U.S. BANK, NATIONAL ASSOCIATION ND, A NATIONAL ASSOCIATION, APPELLANT, *v.* RESOURCES GROUP, LLC, RESPONDENT.

No. 74575

July 3, 2019 444 P.3d 442

Appeal from a judgment certified as final under NRCP 54(b) in a judicial foreclosure/quiet title action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Vacated and remanded.

[Rehearing denied November 1, 2019]

Eglet Adams and *Thomas Neal Beckom*, Las Vegas; *McCarthy & Holthus, LLP*, and *Kristin A. Schuler-Hintz*, Las Vegas, for Appellant.

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn*, Henderson, for Respondent.

Before the Supreme Court, PICKERING, PARRAGUIRRE and CADISH, JJ.

OPINION

By the Court, PICKERING, J.:

This is a homeowners' association (HOA) lien foreclosure dispute. The HOA did not give the first deed of trust holder the notice of default Nevada law requires to foreclose a superpriority lien. Despite this failure, the district court held that the lien foreclosure sale extinguished the first deed of trust and quieted title in favor of the foreclosure sale buyer's successor. The district court found the first deed of trust holder was not entitled to notice at the address specified in the deed of trust, which was error. We vacate and remand for the district court to decide whether, given this notice defect, the first deed of trust holder deserves relief from the sale.

I.

Appellant U.S. Bank held a note secured by a publicly recorded first deed of trust on a home in a Nevada common interest community. The homeowner/borrower defaulted on his HOA dues, whereupon the HOA initiated lien foreclosure proceedings under NRS Chapter 116.[1] The HOA's agent, Alessi & Koenig, gave the homeowner

[1]The references to NRS Chapter 116 are to the pre-2015 version of those statutes, which apply to this dispute. *See* 2015 Nev. Stat., ch. 266, §§ 1-9, at 1333-49.

proper notice of default and notice of sale and attempted to give U.S. Bank notice of default and notice of sale as well. But Alessi & Koenig misread U.S. Bank's deed of trust and sent the notice of default to another, unaffiliated entity, which evidently did not forward it to U.S. Bank. As a result, U.S. Bank did not receive the notice of default. Alessi & Koenig's records suggest it mailed the notice of sale, as distinguished from the notice of default, to U.S. Bank at the address specified for it in the deed of trust, but U.S. Bank's files do not show that it received either the notice of default or the notice of sale.

Alessi & Koenig set the HOA lien foreclosure sale to occur 33 days after it recorded the notice of sale. When no one appeared at the sale, Alessi & Koenig orally continued it for approximately 60 days. Neither the homeowner nor U.S. Bank attended the rescheduled sale. Respondent Resources Group, LLC's principal, Iyad Eddie Haddad, acquired the property at the rescheduled sale for $5,331. The district court did not make a finding as to the property's fair market value, but the record suggests the bid price represented 10% to 15% of the property's fair market value. Haddad initially took title in the name of a trust he had created to acquire this particular property, then had the trust transfer the property to Resources Group.

The homeowner passed away, and his estate defaulted on the loan the U.S. Bank deed of trust secured. Several months after the HOA lien foreclosure sale, U.S. Bank commenced judicial foreclosure proceedings against the homeowner's estate on its deed of trust. Later, after it discovered the HOA sale, U.S. Bank added Resources Group as a defendant. Asserting that the HOA lien foreclosure sale had extinguished U.S. Bank's first deed of trust, Resources Group answered and counterclaimed for a judgment quieting title in itself.

The district court conducted a bench trial and ruled for Resources Group. It held that the HOA lien foreclosure sale extinguished U.S. Bank's deed of trust, leaving U.S. Bank nothing to judicially foreclose. The district court reasoned that U.S. Bank was not entitled to notice of default because it had not requested it from the HOA and that, alternatively, Alessi & Koenig gave adequate notice, even though the notice did not reach U.S. Bank. U.S. Bank appeals.

II.

U.S. Bank presses us to invalidate the HOA foreclosure sale because the person conducting the sale, Alessi & Koenig, failed to mail it the notice of default at the address specified for it in its deed of trust as NRS 116.31168 and NRS 107.090 require. U.S. Bank further argues that the notice defect renders the sale void under *Title Insurance & Trust Co. v. Chicago Title Insurance Co.*, 97 Nev. 523, 634 P.2d 1216 (1981), or at least voidable under *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), and its progeny. We review

the district court's legal conclusions de novo but give deference to its factual findings unless they are clearly erroneous or not supported by substantial evidence. *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

A.

1.

The district court decided this case before we decided *SFR Investments Pool 1, LLC v. Bank of New York Mellon*, 134 Nev. 483, 422 P.3d 1248 (2018) (*SFR 3*). NRS Chapter 116 protects homeowners by requiring a foreclosing HOA to provide the homeowner a 90-day notice of default, followed by a separate notice of sale, before an HOA lien foreclosure sale can proceed. NRS 116.31162(1)(c); NRS 116.311635. In *SFR 3*, this court considered a certified question from Nevada's federal district court asking whether these statutory protections extend to a first deed of trust holder who fails to request notices of default and of sale from the HOA. 134 Nev. at 483-84, 422 P.3d at 1249. We answered the certified question "yes." *Id.* at 484, 422 P.3d at 1249.

NRS 116.3116(2)(b) establishes a split-lien scheme that subordinates the first deed of trust to the superpriority portion of an HOA's lien. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 411 (2014). NRS 116.31168 incorporates the notice requirements of NRS 107.090(3)(b) and (4), which mandate that notice of default and notice of sale go to "[e]ach . . . person with an interest whose interest or claimed interest is subordinate" to the lien being foreclosed, with or without a request therefor. Taken together, these statutes require an HOA seeking to foreclose a superpriority lien to send the holder of a recorded first deed of trust notices of default and of sale, even though the deed of trust holder has not formally requested them. *SFR 3*, 134 Nev. at 485-89, 422 P.3d at 1251-53. Under *SFR 3*, the district court erred when it ruled that U.S. Bank was not entitled to notice of default because it had not requested it.

2.

When this court answers a certified question from a federal court, its "role is limited to answering the question[ ] of law posed to it." *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 955, 267 P.3d 786, 794 (2011). "[T]he certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts." *Id.* The certification order in *SFR 3* only asked whether NRS 116.31168 and NRS 107.090 require an HOA to provide notice of default and notice of sale to a first deed of trust holder absent a formal request therefor. *SFR 3*, 134 Nev. at 489 n.5, 422

P.3d 1253 n.5. The order did not include any facts suggesting notice had been attempted but failed. As a result, *SFR 3* did not consider the mechanics of how, without a formal request for notice, a foreclosing HOA should determine the address to which to send notice.

As *SFR 3* holds, NRS 116.31168(1) requires an HOA foreclosure sale to be conducted, insofar as a first deed of trust holder is concerned, "as if a deed of trust were being foreclosed." If U.S. Bank had filed a request for notices of default and sale under NRS 107.090(2), it would have been entitled to receive notice of default at the address specified in the request but it did not. Absent specific request, when a deed of trust is foreclosed, the notices of default and sale must be mailed to subordinate lienholders in a manner consistent with NRS 107.080, which sets forth the procedure for mailing notices to the property owner. *See* NRS 107.090(1), (3), and (4).[2] In turn, NRS 107.080(3) and (4) (2010) (amended by 2019 Nev. Stat., ch. 238, § 9 (S.B. 382)), require the notice of default to be mailed to the property owner's current address "if known" and the notice of sale to be mailed to the property owners' "last known address."

As noted, U.S. Bank did not file a request for notice. Its publicly recorded deed of trust states that any required notice "shall be given by delivering it or by mailing it by first class mail to the appropriate party's address on page 1." Page 1, paragraph 1 of the deed of trust is entitled "DATE AND PARTIES" and generically lists three parties: "GRANTOR," "TRUSTEE," and "LENDER." For the Lender, it supplies the following name and address:

> LENDER:
> U.S. Bank National Association ND,
> a national banking association organized under
> the laws of the United States
> 4325 17th Avenue SW
> Fargo, ND 58103

Paragraph 2 confirms the "Lender," U.S. Bank, is the beneficiary of the deed of trust.

U.S. Bank's deed of trust provided Alessi & Koenig with a "known address" to which to send the notice of default, but Alessi & Koenig did not follow the instructions the deed of trust gave. Instead, Alessi & Koenig mailed the notice of default to a "return to" name and address appearing at the top left of the deed of trust opposite the recorder's stamp. U.S. Bank established through uncontroverted testimony at trial that it was not affiliated with the "return to" entity and did not receive the notice of default.

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[2]The references in the text are to NRS 107.090 as written before its 2019 amendment. *See* 2019 Nev. Stat., ch. 238, § 15 (S.B. 382). The 2019 amendments affect the paragraph numbering, not the substance.

On this record, the district court clearly erred when it found that Alessi & Koenig gave U.S. Bank adequate notice of default. Since the HOA was foreclosing both the superpriority and subpriority portions of its lien, notice of default needed to go to "the holder of the first security interest as a subordinate interest." *SFR 3*, 134 Nev. at 487, 422 P.3d at 1252. A trustee or other person conducting a foreclosure sale must send notice of default to each person entitled to it at the address the recorded documents provide for that person (or in some instances, if different, their known or last known address). *See Title Ins. & Tr.*, 97 Nev. at 525-26, 634 P.2d at 1218. To give statutorily compliant notice, Alessi & Koenig needed to send the notice of default to U.S. Bank at the address specified for it in its publicly recorded deed of trust. *See Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) (holding that if a contract's language is clear, it will be enforced as written). Confirming the point, Alessi & Koenig had in its file a title report that identified U.S. Bank as the deed of trust beneficiary—and Alessi & Koenig's files show it mailed the notice of sale, as distinguished from the notice of default, to U.S. Bank as Lender at the address listed for it on page 1, paragraph 1 of the deed of trust.

B.

Alessi & Koenig's failure to mail U.S. Bank the notice of default at the address given for it in the recorded deed of trust violated NRS 116.31168 and NRS 107.090(3). U.S. Bank urges this statutory violation automatically voids the sale. As support, U.S. Bank cites *Title Insurance & Trust*, 97 Nev. at 526-27, 634 P.2d at 1218, which affirmed a district court decision that a foreclosure trustee's failure to give notice of default or notice of sale to the person entitled to receive it rendered the sale void. *See* 1 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 7:21, at 955 & n.8 (2014) (discussing defects that will render a foreclosure sale void or voidable and collecting cases holding that "a sale was void when . . . the mortgagee or trustee did not give statutorily required notice").

More recent cases suggest a notice/prejudice rule that limits *Title Insurance & Trust* to the since-amended statute, *see Miyayama v. Quality Loan Serv. Corp.*, No. 2:16-cv-00413-JAD-CWH, 2017 WL 132836, at *5 (D. Nev. Jan. 13, 2017), and extreme facts—the person entitled to notice in *Title Insurance & Trust* received *no* pre-sale notice *at all*, 97 Nev. at 527, 634 P.2d at 1218—it involved. Thus, in *West Sunset 2050 Trust v. Nationstar Mortgage, LLC*, 134 Nev. 352, 354, 420 P.3d 1032, 1035 (2018), we held that the first deed of trust holder's failure to allege prejudice resulting from the HOA's failure to mail notice of default to its assignor "dooms its claim that the defective notice [of default] invalidates the HOA sale." And in *Schleining v. Cap One, Inc.*, 130 Nev. 323, 330-31, 326 P.3d 4,

8-9 (2014), we upheld on an abuse-of-discretion standard a district court's determination that a lender's "substantial compliance" with NRS 107.095 (2009) (amended by 2019 Nev. Stat., ch. 238, § 16 (S.B. 382)), and the guarantor's failure to prove prejudice from the notice defect, excused the lender's failure to provide the guarantor with the notices of default and of sale required by NRS 107.095. Of note, in both *Sunset 2050* and *Schleining*, despite the statutory notice deficiencies, the party complaining about the defective notice came by actual notice of the foreclosure proceedings before the sale occurred. *W. Sunset 2050 Tr.*, 134 Nev. at 354, 420 P.3d at 1035 (emphasizing that the HOA recorded the notice of default, so the assignee of the original deed of trust beneficiary had constructive notice of the notice of default, and received timely notice of sale); *Schleining*, 130 Nev. at 330, 326 P.3d at 8-9 (stating that "the district court properly found that Schleining had actual knowledge of the default and the pending foreclosure sale despite the lack of statutory notice").

Absent notice from some other source, failing to mail the statutorily required notice of default deprives the property owner of the minimum grace period the Legislature has mandated to give the deed of trust holder (or the homeowner) time to cure, compromise, or contest the default. *See Title Ins. & Tr.*, 97 Nev. at 526, 634 P.2d at 1218 (the statutes requiring notice of default and notice of sale reflect the Legislature's judgment that a person facing foreclosure "should have a reasonable opportunity to cure a default or deficiency before the property may be sold"). For the homeowner, the legislatively determined minimum grace period following a notice of default is 90 days, NRS 116.31162; for the first deed of trust holder, it is 80 days, *see* NRS 107.090(3).

At trial, U.S. Bank's collection officer testified that it was the bank's practice, on receiving a Nevada notice of default, to request payoff information and "pay the lien off . . . to protect our interest." The loan secured by the U.S. Bank deed of trust included a future advances clause and this witness testified that, had U.S. Bank received notice of default, it would have paid the lien off and charged its borrower. He also denied receiving notice from any other source of the homeowner/borrower's default or the notice of sale that followed.[3] This testimony, if credited, establishes the lack of notice and prejudice needed to void the sale.

The district court made no finding on actual notice or prejudice because of its erroneous findings that statutory notice of default was

[3]Resources Group argues that U.S. Bank effectively had 90 days because the original sale, which followed the notice of sale by 33 days, was orally continued for 60 days. If U.S. Bank did not receive the notice of sale, this argument is a nonstarter. It also does not address the fact that, assuming U.S. Bank received the notice of sale, the sale was orally continued just 33 days after the first notice U.S. Bank received, which is less than the notice of default grace period the Legislature has established.

either unnecessary or acceptable. As we have held, Alessi & Koenig did not comply with the statutory requirement that it serve U.S. Bank with the notice of default, and U.S. Bank may or may not have received the notice of sale. If on remand the district court finds Alessi & Koenig did not substantially comply with NRS 116.31168 and NRS 107.090(3), that U.S. Bank did not receive timely notice by alternative means, and that U.S. Bank suffered prejudice as a result, the district court should determine whether, under NRS 107.080 (2011), it should declare the sale void to the extent it purports to extinguish U.S. Bank's deed of trust.[4] *See Nationstar Mortg., LLC v. Sahara Sunrise Homeowners Ass'n*, No. 2:15-cv-01597-MMD-NJK, 2019 WL 1233705, at *3 (D. Nev. Mar. 14, 2019) (holding that the foreclosure agent's failure to send a required party the notice of default rendered the foreclosure sale void when evidence demonstrated that the holder of the first deed of trust would have tendered the amount of the superpriority default had it received proper notice), *appeal docketed sub nom.*, *Nationstar Mortg. LLC v. River Glider Ave. Tr.*, No. 19-15760 (9th Cir. Apr. 16, 2019); *Christiana Tr. v. SFR Invs. Pool 1, LLC*, No. 2:16-cv-00684-GMN-CWH, 2018 WL 6603643, at *6 (D. Nev. Dec. 17, 2018) (holding an HOA foreclosure sale void due to the HOA's failure to notice the holder of the first deed of trust), *appeal docketed*, No. 19-15096 (9th Cir. Jan. 17, 2019). A void sale, in contrast to a voidable sale, defeats the competing title of even a bona fide purchaser for value. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018), *as amended on denial of reh'g* (Nov. 13, 2018) ("A party's status as a [bona fide purchaser] is irrelevant when a defect in the foreclosure renders the sale void."); *see Real Estate Finance Law*, § 7:21, at 953-54.

C.

U.S. Bank has a fallback position: Even if the sale was not void, it was voidable, because the low sale price, notice deficiencies, and other irregularities establish that "the sale was affected by some element of fraud, unfairness, or oppression." *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017); *see Shadow Wood Homeowners Ass'n,*

[4]Resources Group does not argue that NRS 116.31166, respecting HOA deed recitals, affects the analysis. The recitals NRS 116.31166 establishes as conclusive do not include recitals respecting service of the notices of default and of sale. And, given Alessi & Koenig's failure to mail the notice of default to U.S. Bank, conclusory recitals attesting to proper notice of default would fail in any event. *See Albice v. Premier Mortg. Servs. of Wash., Inc.*, 239 P.3d 1148, 1154 (Wash. App. 2010) ("We are unwilling to accept a trustee's legal conclusions contrary to the actual facts of the foreclosure process as conclusive evidence where an accurate reporting of the facts would have shown the legal conclusions to be incorrect."), *aff'd*, 276 P.3d 1277 (Wash. 2012).

Inc. v. N.Y. Cmty. Bancorp, Inc., 132 Nev. 49, 56, 366 P.3d 1105, 1110 (2016); *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963). Under these cases, "mere inadequacy of price is not in itself sufficient to set aside the foreclosure sale, but it should be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by fraud, unfairness, or oppression." *Shadow Canyon*, 133 Nev. at 749, 405 P.3d at 648. Though not determinative, "the price/fair-market-value disparity is a relevant consideration because a wide disparity may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale." *Id.* The relationship is hydraulic: "where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought." *Id.* (quoting *Golden*, 79 Nev. at 515, 387 P.2d at 995).

The district court gave short shrift to U.S. Bank's claim that the sale was voidable under *Shadow Canyon*, *Shadow Wood*, and *Golden*. But its mistaken determination that U.S. Bank did not deserve (or received) statutorily compliant notice of default cramped its analysis. As discussed above, Alessi & Koenig failed to give U.S. Bank statutorily required notice of default. Our caselaw establishes that "irregularities that may rise to the level of fraud, unfairness, or oppression" that will render a sale voidable "*include an HOA's failure to mail a deed of trust beneficiary the statutorily required notices*." *Shadow Canyon*, 133 Nev. at 749 n.11, 405 P.3d at 648 n.11 (emphasis added). While the district court did not determine what the property's fair market value was, the record evidence suggests that the $5,331 bid price fell somewhere between 10% and 15% of its fair market value. The grossly inadequate price, combined with the problems with the notice of default—even assuming U.S. Bank received the notice of sale—presents a classic claim for equitable relief under *Shadow Canyon*, *Shadow Wood*, and *Golden*. (Also concerning, but not addressed by the district court, was the evidence U.S. Bank offered respecting Haddad's attorney-client relationship with one of the lawyers at Alessi & Koenig.)

Resources Group counters that the district court found it was a bona fide purchaser for value (BFP) and that, while a *void* sale could defeat its title, a *voidable* sale cannot, defeating U.S. Bank's claim to equitable relief under *Shadow Canyon*, *Shadow Wood*, and *Golden*. *See Shadow Wood*, 132 Nev. at 63-66, 366 P.3d at 1114-16 (holding that a district court must consider a party's BFP status when balancing the equities in an action to quiet title following an HOA foreclosure sale). A BFP is one who "takes the property for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Shadow Wood*, 132 Nev. at 64, 366 P.3d at

1115 (internal quotation marks and citation omitted). The district court's misapprehension respecting U.S. Bank's entitlement to notice of default affected its decision that Resources Group was a BFP, because it made it unnecessary to consider what Resources Group's principal, Haddad, knew or should have known about the defective notice of default or other sale irregularities. We therefore vacate the district court's finding that Resources Group occupied BFP status.

Despite this, Resources Group urges us to affirm the BFP finding as a matter of law. As support, it points to Haddad's trial testimony that he made no inquiries of Alessi & Koenig about the notices of default and of sale and therefore did not have notice anything was amiss. But this argument proves too much. Haddad's trial testimony also established that he had extensive real estate and foreclosure sale experience, attending "five [foreclosure] sales a week, 52 weeks a year." While Haddad may not have had actual notice that Alessi & Koenig failed to give U.S. Bank proper notice of default, this does not mean he did not have inquiry notice, given his sophistication; the fact the sale had been continued and neither the homeowner nor U.S. Bank nor any other bidders appeared at the rescheduled sale; the allegations respecting his close relationship with Alessi & Koenig; and his acknowledgment in the bankruptcy that followed the sale that title to this property was contested. *See Albice*, 239 P.3d at 1157 (holding that "[a] purchaser is on notice if he has knowledge of facts sufficient to put an ordinarily prudent man on inquiry and a reasonably diligent inquiry would lead to the discovery of title or sale defects" and deeming it appropriate to "give substantial weight to a purchaser's real estate investment experience when determining whether a purchaser had inquiry notice"). Whether diligent inquiry by Haddad would have revealed the notice defect, or the other deficiencies alleged, are questions of fact for the district court to resolve. *See Shadow Wood*, 132 Nev. at 65-66, 366 P.3d at 1116.

III.

The district court erred when it rejected U.S. Bank's objection that it did not receive statutorily compliant notice of default. This error affected the other claims in the case. We therefore vacate the partial judgment in favor of Resources Group and remand this case for further proceedings consistent with this opinion.

Parraguirre and Cadish, JJ., concur.

YESENNIA ESMERALDA AMAYA, Appellant, *v.*
MILTON ORLANDO GUERRERO RIVERA, Respondent.

No. 75769

July 3, 2019 444 P.3d 450

Appeal from a district court order establishing child custody. Eighth Judicial District Court, Clark County; Mathew Harter, Judge.

Reversed and remanded.

Silver, J., dissented.

Law Offices of Martin Hart, LLC, and *Alissa A. Cooley*, Las Vegas, for Appellant.

Milton Orlando Guerrero Rivera, in Pro Se.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

Although appellant Yesennia Esmeralda Amaya was granted sole physical custody over her daughter, the district court denied her motion to make the three predicate findings necessary to petition the federal government for Special Immigrant Juvenile (SIJ) status. *See* 8 U.S.C. § 1101(a)(27)(J) (2012); NRS 3.2203. We take this opportunity to clarify that a child custody order can satisfy the first predicate SIJ finding, which requires a person be "appointed" to have custody over a juvenile. We further hold that the second predicate SIJ finding can be made where reunification is not viable with one parent due to abuse, abandonment, neglect, or some similar basis under Nevada law. Because the district court reached the opposite conclusions and also failed to determine whether the third predicate was met, we reverse and remand for further adjudication consistent with this opinion.

BACKGROUND

Amaya gave birth to A.A. in El Salvador in November 2004. A.A.'s father, respondent Milton Orlando Guerrero Rivera,[1] and Amaya were never married and were no longer in a relationship when A.A. was born. A.A. lived with her mother and maternal grandmother in El Salvador until her mother moved to the United States when A.A. was two years old. A.A. then lived with her father

[1]Guerrero Rivera did not file any answering brief in or otherwise respond to this fast-track appeal.

until he kicked her out when she was ten years old, and she resumed living with her maternal grandmother. Amaya kept in regular contact with her daughter through A.A.'s maternal grandmother and sent money and clothes for A.A. A.A. recalls poor treatment from her father—alleging both emotional and physical abuse.

When A.A. was 12 years old, she moved to the United States to avoid the harsh realities of her life in El Salvador. Since February 2017, A.A. has lived with her mother, stepfather, and two half siblings in Las Vegas. A.A. does not want to return to El Salvador. In December 2017, Amaya petitioned for sole physical custody of A.A. The district court entered a default against the nonresponsive Guerrero Rivera, granted joint legal custody to both parties and sole physical custody to Amaya, and ordered Guerrero Rivera to pay child support at $100 per month.

Following the district court's default against Guerrero Rivera but before a written order was entered, Amaya filed a motion for SIJ predicate findings. The district court declined to hold a hearing and denied Amaya's request. The district court concluded that it did not appoint Amaya to have custody over A.A. by granting Amaya's petition for custody and that Amaya did not prove that A.A. was unable to reunify with both parents, rather than with just her father.[2] Presumably because the district court concluded Amaya did not satisfy these first two predicate SIJ findings, it did not reach the third. Amaya then filed a motion for reconsideration, which the district court also denied without a hearing.

DISCUSSION

Federal law provides a pathway for undocumented juveniles residing in the United States to acquire lawful permanent residency by obtaining SIJ status under 8 U.S.C. § 1101(a)(27)(J). *See* 8 C.F.R. § 204.11 (2018). Obtaining SIJ status is a two-step process implicating both state and federal law: first, the applicant must go to state court to obtain a juvenile court order issuing predicate findings,[3] and only after such findings are made can the applicant petition the United States Citizenship and Immigration Services (USCIS) for SIJ status. *See Recinos v. Escobar*, 46 N.E.3d 60, 64-65 (Mass. 2016). The state trial court does not determine whether a petitioner qualifies for SIJ status, but rather provides an evidentiary record for USCIS

[2]We note both Amaya and the district court refer to Assembly Bill 142, the bill that enacted NRS 3.2203 and went into effect in October 2017, before Amaya filed the underlying action. *See* 2017 Nev. Stat., ch. 212, § 1, at 1147. We apply NRS 3.2203 here.

[3]"Juvenile court" is defined under federal law as "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 C.F.R. § 204.11(a). A juvenile is a person who is under 21 years old and unmarried at the time of petitioning for SIJ. 8 C.F.R. § 204.11(c).

to review in considering an applicant's petition. *See Benitez v. Doe*, 193 A.3d 134, 138-39 (D.C. 2018).

The Nevada Legislature enacted NRS 3.2203 in May 2017 to comport with federal law and codify the juvenile courts' existing authority to issue predicate findings for purposes of 8 U.S.C. § 1101(a)(27)(J). *See* 2017 Nev. Stat., ch. 212, Legislative Counsel's Digest, at 1146-47; Hearing on A.B. 142 Before the Assembly Judiciary Comm., 79th Leg. (Nev., March 8, 2017) (statement of Assemblyman Edgar Flores). Under the SIJ statutes, for an undocumented juvenile to be eligible to petition the USCIS, the state court's predicate findings must establish that (1) the juvenile is dependent on a juvenile court, the juvenile has been placed under the custody of a state agency or department, or the juvenile has been placed under the custody of an individual appointed by the court (dependency or custody prong); (2) due to abandonment, abuse, neglect, or some comparable basis under state law, the juvenile's reunification with one or both parents is not viable (reunification prong); and (3) it is not in the juvenile's best interest to be returned to the country of the juvenile's origin (best interest prong). *See* 8 U.S.C. § 1101(a)(27)(J); NRS 3.2203(3). We review the interpretation of these statutes de novo. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

A child custody order satisfies the dependency or custody prong for SIJ predicate findings

First, Amaya challenges the district court's conclusion that the district court did not place A.A. under her custody in granting Amaya's petition for custody.[4] In assessing the dependency or custody prong, the district court determines whether "[t]he child has been declared dependent on the court or has been legally committed to, or placed under the custody of, a state agency or department or a person appointed by the court[.]" NRS 3.2203(3)(a). Under Nevada

[4]The dissent concludes that NRS 3.2203(2)'s lack of explicit enumeration of NRS Chapter 125C places these proceedings beyond the reach of NRS 3.2203. We disagree. District courts conducting proceedings pursuant to NRS Chapter 125C already have jurisdiction to make the types of findings that constitute SIJ findings, *see, e.g.*, NRS 125C.003 (awarding physical custody of a child); NRS 125C.003(3) (determining if a parent has abandoned a child); NRS 125C.0035(4)(j) (determining if a parent has abused or neglected a child); NRS 125C.0035(4) (setting forth considerations in evaluating a child's best interest). In resolving Amaya's petition for custody, the district court's jurisdiction encompassed making the SIJ findings that were material to A.A.'s custody and best interest. *See Landreth v. Malik*, 127 Nev. 175, 187, 251 P.3d 163, 171 (2011) (concluding that the family court had jurisdiction to resolve issues beyond its jurisdiction when necessary to resolve matters over which its jurisdiction was properly exercised). NRS 3.2203 does not divest the court of this authority. *See id.* at 180, 251 P.3d at 166-67 (holding the Legislature cannot limit the constitutional powers of a district court judge).

law, the district court's order granting Amaya's petition for physical custody over A.A. constitutes a court determination that placed A.A. under Amaya's custody. *See* NRS 125A.045(1) (providing that an order determining a child's physical custody is a "[c]hild custody determination"). We conclude that an order determining physical custody of a child satisfies the dependency or custody prong for SIJ predicate findings.[5]

Showing that reunification with one parent is not viable satisfies the reunification prong for SIJ predicate findings

Next, Amaya argues the district court erred in concluding the reunification prong required Amaya to demonstrate A.A. could not reunify with both parents. Amaya contends the plain language that "[t]he reunification of the child with one or both of [the juvenile's] parents was determined not to be viable" encompasses two scenarios: (1) reunification is not viable with one parent, or (2) reunification is not viable with both parents.

The district court did not explicitly rule as to this prong but denied Amaya's request, in part, because she could not show that reunification with *both* parents was not viable. In reaching this conclusion, the district court misreads this court's unpublished order in *In re Guardianship of D.S.M.*, Docket No. 72820 (Order of Affirmance, March 15, 2018). In *D.S.M.*, this court affirmed the district court's denial of a motion for SIJ findings because the appellant, D.S.M.'s aunt, did not show that D.S.M. was unable to reunify with his father due to abandonment or neglect where reunification was not possible because of the father's murder. *Id.* There, the district court had also determined that reunification with the mother was viable, a finding that D.S.M. did not challenge. *Id.* Accordingly, the appellant had not shown that reunification was not viable within the meaning of NRS 3.2203 with even one parent, and thus *D.S.M.* is distinguishable from the underlying facts here and, moreover, does not suggest that the reunification prong requires showing that reunification is not viable with both parents.

We conclude the plain language of "one or both of [the juvenile's] parents" is clear—the use of a disjunctive "or" signals the reunification prong is met where the juvenile cannot reunify with one parent

[5]Several other jurisdictions have adopted this approach. *See, e.g.*, *Simbaina v. Bunay*, 109 A.3d 191, 201 (Md. Ct. Spec. App. 2015) (noting that the state court order awarding sole custody made a determination about the juvenile's custody for purposes of making SIJ findings); *De Guardado v. Guardado Menjivar*, 901 N.W.2d 243, 247-48 (Minn. Ct. App. 2017) (recognizing the determinations made in a dissolution proceeding satisfied the dependency or custody prong because the findings pertained to the minor child's physical and legal custody); *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 721 (App. Div. 2013) (finding that the family court order placing a juvenile in her mother's custody satisfied the dependency or custody prong).

or with both parents. In approving of one-parent SIJ cases, we join the majority of states that have considered this issue. *See, e.g.*, *Eddie E. v. Superior Court*, 183 Cal. Rptr. 3d 773, 779-80 (Ct. App. 2015) (noting the significance of the disjunctive "or" in "1 or both" language in 8 U.S.C. § 1101(a)(27)(J)); *E.P.L. v. J.L.-A.*, 190 A.3d 1002, 1007 (D.C. 2018) ("[T]he [SIJ] statute only requires proof of abandonment by one parent."); *In re Estate of Nina L.*, 41 N.E.3d 930, 938 (Ill. App. Ct. 2015) ("Use of the disjunctive indicates that abuse, neglect or abandonment by one parent is sufficient to support the predicate finding."); *Marcelina M.-G.*, 973 N.Y.S.2d at 721-24 (holding the reunification prong was met where reunification with a child's father was not viable due to abuse, though her mother retained custody). Additionally, this approach is in harmony with federal policy. *See, e.g.*, 6 U.S. Citizenship & Immigr. Servs., Dep't of Homeland Sec., Policy Manual pt. J, ch. 2(D)(1), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2 (last visited May 28, 2019) ("Placing the petitioner 'under the custody of' a person requires physical custody. A qualifying court-appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent's abuse, neglect, or abandonment of the petitioner."). The district court thus erred when it declined to consider whether reunification with A.A.'s father was viable after concluding that reunification with A.A.'s mother was viable.

Accordingly, we reverse the district court's custody order insofar as the court denied Amaya's motion for SIJ predicate findings, and we remand this case to the district court for further proceedings consistent with this opinion.

Hardesty, J., concurs.

Silver, J., dissenting:

To pursue Special Immigrant Juvenile (SIJ) status, a child must first petition a state juvenile court to issue an order making special findings of fact that the child is dependent upon the court or legally committed to a court-appointed individual. *In re Marisol N.H.*, 979 N.Y.S.2d 643, 645 (App. Div. 2014). A state court must thereafter make findings that reunification with one or both of the parents is not viable and that it is not in the child's best interest to return to his or her home country. *Id.* Once a state court has issued the predicate findings, the child may petition the federal government for SIJ status. *Id*. The fact that a child has one fit parent available to care for him or her does not, by itself, preclude the issuance of special findings under the SIJ statute. *Id.* at 645-48. "[I]t is entirely consistent with the legislative aim of the [SIJ] statute to consider the plight the child would face if returned to his or her native country"; therefore a child may be eligible for SIJ status where reunification with one

parent is not viable and it is in the child's best interest to not return to his or her home country. *Id.* (concluding a family court erred by dismissing the children's petitions for the appointment of their mother as their guardian in order to pursue SIJ status, because a parent can be named as the guardian of his or her child, and the family court had refused to conduct a hearing on whether granting the mother's guardianship petition and potentially enabling the children to seek legal status in the U.S. was in the children's best interest).

In Nevada, NRS 3.2203 specifically details when a district court must make findings pursuant to the SIJ statutes: "during a proceeding held pursuant to chapter 62B, 125, 159, 159A or 432B of NRS." NRS 3.2203(2). If a statute is clear and unambiguous, we do not look beyond its plain language, and we strive to give effect to the plain meaning of its words and phrases. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508-09 (2012). Here, the statute clearly applies only to proceedings held pursuant to NRS Chapters 62B (Juvenile Court Proceedings), 125 (Dissolution of Marriage), 159 (Guardianship of Adults), 159A (Guardianship of Minors), or 432B (Protection of Children From Abuse and Neglect). By enumerating specific chapters and subchapters, yet omitting NRS Chapter 125C (Custody and Visitation), the Legislature placed NRS Chapter 125C child custody proceedings outside the scope of NRS 3.2203. *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* 107-11 (2012) (addressing the negative-implication canon); *cf.* NRS 3.223 (specifically providing that the family court has jurisdiction over proceedings brought under NRS Chapter 125C, in addition to 125, 159A, 432B, and other delineated statutes).

Not only is NRS 3.2203(2) clear in this regard, but subsection 3 of the statute, which requires the child to have been placed under the custody of a state agency, department, or person "appointed by the court," likewise does not create ambiguity. Importantly, the "appointed" language relates back to the statutes enumerated earlier in that same subsection. NRS 3.2203(3) ("A person may include in a petition filed or motion made *pursuant to chapter 62B, 125, 159, 159A or 432B of NRS* a request that the court make the . . . finding[ ] . . . [that] [t]he child had been . . . placed under the custody of . . . a person appointed by the court." (emphasis added)); *cf. State v. Plunkett*, 134 Nev. 728, 730-32, 429 P.3d 936, 938-39 (2018) (addressing aider and abettor liability under NRS 212.165(4) and considering other subsections of the same statute in interpreting the statute's plain language). Accordingly, NRS 3.2203(3) when read as a whole is clear that for purposes of SIJ proceedings, the "person appointed by the court" must be appointed in a proceeding under one of those chapters enumerated earlier in the statute. Thus, the plain wording of NRS 3.2203 does not encompass an NRS Chapter 125C proceeding.

Instead of filing under one of the chapters enumerated in the statute, Amaya petitioned the district court under NRS Chapter 125C. Yet, NRS Chapter 125C is specifically excluded from NRS 3.2203, and the plain language of NRS 3.2203 does not mandate that the district court make findings for purposes of the SIJ statutes. Because Amaya petitioned the district court pursuant to NRS Chapter 125C, instead of petitioning the juvenile court for guardianship pursuant to NRS Chapter 159A, I agree with the district court here. The district court was not required to make specific findings because pursuant to NRS 3.2203, the child had not been "placed under the custody of . . . a person appointed by the court" in either temporary or permanent guardianship proceedings, which seems to be what Amaya really desired.

However, I believe nothing precludes Amaya from petitioning for guardianship pursuant to NRS Chapter 159A and thereafter seeking special findings, especially where such a request is unopposed as it was below. Amaya's desire for "specific findings" for SIJ status by the district court was thwarted, in my view, because she used the wrong vehicle to obtain them. Because this case involved a default in a child custody proceeding filed under NRS Chapter 125C, NRS 3.2203 is not implicated. Therefore, I cannot say that under these particular facts the district court abused its discretion and should be reversed for failing to make the specific findings. Further, nothing would preclude Amaya from obtaining her desired result by petitioning again under a different statute encompassed by NRS 3.2203 even if we were to affirm the district court in this case. Accordingly, I respectfully dissent.

TIMMIE CAMERON, JR., Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ERIC JOHNSON, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 77669

July 18, 2019 445 P.3d 843

Original petition for a writ of mandamus challenging the amount of bail and conditions set by the district court.

Petition granted.

The Pariente Law Firm, P.C., and *Michael D. Pariente*, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION[1]

By the Court, Hardesty, J.:

Petitioner Timmie Cameron, Jr., challenges the district court's decision to increase his bail from $25,000 to $100,000, arguing that the district court lacked good cause to support the increase. Because the district court increased the bail after making an initial bail determination, it was required to make a finding of good cause under NRS 178.499(1) for the subsequent increase in bail. We conclude that the district court failed to engage in a meaningful analysis to determine whether good cause was shown, and therefore writ relief is warranted.

FACTS AND PROCEDURAL BACKGROUND

The State charged Cameron with first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, battery with the use of a deadly weapon, grand larceny of a firearm, burglary, coercion, and ownership or possession of a firearm by a prohibited person. At the arraignment hearing, the justice court set bail at $25,000 with mid-level electronic monitoring. The State subsequently sought a grand jury indictment and the case was transferred to district court. The district court transferred bail and set it at $25,000—the same amount as the justice court.

After setting bail, the district court invited the State to submit a written motion for its request to increase bail to $150,000. The State filed a motion seeking to increase bail, which Cameron opposed. The district court subsequently held a hearing on the State's motion, heard arguments by the parties, and set bail at $100,000 and imposed house arrest.

DISCUSSION

Cameron argues that his case merits writ relief because the district court improperly increased the bail without a showing of good

[1]We granted the petition for a writ of mandamus in an unpublished order entered April 29, 2019. Petitioner subsequently filed a motion to publish the decision as an opinion. NRAP 36(f). We granted that motion by order entered June 26, 2019, and we accordingly issue this opinion in place of our April 29, 2019, unpublished order.

cause as required under NRS 178.499(1). "A writ of mandamus is available to compel the performance of an act that the law requires or to control a manifest abuse of discretion." *Int'l Fid. Ins. Co. ex rel. Blackjack Bonding, Inc. v. State*, 122 Nev. 39, 42, 126 P.3d 1133, 1134 (2006); *see also* NRS 34.160. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or 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) (internal quotation marks and citations omitted). A petitioner bears the burden of demonstrating that extraordinary relief is warranted, *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004), and whether to consider a writ of mandamus is ultimately within this court's discretion, *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). We exercise our discretion to consider this writ petition because Cameron has no other remedy at law, *see* NRS 34.170, and "judicial economy and sound judicial administration" weigh in favor of its consideration, *Armstrong*, 127 Nev. at 931, 267 P.3d at 779 (internal quotation omitted).

As the district court determined, it was not constrained by the justice court's bail determination, as the case was not bound over from justice court. However, it chose to transfer bail and set it at the same amount as the justice court had and with the same conditions. As a result, the district court was required to find good cause for a subsequent increase of bail. *See* NRS 178.499(1) (requiring that a district court have good cause to increase bail after it has made an initial bail determination). In determining whether good cause to increase bail exists, the district court should consider the statutory factors.[2]

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[2]Pursuant to NRS 178.498, a district court must consider the following factors when setting bail:

1. The nature and circumstances of the offense charged;
2. The financial ability of the defendant to give bail;
3. The character of the defendant; and
4. The factors listed in NRS 178.4853.

NRS 178.4853 provides that a district court must consider the following factors when considering release without bail:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or other family members and with close friends;
4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing;

We are not convinced that the district court engaged in a meaningful analysis of the factors to be considered when setting, or increasing, the bail amount and other conditions of bail.

In setting the initial bail, the district court adopted the amount and conditions set by the justice court, which were premised on the justice court's review of Cameron's arrest report and criminal history, and on the State's arguments regarding Cameron's 10-year-old conviction for conspiracy to commit aggravated stalking. Nothing in the record shows that Cameron committed additional crimes in the 10 years leading up to this case or in the time he was released on bail. This record belies the State's argument and the district court's conclusion that the justice court did not fully appreciate the circumstances of Cameron's criminal history.

Additionally, the district court did not articulate why its previously imposed bail in the amount of $25,000 with mid-level monitoring was insufficient to ensure Cameron's appearance. It is likewise not clear from the record before us why the district court concluded that Cameron was a flight risk or how the facts before it were substantially different from those before the justice court. Finally, its decision to increase bail four times over the initial amount, without considering Cameron's inability to pay and over his objection, seriously undermines NRS 178.498(2)'s requirement that the district court assess a defendant's inability to post bail *before* making a bail determination. Therefore, we conclude that the district court acted arbitrarily and capriciously in increasing Cameron's bail without explaining the good cause shown, and writ relief is warranted.

CONCLUSION

In light of the above, we grant the writ petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to explain the good cause shown for its increase of bail, taking into consideration the factors required by statute.

Stiglich and Silver, JJ., concur.

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8. The nature and seriousness of the danger to the alleged victim, any other person or the community that would be posed by the person's release;

9. The likelihood of more criminal activity by the person after release; and

10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

LUIS ALEJANDRO MENENDEZ-CORDERO, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 74901

July 25, 2019 445 P.3d 1235

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Affirmed.

John L. Arrascada, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Marilee Cate*, Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Gibbons, C.J., Pickering, Hardesty, Parraguirre, Stiglich, Cadish and Silver, JJ.

OPINION

Per Curiam:

In this appeal, we review appellant Luis Alejandro Menendez-Cordero's convictions for two counts of first-degree murder with a deadly weapon. Menendez-Cordero presents two issues of first impression in Nevada. The first is whether the district court abused its discretion when it empaneled an anonymous jury by withholding the jurors' names and addresses from counsel. The second is whether the district court erred when it failed to instruct the jury on the effect of a deadly weapon enhancement at the penalty hearing.

Upon consideration of these and the remaining issue raised in this appeal, we adopt a framework for analyzing the appropriateness of juror anonymity and affirm the district court's judgment.

BACKGROUND

In 2010, a group of friends gathered at an apartment in Sparks, Nevada. Appellant Menendez-Cordero arrived with Elder Rodriguez. Shortly thereafter, Kevin Melendez arrived and had a brief conversation with Menendez-Cordero and Rodriguez. After the group started playing cards, Menendez-Cordero and Rodriguez went outside. According to eyewitness testimony, Menendez-Cordero returned alone with a gun, shot Melendez and another guest, and fled the crime scene. Both victims died from the gunshot wounds.

While pursuing Menendez-Cordero, the State learned that Menendez-Cordero was a member of MS-13, a transnational gang. A confidential informant told the State that Menendez-Cordero admitted that he shot the victims because one of them had disrespected MS-13. The informant also explained that shortly after the shooting, Menendez-Cordero got a tattoo on his forehead, and that an MS-13 member will commonly get a gang-related tattoo after killing for the gang. Based on this and other evidence, the State charged Menendez-Cordero with two counts of first-degree murder with the use of a deadly weapon.

At a pretrial hearing, a special agent assigned to the Transnational Anti-Gang Unit of the Federal Bureau of Investigation testified about the violent nature of MS-13 and its growing presence in the United States. He informed the court about the role of hierarchy, respect, and tattoos within MS-13. Tattoos play an important role in MS-13 culture, he testified, and often signify the commission of a crime. The agent then identified multiple MS-13-related tattoos on Menendez-Cordero's body, including one across his forehead with the letters M and S and a pair of horns.

Before trial, the State also informed the district court about two recorded conversations wherein Menendez-Cordero asked his associates to threaten a key witness. The State sought to introduce the conversations as consciousness-of-guilt evidence at trial, which the district court ultimately permitted.

Having assessed the violent nature of MS-13, Menendez-Cordero's attempt to obstruct justice, and the lengthy prison sentence Menendez-Cordero faced if convicted, the district court decided to empanel an anonymous jury and redact the jurors' names and addresses from the juror questionnaires. The record indicates that the district court expressly explained its reasons for doing so to the parties before trial. The record also indicates that counsel retained access to the jurors' geographical locations, ages, professions, education levels, family demographics, and other biographical and personal information. Moreover, the district court apparently invited counsel to view the *un*redacted juror questionnaires of certain jurors the court flagged before formally starting jury selection.

Before questioning began, the district court informed all prospective jurors of its decision to identify them by number, not name, but explained that it was doing so to protect their privacy:

> You may be questioning why are we using numbers instead of names. Well, some of you may have seen the newspaper yesterday. I don't know if it's in today. But as the judge here, I felt your privacy was important and I didn't want you being harassed or followed up during your time as jurors here. And so for that reason, I've selected this panel according to numbers. So you can rest assured that the newspaper reporters will leave you alone.

Extensive voir dire followed, which appears to have lasted a couple of hours. During this time, both parties had the opportunity to examine the panel of prospective jurors and ask a wide range of questions aimed at uncovering bias. Nothing in the record suggests that the district court limited the scope of questioning or rushed either party during this process. Instead, the only apparent limitation placed on voir dire was the redaction of the jurors' names and addresses.

After a ten-day trial, the empaneled jury found Menendez-Cordero guilty on both counts and further found that Menendez-Cordero had used a deadly weapon in the commission of the crimes. At the penalty hearing, the district court instructed the jury on the penalty for first-degree murder, the primary offense, and clarified that "[t]he sentence for the deadly weapon enhancement will be determined by the [c]ourt at a later date." It rejected Menendez-Cordero's request for a jury instruction that discussed the potential penalties associated with a deadly weapon enhancement, explaining that this question is not within the province of the jury. The jury then sentenced Menendez-Cordero to life without parole on each count, and the district court sentenced him to a consecutive term of 20 years' imprisonment for use of a deadly weapon on each count. This appeal followed.

DISCUSSION

Anonymous jury

An anonymous jury is one in which certain biographical information is withheld from the parties and counsel.[1] Its propriety is an issue of first impression for this court.

We begin our analysis by observing that federal courts that have addressed this issue do not view anonymous juries as categorically impermissible. Instead, "every federal appeals court to have considered this issue has held that a district court's decision to empanel an anonymous jury is reviewed under a deferential abuse-of-discretion standard." *United States v. Dinkins*, 691 F.3d 358, 371 (4th Cir. 2012) (listing cases from the United States Courts of Appeal for the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits). Because of the fact-intensive nature of this determination, we too adopt an abuse-of-discretion standard and afford great deference to the district court's decision.

Yet we are mindful that juror anonymity may implicate a defendant's constitutional rights. By withholding certain biographi-

[1]Although "[t]he term 'anonymous jury' does not have one fixed meaning," *United States v. Dinkins*, 691 F.3d 358, 371 (4th Cir. 2012), both parties agree, as do we, that the district court's decision to withhold the jurors' names and addresses constituted an empanelment of an anonymous jury.

cal information, the district court denies a defendant information that may be helpful to strike biased jurors during voir dire, thereby threatening that defendant's Sixth Amendment right to an impartial jury. *United States v. Barnes*, 604 F.2d 121, 142 (2d Cir. 1979). By referring to jurors by number instead of name, the district court may imply that a defendant's dangerousness required juror anonymity, "thereby implicating defendants' Fifth Amendment right to a presumption of innocence." *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003).

We therefore emphasize that "empaneling an anonymous jury is an unusual measure," *id.*, and caution that a district court should employ such a measure only after careful consideration of the competing individual and institutional interests at stake. To aid district courts in striking this delicate balance, we adopt the following rule:

> [T]he trial court may empanel an anonymous jury where (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused.

Id. (internal quotation marks omitted).

In doing so, we decline Menendez-Cordero's invitation to apply the more demanding balancing test that we adopted in *Stephens Media, LLC v. Eighth Judicial District Court*, 125 Nev. 849, 862-63, 221 P.3d 1240, 1250 (2009).[2] In *Stephens Media*, we addressed whether the press has a First Amendment right to access juror questionnaires. In concluding that it does, we emphasized that jury selection is a public process, its openness deeply rooted in American jurisprudence and vital to the fair administration of criminal justice. 125 Nev. at 859-60, 221 P.3d at 1247-48. We simply do not believe that withholding identifying biographical information of jurors encumbers public access to a criminal trial in such a way that precludes the fair administration of justice.

Effective administration of justice, however, was not our sole concern. Underlying our holding was our recognition that the First Amendment was adopted primarily to "assur[e] freedom of communication on matters relating to the functioning of government."

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[2]We apply this more rigorous balancing test when the press's First Amendment right to access juror questionnaires threatens to infringe upon a defendant's Sixth Amendment right to a fair trial. It requires that a district court "(1) make[ ] specific findings, on the record, demonstrating that there is a substantial probability that the defendant would be deprived of a fair trial by the disclosure of the questionnaires and (2) consider[ ] whether alternatives to total suppression of the questionnaires would have protected the interest of the accused." *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 863, 221 P.3d 1240, 1250 (2009) (internal quotation marks omitted).

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980); *see also Stephens Media, LLC*, 125 Nev. at 859, 221 P.3d at 1247 (explaining the historical importance of the presumption of an open court). One cannot speak freely on government matters without access to information about our government institutions, which include the judicial branch. *Richmond Newspapers, Inc.*, 448 U.S. at 584 (Stevens, J., concurring). Ensuring public access to criminal proceedings is thus central to preserving the core purpose of the First Amendment.

We are unpersuaded that Menendez-Cordero's concerns are of the same constitutional dimension. His concerns are that when a district court withholds the names and addresses of potential jurors, it (1) interferes with a defendant's ability to exercise peremptory challenges, and (2) threatens to erode a defendant's presumption of innocence. As to his first concern, the use of a peremptory challenge to strike a biased juror is not a constitutionally guaranteed right. We instead view this practice as a statutorily conferred means to achieve the constitutional end of an impartial jury. *See* NRS 16.040, 175.051 (providing each party a specified number of peremptory challenges depending on the type of case and, if criminal, the offense); *see also Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005) (refusing to find a constitutional violation where the district court interfered with a defendant's use of peremptory challenges because such challenges "are a means to achieve the end of an impartial jury" (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988))). We have held before, and we affirm today, that interference with peremptory challenges does not necessarily amount to a constitutional violation; the defendant must also show actual prejudice. *See Blake*, 121 Nev. at 796, 121 P.3d at 578 (requiring the defendant to show "that any juror actually empaneled was unfair or biased"); *see also Summers v. State*, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986) ("Absent a showing that the district court abused its discretion or that the defendant was prejudiced, we shall not disturb a district court's determination to conduct a collective voir dire of prospective jurors."). Menendez-Cordero has made no such showing.

As to his second concern, we recognize that a defendant's presumption of innocence "is a basic component of a fair trial." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). It does not follow that every courtroom procedure that threatens to erode this presumption is unconstitutional. *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (noting that the right to a fair trial "does not mean . . . that every practice tending to single out the accused from everyone else in the courtroom must be struck down"). Where the challenged courtroom practice is not inherently prejudicial, the United States Supreme Court cautions against presuming a constitutional violation without a showing of actual prejudice. *Id.* at 569. We believe that empanel-

ing an anonymous jury is not inherently prejudicial because it does not necessarily imply guilt. *See id.* (concluding that using security officers in a courtroom during trial was not inherently prejudicial because it "need not be interpreted as a sign that [a defendant] is particularly dangerous or culpable"). Although an anonymous juror may attribute the need for anonymity to the dangerousness of the defendant, it is equally possible that the juror will assume that the court merely intended to protect jurors from harassment, shield them from publicity, or streamline the jury selection process. In fact, an anonymous juror may infer nothing at all from anonymity, especially if the juror is unaware that this practice is unusual. In light of the variety of meanings jurors may assign to their anonymity, we refuse to presume that empanelment of an anonymous jury unconstitutionally brands a defendant with guilt, and instead we require that a defendant demonstrate actual prejudice. *See id.* at 569, 572.

We therefore conclude that empanelment of an anonymous jury does not, without actual prejudice, infringe on a defendant's constitutional rights. Moreover, Menendez-Cordero does not argue, and we cannot discern from the record, that the trial was otherwise closed to the general public. Absent any such evidence, we cannot conclude that this procedure was akin to that challenged in *Stephens Media*. We thus decline to extend our First Amendment precedent here and instead follow the lead of every federal circuit court that has addressed the issue of juror anonymity by adopting the two-part approach identified above. *United States v. Dinkins*, 691 F.3d 358, 372 (4th Cir. 2012) (citing cases that also adopt this framework from the United States Courts of Appeals for the Eleventh, First, and Seventh Circuits); *United States v. Lawson*, 535 F.3d 434, 439 (6th Cir. 2008); *United States v. Darden*, 70 F.3d 1507, 1532 (8th Cir. 1995) (citing cases that also adopt this framework from the Second and D.C. Circuits); *United States v. Krout*, 66 F.3d 1420, 1427 (5th Cir. 1995); *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988) (applying a similar balancing test). This approach, we believe, is accurately tailored to balance the constitutional concerns specific to juror anonymity.

There was a strong reason justifying empaneling an anonymous jury

Having adopted the appropriate approach to review a district court's decision to empanel an anonymous jury, we turn to the first part of the test: whether there is a strong reason to believe that the jury or fact-finding process needs protection. Factors bearing on this consideration include:

> (1) the defendants' involvement with organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with

> the judicial process or witnesses; (4) the potential that the defendants will suffer a lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

United States v. Shryock, 342 F.3d 948, 971 (9th Cir. 2003).

While we find this list instructive, we do not view it as exhaustive or dispositive. *Cf. United States v. Hager*, 721 F.3d 167, 187 (4th Cir. 2013) ("[T]he absence of any one factor . . . will not automatically compel a court not to empanel an anonymous jury."). Nonetheless, the district court here provided case-specific reasons justifying its decision to empanel an anonymous jury consistent with all five factors.

First, the district court found that Menendez-Cordero was involved with MS-13, a notoriously dangerous gang. A special agent's testimony about the violent nature of MS-13 and identification of MS-13 tattoos on Menendez-Cordero support this finding. *See Shryock*, 342 F.3d at 972 (holding that the first factor was met where the record showed that the defendant was involved with the Mexican Mafia, a similarly violent organization).

Second, the record demonstrates that MS-13 has the capacity to harm jurors. At a pretrial hearing, a special agent informed the court that MS-13 gang members routinely threaten witnesses with violence or even death. When asked to kill a key witness in this case, for example, Menendez-Cordero's associate said he would take care of it and ask another associate "what the process was last time." This evidence tends to prove that MS-13 regularly uses violence and intimidation to get what it wants, thereby jeopardizing the safety of those involved in the criminal proceeding. *See United States v. Prado*, No. 10-CR-74(JFB), 2011 WL 3472509, at *8 (E.D.N.Y. Aug. 5, 2011) (similarly concluding that "the members of MS-13 are willing and able to engage in violent criminal behavior").

Third, there is clear evidence that Menendez-Cordero interfered with the judicial process in this very proceeding. The State presented evidence that Menendez-Cordero called his associates while in pretrial detention and asked them to intimidate a key witness. *See United States v. Crockett*, 979 F.2d 1204, 1216 (7th Cir. 1992) (finding ample justification for an anonymous jury where, as here, a member of a violent criminal organization attempted to intimidate witnesses while in pretrial detention). Additionally, the record indicates that Menendez-Cordero provided court documents, including discovery materials, to active MS-13 gang members in Washoe County. There is also evidence in the record that shows Menendez-Cordero and an MS-13 affiliate discussed how to intimidate witnesses during trial. When viewed together, these attempts at interference justify the district court's concern.

Fourth, because Menendez-Cordero was charged with a double homicide and faced a lengthy prison sentence if convicted, he may have had an additional incentive to influence the outcome of the proceedings through intimidation or threats. *See United States v. DeLuca*, 137 F.3d 24, 32 (1st Cir. 1998) (noting that lifetime sentences "surely provided a strong inducement to resort to extreme measures in any effort to influence the outcome of their trial").

Finally, a district court can reasonably expect that a double homicide committed by an alleged MS-13 gang member will receive extensive publicity, especially when the local newspaper published a front-page article about the trial and its connection to MS-13. *See United States v. Paccione*, 949 F.2d 1183, 1193 (2d Cir. 1991) (concluding that a case's "front-page news" status was sufficient to satisfy this factor).

Contrary to Menendez-Cordero's contentions, we believe these reasons are sufficiently tailored to the facts of this case. They are rooted in specific concerns about MS-13, as opposed to gang violence generally, and Menendez-Cordero's conduct in this very proceeding, as opposed to hypothetical risks. Accordingly, we conclude that there were strong, case-specific reasons to believe that the jurors and fact-finding process needed protection in this case.[3]

The district court took reasonable precautions to ensure that juror anonymity did not infringe on Menendez-Cordero's fair trial rights

We next consider whether the district court adopted reasonable safeguards to reduce the risk of infringing upon Menendez-Cordero's fair trial rights, which include the right to an impartial jury and the right to a presumption of innocence. Courts have held that a district court adequately protects a defendant's right to an impartial jury when it conducts a thorough voir dire designed to uncover bias. *See, e.g.*, *United States v. Ross*, 33 F.3d 1507, 1520 (11th Cir. 1994) (providing that the district court sufficiently protected a defendant's right to an unbiased jury where it conducted "voir dire that [could] uncover any bias toward issues in the case or to the defendant himself"); *Crockett*, 979 F.2d at 1216 (concluding that the district court took reasonable precautions to protect a defendant's right to an impartial jury where "voir dire was searching and thorough").

Additionally, courts have held that a defendant's presumption of innocence is untainted where the district court gives the jurors a "plausible and nonprejudicial reason for not disclosing their identities." *Paccione*, 949 F.2d at 1192; *see also Shryock*, 342 F.3d at 972-73 (holding that the district court took reasonable precautions when

[3]Although we list these reasons in the order in which the *Shryock* court addressed them, we reiterate that strict adherence to these factors is not required.

it instructed the jurors that anonymity was to "protect their privacy from curiosity-seekers" and assured them it was a common procedure); *United States v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995) (holding that any danger that the jury might infer guilt is minimized where the district court explained to the jurors "that they were being identified by numbers rather than their names so that members of the media would not ask them questions"); *Crockett*, 979 F.2d at 1217 (upholding as reasonable the district court's explanation to the jurors that anonymity "was one of a number of procedures used by the federal courts to avoid any contact between the jurors and the parties"). We clarify, however, that although providing the jury with a plausible and nonprejudicial reason for anonymity is a sufficient precaution, it is not a necessary one in Nevada. A district court may determine that providing such instruction is not reasonably necessary to safeguard a defendant's rights, and decide not to provide the jury with any explanation as to their anonymity. These determinations will depend on the facts of the case. Therefore, absent an abuse of discretion, we will defer to the district court's determination so long as its reasons for empaneling an anonymous jury appear in the record.

Guided by these holdings and principles, we conclude that the district court here implemented reasonable safeguards to minimize infringement on Menendez-Cordero's constitutional rights. Before jury selection, the district court instructed all potential jurors that it would be identifying them by number, not name, to protect them from public identification.[4] By attributing anonymity to privacy concerns, as opposed to Menendez-Cordero's affiliation with MS-13 and its propensity for violence, the district court minimized the risk that the jury would presume guilt before the trial had begun.

Furthermore, the district court redacted only the information necessary to protect the jurors' identities—names and addresses. Counsel retained access to the jurors' geographical locations, ages, professions, education levels, family demographics, and other biographical and personal information. Both parties thus engaged in a thorough voir dire of the prospective jurors and, despite not having access to the jurors' names and addresses, were equipped to formulate questions to uncover bias. The district court even invited counsel to view the unredacted questionnaires of certain jurors it flagged before formally starting the voir dire process to help the parties weed out potentially biased jurors and preserve their peremptory challenges. Although defense counsel declined this invitation, we believe that it evidences the district court's commitment to enabling counsel to strategically and effectively conduct voir dire.

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[4]Menendez-Cordero argues that the district court never gave this instruction. The record plainly belies this argument, however. The district court gave this instruction on October 3, 2017, immediately before the parties began questioning all potential jurors during voir dire.

We therefore hold that the district court did not abuse its discretion when it empaneled an anonymous jury and that its use satisfies both parts of the rule that we adopt today. We further conclude that Menendez-Cordero's remaining juror anonymity arguments are unavailing.[5]

Jury instruction on Menendez-Cordero's deadly weapon enhancement

The jury convicted Menendez-Cordero of first-degree murder. Pursuant to NRS 175.552, the trial jury was thus responsible for imposing the sentence for this charge at a separate penalty hearing. At the penalty hearing, the district court explained the various punishments for first-degree murder, the primary offense, and clarified that "[t]he sentence for the deadly weapon enhancement will be determined by the [c]ourt at a later date."

Menendez-Cordero argues that this was error because the district court did not adequately explain to the jurors the effect of a deadly weapon enhancement before they imposed Menendez-Cordero's sentence. He instead proposed an instruction including more detail on the practical effect of a deadly weapon enhancement on his sentence.

Whether a district court must instruct a jury on the effect of a deadly weapon enhancement at the penalty phase of trial is an issue of first impression in this court, yet we find no reason to treat it any differently than other jury instruction disputes.

That the district court has broad discretion in settling jury instructions is well established. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Accordingly, we review such matters for abuse of discretion or judicial error. *Id.* "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (internal quotation marks omitted). We discern no abuse of discretion here, and our rationale is twofold.

First, while we have consistently held that the defense is entitled to a jury instruction on its theory of the case, *Crawford*, 121 Nev. at 751, 121 P.3d at 586, we have never extended this holding to sentencing enhancements. Whereas determining the credibility of a defendant's theory of the case falls squarely within the jury's province, imposing a sentence enhancement does not. This is true even in cas-

[5]Menendez-Cordero emphasizes throughout his appeal that the district court decided to empanel an anonymous jury sua sponte. Yet, he does not explain why this fact changes the analysis. We conclude that it does not because "no principle would distinguish an order to empanel an anonymous jury made sua sponte from one based on a party's motion." *Shryock*, 342 F.3d at 971.

We further note that Menendez-Cordero suffered no actual prejudice, a point he conceded during oral argument. Any alleged error would therefore be harmless. *See Wilkins v. State*, 96 Nev. 367, 371, 609 P.2d 309, 311 (1980) ("[A]bsent . . . a showing of prejudice, an irregularity in the selection of jurors, without more, must be deemed harmless error.").

es where, as here, the same jury that determined a defendant's guilt is responsible for imposing a sentence pursuant to NRS 175.552. In such cases, NRS 175.552(1) expressly authorizes a jury to sentence a defendant upon finding the defendant guilty of first-degree murder. It does not authorize a jury to impose an additional penalty for sentencing enhancements. Nevada law instead assigns this task to the district court. NRS 193.165 (instructing the trial court, not the jury, on how to determine the length of the additional penalty imposed for a deadly weapon enhancement). We therefore find no justification, statutory or otherwise, for mandating that a district court provide an instruction explaining the deadly weapon enhancement to the jury.

Second, the district court's decision was neither arbitrary nor capricious. After hearing arguments from both parties, the district court concluded that Menendez-Cordero's proposed jury instruction was an incomplete statement of the law that would confuse the jury. This is a sufficiently rational justification. *See Crawford*, 121 Nev. at 754, 121 P.3d at 589 (holding that a defendant is not entitled to jury instructions that are misleading or inaccurate).

Accordingly, we hold that a district court need not instruct a jury that is responsible for imposing a sentence in a first-degree murder case under NRS 175.552 about the effects of a deadly weapon enhancement. By holding that a district court has no statutory obligation to instruct a jury about the consequences of a deadly weapon enhancement, we by no means seek to prohibit a district court from issuing such an instruction. On the contrary, we encourage district courts to tailor jury instructions to the facts of each case.

Admission of Menendez-Cordero's threats as consciousness-of-guilt evidence

Menendez-Cordero argues that the district court erred when it admitted two recorded conversations during which he asked his associates to threaten a key witness. The State argued that these conversations were relevant to show consciousness of guilt and to disprove Menendez-Cordero's alibi that he was not in Nevada during the double homicide. After a pretrial hearing, the district court concluded that the evidence was relevant to show the identity of the shooter and more probative than prejudicial.

"A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong." *Libby v. State*, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999). We discern no abuse of discretion here.

First, Menendez-Cordero argues that the district court erred by admitting this evidence because his threats never actualized. In Nevada, however, whether a threatening statement admitted to show consciousness of guilt reaches the intended party is of no consequence. *See Abram v. State*, 95 Nev. 352, 356-57, 594 P.2d 1143,

1145 (1979) (admitting a defendant's statement that he was "going to get to" a witness, although never communicated to the witness, because the statements "were clearly relevant to the question of guilt" (internal quotation marks omitted)).

Menendez-Cordero next argues that the district court erred because this evidence was not highly probative. We disagree and have previously held, "[e]vidence that after a crime a defendant threatened a witness with violence is directly relevant to the question of guilt." *Evans v. State*, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). We therefore find it reasonable for the district court to conclude that Menendez-Cordero's attempt to threaten a witness was probative to show that he was conscious of his guilt and therefore wanted to silence eyewitness testimony. *See United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995) (providing that threats used to show consciousness of guilt are "second only to a confession in terms of probative value").

Finally, we are unpersuaded by Menendez-Cordero's characterization of this evidence as needlessly cumulative. The decision to exclude evidence as cumulative rests within the district court's discretion. NRS 48.035(2); *Libby*, 115 Nev. at 52, 975 P.2d at 837. Here, the district court considered this evidence at a pretrial hearing and, after hearing from both parties, concluded that its probative value was not substantially outweighed by its cumulative nature. Nothing in the record suggests that this conclusion was manifestly wrong.

Having found no manifest abuse of discretion, we defer to the district court's decision to admit Menendez-Cordero's threats as consciousness-of-guilt evidence.[6]

For the foregoing reasons, we affirm Menendez-Cordero's judgment of conviction.

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[6]We decline to construe these threats as character evidence. *Evans v. State*, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015) (providing that evidence of a threat "is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission"). Even if they were, the district court cautioned the jury against viewing the threats as propensity evidence. We believe that these instructions, absent any evidence that the jury was unable to follow them, were adequate to protect Menendez-Cordero against unwarranted presumptions.

DAISY TRUST, Appellant, *v.*
WELLS FARGO BANK, N.A., Respondent.

No. 72747

July 25, 2019 445 P.3d 846

Appeal from a district court order granting summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

[Rehearing denied September 6, 2019]

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn*, Henderson, for Appellant.

Snell & Wilmer, LLP, and *Andrew M. Jacobs* and *Kelly H. Dove*, Las Vegas, for Respondent.

Fennemore Craig, P.C., and *Leslie L. Bryan-Hart* and *John D. Tennert*, Reno; *Arnold & Porter Kaye Scholer LLP* and *Elliott C. Mogul*, Washington, D.C., for Amicus Curiae Federal Housing Finance Agency.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), this court held that NRS 116.3116(2) provides a homeowners' association (HOA) with a "superpriority" lien that, when properly foreclosed, extinguishes a first deed of trust. That is not the case, however, when the Federal Housing Finance Agency (FHFA) owns the loan secured by the deed of trust or when the FHFA is acting as conservator of a federal entity such as the Federal Home Loan Mortgage Corporation (Freddie Mac) or the Federal National Mortgage Association (Fannie Mae). As we explained in *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n*, 134 Nev. 270, 272-74, 417 P.3d 363, 367-68 (2018), the provision in 12 U.S.C. § 4617(j)(3) (2012), commonly referred to as the Federal Foreclosure Bar, preempts NRS 116.3116(2) and prevents an HOA foreclosure sale from extinguishing the first deed of trust in those circumstances.

In this appeal, we consider two issues related to the Federal Foreclosure Bar. First, we consider whether Freddie Mac must be identified as the beneficiary on the publicly recorded deed of trust

to establish its ownership interest in the subject loan. We hold that Nevada's recording statutes impose no such requirement. Second, we consider whether Freddie Mac's loan servicer must produce the actual loan servicing agreement with Freddie Mac or the original promissory note to establish Freddie Mac's ownership interest in the loan.[1] We hold that neither of those documents is required to establish Freddie Mac's ownership interest where properly authenticated business records otherwise establish that ownership interest. Because the loan servicer in this case introduced such records, we affirm the judgment of the district court, which determined Freddie Mac owned the subject loan at the time of the HOA's foreclosure sale, such that the HOA sale purchaser took title to the property subject to the first deed of trust by operation of the Federal Foreclosure Bar.

BACKGROUND

In September 2007, Donald and Cynthia Blume obtained a loan from Universal American Mortgage Company (Universal) to purchase the subject property, which is governed by an HOA. The Blumes executed a promissory note in favor of Universal wherein they promised to repay the loan, and as security for the loan, the Blumes executed a deed of trust that identified Mortgage Electronic Registration Systems, Inc. (MERS), as the "nominee" beneficiary on behalf of Universal and Universal's successors. In November 2007, Universal sold its interest in the secured loan to Freddie Mac. MERS remained the record deed of trust beneficiary until 2011, when it assigned the beneficial interest in the deed of trust to respondent Wells Fargo. That assignment was recorded in March 2011.

By that time, the Blumes were delinquent on their monthly HOA assessments, and the HOA instituted foreclosure proceedings under NRS Chapter 116. Ultimately, a foreclosure sale was held in August 2012, at which appellant Daisy Trust placed the winning bid and purchased the property for $10,500. Daisy Trust subsequently instituted the underlying quiet title action against Wells Fargo and other defendants who are not parties to this appeal.

After Daisy Trust instituted the action, Wells Fargo revealed that although it was the publicly recorded deed of trust beneficiary as of 2011, Freddie Mac had owned the loan since the 2007 acquisition from Universal and that Wells Fargo had been servicing the loan on Freddie Mac's behalf. Wells Fargo moved for summary judgment based in part on the Federal Foreclosure Bar, with the decisive issue being whether Freddie Mac owned the loan when the HOA

[1]We held in *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC* (*Nationstar 1*), 133 Nev. 247, 250-51, 396 P.3d 754, 757 (2017), that a loan servicer has standing to assert the Federal Foreclosure Bar on behalf of Freddie Mac or Fannie Mae.

foreclosure sale occurred. In support of its position, Wells Fargo produced declarations from April Hatfield, a Wells Fargo employee, and Dean Meyer, a Freddie Mac employee, attesting that Freddie Mac acquired the loan in November 2007 and owned it at the time of the foreclosure sale. Accompanying the declarations were printouts from Wells Fargo's and Freddie Mac's databases. Wells Fargo's printouts reflected a "loan transfer history" showing a date of November 13, 2007, and Freddie Mac's printouts reflected a "funding date" of November 13, 2007. Ms. Hatfield and Mr. Meyer attested that the "loan transfer" and "funding date" referred to the date when Universal sold the loan to Freddie Mac. Ms. Hatfield also attested that an "acquisition date" contained in Wells Fargo's printouts referred to the date when Wells Fargo began servicing the loan on Freddie Mac's behalf, and Mr. Meyer similarly attested that a "servicer number" in Freddie Mac's printouts referred to Wells Fargo. Ms. Hatfield and Mr. Meyer further attested that their respective printouts showed that Freddie Mac owned the loan when the foreclosure sale occurred.

In opposition, Daisy Trust argued (1) Freddie Mac could not establish its ownership interest because Wells Fargo was the publicly recorded deed of trust beneficiary, and (2) the documentation provided by Ms. Hatfield and Mr. Meyer was insufficient to demonstrate Freddie Mac's ownership because it did not include the loan servicing agreement between Wells Fargo and Freddie Mac or the promissory note. The district court rejected Daisy Trust's argument that Freddie Mac needed to be the recorded deed of trust beneficiary, and it also determined that Ms. Hatfield's and Mr. Meyer's declarations, combined with their supporting documentation, sufficiently established that Wells Fargo was servicing the loan on Freddie Mac's behalf and that Freddie Mac owned the loan on the date of the foreclosure sale. Consequently, the district court granted summary judgment for Wells Fargo, concluding that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing the deed of trust and that Daisy Trust therefore took title to the property subject to the deed of trust. This appeal followed.

DISCUSSION

We review a district court's decision to grant summary judgment and its conclusions of law de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002). However, we review a district court's decision to admit evidence for an abuse of discretion. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). "If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of

contrary evidence." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

On appeal, Daisy Trust makes the same two primary arguments that it made in district court: (1) as a matter of law, Freddie Mac needed to be the publicly recorded deed of trust beneficiary to establish that it owned the loan; and (2) even if Freddie Mac did not need to be the beneficiary of record, Wells Fargo's documentation showing that Freddie Mac owned the loan and that Wells Fargo was servicing the loan on Freddie Mac's behalf was insufficient absent a copy of the actual loan servicing agreement between Wells Fargo and Freddie Mac and the original promissory note.[2] We consider each argument in turn.

Freddie Mac did not need to be the beneficiary of record to establish its ownership interest

Daisy Trust contends that Nevada's recording statutes required Freddie Mac to record its interest in the loan. Daisy Trust points to NRS 106.210 and NRS 111.325 as the relevant statutes. Respectively, those statutes currently provide that "any assignment of the beneficial interest under a deed of trust must be recorded" and that "[e]very conveyance of real property within this State . . . which shall not be recorded . . . shall be void as against any subsequent purchaser, in good faith and for a valuable consideration." However, when Freddie Mac acquired the loan in 2007, NRS 106.210 provided that "any assignment of the beneficial interest under a deed of trust *may be recorded*." NRS 106.210(1) (1965) (emphasis added); *see* 2011 Nev. Stat., ch. 81, § 14.5, at 339 (stating the statutory amendment to NRS 106.210 applies to assignments of interest made on or after July 1, 2011). Thus, under the applicable version of NRS 106.210, there was no requirement that any assignment to Freddie Mac needed to be recorded. Regardless, we are not persuaded that even the current version of NRS 106.210 would be implicated or that NRS 111.325 is implicated because there is no requirement that the beneficial interest in the deed of trust needed to be "assigned" or "conveyed" to Freddie Mac in order for Freddie Mac to acquire ownership of the loan. To the contrary, we expressly recognized in *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 520-21, 286 P.3d 249, 259-60 (2012), that MERS can serve as the record deed of trust beneficiary on behalf of a lender and a lender's successors, such as Universal and Freddie Mac in this case. And we then clarified in *In re Montierth*, 131 Nev. 543, 547-48, 354 P.3d 648, 650-51

[2]Although Daisy Trust argued in district court that Wells Fargo should have been required to produce the original promissory note, it appears Daisy Trust is arguing on appeal that Ms. Hatfield and Mr. Meyer needed to expressly attest that they inspected the original promissory note. We address both versions of Daisy Trust's argument below.

(2015), that even though a promissory note and accompanying deed of trust may be "split," the note nevertheless remains fully secured by the deed of trust when the record deed of trust beneficiary is in an agency relationship with the note holder.[3] In this case, the record deed of trust beneficiary (MERS and then Wells Fargo) was at all times in an agency relationship with the note holder (Universal and then Freddie Mac). *See Edelstein*, 128 Nev. at 520-21, 286 P.3d at 259-60; *see also Nationstar 1*, 133 Nev. at 250, 396 P.3d at 757 (observing that a loan servicer can be Freddie Mac's or Fannie Mae's contractually authorized agent). Therefore, consistent with *Edelstein* and *Montierth*, the deed of trust did not have to be "assigned" or "conveyed" to Freddie Mac in order for Freddie Mac to own the secured loan, meaning that neither NRS 106.210 nor NRS 111.325 was implicated. Accordingly, we agree with the district court that Nevada's recording statutes did not require Freddie Mac to publicly record its ownership interest as a prerequisite for establishing that interest. We therefore need not address Freddie Mac's argument that the Federal Foreclosure Bar preempts Nevada's recording statutes; nor is it necessary to address Daisy Trust's argument that it is protected as a bona fide purchaser from the Federal Foreclosure Bar's effect.

Wells Fargo did not need to produce the loan servicing agreement or the original promissory note

Even if Freddie Mac did not need to record its interest in the loan, Daisy Trust contends that Wells Fargo failed to introduce sufficient evidence of Freddie Mac's ownership. Daisy Trust primarily contends that Wells Fargo should have been required to produce a copy of the actual loan servicing agreement between Wells Fargo and Freddie Mac and the original promissory note.

We are not persuaded that the district court abused its discretion in determining that Wells Fargo sufficiently established Freddie Mac's ownership of the loan without those two documents. *M.C. Multi-Family Dev., LLC*, 124 Nev. at 913, 193 P.3d at 544; *Cuzze*, 123 Nev. at 602, 172 P.3d at 134. We agree with the district court that Ms. Hatfield's and Mr. Meyer's respective declarations in which

[3]Consistent with *Montierth*, we note that the Freddie Mac Single-Family Seller/Servicer Guide (Guide), which governs Freddie Mac's relationship with its loan servicers, contemplates Freddie Mac being the note holder while its loan servicer remains the recorded deed of trust beneficiary. *See* Guide at 6301.3 (explaining that the entity selling the loan to Freddie Mac must endorse the promissory note in blank at the time Freddie Mac purchases the loan); *id.* at 6301.6 (explaining that an assignment of the security instrument to Freddie Mac is necessary only if Freddie Mac directs such an assignment to be made). We take judicial notice of the Guide. *See* NRS 47.130; NRS 47.170; *cf. Berezovsky v. Moniz*, 869 F.3d 923, 932 n.9 (9th Cir. 2017) (taking judicial notice of the same Guide).

they both confirmed Wells Fargo's status as Freddie Mac's loan servicer, combined with the authorizations in the Guide that are generally applicable to Freddie Mac's loan servicers, *see, e.g.*, Guide at 8101.1 ("The Servicer . . . agrees that it will represent and defend Freddie Mac's interest in the applicable Mortgage(s) . . . to the same extent it would represent and defend its own interest."), were sufficient to show that Wells Fargo was in fact Freddie Mac's loan servicer with authority to assert the Federal Foreclosure Bar on Freddie Mac's behalf. *Cf. Berezovsky v. Moniz*, 869 F.3d 923, 932-33 (9th Cir. 2017) (determining similar evidence was sufficient to establish Freddie Mac's contractual authorization of its loan servicer in the absence of contrary evidence). In this respect, Daisy Trust's reliance on *Nationstar 1* is misplaced, as we had no occasion to consider whether the loan servicer in that case had presented sufficient evidence to show that Freddie Mac owned the loan or that the servicer had a contract with Freddie Mac to service the loan. *See Nationstar 1*, 133 Nev. at 252, 396 P.3d at 758 (observing that the district court did not address factual issues about loan ownership and servicing relationship).

We likewise agree with the district court that Wells Fargo did not have to produce the original promissory note and reject Daisy Trust's suggestion that Ms. Hatfield and Mr. Meyer should have been required to expressly attest that they inspected the original promissory note. Most notably, producing the actual note or having Ms. Hatfield and Mr. Meyer attest that they inspected the note would not help establish when Freddie Mac obtained ownership of the loan or that it retained such ownership as of the date of the foreclosure sale, as there is no legal requirement that an endorsement on a promissory note be dated. *See* NRS 104.3204 (discussing the endorsement of a promissory note and not providing any requirement that the endorsement be dated); U.C.C. § 3-204 (same).

In contrast, the printouts accompanying Ms. Hatfield's and Mr. Meyer's declarations were probative on that issue, and both declarations explained how the declarants were qualified to lay a foundation for the admissibility of those documents under NRS 51.135's business-records exception to the hearsay rule. In particular, both declarations attested that the database entries contained in the printouts were made (1) at or near the time of the event being recorded, (2) by a person with knowledge of the event, and (3) in the course of the business's regularly conducted activity. *See* NRS 51.135 (imposing these requirements for the admissibility of business records). Having met the requirements of the business-records exception, the evidence was not inadmissible simply because neither Ms. Hatfield nor Mr. Meyer personally entered the information into Wells Fargo's or Freddie Mac's databases or had firsthand knowledge of the events being entered into the databases. *See U-Haul Int'l, Inc. v. Lumber-*

mens Mut. Cas. Co., 576 F.3d 1040, 1044 (9th Cir. 2009) ("It is not necessary for each individual who entered a record . . . into the database to testify as to the accuracy of each piece of data entered."); 30B Charles Alan Wright & Jeffrey Bellin, *Federal Practice and Procedure* § 6863 (2017) ("The question of the sufficiency of the foundation witness' knowledge centers on the witness' familiarity with the organization's record keeping practices, not any particular record. Thus, the witness need not be able to attest to the accuracy of a particular record or entry. If knowledge were required as to each particular entry in a record, document custodians could rarely satisfy the requirements of [the federal analog to NRS 51.135]." (internal quotation marks and footnotes omitted)). Accordingly, the district court was within its discretion in determining that Wells Fargo's and Freddie Mac's database printouts were admissible under NRS 51.135. *Cf. Berezovsky*, 869 F.3d at 932 n.8 (upholding the admissibility of similar records under the federal analog to NRS 51.135).

To the extent that Daisy Trust simply does not trust what Ms. Hatfield and Mr. Meyer attested to, Daisy Trust bore the burden of showing that their declarations or the printouts were *not* trustworthy. *See* NRS 51.135 (providing that business records are admissible "*unless* the source of information or method or circumstances of preparation indicate lack of trustworthiness" (emphasis added)); *see also Cuzze*, 123 Nev. at 602, 172 P.3d at 134 (explaining the moving and opposing parties' respective burdens of production and persuasion on summary judgment). Daisy Trust failed to do so.[4] Accordingly, in the absence of contrary evidence, Wells Fargo's and Freddie Mac's business records sufficiently demonstrated that Freddie Mac owned the loan on the date of the foreclosure sale. We therefore affirm the district court's judgment that the Federal Foreclosure Bar prevented the sale from extinguishing the deed of trust and that Daisy Trust took title to the property subject to the deed of trust.

Gibbons, C.J., and Pickering, Hardesty, Parraguirre, Stiglich, and Silver, JJ., concur.

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[4]We also are not persuaded by Daisy Trust's other admissibility-related arguments, including that the business records were prepared in anticipation of litigation and that Wells Fargo needed to satisfy the standard for admissibility discussed in *In re Vee Vinhnee*, 336 B.R. 437, 446 (9th Cir. B.A.P. 2005).