hancements for the same primary offense. Accordingly, we affirm the judgment of conviction.

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

THE STATE OF NEVADA, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE CONNIE J. STEINHEIMER, District Judge, Respondents, and MATTHEW GLENN HEARN, Real Party in Interest.

No. 73475

December 6, 2018 432 P.3d 154

Original petition for writ of mandamus or prohibition challenging a district court order striking language within NRS 176A.290(2) as unconstitutional.

Petition denied.

[Rehearing denied February 26, 2019]

Pickering, J., dissented.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Terrence P. McCarthy*, Chief Appellate Deputy District Attorney, and *Rebecca Carol Druckman*, Deputy District Attorney, Washoe County, for Petitioner.

John L. Arrascada, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Kendra G. Bertschy*, Deputy Public Defender, Washoe County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

NRS 176A.290 (2014) authorizes district courts to assign certain eligible defendants to a veterans court program.[1] However, if

[1]NRS 176A.290 was amended in 2017. *See* 2017 Nev. Stat., ch. 484, § 5, at 3021. The district court relied upon the version that became effective on January 1, 2014. *See* 2013 Nev. Stat., ch. 384, §§ 1.5, 3, at 2093-94. We apply the

the offense charged or the defendant's prior convictions involved the use or threatened use of force or violence, the district court is not allowed to assign the defendant to the veterans court program, "unless the prosecuting attorney stipulates to the assignment." NRS 176A.290(2).

The district court found that NRS 176A.290(2) was in effect a prosecutorial veto over a judge's sentencing decision, in violation of the Nevada Constitution's separation of powers doctrine. Nev. Const. art. 3, § 1(1). The district court further held that the veto provision was severable. We agree on both points. Accordingly, we deny the State's petition.

FACTUAL AND PROCEDURAL HISTORY

Matthew Glenn Hearn was charged with and pleaded guilty to battery by a prisoner, a category B felony, in violation of NRS 200.481(2)(f). A specialty courts officer deemed Hearn eligible for the veterans court program because he was a veteran who "appears to have a mental illness, substance abuse, or posttraumatic stress disorder which appears to be related to military service."

At sentencing, the State refused to stipulate to Hearn's assignment to veterans court pursuant to NRS 176A.290(2), which prompted Hearn to ask the court to find the statute unconstitutional. The district court obliged, finding that "NRS 176A.290(2) violates the separation of powers doctrine by conditioning the judicial department's discretion to place certain offenders into a treatment program on the prosecutor's (discretionary) stipulation." It further found that the statute was severable and struck the unconstitutional language from the statute. The State challenges that decision in the present writ petition.

DISCUSSION

Propriety of writ relief

The decision to consider a writ of mandamus lies within the sole discretion of this court. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). As an extraordinary remedy, writ relief is generally available only when no "plain, speedy and adequate" legal remedy exists. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (internal quotation marks omitted). This court has exercised its discretion to intervene to clarify "important legal issue[s] in need of clarification" or "in the interest of judicial economy and to provide guidance to Nevada's lower courts." *State, Office of the Att'y Gen. v. Justice Court*

2014 version throughout this opinion, but we note that our analysis and holding apply equally to the current version of the statute, which was not substantively changed by the 2017 amendment.

(Escalante), 133 Nev. 78, 80, 392 P.3d 170, 172 (2017). And a writ of mandamus is the proper remedy "to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011).

Both parties agree that the constitutionality of NRS 176A.290(2) is an "important legal issue in need of clarification." *Escalante*, 133 Nev. at 80, 392 P.3d at 172. They also contend that Nevada's district courts are resolving this issue inconsistently, so our intervention is necessary "to provide guidance to Nevada's lower courts." *Id.* Finally, the State argues that it has no adequate remedy in law to challenge the district court's decision. We agree on all points and exercise our discretion to consider the State's petition for a writ of mandamus.[2]

Statutory background

NRS 176A.280 et seq. authorized the establishment of specialty courts for veterans and military members who have been charged with probation-eligible offenses. When certain criteria are met, a district court has discretion to assign eligible defendants to a specialty court program. NRS 176A.290.[3] The program benefits defendants like Hearn by suspending further criminal proceedings and placing them on probation. *Id.* Upon successful completion of the program, the charges are dismissed. NRS 176A.290(4).

Not all veterans or service members, however, are eligible for assignment to veterans court. NRS 176A.287(1). For example, a defendant who "[h]as previously been assigned to such a program" is not eligible for assignment. NRS 176A.287(1)(a). At issue in this case is NRS 176A.290(2), which provides that a district court may not assign a defendant to such a program without the prosecutor's agreement when an offense charged or the defendant's prior convictions involved the use or threatened use of force or violence:

> If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted in this State or in any other jurisdiction of a felony that involved the use or threatened use of force or violence, the court may not assign the defendant to the program *unless the prosecuting attorney stipulates to the assignment.*

[2]The State alternatively requests a writ of prohibition. A writ of prohibition is inappropriate because the district court had jurisdiction to rule on the constitutionality of NRS 176A.290(2). *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (explaining that a writ of prohibition will not lie if the court "had jurisdiction to hear and determine the matter under consideration").

[3]This statute was amended after Hearn was deemed eligible for the program but prior to his sentencing date. *See* 2017 Nev. Stat., ch. 484, § 4, at 3020. The minor changes to the statutory scheme do not affect his eligibility.

(Emphasis added.) The district court believed that the emphasized language requiring the prosecutor's agreement amounted to an unconstitutional prosecutorial veto over the judiciary's sentencing decision. It struck that language, leaving the rest of the statute intact.

Constitutionality of the prosecutorial consent element

The first issue is whether NRS 176A.290(2) violates Nevada's separation of powers doctrine. "The constitutionality of a statute is a question of law, which this court reviews de novo." *Aguilar-Raygoza v. State*, 127 Nev. 349, 352, 255 P.3d 262, 264 (2011).

As with the United States Constitution, the structure of our state constitution gives rise to the separation of powers doctrine through its "discrete treatment of the three branches of government." *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009). But "Nevada's Constitution goes one step further; it contains an express provision prohibiting any one branch of government from impinging on the functions of another." *Id*. at 292, 212 P.3d at 1103-04; *see* Nev. Const. art. 3, § 1(1).

In *Stromberg v. Second Judicial District Court*, this court analyzed Nevada's separation of powers doctrine within the context of sentencing decisions. 125 Nev. 1, 2-3, 200 P.3d 509, 510 (2009). *Stromberg* concerned a statute that allowed a district court to treat a defendant's third DUI offense as if it were the defendant's second DUI offense "if the offender successfully completes a treatment program." *Id.* at 3, 200 P.3d at 510. The State contended that this statute violated the separation of powers doctrine by infringing upon the prosecutor's power to determine how to charge a DUI offender. *Id*. at 6, 200 P.3d at 512. This court rejected that argument by distinguishing "between the prosecutor's decision in how to charge and prosecute a case and the court's authority to dispose of a case after its jurisdiction has been invoked." *Id*. at 7, 200 P.3d at 512. That is, the prosecutor retained the power to charge an offender for a third DUI offense; the statute merely gave district courts the option to *sentence* such offenders to a treatment program. *Id.* at 8, 200 P.3d at 513. Such sentencing decisions, we concluded, "properly fall[ ] within the discretion of the judiciary." *Id.* Thus, *Stromberg* indicates that charging decisions are within the executive realm and sentencing decisions are inherently judicial functions.

We recognize that a district court's sentencing decision is necessarily limited by the Legislature's power to define the parameters of punishments, "within constitutional limits." *Goudge v. State*, 128 Nev. 548, 554, 287 P.3d 301, 304 (2012). And we reiterate that the Legislature can "completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes." *Mendoza-Lobos v. State*, 125 Nev. 634, 640, 218 P.3d 501, 505 (2009). However, we agree with other jurisdictions that a

court's sentencing discretion, once granted, cannot be conditioned upon the prosecution's approval without running afoul of the separation of powers doctrine. *See, e.g.*, *State v. Prentiss*, 786 P.2d 932, 936 (Ariz. 1989) ("But once the legislature provides the court with the power to use sentencing discretion, the legislature cannot then limit the court's exercise of discretion by empowering the executive branch to review that discretion."); *People v. Navarro*, 497 P.2d 481, 489 (Cal. 1972) ("[A]lthough the Legislature was not required in the first instance to give the court power to commit persons in the status of [the defendant] to the treatment program, having conferred this power it cannot condition its exercise upon the approval of the district attorney."); *State v. Olson*, 325 N.W.2d 13, 18 (Minn. 1982) ("But once the legislature has prescribed the punishment for a particular offense it cannot, within constitutional parameters, condition the imposition of the sentence by the court upon the prior approval of the prosecutor."). To be certain, statutory schemes vary from state to state. But the principle gleaned is that once a defendant's guilt has been determined, the prosecutor's charging discretion is complete and the judiciary's sentencing discretion, if any, is all that remains. *See State v. Ramsey*, 831 P.2d 408, 412 (Ariz. Ct. App. 1992) ("Once the prosecutor has pursued and obtained a guilty verdict, the executive role in the resolution of the criminal action is limited constitutionally.").[4]

Returning to the case at hand, a court's decision to assign a defendant to the veterans court program is a sentencing decision—it is a statutorily approved alternative to entering a judgment of conviction and imposing a term of incarceration. And as we indicated in *Stromberg*, sentencing decisions are "within the discretion of the judiciary." 125 Nev. at 8, 200 P.3d at 513.[5] In requiring that a prosecutor stipulate to the district court's decision, the effect of NRS 176A.290(2) is to afford an executive veto over a judicial function. We recognize that the statute operates in a seemingly atypical fashion, but any prosecutorial power over the district court's disposition at this stage of the proceedings is offensive to the separation of powers.[6] *See Navarro*, 497 P.2d at 488-89 (finding a violation of the

[4]We note that in this matter, as in *Stromberg*, 125 Nev. at 2-3, 200 P.3d at 510, we are asked to consider the district court's sentencing discretion after a determination of guilt has been made.

[5]Hearn was before the district court for disposition after his guilt had been established. *See People v. Superior Court of San Mateo Cty.*, 520 P.2d 405, 410 (Cal. 1974) ("It is true that acquittal or sentencing is the typical choice open to the court, but in appropriate cases it is not the only termination. With the development of more sophisticated responses to the wide range of anti-social behavior traditionally subsumed under the heading of 'crime,' alternative means of disposition have been confided to the judiciary.").

[6]Of particular note in this matter is that the prosecutor was granted unreviewable power for which the statute provided no guidance in exercising.

separation of powers doctrine where a statute required agreement by the prosecutor before the court could assign the defendant to a treatment program and reiterating "that the Legislature, of course, by *general laws* can control eligibility for probation, parole and the term of imprisonment, but it cannot abort the *judicial process* by subjecting a judge to the control of the district attorney" (internal quotation marks omitted)); *cf. People v. Andreotti*, 111 Cal. Rptr. 2d 462, 468-69 (Ct. App. 2001) (concluding a prosecutor's motion for deferral was akin to plea bargaining but acknowledging that "[o]nce the defendant pleads guilty and the prosecutor moves for deferral, the decision of how to dispose of the charges is in the hands of the judge, where it belongs" and that "[i]f the [prosecution] had some sort of veto over *this* decision by the trial court," then the statute would violate the separation of powers doctrine). Thus, we hold that the prosecutorial veto within NRS 176A.290 violates the Nevada Constitution's prohibition against one branch of government "exercis[ing] any functions, appertaining to either of the others." Nev. Const. art. 3, § 1(1).

Severability

The next issue is how to remedy NRS 176A.290(2)'s unconstitutionality. We must determine whether the statute is severable, i.e., whether "it is possible to strike only the unconstitutional provision[ ]." *Sierra Pac. Power Co. v. State, Dep't of Taxation*, 130 Nev. 940, 945, 338 P.3d 1244, 1247 (2014) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 792 (2016). To resolve that issue, we analyze "whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent." *Id.*; *see also* NRS 0.020(1).

The district court struck "unless the prosecuting attorney stipulates to the assignment" and found that the remainder of the statute accorded with the legislative intent behind NRS 176A.290(2) and its associated statutes. We agree. The Legislature enacted NRS 176A.280 et seq. to provide veterans and military members "with an alternative to incarceration and [to] permit[ ] them to access proper treatment for mental health and substance abuse problems resulting from military service." 2009 Nev. Stat., ch. 44, at 100. The Legislature recognized that many veterans suffer from "combat-related injuries" that "can lead to encounters with the criminal justice system which would not have otherwise occurred." *Id*. Thus, to "enable the criminal justice system to address the unique challenges veterans and members of the military face as a result of their honorable service," the Legislature authorized "[t]he establishment of specialty treatment courts for veterans and members of the military *who are nonviolent offenders*." *Id.* (emphasis added). This language

indicates that the *primary* intended beneficiaries of the veterans court are "nonviolent offenders." *Id.* The fact that the Legislature provided for the admittance of some violent offenders, pursuant to prosecutorial stipulation, indicates there was a secondary goal of allowing some violent offenders the benefit of the veterans court. However, the remaining language after severance accords with the Legislature's primary intent.

The district court believed that after striking the offending language it would have the discretion to send a violent offender to veterans court. It is here that we part ways with the district court. With the offending language stricken, the statute now states that, for defendants who have been charged with or have a prior felony conviction for a crime involving "the use or threatened use of force or violence, the court may not assign the defendant to the program." NRS 176A.290(2). Thus the legal effect of this severance is to render all offenders deemed violent by a court ineligible for the veterans court program.[7]

While we recognize that severing the language allowing a violent offender to be assigned to the program upon the prosecutor's agreement impedes the Legislature's secondary goal of allowing some violent offenders to be assigned to the veterans court, it is for the Legislature, not this court, to remedy this impediment. Our goal in severing is merely to determine whether the remainder of the statute can be given legal effect such that it comports with legislative intent. Having concluded that the remaining language in NRS 176A.290(2) conforms with the stated intent of establishing veterans courts for nonviolent offenders and providing guidance to the courts in determining whether the charged offense or the defendant's prior felony convictions make the defendant ineligible,[8] we conclude that severance of the prosecutorial-stipulation provision is proper. Therefore,

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[7]The concurrence seems to agree with the district court. However, NRS 0.025(1)(b) provides that " '[m]ay not' . . . abridges or removes a right, privilege or *power*." (Emphasis added.) And while the use of the word "may" is generally permissive, *see Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013), the use of the word "not" disallows discretion. Indeed, the structure of the statute at issue ("may not" followed by "unless") supports our interpretation that "may not" disallows discretion because the use of the word "unless" would be meaningless if "may not" was discretionary. *See Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011) (recognizing that this court "avoid[s] statutory interpretation that renders language meaningless or superfluous").

[8]What constitutes a violent offense is still a determination left to the district court. The remainder of subsection 2 allows the court to decide whether the offense "involved the use or threatened use of force or violence" and provides guidance in making that decision by directing the court to "consider the facts and circumstances surrounding the offense." NRS 176A.290(2). In particular, the courts are required to consider "whether the defendant intended to place another person in reasonable apprehension of bodily harm." *Id*.

the district court did not manifestly abuse or arbitrarily or capriciously exercise its discretion in arriving at the same conclusion, and a writ of mandamus will not issue. *See Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780 ("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." (citation and internal quotation marks omitted)).

CONCLUSION

Nevada's separation of powers doctrine is violated when a prosecutor is granted veto power over a district court's sentencing decision. Because NRS 176A.290(2) does precisely that, the district court correctly deemed it unconstitutional. The district court also correctly determined that the following language within NRS 176A.290(2) is severable: "unless the prosecuting attorney stipulates to the assignment."[9] Accordingly, we deny the State's petition.

Cherry, Gibbons, Hardesty, and Parraguirre, JJ., concur.

Douglas, C.J., concurring:

The district court correctly determined that the prosecutor does not have an executive veto power over the judiciary pursuant to NRS 176A.290(2); however, the court—as well as my colleagues—commits the mistake of relying on the separation of powers doctrine to reach this conclusion, while not first looking to the specific statutory language. The statutory language here is permissive, and thus, the district court retained the discretion to assign Hearn to the specialty program without the prosecuting attorney's stipulation to the assignment.

We have consistently held "that we should avoid considering the constitutionality of a statute unless it is *absolutely necessary* to do so." *Sheriff v. Andrews*, 128 Nev. 544, 546, 286 P.3d 262, 263 (2012) (emphasis added); *accord State v. Curler*, 26 Nev. 347, 354, 67 P. 1075, 1076 (1902) (noting that "it is a well-established rule of this and other courts that constitutional questions will never be passed upon, except when absolutely necessary to properly dispose of the particular case"). Indeed, on at least one occasion, we have declined to consider the constitutionality of a statute when principles of statutory construction resolved the case. *See Anthony Lee R. v. State*, 113 Nev. 1406, 1417 n.6, 952 P.2d 1, 8 n.6 (1997). As demonstrated below, such is the case here.

When interpreting statutes, "if the language of a statute is clear on its face, we will ascribe to the statute its plain meaning and not look

[9]For the reason described in note 1, *supra*, this holding applies to both the 2014 and 2017 versions of the statute.

beyond its language." *Koller v. State*, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006) (internal quotation marks omitted). Additionally, this court gives effect and "meaning to all words, phrases, and provisions of a statute." *Haney v. State*, 124 Nev. 408, 412, 185 P.3d 350, 353 (2008). Furthermore "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552, *opinion modified on denial of reh'g* (2010) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *accord Virginia & Truckee R.R. Co. v. Henry*, 8 Nev. 165, 174 (1873) ("It requires neither argument nor reference to authorities to show that when the language of a statute admits of two constructions, one of which would render it constitutional and valid and the other unconstitutional and void, that construction should be adopted which will save the statute."). "Moreover, the rules of statutory interpretation that apply to penal statutes require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction." *Mangarella v. State*, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001) ("[a]pplying these rules to NRS 176A.410(1)(e)" to hold that the statute was not unconstitutionally overbroad because "the scope of polygraph examination must be limited to questions relating to the use of controlled substances by the defendant" and the statute "does not permit a probation officer to conduct a polygraph examination on any issue").

As noted by the majority, NRS 176A.290(2) provides in part:

> If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted in this State or in any other jurisdiction of a felony that involved the use or threatened use of force or violence, the district court, justice court or municipal court, as applicable, *may not* assign the defendant to the program unless the prosecuting attorney stipulates to the assignment.

(Emphasis added.) The majority concludes that this affords an executive veto power over the judiciary because it requires that a prosecutor stipulate to the district court's decision. Majority opinion *ante* at 787. "But this reading ignores the statute's use of the permissive 'may.'" *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013). "It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory." *Id.* (quoting *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994)); *see also Barral v. State*, 131 Nev. 520, 523, 353 P.3d 1197, 1198 (2015) (holding that a district court has no discretion where the statute includes the term "shall").

NRS 176A.290(2) states that the court "may not assign the defendant to the program" without the prosecuting attorney's stipulation, but the statute does not state that the court "shall not" or "must not." The Legislature could have used the term "shall" to impose a duty on the courts to refrain from assigning a defendant to the program unless the prosecuting attorney stipulated to the assignment. *See* NRS 0.025(1)(d) (defining "shall" as "impos[ing] a duty to act"); *see also* 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 21:8 (7th ed. 2009) ("When the action is mandatory 'shall' should always be employed. When the action is permissive 'may' should be used."). Indeed, the Legislature has done so in other statutes. *See* NRS 16.110(1) ("After the [jury] instructions are given, the judge *shall not* clarify, modify or in any manner explain them to the jury except in writing unless the parties agree to oral instructions." (emphasis added)); NRS 176.0611(4) ("If a fine is determined to be uncollectible, the defendant is not entitled to a refund of the fine or administrative assessment the defendant has paid and the justice or judge *shall not* recalculate the administrative assessment." (emphasis added)). If there were any doubts, the sentence after the one relied upon here by the majority demonstrates that the Legislature knew how to use "shall" instead of "may" when imposing an affirmative duty on the court:

> For the purposes of [NRS 176A.290(2)], in determining whether an offense involved the use or threatened use of force or violence, the district court, justice court or municipal court, as applicable, *shall consider* the facts and circumstances surrounding the offense, including, without limitation, whether the defendant intended to place another person in reasonable apprehension of bodily harm.

NRS 176A.290(2) (emphasis added).

Instead, the Legislature chose to state that the court "may not" assign defendants to the program without the prosecuting attorney's stipulation. As clarified by NRS 0.025(1)(b), the term "may not," unless expressly provided otherwise, "*abridges* or removes a right, privilege or power." (Emphasis added.) In the context of NRS 176A.290(2), I would interpret it as abridging the court's discretion to assign defendants to the program by requiring it to seek input from the prosecuting attorney when determining whether to assign a defendant to the program. However, it would not prevent the court from assigning defendants to the program if the prosecuting attorney does not so stipulate, so long as the court sought the input from the prosecuting attorney.

Such an interpretation would "save [the] statute from unconstitutionality," *Castaneda*, 126 Nev. at 481, 245 P.3d at 552 (internal quotation marks omitted), because the statute would not give the prosecuting attorney an executive veto over the judiciary. Indeed,

we need not reach the constitutionality of the statute, as traditional principles of statutory construction would resolve the case. *See Anthony Lee R.*, 113 Nev. at 1417 n.6, 952 P.2d at 8 n.6. Moreover, this interpretation is consistent with our prior holdings that penal statutes "which negatively impact a defendant must be strictly construed," *Mangarella*, 117 Nev. at 134, 17 P.3d at 992, as there is no doubt that requiring the prosecuting attorney to stipulate to the defendant's assignment to the program negatively impacts the defendant.

I agree with my colleagues that an executive veto over the judiciary in this case would violate the separation of powers doctrine. However, that is not what we have here. Because I believe the majority's logic ignores the language of the statute and reaches an unnecessary issue, I write separately and concur as to the result only.

Pickering, J., dissenting:

The Legislature has authorized a deferred sentencing program to treat defendants who are veterans or members of the military, known as veterans court. NRS 176A.280. After guilt is established, whether by guilty plea or other adjudication, the court suspends further proceedings, including entry of judgment, so the defendant can participate in the veterans court program. NRS 176A.290(1). If the defendant fails to complete the program, the court then enters the judgment of conviction and sentences the defendant conventionally. NRS 176A.290(3). But if the defendant successfully completes the program, "the court shall discharge the defendant and dismiss the proceedings." NRS 176A.290(4). With certain exceptions not relevant here, discharge and dismissal under this statute "is without adjudication of guilt and is not a conviction." *Id.*

The Legislature has placed a number of conditions on eligibility for veterans court, including that the defendant appears to suffer from a mental illness, substance abuse, brain injury, or posttraumatic stress disorder related to military service, or military sexual trauma, NRS 176A.280(1)(a)(1), (2); the defendant "[w]ould benefit from assignment to the program," NRS 176A.280(1)(b); the defendant has not been previously assigned to such a program, NRS 176A.287(1)(a); the defendant was honorably discharged unless extraordinary circumstances exist, NRS 176A.287(1)(b), (2); and the offense is probationable, NRS 176A.290(1).

The Legislature has further limited eligibility for veterans court based on the defendant's use of force or violence, as follows:

> If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted . . . of a felony that involved the use or threatened use of force or violence, the district court . . . may not assign the defendant to the program *unless the prosecuting attorney stipulates to the assignment.*

NRS 176A.290(2) (emphasis added). It is this provision that is at issue on this writ. The majority concludes that the italicized language—requiring prosecutorial stipulation before a veteran charged with, or who has a history of, violent crime can be assigned to veterans court—intrudes on judicial discretion and thus violates the separation of powers doctrine. To correct this perceived violation, the majority rewrites the statute to strike its italicized language. As a result, no veteran charged with or who has a history of violent crime can participate in veterans court going forward—even, presumably, in a case where both the district court and the prosecutor believe assignment is appropriate. As I disagree with both the reasoning and result, I respectfully dissent.

I.

Matthew Hearn is a veteran of the United States Army, honorably discharged from service, with a diagnosis of posttraumatic stress disorder. He was charged with felony battery by a prisoner for the use of "force or violence upon the person of DEPUTY JAMES COOK by putting the victim in a headlock and strangling him." Hearn pleaded guilty. During the plea canvass, Hearn stated that he did not dispute the facts of the crime as charged.

After entry of his plea, Hearn applied for veterans court. A specialty courts officer sent a letter informing Hearn that he was eligible to participate in veterans court. The prosecutor subsequently informed Hearn that the State would not agree to Hearn's assignment to veterans court. Hearn then filed a motion to hold NRS 176A.290(2), in particular the provision relating to prosecutorial stipulation, unconstitutional as a violation of the separation of powers. The district court agreed, finding that the provision requiring the prosecutor's stipulation for a violent offender to be eligible for veterans court violated the separation of powers doctrine. The district court then purported to sever the provision requiring the prosecutor's stipulation from the remainder of subsection 2 and held that "[w]ithout the offending language, the judiciary retains its discretion to assign or not assign the defendant to the program."

The State filed a petition for a writ of mandamus or prohibition challenging the district court's decision. Although the majority denies the State's writ petition, it reaches the exact opposite conclusion from the district court. In the majority's view, a defendant charged with, or who has a history of violent crime, is categorically ineligible for veterans court.

II.

Article 3, Section 1(1) of the Nevada Constitution addresses the relationship between the three branches of State government:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

This provision establishes that the three branches are separate and coequal, and each has powers related to its own functions. While observing that each branch "maintain[s] its separate autonomy," this court has recognized that there is some amount of overlap and interdependence. *Galloway v. Truesdell*, 83 Nev. 13, 21, 422 P.2d 237, 243 (1967).

A.

One area of overlap and interdependence is implicated in this case—what penalty applies to a criminal offense. Establishing the penalty for a criminal offense is a legislative function. *Mendoza-Lobos v. State*, 125 Nev. 634, 639-40, 218 P.3d 501, 504-05 (2009). Deciding what penalty to impose in a given case is a judicial function. *Id.* The judicial function is constrained, however, by the related legislative function. For example, the Legislature may "completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes" or "mandat[e] factors to be considered by the courts when imposing a sentence." *Id.* at 640, 218 P.3d at 505. Similarly, "[t]he power to suspend [a] sentence and grant probation springs from legislative grant rather than from the inherent powers of the court." *Creps v. State*, 94 Nev. 351, 360, 581 P.2d 842, 848 (1978). So too does the power to place a defendant in a deferred sentencing program. *See Savage v. Third Judicial Dist. Court*, 125 Nev. 9, 16-17, 200 P.3d 77, 82 (2009) (recognizing that the Legislature authorized a DUI treatment program). Judicial power, on the other hand, "is the *authority* to hear and determine justiciable controversies." *Galloway*, 83 Nev. at 20, 422 P.2d at 242. And demonstrating this coordination of powers, judicial power naturally includes the imposition of a sentence within the limits set by the Legislature. *Mendoza-Lobos*, 125 Nev. at 639-40, 218 P.3d at 505.

The majority concludes that the Legislature may not condition eligibility for veterans court upon prosecutorial agreement because it affords the prosecutor a veto over a judicial function. Not so. The Legislature has set the parameters of eligibility for the program: a violent offender is not eligible for veterans court without prosecutorial stipulation. This does not afford the prosecutor a veto but rather establishes a condition precedent to the district court's exercise of the discretion granted by the Legislature. The district court

may not place a violent offender in the program without an agreement by the prosecutor (and the defendant for that matter, *see* NRS 176A.290(1)). These are the eligibility parameters established by the Legislature. Without them, a violent offender would not be eligible for veterans court at all. While the district court may exercise its discretion in sentencing within the bounds set by the Legislature, the district court has no authority to traverse the bounds or ignore the conditions on eligibility set by the Legislature.

This is no different than conditions the Legislature has placed on the district court's discretion to suspend a sentence and place a defendant on probation. For example, the Legislature has provided that defendants convicted of certain offenses shall not be placed on probation without a psychosexual evaluation certifying that the defendant is not a high risk to reoffend. NRS 176A.110(1). Without this certification, a district court has no discretion to place a defendant on probation. A condition precedent does nothing more than set the parameters of the district court's discretion.

B.

The majority mistakenly relies upon *Stromberg v. Second Judicial District Court*, 125 Nev. 1, 200 P.3d 509 (2009), to conclude that the Legislature cannot condition assignment to veterans court upon prosecutorial agreement. Unlike the case before us today involving the tension between the legislative and judicial branches, *Stromberg* addressed the interplay between the executive and judicial branches. In *Stromberg*, the State argued that former NRS 484.37941[1] violated the separation of powers in permitting the district court to accept a guilty plea to a third-offense DUI and, upon successful completion of the program, enter a conviction for a second-offense DUI over the State's objection. *Id*. at 6, 200 P.3d at 512. The State argued that this interfered with its exclusive power to charge a defendant. *Id*. This court rejected the separation-of-powers argument, noting that the district court's exercise of discretion in granting the application for treatment was "simply a choice between the legislatively prescribed penalties set forth in the statute" and does not limit the State's discretion to charge an offender with a third-offense DUI or a lesser offense. *Id*. at 8, 200 P.3d at 513. Insofar as this court recognized that the district court exercised its discretion within the parameters set by the Legislature, *Stromberg* correctly states the law.

However, *Stromberg* went on to conclude that the "court's decision to allow an offender to enter a program of treatment is analogous to the decision to sentence an offender to probation." *Id*. This is a false analogy. Assignment to veterans court is not analogous to sentencing. The assignment *defers* sentencing, and the success-

[1]NRS 484.37941 was repealed and replaced by NRS 484C.340.

ful completion of veterans court results in the dismissal of charges. NRS 176A.290(4). An offender will only be sentenced if the offender does not successfully complete the program. *Id*.

The California cases relied upon in *Stromberg*, *Esteybar v. Municipal Court for Long Beach Judicial District*, 485 P.2d 1140 (Cal. 1971), and *People v. Superior Court of San Mateo County*, 520 P.2d 405 (Cal. 1974), have dubious value, since they involve dissimilar statutory provisions for treatment of an offense as a misdemeanor and a pre-plea diversion program. And while it is neither necessary nor helpful to try to explicate the Byzantine array of sentencing and alternative sentencing options in California, California has subsequently recognized that a deferred sentencing program, similar to our veterans court, did not violate the separation of powers by conditioning assignment upon prosecutorial agreement. *See People v. Andreotti*, 111 Cal. Rptr. 2d 462, 463-70 (Ct. App. 2001) (explaining the difference between a diversion program and a deferred entry of judgment program, likening the requirement that the prosecutor move to defer entry of judgment to the prosecutor's power to plea bargain, and concluding that this requirement did not violate the separation of powers). The majority's reading of the *Andreotti* decision seemingly ignores the fact that a prosecutor must file a motion for a defendant to be eligible for deferral and the ultimate conclusion that this requirement does not violate the separation of powers. *Id*. It is hard to reconcile how eligibility based upon prosecutorial stipulation differs much in substance to eligibility based upon a prosecutorial motion. Under either scenario, eligibility for placement in a diversion program, which involves prosecutorial agreement, necessarily informs on the district court's discretion to place a defendant in a diversion program.

Other states have similarly determined that conditioning the district court's exercise of discretion upon prosecutorial agreement in deferred sentencing does not run afoul of the separation of powers. *See, e.g.*, *People in Interest of R.M.V.*, 942 P.2d 1317, 1319-22 (Colo. App. 1997) (holding that conditioning deferral of sentencing upon prosecutorial consent does not violate separation of powers because it is analogous to the executive authority to plea bargain); *State v. Graves*, 648 P.2d 866, 868-69 (Or. Ct. App. 1982) (determining that drug diversion statute did not violate separation of powers); *State v. Pierce*, 657 A.2d 192, 195-96 (Vt. 1995) (determining that requiring prosecutorial agreement in deferred sentencing does not violate separation of powers because deferred sentencing is more analogous to the prosecutor's power to plea bargain or a conditional pardon). I agree with these decisions and would hold that NRS 176A.290(2) does not violate the separation of powers by requiring the prosecutor's stipulation before a violent offender is eligible for veterans court.

III.

After determining that the prosecutorial-stipulation language in NRS 176A.290(2) violates the separation of powers doctrine, the majority addresses severance. It concludes that the remedy for the separation of powers violation is to strike the phrase "unless the prosecuting attorney stipulates to the assignment" from NRS 176A.290(2). As revised, NRS 176A.290(2) now reads: "If the offense committed by the defendant involved the use or threatened use of force or violence or if the defendant was previously convicted . . . of a felony that involved the use or threatened use of force or violence, the district court . . . may not assign the defendant to the program."

Severance is a recognized means of curing constitutional infirmity in a statute. NRS 0.020(1). As employed here, though, it leads to the dog-in-the-manger result that no defendant who is charged with or has committed a violent crime can participate in veterans court. The judiciary's power is protected but at the price of the discretionary eligibility for veterans court the Legislature provided for. The majority appears to try to soften the blow of its decision, which precludes all violent offenders from being assigned to veterans court, by reminding the district court to consider whether "the facts and circumstances surrounding the offense" show that the offense involved the use or threatened use of force or violence pursuant to NRS 176A.290(2). Aside from the fact that no one has suggested the offense charged in this case did not involve the use or threatened use of force or violence for purposes of NRS 176A.290(2), the record before us establishes the offense involved the use of force (a chokehold). Given the charges, which he admitted in pleading guilty, Matthew Hearn is categorically ineligible for veterans court.

IV.

The wisdom of requiring prosecutorial agreement for a violent offender to be assigned to veterans court is debatable among reasonable people. However, it is up to the Legislature to make public policy determinations about the eligibility requirements for a deferred sentencing program and the parameters of the district court's discretion in determining whether to assign an offender to such a program. Veterans court is Nevada's acknowledgment of the service of the men and women in our military and the debt we owe them for their service. In establishing veterans court, the Legislature acknowledged that combat-related injuries have led to increased contact with the criminal justice system for some veterans and that these veterans would benefit from rehabilitative services. 2009 Nev. Stat., ch. 44, at 99-100 (enacting statements). The Legislature chose to open the doors of veterans court to those who committed violent crimes if the prosecution agreed. But the majority's decision pre-

cludes offenders who commit violent crimes from inclusion in the program. I disagree that NRS 176A.290(2) violates the separation of powers doctrine, and I dissent from the decision categorically precluding all violent offenders from assignment to veterans court.

IN RE THE EXECUTION OF SEARCH WARRANTS FOR: 12067 OAKLAND HILLS, LAS VEGAS, NEVADA 89141; 54 CAROLINA CHERRY DRIVE, LAS VEGAS, NEVADA 89141; 5608 QUIET CLOUD DRIVE, LAS VEGAS, NEVADA 89141; AND 3321 ALCUDIA BAY AVENUE, LAS VEGAS, NEVADA 89141.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, APPELLANT, *v.* LAURA ANDERSON, RESPONDENT.

No. 71536-COA

December 13, 2018 435 P.3d 672

Appeal from a district court order awarding attorney fees in the context of a motion for the return of seized property. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed.

Marquis Aurbach Coffing and *Nicholas D. Crosby*, Las Vegas, for Appellant.

Kathleen Bliss Law PLLC and *Kathleen Bliss Quasula*, Henderson, for Respondent.

Before the Court of Appeals, SILVER, C.J., TAO and GIBBONS, JJ.

OPINION

By the Court, TAO, J.:

NRS 18.010(2)(a) permits an award of attorney fees to a "prevailing party" in a civil action when that party recovers a money judgment in an amount less than $20,000. At issue here is whether that provision permits a fee award against a police department ordered to return a large amount of cash (and other property) seized pursuant to a criminal search warrant.

We conclude that it does not because an order to return seized cash is an order to return physical property, not a "money judgment," and therefore we reverse the district court's award of fees. Further, we decline to affirm the award under NRS 18.010(2)(b) and

in so doing we clarify the evidentiary burdens that parties litigating return-of-property motions against a police department must meet under NRS 179.085.

FACTUAL AND PROCEDURAL HISTORY

Suspecting respondent Laura Anderson of running a secret prostitution ring, the Las Vegas Metropolitan Police Department (LVMPD) obtained a series of search warrants allowing it to look for contraband in five properties connected to her. Acting on those warrants, officers seized automobiles, electronics, and other personal effects, including more than $50,000 in cash.

Nine months then elapsed without any criminal charges being filed against her and without any civil forfeiture proceedings being initiated against the seized property. Anderson filed a civil motion under NRS 179.085 seeking the return of all property seized during the search. Her motion did not challenge the legality of the search or the manner in which it was conducted, but only whether LVMPD's continued retention of the property remained reasonable in the absence of criminal charges.[1]

LVMPD initially filed a written partial opposition to the motion agreeing that it possessed a legal duty to return property that no longer had any evidentiary value and stipulating to the immediate return of some computer equipment and memory devices whose contents had been copied. The written opposition asserted that the other seized evidence, including the large amount of cash, could not yet be returned because it was relevant to a federal criminal investigation that was ongoing at the time.

Something changed between the time the written briefs were filed and the date of the oral argument on Anderson's motion. When counsel for LVMPD appeared for the hearing, he abandoned the arguments made in the written briefing and instead informed the district court that he had recently learned that the federal investigation had terminated without the filing of any charges. He therefore verbally stipulated that all property could be returned to Anderson. Based on this non-opposition, the district court granted Anderson's motion and ordered the property returned.

Anderson thereafter filed a motion seeking an award of attorney fees against LVMPD pursuant to NRS 18.010(2). In her motion, Anderson contended that she was a "prevailing party" entitled to fees under NRS 18.010(2)(a) and, alternatively, that the police depart-

[1]NRS 179.085 originally allowed individuals to seek return of seized property only on grounds that the underlying search and seizure were unlawful, but before Anderson filed her motion the Legislature amended it to add the additional ground that law enforcement's continued retention of the property was unreasonable in light of all the circumstances. *See* 2015 Nev. Stat., ch. 113, § 1, at 405-06.

ment mounted a defense to her motion "without reasonable ground," entitling her to fees under NRS 18.010(2)(b). The district court issued a written order awarding Anderson $18,255 in attorney fees under NRS 18.010(2)(a) but did not address Anderson's contention that an attorney fee award was warranted under NRS 18.010(2)(b). LVMPD now appeals the district court's fee award.

ANALYSIS

The district court based its award of attorney fees upon NRS 18.010(2)(a). On appeal, LVMPD argues that this constituted legal error because recovery of a money judgment is a prerequisite to an award of attorney fees under that subsection. Anderson counters that the underlying judgment was monetary in nature because some of the property she recovered was cash. Alternatively, she argues that this court could affirm the award under NRS 18.010(2)(b), under the doctrine of "right result, wrong reason." *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that appellate courts "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason").

Standard of review

This court reviews a district court's award of attorney fees for a "manifest abuse of discretion." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (internal quotation marks and citation omitted). "But when the attorney fees matter implicates questions of law, the proper review is de novo." *Id.* Here, the question is whether a district court may award attorney fees at all under NRS 18.010(2)(a) in a return-of-property action brought under NRS 179.085, which is a question of law. Thus, our review is de novo. *See Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 8-11, 106 P.3d 1198, 1199-200 (2005) (reviewing de novo the question of whether landowners in condemnation actions may be awarded attorney fees as prevailing parties under NRS 18.010(2)(a)); *see also Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) ("Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." (internal quotation marks, alterations, and citation omitted)).

NRS 18.010(2)(a) cannot support an award of attorney fees when no money judgment has been entered

LVMPD argues that the district court's award of fees cannot be justified under NRS 18.010(2)(a). As always, the proper place to begin is with the plain text of the relevant statute, and if those words are unambiguous, that is where our analysis ends as well. *See Pawlik v. Deng*, 134 Nev. 83, 85, 412 P.3d 68, 71 (2018).

NRS 18.010(2)(a) states that a district court may award attorney fees to a "prevailing party" when that party "has not recovered more than $20,000." The Nevada Supreme Court has explained that this latter phrase represents an important limitation on the scope and reach of the statute, restricting it "to situations where the prevailing party's recovery was readily measurable against the standard set forth in the statute," meaning that it "ha[s] effect only when a party recovered some amount . . . in damages." *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 282-83, 890 P.2d 769, 773 (1995); *see Thomas*, 122 Nev. at 93-94, 127 P.3d at 1065-66 (reaffirming money judgment requirement and refusing to overrule *Crown Financial*). Such awards are permitted only in suits involving money judgments, which excludes actions seeking only declaratory or equitable relief.

A return-of-property action under NRS 179.085(5) is not an action seeking an award of money damages. Rather, the plain text of the statute states that a motion for return of seized property "filed when no criminal proceeding is pending . . . must be treated as a civil complaint seeking equitable relief." NRS 179.085(5). Thus, a movant seeking relief only under NRS 179.085(5) is not eligible for an award of attorney fees under NRS 18.010(2)(a).

Anderson nonetheless counters that the underlying judgment was not merely equitable but rather fundamentally monetary in nature because some of the seized property was in the form of a large amount of cash (around $50,000). But the terms of the judgment itself concern the return of property. The mere fact that some of that property happened to be in the form of cash does not convert the nature of the award itself into one for a money judgment. Unlike a true money judgment, the judgment here was not constructed to award money damages as compensation for some injury inflicted upon Anderson, and she would not have been entitled to satisfy it by attaching or executing against other assets of LVMPD until paid in full. Quite to the contrary, in return-of-property actions like this one, NRS 21.020(5) limits collection and execution to delivery of the specified property and nothing more, unless the judgment itself itemizes other costs or monetary damages. In any event, Anderson's argument fails on its own terms because, even if we somehow considered the district court's order to be a money judgment, the amount of cash seized exceeded $50,000. This sum falls outside the scope of NRS 18.010(2)(a), which is limited to cases involving judgments of $20,000 or less. Consequently, the district court erred by awarding attorney fees under NRS 18.010(2)(a).

The attorney fees award cannot be affirmed under NRS 18.010(2)(b) because the district court did not enter the required findings

Alternatively, Anderson argues that she was entitled to attorney fees under NRS 18.010(2)(b). NRS 18.010(2)(b) permits an award

of attorney fees where a claim or defense was "brought or maintained without reasonable ground or to harass the prevailing party." Anderson contends that the district court's award of attorney fees can be affirmed under NRS 18.010(2)(b) because LVMPD failed to present any "credible evidence" with its opposition to her motion that justified the nine-month retention of her property.[2]

Anderson's argument

As an initial observation, Anderson's argument conflates two very different things that must be sorted out. Anderson argues that attorney fees are warranted because LVMPD failed to provide proof that it had good reason to keep her property for so long without filing criminal charges. But NRS 18.010(2)(b) targets only how the litigation itself is conducted, not what the parties did before the litigation commenced. LVMPD may or may not have had a good reason to keep Anderson's property; either way, NRS 18.010(2)(b) permits an award of fees only if LVMPD "brought or maintained" a defense during the litigation itself that was either groundless or intended to harass.

Within the litigation, Anderson seems to argue that LVMPD failed to provide "credible evidence" in support of the factual allegations contained in its opposition to her motion. She cites *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351 (2000), and *Allianz Insurance Co. v. Gagnon*, 109 Nev. 990, 860 P.2d 720 (1993), for the proposition that an award of fees under NRS 18.010(2)(b) is tested by whether the opposing party presented "credible evidence" to support its defense. From this, Anderson argues that LVMPD's opposing brief consisted entirely of argument unsupported by credible external "evidence" such as affidavits or exhibits, and consequently NRS 18.010(2)(b) was satisfied and she is entitled to fees.

In effect, Anderson argues that those cases imposed an affirmative burden of production upon LVMPD to immediately support everything it said in its opposition with corroborating evidence at peril of being later subject to a fee award. But the cases say no such thing. In fact, the language of those cases refers to the lack of any credible evidence being presented "at trial" to support the initial allegations contained in the pleadings. *See Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (noting that *Allianz* defined a claim as "groundless" if "the allegations in the complaint . . . are not supported by any credible evidence at trial"). They say nothing about whether any party possesses any affirmative burden of production on any issue at the pleading stage of a return-of-property motion.

[2]Anderson also argues that LVMPD's proffered defense was "legally impossible," but offers little support for that proposition and we decline to address it.

In the end, the scope of NRS 18.010(2)(b) is defined not by a few words taken from isolated cases, but rather by the words of the statute itself. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (noting that "[t]he words of a governing text are of paramount concern"). The ultimate inquiry under NRS 18.010(2)(b) is whether a claim or defense was brought or maintained "without reasonable ground or to harass the prevailing party," with the stated goal of "deter[ring] frivolous or vexatious claims and defenses." What matters is whether the proceedings were initiated or defended "with improper motives or without reasonable grounds." *Bobby Berosini*, 114 Nev. at 1354, 971 P.2d at 387.

Here, the district court made no findings, and the record contains no evidence, that would enable us to affirm an award of attorney fees under this statute. The court never found that LVMPD asserted a defense that was brought or maintained "without reasonable ground," was intended to "harass" Anderson, or rendered the litigation "vexatious." Indeed, it's difficult to see how those findings could have been made when LVMPD immediately conceded part of the motion in writing in its response and then a few weeks later conceded the rest of it at the very first hearing on the motion. The litigation itself ended up lasting little more than a single month and the docket consists of nothing more than Anderson's initial motion, LVMPD's initial written opposition partly conceding the motion, Anderson's reply brief, the oral hearing at which LVMPD conceded the motion in its entirety, and then the proceedings surrounding Anderson's request for attorney fees. Accordingly, the district court's award of fees must be reversed.

The evidentiary burdens in return-of-property motions

Quite apart from whether Anderson was or was not entitled to fees, both parties and the district court appeared confused as to how they should have handled the underlying merits of Anderson's return-of-property motion. Moreover, this confusion extended to the way Anderson briefed her appeal, with Anderson arguing that fees should have been awarded because LVMPD failed to present "credible evidence" at a time when it never actually had any burden of production. Their confusion was understandable considering the general language employed in NRS 179.085 and the lack of any clear guidance from Nevada courts on how to understand the statute or handle such motions. Consequently, we take this opportunity to clarify the evidentiary burdens litigants bear in initiating and defending return-of-property motions quite outside of, and apart from, any subsequent request for attorney fees after the merits have been resolved.

NRS 179.085(1)(e) permits "[a] person aggrieved by . . . the deprivation of property [to] move the court . . . for the return of the

property on the ground that . . . [r]etention of the property by law enforcement is not reasonable under the totality of the circumstances." In resolving that motion, the statute contemplates an expedited procedure with no formal discovery mechanisms or eventual jury trial; instead, "[t]he judge shall receive evidence on any issue of fact necessary to the decision of the motion." NRS 179.085(1).

Here, LVMPD quickly conceded the merits of Anderson's motion. Consequently, the district court was not required to do anything more than grant Anderson's motion as unopposed. However, had things been different and had LVMPD contested the motion substantively, the district court may have been required to consider evidence to resolve the matter. To do so, the district court would have followed a procedure well established in federal courts.

NRS 179.085 largely mirrors Federal Rule of Criminal Procedure 41(g),[3] and where Nevada statutes track their federal counterparts, federal cases interpreting the rules can be instructive. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002); *Middleton v. State*, 114 Nev. 1089, 1107 & n.4, 968 P.2d 296, 309 & n.4 (1998) (citing a federal case interpreting Federal Rules of Criminal Procedure that were "largely equivalent" to Nevada statutes).

Fed. R. Crim. P. 41(g) generally requires that factual disputes in return-of-property motions be resolved through evidence, either affidavits or other documentary evidence or, if documentary evidence is insufficient, then by considering the testimony of witnesses during an evidentiary hearing. *See United States v. Stevens*, 500 F.3d 625, 628 (7th Cir. 2007); *United States v. Albinson*, 356 F.3d 278, 282 (3d Cir. 2004); *United States v. Chambers*, 192 F.3d 374, 378 (3d Cir. 1999).

During the consideration of such evidence, the moving party bears the initial burden to show that the government's retention of his or her property is facially unreasonable under the totality of all of the circumstances that then exist. *See* NRS 179.085(1)(e); *In re Matter of Search of Kitty's E.*, 905 F.2d 1367, 1375 (10th Cir. 1990) ("A movant must demonstrate that retention of the property by the government is unreasonable in order to prevail on a [Fed. R. Crim. P. 41(g)] motion."). When the movant initially files his or her motion, he or she may have little idea of where any criminal investigation might stand. Nevertheless, the burden can be met in a few ways based upon information already within the movant's possession. For example, this can occur when a criminal case has been completely resolved, either through a trial or a guilty plea, because

[3]Fed. R. Crim. P. 41 was amended in 2002 "as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." *United States v. Albinson*, 356 F.3d 278, 279 n.1 (3d Cir. 2004) (internal quotation marks and citation omitted). What was formerly Fed. R. Crim. P. 41(e) became Fed. R. Crim. P. 41(g), but the rule itself stayed largely the same. *Id.*

such a resolution suggests that any criminal investigation is likely over. *See United States v. Gladding*, 775 F.3d 1149, 1152 (9th Cir. 2014) (holding that the burden of proof shifts to the government when "the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or . . . the government has abandoned its investigation" (quoting *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987))). It can also occur when no charges have been filed even after the government has had more than enough time to conduct its investigation. *See Martinson*, 809 F.2d at 1369 n.5 (recognizing that the burden could shift to the government if it has retained property for an extended period of time without filing charges); *Mr. Lucky Messenger Serv., Inc. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978) (remanding for an evidentiary hearing to determine whether the government could reasonably justify retaining plaintiff's cash for over 17 months without bringing any charges).

If the movant fails to meet this initial burden, nothing more is required and the motion may be denied even if the government produces no evidence in response. If, however, the district court finds that the movant has made an initial showing that the retention of the property appears facially unreasonable, then the burden shifts to the government to demonstrate that it has a legitimate reason to retain the property. *Martinson*, 809 F.2d at 1369. The government could meet this burden in several ways. It could, for example, show that the property was contraband (such as drugs) that could not be legally returned. *See id.* Alternatively, it could show that the seized property was not actually owned by the movant (such as if it had actually been stolen from someone else). *See United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979). It could also show that the property was the subject of civil forfeiture proceedings, or it could show that the property was related to an ongoing criminal investigation. *See id.* In any of these cases, the government would have the burden to prove its allegations through something more than a naked assertion of counsel. *See Stevens*, 500 F.3d at 628 ("[A]rguments in a Government brief, unsupported by documentary evidence, are *not* evidence.").

If the government intends to prove that it's keeping the property pursuant to an active criminal investigation, then things become interesting. The types of "evidence" that could prove the existence of an ongoing law enforcement investigation are likely to be wholly unlike the kinds of evidence that parties typically present in other types of lawsuits. Many law enforcement activities—especially ones that do not result in the filing of any criminal charges—are governed by a web of rules governing confidentiality that do not exist in other contexts, including rules that protect the secrecy of

grand jury proceedings and the identities of confidential informants. *See, e.g.*, Fed. R. Crim. P. 6(e); 28 C.F.R. §§ 16.21-.29. Rules aside, the disclosure of an active and ongoing criminal investigation may jeopardize the integrity of the investigation itself by revealing to a suspect that he or she is being investigated, how the investigation is being conducted, and by whom. Indeed, when a federal grand jury has been convened to investigate a target, unauthorized disclosure of its existence may constitute the commission of a federal crime, even when the disclosure is made in defense of a civil action like this one. *See* 18 U.S.C. § 401 (allowing a federal court to punish contempt of its authority by fine or imprisonment, including for "disobedience or resistance to its lawful . . . rule"). The question thus becomes how parties and district courts can determine whether keeping seized property is justified without either jeopardizing an active criminal investigation or running afoul of other statutes or rules requiring that such investigations remain confidential.

To solve this conundrum, the district court may choose to permit the government to supply its evidence in camera to preserve the secrecy and integrity of any ongoing investigation, and to prevent such motions from becoming a discovery tool through which a suspect can gather intelligence through the back door on the progress of the government's investigative efforts. *See, e.g.*, *Mr. Lucky Messenger Serv.*, 587 F.2d at 17 (remanding and directing the district court to, in its discretion, conduct the evidentiary hearing in camera because the reasons for the government's continued retention of property "may be integrally related to . . . grand jury proceedings"); *In re Documents & Other Possessions at Metro. Ctr. of Prisoner Hale*, 228 F.R.D. 621, 624 (N.D. Ill. 2005) (holding that the government could submit more information to the court "*ex parte* and under seal" if it wished "[d]ue to the sensitive nature of the case and in the event of an ongoing investigation that [it] does not wish to disclose").

In the instant case, had LVMPD contested Anderson's motion in a substantive way, the district court would have had to resolve the merits of the matter by weighing evidence. But because LVMPD quickly conceded the motion, the district court was not required to consider anything more. From this, Anderson seems to argue that merely because LVMPD produced no evidence and lost the motion, its defense was unreasonable and fees were appropriate. But LVMPD had no burden to produce anything yet, and even if it had, Anderson's assertion is far from true. Not every unsuccessful defense is ipso facto "unreasonable," "frivolous," or "vexatious." Merely losing a motion on the merits does not mean that the losing defense was utterly "without reasonable ground" for purposes of awarding attorney fees. NRS 18.010(2)(b) does not create an automatic "loser

pays" system, of the kind found in England, in which the unsuccessful party always pays fees to the winning party. *See Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part and dissenting in part) (noting that the "English Rule" is one "under which the losing party, whether plaintiff or defendant, pays the winner's fees"). Instead, whether the losing party's defense went beyond merely unsuccessful into becoming "vexatious" and "without reasonable ground" is a decision for the district court to make in the first instance.

Here, LVMPD conceded the motion without much of a fight, and therefore the district court did not weigh any evidence and did not make any findings that LVMPD did anything to trigger NRS 18.010(2)(b). Moreover, because the district court granted Anderson's motion as unopposed, it never had to determine whether Anderson actually met her initial burden. Thus, the burden never shifted to LVMPD to do anything more or supply any evidence. Even if it had, that would not necessarily mean that fees were warranted; to award fees, the district court must have made a separate finding that LVMPD not only lost the motion, but unreasonably fought it based upon grounds prohibited under NRS 18.010(2)(b). No such findings exist, and therefore the award of fees must be reversed.

CONCLUSION

For the foregoing reasons, the district court's award of attorney fees was not proper under NRS 18.010(2)(a) and cannot be affirmed under NRS 18.010(2)(b) in the absence of any relevant findings or any clear evidence that LVMPD brought or maintained its defense without reasonable ground. Accordingly, we reverse the district court's order awarding attorney fees.

Gibbons, J., concurs.

Silver, C.J., concurring:

I concur in the result only.

GLENN MILLER DOOLIN, Appellant, *v.* THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS, Respondent.

No. 73698-COA

December 13, 2018 440 P.3d 53

Pro se appeal from a district court order denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Linda Marie Bell, Chief Judge.

Affirmed.

[Rehearing denied February 26, 2019]

Glenn Miller Doolin, Indian Springs, in Pro Se.

Adam Paul Laxalt, Attorney General, and *Jessica E. Perlick*, Deputy Attorney General, Carson City, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

Per Curiam:

The issue presented in this appeal is whether an offender may have statutory credit earned pursuant to NRS 209.4465 applied to the offender's parole eligibility and minimum term for a sentence imposed pursuant to NRS 207.010. We conclude that both the sentence and category of conviction are enhanced when an offender is adjudicated a habitual criminal pursuant to NRS 207.010. And because such an adjudication will always enhance a conviction for a lower category felony to either a category A or B felony, we hold NRS 209.4465(8)(d) precludes application of statutory credit to an offender's parole eligibility and minimum term for a sentence imposed pursuant to NRS 207.010. Because Glenn Miller Doolin was adjudicated a habitual criminal pursuant to NRS 207.010(1)(a), we conclude the district court correctly determined Doolin was not entitled to the application of credit to his parole eligibility and minimum term. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Doolin was convicted of grand larceny of a motor vehicle, a category C felony, *see* NRS 205.228(2), and possession of burglary tools, a gross misdemeanor, *see* NRS 205.080(1), for crimes he committed in 2012. For the grand larceny of a motor vehicle count,

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

the district court adjudicated Doolin a habitual criminal and sentenced him, pursuant to the small habitual criminal enhancement, to a prison term of 60 to 150 months. *See* NRS 207.010(1)(a). The district court also sentenced Doolin to serve a consecutive term of 12 months in the Clark County Detention Center for his possession of burglary tools conviction.

Doolin filed a postconviction petition for a writ of habeas corpus and supplemental petition in which he challenged the computation of time served for his prison sentence. Doolin claimed the Nevada Department of Corrections has failed to apply statutory credit toward his parole eligibility and minimum term. The district court concluded Doolin was not entitled to relief and denied the petition. This appeal follows.

ANALYSIS

Doolin claims the district court erred by finding he is not entitled to have the statutory credit he has earned applied to his parole eligibility and minimum term. He asserts the exclusion in NRS 209.4465(8)(d) does not apply to him because, although he was *punished* as a category B felon under the habitual criminal statute, he was only *convicted* of a category C felony.

Doolin observes that NRS 209.4465(8)(d) excludes the application of statutory credit to the parole eligibility and minimum term for a sentence for an offender who is "*convicted* of: . . . [a] category A or B felony" (emphasis added), but NRS 207.010(1)(a) states that an offender who is adjudicated a habitual criminal "shall be *punished* for a category B felony" (emphasis added). Doolin urges this court to conclude that the Legislature's use of *convicted* in NRS 209.4465(8)(d) and *punished* in NRS 207.010(1)(a) indicate NRS 209.4465(8)(d) was not intended to preclude the application of statutory credit to a sentence imposed pursuant to NRS 207.010. *See Williams v. State, Dep't of Corr.*, 133 Nev. 594, 598, 402 P.3d 1260, 1264 (2017) (stating courts "must presume that the variation in language indicates a variation in meaning").

Doolin asserts *Howard v. State*, 83 Nev. 53, 422 P.2d 548 (1967), and *Parkerson v. State*, 100 Nev. 222, 678 P.2d 1155 (1984), support such a conclusion. *Howard* and *Parkerson* state the habitual criminal enhancement is not a separate offense and only acts to increase an offender's punishment. *Howard*, 83 Nev. at 56, 422 P.2d at 550; *Parkerson*, 100 Nev. at 224, 678 P.2d at 1156. Doolin argues *Howard* and *Parkerson* thus imply that sentencing under the habitual criminal enhancement does not equate to a conviction. He further argues that this, in turn, means imposition of the habitual criminal enhancement does not alter the category of felony he was convicted of committing, and he is entitled to application of statutory credit

toward his parole eligibility and minimum term as an offender convicted of a category C felony.

The ultimate question we must answer is whether NRS 209.4465(8)(d) precludes an offender sentenced pursuant to NRS 207.010 from having statutory credit applied to his or her parole eligibility and minimum term for that sentence. To answer this question, we must first decide whether habitual criminal adjudication pursuant to NRS 207.010 enhances both the sentence and category of conviction, i.e., whether an offender who is "punished for a category B felony" under NRS 207.010(1)(a) is also *convicted* of a category B felony. The resolution of this issue is a matter of statutory interpretation.

"Statutory interpretation is an issue of law subject to de novo review." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). The goal of statutory interpretation "is to give effect to the Legislature's intent." *Id.* To ascertain the Legislature's intent, we first focus our inquiry on the statute's plain language, "avoid[ing] statutory interpretation that renders language meaningless or superfluous." *Id.* "[W]henever possible, [we] will interpret a rule or statute in harmony with other rules or statutes." *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev. 783, 789, 358 P.3d 228, 232 (2015) (internal quotation marks omitted). "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003).

Doolin is correct in that the statutes he compares use different language and the habitual criminal enhancement is not considered a separate conviction apart from the underlying offense, *see Howard*, 83 Nev. at 56, 422 P.2d at 550. However, Doolin's argument that habitual criminal adjudication does not enhance the category of felony an offender is convicted of fails to consider NRS Chapter 207's overall habitual criminal scheme and, in particular, ignores a key provision that governs the imposition of the habitual criminal enhancement.

Pursuant to NRS 207.010(1)(a), offenders sentenced under the small habitual criminal enhancement are "punished for a category B felony." Similarly, NRS 207.010(1)(b) states that offenders sentenced under the large habitual criminal enhancement are "punished for a category A felony." Although NRS 207.010 uses the word *punished*, NRS 207.016(1) states "[a] *conviction* pursuant to NRS 207.010 . . . operates only to increase, not to reduce, the sentence otherwise provided by law for the principal crime" (emphasis added). Thus, NRS 207.016(1) states an offender who has been sentenced under NRS 207.010 has been convicted under NRS 207.010. Reading NRS 207.010 and NRS 207.016(1) in harmony, we conclude the plain language of those statutes demonstrates the Legis-

lature intended for both the sentence and category of conviction to be enhanced when an offender is adjudicated a habitual criminal pursuant to NRS 207.010.

This conclusion is not contrary to, and does not alter, prior decisions explaining that the habitual criminal enhancement is not a separate offense, but rather a status that "allows enlarged punishment," *Howard*, 83 Nev. at 57, 422 P.2d at 550, because the enhancement of the category of conviction does not change the elements of the underlying crime or create a new crime; rather, it only operates to increase the punishment for a recidivist. This is consistent with the Legislature's approach to other criminal enhancements that are based on prior convictions, such as the enhancements for battery constituting domestic violence and driving under the influence. For each of those crimes, an offender's sentence and category of conviction may be enhanced following submission of evidence of the offender's prior criminal convictions. *See* NRS 200.485(1)(a)-(c); NRS 484C.400(1)(a)-(c).

Because we conclude the meaning of the statutory language in NRS 207.010 and NRS 207.016 is plain, there is no need to look to legislative history. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (stating courts should look to legislative history when the statute is ambiguous, i.e., "when the statutory language lends itself to two or more reasonable interpretations" (internal quotation marks omitted)). We nevertheless note the legislative history also supports this interpretation.

NRS 207.010 was enacted in 1995 after approval of Senate Bill 416, which made "various changes regarding sentencing of persons convicted of felonies," Hearing on S.B. 416 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., May 1, 1995). *See* 1995 Nev. Stat., ch. 443, §§ 180-81, at 1237-38. The legislative history for Senate Bill 416 includes a crimes category chart that listed the small habitual criminal enhancement with the category B felonies and the large habitual criminal enhancement with the category A felonies. Hearing on S.B. 416 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., May 1, 1995) (Exhibit F). Given this chart, it appears the Legislature did not intend for habitual criminal adjudication to retain the category of felony of the underlying crime and only enhance the range of punishment that may be imposed. Accordingly, we conclude the legislative history indicates that the Legislature intended for both the sentence and category of conviction to be enhanced when an offender is adjudicated a habitual criminal pursuant to NRS 207.010.[2]

[2]To the extent Doolin argues the rule of lenity requires resolution of any ambiguity in his favor, this argument lacks merit. Because there is no unresolved ambiguity, the rule of lenity does not apply. *See Lucero*, 127 Nev. at 99, 249 P.3d at 1230 ("Because ambiguity is the cornerstone of the rule of lenity, the rule

For the reasons stated above, we conclude the plain language of the statutes demonstrates that both the sentence and category of conviction are enhanced when an offender is adjudicated a habitual criminal pursuant to NRS 207.010, and note this conclusion is also supported by legislative history. Therefore, when an offender is adjudicated a habitual criminal pursuant to NRS 207.010(1)(a), the conviction is enhanced and the offender is convicted of a category B felony, and when an offender is adjudicated a habitual criminal pursuant to NRS 207.010(1)(b), the conviction is enhanced and the offender is convicted of a category A felony.

Turning to the application of statutory credit under NRS 209.4465, we note NRS 209.4465(8)(d) precludes the application of statutory credit to an offender's parole eligibility and minimum term for a sentence on a conviction for a category A or B felony. Because we conclude adjudication as a habitual criminal pursuant to NRS 207.010 enhances both the sentence and category of conviction, we hold that an offender who is adjudicated a habitual criminal pursuant to NRS 207.010 is not entitled to have statutory credit applied to the eligibility for parole and minimum term for that sentence.

Here, although grand larceny of a motor vehicle is a category C felony, because Doolin was adjudicated a habitual criminal pursuant to NRS 207.010(1)(a), his category of conviction was enhanced to a category B felony. Therefore, NRS 209.4465(8)(d) precludes application of statutory credit to his parole eligibility and minimum term. Accordingly, we conclude the district court did not err by denying Doolin's petition.

CONCLUSION

We conclude habitual criminal adjudication pursuant to NRS 207.010 enhances both the sentence and category of conviction. Thus, habitual criminal adjudication pursuant to NRS 207.010 will always enhance a conviction for a lower category felony, and the offender will be convicted of either a category A or B felony. We therefore hold that NRS 209.4465(8)(d) precludes application of statutory credit to an offender's parole eligibility and minimum term for a sentence imposed pursuant to NRS 207.010. Because Doolin was adjudicated a habitual criminal pursuant to NRS 207.010(1)(a), NRS 209.4465(8)(d) precludes application of statutory credit to his parole eligibility and minimum term. Accordingly, we conclude the district court properly denied Doolin's petition. Therefore, we affirm.

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only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity.").

WILLIAM EDWARD BRANHAM, Appellant, *v.*
ISIDRO BACA, Warden, Respondent.

No. 74743-COA

December 13, 2018 434 P.3d 313

Appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and *Jonathan M. Kirshbaum*, Assistant Federal Public Defender, Las Vegas, for Appellant.

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

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

Per Curiam:

In this opinion, we consider whether the United States Supreme Court decisions in *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), constitute good cause to overcome the procedural bars to a postconviction petition for a writ of habeas corpus in which the petitioner contends he is entitled to the retroactive application of a nonconstitutional substantive rule. *Welch* and *Montgomery* do not alter the threshold requirement that, for a new substantive rule to apply retroactively, it must be a constitutional rule. We hold the decisions in those cases do not constitute good cause to raise a procedurally barred claim arguing a nonconstitutional rule should be applied retroactively. Therefore, we conclude the district court did not err by finding Branham failed to demonstrate good cause or a fundamental miscarriage of justice to overcome the procedural bars to his petition. Accordingly, we affirm.

PROCEDURAL HISTORY

William Edward Branham was convicted in 1993 of first-degree murder. The Nevada Supreme Court affirmed Branham's conviction on direct appeal. *See Branham v. State*, Docket Nos. 24478 & 24648 (Order Dismissing Appeals, December 18, 1996). Thereafter, Branham filed a timely postconviction petition for a writ of habeas

corpus, which was resolved on its merits, and a subsequent, procedurally barred petition. The district court orders resolving those petitions were affirmed on appeal. *See Branham v. State*, Docket No. 45532 (Order of Affirmance, November 10, 2005); *Branham v. Warden*, Docket Nos. 33830 & 33831 (Order Dismissing Appeals, February 15, 2000).

Branham filed the instant postconviction petition for a writ of habeas corpus on April 7, 2017, more than 20 years after the remittitur was issued from his direct appeal. He claimed he is entitled to the retroactive benefit of the narrowed definition of "willful, deliberate and premeditated" murder announced in *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000), and, accordingly, his convictions should be set aside and he should receive a new trial wherein the jury is properly instructed. Although acknowledging his petition was subject to procedural bars, Branham asserted the recent United States Supreme Court decisions in *Welch* and *Montgomery* provided good cause to raise this claim. The district court dismissed Branham's petition as procedurally time-barred, finding he failed to demonstrate good cause or a fundamental miscarriage of justice to overcome the procedural bars. This appeal follows.

ANALYSIS

Branham claims the district court erred by dismissing his petition as procedurally barred. Branham acknowledges his petition was subject to procedural bars, *see* NRS 34.726(1); NRS 34.810(1)(b), (2), but he argues the district court erred by finding he failed to demonstrate good cause or a fundamental miscarriage of justice to overcome the procedural bars.[1]

The application of procedural bars is mandatory, *see State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), but a petitioner may overcome the bars in one of two ways: (1) by demonstrating good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(3), or (2) by demonstrating actual innocence, such that a fundamental miscarriage of justice would result were the underlying claims not heard on the merits, *see* NRS 34.800(1)(b); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). As discussed below, we conclude the district court did not err by finding Branham failed to overcome the procedural bars.

Branham did not demonstrate good cause

To demonstrate good cause to overcome the procedural bars, a petitioner must offer a legal excuse by showing "that an impedi-

[1]To the extent Branham also claims the district court erred by finding he failed to demonstrate prejudice, because Branham had to demonstrate both good cause and prejudice to overcome the procedural bars, *see* NRS 34.726(1); NRS 34.810(1)(b), (3), and because, as explained below, we conclude he did not demonstrate good cause, we need not address this claim.

ment external to the defense prevented him . . . from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). That is, a petitioner must show "that the factual or legal basis for a claim was not reasonably available . . . or that some interference by officials, made compliance impracticable." *Id.* (internal quotation marks omitted).

Branham claims he demonstrated good cause to overcome the procedural bars because the recent United States Supreme Court decisions in *Welch* and *Montgomery* expand the reach of federal retroactivity jurisprudence to state collateral proceedings.

In both *Welch* and *Montgomery*, the issue before the Court was whether an earlier decision announced a new, substantive rule of constitutional law that must be applied retroactively to cases that were final when the earlier decision was rendered. *See Welch*, 136 S. Ct. at 1261; *Montgomery*, 136 S. Ct. at 732-34. The question in *Welch* was whether the prior decision constituted a new *substantive* constitutional rule. 136 S. Ct. at 1261. In deciding this question, the Court held that whether a rule is characterized as procedural or substantive depends on the function of the new rule, "not the constitutional guarantee from which the rule derives." 136 S. Ct. at 1266. The question in *Montgomery* was whether "the Constitution requires state collateral review courts to give retroactive effect" to "a new substantive rule of constitutional law [that] controls the outcome of a case." 136 S. Ct. at 729. The court held the answer was yes. *Id*.

Branham asserts these decisions establish that the substantive rule exception to the federal retroactivity framework requires states to apply any new substantive rule, including a decision narrowing the interpretation of a criminal statute, retroactively. In particular, Branham claims that *Welch* implies "the clarification/change in law dichotomy [in retroactivity analysis] has become essentially obsolete" and, after *Welch*, the only relevant question is whether the new interpretation represents a new substantive rule. Branham argues that the decision in *Byford* set forth a new substantive rule and, as a result, the decisions in *Welch* and *Montgomery* provide a legal basis that was not previously available to support his underlying claim that he is entitled to the retroactive application of *Byford*. Branham is mistaken as to the implications of the holdings of *Welch* and *Montgomery*.

The United States Supreme Court first set out its modern retroactivity framework in the plurality opinion *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* established that new constitutional rules, i.e., rules of criminal procedure that have an underlying constitutional source, generally do not apply retroactively to convictions that were final when the new constitutional rule was announced. *Id.* at 306-07.

However, *Teague* recognized two categories of constitutional rules that are not subject to its retroactivity bar. *Montgomery*, 136 S. Ct. at 728. "First, courts must give retroactive effect to new substantive rules of constitutional law." *Id*. "Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect." *Welch*, 136 S. Ct. at 1264 (internal quotation marks omitted). The threshold requirement for the applicability of *Teague*'s retroactivity framework is that the new rule at issue must be a constitutional rule.[2] *See Teague*, 489 U.S. at 306.

In both *Welch* and *Montgomery*, the Court applied the existing *Teague* retroactivity framework to decide the issue before it. *See Welch*, 136 S. Ct. at 1264-68; *Montgomery*, 136 S. Ct. at 728-36. Nothing in either case alters *Teague*'s threshold requirement that the new rule at issue must be a constitutional rule. *See Welch*, 136 S. Ct. at 1264 (reiterating that the *Teague* retroactivity framework applies to new constitutional rules); *Montgomery*, 136 S. Ct. at 728 (same). Because the decisions in *Welch* and *Montgomery* do not alter this threshold requirement, we hold those decisions do not constitute good cause for raising a procedurally barred claim arguing a nonconstitutional rule should be applied retroactively.

Here, Branham claimed the decisions in *Welch* and *Montgomery* provided good cause to raise his *Byford* claim. However, the decision in *Byford* "was a matter of interpreting a state statute, not a matter of constitutional law," and "[n]othing in the language of *Byford* suggests that decision was grounded in constitutional concerns." *Nika*, 124 Nev. at 1288, 198 P.3d at 850. Because the decision in *Byford* did not establish a new constitutional rule, the decisions in *Welch* and *Montgomery* do not constitute good cause for Branham to raise his procedurally barred claim that *Byford* must be applied retroactively.[3]

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[2]Nevada has adopted a more liberal version of the federal retroactivity framework, but still recognizes this threshold requirement. *See Nika v. State*, 124 Nev. 1272, 1288, 198 P.3d 839, 850 (2008) ("[I]f a rule is new but not a constitutional rule, it has no retroactive application to convictions that are final at the time of the change in the law."); *Colwell v. State*, 118 Nev. 807, 816-17, 59 P.3d 463, 469-70 (2002).

[3]We note that even if the holding in *Byford* could be construed to fall within the *Teague* substantive rule exception, the portions of *Welch* and *Montgomery* on which Branham relies are based on federal law that has long been available for Branham to raise in postconviction proceedings. Further, because Nevada adopted the federal retroactivity framework in 2002, Branham could have raised his retroactivity argument long before the decision in *Montgomery* was issued. Therefore, *Welch* and *Montgomery* still would not provide good cause to excuse the procedural bars. *See Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (holding a good cause claim cannot itself be procedurally barred).

Branham did not demonstrate a fundamental miscarriage of justice

Branham also claims he demonstrated a fundamental miscarriage of justice to overcome the procedural bars. A district court may reach the merits of any claims of constitutional error where a petitioner can demonstrate a fundamental miscarriage of justice has resulted in the conviction of one who is actually innocent. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Branham's argument fails for two reasons.

First, a successful claim of a fundamental miscarriage of justice only allows for consideration on the merits of claims of *constitutional* error. But because the *Byford* decision was not grounded in constitutional concerns, Branham's underlying *Byford* claim was not a claim of constitutional error. Accordingly, Branham would not have been entitled to have his underlying *Byford* claim decided on the merits. Second, Branham could not demonstrate he was actually innocent. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency." (alteration in original) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998))). He thus failed to demonstrate dismissal of his claim would result in a fundamental miscarriage of justice.

CONCLUSION

We hold that the United States Supreme Court decisions in *Welch* and *Montgomery* do not constitute good cause to raise a procedurally barred claim arguing that a nonconstitutional rule should be applied retroactively. Because the decision in *Byford* did not establish a new constitutional rule, we conclude the district court did not err by finding the decisions in *Welch* and *Montgomery* did not constitute good cause for Branham to raise his procedurally barred claim that *Byford* must be applied retroactively.[4] Branham also failed to demonstrate that dismissal of his claim would result in a fundamental miscarriage of justice. Accordingly, we affirm the district court's order dismissing Branham's postconviction petition for a writ of habeas corpus as procedurally barred.

[4]We note the district court erred by finding that *Welch* and *Montgomery* did not provide good cause to overcome the procedural bars on the ground that *Byford* did not announce a new substantive rule. Nevertheless, for the reasons stated, we conclude the district court reached the correct result, albeit for the wrong reason. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

CENTURY SURETY COMPANY, Appellant, *v.* DANA ANDREW, as Legal Guardian on Behalf of RYAN T. PRETNER; and RYAN T. PRETNER, Respondents.

No. 73756

December 13, 2018 432 P.3d 180

Certified question pursuant to NRAP 5 concerning insurer's liability for breach of its duty to defend. United States District Court for the District of Nevada; Andrew P. Gordon, Judge.

Question answered.

Gass Weber Mullins, LLC, and *James Ric Gass* and *Michael S. Yellin*, Milwaukee, Wisconsin; *Christian, Kravitz, Dichter, Johnson & Sluga* and *Martin J. Kravitz*, Las Vegas; *Cozen O'Connor* and *Maria L. Cousineau*, Los Angeles, California, for Appellant.

Eglet Prince and *Dennis M. Prince*, Las Vegas, for Respondents.

Lewis Roca Rothgerber Christie LLP and *J. Christopher Jorgensen* and *Daniel F. Polsenberg*, Las Vegas, for Amicus Curiae Federation of Defense & Corporate Counsel.

Lewis Roca Rothgerber Christie LLP and *Joel D. Henriod* and *Daniel F. Polsenberg*, Las Vegas; *Crowell & Moring LLP* and *Laura Anne Foggan*, Washington, D.C., for Amici Curiae Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America.

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

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Douglas, C.J.:

An insurance policy generally contains an insurer's contractual duty to defend its insured in any lawsuits that involve claims covered under the umbrella of the insurance policy. In response to a certified question submitted by the United States District Court for the District of Nevada, we consider "[w]hether, under Nevada law, the liability of an insurer that has breached its duty to defend, but has not acted in bad faith, is capped at the policy limit plus any

[1]The Honorable Ron D. Parraguirre, Justice, is disqualified from participation in the decision of this matter.

costs incurred by the insured in mounting a defense, or [whether] the insurer [is] liable for all losses consequential to the insurer's breach." We conclude that an insurer's liability where it breaches its contractual duty to defend is not capped at the policy limits plus the insured's defense costs, and instead, an insurer may be liable for any consequential damages caused by its breach. We further conclude that good-faith determinations are irrelevant for determining damages upon a breach of this duty.

FACTS AND PROCEDURAL HISTORY

Respondents Ryan T. Pretner and Dana Andrew (as legal guardian of Pretner) initiated a personal injury action in state court after a truck owned and driven by Michael Vasquez struck Pretner, causing significant brain injuries. Vasquez used the truck for personal use, as well as for his mobile auto detailing business, Blue Streak Auto Detailing, LLC (Blue Streak). At the time of the accident, Vasquez was covered under a personal auto liability insurance policy issued by Progressive Casualty Insurance Company (Progressive), and Blue Streak was insured under a commercial liability policy issued by appellant Century Surety Company. The Progressive policy had a $100,000 policy limit, whereas appellant's policy had a policy limit of $1 million.

Upon receiving the accident report, appellant conducted an investigation and concluded that Vasquez was not driving in the course and scope of his employment with Blue Streak at the time of the accident, and that the accident was not covered under its insurance policy. Appellant rejected respondents' demand to settle the claim within the policy limit. Subsequently, respondents sued Vasquez and Blue Streak in state district court, alleging that Vasquez was driving in the course and scope of his employment with Blue Streak at the time of the accident. Respondents notified appellant of the suit, but appellant refused to defend Blue Streak. Vasquez and Blue Streak defaulted in the state court action and the notice of the default was forwarded to appellant. Appellant maintained that the claim was not covered under its insurance policy.

Respondents, Vasquez, and Blue Streak entered into a settlement agreement whereby respondents agreed not to execute on any judgment against Vasquez and Blue Streak, and Blue Streak assigned its rights against appellant to respondents. In addition, Progressive agreed to tender Vasquez's $100,000 policy limit. Respondents then filed an unchallenged application for entry of default judgment in state district court. Following a hearing, the district court entered a default judgment against Vasquez and Blue Streak for $18,050,183. The default judgment's factual findings, deemed admitted by default, stated that "Vasquez negligently injured Pretner, that Vasquez was working in the course and scope of his employment with Blue Streak at the time, and that consequently Blue Streak was also lia-

ble." As an assignee of Blue Streak, respondents filed suit in state district court against appellant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair claims practices, and appellant removed the case to the federal district court.

The federal court found that appellant did not act in bad faith, but it did breach its duty to defend Blue Streak. Initially, the federal court concluded that appellant's liability for a breach of the duty to defend was capped at the policy limit plus any cost incurred by Blue Streak in mounting a defense because appellant did not act in bad faith. The federal court stated that it was undisputed that Blue Streak did not incur any defense cost because it defaulted in the underlying negligence suit. However, after respondents filed a motion for reconsideration, the federal court concluded that Blue Streak was entitled to recover consequential damages that exceeded the policy limit for appellant's breach of the duty to defend, and that the default judgment was a reasonably foreseeable result of the breach of the duty to defend. Additionally, the federal court concluded that bad faith was not required to impose liability on the insurer in excess of the policy limit. Nevertheless, the federal court entered an order staying the proceedings until resolution of the aforementioned certified question by this court.

DISCUSSION

Appellant argues that the liability of an insurer that breaches its contractual duty to defend, but has not acted in bad faith, is generally capped at the policy limits and any cost incurred in mounting a defense.[2] Conversely, respondents argue that an insurer that breaches its duty to defend should be liable for all consequential damages, which may include a judgment against the insured that is in excess of the policy limits.[3]

In Nevada, insurance policies are treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies. *See Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014); *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 684, 99 P.3d 1153, 1156-57 (2004); *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). The general rule in a breach of contract case is that the injured party may be awarded expectancy damages, which are determined by the method set forth in the Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981). *Rd. & Highway Builders,*

[2]The Federation of Defense & Corporate Counsel, Complex Insurance Claims Litigation Association, American Insurance Association, and Property Casualty Insurers Association of America were allowed to file amicus briefs in support of appellant.

[3]The Nevada Justice Association was allowed to file an amicus brief in support of respondents.

LLC v. N. Nev. Rebar, Inc., 128 Nev. 384, 392, 284 P.3d 377, 382 (2012). The Restatement (Second) of Contracts § 347 provides, in pertinent part, as follows:

> [T]he injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) *any other loss, including incidental or consequential loss, caused by the breach*, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

(Emphasis added.)

An insurance policy creates two contractual duties between the insurer and the insured: the duty to indemnify and the duty to defend. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 309, 212 P.3d 318, 324 (2009). "The duty to indemnify arises when an insured becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy." *United Nat'l*, 120 Nev. at 686, 99 P.3d at 1157 (internal quotation marks omitted). On the other hand, "[a]n insurer . . . bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Id.* at 687, 99 P.3d at 1158 (alteration in original) (internal quotation marks omitted).

Courts have uniformly held the duty to defend to be "separate from," 1 Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 5.02[a], at 327 (17th ed. 2015) (internal quotation marks omitted), and "broader than the duty to indemnify," *Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 949 (9th Cir. 2002). The duty to indemnify provides those insured financial protection against judgments, while the duty to defend protects those insured from the action itself. "The duty to defend is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459-60 (Wash. 2007). The insured pays a premium for the expectation that the insurer will abide by its duty to defend when such a duty arises. In Nevada, that duty arises "if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify," which then "the insurer *must* defend." *Rockwood Ins. Co. v. Federated Capital Corp.*, 694 F. Supp. 772, 776 (D. Nev. 1988) (emphasis added); *see also United Nat'l*, 120 Nev. at 687, 99 P.3d at 1158 ("Determining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy.").[4]

[4]Appellant correctly notes that we have previously held that this duty is not absolute. In the case appellant cites, *United National*, we held that "[t]here

In a case where the duty to defend does in fact arise, and the insurer breaches that duty, the insurer is at least liable for the insured's reasonable costs in mounting a defense in the underlying action. *See Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 127 Nev. 331, 345, 255 P.3d 268, 278 (2011) (providing that a breach of the duty to defend "may give rise to damages in the form of reimbursement of the defense costs the indemnitee was thereby forced to incur in defending against claims encompassed by the indemnity provision" (internal quotation marks omitted)). Several other states have considered an insurer's liability for a breach of its duty to defend, and while no court would disagree that the insurer is liable for the insured's defense cost, courts have taken two different views when considering whether the insurer may be liable for an entire judgment that exceeds the policy limits in the underlying action.

The majority view is that "[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs." *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Cal. 1958); *see also Emp'rs Nat'l Ins. Corp. v. Zurich Am. Ins. Co. of Ill.*, 792 F.2d 517, 520 (5th Cir. 1986) (providing that imposing excess liability upon the insurer arose as a result of the insurer's refusal to entertain a settlement offer within the policy limit and not solely because the insurer refused to defend); *George R. Winchell, Inc. v. Norris*, 633 P.2d 1174, 1177 (Kan. Ct. App. 1981) ("Absent a settlement offer, the plain refusal to defend has no causal connection with the amount of the judgment in excess of the policy limits."). In *Winchell*, the

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is no duty to defend [w]here there is no *potential* for coverage." 120 Nev. at 686, 99 P.3d at 1158 (second alteration in original) (internal quotation marks omitted). We take this opportunity to clarify that where there is potential for coverage based on "comparing the allegations of the complaint with the terms of the policy," an insurer does have a duty to defend. *Id.* at 687, 99 P.3d at 1158. In this instance, as a general rule, facts outside of the complaint cannot justify an insurer's refusal to defend its insured. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("The general rule is that insurers may not use facts outside the complaint as the basis for refusing to defend. . . ."). Nonetheless, the insurer can always agree to defend the insured with the limiting condition that it does not waive any right to later deny coverage based on the terms of the insurance policy under a reservation of rights. *See Woo*, 164 P.3d at 460 ("Although the insurer must bear the expense of defending the insured, by doing so under a reservation of rights . . . the insurer avoids breaching its duty to defend and incurring the potentially greater expense of defending itself from a claim of breach."). Accordingly, facts outside the complaint may be used in an action brought by the insurer seeking to terminate its duty to defend its insured in an action whereby the insurer is defending under a reservation of rights. Restatement of Liability Insurance § 13 cmt. c (Am. Law Inst., Proposed Final Draft No. 2, 2018) ("Only in a declaratory-judgment action filed while the insurer is defending, or in a coverage action that takes place after the insurer fulfilled the duty to defend, may the insurer use facts outside the complaint as the basis for avoiding coverage.").

court explained the theory behind the majority view, reasoning that when an insurer refuses a settlement offer, unlike a refusal to defend, "the insurer is causing a discernible injury to the insured" and "the injury to the insured is traceable to the insurer's breach." 633 P.2d at 1177. "A refusal to defend, in itself, can be compensated for by paying the costs incurred in the insured's defense." *Id.* In sum, "[a]n [insurer] is liable to the limits of its policy plus attorney fees, expenses and other damages where it refuses to defend an insured who is in fact covered," and "[t]his is true even though the [insurer] acts in good faith and has reasonable ground[s] to believe there is no coverage under the policy." *Allen v. Bryers*, 512 S.W.3d 17, 38-39 (Mo. 2016) (first and fifth alteration in original) (internal quotation marks omitted), *cert. denied by Atain Specialty Ins. Co. v. Allen*, 138 S. Ct. 212 (2017).

The minority view is that damages for a breach of the duty to defend are not automatically limited to the amount of the policy; instead, the damages awarded depend on the facts of each case. *See Burgraff v. Menard, Inc.*, 875 N.W.2d 596, 608 (Wis. 2016). The objective is to have the insurer "pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract." *Id.* (internal quotation marks omitted). Thus, "[a] party aggrieved by an insurer's breach of its duty to defend is entitled to recover all damages naturally flowing from the breach." *Id.* (internal quotation marks omitted). Damages that may naturally flow from an insurer's breach include:

> (1) the amount of the judgment or settlement against the insured plus interest [even in excess of the policy limits]; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach.

Newhouse v. Citizens Sec. Mut. Ins. Co., 501 N.W.2d 1, 6 (Wis. 1993).

For instance, in *Delatorre v. Safeway Insurance Co.*, the insurer breached its duty to defend by failing to ensure that retained counsel continued defending the insured after answering the complaint, which ultimately led to a default judgment against the insured exceeding the policy limits. 989 N.E.2d 268, 274 (Ill. App. Ct. 2013). The court found that the entry of default judgment directly flowed from the insurer's breach, and thus, the insurer was liable for the portion that exceeded the policy limit. *Id.* at 276. The court reasoned that a default judgment "could have been averted altogether had [the insurer] seen to it that its insured was actually defended as contractually required." *Id.*

On the other hand, in *Hamlin Inc. v. Hartford Accident & Indemnity Co.*, the court considered whether the insured had as good of a defense as it would have had had the insurer provided counsel. 86

F.3d 93, 95 (7th Cir. 1996). The court observed that although the "insurer did not pay the entire bill for [the insured's] defense," the insured is not "some hapless individual who could not afford a good defense unless his insurer or insurers picked up the full tab." *Id.* Moreover, the court noted that the insured could not have expected to do better with the firm it hired, which "was in fact its own choice, and not a coerced choice, that is, not a choice to which it turned only because the obstinacy of the [insurers] made it unable to 'afford' an even better firm (if there is one)." *Id.* Therefore, because the entire judgment was not consequential to the insurer's breach of its duty to defend, the insured was not entitled to the entire amount of the judgment awarded against it in the underlying lawsuit. *Id.*

We conclude that the minority view is the better approach. Unlike the minority view, the majority view places an artificial limit to the insurer's liability within the policy limits for a breach of its duty to defend. That limit is based on the insurer's duty to indemnify but "[a] duty to defend limited to and coextensive with the duty to indemnify would be essentially meaningless; insureds pay a premium for what is partly litigation insurance designed to protect . . . the insured from the expense of defending suits brought against him." *Capitol Envtl. Servs., Inc. v. N. River Ins. Co.*, 536 F. Supp. 2d 633, 640 (E.D. Va. 2008) (internal quotation marks omitted). Even the *Comunale* court recognized that "[t]here is an important difference between the liability of an insurer who performs its obligations and that of an insurer who breaches its contract." 328 P.2d at 201. Indeed, the insurance policy limits "only the amount the insurer may have to pay in the performance of the contract as compensation to a third person for personal injuries caused by the insured; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer." *Id.*

The obligation of the insurer to defend its insured is purely contractual and a refusal to defend is considered a breach of contract. Consistent with general contract principles, the minority view provides that the insured may be entitled to consequential damages resulting from the insurer's breach of its contractual duty to defend. *See* Restatement of Liability Insurance § 48 (Am. Law Inst., Proposed Final Draft No. 2, 2018). Consequential damages "should be such as may fairly and reasonably be considered as arising naturally, or were reasonably contemplated by both parties at the time they made the contract." *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 190, 772 P.2d 1284, 1286 (1989) (internal quotation marks omitted). The determination of the insurer's liability depends on the unique facts of each case and is one that is left to the jury's determination. *See Khan v. Landmark Am. Ins. Co.*, 757 S.E.2d 151, 155 (Ga. Ct. App. 2014) ("[W]hether the full amount of the judgment was recoverable was a jury question that depended upon what

damages were found to flow from the breach of the contractual duty to defend.").[5]

The right to recover consequential damages sustained as a result of an insurer's breach of the duty to defend does not require proof of bad faith. As the Supreme Court of Michigan explained:

> The duty to defend . . . arises solely from the language of the insurance contract. A breach of that duty can be determined objectively, without reference to the good or bad faith of the insurer. If the insurer had an obligation to defend and failed to fulfill that obligation, then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach.

Stockdale v. Jamison, 330 N.W.2d 389, 392 (Mich. 1982). In other words, an insurer's breach of its duty to defend can be determined objectively by comparing the facts alleged in the complaint with the insurance policy. Thus, even in the absence of bad faith, the insurer may be liable for a judgment that exceeds the policy limits if the judgment is consequential to the insurer's breach. An insurer that refuses to tender a defense for "its insured takes the risk not only that it may eventually be forced to pay the insured's legal expenses but also that it may end up having to pay for a loss that it did not insure against." *Hamlin*, 86 F.3d at 94. Accordingly, the insurer refuses to defend at its own peril. However, we are not saying that an entire judgment is automatically a consequence of an insurer's breach of its duty to defend; rather, the insured is tasked with showing that the breach caused the excess judgment and "is obligated to take all reasonable means to protect himself and mitigate his damages." *Thomas v. W. World Ins. Co.*, 343 So. 2d 1298, 1303 (Fla. Dist. Ct. App. 1977); *see also Conner v. S. Nev. Paving, Inc.*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987) ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.").

CONCLUSION

In answering the certified question, we conclude that an insured may recover any damages consequential to the insurer's breach of its duty to defend. As a result, an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith.

Cherry, Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

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[5]Consequently, we reject appellant's argument that, as a matter of law, damages in excess of the policy limits can never be recovered as a consequence to an insurer's breach of its duty to defend.