[Headnote 6]

Accordingly, for the reasons set forth above, we conclude that NDOT is not a design professional as envisioned by the Legislature in NRS 11.2565(1)(a).[3] As such, the requirements of NRS 11.258 are inapplicable to NDOT since the action would not statutorily qualify as "an action involving nonresidential construction." NRS 11.258(1). Because NRS 11.258 is inapplicable to NDOT, we conclude that the district court did not err in denying NDOT's motion to dismiss, and we thus deny this petition.[4]

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

MICHAEL DAMON RIPPO, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 53626

February 25, 2016 368 P.3d 729

Appeal from the denial of a postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; David Wall, Judge.

Defendant was convicted of first-degree murder and was sentenced to death, and the supreme court, 113 Nev. 1239, 946 P.2d 1017 (1997), affirmed his convictions and sentence on direct appealed. Defendant subsequently filed a postconviction habeas corpus petition, which was denied, and the denial was affirmed on appeal by the supreme court, 122 Nev. 1086, 146 P.3d 279 (2006). Defendant then filed a second postconviction habeas corpus petition. The district court denied the petition. Defendant appealed. The supreme court held that: (1) second postconviction habeas corpus petition was filed within reasonable time after claim became available; (2) defendant failed to establish claim of judicial bias; (3) State's failure to disclose favorable disposition of criminal cases of witnesses was not a *Brady v. Maryland*, 373 U.S. 83 (1963), violation; (4) trial counsel's failure to present evidence that defendant suffered from a neuropsychological impairment was not deficient performance; (5) trial counsel's failure to present testimony from violence

[3]Because both subsections of NRS 11.2565(1) must be met in order for a claim to be classified as an "[a]ction involving nonresidential construction" and we have determined that NDOT does not qualify as a design professional under subsection (a), we need not consider whether subsection (b) has been satisfied.

[4]NDOT also argues that NRS 11.259 mandates dismissal with prejudice. Because we conclude that the district court did not err in denying NDOT's motions to dismiss, we do not address this argument.

risk assessment expert and institutionalization expert was not deficient performance; (6) trial counsel's failure to present evidence that defendant was sexually and physically abused by his stepfather was not ineffective assistance of counsel; (7) trial counsel's failure to cross-examine witness with results of pretrial psychiatric evaluation was not deficient performance; and (8) conviction stemming from offense committed by defendant when he was 16 years old could be used as aggravating circumstance to support death-penalty eligibility.

Affirmed.

[Rehearing denied May 19, 2016]

CHERRY, J., dissented in part.

Rene L. Valladares, Federal Public Defender, and *David Anthony* and *Michael Pescetta*, Assistant Public Defenders, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.[1]

1. HABEAS CORPUS.
   When reviewing the district court's application of the procedural default rules in a postconviction habeas corpus petition, the supreme court will give deference to its factual findings but will review the court's application of the law to those facts de novo.
2. HABEAS CORPUS.
   To demonstrate the cause required to excuse the procedural default of claims raised in a second or successive habeas corpus petition, the petitioner must show that an impediment external to the defense prevented the petitioner from presenting the claims previously or warrants presenting him or her again. NRS 34.810(1)(b), (2).
3. HABEAS CORPUS.
   A habeas petition challenging a judgment of conviction or sentence must be filed within one year after entry of the judgment of conviction, or if a timely appeal is taken from the judgment of conviction, within one year after the supreme court issues its remittitur on direct appeal from the judgment of conviction. NRS 34.726(1).
4. HABEAS CORPUS.
   To excuse the delay in filing a habeas corpus petition, a qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default. NRS 34.726(1).
5. CRIMINAL LAW.
   To make out a claim that postconviction counsel provided ineffective assistance, a petitioner must demonstrate that counsel's performance was deficient and that the deficient performance resulted in prejudice.

[1]After this appeal was briefed, argued, and submitted for decision, attorney Steven Wolfson was appointed Clark County District Attorney. Mr. Wolfson was one of the attorneys who represented appellant Michael Damon Rippo at trial. He has not appeared as the district attorney in this appeal.

6. Criminal Law.

Although a petitioner knows during the course of the postconviction proceedings that postconviction counsel omitted claims or presented claims in a certain way, the petitioner cannot state a claim of ineffective assistance of postconviction counsel until the petitioner has suffered prejudice.

7. Habeas Corpus.

In determining whether a habeas corpus claim has been raised in a timely fashion, the factual basis for a claim of ineffective assistance of postconviction counsel is not reasonably available until the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred.

8. Habeas Corpus.

The defendant's ineffective assistance of postconviction counsel claim was filed within a reasonable time after claim became available, so as to support determination that the defendant established good cause for delay in filing second postconviction habeas corpus petition following capital murder conviction, where the defendant filed his petition within one year after the supreme court issued its remittitur on appeal from the order denying his first habeas petition. NRS 34.726(1).

9. Habeas Corpus.

A petition asserting ineffective assistance of postconviction counsel to excuse the procedural default of other claims has been filed within a reasonable time after the postconviction-counsel claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after the supreme court issues its remittitur.

10. Constitutional Law; Criminal Law.

Unlike the rights to effective assistance of trial and appellate counsel, which are guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution, there is no recognized constitutional right to effective assistance of postconviction counsel. U.S. Const. amends. 6, 14.

11. Criminal Law.

In order to establish ineffective assistance of counsel, a defendant must demonstrate: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense.

12. Criminal Law.

A court need not address the prongs of the test for ineffective assistance of counsel in a particular order or even consider both prongs if the defendant makes an insufficient showing on one. U.S. Const. amend. 6.

13. Criminal Law.

When a petitioner presents a claim of ineffective assistance of postconviction counsel on the basis that postconviction counsel failed to prove the ineffectiveness of the petitioner's trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys.

14. Criminal Law.

The showing required to satisfy the prejudice prong of the test for ineffective assistance of counsel, a reasonable probability that the result of the proceeding would have been different, varies depending on the context, including the proceeding in which the allegedly deficient performance occurred and the nature of the deficient performance. U.S. Const. amend. 6.

15. Criminal Law.

In the context of postconviction counsel, the prejudice prong of the test for ineffective assistance of counsel requires a showing that counsel's deficient performance prevented the petitioner from establishing that the conviction was obtained, or that the sentence was imposed, in violation of the federal or state constitution or laws of the state.

16. Criminal Law.

When considering the prejudice prong of the test for ineffective assistance of postconviction counsel, the ultimate issue is the fairness of the defendant's conviction and sentence, and it is not enough for the defendant to prove that the first postconviction relief proceeding should have gone differently; the defendant must also prove that the flaw in the prior postconviction relief proceeding prevented the defendant from establishing a demonstrable and prejudicial flaw in the original trial court proceedings.

17. Habeas Corpus.

If a habeas corpus petitioner who seeks to excuse a procedural default based on ineffective assistance of counsel makes the showing of prejudice required by *Strickland v. Washington*, 466 U.S. 668 (1984), the petitioner also has met the actual prejudice showing required to excuse the procedural default. NRS 34.810.

18. Judges.

Allegation that law enforcement and prosecuting attorney's office involved in case participated in federal investigation of trial judge was insufficient to support claim of judicial bias in capital murder prosecution, where there was no evidence that the judge was under pressure to accommodate the State or treat criminal defendants in state proceedings less favorably because of investigation. NRS 34.726(1).

19. Criminal Law.

The mere omission of a claim that has been further developed by new counsel does not raise a presumption that prior habeas corpus counsel was incompetent.

20. Criminal Law.

The State's failure to disclose favorable disposition of criminal cases of witnesses was not a *Brady v. Maryland*, 373 U.S. 83 (1963), violation in capital murder prosecution, where witnesses were thoroughly cross-examined regarding issue of whether they were promised anything in exchange for their testimony, disposition of criminal cases of witnesses was matter of public record, and there was no evidence of any explicit or tacit agreements between the State and witnesses for their testimony.

21. Criminal Law.

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.

22. Criminal Law.

To establish a *Brady v. Maryland*, 373 U.S. 83 (1963), violation, the defendant must show: (1) that the State withheld evidence; (2) which is favorable to the accused because it is exculpatory or impeaching; and (3) that prejudice resulted because the evidence was material, i.e., that there is a reasonable possibility of a different result had there been disclosure.

23. Habeas Corpus.

When a *Brady v. Maryland*, 373 U.S. 83 (1963), claim is raised in an untimely or successive habeas corpus petition, the cause-and-prejudice showing can be met based on the second and third prongs required to establish a *Brady* violation.

24. Criminal Law.

A promise made by the prosecution to a key witness in exchange for the witness's testimony constitutes impeachment evidence that must be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963).

25. Criminal Law.

Where the prosecution knowingly presents false or misleading testimony or fails to correct false testimony after learning of its falsity, a new

trial is required if the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial.

26. Criminal Law.

The defendant would have been aware of any falsity in informants' testimony at the time the witnesses testified, and therefore, the State's purported failure to disclose alleged falsity of testimony was not a *Brady v. Maryland*, 373 U.S. 83 (1963), violation in capital murder prosecution.

27. Criminal Law.

Trial counsel's failure to present evidence that the defendant suffered from a neuropsychological impairment was not deficient performance and, therefore, did not constitute ineffective assistance of counsel in sentencing phase of capital murder prosecution, where counsel had access to multiple psychological evaluations of the defendant from years before trial and just before trial, none of which revealed any psychoses, neuropsychological impairments, or major affective disorders. U.S. Const. amend. 6.

28. Criminal Law.

When considering a claim of ineffective assistance of counsel, the reasonableness of counsel's performance is evaluated from counsel's perspective at the time, without the distorting effects of hindsight. U.S. Const. amend. 6.

29. Criminal Law.

Trial counsel's failure to present testimony from violence risk assessment expert and institutionalization expert was not deficient performance and, therefore, did not constitute ineffective assistance of counsel in sentencing phase of capital murder prosecution, where counsel presented some lay testimony from prison vocational instructor who had interacted with the defendant, and any expert testimony would have been challenged on cross-examination with evidence that the defendant was found with weapons in his cell and had exposed himself to and threatened to kill a prison guard. U.S. Const. amend. 6.

30. Criminal Law.

Trial counsel's failure to present evidence that the defendant was sexually and physically abused by his stepfather was not deficient performance and, therefore, did not constitute ineffective assistance of counsel in sentencing phase of capital murder prosecution, where counsel met with members of the defendant's family to find out if any of them were willing to testify during penalty phase, and the defendant's sister testified regarding their upbringing during penalty phase. U.S. Const. amend. 6.

31. Criminal Law.

When it comes to preparing for the penalty phase of a capital case, trial counsel generally has a duty to conduct a thorough investigation of the defendant's background.

32. Criminal Law.

When evaluating claims of ineffective assistance of counsel, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. U.S. Const. amend. 6.

33. Criminal Law.

Evaluating a claim of ineffective assistance of counsel calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. U.S. Const. amend. 6.

34. Criminal Law.

Trial counsel's failure to present evidence that the defendant was physically and sexually abused by his stepfather did not prejudice the defendant and, therefore, did not constitute ineffective assistance of counsel during

sentencing phase of capital murder prosecution, where counsel provided mitigating evidence in form of testimony of the defendant's sister, letter from the defendant's mother, and other evidence of the defendant's good behavior in prison and kind demeanor, whereas the State presented three valid aggravating circumstances in form of the defendant's prior violent felony conviction, that he was under sentence of imprisonment at time of murders, and that murders involved torture. U.S. Const. amend. 6.

35. Criminal Law.

Any error in the district court's decision to quash a subpoena for records that were in the possession of the Department of Parole and Probation was invited by the defendant in capital murder prosecution, where trial counsel informed the court that the defendant had no objection to the district court's decision to quash subpoena.

36. Criminal Law.

Trial counsel's failure to cross-examine witness with results of pretrial psychiatric evaluation was not deficient performance and, therefore, did not constitute ineffective assistance of counsel in capital murder prosecution, where there was no evidence that counsel was aware of evaluation, and counsel thoroughly cross-examined witness and challenged her credibility. U.S. Const. amend. 6.

37. Habeas Corpus.

Where a habeas corpus petitioner cannot demonstrate cause and prejudice, the district court may nevertheless excuse a procedural bar if the petitioner demonstrates that failing to consider the merits of any constitutional claims would result in a fundamental miscarriage of justice; typically, a fundamental miscarriage of justice in this context requires a colorable showing of actual innocence.

38. Sentencing and Punishment.

The defendant's prior conviction stemming from offense committed when the defendant was 16 years old could be used as an aggravating circumstance for death-penalty eligibility in murder prosecution.

Before Parraguirre, C.J., Hardesty, Douglas, Cherry, Saitta, Gibbons and Pickering, JJ.

OPINION

Per Curiam:

The bodies of Denise Lizzi and Lauri Jacobson were found in Jacobson's apartment on February 20, 1992. Both women had been strangled. A jury found appellant Michael Damon Rippo guilty of two counts of first-degree murder and related felonies in 1996 and sentenced him to death. His convictions and sentences were affirmed on appeal, *Rippo v. State*, 113 Nev. 1239, 946 P.2d 1017 (1997), and he was denied relief in a postconviction habeas proceeding, *Rippo v. State*, 122 Nev. 1086, 146 P.3d 279 (2006). Rippo then filed a second postconviction petition for a writ of habeas corpus in state court. The petition was both untimely and successive. The district court determined that Rippo failed to make the showing required to excuse those procedural bars and denied the petition.

In this opinion, we focus on Rippo's claim that the ineffective assistance of the attorney who represented him in the first postconviction proceeding excused the procedural bars to claims raised in his second petition. This court has held that where a petitioner is entitled to the appointment of postconviction counsel pursuant to a statutory mandate, the ineffective assistance of that counsel may provide good cause for filing a second petition. *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997); *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996). But the ineffective-assistance claim must not itself be procedurally barred, *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), such as being raised in an untimely fashion, *see* NRS 34.726; *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). We take this opportunity to provide guidance on two issues related to whether an ineffective-assistance-of-postconviction-counsel claim, asserted as good cause to excuse other defaulted claims, has been raised in a timely fashion: (1) when does a postconviction-counsel claim reasonably become available, and (2) what is a reasonable time thereafter in which the claim must be asserted. As to the first question, we hold that the factual basis for a claim of ineffective assistance of postconviction counsel is not reasonably available until the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred. As to the second question, we hold that a petition asserting ineffective assistance of postconviction counsel to excuse the procedural default of other claims has been filed within a reasonable time after the postconviction-counsel claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. We also take this opportunity to explain the test for evaluating claims of ineffective assistance of postconviction counsel, adopting the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Applying these holdings, we conclude that although Rippo filed his petition within a reasonable time after the postconviction-counsel claims became available, those claims lack merit and therefore he has not demonstrated good cause for an untimely petition or good cause and prejudice for a second petition. We also reject his other allegations of good cause and prejudice. The district court properly denied the petition as procedurally barred. We therefore affirm.

FACTS AND PROCEDURAL HISTORY

Rippo and his girlfriend, Diana Hunt, were charged in the robbery and murder of Lizzi and Jacobson.[2] Hunt agreed to plead guilty to

[2]The facts are set forth in greater detail in our opinion on direct appeal from the judgment of conviction. *Rippo*, 113 Nev. at 1244-47, 946 P.2d at 1021-23.

robbery and testify against Rippo. According to Hunt's testimony, Rippo hatched a plan to rob Lizzi that included Hunt subduing Jacobson by hitting her with a beer bottle. In carrying out the plan, Rippo used a stun gun to subdue both women, bound and gagged them, and strangled them;[3] wiped down the apartment with a rag and removed Lizzi's boots and pants because he had bled on her pants; and took Lizzi's car and credit cards, later using the credit cards to make several purchases. Approximately one week later, Rippo confronted Hunt, who suggested that they turn themselves in to the police. Rippo refused, telling Hunt that he had returned to Jacobson's apartment, cut the women's throats, and jumped up and down on them. Other witnesses provided testimony linking Rippo to property taken from the women. And several witnesses testified to incriminating statements made by Rippo. The medical examiner testified that Lizzi's injuries were consistent with manual and ligature strangulation and that Jacobson died from asphyxiation due to manual strangulation. But the medical examiner also testified that neither body revealed stun gun marks. A jury found Rippo guilty of two counts of first-degree murder and one count each of robbery and unauthorized use of a credit card.

At the penalty hearing, the State alleged six aggravating circumstances: that the murders were committed (1) by a person who was under a sentence of imprisonment; (2) by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (3) during the commission of a burglary; (4) during the commission of a kidnapping; (5) during the commission of a robbery; and (6) that the murders involved torture, depravity of mind, or the mutilation of the victims. In support of the first two aggravating circumstances, the State presented evidence that Rippo had a prior conviction for sexual assault and was on parole at the time of the murders. The remaining aggravating circumstances were supported by the guilt-phase evidence. In addition to the evidence supporting the aggravating circumstances, the State presented evidence that Rippo had a prior conviction for burglary and had confessed to committing numerous burglaries. The State also presented evidence about Rippo's conduct while in prison, that on one occasion he had been found with weapons in his cell, and on another occasion he threatened to kill a female prison guard. Finally, the State called five members of Jacobson's and Lizzi's families who provided victim-impact testimony.

The defense presented three witnesses in mitigation: (1) a prison worker testified that Rippo had not presented any problems while incarcerated; (2) Rippo's stepfather, Robert Duncan, testified regard-

[3]Hunt testified that when she accused Rippo of choking the women, he told her that he had temporarily cut off their air supply and that he and Hunt needed to leave before the women regained consciousness.

ing Rippo's friendly behavior when living with him while on parole and asked the jury to spare Rippo's life; and (3) Rippo's sister testified that their former stepfather, James Anzini, emotionally abused Rippo and had stolen his paychecks and gambled them away, and she urged the jury to show mercy. The defense also presented a letter from Rippo's mother, who was unable to testify in person because of medical issues. She described Rippo's upbringing and personality as a child (inquisitive, tender, and loving). She explained that Anzini made his living by gambling and that as a result, the family environment was not stable. She further described Rippo's relationship with Anzini in his teen years; the circumstances leading to Rippo's juvenile adjudication and commitment; the impact on the family environment and Rippo when Anzini was diagnosed with terminal cancer, eventually leading up to the sexual assault committed by Rippo in 1981; and Rippo's efforts to improve himself while incarcerated. At the conclusion of the penalty hearing, Rippo made a statement in allocution.

The jury found all six aggravating circumstances, concluded that the mitigating circumstances did not outweigh the aggravating circumstances, and imposed a sentence of death for each murder. This court affirmed the convictions and sentences on direct appeal. *Rippo*, 113 Nev. at 1265, 946 P.2d at 1033. The remittitur issued on November 3, 1998.

Rippo filed a timely postconviction petition for a writ of habeas corpus in the district court on December 4, 1998, which was supplemented twice (on August 8, 2002, and February 10, 2004). As required by NRS 34.820, Rippo was represented by court-appointed counsel in the postconviction proceeding. Following an evidentiary hearing, the district court denied the petition. *See Rippo*, 122 Nev. at 1091, 146 P.3d at 282. On appeal, this court struck three of the six aggravating circumstances pursuant to *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004)—the circumstances alleging that the murders occurred during the commission of a burglary, a kidnapping, and a robbery—but affirmed the denial of Rippo's petition after concluding in a 4-3 decision that the jury's consideration of the invalid aggravating circumstances was harmless beyond a reasonable doubt. *Rippo*, 122 Nev. at 1094, 1098, 146 P.3d at 284, 287. The remittitur issued on January 16, 2007.

Rippo filed a second postconviction petition for a writ of habeas corpus on January 15, 2008, with the assistance of the Federal Public Defender's Office. The 193-page petition asserted 22 grounds for relief, some of which had been raised in prior proceedings and others that were new.[4] The State moved to dismiss the petition as procedurally barred, and Rippo sought leave to conduct discovery. After hearing argument on the petition and motions, the district court

[4]The petition was accompanied by approximately 17 volumes of exhibits.

granted the State's motion to dismiss and denied Rippo's motion for discovery as moot. This appeal followed.

DISCUSSION

[Headnote 1]

The petition at issue raised claims for relief based on trial error, prosecutorial misconduct and failure to disclose evidence, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and ineffective assistance of postconviction counsel. Rippo acknowledged that the petition was not filed within the time period provided by NRS 34.726(1) and that most of the grounds in the petition were either waived, successive, or an abuse of the writ and therefore subject to various procedural defaults under NRS 34.810. He provided several explanations for his failure to file the petition within the time provided by NRS 34.726(1) and for failing to raise the new claims in prior proceedings or raising the claims again. The district court dismissed the petition as procedurally defaulted, specifically mentioning NRS 34.726 and NRS 34.810(2). In reviewing the district court's application of the procedural default rules, we will give deference to its factual findings but "will review the court's application of the law to those facts de novo." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

Ineffective assistance of postconviction counsel as cause and prejudice to excuse a procedural default

This opinion focuses on Rippo's allegations that counsel appointed to represent him in his first postconviction proceeding provided ineffective assistance (postconviction-counsel claim). We have recognized a right to effective assistance of postconviction counsel only where the appointment of postconviction counsel is statutorily mandated. *See Crump v. Warden*, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5 (1997); *McKague v. Warden*, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). Under Nevada law, the appointment of postconviction counsel is statutorily mandated in one circumstance: where the "petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence." NRS 34.820(1)(a). That is the case here—Rippo has been sentenced to death and his prior petition was the first one challenging the validity of his conviction and sentence. Rippo therefore was entitled to effective assistance of that counsel.

Rippo's allegations regarding postconviction counsel arise in two contexts. First, Rippo asserted a postconviction-counsel claim as a free-standing claim for relief from his judgment of conviction

and sentence (claim 20(A), (B)).[5] Second, Rippo asserted that postconviction counsel's ineffective assistance established "cause and prejudice" to excuse the procedural default of the other claims in his petition. In both contexts, we must address the allegations about postconviction counsel's performance within the prism of the three procedural bars that are implicated by the petition and the district court's decision: the second-or-successive-petition bar set forth in NRS 34.810(2), the waiver bar set forth in NRS 34.810(1)(b), and the time bar set forth in NRS 34.726(1).[6]

Successive petitions and abuse of the writ

We start with the statutory provision that limits second or successive habeas petitions that challenge a judgment of conviction or sentence. Under NRS 34.810(2), such a petition must be dismissed in either of two circumstances: (1) if "it fails to allege new or different grounds for relief and . . . the prior determination was on the merits" or (2) "if new and different grounds are alleged" and the court finds that the petitioner's failure "to assert those grounds in a prior petition constituted an abuse of the writ." To avoid dismissal under this provision, the petitioner must plead and prove specific facts that demonstrate both "[g]ood cause for the petitioner's failure to present

[5]The free-standing claim raises another issue that has not been adequately addressed by the parties and therefore is not addressed in this opinion: whether a free-standing claim of ineffective assistance of postconviction counsel is cognizable in a postconviction petition for a writ of habeas corpus given that there is no constitutional right to postconviction counsel. *See* NRS 34.724(1) ("Any person convicted of a crime and under sentence of death or imprisonment who *claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State* . . . may . . . file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence . . . ." (emphasis added)).

[6]Rippo's petition was subject to a fourth procedural bar, laches under NRS 34.800, because it was filed more than five years after our decision on direct appeal from the judgment of conviction. *See* NRS 34.800(2). Although the State pleaded laches below as required by NRS 34.800(2), we decline to address it on appeal for two reasons. First, the district court did not mention laches in its order, and the State has not asserted it as an alternative basis on which to affirm the district court's decision aside from a summary statement on the final page of its brief that claim 21 is "subject to laches." Second, we need not consider whether the petition is procedurally defaulted under NRS 34.800 because it is procedurally defaulted under other provisions. *See Riker*, 121 Nev. at 239, 112 P.3d at 1079 ("A court need not discuss or decide every potential basis for its decision as long as one ground sufficient for the decision exists. . . . Thus, our conclusion in a case that one procedural bar precludes relief carries no implication regarding the potential applicability of other procedural bars." (footnote omitted)); *see also Pellegrini v. State*, 117 Nev. 860, 867 n.5, 34 P.3d 519, 524 n.5 (2001) (declining to address laches where claims were procedurally barred under other provisions and district court's order did not rely on laches).

the claim or for presenting the claim again" and "[a]ctual prejudice to the petitioner." NRS 34.810(3). Here, the prior petition was resolved on the merits and all of the grounds in the second petition had been raised in the prior petition or were new and different grounds for relief. The second petition therefore was subject to dismissal under NRS 34.810(2) absent a showing of cause and prejudice under NRS 34.810(3).

Failure to raise claims in prior proceedings

A petition also may be subject to dismissal under NRS 34.810(1)(b) if it raises any grounds that could have been raised in a prior proceeding (whether at trial, on appeal, or in a prior postconviction proceeding). Like the procedural default for second and successive petitions under NRS 34.810(2), this procedural default may be excused by a showing of "cause for the failure to present the grounds and actual prejudice," NRS 34.810(1)(b), and the petitioner has "the burden of pleading and proving specific facts that demonstrate" cause and actual prejudice, NRS 34.810(3). Most of the grounds raised in Rippo's petition could have been raised in a prior proceeding, including those based on alleged errors that occurred at trial (claims 1, 2, 6-14), which could have been raised on direct appeal; ineffective assistance of trial and appellate counsel (claims 3-8, 10-12, 14, 16-19), which could have been raised in the prior postconviction habeas petition; errors on appellate review (claim 15), which could have been raised in a petition for rehearing; and errors or irregularities in the prior postconviction proceeding (claim 20(C)-(G)), which could have been raised in the prior postconviction appeal. Those grounds therefore are subject to dismissal under NRS 34.810(1)(b).[7]

Procedural default of cause-and-prejudice claim

[Headnote 2]

To demonstrate the cause required to excuse the procedural default of claims under NRS 34.810(1)(b) and (2), the petitioner must show that "an impediment external to the defense" prevented the petitioner from presenting the claims previously or warrants presenting them again. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). In an effort to make the required showing, Rippo relies primarily on allegations that his first postconviction counsel provided ineffective assistance.

This court has addressed ineffective assistance of postconviction counsel as cause to excuse a procedural default under NRS 34.810(1)(b) in *Crump*. In that case, we held that where a petition-

[7]The free-standing postconviction-counsel claim (claim 20(A), (B)) could not have been raised in a prior proceeding; that ground therefore is not subject to NRS 34.810(1)(b) to the extent that it is cognizable, *see supra* n.5. *See Riker*, 121 Nev. at 235, 112 P.3d at 1077.

er has the statutory right to assistance of postconviction counsel, a meritorious claim that postconviction counsel provided ineffective assistance may establish cause under NRS 34.810(1)(b) for the failure to present claims for relief in a prior postconviction petition for a writ of habeas corpus.[8] 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997). But we have also recognized that an ineffective-assistance-of-counsel claim cannot be asserted as cause to excuse the procedural default of another claim for relief if the ineffective-assistance claim is itself defaulted. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *accord Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000) (holding that ineffective-assistance claim asserted in federal habeas petition as cause for procedural default of another claim may itself be subject to procedural default that can be excused only by satisfying cause-and-prejudice standard with respect to ineffective-assistance claim). That is the case here: Rippo's ineffective-assistance-of-postconviction-counsel claim is itself subject to procedural default under NRS 34.726(1).[9] *Riker*, 121 Nev. at 235, 112 P.3d at 1077; *see also Pellegrini*, 117 Nev. at 869-70, 34 P.3d at 526 (rejecting argument that NRS 34.726 does not apply to second or successive petitions).

Availability of postconviction-counsel claim and time within which it must be raised

[Headnote 3]

Under NRS 34.726(1), a habeas petition challenging a judgment of conviction or sentence must be filed within one year after entry of the judgment of conviction, or if a timely appeal is taken from the judgment of conviction, within one year after this court issues its remittitur on direct appeal from the judgment of conviction. *Dickerson v. State*, 114 Nev. 1084, 1087-88, 967 P.2d 1132, 1133-34 (1998) (construing NRS 34.726(1) to allow one year from remittitur on direct appeal only if direct appeal was timely). Rippo's petition was not filed within that time period. To excuse the delay in filing the petition, Rippo had to demonstrate good cause for the delay.

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[8]We have held that good cause cannot be shown based on a postconviction-counsel claim where there is no constitutional or statutory right to counsel. *McKague*, 112 Nev. at 164-65, 912 P.2d at 258; *see also Brown v. McDaniel*, 130 Nev. 565, 571-72, 331 P.3d 867, 869 (2014) (holding that decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), does not address state procedural default rules and refusing to recognize ineffective assistance of postconviction counsel as good cause where petitioner did not have statutory or constitutional right to postconviction counsel).

[9]This procedural default was not addressed in *Crump* because Crump filed his petition in 1989, before NRS 34.726 had been adopted. *See* 1991 Nev. Stat., ch. 44, § 5, at 75-76 (adopting NRS 34.726); *id.* § 33, at 92 (providing that amendments did not apply to postconviction proceedings commenced before January 1, 1993).

NRS 34.726(1). A showing of good cause for the delay has two components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*

[Headnote 4]

The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem*, 119 Nev. at 621, 81 P.3d at 525; *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem*, 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Rippo argues that there was such an impediment. Specifically, he asserts that the delay in filing the petition was due to ineffective assistance of postconviction counsel and that his postconviction-counsel claim was not available at the time of the procedural default under NRS 34.726(1). We agree.

[Headnotes 5, 6]

The availability of a postconviction-counsel claim is related to the showing that a petitioner must make to prove the claim. To make out a claim that postconviction counsel provided ineffective assistance, a petitioner must demonstrate that counsel's performance was deficient and that the deficient performance resulted in prejudice. *See* discussion *infra* pp. 20-24. Although a petitioner knows during the course of the postconviction proceedings that postconviction counsel omitted claims or presented claims in a certain way, he cannot state a claim of ineffective assistance of postconviction counsel until he has suffered prejudice. The basis for the claim thus depends on the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred. *Paz v. State*, 852 P.2d 1355, 1358 (Idaho 1993) (Bistline, J., dissenting); *cf. K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 369-70, 811 P.2d 1305, 1306 (1991) (explaining that statute of limitations for attorney malpractice action does not begin to run until claimant sustains damages and "that damages for attorney malpractice are premature and speculative until the conclusion of the underlying lawsuit in which the professional negligence allegedly occurred"). In this case, as with most capital cases, the postconviction proceedings did not conclude within the time period provided in NRS 34.726(1). Therefore, the claim that postconviction counsel provided ineffective assistance in litigating the prior petition was not reasonably available to Rippo at the time of the procedural default under NRS 34.726(1).

The fact that the claim was not reasonably available within the one-year period does not end the inquiry because a peti-

tioner does not have an indefinite period of time to raise a postconviction-counsel claim. As we have recognized, "[t]he necessity for a workable [criminal justice] system dictates that there must exist a time when a criminal conviction is final." *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984) (explaining consideration behind decision to restrict postconviction petition for writ of habeas corpus before enactment of specific statutory time limitations on such petitions). Consistent with that need for finality, we have held that when a petition raises a claim that was not available at the time of a procedural default under NRS 34.726(1), it must be filed within "a reasonable time" after the basis for the claim becomes available. *Hathaway*, 119 Nev. at 254-55, 71 P.3d at 507-08 (discussing delay in filing petition alleging appeal-deprivation claim where petitioner believed that attorney had filed appeal and did not learn of attorney's failure to file appeal before procedural default under NRS 34.726(1)). To determine whether Rippo's petition was filed within a reasonable time, we must answer two questions: (1) when does a claim that postconviction counsel provided ineffective assistance become available, and (2) what is a reasonable time thereafter for filing a petition that raises the claim.

[Headnote 7]

The answer to the first question is related to the basis for a postconviction-counsel claim. We reasoned above that a necessary basis for a claim of ineffective assistance of postconviction counsel depends on the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred. Consistent with that determination, we conclude that the postconviction-counsel claim becomes available at the conclusion of those proceedings. Although there is no mandatory appeal in the postconviction context and it is not clear that there is a statutory right to counsel to pursue an appeal from an order denying a postconviction habeas petition even when there was such a right to counsel in the district court,[10] we conclude that as a practical matter, if a timely appeal is taken, the postconviction proceeding concludes when this court issues its remittitur on appeal. Otherwise, there is the potential for piecemeal litigation that would further clog the criminal justice system. If no timely appeal is filed, the postconviction proceeding concludes when the district court enters its judgment resolving the

[10]The Supreme Court has indicated that there is no constitutional right to assistance of counsel on appeal from an "initial-review collateral proceeding." *Coleman v. Thompson*, 501 U.S. 722, 755 (1991); *see also Martinez v. Ryan*, 566 U.S. 1, 16 (2012) ("The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts."). And NRS 34.820(1)(a) does not clearly indicate whether the mandatory appointment of counsel pursuant to that statute carries over to an appeal.

petition. In this case, the prior postconviction proceeding concluded when this court issued its remittitur in the postconviction appeal on January 16, 2007. Rippo's postconviction-counsel claim therefore became available on that date.

[Headnotes 8, 9]

The next question is whether Rippo's petition was filed within a reasonable time after the postconviction-counsel claim became available. Rippo asserts that a reasonable time for filing a petition that raises a postconviction-counsel claim would be within one year after the claim becomes available, similar to the time limit set forth in NRS 34.726(1). The State, on the other hand, suggests that a delay of even less than one year may be unreasonable depending on the circumstances, thus proposing more of a claim-by-claim approach. Both positions hold some appeal. Rippo's position provides a bright-line rule while providing sufficient time to investigate additional claims that may not appear from the record. The State's position acknowledges that most omitted claims will appear in the record and that a year is not required for all claims that may have been unavailable at the time of a default under NRS 34.726(1). We are reluctant, however, to take the State's approach because it would only add to the already endless litigation over the application of the procedural default rules, rules that are supposed to discourage the perpetual filing of habeas petitions, *see Pellegrini*, 117 Nev. at 875, 34 P.3d at 529. One needs only look to the California experience in applying its requirement that a habeas petition be filed without "substantial delay" to understand our reticence to use an imprecise standard in this arena. *See generally In re Gallego*, 959 P.2d 290 (Cal. 1998); *In re Robbins*, 959 P.2d 311 (Cal. 1998); *In re Clark*, 855 P.2d 729 (Cal. 1993); *see also Carey v. Saffold*, 536 U.S. 214, 223 (2002) (discussing California's timeliness standard in context of applying federal tolling provision and observing that "[t]he fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application . . . comes too late").

To provide clearer boundaries, we look to NRS 34.726 for guidance. With NRS 34.726(1), the Legislature has determined that one year provides sufficient time within which to raise claims that trial and appellate counsel provided ineffective assistance. The same can be said with respect to raising a postconviction-counsel claim. Using a similar one-year boundary for what is a reasonable time within which to file a petition raising a postconviction-counsel claim that was not factually or legally available at the time of a procedural default under NRS 34.726 also provides some fairness and predictability. *Cf. Pellegrini*, 117 Nev. at 874-75, 34 P.3d at 529 (concluding that for purposes of determining timeliness of successive petitions filed by petitioners whose convictions were final be-

fore effective date of NRS 34.726, "it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions"). We therefore conclude that a claim of ineffective assistance of postconviction counsel has been raised within a reasonable time after it became available so long as the postconviction petition is filed within one year after entry of the district court's order disposing of the prior postconviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. Because Rippo filed his petition within one year after we issued our remittitur on appeal from the order denying the prior petition, the second petition was filed within a reasonable time after the postconviction-counsel claim became available. Rippo thus met the first component of the good-cause showing required under NRS 34.726(1).

Undue prejudice to excuse untimely petition based on ineffective assistance of postconviction counsel and standard for evaluating postconviction counsel's effectiveness

The second component of the good-cause showing under NRS 34.726(1) requires the petitioner to demonstrate "[t]hat dismissal of the petition as untimely will unduly prejudice [him]." A showing of undue prejudice necessarily implicates the merits of the postconviction-counsel claim, otherwise this requirement would add nothing to the first component of the good-cause showing required under NRS 34.726(1) and the petitioner would be able to overcome the procedural default under that statute without establishing the merits of the postconviction-counsel claim.

[Headnote 10]

To determine whether the postconviction-counsel claim has any merit, we must address the standard for evaluating postconviction counsel's performance. We have held that the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to evaluate the effectiveness of trial counsel, *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984), and appellate counsel, *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996). Similarly, we have indicated that *Strickland* should be used to evaluate the effectiveness of postconviction counsel where there is a statutory right to that counsel. *Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 254 (1997) ("[W]e must remand this matter to the district court for an evidentiary hearing to determine whether [first postconviction counsel's] omissions constitute ineffective assistance of counsel as set forth in Strickland."). But unlike the rights to effective assistance of trial and appellate counsel, which are guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, *Evitts v. Lucey*, 469 U.S. 387, 392, 396-97 (1985), there is no

recognized constitutional right to effective assistance of postconviction counsel,[11] *McKague v. Warden*, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996) (concluding that neither the United States nor Nevada Constitution provides for a right to counsel in postconviction proceedings). Given that distinction, we are not obligated to apply *Strickland* to evaluate postconviction counsel's effectiveness. *See People v. Perkins*, 856 N.E.2d 1178, 1183 (Ill. App. Ct. 2006) (observing that with statutory right to postconviction counsel, "*Strickland* is not automatically applicable to claims of less-than-reasonable assistance of postconviction counsel"). However, because *Strickland* provides a well-established standard that has been developed through caselaw and can be easily applied in the postconviction-counsel context, *see Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (describing *Strickland* as "a fair, workable and, as it turns out, durable standard"), we take this opportunity to explicitly adopt the *Strickland* standard to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of that counsel.[12]

[Headnotes 11-13]

Strickland has two prongs. The petitioner must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Both showings must be made before counsel can be deemed to have provided ineffective assistance, *id.* at 687, but a court need not address the prongs in a particular order or even consider both prongs if the petitioner makes an insufficient showing on one, *id.* at 697; *see also McNelton v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). And when a petitioner presents a claim of ineffective assistance of postconviction counsel on the basis that postconviction

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[11]In the absence of a Supreme Court decision recognizing a constitutional right, we reiterate that the limited right to effective assistance of postconviction counsel addressed in this opinion arises out of the statutory mandate to appoint counsel under NRS 34.820(1)(a), and we disavow any prior decisions suggesting that the right has a constitutional basis, *see, e.g.*, *Pellegrini*, 117 Nev. at 887-88 n.125, 34 P.3d at 537 n.125 (describing *McKague* as "holding that there is no constitutional right to effective assistance of counsel except where state law entitles one to the appointment of counsel"); *Crump*, 113 Nev. at 304-05, 934 P.2d at 254.

[12]Not all states guarantee postconviction petitioners a statutory right to the effective assistance of counsel, but in states that do, use of the *Strickland* standard is not uncommon. *See, e.g.*, *In re Clark*, 855 P.2d 729, 748-49 (Cal. 1993); *Silva v. People*, 156 P.3d 1164, 1168-69 (Colo. 2007); *Stovall v. State*, 800 A.2d 31, 38 (Md. Ct. Spec. App. 2002); *Johnson v. State*, 681 N.W.2d 769, 776-77 (N.D. 2004); *Commonwealth v. Priovolos*, 715 A.2d 420, 422 (Pa. 1998). The Supreme Court has also indicated that *Strickland* applies when a state prisoner seeks federal habeas relief and asserts the ineffective assistance of state habeas counsel as cause to excuse the procedural default of a trial-counsel claim. *Martinez*, 566 U.S. at 14.

counsel failed to prove the ineffectiveness of his trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys. *State v. Jim*, 747 N.W.2d 410, 418 (Neb. 2008) (stating that layered claim of ineffective assistance requires evaluation at each level of counsel); *see also Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (observing that prejudice showing required for ineffective assistance of postconviction counsel based on failure to raise ineffective-assistance-of-trial-counsel claim "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective"), *overruled on other grounds by McKinney v. Ryan*, No. 09-99018, 2015 WL 9466506, at *16-17 (9th Cir. 2015).

[Headnotes 14-16]

The showing required to satisfy the prejudice prong—a reasonable probability that the result of the proceeding would have been different—varies depending on the context, including the proceeding in which the allegedly deficient performance occurred and the nature of the deficient performance. *See, e.g.*, *Missouri v. Frye*, 566 U.S. 134, 146-47 (2012) (prejudice arising from deficient performance based on failure to communicate plea offer to defendant); *Lafler v. Cooper*, 566 U.S. 156, 162-64 (2012) (prejudice arising from deficient performance in advising defendant to reject favorable plea offer); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice arising from deficient performance that led defendant to accept plea offer rather than proceed to trial); *Strickland*, 466 U.S. at 694 (prejudice arising from deficient performance of counsel during trial); *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114 (prejudice arising from deficient performance on appeal from judgment of conviction). In the context of postconviction counsel, we conclude that the prejudice prong requires a showing that counsel's deficient performance prevented the petitioner from establishing "that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State," NRS 34.724(1). As one state court has explained, the question is more than whether "the first post-conviction relief proceeding should have gone differently":

> [T]he ultimate issue is the fairness of the defendant's conviction and sentence. It is not enough for the defendant to prove that the first post-conviction relief proceeding should have gone differently. The defendant must also prove that the flaw in the prior post-conviction relief proceeding prevented the defendant from establishing a demonstrable and prejudicial flaw in the original trial court proceedings.

Grinols v. State, 10 P.3d 600, 620 (Alaska Ct. App. 2000), *aff'd*, 74 P.3d 889 (Alaska 2003); *see also Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D. 2001) ("[I]neffective assistance of counsel at a prior

habeas proceeding is not alone enough for relief in a later habeas action. Any new effort must eventually be directed to error in the original trial . . . .").[13] Thus, the Supreme Court's observation that "[s]urmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), is particularly apt when it comes to postconviction counsel's assistance. If a petitioner surmounts that high bar and proves that postconviction counsel provided ineffective assistance, then the postconviction-counsel claim is sufficient to meet the undue-prejudice component of the good-cause showing required to excuse a procedural default under NRS 34.726(1).

Actual prejudice to excuse procedural default under NRS 34.810 based on ineffective assistance of postconviction counsel

Similarly, a postconviction-counsel claim is sufficient to establish cause to excuse the procedural default of another claim under NRS 34.810(1)(b) or NRS 34.810(2) if the petitioner proves both prongs of the ineffective-assistance test. *See Lynch v. Ficco*, 438 F.3d 35, 49 (1st Cir. 2006) ("In theory, *Strickland* attacks (including its own prejudice prong) go to the separate 'cause' as opposed to the 'prejudice' standards for overcoming default."); *see also Clabourne*, 745 F.3d at 377 (explaining that to establish "cause" to allow federal habeas review of trial-counsel claim that was defaulted in state court based on allegation of ineffective assistance of postconviction counsel, petitioner "must establish that his counsel in the state postconviction proceeding was ineffective" by establishing both prongs of the *Strickland* test). But to excuse the procedural default of another claim under NRS 34.810, the petitioner also must demonstrate actual prejudice. NRS 34.810(1)(b), (3).

[Headnote 17]

If a petitioner who seeks to excuse a procedural default based on ineffective assistance of counsel makes the showing of prejudice required by *Strickland*, he also has met the actual prejudice showing required to excuse the procedural default.[14] *See, e.g.*, *Joseph v. Coyle*, 469 F.3d 441, 462-63 (6th Cir. 2006) (explaining that

[13]The statutes in South Dakota have been amended since *Jackson* was decided to preclude relief based on the ineffectiveness of postconviction counsel. S.D. Codified Laws § 21-27-4 ("The ineffectiveness or incompetence of counsel, whether retained or appointed, during any collateral post-conviction proceeding is not grounds for relief under this chapter.").

[14]Other courts have suggested that actual prejudice requires a greater showing than that required for the prejudice prong of an ineffective-assistance claim, *see, e.g.*, *United States v. Dale*, 140 F.3d 1054, 1056 n.3 (D.C. Cir. 1998); *see Armstrong v. Kemna*, 590 F.3d 592, 606 (8th Cir. 2010) (citing inconsistent decisions on the issue by different Eighth Circuit panels), but we are not persuaded that there is a useful distinction to be made.

because the Supreme Court has held in *Strickler v. Greene*, 527 U.S. 263 (1999), that the materiality prong of a *Brady*[15] violation parallels the prejudice showing required to excuse a procedural default, the prejudice prong of the ineffective-assistance test, which is similar to the *Brady* materiality prong, also parallels the prejudice showing required to excuse a procedural default); *Lynch*, 438 F.3d at 49-50 (same); *Mincey v. Head*, 206 F.3d 1106, 1147 n.86 (11th Cir. 2000) (same); *accord State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (following *Strickler* and equating *Brady* materiality with the prejudice require to excuse a procedural default under NRS 34.810).[16]

With this foundation in mind, we turn to Rippo's claims and whether he has met both prongs of the ineffective-assistance test with respect to postconviction counsel and therefore has demonstrated cause and prejudice to excuse the applicable procedural bars based on the ineffective assistance of postconviction counsel.[17] Applying the two-prong test set forth above, we conclude that Rippo failed to show that postconviction counsel was ineffective, and that he was not entitled to an evidentiary hearing on the allegations related to postconviction counsel because they either lack merit or were not supported by sufficient factual allegations, *see Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (stating that postconviction petitioner is entitled to evidentiary hearing when he asserts specific factual allegations that, if true, would entitle him to relief). We therefore conclude that although Rippo raised his postconviction-counsel claims within a reasonable time after they became available, he failed to demonstrate undue prejudice to excuse the procedural default under NRS 34.726(1) or cause and actual prejudice to excuse the procedural defaults under NRS 34.810.[18]

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[15]*Brady v. Maryland*, 373 U.S. 83 (1963).

[16]This court previously observed in *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 949-50 (1994), that the two prejudice showings are "separate and distinct" but also suggested that when "both prejudice requirements happen to address the same concern," then the same showing will satisfy them. To the extent that these observations in *Lozada* are inconsistent with this decision, we disavow them.

[17]Rippo's opening brief focuses primarily on the substantive merits of the grounds asserted in the petition, with limited attention paid to the threshold cause-and-prejudice inquiry based on the allegedly ineffective assistance provided by prior postconviction counsel. While the assertions of ineffective assistance of postconviction counsel in Rippo's briefs are not as detailed or focused as we would prefer, they also are not the kind of "*pro forma*, perfunctory" assertions of ineffective assistance that we discouraged in *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001).

[18]To the extent that Rippo relies on arguments other than ineffective assistance of postconviction counsel to establish cause and prejudice as to any particular defaulted ground for habeas relief, those arguments are addressed in the discussion of each defaulted claim.

Judicial bias (claim 1)

[Headnote 18]

In claim 1 of his petition, Rippo alleged that his convictions and death sentences are invalid because the trial judge was biased and that trial and appellate counsel were ineffective because they failed to adequately challenge the trial judge's alleged bias. He argues on appeal that the district court erred in applying the procedural default under NRS 34.810(2) and the law-of-the-case doctrine to this claim.

The judicial-bias claim is based on allegations that the trial judge (1) was the subject of a federal investigation at the time of trial, (2) knew that the Clark County District Attorney's Office and/or the Las Vegas Metropolitan Police Department (Metro) were involved in the investigation but failed to disclose that fact, and (3) was acquainted with a trial witness (Denny Mason) but failed to disclose that fact because it would have incriminated the judge in the federal investigation. This claim was raised on direct appeal and rejected by this court. *Rippo v. State*, 113 Nev. 1239, 1248-50, 946 P.2d 1017, 1023-24 (1997). Normally, the law-of-the-case doctrine would preclude further litigation of this issue. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Rippo argues, however, that the doctrine should not apply because the facts are substantially different than they were on direct appeal and because our prior decision was based on false representations by the State and the trial judge. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (observing that federal courts recognize exception to the doctrine when "subsequent proceedings produce substantially new or different evidence").

The first and third allegations above were raised in Rippo's opening brief on direct appeal. We rejected both. *Rippo*, 113 Nev. at 1248, 946 P.2d at 1023 (concluding that "[a] federal investigation of a judge does not by itself create an appearance of impropriety sufficient to warrant disqualification"); *id.* at 1249, 946 P.2d at 1024 (observing that "no evidence exists, beyond the allegations set forth by the defense, that [the trial judge] knew either Denny Mason or his alleged business partner," but that "[e]ven if a relationship existed, Rippo has not shown that the judge's alleged acquaintance with Mason's business partner would result in bias"). There are no substantially different facts alleged now that would warrant an exception from the law-of-the-case doctrine with respect to our prior decision regarding these allegations.

The allegation that the trial judge failed to disclose that he knew that the prosecutor's office and/or Metro were involved in the federal investigation also was raised in Rippo's opening brief on direct appeal. We observed that there was no evidence "that the State was either involved in the federal investigation or conducting its own

investigation of [the trial judge]." *Id.* at 1248, 946 P.2d at 1023. Rippo now asserts that the prosecutors and the trial judge lied about the State's involvement in the federal investigation, relying on the federal government's trial memorandum and a defense motion that were filed in the trial judge's federal prosecution and testimony presented in the federal trial, which took place after Rippo's trial. The documents and testimony indicate that, as part of a sting operation, an unnamed chief or deputy district attorney worked with federal authorities to bring a fictitious case before the trial judge and that the judge saw a person wearing a Metro jacket when FBI agents executed a search warrant at his home. It is not entirely clear that this new information establishes that the State was engaged in its own investigation of the trial judge or that there was a joint state/federal investigation as opposed to a federal investigation in which some state actors provided assistance to the federal authorities. But even if it does, the facts remain insufficient to establish judicial bias.

Rippo's judicial-bias claim is not that the trial judge was biased against him specifically but more that the investigation and indictment created a "compensatory, camouflaging bias"—that the trial judge would be biased against criminal defendants at the time to curry favor with the agencies investigating him and prove that he was not soft on criminal defendants. *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (describing similar claim of judicial bias). Taking Rippo's allegations as true, there remains "[n]o factual basis . . . for Rippo's argument that [the trial judge] was under pressure to accommodate the State or treat criminal defendants in state proceedings less favorably" or that he was biased against Rippo because of the investigation and indictment. *Rippo*, 113 Nev. at 1248, 946 P.2d at 1023. Such speculative allegations simply are not sufficient to warrant discovery or an evidentiary hearing on this issue as they do not support the assertion that the trial judge was actually biased in this case. *Cf. Bracy*, 520 U.S. at 905-09 (holding that a petitioner had demonstrated good cause for discovery to prove a "compensatory, camouflaging bias" on the part of a trial judge who had been indicted (and later convicted) of taking bribes from criminal defendants to fix cases where petitioner "support[ed] his discovery request by pointing not only to [the trial judge's] conviction for bribe taking in other cases, but also to additional evidence . . . that lend[ed] support to his claim that [the trial judge] was actually biased *in petitioner's own case*," including " 'specific allegations' that [petitioner's] trial attorney, a former associate of [the trial judge's] in a law practice that was familiar and comfortable with corruption, may have agreed to take [petitioner's] capital case to trial quickly so that petitioner's conviction would deflect any suspicion [that] the rigged . . . cases might attract"). Rippo therefore has not demonstrated grounds to

warrant reconsideration of our prior decision in the face of the law-of-the-case doctrine.[19]

[Headnote 19]

Rippo also has not demonstrated good cause and actual prejudice to excuse his failure to re-raise the judicial-bias claim in the first habeas petition. He asserts that prior postconviction counsel provided ineffective assistance in failing to further investigate the facts surrounding the judicial-bias claim and failing to re-raise the claim in the first petition or to repackage it as a trial- or appellate-counsel claim. We are not convinced that prior postconviction counsel was incompetent for failing to repackage the judicial-bias claim as a trial- or appellate-counsel claim for two reasons. First, both trial and appellate counsel raised the judicial-bias issue, so any ineffective-assistance claim would have been belied by the record. Second, after evaluating trial and appellate counsel's performance based on "counsel's perspective at the time," *Strickland*, 466 U.S. at 689, it is not clear that trial and appellate counsel were deficient in failing to present the evidence that is now offered in support of the judicial-bias claim. The new information is based on documents filed in connection with and testimony at the federal trials in 1997 and 1998, after Rippo's trial. That evidence clearly was not available to trial counsel, making it difficult to fault trial counsel for failing to discover and present it. Even if some of the documents were filed in the federal case while the direct appeal was pending, appellate counsel could not have expanded the record before this court to include evidence that was not part of the trial record, *see Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476-77, 635 P.2d 276, 277-78 (1981), making it difficult to fault appellate counsel's performance. Granted, the new information could have

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[19]Rippo's reliance on *United States v. Jaramillo*, 745 F.2d 1245 (9th Cir. 1984), is unavailing. In that case, a federal district court judge declared a mistrial in a criminal case upon learning that he had been indicted by a federal grand jury. *Id.* at 1246. Rejecting a double-jeopardy claim, the appellate court determined that the trial judge "properly concluded that a reasonable person with knowledge of all the facts pertaining to the nature of the indictment would question the ability of a judge facing prosecution to remain impartial as the presiding jurist in a criminal proceeding." *Id.* at 1248. The court noted the "historically unique problems [the trial judge] faced as a judge indicted on criminal charges which called into question his moral fitness to sit as a judge." *Id.* at 1249. Here, in contrast, the trial judge was not indicted until after Rippo's trial. And on direct appeal, we rejected the idea that the investigation alone would have warranted his disqualification in all criminal trials. *Rippo*, 113 Nev. at 1248-49, 1249 & n.1, 946 P.2d at 1023 & n.1 ("We further note that [the trial judge's] disqualification in the instant case would lead to his disqualification in all criminal cases he heard while subject to the federal investigation. Such a result would be insupportable.").

been discovered in time for prior postconviction counsel to use it as grounds to reassert the judicial-bias claim in the first petition, but we are not convinced that prior habeas counsel's failure to further investigate and re-assert this claim was objectively unreasonable. The mere omission of a claim that has been further developed by new counsel " 'does not raise a presumption that prior habeas corpus counsel was incompetent.'" *In re Reno*, 283 P.3d 1181, 1210 (Cal. 2012) (quoting *In re Clark*, 855 P.2d 729, 749 (Cal. 1993)). Because this court had rejected the generic proposition that the trial judge had to be disqualified in all criminal cases while he was subject to the federal investigation, *Rippo*, 113 Nev. at 1248, 1249 & n.1, 946 P.2d 1023 & n.1, and the new information still does not establish bias in this case, Rippo has not demonstrated that the judicial-bias claim is "one that any reasonably competent [habeas] counsel would have" reasserted or that the claim would have entitled him to relief, *Reno*, 283 P.3d at 1211. Therefore, the postconviction-counsel claim lacks merit and is not adequate cause to excuse the procedural default of the judicial-bias claim under NRS 34.810(2).

Prosecutorial misconduct (claims 2 and 9)

Rippo raised numerous allegations of prosecutorial misconduct that appear in claims 2 and 9 in his second habeas petition. Those allegations are that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) (claim 2); the State failed to correct false testimony by its witnesses (claim 2); the State failed to disclose and misrepresented its involvement in the federal investigation of the trial judge (claim 2); the prosecutors made improper arguments to the jury (claim 2); and the State intimidated a defense witness (claim 9).[20] These claims were primarily raised as trial error, but claim 2 also included summary allegations that trial and appellate counsel were ineffective to the extent that they did not litigate or failed to fully litigate or uncover the misconduct alleged in that claim. The district court determined that both claims 2 and 9 were procedurally defaulted under NRS 34.810(2) and that claim 2 was also defaulted under NRS 34.810(1)(b). The court also observed that several of the misconduct allegations were subject to the law-of-the-case doctrine. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

[20]Included in his allegations of prosecutorial misconduct, Rippo claims that the State violated a discovery order (claim 2) as evidenced by a series of nondisclosures concerning the existence of a jailhouse informant, a forensic report, exculpatory statements a witness made to the prosecutor, and the State's release of "twelve inches of document discovery on the day of calendar call." Absent from Rippo's claim, however, is any allegation of prejudice even assuming his contentions are true. Accordingly, he has not demonstrated that postconviction counsel was ineffective in this regard.

Brady allegations

[Headnotes 20-23]

We first address the arguments in claim 2 that are based on *Brady* violations. "*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)). To establish a *Brady* violation, the defendant must show (1) that the State withheld evidence, (2) which is favorable to the accused because it is exculpatory or impeaching, and (3) that prejudice resulted because the evidence was material, i.e., that there is a reasonable possibility of a different result had there been disclosure. *Id.* at 599-600, 81 P.3d at 8. When a *Brady* claim is raised in an untimely or successive petition, the cause-and-prejudice showing can be met based on the second and third prongs required to establish a *Brady* violation. *Id.* at 599, 81 P.3d at 8. The *Brady* allegations here involve claims that the State withheld evidence that could have been used to impeach several of the State's witnesses: Thomas Sims, Thomas Christos, and Michael Beaudoin.[21]

[Headnote 24]

The *Brady* allegations related to Sims and Christos focus on whether the State withheld evidence of cooperation agreements whereby these witnesses received favorable treatment in exchange for testifying. A promise made by the prosecution to a key witness in exchange for the witness's testimony constitutes impeachment evidence that must be disclosed under *Brady*. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). As the district court observed, Sims and Christos were thoroughly "cross-examined [during trial] regarding continuances, quashed bench warrants, and future benefits" with respect to other criminal charges. Both witnesses denied being promised, expecting, or receiving any benefits in exchange for their testimony. A prosecutor also testified that Sims was not promised anything in exchange for his testimony, and the jury was aware that Sims' pending felony case had been continued repeatedly over the course of several years, the extent to which the delay in that proceeding may have benefited him, and the prosecutor's reasons

[21]The petition below made summary allegations (claim 2, ¶¶ 13, 14) that the State failed to disclose exculpatory or impeachment evidence related to Donald Hill (aka William Burkett) and David Levine, but it included no specific allegations regarding the *Brady* violation related to Hill and made a summary allegation that Levine "expected to receive a favorable parole recommendation in exchange for his testimony." In his appellate briefs, Rippo argues that both witnesses testified falsely. The allegation as to Hill appears to involve a post-trial recantation, while the allegation as to Levine appears to involve a *Giglio* claim—that the prosecution knowingly used false testimony. *See Giglio v. United States*, 405 U.S. 150 (1972). Those arguments are addressed *infra*.

for agreeing to the continuances.[22] Rippo's allegations are based on records related to the disposition of various criminal cases involving Sims and Christos before and after they testified. But those favorable dispositions are a matter of public record that was not and could not be withheld by the State. They also do not suffice to establish either explicit or tacit agreements between the State and these witnesses in exchange for their testimony. *See Bell v. Bell*, 512 F.3d 223, 233-34 (6th Cir. 2008) (concluding that handling of witness's case does not prove existence of an agreement between prosecution and witness); *Middleton v. Roper*, 455 F.3d 838, 854 (8th Cir. 2006) (concluding that speculation based on sequence of events in which witnesses obtained favorable dispositions of criminal charges after testifying against defendant was not sufficient to demonstrate that prosecution withheld evidence of deal offered to witnesses in exchange for their testimony); *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony. . . . [T]he fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony."). Rippo therefore has not made sufficient factual allegations as to Sims and Christos to support a finding that the State violated *Brady*. Nor are the speculative allegations offered 12 years after trial based on public information that has long been available sufficient to warrant an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). For these reasons, the *Brady* claim as to these witnesses is not sufficient itself to establish cause and prejudice.[23] The deficiencies in Rippo's *Brady* claim as to these witnesses also undermine his effort to rely on the alleged ineffective assistance of postconviction counsel as cause to excuse his failure to raise the *Brady* claim in the first petition.

The *Brady* allegation involving Beaudoin is similar to those involving Sims and Christos, but where Rippo failed to allege any additional facts sufficient to establish a *Brady* violation related to those witnesses, Rippo has offered additional specific allegations with respect to Beaudoin. With his petition, Rippo submitted a dec-

[22]Rippo suggests that postconviction counsel was ineffective for failing to raise a trial-counsel claim based on trial counsel's failure to have the prosecutor's testimony read into the record to impeach Sims. The record, however, shows that the prosecutor testified before the jury at trial.

[23]As a separate but related subclaim, Rippo argues that the State violated *Brady* by allowing Sims and Christos to testify falsely that they received no promises of leniency or favorable treatment in exchange for their testimony. This argument fails, however, as Rippo has not alleged sufficient facts to support the allegation that Sims and Christos testified falsely.

laration dated May 18, 2008, in which Beaudoin indicates that he was arrested on felony drug charges after he began cooperating with the prosecution in this case and that he contacted one of the attorneys prosecuting Rippo "at some point before [he] was scheduled to testify" and asked for help since he was helping the prosecution by testifying against Rippo.[24] According to the declaration, as a result of that call, the district attorney's office dropped one of the charges and reduced the other from a felony to a gross misdemeanor, and Beaudoin avoided going to prison on the charges. The declaration indicates that if "anyone had bothered to ask [him] about these matters, [he] would have provided them with all of the information that is contained in [the] declaration."[25] The latter representation seems questionable since Beaudoin was asked about inducements at trial and testified that there had been none. It is entirely possible that his trial testimony was truthful because the declaration does not indicate that the prosecutor made any explicit or tacit promises to Beaudoin before he testified. As discussed with respect to the *Brady* claim involving Sims and Christos, absent such a promise by the prosecution, there was no *Brady* violation. Regardless, we also are not convinced that the information in the Beaudoin declaration is material as required to establish a *Brady* violation.

Beaudoin had already testified before the grand jury and his trial testimony was consistent with that prior testimony, thus undermining the impeachment value of the information in the postconviction declaration, and Beaudoin was not such a key witness for the prosecution that additional impeachment of him beyond that presented at trial (his criminal record) would lead to a reasonable possibility of a different outcome at trial. *Cf. Harris v. Lafler*, 553 F.3d 1028, 1033-34 (6th Cir. 2009) (concluding that there was reasonable probability of different outcome at trial had prosecution disclosed promises of leniency or favorable treatment in exchange for witness's testimony where witness provided only eyewitness account of shooting and identified defendant as the shooter, providing only evidence that directly linked defendant to the shooting). Thus, even accepting the representations in the declaration as true and assuming that there was a promise of favorable treatment in exchange for Beaudoin's testimony shortly before he testified at trial, the failure to disclose that promise does not undermine our confidence in the jury's verdict. *See Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (explaining that materiality prong of *Brady* involves whether the violation un-

[24]The State does not acknowledge or address the declaration in its appellate brief, but we are not convinced that an evidentiary hearing is warranted on this claim based solely on that omission.

[25]Beaudoin also states in the declaration that he believes that Rippo "is responsible for the crime" but does not "believe that he should receive the death penalty because it's not going to bring Denise back."

dermines confidence in the verdict). For these reasons, we conclude that this *Brady* claim lacks merit and cannot itself establish cause and prejudice and that Rippo has not demonstrated that postconviction counsel was ineffective in failing to raise this *Brady* claim.

False testimony

Rippo also alleges prosecutorial misconduct related to three jailhouse informants: David Levine, James Ison, and Donald Hill (aka William Burkett). These witnesses testified about admissions that Rippo made to them while he was incarcerated pending trial in this case. Each informant testified that he had known Rippo before the murders and that Rippo admitted his involvement in the murders. Based on handwritten declarations provided by Levine, Ison, and Hill in connection with the second postconviction petition, Rippo asserts that these witnesses gave false testimony. We first address the allegations involving Levine and Ison and then turn to those involving Hill.

[Headnote 25]

Rippo alleges that prosecutors or police officers provided Levine and Ison with information about the case that they then related at trial as information obtained from Rippo, making their testimony appear more credible. Rippo asserts that Levine and Ison could have been impeached with this information had it been disclosed to the defense. Although couched in terms of the State's alleged failure to disclose material exculpatory and impeachment information, Rippo's claim speaks more to the prosecution knowingly presenting false or misleading testimony. *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) (requiring prosecutor to correct testimony if he learns of its falsity after the testimony has been presented). Where the prosecution knowingly presents false or misleading testimony or fails to correct false testimony after learning of its falsity, a new trial is required if "the false testimony used by the State in securing the conviction . . . may have had an effect on the outcome of the trial." *Napue*, 360 U.S. at 272. The claim is procedurally barred under both NRS 34.726 and NRS 34.810. Rippo appears to press two arguments on appeal to excuse the procedural bars.

[Headnote 26]

First, he relies on the alleged withholding of evidence by the State. *Cf. State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (explaining that withholding of favorable evidence may establish cause for raising *Brady* claim in an untimely and/or successive petition). This argument is insufficient because any falsity in Levine's and Ison's testimony about Rippo's admissions would have been known to Rippo at the time that the witnesses testified. *Cf. West v. Johnson*,

92 F.3d 1385, 1398-99 (5th Cir. 1996) (rejecting *Brady* claim that prosecution withheld evidence suggesting that defendant fabricated his confession because defendant "knew whether or not he had taken the necklace"); *United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) (concluding that there was no improper suppression of evidence under *Brady* where evidence at issue involved defendant's whereabouts, which were within defendant's knowledge).

Second, Rippo relies on the alleged ineffective assistance of postconviction counsel to excuse the procedural bars to consideration of the claim as to Levine and Ison. The district court apparently rejected this argument on the prejudice prong of the ineffective-assistance claim, concluding that the declarations offered by Rippo do not undermine confidence in the verdict because Levine and Ison have not recanted their testimony that Rippo admitted his involvement in the murders. We agree with the district court's reading of the declarations provided by Levine and Ison.

Although the information in the declarations could have been used to impeach these witnesses had the defense been aware of it, we are not convinced that there is a reasonable likelihood that the allegedly false portions of Levine's or Ison's testimony could have affected the jury's verdict (*Giglio*/*Napue* standard) or that there is a reasonable possibility of a different outcome had the information been disclosed (*Brady* standard). Both witnesses were impeached regarding discrepancies between their statements to police and their trial testimony. Their credibility was enhanced more by their long-term acquaintance with Rippo than by the details that their declarations bring into question. In light of those circumstances and the fact that neither witness has recanted his testimony that Rippo confessed to his involvement in the murders, we agree with the district court's assessment that Rippo cannot demonstrate prejudice based on postconviction counsel's failure to raise claims related to Levine's and Ison's testimony.[26] Accordingly, the postconviction-counsel claim lacks merit and therefore is not cause to excuse the procedural default of this claim.

Rippo's allegations as to Hill are of a different nature in that they appear to involve a partial recantation rather than the prosecution withholding evidence or knowingly presenting false testimony. Hill's postconviction declaration states that, contrary to his testimony at trial, Rippo never suggested that he wanted to have Hunt killed and that as far as Hill knew at the time, Hunt was not going

[26]We recognize that some of the details brought into question by the declarations arguably corroborated Hunt's testimony and therefore lent credibility to her account of the murders, but we are not convinced that any of those corroborating elements in themselves were of such significance that undermining them would also undermine our confidence in the jury's verdict.

to testify against Rippo.[27] The declaration does not suggest that the prosecution knew or had reason to know that this part of Hill's testimony was false, and although this claim is included in a section of Rippo's appellate brief that is focused on prosecutorial misconduct, Rippo does not argue that the prosecution was aware that Hill testified falsely or suppressed evidence that could have been used to impeach Hill.[28] Nor does the declaration call into question Hill's trial testimony that Rippo admitted that he strangled the victims and put their bodies in a closet. Given these deficiencies, we cannot conclude that the district court erred in determining that Rippo had not demonstrated good cause and prejudice to excuse the procedural default of this claim.

Prosecutorial misconduct in closing argument

Rippo also asserts that the prosecutors committed misconduct during guilt- and penalty-phase argument. We first address the claims that had been raised before on direct appeal and then turn to the new claims.

The allegations of prosecutorial misconduct that were raised and rejected on direct appeal, *Rippo v. State*, 113 Nev. 1239, 1253-55 & n.5, 946 P.2d 1017, 1026-28 & n.5 (1997), are subject to the law-of-the-case doctrine, which precludes further litigation of those claims. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Given that further litigation of those claims would have been barred by the law-of-the-case doctrine, we are not convinced that postconviction counsel's failure to raise them again fell outside the wide range of professionally competent assistance. Nor are we convinced by Rippo's suggestion that he has good cause to raise these claims again because they must be considered cumulatively. In particular, the assertion of "cumulative error" as cause to raise these claims anew ignores our prior determination that there was no error with respect to the claims that previously were rejected on appeal on their merits. Rippo does not explain how argument by a prosecutor that has been found not to be error can now be aggregated to comprise a new claim that falls outside the law-of-the-case doctrine. *See In re*

[27]The declaration also states that Hill's girlfriend was not incarcerated at the women's prison in Carson City with Hunt during the relevant time period. Hill testified similarly at trial: when asked at trial whether his fiancée was still at the women's prison, he responded that she was not.

[28]Rippo's appellate brief suggests that Hill revealed his status as a "career criminal informant" for the first time on cross-examination at trial. But in the trial testimony cited in the brief, Hill, who had been incarcerated for all but nine months between 1982 and 1996, testified that he had acted as an informant in two cases, including this one. The citation therefore does not appear to support the characterization of Hill as a "career criminal informant."

Reno, 283 P.3d 1181, 1223-24 (Cal. 2012) (rejecting "cumulative error" explanation for capital petitioner to raise a claim again that was rejected on its merits in a prior appeal and explaining that such a claim "cannot logically be used to support a cumulative error claim because [the appellate court has] already found there was no error to cumulate").

One prosecutorial-misconduct claim that was raised on appeal (the characterization of Rippo as "evil" during penalty-phase argument) would not have been subject to the law-of-the-case doctrine because it was not preserved, and therefore this court chose not to consider it on the merits. 113 Nev. at 1260, 946 P.2d at 1030. But that claim and the other new claims of prosecutorial misconduct are procedurally barred under NRS 34.726 and NRS 34.810 because they were untimely and could have been raised before. Rippo generally asserts that postconviction counsel was ineffective for omitting trial- or appellate-counsel claims based on these alleged instances of prosecutorial misconduct. We conclude, however, that Rippo has not demonstrated any misconduct (i.e., error) as to the challenged comments by the prosecutor; therefore he has not met either prong of the omitted trial-counsel claim or the performance prong as to the omitted appellate counsel. The postconviction-counsel claim therefore lacks merit and is not sufficient cause to excuse the procedural default of these trial-error and ineffective-assistance claims regarding prosecutorial misconduct in argument at the guilt and penalty phases. And in the absence of any error, those claims also could not be cumulated with the instances of prosecutorial misconduct that were found to have merit on direct appeal (the reference to evidence not presented at trial and the comment on Rippo's failure to call a witness) but were determined to be harmless both individually and cumulatively, *see Rippo*, 113 Nev. at 1253-55 & n.5, 946 P.2d at 1026-28 & n.5. On that basis, Rippo also cannot rely on "cumulative error" as cause to raise the new claims of prosecutorial misconduct. *See Reno*, 283 P.3d at 1223-24.

Witness intimidation

The allegation of improper witness intimidation (claim 9) was rejected by this court on direct appeal. *Rippo*, 113 Nev. at 1251, 946 P.2d at 1025. Given that further litigation of the issue is precluded by the law-of-the-case doctrine, *see Hall*, 91 Nev. at 315, 535 P.2d at 798, we are not convinced that postconviction counsel's failure to re-raise this issue fell outside of the wide range of professionally competent assistance. We also reject the idea that the need to consider claims of prosecutorial misconduct cumulatively provides cause to raise this claim again where it was rejected previously on the merits. *See Reno*, 283 P.3d at 1223-24.

Failure to investigate and present mitigating evidence (claim 3)

Rippo argues that the district court erred in procedurally defaulting his claim that trial counsel were ineffective for failing to investigate and present mitigating evidence and submit a special verdict form listing possible mitigating circumstances. To excuse the procedural default, Rippo asserts that postconviction counsel was ineffective for failing to raise the trial-counsel claim. We conclude that this claim is not sufficient to excuse the procedural default because Rippo fails to meet either prong of the *Strickland* test to support a viable trial-counsel claim and therefore cannot demonstrate that postconviction counsel was ineffective in failing to raise it.

[Headnotes 27, 28]

Rippo claims that postconviction counsel should have asserted an ineffective-assistance claim based on trial counsel's failure to present evidence that he suffered from a neuropsychological impairment. As support, he relies on a neuropsychological evaluation conducted 12 years after trial, which concluded that he had "mild neurocognitive dysfunction" and Attention Deficit Hyperactivity Disorder and Obsessive-Compulsive Disorder. But the reasonableness of counsel's performance is evaluated "from counsel's perspective at the time," without "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). At the time of trial in this case, counsel had access to multiple psychological evaluations of Rippo from years before trial and just before trial, none of which revealed any psychoses, neuropsychological impairments, or major affective disorders. Considering the evaluations available to trial counsel, we cannot fault postconviction counsel for not asserting that trial counsel's failure to seek additional evaluations fell outside "the wide range of reasonable professional assistance." *Id.*

[Headnote 29]

Rippo further claims that postconviction counsel should have asserted an ineffective-assistance claim based on trial counsel's failure to present testimony from a violence risk assessment expert and an institutionalization expert to establish that he would function well in a structured prison setting. Trial counsel did present some lay testimony to this effect from a prison vocational instructor who had interacted with Rippo. We are not convinced that trial counsel's failure to present an expert to provide similar testimony was unreasonable. Nor does the failure to present such testimony undermine our confidence in the outcome of the penalty hearing, *see id.* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."), particularly since any expert opinion would have been challenged on cross-examination with evidence that Rippo was found with weapons in his cell and had exposed

himself to and threatened to kill a prison guard, the same as the witness who did testify at the penalty hearing. For these reasons, the ineffective-assistance-of-trial-counsel claim lacks merit, and we cannot fault postconviction counsel for failing to assert it.[29]

[Headnote 30]

Rippo also claims that postconviction counsel should have asserted an ineffective-assistance claim based on trial counsel's failure to present evidence that Rippo was sexually and physically abused by his stepfather James Anzini. At the penalty phase, trial counsel presented one witness who testified about Rippo's childhood and upbringing, his sister Stacie. She described Rippo as the "family clown" and a "great brother" who was protective of and encouraging to his sisters. She also testified about their childhood, explaining that life with Anzini was difficult. He was a compulsive gambler and often took Rippo's allowance and paychecks to support his gambling habit. He frequently pushed Rippo around and told him that he would never amount to anything, and he degraded women in front of Rippo. So trial counsel did present some evidence at the penalty phase on the topic of Rippo's childhood and upbringing. Rippo argues, however, that the presentation fell short due to trial counsel's failure to adequately investigate and interview his family members and that reasonably competent counsel would have uncovered evidence of sexual and physical abuse.

To support his claim, Rippo filed several declarations by various family members, including his sister Stacie; his father; his former stepmother; and Anzini's ex-wife, sister, brother-in-law, former sister-in-law, and sons (Rippo's stepbrothers). In her declaration, Stacie recalls that Anzini was abusive in that he was demeaning toward women; played games that frightened her, her sister, and Rippo; and was extremely aggressive when he played board games with the children, calling Rippo a "sissy" when he lost to his sisters. She states that Anzini enjoyed scaring and taunting the children and that their mother and Anzini had violent arguments. She describes Anzini as physically abusive to the children but that she was unaware

[29]Rippo also claims that postconviction counsel should have challenged trial counsel's failure to prepare a social history and provide it to a mental health expert for evaluation. As support, he provided a lengthy social history and an evaluation from psychologist Dr. Jonathan Mack, who opined that Rippo experienced "significant psychosocial trauma in the home of his mother and step-father, and possibly earlier in the home of his biological father and mother," which "caused a free floating anxiety" leading to obsessive-compulsive and drug-addictive tendencies, and that Rippo had a suppressed variant of post-traumatic stress disorder that was difficult to diagnosis perhaps due to "conscious and unconscious repression of family-of-origin trauma." This new mitigation evidence lacks sufficient persuasiveness to have altered the outcome of the penalty hearing had it been presented to the jury. We therefore are not convinced that postconviction counsel was ineffective in omitting this trial-counsel claim.

of "what, if anything [Anzini] did to [Rippo] that may have had any sexual overtones." In the other declarations, Anzini is described as physically and verbally abusive. Most of the declarants never saw instances of physical abuse involving Rippo, but they suspected that Anzini had physically abused Rippo based on his general character for such abuse or because they saw bruises on Rippo or his sisters that they felt were not sufficiently explained. Many of the declarants also suggested that Rippo had been a happy, good boy and that being raised by Anzini must have changed him. None of the declarations suggest that Anzini sexually abused Rippo.

[Headnotes 31-33]

We first address the performance prong on the omitted trial-counsel claim as it informs whether postconviction counsel's omission of that claim was ineffective. When it comes to preparing for the penalty phase of a capital case, trial counsel generally has a duty to conduct "a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). But *Strickland* does not require the same investigation in every case. *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. The test "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011).

Here, Stacie's declaration indicates that trial counsel met with her and other unidentified members of Rippo's family before the penalty hearing to find out if any of them were willing to testify during the penalty hearing and Stacie agreed to do so. She suggests that her testimony would have been more detailed about the abuse perpetrated by Anzini if trial counsel had better prepared her. But at the penalty hearing, trial counsel asked Stacie broad questions about how Anzini was around the house and how he was toward Rippo, and in response she never suggested significant physical abuse even though it is clear that she knew Rippo's upbringing was important when she observed at the end of her testimony that "a lot of your upbringing directs your life." Even assuming that trial counsel spent a limited amount of time with Stacie before she testified, we are not convinced that counsel's acts or omissions in this respect were outside the wide range of professionally competent assistance.

We are not as confident addressing the performance prong with respect to the more general allegation that trial counsel failed to interview and present the testimony of other family members. Stacie's declaration does not identify the other family members who were present for the meeting with counsel before the penalty hearing, but the family members who provided declarations for the postconvic-

tion petition indicate that they were never contacted by trial counsel. Absent an evidentiary hearing, it is difficult to determine whether trial counsel considered contacting other family members or had any reason to believe such an investigation would be fruitful. In this respect, Stacie's testimony at the penalty phase and the letter that counsel read into the record from Rippo's mother suggest that no one led trial counsel to believe there was more significant physical abuse or any sexual abuse and therefore counsel's investigation and presentation may have been within the wide range of professionally competent assistance in this respect. In the same vein, Rippo has not specifically alleged that he informed trial counsel about the abuse or identified any family members who could testify to the abuse. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."); *see also Waldrop v. Thigpen*, 857 F. Supp. 872, 915 (N.D. Ala. 1994) ("The attorney's duty under the Sixth Amendment is to conduct a *reasonable* investigation, not such an exhaustive investigation that all conceivable mitigating evidence is necessarily uncovered."). Although we believe that Rippo has not overcome the presumption that trial counsel's performance was within the wide range of professionally competent assistance, we also address the prejudice prong below.

[Headnote 34]

Considering all of the information in the declarations, we are not convinced that "there is a reasonable probability that at least one juror would have struck a different balance" between life and death. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). In addition to Stacie's testimony and the letter from Rippo's mother, the defense presented testimony about Rippo's good behavior in prison and for a period of time while he was on parole and living with his mother and stepfather, Robert Duncan. The testimony at the penalty hearing and the postconviction declarations describe Rippo as a likeable and kind person who was skilled and intelligent. Rippo also made a statement in allocution and expressed remorse for the victims' deaths. Although some of the declarations include descriptions of instances where Anzini emotionally and verbally abused Rippo, aside from Stacie's declaration, the postconviction declarations detail little in the way of specific instances of physical abuse involving Rippo; many of the declarants indicate that they suspected such abuse but had not witnessed it or were told by someone else that Anzini was abusive toward everyone in the house. Against this mitigating evidence, the State proved three valid aggravating circumstances: (1) that Rippo had a prior violent felony conviction for sexual assault, (2) that he was under a sentence of imprisonment at the time

of the murders, and (3) that the murders involved torture. *See Rippo v. State*, 122 Nev. 1086, 1093, 1098, 146 P.3d 279, 284, 287 (2006) (holding that three aggravating circumstances were invalid under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), but that the jury's consideration of those aggravating circumstances was harmless beyond a reasonable doubt). We have characterized the mitigating evidence presented at trial in this case as "not particularly compelling," *Rippo*, 122 Nev. at 1094, 146 P.3d at 284, and the additional mitigating evidence does not add anything compelling enough for us to conclude that there is a reasonable probability that at least one juror would have struck a different balance—either in weighing the aggravating and mitigating circumstances or choosing between life and death. *See Cullen*, 563 U.S. at 189 (explaining that *Strickland*'s reasonable probability standard "requires a 'substantial,' not just 'conceivable,' likelihood of a different result" (quoting *Harrington*, 562 U.S. at 112)). On the latter point of the ultimate choice between life and death, it is significant that Rippo took two lives. Having determined that the omitted trial-counsel claim lacks merit, Rippo has not demonstrated cause to excuse the procedural default of that claim based on ineffective assistance of postconviction counsel.

Finally, Rippo claims that trial counsel should have argued specific mitigating circumstances and requested a special verdict form listing specific mitigating circumstances. Postconviction counsel raised this trial-counsel claim in the first petition. At the evidentiary hearing on that petition, trial counsel testified that they chose not to create a list of specific mitigating circumstances—other than the statutory mitigating circumstances—because they wanted the jury "to think of absolutely anything as a mitigating factor." We cannot fault postconviction counsel for not pursuing this claim further on appeal given that the testimony establishes that it was a strategic decision and there is no reasonable probability that this court would have granted some form of relief based on this claim. *See Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decision are virtually unchallengeable absent extraordinary circumstances."), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000).

Disclosure of records (claim 8)

[Headnote 35]

Rippo argues that the district court erred in dismissing his claim related to the trial court's decision to quash a subpoena for records that were in the possession of the Department of Parole and Probation. He argues that the trial court infringed on his constitutional right to present a defense and confront the witnesses against him, that trial counsel failed to "adequately litigate the disclosure of the

records," and that appellate counsel should have raised the issue on direct appeal. To excuse the procedural default of these claims under NRS 34.726(1) and NRS 34.810, Rippo asserts that prior postconviction counsel was ineffective for failing to raise them. We conclude that the postconviction-counsel claim lacks merit and therefore the trial-error and ineffective-assistance claims are defaulted.

The postconviction-counsel claim lacks merit as to the allegation of trial error because the alleged error was invited. When the trial court held a hearing on the State's motion to quash the subpoena, trial counsel represented that he and the prosecution had "worked something out informally" and he did not have an objection to the court granting the motion to quash. Under the circumstances, Rippo cannot complain that the trial court erred when his counsel participated in and invited the alleged error in granting the motion to quash. *See Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal."). There similarly is no basis for concluding that postconviction counsel was deficient for not presenting a trial-error claim that was both procedurally defaulted (under NRS 34.810(1)(b) because it could have been raised on appeal) and without merit. Accordingly, the postconviction-counsel claim is not sufficient to excuse the procedural default of the trial-error claim.

The postconviction-counsel claim also lacks merit as cause and prejudice with respect to the defaulted allegations of ineffective assistance of trial and appellate counsel. The appellate-counsel claim fails on the prejudice prong of *Strickland* because there is no reasonable probability that this omitted issue would have had success on appeal, *see Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (explaining *Strickland* prejudice in context of appellate-counsel claim), given trial counsel's representation that the issue had been resolved informally and that there was no objection to granting the motion to quash, *see Carter*, 121 Nev. at 769, 121 P.3d at 599 ("A party who participates in an alleged error is estopped from raising any objection on appeal."). The trial-counsel claim fails on both prongs. As to the deficiency prong, the record indicates that trial counsel had come to a resolution on the issue with the prosecution and Rippo has not made any factual allegations to the contrary. As to the prejudice prong, Rippo has not substantiated his claim that the records would have given rise to expert testimony; even now, over a decade after trial, Rippo has not identified an expert willing to offer testimony about his future dangerousness and amenability to a structured living environment based on the records. He therefore has not established a reasonable probability of a different outcome at trial had counsel challenged the motion to quash the subpoena. Because the appellate- and trial-counsel claims fail, so does the postconviction-counsel claim as cause and prejudice

to excuse the procedural default of the appellate- and trial-counsel claims.

[Headnote 36]

Rippo also argues that the district court erred in dismissing his claim that the trial court erred by preventing him from cross-examining Diana Hunt with the results of a pretrial psychiatric evaluation. To excuse the procedural default of this alleged trial error under NRS 34.726(1) and NRS 34.810, Rippo asserts that prior postconviction counsel was ineffective based on his failure to assert trial- and appellate-counsel claims related to this alleged trial error. We conclude that the postconviction-counsel claim lacks merit.

First, because Rippo has not identified a discovery motion or other request for the evaluation that was denied by the trial court, he has not demonstrated a viable issue that reasonably competent appellate counsel could have raised. Second, because Rippo fails to allege that trial counsel knew about the evaluation or explain what additional investigation trial counsel should have conducted that would have uncovered the evaluation, assuming that counsel was not aware of it, he has not demonstrated that trial counsel's conduct did not fall within the range of reasonable professional assistance. It further appears that there was no viable prejudice argument to support a trial-counsel claim as trial counsel thoroughly cross-examined Hunt and challenged her credibility, and Hunt admitted her criminal history, involvement in the charged crimes, and agreement to testify against Rippo to avoid murder charges. Given the lack of any substantial basis on which to challenge trial or appellate counsel's performance, the postconviction-counsel claim lacks merit and cannot be sufficient cause to excuse the procedural default of the trial-error claim.[30]

Actual innocence

[Headnote 37]

Where, as here, a petitioner cannot demonstrate cause and prejudice, the district court may nevertheless excuse a procedural bar

[30]Rippo also challenges the district court's denial of the following claims related to (1) inadequate voir dire of potential jurors (claim 4), (2) admission of prior bad act evidence (claim 5), (3) guilt phase jury instructions (claims 6, 7, 11, and 19), (4) admission of victim-impact evidence (claim 12), (5) penalty phase jury instructions (claims 16 and 17), and (6) admission of gruesome photographs (claim 18). We conclude that Rippo failed to overcome the applicable procedural bars and/or the law-of-the-case doctrine and therefore the district court properly denied these claims. We further reject Rippo's claim that cumulative error requires reversal of the judgment of conviction. Any deficiencies in postconviction counsel's representation, considered individually or cumulatively, *see McConnell*, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17, did not prejudice him. Finally, we reject Rippo's claim that the lethal injection protocol is unconstitutional, as this claim is not cognizable in a postconviction petition for a writ of habeas corpus. *See id.* at 248-49, 212 P.3d at 311.

if the petitioner demonstrates that failing to consider the merits of any constitutional claims would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Typically, a fundamental miscarriage of justice in this context requires "a colorable showing" of actual innocence. *Id.* And we have allowed such gateway claims of actual innocence with respect to a capital petitioner's death eligibility. *Id.* Rippo contends that he is ineligible for the death penalty because the three aggravating circumstances supporting his death sentence are invalid.[31]

Rippo argues that insufficient evidence supports the torture aggravating circumstance, a claim we rejected on direct appeal. *See Rippo v. State*, 113 Nev. 1239, 1263-64, 946 P.2d 1017, 1032-33 (1997). He acknowledges our prior review but argues that we never determined whether the evidence showed that he "inflict[ed] pain beyond the killing itself." *Hernandez v. State*, 124 Nev. 978, 984, 194 P.3d 1235, 1239 (2008), *overruled on other grounds by Armenta-Carpio v. State*, 129 Nev. 531, 532, 306 P.3d 395, 396 (2013). His claim is patently without merit based on this court's observation regarding the evidence of torture inflicted on the victims, which comports with the requirement identified by Rippo. *Rippo*, 113 Nev. at 1264, 946 P.2d at 1033 ("There seems to be little doubt that when Rippo was shocking these victims with a stun gun, he was doing so for the purpose of causing them pain and terror and for no other purpose. Rippo was not shocking these women with a stun gun for the purpose of killing them but, rather, it would appear, with a purely 'sadistic purpose.'").

[Headnote 38]

Rippo complains that the other two aggravating circumstances are invalid for two reasons. First, he argues that the prior conviction related to both aggravating circumstances was the product of an invalid guilty plea. Based on our review of the record, we disagree that his guilty plea was involuntarily or unknowingly entered. Second, relying on *Roper v. Simmons*, 543 U.S. 551 (2005), Rippo argues that the prior conviction could not be used as an aggravating circumstance for death-penalty eligibility because he was only 16 years old at the time of the prior offense. We reject this argument because *Roper* only addresses whether a defendant can be sentenced to death for a capital offense committed before age 18; it does not address whether a conviction for an offense that was committed before the defendant was 18 can be used to make the defendant death-eligible on another offense committed after the defendant turned 18. Here,

[31]Rippo challenged two of the aggravating circumstances in claims 13 and 14 in his petition. Those claims were subject to the same procedural bars discussed in this opinion. The claims are addressed here only to the extent that they are the basis for Rippo's assertion of actual innocence as a gateway to consideration of his procedurally defaulted claims.

the murders were committed a week before Rippo's 27th birthday. The aggravating circumstances are valid, and Rippo has not demonstrated that he is ineligible for the death penalty.[32]

Having determined that Rippo is not entitled to relief, we affirm the order of the district court.

CHERRY, J., concurring in part and dissenting in part:

I concur in the majority's decision that when postconviction counsel is appointed pursuant to NRS 34.820, a challenge to that counsel's representation becomes available upon the conclusion of the first postconviction proceeding. I further agree with the majority's adoption of the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate claims of ineffective assistance of postconviction counsel. However, I disagree with the majority's decision that a petition raising a claim of ineffective assistance of first postconviction counsel is filed within a reasonable time if it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal is taken from the district court's order, within one year after our issuance of remittitur. I would hold that the reasonableness of any delay should be assessed on a case-by-case basis considering the totality of the circumstances, which may justify a delay of more than one year. I further dissent from the majority's conclusion that Rippo failed to show that he is entitled to an evidentiary hearing on his claims that postconviction counsel was ineffective for not raising a claim of prosecutorial misconduct and an ineffective-assistance claim based on trial counsel's failure to present additional mitigation evidence. Therefore, I would reverse and remand this matter to the district court for an evidentiary hearing on these claims.

Rippo complains that postconviction counsel was ineffective in failing to investigate and present evidence that the State knowingly presented perjured testimony at trial. Two of the State's witnesses, David Levine and James Ison, have provided declarations stating that the police provided details about the murders that Rippo had not disclosed to them. The majority acknowledges that the statements in the declarations could have been used to impeach Levine and Ison but concludes that this was not enough to make a difference. In my view, an evidentiary hearing is necessary before that determination can be made. While Levine and Ison did not recant their testimony that Rippo admitted his involvement in the murders, their statements certainly impeached aspects of their testimony and, perhaps more importantly, raise serious concerns about prosecutorial misconduct. *See People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956) ("It is of

[32]Rippo argues that postconviction counsel was ineffective for not challenging the aggravating circumstances as invalid. We conclude that his claim lacks merit and therefore the district court did not err by denying this claim.

no consequence that the falsehood bore upon the witness'[s] credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."). The implications of the matters raised in the declarations deserve closer examination that an evidentiary hearing will provide.

Rippo also contends that postconviction counsel was ineffective for not challenging trial counsel's failure to present mitigating evidence of the abuse he suffered at the hands of his stepfather, James Anzini, and his neuropsychological impairment. The new evidence paints a picture of emotional and physical abuse to which the jury was not privy. Anzini played games with Rippo and his siblings for the sole purpose of belittling and harassing them. Anzini scared the children by pretending that he was going to drive the car they were riding in over a cliff. He hit Rippo and his siblings with books and bamboo sticks. Anzini treated Rippo worse than any of his children or stepchildren. On one occasion, after Rippo suffered a beating from a neighbor boy, Anzini ordered him to "go back and finish the job." Rippo returned to fight the boy and was badly hurt. In another incident, Anzini flew into a rage when Rippo accidently broke an inexpensive household item. Anzini punished Rippo for minor infractions by confining him to his room for hours without access to a bathroom and then beating him when he wet his pants. While the family was living in Moab, Utah, Anzini punished Rippo by making him stand outside when the temperature was over 100 degrees. Rippo's mother, Carole Anzini, also contributed to his troubled childhood. She was neglectful in her care of him, and when he was seven years old, she took Rippo and his siblings from their home in New York without permission from the children's father, Domiano Campanelli. Campanelli knew nothing about his children's whereabouts until ten years later. The new mitigation evidence strongly suggests that Campanelli was a kind and caring father who loved his children very much. Because of Carole's actions, Rippo was robbed of a loving relationship with his father for a decade.

In addition, Rippo provided an evaluation from psychologist Jonathan Mack. Dr. Mack concluded that Rippo suffers from Attention Deficit Hyperactivity Disorder, which, along with his unstable upbringing, contributed to his early drug use. Further, Rippo sustained significant psychosocial trauma during his childhood, which caused "a chronic free floating anxiety which led to the development of his obsessive-compulsive and drug addictive tendencies" as a means of controlling his anxiety. Dr. Mack observed that Rippo's overall neurological and psychological assessment reveals that he has significant problems with attention, impulse control, and short-term

memory that could have been identified by competent neurological testing prior to trial.

The mitigation evidence presented at trial did little in the way of providing the jury any insight into Rippo's character, background, and conduct. Had the new mitigation evidence been presented, it could have provided that insight and swayed the jury to choose imprisonment rather than death. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) ("Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime." (citations and internal quotation marks omitted)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003) (''Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (quoting *Boyde v. California*, 494 U.S. 370, 382 (1990))); Jesse Chang, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Cases*, 35 Law & Soc. Inquiry 39, 46 (2010) ("The purpose of mitigating evidence is to provide the jury with a basis for sentencing the individual defendant to life imprisonment rather than to death . . . . The challenge facing defense counsel is to present mitigating evidence that explains the defendant's commission of the crime. This requires providing the jury with an empathy provoking way of understanding the defendant and his conduct."). While the majority casually dismisses this new mitigation evidence, concluding that it would not have made a difference, Rippo has produced sufficient support entitling him to an evidentiary hearing to prove his allegations that postconviction counsel provided ineffective assistance by failing to investigate and challenge trial counsel's performance in the presentation of mitigating circumstances. Should he be successful, he may secure a new penalty hearing. Justice demands that he receive that opportunity.

NADINE GOODWIN, Appellant, *v.* CYNTHIA A. JONES and RENEE OLSON, as Former and Present Administrators; and STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION, EMPLOYMENT SECURITY DIVISION, Respondents.

No. 62493

March 3, 2016 368 P.3d 763

Appeal from a district court order denying a petition for judicial review of an unemployment benefits decision. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Claimant sought unemployment compensation. The Department of Employment, Training and Rehabilitation, Employment Security Division (ESD), denied claim on the ground that claimant was terminated for misconduct connected with her work, and claimant appealed. The appeals referee affirmed, and claimant appealed. The ESD's Board of Review denied claimant's appeal of the appeals referee's decision, and claimant appealed. The district court denied claimant's petition for judicial review, and claimant appealed. The court of appeals, Gibbons, C.J., held that: (1) substantial evidence supported the appeals referee's findings that employer's certification requirement applied to claimant, who worked as a drug court administrator, and that this requirement was reasonably related to claimant's employment; and (2) claimant failed to provide evidence demonstrating that she made a reasonable, good-faith attempt to comply with employer's certification requirement and that her failure to comply was justified.

Affirmed.

Brian R. Morris, Reno, for Appellant.

Neil A. Rombardo and *J. Thomas Susich*, Carson City, for Respondents.

1. Unemployment Compensation.
   Legislature enacted unemployment compensation laws to provide temporary assistance and economic security to individuals who become involuntarily unemployed.
2. Unemployment Compensation.
   Analysis of whether misconduct disqualifies an employee from receiving unemployment benefits is separate from the analysis of whether misconduct warrants termination and requires the trier of fact to apply the legal definition of misconduct to the factual circumstances of the case.
3. Unemployment Compensation.
   When off-duty conduct violates an employer policy, the issue in unemployment compensation case is whether the employer's rule or policy has a reasonable relationship to the work to be performed, and if so, whether there has been an intentional violation or willful disregard of that rule or policy.

4. Unemployment Compensation.
   Unemployment compensation claimant's job description and her testimony provided substantial evidence to support the appeals referee's findings that employer's certification requirement applied to claimant, who worked as a drug court administrator, and that this requirement was reasonably related to claimant's employment for purposes of determining whether claimant's failure to maintain a certification required by employer constituted misconduct disqualifying her from receipt of unemployment compensation. NRS 612.385.
5. Unemployment Compensation.
   The court of appeals reviews a decision denying unemployment benefits to determine whether the administrative agency acted arbitrarily or capriciously, and generally, the court looks to whether substantial evidence supports the agency's decision.
6. Unemployment Compensation.
   In unemployment compensation case, the court of appeals reviews questions of law de novo, but fact-based legal conclusions are entitled to deference.
7. Unemployment Compensation.
   Substantial evidence to support agency's decision granting or denying unemployment compensation is that which a reasonable mind might accept as adequate to support a conclusion.
8. Unemployment Compensation.
   Initially, the employer bears the burden of showing by a preponderance of the evidence that unemployment compensation claimant engaged in disqualifying misconduct, and if employer meets this burden, the burden then shifts to the former employee to demonstrate that the conduct cannot be characterized as misconduct, by explaining the conduct and showing that it was reasonable and justified under the circumstances. NRS 612.385.
9. Unemployment Compensation.
   In unemployment compensation case, findings of misconduct present mixed questions of law and fact, which are generally given deference unless they are not supported by substantial evidence. NRS 612.385.
10. Unemployment Compensation.
    Burden of demonstrating a good-faith effort to satisfy license requirement is on the unemployment compensation claimant, and claimant does not meet this burden unless claimant supports a good-faith claim with evidence; however, claimant may meet this burden by providing evidence that an unforeseen circumstance thwarted a good-faith attempt to satisfy a license requirement.
11. Unemployment Compensation.
    Employment Security Division met its initial burden of showing that unemployment compensation claimant's failure to maintain her certification, which was required for her drug court administrator position, constituted disqualifying misconduct, and burden shifted to claimant who failed to provide evidence demonstrating that she made a reasonable, good-faith attempt to comply with employer's certification requirement and that her failure to comply was justified; claimant had ample notice of the law pertaining to certification and of employer's certification requirement, but failed to take steps to ensure that she fulfilled this requirement on time, despite having ten years in which to obtain her bachelor's degree, record was devoid of any documentary evidence of claimant's progress as she worked toward her degree, and nothing in the record demonstrated that claimant

sought extension to complete her degree until after the ten-year period had already expired. NRS 612.385.

12. Administrative Law and Procedure.
The court of appeals is generally bound by the fact-based legal conclusions made by the administrative agency, such that, even if the court disagreed with the agency's finding, the court would be powerless to set it aside if it is supported by substantial evidence.

13. Administrative Law and Procedure.
The court of appeals cannot pass on the credibility of a witness, and thus, the court must examine the record that was before the administrative agency to ascertain whether the agency acted arbitrarily or capriciously.

14. Unemployment Compensation.
The court of appeals cannot substitute its judgment for that of the appeals referee regarding the weight of evidence in unemployment compensation case.

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Gibbons, C.J.:

[Headnote 1]

The Nevada Legislature enacted unemployment compensation laws "to provide temporary assistance and economic security to individuals who become involuntarily unemployed." *Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006) (internal quotation marks omitted). Pursuant to NRS 612.385, a terminated employee is ineligible to receive unemployment compensation benefits if the employer terminated the employee for misconduct connected with the employee's work. In this appeal, we consider whether an employee's failure to maintain a certification required by the employer constituted misconduct within the meaning of NRS 612.385. Here, because the employee did not provide sufficient evidence to demonstrate that she made a reasonable, good-faith attempt to maintain her certification, we conclude the employee's conduct amounted to disqualifying misconduct. Therefore, under the particular circumstances of this case, we affirm the district court's decision denying judicial review of the administrative agency's denial of appellant's application for unemployment benefits.

BACKGROUND

Appellant Nadine Goodwin first enrolled at Truckee Meadows Community College (TMCC) in 1999. In January 2001, Goodwin received a certification as an alcohol and drug abuse counselor intern, but the record does not reveal when she initially applied for her certification. Under state regulations applicable to alcohol and drug abuse counselor interns, a certified intern must complete the

education requirements to become a certified counselor within ten years of the date on which the person applied for intern certification. Nevada Administrative Code (NAC) 641C.290(5). Among other requirements, the intern must have a bachelor's degree to become a certified counselor. NRS 641C.390(1)(c).

In September 2003, Bristlecone Family Resources,[1] an agency that provides treatment programs for drug, alcohol, and gambling abuse or addiction, as well as family counseling services, hired Goodwin as a counselor intern. At some later but unknown date, Goodwin transitioned into an adult drug court administrator role, where she remained until Bristlecone terminated her employment.

In 2006, Goodwin signed Bristlecone's job description for her position acknowledging that, as a drug court administrator, she was "[r]esponsible to follow all necessary protocol to secure and maintain . . . Intern . . . Counselor status when appropriate." Goodwin also acknowledged that her job description included "[p]rovid[ing] direct client services, which [could] include individual counseling [and] group counseling." Additionally, Bristlecone circulated a letter informing all staff that, effective March 1, 2008, "[t]he Counselor Intern is responsible for maintaining proper licensure." The scope of the letter was "[a]ll staff" and specifically listed as responsible for compliance the "Clinical Director, Clinical Supervisors, [and] Human Resources." The letter warned that failure to maintain proper licensure may result in termination.

Goodwin received an associate's degree from TMCC in 2010, 11 years after she first enrolled. She then transferred her TMCC credits to Walden University to apply toward a bachelor's degree. Nothing in the record establishes how many credits Goodwin accumulated at TMCC or how many credits she transferred to Walden.

On May 6, 2011, Wendy Lay, Executive Director of the State of Nevada Board of Examiners for Alcohol, Drug & Gambling Counselors (the Board), informed Goodwin by letter that Goodwin's intern certification would expire and she would be unable to renew it unless she completed her bachelor's degree by June 30, 2011. This letter was the first communication from the Board regarding Goodwin's certification expiration, and it occurred at least five months after the ten-year time period in NAC 641C.290(5) had already expired.

Goodwin responded to Lay in an email and stated, among other things: "I understand I cannot do any substance abuse counseling and I won't." Goodwin then sought an extension of her certification from the Board at its July 8, 2011, meeting; however, the Board denied her request. As a result, the Board confirmed the expiration of Goodwin's intern certification. Bristlecone terminated Goodwin the same day, citing her failure to maintain an intern certification or

[1]Bristlecone Family Resources is not a party to this appeal.

obtain a counselor certification as required by Bristlecone's employment policy.

Goodwin applied to respondent State of Nevada, Department of Employment, Training & Rehabilitation, Employment Security Division (ESD) for unemployment benefits.[2] ESD denied Goodwin's claim on the ground that she was terminated for misconduct connected with her work. Goodwin appealed ESD's decision to an appeals referee who conducted a hearing to determine whether Goodwin's conduct disqualified her from receiving unemployment benefits.

Goodwin testified at the hearing that she was five classes shy of attaining her bachelor's degree when Bristlecone terminated her. Goodwin asserted that she took the maximum number of classes offered by Walden (two classes every six weeks) but took at most three classes per semester at TMCC over the 11-year period of enrollment. She did not submit any documentary evidence to the appeals referee supporting her progress or the number of courses she took at any given time at TMCC. Goodwin explained to the appeals referee that she did not take more classes at TMCC because she worked full time and bore substantial responsibilities as a single mother of three children, ages 26, 24, and 19, at the time she was terminated.

Goodwin also stated she had relied on her conversations with Lay in believing the Board would grant her an extension. She testified that Lay advised her to provide transcripts to the Board to demonstrate her scholastic progress because of how close she was to completion. The record does not contain evidence that Goodwin submitted the transcripts to the Board. Additionally, Goodwin testified that she completed over 21,000 hours of work as a counselor intern.

The appeals referee found that Goodwin used nine years of the designated ten-year period to earn her associate's degree, leaving only one year to complete her bachelor's degree. The appeals referee also found that Goodwin's failure to maintain her intern certification violated Bristlecone's employment policy. Further, the appeals referee summarily found that Goodwin's conduct included an element of wrongfulness.

ESD's Board of Review denied Goodwin's appeal of the appeals referee's decision without comment. Goodwin then sought judicial review in the district court. The district court reviewed the prior proceedings and concluded Goodwin's failure to attain her bachelor's degree within ten years constituted misconduct connected with her work. The district court therefore denied Goodwin's petition for judicial review. This appeal followed.

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[2]Cynthia Jones and Renee Olson are also named as respondents in this appeal as former and present administrators, but their role in the underlying matter is unclear from the record, and neither has participated in the proceedings below or on appeal.

ANALYSIS

Goodwin argues that degree completion constitutes off-duty conduct. As such, she contends the appeals referee could only find it to be disqualifying misconduct if ESD established that the conduct violated a Bristlecone policy, which reasonably related to her job, and that she intentionally or willfully violated the policy. With regard to the last consideration, Goodwin argues that her failure to obtain her degree, and thus to maintain her certification, was not willful or intentional because she continuously pursued her education and maintained contact with the Board to try to obtain an extension when she failed to complete the education requirements in time.

ESD does not dispute that the behavior at issue constituted off-duty conduct, but argues that the policy regulating such behavior had a reasonable relationship to Goodwin's work. Moreover, ESD contends that Goodwin deliberately ignored the approaching deadline for obtaining her degree, and thus, that her failure to maintain her certification constituted a willful or intentional violation of Bristlecone's policy.

[Headnote 2]

We review an administrative agency's decision to determine whether it was arbitrary or capricious or an abuse of discretion. NRS 233B.135(3)(f). The analysis of whether misconduct disqualifies an employee from receiving unemployment benefits is separate from the analysis of whether misconduct warrants termination and requires the trier of fact to apply the legal definition of misconduct to the factual circumstances of the case. *Bundley*, 122 Nev. at 1446, 148 P.3d at 755.

[Headnote 3]

When off-duty conduct violates an employer policy, the issue is whether "the employer's rule or policy has a reasonable relationship to the work to be performed; and if so, whether there has been an intentional violation or willful disregard of that rule or policy." *Clevenger v. Nev. Emp't Sec. Dep't*, 105 Nev. 145, 150, 770 P.2d 866, 868 (1989). The intentional violation or willful disregard requirement is consistent with the general definition of misconduct in the unemployment benefits context, which provides that misconduct is "a deliberate violation or disregard on the part of the employee of standards of behavior which his employer has the right to expect." *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968) (internal quotation marks omitted).

Thus, the threshold questions we must address are whether Bristlecone had a policy requiring Goodwin to maintain certification as an adult drug court administrator, and if so, whether that policy had a reasonable relationship to the work performed. We answer both questions in the affirmative.

Goodwin was required to maintain her certification

[Headnote 4]

Goodwin initially argues that ESD failed to show that Bristlecone's policy required her to be certified in order to perform her job as a drug court administrator. ESD counters that Bristlecone required Goodwin to be certified, both by Bristlecone's policy and by law. In addition, ESD argues Bristlecone hired Goodwin as a drug counselor and, accordingly, she was subject to Bristlecone's employment policy requiring all drug counselors to maintain certification.

[Headnotes 5-7]

This court reviews a decision denying unemployment benefits to determine whether the administrative agency acted arbitrarily or capriciously. *See McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). Generally, this court looks to whether substantial evidence supports the agency's decision. *Bundley*, 122 Nev. at 1445, 148 P.3d at 754. More particularly, we review questions of law de novo, but fact-based legal conclusions are entitled to deference. *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion."[3] *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993).

NRS Chapter 641C governs intern certification for alcohol and drug counseling. Under that chapter, it is a misdemeanor offense for a person to "engage in the practice of counseling alcohol and drug abusers" without a proper certification. NRS 641C.900; NRS 641C.950. Thus, if Goodwin's job duties required her to practice counseling, and she engaged in any counseling whatsoever, then the law required her to maintain her intern certification or to obtain counselor certification. *See* NRS 641C.900; NRS 641C.950.

The appeals referee concluded that Bristlecone's employment policy required Goodwin to maintain her certification. At the hearing, ESD submitted into evidence Bristlecone's written employment policy, which stated that adult and family drug court administrators are required to provide direct client services, including individual or group counseling. Additionally, the policy stated that Bristlecone's drug court administrators must maintain certified intern status where appropriate. Moreover, Goodwin testified that she engaged in 21,000 hours of counseling while employed at Bristlecone.

Therefore, we conclude Goodwin's job description and her testimony provide substantial evidence to support the appeals referee's findings that Bristlecone's certification requirement applied to Goodwin, who worked as a drug court administrator, and that

[3]The Nevada Revised Statutes similarly define substantial evidence as "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4), *amended by* 2015 Nev. Stat., ch. 160, § 11, at 711.

this requirement was reasonably related to Goodwin's employment. Thus, the issue of whether Goodwin's behavior constituted an intentional violation or willful disregard of that policy must now be addressed. *See Clevenger*, 105 Nev. at 150, 770 P.2d at 868.

Failure to maintain required certification constituted disqualifying misconduct

[Headnotes 8, 9]

Initially, the employer bears the burden of showing by a preponderance of the evidence that the employee engaged in disqualifying misconduct under NRS 612.385. *Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. If the employer meets this burden, the burden then "shifts to the former employee to demonstrate that the conduct cannot be characterized as misconduct within the meaning of NRS 612.385, for example, by explaining the conduct and showing that it was reasonable and justified under the circumstances." *Id.* at 1448, 148 P.3d at 756. Findings of misconduct present mixed questions of law and fact, which are generally given deference unless they are not supported by substantial evidence. *Garman v. State, Emp't Sec. Dep't*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986).

The Nevada Supreme Court has generally determined that an employee's violation of an employment policy is an intentional violation or willful disregard when the employee knows of the policy yet deliberately chooses not to follow the policy. *See, e.g.*, *Fremont Hotel & Casino v. Esposito*, 104 Nev. 394, 398, 760 P.2d 122, 124 (1988) (concluding that a cocktail server's refusal to take a drug and alcohol test after being reminded that the union-employer contract required testing was an intentional violation of that policy); *Barnum*, 84 Nev. at 42, 436 P.2d at 222 (concluding that an employee driver intentionally violated a company policy when he deliberately removed a mandated safety tracking device from a company truck despite knowing the device was required on all trips).

The Nevada Supreme Court has also determined that a substantial disregard of the employer's interest may be demonstrated when the violation of an employment policy is the result of a lack of action. For example, in *Kraft v. Nevada Employment Security Department*, 102 Nev. 191, 194-95, 717 P.2d 583, 585 (1986), the court concluded that an employee's failure to notify his employer of his absence in accordance with the employer's notice policy constituted disqualifying misconduct. There, the employee failed to notify his employer that he would not be at work when his car broke down on the way to work. *Id.* at 192-93, 717 P.2d at 584. The employee in *Kraft* explained that he did not notify his employer of his absence because there were not any telephones in the immediate vicinity. *Id.* The court, however, concluded that substantial evidence supported the agency's finding that a telephone was probably nearby and that the employee's failure to make any effort to locate a telephone for

over three hours constituted misconduct. *Id.* at 194-95, 717 P.2d at 584-85.

In analyzing the employee's circumstances in *Kraft*, the court stated that "there must be a point when inaction can only be viewed as the product of indifference." *Id.* at 194, 717 P.2d at 585. The court declared that "it is the duty of the employee to have regard for the interests of his employer and for his own job security . . . . Although circumstances may vary this duty, good faith on the part of the employee must always appear." *Id.* (internal quotations omitted). The court concluded the employee failed to act reasonably and in good faith under the circumstances; therefore, his inaction constituted disqualifying misconduct. *Id.* at 194-95, 717 P.2d at 585.

While the Nevada Supreme Court has never addressed whether an employee's failure to maintain a certification in accordance with an employer policy constitutes disqualifying misconduct, other jurisdictions have. *See, e.g.*, *Holt v. Iowa Dep't of Job Serv.*, 318 N.W.2d 28 (Iowa Ct. App. 1982); *Chacko v. Commonwealth, Unemployment Comp. Bd. of Review*, 410 A.2d 418 (Pa. Commw. Ct. 1980); *Hicks v. Commonwealth, Unemployment Comp. Bd. of Review*, 383 A.2d 577 (Pa. Commw. Ct. 1978). As a Pennsylvania court stated, "academic failure after a good-faith effort would not be willful misconduct," but where the employee accepted a position knowing doctoral studies were required, refusing to pursue those studies without good reason constituted, among other things, an "intentional and substantial disregard" inimical to the employer's interest and was deemed willful misconduct. *Millersville State Coll., Pa. Dep't of Educ. v. Commonwealth, Unemployment Comp. Bd. of Review*, 335 A.2d 857, 860 (Pa. Commw. Ct. 1975).[4]

[Headnote 10]

The burden of demonstrating a good-faith effort is on the employee; the employee does not meet this burden unless the employee supports a good-faith claim with evidence. *See Chacko*, 410 A.2d at 419; *see also Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. The employee may, however, meet this burden by providing evidence that an unforeseen circumstance thwarted a good-faith attempt to satisfy a license requirement. *See Holt*, 318 N.W.2d at 30 (concluding that failure to comply with an employer's license requirement

[4]Goodwin argues, unconvincingly, that Pennsylvania applies its misconduct statute differently than Nevada because Pennsylvania denies unemployment benefits to employees terminated due to incarceration, whereas Nevada does not. We reject this argument because Pennsylvania does not apply a bright-line rule; rather, the misconduct determination is based on the circumstances of each case. *See Wertman v. Commonwealth, Unemployment Comp. Bd. of Review*, 520 A.2d 900, 903 (Pa. Commw. Ct. 1987) (distinguishing cases where an employee incarcerated due to an inability to post bail cannot be said to have engaged in willful misconduct, whereas an employee incarcerated as a result of a conviction could yield a finding of willful misconduct).

was not a willful disregard or intentional violation of the requirement because the employee's spouse became unexpectedly ill requiring the employee to take care of the couple's four children).

[Headnote 11]

We find the rationale behind these decisions instructive when considered in light of existing Nevada law regarding misconduct in the unemployment benefits context. In this case, substantial evidence supports the conclusion that Goodwin had ample notice of the law pertaining to certification and of Bristlecone's certification requirement, but failed to take steps to ensure that she fulfilled this requirement on time, despite having ten years in which to obtain her degree. Given the clear requirement and the length of time available to comply, we conclude that ESD met its initial burden of showing that Goodwin's failure to maintain her certification constituted misconduct. *See Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. Thus, the burden shifted to Goodwin to provide evidence demonstrating that she made a reasonable, good-faith attempt to comply with the certification requirement and that her failure to comply was justified under the circumstances of this case.

[Headnotes 12, 13]

Implicit in the appeals referee's decision concluding that Goodwin's actions constituted misconduct is the finding that the failure to take sufficient courses to ensure that she graduated on time was neither reasonable nor in good faith under the circumstances. We are generally bound by the fact-based legal conclusions made by the administrative agency, such that, "[e]ven if we disagreed with [the agency's] finding, we would be powerless to set it aside" if it is supported by substantial evidence. *See Kraft*, 102 Nev. at 194, 717 P.2d at 585 (citing *McCracken*, 98 Nev. at 31, 639 P.2d at 553). Further, we cannot pass on the credibility of a witness. *Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973). Thus, we must examine the record that was before the administrative agency to ascertain whether the agency acted arbitrarily or capriciously. *Bundley*, 122 Nev. at 1444, 148 P.3d at 754.

Here, Goodwin's primary explanation for not completing the coursework was due to her work and family responsibilities. Goodwin, however, did not assert, and the record does not contain evidence showing, that she did not understand her family responsibilities at the time she applied for her intern certification or when she accepted her position with Bristlecone, such that she would not have known that she would need to balance those responsibilities in order to ensure her timely graduation. *Cf. Holt*, 318 N.W.2d at 30. Nor did she provide sufficient evidence to demonstrate that her progress towards her degree constituted a reasonable, although ultimately unsuccessful, attempt to obtain her degree in time to ensure her continuous compliance with the certification requirement.

In particular, Goodwin testified that she was only able to take, at most, three courses per semester at TMCC and could not work part time to allow her to take more courses. Goodwin, however, failed to provide any evidence demonstrating the number of courses she took at any given time throughout her tenure at TMCC; indeed, the record is devoid of any documentary evidence of her progress as she worked toward her degree. Therefore, there was a lack of evidence on which the appeals referee could have found that Goodwin made a reasonable, good-faith effort to graduate on time. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (explaining that a lack of evidence may provide a basis for upholding an administrative agency's decision under the substantial evidence standard).

Moreover, Goodwin testified that she finally received her associate's degree 11 years after initially enrolling at TMCC (which was also 9 years after receiving her counselor intern certification). The appeals referee determined that Goodwin should have been focusing her efforts on her bachelor's degree. When she finally transferred to Walden University, only one year remained before her certification expired. Goodwin provided no evidence showing how many credits she earned while attending TMCC or how many credits Walden accepted to apply towards her bachelor's degree.

Further, although Goodwin asserts that she maintained contact with the Board and thought she would receive an extension, nothing in the record demonstrates that Goodwin sought such an extension until after the ten-year period had already expired. Thus, this effort does not show that Goodwin took timely and reasonable steps to try to comply with the certification requirement.

[Headnote 14]

We cannot substitute our judgment for that of the appeals referee regarding the weight of evidence. *See Bundley*, 122 Nev. at 1445, 148 P.3d at 754. In this case, Goodwin presented insufficient evidence on which the appeals referee could conclude she made a reasonable, good-faith attempt at meeting the certification requirement. *See Wright*, 121 Nev. at 125, 110 P.3d at 1068. Thus, we are bound by law to uphold the appeals referee's determination. *See Kraft*, 102 Nev. at 194, 717 P.2d at 585.

CONCLUSION

On this record, we conclude that substantial evidence supports the appeals referee's finding that Goodwin's failure to comply with Bristlecone's certification policy amounted to a substantial disregard of a reasonable employer policy—an action that amounted to disqualifying misconduct. *See Garman*, 102 Nev. at 566, 729 P.2d at 1337. Further, because Goodwin failed to provide sufficient evidence regarding the progress she made in attempting to timely graduate, we conclude she did not satisfy her burden of proving she

made a reasonable and good-faith attempt to meet the employer's requirements. Accordingly, because we conclude the administrative agency's decision was not arbitrary, capricious, or an abuse of discretion, NRS 233B.135(3)(f), we affirm the district court's order denying judicial review.

TAO and SILVER, JJ., concur.

NEVADA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF PAROLE AND PROBATION, APPELLANT, *v.* KENNETH SCOTT COLEY, AKA KING COLEY, RESPONDENT.

No. 67864

March 3, 2016 368 P.3d 758

Appeal from a district court order granting a writ of mandamus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Former probationer petitioned for writ of mandamus, seeking to compel Division of Parole and Probation to grant his application to change his probation discharge status from dishonorable to honorable. The district court granted writ of mandamus. Division appealed. The supreme court, PICKERING, J., held that: (1) probationer could not receive mandamus relief to compel Division to act under sunsetted statute, and (2) Division did not abuse its discretion.

Reversed.

Adam Paul Laxalt, Attorney General, and *Adam D. Honey*, Deputy Attorney General, Carson City, for Appellant.

Gentile, Cristalli, Miller, Armeni & Savarese and *Paola M. Armeni* and *Colleen E. McCarty*, Las Vegas, for Respondent.

1. MANDAMUS.
   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.
2. MANDAMUS.
   Mandamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously. NRS 34.160.
3. COURTS.
   An exercise of discretion is considered arbitrary if it is founded on prejudice or preference rather than on reason and capricious if it is contrary to the evidence or established rules of law.
4. MANDAMUS.
   The burden of proof to show the capriciousness in the exercise of discretion is on the applicant seeking a writ of mandamus.

5. MANDAMUS.
   A district court's decision regarding a petition for a writ of mandamus is generally reviewed for an abuse of discretion.
6. MANDAMUS.
   To the extent the petition for a writ of mandamus depends on statutory interpretation, review is de novo.
7. MANDAMUS; SENTENCING AND PUNISHMENT.
   Former probationer could not receive mandamus relief to compel Division of Parole and Probation to grant his application to change probation discharge status, which probationer submitted after statute granting Division authority to change probation discharge status had sunsetted; even though Division mistakenly processed two other applications under regulations, law did not require Division to accept applications after statute and authority upon which regulations were premised sunsetted, Division could not have abused its discretion in denying probationer's application as no authority granted Division discretion, and Division's processing of other applications was ultra vires. NRS 34.160; NAC 213.720 *et seq.*
8. SENTENCING AND PUNISHMENT.
   Division of Parole and Probation did not abuse its discretion in denying former probationer's application to change probation discharge status from dishonorable to honorable based on defendant's failure to complete community service, which was same reason for his original dishonorable discharge; assuming Division had authority to exercise discretion to change discharge status under sunsetted statute, defendant was not automatically eligible for change in discharge under statute, and Division consistently only granted applications if dishonorable discharge resulted from nonpayment of restitution or supervision fees and consistently denied applications if dishonorable discharge resulted from other factors. NAC 213.720 *et seq.*

Before HARDESTY, SAITTA and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

"In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority pursuant to which the function was assigned." NRS 233B.040(1). Here, we are asked to decide whether mandamus relief is proper to compel the Division of Parole and Probation to accept an application for a change in probation discharge status under a set of regulations adopted pursuant to a statute that sunsetted in 2008. We conclude that the regulations upon which respondent Kenneth Coley relies are invalid, rendering mandamus relief inappropriate. Accordingly, we reverse the district court's order granting Coley's writ of mandamus.

I.

A.

In 2005, the Legislature enacted Section 16 of Senate Bill 445 as a three-year experiment to determine whether allowing "in-

dividuals who were dishonorably discharged [from probation] because of nonpayment of restitution, or nonpayment of their supervisory fees," to apply for a change in their discharge status to "honorable," as long as they made a good effort to pay restitution, would help make victims whole again, and pay down the large amount of outstanding restitution. Hearing on S.B. 445 Before the Assembly Judiciary Comm., 73d Leg. (Nev., May 12, 2005). Section 16 provided three criteria that render an individual ineligible to apply for a change in discharge status:

> (a) The fact that he committed a new crime, other than a violation of a traffic law for which he was issued a citation, during the period of his probation or parole;
>
> (b) The fact that his whereabouts were unknown at the time of his discharge from probation or parole; or
>
> (c) Any incident involving his commission of a violent act or an act that threatened public safety during the period of his probation or parole.

2005 Nev. Stat., ch. 476, § 16(2), at 2360.

Section 16 directed the Division of Parole and Probation (Division) to adopt implementing regulations:

> [A] person who was dishonorably discharged from probation or parole before the effective date of this section, until July 1, 2008, may apply to the Division of Parole and Probation of the Department of Public Safety, *in accordance with the regulations adopted by the Division pursuant to the provisions of this section* . . . .

2005 Nev. Stat., ch. 476, § 16(1), at 2360 (emphasis added). On May 4, 2006, the Division adopted regulations for a "Change of Dishonorable Discharge to Honorable Discharge." *See* NAC 213.720 *et seq.* The regulations specifically incorporate Section 16, not only in the section titles, but also in the text. For example, NAC 213.730 is titled " 'Applicant' defined. (§ 16 of ch. 476, Stats. 2005)." Further, the text of NAC 213.730 defines an applicant as "a person who submits an application to the Division to change his or her dishonorable discharge from probation or parole to an honorable discharge from probation or parole *in accordance with the provisions of section 16 of chapter 476, Statutes of Nevada 2005*." (Emphasis added.)

As a three-year experiment, Section 16 included a "sunset" clause that rendered Section 16 ineffective after July 1, 2008. Although Section 16 included sunsetting language, the regulations adopted to implement Section 16, NAC 213.720 *et seq.*, do not.

At the end of the three years, Section 16, subsection 5, required the Division to send a written report to the Legislative Counsel Bureau including statistics about the program and whether the Divi-

sion recommends that the program continue. 2005 Nev. Stat., ch. 476, § 16(5), at 2361. On December 8, 2008, the Division sent its written report, detailing the number of applications received, granted, denied, the reasons why, and its recommendation. Of the nine applications completed, only three individuals received a change in discharge. The other six individuals were denied a change in discharge because "the Dishonorable Discharges resulted from factors *in addition to* non-payment of Restitution and/or Supervision fees, which were not addressed in the regulation change." Nevertheless, the Division concluded: "This regulation, with the possibility of receiving additional restitution due to victims or fees due to the Division, should be continued." Despite the Division's recommendation that Section 16 continue, the Legislature never codified Section 16 into the Nevada Revised Statutes.

B.

In 2014, respondent Kenneth Coley applied to the Division for a change in his probation discharge status. In accordance with the instructions and application given by the Division, which referenced Section 16, Coley submitted his application and financial plan to satisfy his outstanding fees owed to the Division. However, the Division denied Coley's request because of his failure to complete community service, which was the same reason for his original dishonorable discharge. After denying Coley's application, the Division changed its website instructions to include that a person is ineligible if he or she fails to satisfy a condition of their probation, such as community service. Coley confronted the Division about this change, and it replied that Section 16 is no longer applicable law. The Division expressed that only offenders who were dishonorably discharged for unpaid supervision fees and restitution could qualify for a change of status.

Thereafter, Coley filed a petition for writ of mandamus seeking to compel the Division to comply with Section 16 and grant his application for a request of change of probation discharge status. The Division maintained that Section 16 expired in 2008. Coley argued that the Division acted arbitrarily and capriciously in denying his application because the Division granted two other applications after 2008.[1] The district court agreed with Coley and granted his petition, ordering the Division to proceed with Coley's application, allow him to make payments toward his fees, and, if he satisfies his financial obligations, to recommend a change in his discharge status to honorable.

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[1]The Division admitted to granting two applications after Coley's application. However, "their only short coming in their dishonorable discharge was lack of restitution."

II.

[Headnotes 1-6]

District courts have the "power to issue writs of Mandamus." Nev. Const. art. 6, § 6(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." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. "Mandamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (citation omitted). An exercise of discretion is considered arbitrary if it is "founded on prejudice or preference rather than on reason" and capricious if it is "contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (quoting *Arbitrary* and *Capricious*, *Black's Law Dictionary* (9th ed. 2009)). "The burden of proof to show the capriciousness is on the applicant." *Gragson v. Toco*, 90 Nev. 131, 133, 520 P.2d 616, 617 (1974). Generally, this court reviews a district court's decision regarding a petition for a writ of mandamus for an abuse of discretion. *Veil v. Bennett*, 131 Nev. 179, 180-81, 348 P.3d 684, 686 (2015). To the extent the petition depends on statutory interpretation, though, our review is de novo. *State v. Barren*, 128 Nev. 337, 340, 279 P.3d 182, 184 (2012).

[Headnote 7]

Here, the district court found the Division's denial of Coley's application arbitrary and capricious because it continued to process applications after July 1, 2008, yet denied Coley's "application on the basis of disqualifying factors not found in Section 16 and NAC 213.720–NAC 213.790." Procedurally, the district court erred in granting Coley mandamus relief because the law does not require the Division to accept applications. Section 16 and NAC 213.720 *et seq.* are no longer valid law because Section 16, the statutory authority upon which the regulations were premised, sunsetted in 2008. *See* 1A Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Constr.* § 31:2 (7th ed. 2009) ("The legislative act is the charter of the administrative agency and administrative action beyond the authority conferred by the statute is ultra vires. . . . Regulations which are not in harmony with the plain language of the underlying statute cannot serve as a guide in statutory construction."); *see also* NRS 233B.040(1) ("In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority pursuant to which the function was assigned.").

In this case, NAC 213.720 *et seq.* derive from and depend on Section 16, as demonstrated by the citation to Section 16 in the title of each code section. *See* NRS 233B.040(2) ("Every regulation

adopted by the agency must include: (a) A citation of the authority pursuant to which it, or any part of it, was adopted . . . ."). Because Section 16 sunsetted in 2008, the Division did not have the authority to continue to accept applications pursuant to NAC 213.720 *et seq.* after that date.[2] Nevertheless, the Division mistakenly accepted a total of three applications post-2008—Coley's application and two other applications, which were granted.

[Headnote 8]

We must decide, therefore, whether the Division's mistake in processing two applications under invalid regulations can sustain the district court's holding that the Division acted arbitrarily and capriciously in denying Coley's application. We conclude it cannot and that the Division did not abuse its discretion because no authority existed that granted the Division any discretion. The Division's processing of the applications post-2008 was ultra vires. Mandamus relief is, therefore, inappropriate because it would require the Division to process an application that it lacks authority to process. Even adopting the district court's view, however, that the Division exercised discretion when it continued to process applications, the district court erred because the Division did not act arbitrarily or capriciously.

In resolving the petition below, the district court committed two further errors. By negative implication, the district court incorrectly interpreted Section 16's disqualifying factors to mean that because Coley's discharge was not based on one of the disqualifying factors, he was automatically eligible for a change in discharge. This interpretation frustrates the legislative purpose behind Section 16, which was "for individuals who were dishonorably discharged because of nonpayment of restitution, or nonpayment of their supervisory fees." Hearing on S.B. 445 Before the Assembly Judiciary Comm., 73d Leg. (Nev., May 12, 2005). Section 16 was not created as a mechanism to allow individuals to avoid court-imposed probation obligations, other than restitution or payment of fees, such as community service or drug court.

Second, the Division did not act arbitrarily or capriciously in denying Coley's application. Even before the sunset provision of Section 16 went into effect, the Division consistently denied applicants whose "Dishonorable Discharges resulted from factors *in addition to* non-payment of Restitution and/or Supervision fees." Moreover, the district court relied heavily on the Division's admission that it granted two applications after 2008 but refused to grant Coley's ap-

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[2]Moreover, NRS Chapter 176A does not provide legal authority for changing one's discharge status. Rather, it specifies the criteria for receiving an honorable discharge. *See* NRS 176A.850; *infra* note 3.

plication. However, the Division distinguished those applications at the hearing, stating that those dishonorable discharges only resulted from failure to pay restitution, not the failure to complete any other probation obligations. Therefore, the Division has consistently only granted applications if the dishonorable discharge resulted from nonpayment of restitution or supervision fees and has consistently denied applications if the dishonorable discharge resulted from other factors.

This consistent treatment hardly rises to the level of being "founded on prejudice or preference rather than on reason" or "contrary to the evidence or established rules of law." *Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780 (quotations and citations omitted). Rather, the denial of Coley's application was based on reason—Coley's dishonorable discharge resulted from factors *in addition to* the failure to pay restitution or supervision fees. This reason is not contrary to established rules of law, as Section 16 does not state that if a dishonorable discharge was not based on one of the disqualifying factors, it must be granted.[3] Further, the Division's denial of Coley's application was not contrary to established rules of law because the law under which the Division had authority to process the applications sunsetted in 2008.

III.

As the burden of proof is on Coley to establish that the Division acted arbitrarily or capriciously, *Gragson*, 90 Nev. at 133, 520 P.2d at 617, Coley has failed to meet that burden for extraordinary relief. Despite the procedural barrier to mandamus relief, Coley has not shown that the Division was granting applications for individuals who failed to satisfy probation obligations, such as community service. Rather, the record before this court clearly evinces that the Division consistently denied such applications. Thus, the district

[3]This interpretation is consistent with NRS 176A.850(1), which lists when an individual may be granted an honorable discharge from probation:

> 1. A person who:
> (a) *Has fulfilled the conditions of probation* for the entire period thereof;
> (b) Is recommended for earlier discharge by the Division; or
> (c) Has demonstrated fitness for honorable discharge *but because of economic hardship*, verified by the Division, has been unable to make restitution as ordered by the court,
> may be granted an honorable discharge from probation by order of the court.

(Emphases added.) NRS 176A.850 demonstrates that the Legislature intended individuals to satisfy their probation obligations to be eligible for an honorable discharge. *See also* NRS 176A.870(3) (stating that an individual who "failed to qualify for an honorable discharge as provided in NRS 176A.850 is not eligible for an honorable discharge and must be given a dishonorable discharge").

court erred in concluding that the Division acted arbitrarily and capriciously, such that mandamus relief was necessary. We, therefore, reverse the district court's grant of mandamus relief.

HARDESTY and SAITTA, JJ., concur.

KERSTAN MICONE, NKA KERSTAN HUBBS, APPELLANT, *v.* MICHAEL MICONE, RESPONDENT.

No. 67934

March 3, 2016 368 P.3d 1195

Appeal from a post-divorce decree order modifying child custody and support. Eighth Judicial District Court, Family Court Division, Clark County; Rena G. Hughes, Judge.

Divorced father filed motion to change custody, seeking primary physical custody of couple's minor daughter. The district court awarded primary physical custody to daughter's paternal grandparents. Divorced mother appealed. The supreme court, PICKERING, J., held that the district court abused its discretion in awarding custody to daughter's nonparty grandparents.

Affirmed in part, reversed in part, and remanded.

Black & LoBello and *John D. Jones*, Las Vegas, for Appellant.

Prokopius & Beasley and *Donn W. Prokopius*, Las Vegas, for Respondent.

1. CHILD SUPPORT.
   The supreme court would reject divorced mother's issue-preclusion-based challenge to the district court's order barring modification of certain child support arrearages, in context of divorced father's motion to change custody, in which he sought primary physical custody of daughter; order relied on video transcript from hearing, which mother failed to include in record on appeal.
2. CHILD CUSTODY; CONSTITUTIONAL LAW.
   The district court abused its discretion in awarding primary physical custody of couple's minor daughter to her paternal grandparents; grandparents were not parties to nor intervenors in action, unilateral award of custody to nonparty grandparents failed to provide notice and opportunity to be heard required by due process to divorced father and divorced mother, neither father nor mother briefed or argued whether awarding custody to grandparents was justified or would be in daughter's best interest, and the district court failed to make specific findings that awarding custody to either father or mother would have been detrimental to daughter and that award of custody to grandparents was in daughter's best interest. U.S. CONST. amend. 14; NRS 125.500(1) (Repealed).

3. Child Custody.
   The supreme court reviews a child custody determination for an abuse of discretion.
4. Child Custody; Constitutional Law.
   If the district court awards custody to a nonparent that neither brought nor intervened in the custody action, the parties' due process rights may be violated. U.S. Const. amend. 14.
5. Child Custody.
   To be awarded custody of a minor child, a nonparent must either bring or intervene in a custody suit and present evidence to overcome the parental preference.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

This is an appeal from a district court order modifying a child custody and support decree to change primary physical custody from the child's mother to the child's grandparents. The grandparents were not parties to the action, and the district court did not notify the parents that the grandparents were being considered as a custodial option. Without joinder of the grandparents, notice to the parents that the grandparents might be awarded custody, and the requisite findings to overcome the parental preference, the district court's order cannot stand. We therefore reverse in part, affirm in part, and remand.

I.

In 2009, appellant Kerstan Micone and respondent Michael Micone divorced. The parties were awarded joint legal custody of their two minor children, while Kerstan received primary physical custody of both children. The divorce decree provided that after the 2009 school year, the children would attend public school unless both parents agreed to pay for private school. The Micones' daughter (I.M.) received poor grades in Las Vegas public schools, possibly due to I.M.'s dyslexia, so Michael agreed to pay half of I.M.'s private school tuition if she would attend private school in Reno. Kerstan and Michael agreed that it was in I.M.'s best interest for her to live during the school year with her paternal grandparents in Reno. Thereafter, in August 2013, I.M. moved to her grandparents' house in Reno, where she currently resides and attends school, returning to live with Kerstan in the summer.

[Headnote 1]

In 2014, Michael, who lives in Reno, moved to change custody, seeking primary physical custody of I.M. Kerstan opposed any

change in physical custody, conceding that she allowed I.M. to live with her grandparents in Reno, but objecting that this did not mean she agreed to change her physical custody status. On January 15, 2015, the district court found it was in I.M.'s best interest to reside with her grandparents and awarded primary physical custody to I.M.'s paternal grandparents, who were neither parties to, nor intervenors in, the action. The district court concluded that because I.M. "is, and has been, residing with her paternal grandparents since August 2013, neither parent has primary or shared physical custody of the child after that date." Kerstan appeals.[1]

II.

[Headnotes 2, 3]

This court reviews a child custody determination for an abuse of discretion. *See Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). While we have not authoritatively addressed child custody awards to nonparty nonparents, we have held that a court must have jurisdiction over a party before it can enter judgment affecting that party. *See Young v. Nev. Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987) ("A court does not have jurisdiction to enter judgment for or against one who is not a party to the action."). Applying *Young* to child custody cases is consistent with how other courts have addressed this issue. *See Landry v. Nauls*, 831 S.W.2d 603, 605 (Tex. Ct. App. 1992); *see also Elton H. v. Naomi R.*, 119 P.3d 969, 979 (Alaska 2005) (requiring that a nonparty grandmother consent to becoming a party upon remand to be considered a custodial option).

In *Landry*, the Texas Court of Appeals considered whether the trial court abused its discretion by awarding permanent managing conservatorship to the nonparty paternal grandmother without overcoming the parental preference statute. 831 S.W.2d at 606. The court held that "[i]t is no longer sufficient for the trial court to merely state that an award of custody to a nonparent is in the best interest of the child." *Id.* at 605. Instead, a nonparent must either "bring or intervene in a custody suit" and present evidence to overcome parental preference to be awarded custody of a minor child. *Id.* We conclude

[1]We reject Kerstan's issue-preclusion-based challenge to the district court's order barring modification of certain child support arrearages, as the order relies on video transcript from a June 26, 2013, hearing, which Kerstan failed to include in the record on appeal. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (declining to consider matters that do not properly appear in the record on appeal); *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

that *Landry* is consistent with Nevada law, as NRS 125.510 (2013)[2] demonstrates that the court should have jurisdiction over parties in child custody disputes. NRS 125.510 ("The *party* seeking such an order shall submit to the jurisdiction of the court for the purposes of this subsection." (emphasis added)) (repealed by 2015 Nev. Stat., ch. 445, § 10, at 2586); *see also* NRS 125A.345(3) ("The obligation to join a party and the right to intervene as a party in a child custody proceeding conducted pursuant to the provisions of this chapter are governed by the law of this state as in child custody proceedings between residents of this state.").

[Headnote 4]

If a court awards custody to a nonparent that neither brought nor intervened in the custody action, the parties' due process rights may be violated. *See Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 20, 317 P.3d 820, 827 (2014) (providing that procedural due process requires reasonable notice and an opportunity to present objections); *see also* NRS 125A.345(1) (requiring notice and an opportunity to be heard for child custody determinations); *Anonymous v. Anonymous*, 353 So. 2d 515, 519 (Ala. 1977) (holding award of child custody to nonparty grandparent violated parent's due process rights because "the custody dispute centered around and was focused upon, the parties"); *Elton H.*, 119 P.3d at 979 (requiring the parties to the dispute to have sufficient notice of the possibility that a nonparty will receive custody to satisfy due process).

Here, the district court's unilateral award of custody to the nonparty grandparents failed to provide the notice and opportunity to be heard that fundamental fairness, indeed, due process, requires on an issue as important as child custody. In Michael's motion to change custody, and Kerstan's opposition, both parties argued how I.M.'s best interest would be served or disserved by primary custody lying with Michael, as opposed to Kerstan, or vice versa. Neither party briefed or argued whether awarding primary physical custody to the grandparents was justified or would be in I.M's best interest. The surprise award of custody to the nonparty grandparents violated the Micones' due process rights. *See Gonzales-Alpizar*, 130 Nev. at 20, 317 P.3d at 827.

Additionally, the district court failed to make specific findings that awarding custody to either Michael or Kerstan would be detrimental to I.M. and the award of custody to the paternal grandparents was in I.M.'s best interest. *See* NRS 125.500(1)[3] (requiring a district court

[2]While the Legislature repealed NRS 125.510 in 2015, the same language was added to NRS Chapter 125C. *See* A.B. 263, 78th Leg. (Nev. 2015).

[3]Similar to NRS 125.510, the Legislature repealed NRS 125.500 in 2015, but added the same language to NRS Chapter 125C. *See* A.B. 263, 78th Leg. (Nev. 2015).

to find that "an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child" before awarding custody to a nonparent). Though the district court found that Michael and Kerstan consented to I.M. residing with her grandparents, Kerstan maintains that she did not consent to changing her custody status. Thus, the district court needed to make the requisite findings under NRS 125.500 before awarding custody to the grandparents.

We note that Kerstan argues a change in custody is unwarranted when a custodial parent sends a child to live with a third-party for educational or similar interests, such as sending a child to boarding school. *See, e.g.*, *DaSilva v. DaSilva*, 15 Cal. Rptr. 3d 59, 62 (Ct. App. 2004). Kerstan did not present this argument below until her reconsideration motion, which the district court declined to hear pending appeal in this court. Upon remand, the district court should consider these arguments on the merits, as it is inappropriate for this court to do so without the issues being decided below. *Cf. Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007).

III.

[Headnote 5]

To be awarded custody of a minor child, a nonparent must either "bring or intervene in a custody suit" and present evidence to overcome the parental preference. Here, because the grandparents neither brought nor intervened in the custody suit, the district court failed to notify the Micones that it was considering the grandparents as a custodial option, and the district court did not make the requisite findings to overcome the parental preference, we conclude that the district court abused its discretion. Accordingly, we reverse the district court's award of primary physical custody to the nonparty grandparents, affirm its order regarding issue preclusion, and remand for proceedings consistent with this opinion.

HARDESTY and SAITTA, JJ., concur.

TIMOTHY TOM, an Individual, Appellant, *v.* INNOVATIVE HOME SYSTEMS, LLC, a Nevada Limited Liability Company, Respondent.

No. 65419

TIMOTHY TOM, an Individual, Appellant, *v.* INNOVATIVE HOME SYSTEMS, LLC, a Nevada Limited Liability Company, Respondent.

No. 66006

March 10, 2016 368 P.3d 1219

Consolidated appeals from a district court summary judgment in a mechanic's lien action and a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Contractor brought action against homeowner for breach of contract and foreclosure of notice of mechanic's lien, alleging that an electrical license was not required for the work it performed on homeowner's residence, which included installation of automation, sound, surveillance, and landscaping systems. The district court entered summary judgment in favor of contractor. Homeowner appealed. The court of appeals, Gibbons, C.J., held that: (1) decision of State Contractors' Board closing homeowner's complaint and directing contractor to make repairs to residence was not a final decision resolving a contested case, as required to preclude homeowner from relitigating whether contractor was required to have an electrical license; (2) genuine issues of material fact existed as to whether contractor needed an electrical license; and (3) genuine issues of material fact existed as to whether contractor completed its contractual obligations to homeowner.

Reversed in part, vacated in part, and remanded.

[Rehearing denied August 4, 2016]

Pezzillo Lloyd and *Brian J. Pezzillo, Jennifer R. Lloyd, Marisa L. Maskas*, and *George E. Robinson*, Las Vegas, for Appellant.

Snell & Wilmer, LLP, and *Leon F. Mead II*, Las Vegas, for Respondent.

1. Appeal and Error.
   The court of appeals reviews a district court's grant of summary judgment de novo.
2. Appeal and Error.
   A district court's award of attorney fees is reviewed for an abuse of discretion.

3. Licenses.
   The primary purpose of Nevada's licensing statutes for contractors is to protect the public against both faulty construction and financial irresponsibility. NRS 624.260(1) (1997).
4. Licenses.
   To protect consumers, the statute requiring proof that a contractor was duly licensed serves as an absolute bar on the recovery of contract claims brought by unlicensed contractors or contractors not properly licensed for the duration of work requiring such a license. NRS 108.222(2), 624.320.
5. Judgment.
   In reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.
6. Judgment.
   The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact, and only if the moving party meets its burden of production does the burden shift to the opposing party to show the existence of a genuine issue of material fact.
7. Administrative Law and Procedure.
   Claim and issue preclusion can apply in the administrative context when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it that the parties have had an opportunity to litigate.
8. Administrative Law and Procedure.
   An agency decision can result in issue or claim preclusion as to a subsequent decision made by another court or a different agency.
9. Judgment.
   For claim preclusion to apply: (1) the same parties or their privies must be involved in both cases, (2) a valid final judgment must be entered in the first case, and (3) the subsequent action must be based on the same claims or any part of them that were or could have been brought in the first case.
10. Judgment.
    For issue preclusion to apply: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action, (2) the initial ruling must have been on the merits and have become final, (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation, and (4) the issue must have been actually and necessarily litigated.
11. Administrative Law and Procedure; Licenses.
    Decision of State Contractors' Board closing homeowner's complaint and directing contractor to make repairs to residence was not a final decision resolving a contested case, as required to apply issue or claim preclusion to preclude homeowner from relitigating, in contractor's breach of contract action, whether contractor was required to have an electrical license for work performed on residence; decision did not determine legal rights, duties, or privileges of either party, there was no notice of hearing sent to the parties and no ability for homeowner to present evidence or witnesses in response to contractor's letter to the Board, and the Board did not issue findings of fact or conclusions of law. NRS 108.222(2), 233B.032, 233B.121(2), (4), (7), 233B.125, 624.320; NAC 624.700(3)(c).
12. Judgment.
    Genuine issues of material fact existed as to whether contractor needed an electrical license to install automation, sound, surveillance, and landscaping systems in homeowner's residence, precluding summary judgment in favor of contractor in action for foreclosure of notice of mechanic's lien. NRS 108.222(2), 624.320.

13. Appeal and Error.
Contractor waived appellate review of argument that the court of appeals should apply a disputable presumption that the State Contractors' Board followed the law, in breach of contract action against homeowner, where contractor did not raise argument in the district court. NRS 47.250(16).

14. Judgment.
Genuine issues of material fact existed as to whether contractor completed its contractual obligations to homeowner in installing automation, sound, surveillance, and landscaping systems in homeowner's residence, precluding summary judgment in favor of contractor in breach of contract action. NRS 108.222(2), 624.320.

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Gibbons, C.J.:

This case involves the foreclosure of a mechanic's lien and a breach of contract claim relating to work performed on a residence. At issue here is whether the district court properly granted summary judgment on both claims based on its conclusion that respondent Innovative Home Systems, LLC (IHS) did not need a license to perform the work it bid and completed on appellant Timothy Tom's residence. We also address the district court's award of attorney fees.

Pursuant to NRS 108.222(2), a contractor must be duly licensed to have an enforceable mechanic's lien for work it performed. In addition, NRS 624.320 precludes an unlicensed contractor from bringing or maintaining an action for the collection of compensation on a contract for which a license is required. In applying these statutes to the facts of this case, we conclude that genuine issues of material fact remain regarding whether IHS's work on Tom's residence required a license and whether IHS completed the contract in a workmanlike manner, thereby possibly negating Tom's obligation to make final payment under the contract. Accordingly, the district court erred in granting summary judgment on these issues. We therefore reverse the district court's order granting summary judgment, vacate the award of attorney fees, and remand this matter to the district court for further action consistent with this opinion.

BACKGROUND

Tom and IHS entered into a contract in April 2012, in which IHS agreed to install automation, sound, surveillance, and landscaping systems in Tom's residence. IHS began work on the residence soon thereafter. It is undisputed that IHS did not have an electrical contractor's license when it bid the contract and began the work. In September 2012, IHS applied for, and received, an electrical contractor's license, which IHS contends was needed for other projects it

would be working on, but not for the work on Tom's residence. IHS continued working on the Tom residence until December 2012. At that time, the parties disagreed on the performance of the contract, Tom refused to tender further payment to IHS, and IHS consequently filed a notice of lien against Tom's residence.

In response, Tom filed a consumer complaint with the Nevada State Contractors' Board (the Board), a state administrative agency, alleging that (1) IHS did not complete certain parts of the contract in a workmanlike manner and (2) IHS bid the job and performed the work without first obtaining the required electrical license. In response to the first allegation, an investigator for the Board investigated the matter and sent IHS a notice to correct, which required IHS to correct nine of the items listed in the complaint.

The investigator also requested a response to Tom's complaint from IHS. IHS responded with a letter claiming, among other things, that it did not need a license to complete the work on Tom's residence. IHS further stated that "[o]n occasion, . . . some low voltage wire needs to be pulled through previously constructed walls for aesthetic purposes to allow the systems to operate." IHS went on to explain that, "because of occasional overlap between such activities for which a license may arguably be required and those for which an exemption may apply, IHS made the conscious decision to obtain a C-2D low voltage license." IHS claimed the overlap would possibly occur in future jobs, but not in this case.

After IHS purportedly remedied the work items identified by the investigator, the Board closed the case as resolved through a letter signed by a compliance supervisor. The Board neither conducted an adversary proceeding to determine the legal rights of the parties, nor issued a written decision specifically ruling on the license issue.

IHS then filed a complaint in district court against Tom alleging breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, foreclosure of notice of lien, and declaratory relief. IHS also requested attorney fees. After an initial round of dispositive motions by both parties were denied without prejudice, IHS filed a renewed motion for summary judgment on its claims, again arguing that an electrical license was not required for the work performed on Tom's residence and that its lien was proper and perfected. In support of this position, IHS's renewed motion cited three advisory opinions written by the licensing administrator on behalf of the executive officer of the Board addressing licensing requirements in the context of work performed by other contractors. IHS also provided additional support for its positions that IHS's work either did not require a license or fell within an exemption to the licensing requirement. After a hearing, the district court granted summary judgment in favor of IHS on the claims of breach of con-

tract, breach of the covenant of good faith and fair dealing, foreclosure upon the notice and claim of lien, and declaratory relief.[1]

Since the court found a valid contract existed, it denied IHS's unjust enrichment claim; however, it stated that, if the contract had been deemed unenforceable, it would have granted summary judgment to IHS for unjust enrichment. Even though discovery had not yet commenced, the court also denied Tom's motion for discovery pursuant to NRCP 56(f), stating that he failed to demonstrate that any discovery would lead to admissible evidence that would create a genuine issue of material fact. The district court did not rule on IHS's alternative theory of exemption.

The district court relied on two aspects of the Board's actions in determining that IHS did not need a license. First, the court concluded that if IHS needed a license to perform the work on Tom's residence, the Board was required, pursuant to NRS 624.212(1), to order IHS to cease and desist its work upon learning IHS was operating without a license. Because it did not do so and instead closed Tom's complaint, the district court determined that the Board "necessarily found that a license was not necessary" for the work IHS performed. Second, the court relied on the Board's advisory opinions, which determined that no license was needed when answering licensing questions regarding work on unrelated matters and concluded that those opinions were persuasive authority. Based on these conclusions, the district court awarded IHS the full lien amount of $23,674.67 and ordered the residence sold to satisfy payment of the lien and the impending attorney fees and costs. Tom subsequently appealed this determination, which is pending before this court in Docket No. 65419.

Thereafter, the district court filed an order awarding IHS $1,144.37 in costs and $35,350.00 in attorney fees pursuant to NRS 18.010(2)(b) and NRS 108.237(1)—an amount less than IHS requested. Tom then appealed the order awarding IHS its attorney fees and costs, which is before us in Docket No. 66006, and his two appeals were subsequently consolidated.

ANALYSIS

Throughout the proceedings before the Board, in the district court action, and now before this court, Tom has steadfastly maintained that IHS was required to have an electrical license in order to bid on and perform the work on his residence. And this position lies at the heart of Tom's argument that, without the required license, IHS cannot enforce its mechanic's lien or maintain an action against him

[1]The Honorable James Brennan heard the initial dispositive motions filed by IHS and Tom. The Honorable Adriana Escobar heard and granted IHS's renewed motion for summary judgment.

to collect compensation on the parties' contract. In response to these assertions, IHS contends that it did not need an electrical license to perform the work or alternatively, that the work it performed was exempt from the license requirement.

Tom also argues that the district court erred in basing its decision to grant summary judgment on the licensing issue on the Board's resolution of Tom's administrative complaint and the Board's advisory opinions. He further asserts that genuine issues of material fact remain regarding whether IHS completed its obligations under the contract, thus precluding summary judgment on that issue. And because he claims summary judgment was improper, Tom argues that the award of attorney fees to IHS was also improper. IHS contends that there were no genuine issues of material fact remaining and therefore, granting judgment as a matter of law in its favor was appropriate, as was the award of attorney fees.

[Headnotes 1, 2]

We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A district court's award of attorney fees is reviewed for an abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005).

Before addressing the parties' specific arguments regarding the district court rulings at issue here, we first provide a brief discussion of Nevada's licensing scheme. A general understanding of this scheme and the statutes involved in this case will provide necessary background, as well as a starting point, for considering the issues presented on appeal.

Nevada's licensing laws

[Headnotes 3, 4]

"The primary purpose of Nevada's licensing statutes is to protect the public against both faulty construction and financial irresponsibility." *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F.2d 486, 489 (9th Cir. 1976) (relying in part on *Nev. Equities, Inc. v. Willard Pease Drilling Co.*, 84 Nev. 300, 303, 440 P.2d 122, 123 (1968)). Licensing statutes allow Nevada to "exercis[e] its regulatory power over [contractors'] operations and effectuat[e] its consumer protection goals." *Interstate Commercial Bldg. Servs., Inc. v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 23 F. Supp. 2d 1166, 1173 (D. Nev. 1998) (citing NRS 624.260(1) (1997)[2] (requiring applicants "to show such a degree of experience, financial responsibility and such gen-

[2]While this statute has subsequently been amended, the subsection relied on by the federal district court in *Interstate Commercial* did not change. *See* 2015 Nev. Stat., ch. 359, § 2, at 2005.

eral knowledge . . . [as is] necessary for the safety and protection of the public" in order to obtain a contractor's license)). Thus, to protect consumers, NRS 624.320 serves as an absolute bar on the recovery of contract claims brought by unlicensed contractors or contractors not properly licensed for the duration of work requiring such a license. *See Magill v. Lewis*, 74 Nev. 381, 384, 387, 333 P.2d 717, 718-19, 720 (1958) (recognizing that NRS 624.320 essentially nullifies contracts with unlicensed contractors). Further, under NRS 108.222(2), unlicensed contractors are also unable to obtain an enforceable lien against the subject property.

Under this statutory scheme, anyone engaging in the business or acting in the capacity of a contractor,[3] or submitting a bid on a project, must be licensed unless they are exempt from licensure. NRS 624.700(1). And, relevant to the specific issues presented here, an electrical license is required for the "installation, alteration and repair of systems that use fiber optics or do not exceed 91 volts, including telephone systems, sound systems, cable television systems, closed circuit video systems, satellite dish antennas, instrumentation and temperature controls, computer networking systems and landscape lighting." NAC 624.200(2)(d).

Thus, if IHS performed any of the work described in NAC 624.200(2)(d) on Tom's residence, it needed an electrical license in order to bid on and perform the work. *See* NRS 624.700(1)(b) (bidding); NRS 624.700(1)(a) (performing). But an exemption to the licensure requirement exists when the project is limited to the "sale or installation of any finished product . . . which is not fabricated into and does not become a permanent fixed part of the structure." NRS 624.031(6).

With this background information in mind, we now turn to Tom's challenges to the district court's grant of summary judgment to IHS and award of attorney fees in favor of IHS. We first examine the district court's summary judgment decision, beginning with the determination that IHS was not required to possess an electrical license in order to bid on or perform work on Tom's residence. We will then determine the propriety of the court's grant of summary judgment on IHS's breach of contract claim. We conclude our review of the issues presented by examining the award of attorney fees to IHS.

Licensure

To resolve the licensing issue, the district court relied on the Board's resolution of Tom's complaint, which the court found deter-

[3]A contractor is anyone who, "acting solely in a professional capacity, . . . submits a bid to, or does himself[,] . . . construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building." NRS 624.020(2).

minative of whether IHS needed a license for the work it performed on Tom's residence, thus giving that resolution preclusive effect. The district court further concluded that the advisory opinions provided by IHS also demonstrated that IHS did not need a license for the work it performed. Tom asserts that the district court erred in its reliance on these documents, but IHS counters that such reliance was proper because the documents demonstrated that IHS was not required to have a license, making the grant of summary judgment in its favor on that issue appropriate.

We begin our examination of these issues by considering whether the district court properly concluded that the Board's resolution of Tom's administrative complaint was dispositive evidence that IHS did not need a license for the work performed on Tom's residence. Thereafter, we turn to the district court's reliance on the advisory opinions issued by the Board as further demonstrating that IHS did not need a license.

[Headnotes 5, 6]

Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate" that no genuine issues of material fact remain "and that the moving party is entitled to a judgment as a matter of law." *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (internal quotation marks omitted). In reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* "The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Only if the moving party meets its burden of production does the burden shift to the opposing party "to show the existence of a genuine issue of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting) (rejecting the majority's application of the summary judgment rule to the facts at hand, but not its explanation of the rule)).

The district court's reliance on the Board's decision

In concluding that a license was not required for the work IHS performed on Tom's residence, the district court relied heavily on the Board's decision to close Tom's complaint without ordering IHS to cease all work under the contract. Specifically, the district court noted that NRS 624.212 required the Board to take such action if a license was required, and that its failure to do so indicated that the Board had "necessarily found that a license was not necessary for the work performed by IHS." While not stated in these exact terms, the district court essentially held that the Board's decision was entitled to preclusive effect on the question of whether a license was

required so as to bar Tom from relitigating that issue. Tom argues that because there was no final decision resulting from a contested case on the license issue, the district court should not have viewed the Board's actions as determinative of the licensing issue, while IHS contends the district court did not err by doing so. We start our discussion of this issue by analyzing issue and claim preclusion and how those legal principles apply in the administrative context.

[Headnotes 7, 8]

"Claim and issue preclusion can apply in the administrative context '[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate.'" *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 891, 266 P.3d 602, 605 (2011) (alteration in original) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)); *see also Britton v. City of N. Las Vegas*, 106 Nev. 690, 692, 799 P.2d 568, 569 (1990) ("It is a well-settled rule of law that res judicata may apply to administrative proceedings."). Thus, "[a]n agency decision can result in issue or claim preclusion as to a subsequent decision made by another court or a different agency." *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 459, 254 P.3d 641, 646 (2011).

[Headnotes 9, 10]

In order for either doctrine to apply to bar the relitigation of a claim or issue, all the elements of the particular doctrine must be met. For claim preclusion to apply, (1) the same parties or their privies must be involved in both cases, (2) a valid final judgment must be entered in the first case, and (3) the subsequent action must be "based on the same claims or any part of them that were or could have been brought in the first case." *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d 912, 915 (2014) (internal quotation marks omitted). Similarly, for issue preclusion to apply,

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue [must have been] actually and necessarily litigated.

Id. at 258, 321 P.3d at 916 (first alteration in original) (internal quotation marks omitted).

Having laid out the elements for both claim and issue preclusion, we must now determine if the Board's resolution of Tom's administrative complaint met these elements such that it barred Tom from relitigating the licensing issue in the district court. To do so, we must

first examine the Board's statutory powers and its role in resolving the complaints and issues presented to it before addressing the specific Board decision at issue here.

The Board

The Board consists of seven members, NRS 624.040, and is an administrative agency within the meaning of the Administrative Procedure Act (APA). Thus, it must comply with the Act's provisions. *See* NRS 233B.031 (defining an agency as "an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases"); NRS 624.100(1) (authorizing the Board to make reasonable regulations necessary to carry out the provisions of NRS Chapter 624); NRS 233B.039 (listing those agencies that are exempted from the requirements of the APA and not including the Nevada State Contractors' Board amongst the exempted agencies). Additionally, the Board's enforcement actions are authorized by Chapter 624 of the Nevada Revised Statutes, *see* NRS 624.040-.212, the chapter which also governs contractors' licenses. *See* NRS 624.240-.288. As directed by statute, the Board designates one or more of its employees to investigate any form of construction fraud, NRS 624.165(1)(a), which in this case, is defined as "a person engaged in construction knowingly . . . [acting] as a contractor without . . . [p]ossessing a contractor's license." NRS 624.165(3)(e)(1).

In that vein, after the Board receives a written complaint, it must "investigate the actions of any person acting in the capacity of a contractor, with or without a license." NRS 624.160(4). If the Board's investigation reveals that the contractor submitted a bid on a project or performed work without the proper license, the Board must issue a cease-and-desist order to stop the unlicensed work. NRS 624.212(1).

Further, "[t]he Board is vested with all of the functions and duties relating to the administration of [NRS Chapter 624]." NRS 624.160(1). This includes adjudicating contested cases. *See* NRS 233B.121; *see also* NRS 624.170(2)(c) (permitting the Board to "[i]ssue subpoenas for the attendance of witnesses and the production of records, books and papers in connection with any hearing, investigation or other proceeding of Board"); NRS 624.510(8)[4] (providing that the Board may award attorney fees incurred in contested cases under certain circumstances). A contested case is de-

[4]This statute has since been amended, but the relied-upon subsection was not altered. *See* 2015 Nev. Stat., ch. 359, § 6, at 2010.

fined as a proceeding "in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032. Parties to contested cases have statutory rights to: (1) receive notice of the proceeding; (2) be represented by counsel; and (3) respond to and present evidence. NRS 233B.121(1)-(4).

Related to its investigative duties and ability to resolve contested cases, the Board can also make findings of fact regarding the issues presented to it. NRS 233B.125; *see also Dickinson v. Am. Med. Response*, 124 Nev. 460, 469, 186 P.3d 878, 884 (2008) (stating that the agency's factual findings are "crucial to the administrative process"). Indeed, when resolving contested cases resulting in a final decision, NRS 233B.125 requires the Board to "include findings of fact and conclusions of law, separately stated," either on the record or in writing. *But see* NRS 233B.121(5) (stating that an administrative agency may make an informal disposition in certain circumstances and if it does, "the parties may waive the requirement for findings of fact and conclusions of law").

The Board's decision on Tom's administrative complaint

[Headnote 11]

With regard to the agency decision relied on by the district court in granting IHS's motion for summary judgment, the Board conducted an investigation on Tom's complaint and issued a notice to correct to IHS. Although the notice to correct stated IHS's failure to comply could result in a fine, it cited NAC 624.700(3), which permits the Board to take action after an investigation, as opposed to after a proceeding in a contested case. Additionally, that regulation does not allow for the imposition of a fine itself, but rather allows the Board to require the contractor to show cause why disciplinary action, which could include a fine, should not be issued, demonstrating that further procedures are required before such discipline is imposed. *See* NAC 624.700(3)(c). Thus, the notice from the investigator in this case directing IHS to make certain repairs did not determine the legal rights, duties, or privileges of either party. *See* NRS 233B.032. The Board's letter closing the complaint similarly did not attempt to determine the rights, duties, or privileges of either party; instead, the letter simply stated that the issues identified in Tom's complaint appeared to have been resolved. *See id.*

Furthermore, the investigator's act of issuing a letter directing IHS to respond to the complaint falls far short of compliance with the notice and hearing requirements mandated in NRS 233B.121 for contested cases. There was no notice of a hearing sent to the

parties, no ability for Tom to present evidence or witnesses in response to IHS's letter,[5] and no administrative record that complied with the statute. *See* NRS 233B.121(2), (4), (7); *see also Private Investigator's Licensing Bd. v. Atherley*, 98 Nev. 514, 515, 654 P.2d 1019, 1020 (1982) (concluding that when a proceeding relating to the licensing process does not require notice and an opportunity for a hearing, it does not constitute a contested case under the APA).

Finally, the Board did not issue findings of fact and conclusions of law pursuant to NRS 233B.125. And neither party argues, and the record does not support, that the circumstances required in NRS 233B.121(5) were met, allowing the Board to issue an informal disposition. Thus, we conclude, as argued by Tom, that the Board's decision cannot be characterized as a final decision resolving a contested case.

Having determined that there was no actual litigation and no final decision made on the merits of the case by the Board, we conclude that no preclusive effect could be given to the Board's decision on Tom's complaint.[6] *See Alcantara*, 130 Nev. at 257-58, 321 P.3d at 915-16; *see also Britton*, 106 Nev. at 693, 799 P.2d at 569-70 (stating that an administrative decision can have a preclusive effect on a future case only if it resulted in a final judgment on the merits). And it follows that, because the Board's decision was not entitled to preclusive effect on the issues presented to the district court, the district court erred in granting summary judgment in favor of IHS on this basis.[7] We now turn to the other basis for the district court's grant of summary judgment—the Board's advisory opinions.

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[5]Although IHS submitted documentation to support the assertions raised in its response letter to the Board, it is unclear whether Tom submitted additional documentation with the complaint or in response to IHS's letter.

[6]IHS argues, and the district court concluded, that Tom had to seek judicial review pursuant to NRS Chapter 233B because the Board's actions constituted a final decision. IHS therefore maintains that this court should defer to the Board's decision and that this is not a preclusion issue. Because we have already concluded that the Board's decision did not constitute a final decision resulting from a contested case, and because this case is not an appeal from a petition for judicial review of an agency decision, deference to the agency is not appropriate. *See* NRS 233B.135(2)-(3) (providing that, in the judicial review process, the burden of proof is on the party challenging the agency decision and that the district court should not substitute its judgment for that of the agency on questions of fact).

[7]IHS also argues that summary judgment is supported because, pursuant to its complaint form, the Board may not request an unlicensed contractor to complete work, but here, the Board requested IHS to address nine of Tom's complaint items. IHS further argues that summary judgment is supported by the Board's failure to order IHS to cease work on Tom's residence. Because we conclude that the Board's action of closing Tom's complaint should not have been given preclusive effect, we also conclude that neither the Board's actions in ordering IHS to address nine of the complaint items nor the Board's failure to order IHS to cease work on Tom's residence should be given preclusive effect because the elements for claim and issue preclusion have not been met. *See Alcantara*, 130 Nev. at 257-58, 321 P.3d at 915-16; *Britton*, 106 Nev. at 693, 799 P.2d at 569-70.

The district court's reliance on advisory opinions addressing other matters

[Headnote 12]

The district court explicitly relied on three advisory opinions,[8] which did not directly involve Tom or IHS but discussed work arguably resembling the work IHS performed on Tom's residence, as providing a legal basis for granting summary judgment on the licensing issue. Tom argues that the district court clearly erred in relying on the advisory opinions because of the disclaimer contained in each opinion limiting them to the specific facts and circumstances provided to the Board, a point which IHS concedes on appeal. IHS counters, however, that reliance on these advisory opinions was still proper because they are in accord with other jurisdictions dealing with the same issue and that the opinions also provide insight into whether a license was needed for the work IHS performed.

We disagree with IHS's position. First, all three opinions contain disclaimers that limit their use. Two of the three advisory opinions state:

> The foregoing opinion applies only to the specific facts and circumstances defined herein. Facts and circumstances that differ from those in this opinion may result in an opinion contrary to this opinion. No inferences regarding the provisions of [the NRS] quoted and discussed in this opinion may be drawn to apply generally to any other facts and circumstances.

Therefore, in addition to the parties' concessions on appeal that the opinions' applications are limited to their facts, the opinions themselves caution against applying inferences to factually dissimilar circumstances.

Moreover, IHS's reliance on *Walker v. Thornsberry*, 158 Cal. Rptr. 862 (Ct. App. 1979), is unavailing. While the *Walker* court did decide a licensure issue similar to the one at issue here, the fact that that court concluded that a license was not required for the installation of a prefabricated bathroom, *see id.* at 865, is not a reason to conclude that the advisory opinions in this case are instructive because *Walker* does not resolve the deficiencies present in the advisory opinions relied upon by IHS. The first deficiency, addressed

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[8]The APA mandates that each administrative agency provide for the issuance of advisory opinions regarding "the applicability of any statutory provision, agency regulation or decision of the agency." NRS 233B.120. The Board may provide advisory opinions, NRS 624.160(3), to any person who files a petition regarding "the applicability of any provision of Chapter 624 of NRS." NAC 624.120. Although NRS 233B.120 states that declaratory orders disposing of petitions have the same status as agency decisions, it is silent as to the legal effect of advisory opinions. NRS 233B.038(2)(f), however, provides that an advisory opinion that is not of general applicability is not enforceable as a regulation. *But see* NRS 233B.038(1)(a) (providing that an agency's statement of general applicability interpreting a statute is enforceable as a regulation).

above, is that the opinions are limited to their facts. The second deficiency, discussed in more detail below, is that the work discussed in those opinions was dissimilar to the work performed by IHS.

Below, the district court gave the advisory opinions persuasive effect because it found that the advisory opinions were factually similar to IHS's work; therefore, it concluded that IHS did not need a license for the work performed on Tom's residence.[9] We disagree with the district court's interpretations and conclude that the advisory opinions are not persuasive.

First, in reviewing the questions addressed in the advisory opinions, it is clear that all three are factually dissimilar to the case at bar. One opinion answers whether a license would be necessary to install a new phone system utilizing an existing cabling infrastructure. Another opinion answers whether a license would be required to install component communication equipment into metal cabinets. And the last opinion answers whether a license would be required to install a pet containment system consisting of plugging low-voltage wiring into a lightning protector. Thus, the opinions do not appear to be sufficiently similar to the case at bar to be persuasive because none of them discuss whether a contractor's license is required to install automation, sound, surveillance, and landscaping systems like the systems IHS installed at Tom's residence. *See generally Univ. &*

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[9]The substance of the advisory opinions consists merely of a question and an answer. The first opinion states:

> ISSUE: Would a Nevada State [Contractor's] license be required to install a new phone system for the Carson City School System utilizing existing cabling infrastructure?
>
> ADVISORY OPINION: Based upon the information provided, the Board opined that a [Contractor's] license would not be required to set components in place and plug the equipment into existing outlets. A C-2 (Electrical) or a C-2(e) Signal Systems classification would be required if any electrical work is performed.

The second opinion states:

> ISSUE: Would a Nevada State [Contractor's] license be required to install component communication equipment into metal cabinets in police dispatch rooms.
>
> ADVISORY OPINION: Based upon the information provided, a [Contractor's] license would not be required to set components in place and plug the equipment into existing outlets. A C-2 (Electrical) or a C-2(e) Signal Systems classification would be required if any electrical work is performed.

The third opinion states:

> ISSUE: Is a [Contractor's] license required to perform the installation of pet containment systems that consist of low-voltage wiring that is plugged into a lightning protector and then into a grounded outlet?
>
> ADVISORY OPINION: Based upon the information provided, the Board opined that a [Contractor's] license would not be required to perform the installation of the PetSafe pet containment systems.

Cmty. Coll. Sys. of Nev. v. DR Partners, 117 Nev. 195, 203-04, 18 P.3d 1042, 1047-48 (2001) (stating that nonbinding opinions of the attorney general that do not support the assertion for which they are presented are not persuasive).

Second, the opinions are very brief, each consisting only of a one-sentence statement of the issue and one or two sentences for the opinion. There is not a section for a description of the facts, only a few words within the issue statement. Even if the type of work in the advisory opinions was factually similar to some of the work IHS performed, the advisory opinions could not cover the entire scope of work contemplated by the contract with IHS—installation of automation, sound, surveillance, and landscaping systems. Further, two of these opinions, wherein the Board opined that the work described did not require an electrical license, included a statement of the general principle that "[an electrical license] *would be required if any electrical work* is performed" (emphasis added), an issue that was not explored by the district court. Thus, the advisory opinions lack the factual detail necessary for the opinions to be used as persuasive authority. *But see Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) (providing that an agency's interpretation of a statute is not controlling, but can be persuasive).

[Headnote 13]

In sum, we conclude that the district court erred in treating the Board's letter closing Tom's complaint as dispositive of the license issue. We further conclude that the advisory opinions do not support granting IHS summary judgment on that issue. Thus, when viewing all of this evidence in the light most favorable to Tom, we conclude that IHS failed to meet its initial burden of production to show the absence of a genuine issue of material fact regarding whether it needed a license. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134. Additionally, the contract itself, and its multiple revisions, when construed in a light most favorable to Tom, are also sufficient to create a genuine issue of material fact regarding whether a license was needed. *See id.* Therefore, we reverse the district court's grant of summary judgment on the lien claim, as that decision was premised on the conclusion that IHS did not need a license for the work it performed on Tom's residence.[10] We next address whether summary judgment was proper on IHS's breach of contract claim.

[10]IHS also argues on appeal that, pursuant to NRS 47.250(16), this court should apply a disputable presumption that the Board followed the law in this case. IHS waived this argument, however, because it was not raised in the district court, and we therefore decline to consider it. *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 . . . is deemed to have been waived and will not be considered on appeal.").

Breach of contract

[Headnote 14]

IHS's breach of contract claim is based on its assertion that it completed its contractual obligations, but Tom did not make a final payment. Tom argues that IHS never completed the work on his residence; therefore, final payment was not required. To support his assertion, Tom filed an affidavit describing the unfinished work, which included issues with the equipment rack ventilation system, the sprinkler system, the sidelight window switchable smart tint, and a failure to honor a warranty and provide wiring diagrams to some of the systems as promised.

IHS, on the other hand, relies on the closure of Tom's Board complaint to support its assertion that it finished all contractual obligations in a workmanlike manner. It further states that had it not completed the work in question, Tom would have filed another complaint with the Board and since no such complaint was filed, IHS maintains that it satisfied its contractual obligations. In its order, the district court found that IHS had resolved the items that the Board directed it to correct before closing Tom's complaint, that there was no evidence that Tom "insisted that additional problems remained after IHS complied with the [Board's] correction directive," and that Tom's affidavit failed to create a genuine issue of material fact that IHS had not completed its portion of the contract.

Looking at IHS's evidence on the contract claim, we conclude that it has not met its burden of proving that no genuine issue of material fact exists regarding whether the contract was completed. *See id.* First, while the Board's letter stated it was closing the complaint because it appeared that the issues raised therein were resolved, it does not state that IHS fully completed its obligations under the contract. And, although Tom certainly could have filed a second complaint with the Board regarding any remaining issues, he was under no obligation to do so as he also had the right to pursue those claims in court. Thus, the closing of Tom's Board complaint is not dispositive evidence that IHS completed the contract.

Additionally, when viewing the competing affidavits from IHS and Tom, and the additional evidence, in a light most favorable to Tom, it is apparent that genuine issues of material fact remain regarding whether IHS satisfied all of its obligations under the contract such that Tom would be required to pay IHS in full.[11] Thus,

[11]For example, IHS's affidavit stated that it included an item on a revised contract, at Tom's request, that was actually supposed to be completed by another contractor and thus, was not IHS's responsibility. Tom's affidavit, however, asserts that IHS was to complete that item and failed to do so. Tom's statement, plus the contract from IHS including the disputed item, creates a genuine issue of material fact as to whether IHS completed its obligations under the contract. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134.

summary judgment on this issue was improper as well. *See id.* Therefore, regarding the district court's grant of summary judgment, there remain genuine issues of fact as to whether IHS needed a contractor's license and whether Tom breached his contractual obligations. Because these disputed facts are material to the success of the mechanic's lien and breach of contract claims, summary judgment was inappropriate in this case and we reverse that decision.[12] *See id.*

Attorney fees

After granting summary judgment in favor of IHS, the district court also awarded attorney fees to IHS. On appeal, Tom raises three separate challenges to this award. First, Tom argues that the district court improperly awarded attorney fees under NRS 18.010(2)(b) because there were reasonable grounds for Tom's claims and his defenses were not raised to harass IHS. Second, Tom maintains that the district court improperly awarded attorney fees under NRS 108.237 because a portion of the award requested was incurred during the administrative process and outside of court proceedings.[13] Third, Tom claims that the district court abused its discretion by not making any findings regarding the *Brunzell* factors.[14] Because of our conclusion that summary judgment was inappropriate in this case, the award of attorney fees is necessarily vacated; therefore, we do not address this issue.

CONCLUSION

Because genuine issues of material fact remain as to whether IHS needed a license to perform certain work under the contract and

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[12]Because we conclude that genuine issues of material fact remain pending below such that summary judgment was inappropriate, we need not address Tom's additional argument that the district court abused its discretion in denying his NRCP 56(f) motion for a continuance to obtain discovery in order to oppose the motion. We do note, however, that discovery had not even commenced in this case when the district court granted summary judgment.

[13]The district court did not identify if it was awarding attorney fees associated only with IHS's complaint before the district court, or if it was also awarding attorney fees IHS incurred in defending the action brought by Tom before the Board, as was requested by IHS in its fees motion. While we need not rule on this issue at this juncture, we urge the district court to be aware of this distinction if the parties request an award of attorney fees under NRS 108.237(1) during the proceedings on remand.

[14]Although we conclude that an award of attorney fees is premature at this time, we note that the district court failed to analyze the *Brunzell* factors in its award. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (identifying factors a district court must consider when making an award of attorney fees); *see also Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (providing that an award of attorney fees will be deemed reasonable "as long as the court provides sufficient reasoning and findings in support of its ultimate determination").

whether IHS completed the contract, we reverse the district court's order granting summary judgment in IHS's favor. Accordingly, we also vacate the award of attorney fees and remand this case to the district court for further proceedings consistent with this opinion.

SILVER, J., concurs.

TAO, J., concurring:

I join wholeheartedly in every aspect of the majority's very thorough and well-reasoned opinion, but write separately to address a matter that, historically, the Nevada Supreme Court has not explained as clearly as it perhaps should have. The Nevada Supreme Court has held that advisory opinions issued by executive-branch boards can be deemed "persuasive." Following this principle, the majority concludes that the advisory opinions cited by respondent are not sufficiently persuasive to govern the outcome of this appeal. I fully agree with the majority's conclusion, but my concern is that the Nevada Supreme Court has not always given clear guidance regarding whether, when, and why courts should follow such advisory opinions.

Used imprecisely, words can obscure as much as they explain. We say that a judicial opinion can be "persuasive," and we say that an executive-branch board advisory opinion can be "persuasive." In both instances, we use the same word—but we really mean two very different things. If one were to read the supreme court's precedent too loosely, one might come away thinking that we apply the same thought process in both contexts when we not only do not, but cannot.

When we read judicial opinions with an eye toward deciding whether to follow them or not, we are exploring the reasoning of other judges who are similarly situated to us, have similar powers and limits, and who are allowed to consider the same things as we could have considered under the rules of evidence, procedure, jurisdiction (both personal and subject matter), standing, mootness, ripeness, waiver and preservation of issues, and all of the other established doctrines of justiciability that govern what courts do and how they do it. A judicial opinion is an expression of how a judge understood a principle of law and applied it to a set of judicially admissible facts. We consider a judicial opinion to be persuasive, meaning worth extending and applying to other cases with different facts, when it accords with our own sense of what the law means and how we would have likely addressed the same question under the same rules and constraints when faced with a comparable set of facts admitted into evidence.

But executive-board advisory opinions are nothing like judicial opinions. Executive boards do not operate under the same rules of evidence or procedure that courts do, they are not constrained by the

same jurisdictional and constitutional constraints that courts are, and they may consider things that would never be admitted as evidence in a court of law. In disciplinary matters, the board is simultaneously the prosecutor who decides to bring the action, the judge of how the hearing will be conducted and what evidence will be considered, and the jury who decides the truth of the charge. The very fact that boards can issue "advisory" opinions at all—unbound by judicial considerations of ripeness, mootness, standing, or justiciability—symbolizes one fundamental difference between the operation of a board and the operation of a court.

Courts give deference to executive boards, but not because they act like courts; in many ways boards could not operate less like courts, and we need to be careful when applying judicial doctrines like collateral estoppel, res judicata, and "law of the case" to board actions in the same way that we apply them to judicial decisions. Rather, courts give deference to executive boards because they have subject-matter expertise that judges do not. Boards are essentially panels of experts licensed in the field and appointed to regulate the standards of their own profession. Unlike courts run by generalist judges whose principal (or only) training is in the law, Nevada boards are purposefully structured to include nonlawyer members who lack legal training but who have personal familiarity with the area over which the board exercises jurisdiction, whether the subject matter relates to contractor licensing, osteopathic practices, the qualifications of massage therapists, or any of the other myriad subject areas and professions licensed and supervised by state executive boards in Nevada. By virtue of their experience, board members know things about the subject matter that judges likely will not know and that could never be admitted into evidence in a court governed by rules of evidence. Even board members who have law degrees will likely know more than most judges do about board licensing and discipline, because a court like ours confronts a licensing question perhaps once in a blue moon, if that; but the very purpose of a board is to grapple with the same questions over and over, frequently in disputes that would never reach a court.

So, when we say that an advisory opinion issued by a board is, or is not, persuasive, we should not mean that we have reviewed the board's reasoning and picked apart its written opinion in the same manner as we would a judicial opinion, focusing on the clarity of its internal logic or the fairness of its ultimate outcome. Instead, what we should mean is something very different: that the board has, or has not, brought its superior subject-matter expertise to bear on the question at hand in a way that enlightens us and helps us resolve the case before us.

In this particular case, this distinction makes no difference because the advisory opinions relied upon here are not persuasive in either sense of the term; they are so narrowly drafted that they are

not guideposts to much of anything useful in this case. But that will not always be true, and there likely will be cases in which thinking about the board's opinion as an example of legal reasoning, and thinking about it instead as an exercise in subject-matter expertise, may lead to very different views on whether we should give weight to what the board thought or did. To the extent that our role includes providing guidance to the public on how questions like this will be analyzed and resolved, we should be clear on precisely what we are saying or else we risk confusing the issue more than clarifying it, even on questions like this one where the potential confusion originates with the words used by the Nevada Supreme Court.