled question exists regarding the validity of the administrative warrant in this case than the majority acknowledges, and therefore this appeal just might fall into the third category of cases rather than the first. However, I concur with the outcome of this appeal because, whether the warrant was valid or not, Judy Palmieri did not meet her burden of demonstrating that Officer Stockman acted unreasonably or recklessly enough to waive the shield of qualified immunity to which she is otherwise entitled as a law enforcement officer performing a discretionary function.

The first step that we must take to resolve this appeal is to identify the governing law. The majority analyzes the search warrant in this case primarily by relying upon federal caselaw, with a few state cases thrown in for good measure.[1]

At first blush, this seems to make some sense; Nevada generally follows federal law on most search-and-seizure questions. *State v. Lloyd*, 129 Nev. 739, 745, 312 P.3d 467, 471 (2013). Furthermore, as a general matter, it is axiomatic that federal law governs federal claims, even those filed in state courts; after all, that is what the Supremacy Clause says. U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). 42 U.S.C. § 1983 is a federal statute, so federal law follows everywhere a § 1983 claim is filed; thus it is entirely unnecessary for us to "adopt" any of it to resolve a § 1983 action. *Howlett v. Rose*, 496 U.S. 356, 358, 375 (1990) ("State courts as well as federal courts have jurisdiction over § 1983 cases" but "the elements of, and the defenses to, a federal cause of action are de-

[1]For example, the majority discusses *Commonwealth v. DeLuca*, 6 Pa. D. & C. 5th 306, 324-25 (Pa. Ct. C.P., Del. Cnty. 2008). But Pennsylvania does not follow federal search-and-seizure law on many issues, choosing instead to implement its own version of the exclusionary rule. *Commonwealth v. Edmunds*, 586 A.2d 887, 896-99 (Pa. 1991) ("The history of Article I, Section 8 [of the Pennsylvania Constitution] thus indicates that the purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the 4th Amendment . . . .").

fined by federal law"). Indeed, state courts cannot constitutionally refuse to apply federal law to § 1983 claims even when filed in a state court. *Id.* at 367-71 ("The Supremacy Clause makes [federal] laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law . . . . The Supremacy Clause forbids state courts to dissociate themselves from federal law [in resolving § 1983 claims]."). *See Richard v. Bd. of Supervisors of La. State Univ.*, 960 So. 2d 953, 961 (La. Ct. App. 2007) ("[T]he same body of federal law governs § 1983 actions in state and federal courts . . . ."); *Walker v. Maruffi*, 737 P.2d 544, 547 (N.M. Ct. App. 1987) (in § 1983 actions, "[w]e are bound by decisions of the United States Supreme Court affecting federal law"); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971) ("The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal."). *See generally* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation* § 4.03, at 275 (3d ed. 1991) (federal law governs § 1983 actions filed in state court).[2]

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[2]The problem is that once we get below the level of greatest generality, the phrase "federal law" is less clear than it appears because federal cases are not always as monolithic, uniform, or even consistent as perhaps they should be. Frequently the real issue boils down to which competing version of federal law should be applied.

For example, when a search warrant affidavit contains a false statement, the warrant might still be valid if it would have issued anyway had the falsity not been included. *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). But in the context of § 1983, the federal circuits disagree on whether this question is answered by the court as a matter of law, or by the jury as a matter of fact. Some circuits hold that it is either a mixed question of fact and law, or a pure question of fact reserved for the jury. *See Velardi v. Walsh*, 40 F.3d 569, 574 (2d Cir. 1994); *see Hill v. McIntyre*, 884 F.2d 271, 275-76 (6th Cir. 1989). Other circuits, including the Ninth, have held that it is a question of law. *Hervey v. Estes*, 65 F.3d 784, 789 n.5 (9th Cir. 1995). Whether a question is characterized as one of fact or law quite obviously has a real bearing on whether, and when, a claim can or cannot be properly be resolved on summary judgment, as Palmieri's claim was below.

Here, the majority chooses to follow the Ninth Circuit's approach in *Hervey*. In isolation, I do not disagree with this; Ninth Circuit decisions are frequently considered to be persuasive, though not binding, authority by the Nevada Supreme Court. *See Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), *aff'd sub nom. Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538 (1989). But later in the opinion, the majority also chooses to follow the Eleventh Circuit's approach in *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 957-58 (11th Cir. 1982), on the standards for a proper "administrative search." But the Eleventh Circuit does not appear to fully agree with the Ninth Circuit on how the doctrine of qualified immunity in a § 1983 action should be evaluated on summary judgment. *See Branch v. Tunnell*, 937 F.2d 1382, 1385-

However, in this particular case it is not clear that the majority has applied the correct body of law because a state is free to "impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so," *Cooper v. California*, 386 U.S. 58, 62 (1967), and Nevada may have done just that in connection with administrative searches in a case that the majority overlooks.

In *Owens v. City of North Las Vegas*, 85 Nev. 105, 450 P.2d 784 (1969), the Nevada Supreme Court appears to have imposed a requirement upon administrative search warrants that does not exist in some other jurisdictions: administrative warrants "should normally be sought only after the entry has been refused, absent some compelling reason for securing immediate entry."[3] *Id*. at 111, 450 P.2d at 788. The court noted:

> Where considerations of health and safety are involved, the facts that would justify an inference of "probable cause" to make an inspection are different from those that would justify an inference when a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause . . . that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to

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86 (9th Cir. 1991), *disagreeing with Kenyatta v. Moore*, 744 F.2d 1179 (5th Cir. 1984) (the Eleventh Circuit was split off of the Fifth Circuit, and Fifth Circuit precedent from that time frame is binding upon the Eleventh unless overruled or modified, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)). *See also United States v. Kapordelis*, 569 F.3d 1291, 1308 (11th Cir. 2009) ("This Court has not, however, stated a precise standard of review for a district court's denial of a *Franks* hearing[, and] we need not determine which standard of review applies today."). So, the majority seems to suggest that we follow the Eleventh Circuit's law when it comes to the substance of an administrative warrant, but we follow the law of the Ninth Circuit when it comes to whether we analyze certain aspects of that substance on summary judgment as questions of law or fact. I am not sure these are consistent, but I suppose any potential incongruity must be sorted out in future cases.

[3]As the majority notes in footnote 21, this language somewhat echoes language from the U.S. Supreme Court in *Camara v. Municipal Court*, 387 U.S. 523, 539-40 (1967). But notably, *Camara* stated that an administrative warrant could issue without a prior "refusal of entry" when the warrant was based upon a "citizen complaint" or there is "other satisfactory reason." The Nevada Supreme Court specifically omitted this language from *Owens*, instead only permitting an exception where there is a "compelling reason" for immediate entry regardless of whether the complaint came from a citizen or not, language that does not appear in *Camara* and is obviously much narrower. Therefore, I disagree that *Owens* only repeats and adds nothing to *Camara* when it plainly, and we must assume intentionally, uses entirely different language. Furthermore, *Owens* has been good law since 1969, and respondent Clark County is well aware of it, at least at an institutional level, having cited it as authority in its answering brief in *Ransdell v. Clark County*, Docket No. 48592.

> justify the issuance of a warrant. The test of "probable cause" required by the Fourth Amendment can take into account the nature of the search that is being sought. There can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.
>
> . . . We appreciate that in most routine inspections there is no great urgency to inspect at a certain time on a given day. Likewise, most citizens will permit routine inspections without a warrant. As a practical matter, in view of the Fourth Amendment's requirement that a warrant describe the property to be searched, warrants should normally be sought only after the entry has been refused, absent some compelling reason for securing immediate entry.

Id. at 110-11, 450 P.2d at 787-88. The court affirmed the validity of the administrative warrant in the case before it, observing that the warrant request "grew out of Owens' refusal to permit the city building inspector to enter his home to check for violations of the city building code." *Id*. at 106, 450 P.2d at 785.

In contrast, nothing like that happened before Palmieri's home was searched. Officer Stockman made no effort to seek consensual entry into Judy Palmieri's home at any time before seeking a warrant; according to Stockman's own affidavit, she merely received a phone tip, performed a computer search, and then submitted a warrant application for approval. From what I can tell, this all happened within a matter of minutes, and Officer Stockman never even bothered to visit the premises until she arrived later with the signed warrant already in hand. Therefore, entry was never requested or denied in this case before the warrant was sought or obtained.

Furthermore, I can see no "compelling" reason in this case to justify an immediate entry without such a request when the conditions of Palmieri's dogs were unlikely to have changed during the time it might have taken to procure a warrant after knocking on the door and asking for permission first. Unlike drugs or other small contraband, dogs cannot be flushed down the toilet or otherwise easily disposed of, and if it is true that they were dangerously unhealthy when Stockman first knocked, they likely would have been in the same condition shortly thereafter when she returned with a warrant.

Accordingly, the "refusal of entry" language of *Owens* has not been complied with in this case.[4] The difficult question is whether

[4]The closest the majority comes to applying the *Owens* test to the facts of this case is in its observation in footnote 3 that Palmieri previously denied entry to another animal control officer, Jason Elff, on another occasion. But that was in 2006, four years before the search in this case and in response to an entirely different complaint. The majority also notes in footnote 21 that Officer Stockman later testified in deposition that she believed requesting entry would be futile, but that assertion was not included within the search warrant affidavit.

that alone renders the administrative warrant invalid; *Owens* does not quite say that an administrative warrant sought without a prior refusal of entry is *per se* invalid for that reason alone. Rather, *Owens* emphasizes that the touchstone for validity is the reasonableness of the warrant request under the circumstances. 85 Nev. at 107-08, 450 P.2d at 785-86.

Fundamentally, there are three ways to read the "refusal of entry" language contained in *Owens*: (1) as imposing an additional requirement above and beyond those already required by the Fourth Amendment that must be independently met in every case before an administrative warrant may issue in Nevada; (2) as merely identifying one consideration that a judge may take into account in determining whether a warrant request is reasonable or not (i.e., observing that warrant requests made after entry has been refused are more likely to be deemed reasonable than ones in which this has not happened); or (3) as pure *obiter dicta* that adds nothing to the constitutional analysis.

If *Owens* is anything other than pure *dicta*, then as an intermediate court we must follow and apply it faithfully, even if it might seem incompatible with federal law or decisions from other states addressing the same issue.

> The principle of *stare decisis* is designed to promote stability and certainty in the law. While most often invoked to justify a court's refusal to reconsider its own decisions, it applies *a fortiori* to enjoin lower courts to follow the decision of a higher court. This principle is so firmly established in our jurisprudence that no lower court would deliberately refuse to follow the decision of a higher court. But cases come in all shapes and varieties, and it is not always clear whether a precedent applies to a situation in which some of the facts are different from those in the decided case. Here lower courts must necessarily make judgments as to how far beyond its particular facts the higher court precedent extends.

Hubbard v. United States, 514 U.S. 695, 720 (1995) (Rehnquist, J., dissenting).

If *Owens* is read to impose an additional and independent Nevada-specific requirement upon administrative warrants in order

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The validity of a search warrant must be assessed based only upon what the judge knew when the warrant was signed, not on facts hidden from the judge or uncovered after the warrant has already been obtained. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983) (when assessing the validity of a search warrant affidavit, courts look only to the four corners of the affidavit itself to determine whether, based upon the affidavit alone, the magistrate had a "substantial basis" for authorizing the search at the time the request was made). Therefore, Officer Stockman's later deposition testimony simply cannot be considered in assessing whether the warrant was valid when issued.

for them to be validly issued, that requirement was not met here and the warrant was invalid. If *Owens* is read to merely articulate one factor relating to "reasonableness" that the court must consider, that factor was not considered by the district court below and has not been considered by the majority, and the warrant might or might not be valid. Either way, the question is considerably more complicated than it might first appear.

Were the constitutionality of Officer Stockman's administrative warrant the only question before us, then we would have to "make judgments as to how far beyond its particular facts the higher court precedent extends." *Hubbard*, 514 U.S. at 720. But the question before us is not the *per se* validity of the warrant, but rather whether Officer Stockman is entitled to qualified immunity from liability under § 1983. And, under the circumstances of this appeal, answering that question does not require us to definitively resolve how *Owens* must be interpreted. Indeed, and perhaps somewhat ironically, what is important for purposes of resolving Officer Stockman's qualified immunity defense is the very lack of clarity in *Owens*.

In certain circumstances, a law enforcement officer can conduct a defective search and yet still be cloaked with qualified immunity from subsequent civil liability. A searching officer is entitled to qualified immunity if "a reasonable officer could have believed" that the search was lawful "in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The central question is whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment. *Id*.; *see also Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). This is the same objective reasonableness standard applied under the "good faith" exception to the exclusionary rule. *See Malley v. Briggs*, 475 U.S. 335, 344 (1986); *see also Groh v. Ramirez*, 540 U.S. 551, 566 (2004) (Kennedy, J., dissenting).

Law enforcement officers lose their immunity if it is "obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341; *see Velardi v. Walsh*, 40 F.3d 569, 575-76 (2d Cir. 1994) ("Whether or not the Fourth Amendment's particularity requirement would have been satisfied on these facts in the context of a motion to suppress . . . we conclude that the defendants' qualified immunity shields them from liability [when] it was objectively reasonable for them to believe that their actions did not violate Fourth Amendment requirements." (citation omitted)).

Generally speaking, there are several types of mistakes that a law enforcement official may make. The officer may make a mistake of

law, i.e., be unaware of existing law and how it should be applied. *See Saucier*, 533 U.S. at 206. Alternatively, the officer may make a mistake of fact, i.e., may misunderstand important facts about the search and assess the legality of his conduct based on that misunderstanding. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1 (1995). Or, the officer may misunderstand elements of both the facts and the law. *See Creighton*, 483 U.S. at 641. Qualified immunity jurisprudence applies regardless of whether the officer's error was a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Butz v. Economou*, 438 U.S. 478, 507 (1978) (noting that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law"). Whatever kind of mistake is involved, the ultimate question is whether the officer's reliance upon the defect was reasonable.

What we have in this case is a possible mistake of law; entry into Palmieri's home was not refused pursuant to *Owens* before the warrant was sought. But if a mistake occurred, it was not a violation of "clearly established" law that should have been "obvious" to Officer Stockman. As I have observed, *Owens* can be read in alternative ways, one of which would invalidate the warrant and two of which might or might not. Therefore, it cannot be said to have represented law so established that every reasonable law enforcement officer should have familiarized themselves with its contours before being put into the field with the power to apply for administrative warrants. For that reason, I agree that Officer Stockman cannot be said to have acted unreasonably under the totality of the circumstances, and she has not forfeited the shield of qualified immunity.[5]

Therefore, I agree with the majority's thorough and detailed analysis of this appeal. Under the facts of this case, the meaning of *Owens* is not central to our disposition and will have to be addressed another day.

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[5]Furthermore, a defective search may still be considered valid so long as the executing officer relied in objective "good faith" upon the authority of the search warrant. *See United States v. Leon*, 468 U.S. 897, 920-21 (1984); *Byars v. State*, 130 Nev. 848, 859, 336 P.3d 939, 947 (2014) (following *Leon*). Here, Officer Stockman submitted her search warrant application to her supervisor, to the career prosecutors at the Clark County District Attorney's Office, and finally to a district court judge, all of whom approved the application notwithstanding its possible flaws. Considering the vagueness of *Owens*, Officer Stockman acted reasonably when she went through proper channels and sought, and received, approval for her actions at every level from others in whom she was entitled to place her trust. Under the circumstances of this case, the district judge reviewed and signed the warrant, and there is no evidence that Officer Stockman acted in a nefarious or underhanded way or had any reason to doubt that the warrant was entirely valid once the ink on the judge's signature was dry.

JAQUEZ DEJUAN BARBER, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 62649

December 31, 2015 363 P.3d 459

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary and grand larceny. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

After he was certified as an adult, defendant was convicted in the district court of burglary and grand larceny. He appealed. The supreme court, HARDESTY, C.J., held that: (1) as a matter of first impression, juvenile court did not lose jurisdiction over defendant when it failed to dispose of his case within one year of filing of delinquency petition; but (2) evidence did not support convictions, overruling *Geiger v. State*, 112 Nev. 938, 920 P.2d 993 (1996).

Reversed.

Philip J. Kohn, Public Defender, and *Sharon G. Dickinson*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

1. INFANTS.
   The juvenile court did not lose jurisdiction over juvenile when court failed to comply with statutory requirement that it render final disposition of case within one year of filing of delinquency petition. NRS 62D.310(3).
2. CRIMINAL LAW.
   The supreme court reviews questions of statutory construction de novo.
3. STATUTES.
   The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.
4. STATUTES.
   The supreme court avoids statutory interpretation that renders language meaningless or superfluous.
5. STATUTES.
   If a statute's language is clear and unambiguous, the supreme court will enforce the statute as written.
6. STATUTES.
   The supreme court attempts to harmonize statutory provisions in order to carry out the overriding legislative purpose.
7. COURTS.
   Jurisdictional issues can be raised at any time.
8. CRIMINAL LAW.
   The supreme court reviews issues of subject matter jurisdiction de novo.

9. Courts.
   The juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it in the statute.
10. Criminal Law.
    Defendant waived for appeal his claim that the juvenile court's failure to dispose of his case within one year of filing of delinquency petition violated his due process rights, when defendant failed to move for dismissal in juvenile court or to appeal from his certification for criminal proceedings as an adult. U.S. Const. amend. 14; NRS 62D.310(3).
11. Criminal Law.
    The standard of review for a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
12. Criminal Law.
    In rendering its decision, the jury is tasked with assessing the weight of the evidence and determining the credibility of witnesses.
13. Criminal Law.
    A jury is free to rely on both direct and circumstantial evidence in returning its verdict.
14. Burglary.
    Without corroborating evidence, fingerprints and testimony that occupants did not know defendant can be sufficient to prove a burglar's identity where the fingerprints are found within the structure's outer boundary. NRS 205.060(1).
15. Burglary.
    Where fingerprint evidence is found on the outside of the structure, additional evidence is necessary to prove the burglar's identity, overruling *Geiger v. State*, 112 Nev. 938, 920 P.2d 993 (1996). NRS 205.060(1).
16. Burglary.
    Evidence was insufficient to support convictions for burglary and grand larceny, even though State presented evidence of defendant's palm print on outside of window, evidence that occupants did not know defendant, and evidence that there was no reason for defendant's print to be there; State presented no other evidence that linked defendant to the stolen property or to prove that defendant had entered the home. NRS 205.060(1).

Before the Court En Banc.

OPINION

By the Court, Hardesty, C.J.:

Under NRS 62D.310, a juvenile court must make a final disposition of a case within 60 days of a petition being filed, but the court may extend the time for final disposition up to 1 year. In this appeal, we are asked to consider whether the juvenile court loses jurisdiction over a juvenile if it does not make its final disposition of the case within the 1-year period provided by statute. We conclude that the juvenile court maintains jurisdiction over a juvenile even after expiration of the 1-year time period. We are also asked to consider whether there was sufficient evidence to convict appellant Jaquez

Dejuan Barber of burglary and grand larceny. In considering this argument, we reexamine our decision in *Geiger v. State*, 112 Nev. 938, 940-41, 920 P.2d 993, 995 (1996), and conclude that insufficient evidence in this case warrants reversal of the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

On January 21, 2009, Aldegunda Mendoza returned home from a meeting at her daughter's school to find her front door ajar and her backyard "full of water." She noticed her drawers had been ransacked and she called the police. Las Vegas Metropolitan Police Department (LVMPD) officer Chad Shevlin responded and performed a sweep of the home, discovering that the back sliding door and the master bathroom window were also open. Soon after, Mendoza discovered that cash and Mexican pesos were missing from the home.

A broken spigot attached to the back of the house, located under the master bathroom window, was the source of the water in the backyard. A bucket of concrete paint had been placed under the outside of the master bathroom window, and the tub ring and the interior wall had marks on them. Officer Shevlin opined that this evidence suggested that the bathroom window had been the intruder's point of entry. He then called for crime scene analysts to come to the home.

Robbie Dahn, a senior crime scene analyst, and three ride-along department trainees responded to the call. Dahn dusted for fingerprints, and she or a trainee under her supervision photographed the scene. Dahn took many fingerprints but focused on what she also determined to be the point of entry, the master bathroom window. Additionally, she focused on the interior of the bathroom.

Latent print examiner Kathryn Aoyama testified that Dahn recovered eight readable prints. Three of the prints recovered from inside the home belonged to a ride-along trainee. Four prints did not match anyone. Aoyama testified that one palm print found on the outside master bathroom window, the alleged point of entry, matched Barber. This match, however, was made after Barber turned 18 years old and was arrested and processed in the adult system for a different crime.

Procedural history

At the time of the burglary, Barber was 17 years old. On April 8, 2009, LVMPD sought an arrest warrant for Barber. The juvenile court issued the warrant on May 12, 2009, and the warrant was served that same day. Also on May 12, the State filed a juvenile delinquency petition charging Barber with burglary and grand larceny.

On August 16, 2010, more than a year after the State filed its juvenile delinquency petition, the State filed a petition to certify Barber

for criminal proceedings as an adult. At the certification hearing the following month, Barber waived any objection to the certification petition, and the juvenile court granted the State's petition and certified Barber for criminal proceedings as an adult.

After a 3-day jury trial, Barber was found guilty on both counts. The court sentenced Barber to a term of 12 to 30 months for each count running concurrently and ordered $7,000 in restitution. This appeal followed.

DISCUSSION

On appeal, Barber argues that the juvenile court lost jurisdiction over him after 1 year had passed without the court making a final disposition on the delinquency petition pursuant to NRS 62D.310(3), and there was insufficient evidence to convict him of burglary and grand larceny.[1]

The juvenile court maintained jurisdiction over Barber after 1 year had passed without the court making a final disposition of the delinquency petition under NRS 62D.310(3)

[Headnote 1]

Barber argues that since NRS 62D.310(3) requires a final disposition of a case within 1 year after a delinquency petition has been filed and 15 months had passed before the State filed a certification petition, the juvenile court lost jurisdiction over him. This jurisdiction issue is a matter of first impression.

[Headnotes 2-6]

Resolving this issue requires an interpretation of NRS 62D.310(3), and this court reviews questions of statutory construction de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). Legislative intent is paramount to interpreting a statute. *Id*. "The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *Id*. (internal quotations omitted). "This court 'avoid[s] statutory interpretation that renders language meaningless or superfluous,' and '[i]f the statute's language

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[1]Barber also argues that the district court violated his constitutional right to a speedy trial and statutory right to a trial within 60 days pursuant to NRS 178.556, and the district court erred in denying his motion for an advisory verdict jury instruction. After careful consideration, we determine that these arguments are without merit.

Barber further argues that he did not make a knowing and intelligent waiver of his right to the certification hearing, the district court failed to properly address his motions to substitute counsel, the latent print examiner's testimony violated the Confrontation Clause, the $7,000 restitution order should be reversed, and cumulative error warrants reversal. In light of our ultimate disposition in this case, we do not address these arguments.

is clear and unambiguous, [this court will] enforce the statute as written.'" *In re George J.*, 128 Nev. 345, 349, 279 P.3d 187, 190 (2012) (alterations in original) (quoting *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011)). Additionally, this court "attempt[s] to harmonize [statutory] provisions in order to carry out the overriding legislative purpose." *In re Eric A.L.*, 123 Nev. 26, 31, 153 P.3d 32, 35 (2007).

[Headnotes 7, 8]

Here, the central issue is whether the juvenile court had jurisdiction over Barber. While Barber did not challenge jurisdiction in juvenile or district court, jurisdictional issues can be raised at any time. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) ("[W]hether a court lacks subject matter jurisdiction 'can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties.'" (quoting *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990))). This court reviews issues of subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

[Headnote 9]

"[T]he juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it in the statute." *Kell v. State*, 96 Nev. 791, 792-93, 618 P.2d 350, 351 (1980). By statute, "the juvenile court has exclusive original jurisdiction over a child living or found within the county who is alleged or adjudicated to have committed a delinquent act." NRS 62B.330(1). Here, the juvenile court had exclusive jurisdiction because the State alleged that when Barber was 17 years old, he committed acts that would be criminal offenses (burglary under NRS 205.060 and grand larceny under NRS 205.220), and those offenses are not excluded from the juvenile court's jurisdiction. *See* NRS 62A.030(1) (defining "child"); NRS 62B.330 (providing that the juvenile court has exclusive original jurisdiction over a child alleged or adjudicated to have committed a delinquent act and listing acts deemed not to be delinquent and therefore not within the juvenile court's jurisdiction).

However, Barber argues that the juvenile court lost jurisdiction and could not certify the case to the district court when it did not comply with NRS 62D.310. We disagree. Under NRS 62D.310(1), "the juvenile court shall make its final disposition of a case not later than 60 days after the date on which the [delinquency] petition in the case was filed." The statute permits several exceptions for extension of the 60-day period, but "[t]he juvenile court shall not extend the time for final disposition of a case beyond 1 year from the date on which the petition in the case was filed." NRS 62D.310(3); *see* NRS 62D.310(2). The statute does not specify a remedy or sanction when the juvenile court does not comply with the statutory deadlines.

Jurisdiction stripping or dismissal requirements would normally be included if that were the Legislature's intent. For example, some states have provisions that are similar to NRS 62D.310. *See, e.g.*, Fla. R. Juv. P. R. 8.090(a)(1) (requiring an adjudicatory hearing within 90 days from detention); 705 Ill. Comp. Stat. Ann. 405/5-601(1) (West 2005) (requiring a trial within 120 days of filing a delinquency petition). These statutes, however, do not indicate that juvenile courts lose jurisdiction; instead, they either expressly require or permit dismissal when courts exceed their deadlines. Fla. R. Juv. P. R. 8.090(m) (permitting dismissal); 705 Ill. Comp. Stat. Ann. 405/5-601(3) (requiring dismissal). Unlike Florida and Illinois, exceeding the deadlines in NRS 62D.310 does not require dismissal. Other states that have interpreted similar statutes that are silent on the remedy or sanction for violating the time limits have not read jurisdiction stripping or dismissal language into them. For example, Vermont courts have held that delays beyond the deadlines for disposition hearings in its statutes did not mandate dismissal. *See, e.g.*, *In re J.V.*, 573 A.2d 1196, 1196 (Vt. 1990) (noting that "[t]he time limits are directory rather than jurisdictional requirements"). Accordingly, without express language in the statutes articulating that juvenile courts lose jurisdiction for noncompliance, the juvenile court maintains jurisdiction. *See McKay v. Bd. of Cnty. Comm'rs of Douglas Cnty.*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) (explaining that when a statute is silent, "it is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the [L]egislature would or should have done").

[Headnote 10]

In addition, commentary during the adoption of Title 5 further supports the notion that juvenile courts should maintain jurisdiction of juveniles. "Truly we want to keep children in juvenile court if we can help them. We do not want to escalate them up into adult circumstances and give them a record at such a young age and perhaps impact the rest of their lives." Hearing on S.B. 197 Before the Senate Judiciary Comm., 72d Leg. (Nev., March 7, 2003) (statement by Judge Cynthia Dianne Steel).[2]

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[2]Barber also argues that NRS 62D.310 "is akin to a statute of limitations requiring dismissal when a case is not filed within a determined period." "A statute of limitations prohibits a suit after a period of time that follows the accrual of the cause of action." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). NRS 62D.310 says nothing about when a delinquency petition must be filed; instead, it places a deadline on the court to make a final disposition. Thus, because a statute of limitations is a limitation on the commencement of an action, *see FDIC*, 130 Nev. at 899, 336 P.3d at 965—not a limitation on the date for the court's disposition—this argument lacks merit.

Barber further argues that the State violated his due process rights when it violated NRS 62D.310, and thus, "had a conscious indifference to following the rules of procedure." Barber cites three cases for the proposition that dismissal is

There was insufficient evidence to convict Barber

[Headnotes 11-13]

The standard of review for a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotations omitted). In rendering its decision, the jury is tasked with "assess[ing] the weight of the evidence and determin[ing] the credibility of witnesses." *Id.* at 202-03, 163 P.3d at 414 (internal quotations omitted). A jury is free to rely on both direct and circumstantial evidence in returning its verdict. *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

Burglary is defined in NRS 205.060(1) as "enter[ing] any [structure], with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses." Grand larceny is defined in NRS 205.220(1)(a) as "[i]ntentionally steal[ing], tak[ing] and carr[ying] away . . . [p]ersonal goods or property, with a value of $650 or more, owned by another person . . . ."

The sufficiency issue here concerns identity. We have previously addressed whether fingerprint evidence is sufficient to uphold a conviction for burglary. In *Carr v. State*, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980), we held that a defendant's fingerprints on objects *inside* the home and "circumstances rul[ing] out the possibility that they might have been imprinted at a different time" were sufficient to identify the defendant, such that additional corroborating evidence was not needed. In a later case, *Geiger v. State*, 112 Nev. 938, 940-41, 920 P.2d 993, 995 (1996), we relied on *Carr* and held that there was sufficient evidence to support a conviction for burglary when the only evidence was a fingerprint on a window screen

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appropriate when a prosecutor either willfully fails to follow procedural rules or is consciously indifferent to following procedural rules: *Joseph John H. v. State*, 113 Nev. 621, 622-24, 939 P.2d 1056, 1057-58 (1997); *Bustos v. Sheriff*, 87 Nev. 622, 623-24, 491 P.2d 1279, 1280-81 (1971); and *Maes v. Sheriff*, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970). First, NRS 62D.310 does not specifically put any requirements on the State. Additionally, although the delay here is somewhat troubling, there is nothing in the record to explain it. Finally, in each of the cases Barber cited, the defendant either objected to or filed a motion based on the prosecutor's failure to comply with procedural rules. *See Joseph John H.*, 113 Nev. at 622, 939 P.2d at 1057 (indicating that defendant objected after prosecutor requested a continuance based only on an oral affidavit of diligence); *Bustos*, 87 Nev. at 624, 491 P.2d at 1280-81 (upholding district court's denial of habeas relief due to finding of good cause for delay); *Maes*, 86 Nev. at 319, 468 P.2d at 333 (stating that defendants "petitioned the district court for release via habeas corpus" after no preliminary examination was conducted within the 15-day statutory requirement). Barber failed to move for dismissal in juvenile court or to appeal from the certification order, so he waived this issue.

leaning against the house that had been pried off a window that was determined to be the point of entry, and the victim did not know the defendant.

[Headnotes 14, 15]

There is a difference between *Carr* and *Geiger* that was not sufficiently acknowledged in *Geiger*—where the fingerprints were found. This difference is significant because burglary requires entry. *See* NRS 205.060(1). Without corroborating evidence, fingerprints and testimony that the occupants did not know the defendant can be sufficient to prove a burglar's identity where, as in *Carr*, the fingerprints are found within the structure's outer boundary. *See, e.g.*, *Merlino v. State*, 131 Nev. 652, 663, 357 P.3d 379, 385 (2015). But where, as in *Geiger*, the fingerprint evidence is found on the outside of the structure, we conclude that additional evidence is necessary to prove the burglar's identity. We thus overrule *Geiger* to that extent.

[Headnote 16]

The only direct evidence that the State presented to support its theory that Barber was guilty of both burglary and grand larceny was Barber's palm print on the outside of the window, that the occupants did not know Barber, and that there was no reason for his print to be there. The State presented no other evidence that linked Barber to the stolen property or to prove that Barber had entered the home. While the State presented evidence of dirt or marks inside the tub below the bathroom window, our review of the record reveals no evidence presented by the State that placed Barber inside the home or to show that it was Barber who left the dirt or marks inside the tub. Although circumstantial evidence alone may support a verdict, *Canape v. State*, 109 Nev. 864, 869, 859 P.2d 1023, 1026 (1993); *see also Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980), we conclude that the limited evidence in this case is too weak to support a conviction for burglary and grand larceny.

Based on the evidence in this case, we conclude that the State failed to sufficiently prove the elements of burglary and grand larceny such that any rational juror could have found Barber guilty beyond a reasonable doubt. *See Rose*, 123 Nev. at 202, 163 P.3d at 414. For this reason, we reverse the district court's judgment of conviction.

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