ROBERT CLARKE, an Individual, Appellant, *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, an Unincorporated Association; and NEVADA SERVICE EMPLOYEES UNION, aka CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, SEIU 1107, a Nonprofit Cooperative Corporation, Respondents.

No. 80520

SERVICE EMPLOYEES INTERNATIONAL UNION, an Unincorporated Association; and NEVADA SERVICE EMPLOYEES UNION, aka CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, SEIU 1107, a Nonprofit Cooperative Corporation, Appellants, *v.* DANA GENTRY, an Individual; and ROBERT CLARKE, an Individual, Respondents.

No. 81166

September 16, 2021 495 P.3d 462

Consolidated appeals from district court orders granting summary judgment and denying post-judgment motions for attorney fees in an employment matter. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed in part, reversed in part, and remanded (Docket No. 80520); affirmed in part, vacated in part, and remanded (Docket No. 81166).

Herndon, J., with whom Parraguirre and Silver, JJ., agreed, dissented in part.

McAvoyAmaya & Revero and *Michael J. McAvoyAmaya*, Las Vegas, for Appellant/Respondent Robert Clarke and Respondent Dana Gentry.

Christensen James & Martin and *Evan L. James*, Las Vegas, for Respondent/Appellant Nevada Service Employees Union.

Rothner, Segall & Greenstone and *Jonathan M. Cohen, Maria Keegan Myers*, and *Glenn Rothner*, Pasadena, California, for Respondent/Appellant Service Employees International Union.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

These consolidated appeals arise from the termination of appellant's employment with the Nevada Service Employees Union. The

main issue in the appeal in Docket No. 80520 concerns whether appellant's wrongful termination claims against the union respondents were conflict-preempted by the Labor Management Reporting and Disclosure Act (LMRDA), which promotes union democracy. Applying principles of conflict preemption, we hold that because Nevada's wrongful termination claims do not significantly conflict with any concrete federal interest expressed by the LMRDA, the LMRDA does not preempt these claims. Additionally, because appellant failed to show that a genuine dispute of material fact existed regarding his alter ego theory of liability, the district court did not err when it granted summary judgment in favor of one of the union respondents on that ground. As to the attorney fees issue in Docket No. 81166, we conclude that the district court acted within its discretion when it denied a union respondent's motion for attorney fees because rejection of the unions' unclear offers of judgment was not grossly unreasonable.

FACTS

Nevada Service Employees Union, Local 1107 is the Nevada chapter of Service Employees International Union (SEIU) (collectively the Unions). In August 2016, Local 1107 hired Robert Clarke as Director of Finance and Human Resources for the union, pursuant to an employment contract. In this senior level position, Clarke was responsible directly to the Local 1107 president, Cherie Mancini. The employment contract contained a for-cause termination provision stating that "[t]ermination of this employment agreement may be initiated by the [Local 1107] President for cause." A similar for-cause termination provision was contained in Local 1107's employment contract with Dana Gentry for her position as Communications Director. In performing their managerial duties with Local 1107, both Clarke and Gentry attended weekly meetings with Mancini and another employee, Peter Nguyen. Clarke, Gentry, and Nguyen collectively constituted Local 1107's "managers" or "directors."

In fall 2016, SEIU appointed a hearing master to hear grievances against Mancini and to make recommendations regarding the internal needs of Local 1107. In her April 2017 reports, the hearing master concluded that "[t]he overall pattern that emerges from the evidence is one of a President willing, and even inclined, to sideline her fellow officers so that she can function autocratically or, at best, with a small cadre of staff whose hiring was never even approved by the [Local 1107 Executive] Board." Because of the hearing master's reports, Local 1107's Executive Board voted to have SEIU impose a trusteeship over the chapter. The trustees, who acted on behalf of Local 1107 once appointed by SEIU, subsequently removed all

board members from office, including Mancini, and terminated Clarke's and Gentry's employment.[1]

Clarke and Gentry filed the underlying complaint against the Unions, as well as against other defendants who are not named parties on appeal, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, intentional interference with contractual relations, wrongful termination, tortious discharge, and negligence (collectively the wrongful termination claims). The Unions served an NRCP 68 offer of judgment on Clarke and Gentry of $30,000 each, on behalf of all defendants, to dismiss all claims. Clarke and Gentry did not accept the offer of judgment. The Unions later moved for summary judgment, arguing that the LMRDA preempted Clarke's and Gentry's claims. SEIU also sought summary judgment on the basis that it owed Clarke and Gentry no duty because it had not employed them or entered into any employment contract with either of them. In Clarke and Gentry's opposition to those motions, they asserted for the first time that SEIU was the alter ego of Local 1107. The district court ultimately granted the Unions' motions, concluding that the LMRDA preempted all of Clarke's and Gentry's claims. The court further concluded that SEIU was entitled to summary judgment because it had not employed or entered into a contract with Clarke or Gentry.

The Unions then moved for attorney fees based on their rejected offer of judgment, which the district court denied. While the court found that the offer of judgment complied with NRCP 68 and was reasonable in amount and timing, it also found that "it was not grossly unreasonable for [Clarke and Gentry] to reject the Offer of Judgment because the Offer of Judgment required a global resolution of all claims against all Defendants." Clarke, but not Gentry, appeals from the order granting summary judgment, and the Unions appeal from the order denying their motion for attorney fees.

DISCUSSION

The LMRDA does not preempt state law wrongful termination claims

We review questions of federal preemption and decisions granting summary judgment de novo. *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (explaining that we review questions of federal preemption de novo); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (explaining that we review decisions regarding summary judgment de novo). The Unions, relying on *Finnegan v. Leu*, 456 U.S. 431 (1982), and *Screen Extras Guild, Inc. v. Superior*

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[1]The Ninth Circuit Court of Appeals later upheld the trusteeship. *Garcia v. Serv. Emps. Int'l Union*, Nos. 19-16863, 19-16933 & 19-16934, 2021 WL 1255615, at *2 (9th Cir. Apr. 5, 2021).

Court, 800 P.2d 873 (Cal. 1990), argue that Nevada law wrongful termination claims conflict with the LMRDA's policy of ensuring democratic governance of labor unions, and thus the LMRDA preempts those wrongful termination claims, such that the district court properly granted summary judgment in their favor. We disagree.

"[W]hen a conflict exists between federal and state law, valid federal law overrides, *i.e.*, preempts, an otherwise valid state law." *Nanopierce Techs.*, 123 Nev. at 370, 168 P.3d at 79. In preemption analysis, courts must determine whether Congress expressly or impliedly intended to preempt state law. *Id.* Although there are different types of preemption, the only potentially applicable type of preemption in this matter—and the only type argued by the Unions—is conflict preemption. In analyzing whether conflict preemption applies, a court "examines the federal statute as a whole to determine whether a party's compliance with both federal and state requirements is impossible or whether, in light of the federal statute's purpose and intended effects, state law poses an obstacle to the accomplishment of Congress's objectives." *Id.* at 371-72, 168 P.3d at 80. In other words, we ask "whether the act's purpose would be frustrated if state law were to apply." *Id.* at 375, 168 P.3d at 82. A general tension with the broad or abstract goals of federal laws or programs is insufficient to warrant conflict preemption. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981). Instead, courts should not displace state law unless there is a "significant conflict" between the operation of the state law and concretely identifiable federal interests. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). As "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the [s]tate," *MGM Grand Hotel-Reno, Inc. v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)), there must be a "clear and manifest" indication of Congress's intent to preempt state law, *Nanopierce Techs.*, 123 Nev. at 370-71, 168 P.3d at 79 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)) (explaining that "Congress's intent to preempt state law, in light of a strong presumption that areas historically regulated by the states generally are not superseded by a subsequent federal law, must be 'clear and manifest' ").

Clarke's wrongful termination claims—both in contract and in tort—are all based on his allegedly wrongful discharge from employment. Thus, for his claims to be viable, we must first determine whether the LMRDA, which has the goal of promoting union democracy, preempts Nevada law wrongful termination claims. We conclude it does not.

In *Finnegan*, on which the Unions rely, a newly elected union president fired several union business agents who, in their capacity as union members, supported a different candidate for union

president. 456 U.S. at 433-34. Relying on the LMRDA, which protects union members' political rights, the business agents filed suit in federal district court, arguing that their firings were a form of "discipline" based on their exercise of guaranteed political rights and thus prohibited under the LMRDA. *Id.* at 437. The United States Supreme Court disagreed, holding that the LMRDA's prohibition against discipline "refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union." *Id.* (emphasis in original). Because discharge from union employment does not affect union member rights, the LMRDA did not prohibit the termination. *Id.* at 438.

Further, the Supreme Court held that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id.* at 441. While acknowledging that "the ability of an elected union president to select his own administrators" is an important part of union governance and is not "inconsistent" with the LMRDA's goals, the Supreme Court recognized that "neither the language nor the legislative history of the [LMRDA] suggests that it was intended even to address the issue of union patronage." *Id. Finnegan*, thus, did not address a situation where, as here, a union employee has a for-cause employment contract and asserts state law wrongful termination claims.[2] *See id.* at 442 (recognizing that "[n]othing in the [LMRDA] evinces a congressional intent to alter the traditional pattern which would permit a union president *under these circumstances* to appoint agents of his choice to carry out his policies" (emphasis added)). Nor did the *Finnegan* decision hold or even imply that pursuing such claims would frustrate any federal purpose or that complete and unfettered union patronage was a concretely identifiable federal interest; to the contrary, the Supreme Court observed that Congress was not even concerned with union patronage practices when drafting the LMRDA. *See id.* at 441.

The other case on which the Unions rely, *Screen Extras Guild*, does not require a different conclusion even though it does address preemption. In *Screen Extras Guild*, a union business agent filed a wrongful termination suit. 800 P.2d at 875. Applying a novel "substantive or jurisdictional" preemption analysis, the California Supreme Court concluded that there was an actual conflict between California's wrongful termination cause of action and the LMRDA's underlying policies. *Id.* at 875-77. The court in *Screen Extras Guild*

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[2]Indeed, the Supreme Court has previously recognized that the LMRDA generally does not preempt state causes of action and expressly states when it intends to preempt state law. *See De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (acknowledging that "[t]he [LMRDA], which reflects congressional awareness of the problems of pre-emption in the area of labor legislation, . . . did not leave the solution of questions of pre-emption to inference. When Congress meant pre-emption to flow from the [LMRDA] it expressly so provided.").

acknowledged that the LMRDA's primary objective is to ensure union democracy, as articulated in *Finnegan*. *Id.* at 877. But from there, it reasoned that *Finnegan* determined that "Congress must have intended that elected union officials would retain unrestricted freedom to select business agents, *or, conversely, to discharge business agents with whom they felt unable to work or who were not in accord with their policies*," and thus the court concluded that "even 'garden-variety' wrongful termination actions . . . implicate the union democracy concerns of the LMRDA." *Id.* at 877, 879 (emphasis added). We disagree.

As discussed above, *Finnegan* does not stand for such a broad application of the LMRDA. *Finnegan* did not hold that union officials may, despite a for-cause employment agreement, "discharge business agents with whom they felt unable to work or who were not in accord with their policies." *Id.* at 877. Its holding that termination of the employee in that case was *not inconsistent* with the LMRDA's goals does not support a logical leap to the conclusion that the LMRDA *requires* unfettered union employee termination in violation of generally applicable state law. Further, *Screen Extras Guild* never attempted to reconcile the *Finnegan* Court's acknowledgment that the LMRDA was not "intended even to address the issue of union patronage," 456 U.S. at 441, with Supreme Court precedent on preemption, which requires that Congress have a clear and manifest intent to preempt state law in areas traditionally left to the state's police power, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). How can Congress show a clear and manifest intent to preempt state wrongful termination claims by discharged union employees when it was not concerned with union patronage at all? Simply, it cannot, and it did not do so here. Thus, because there is no "clear and manifest" indication of Congress's intent to preempt wrongful termination claims, *Nanopierce Techs.*, 123 Nev. at 370-71, 168 P.3d at 79, nor a "significant conflict" between the operation of state law and a concrete federal interest, *Boyle*, 487 U.S. at 507, we reject the California approach and hold that the LMRDA does not preempt Nevada wrongful termination claims.[3] Accordingly, the district court erred in entering summary judgment in favor of the Unions on conflict-preemption grounds.[4]

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[3]This conclusion is consistent with the LMRDA's express non-preemption provision. *See* 29 U.S.C. § 523(a) (2019) ("Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization . . . under any other Federal law or under the laws of any State . . . .").

[4]The dissent misinterprets our holding. We do not require the trustee, or an elected union president, to continue a union employee's employment. Instead, we merely hold that, if a trustee or union employer terminates a union employee who has a for-cause employment contract, that employee's wrongful termination action is not preempted by the LMRDA. We express no opinion on the merits of the claims asserted by Clarke or Gentry.

Clarke failed to show that a genuine dispute of material fact existed to preclude summary judgment in favor of SEIU

The Unions argue that Clarke failed to show sufficient evidence to support his purported alter ego claim against SEIU. Assuming without deciding that Clarke sufficiently pleaded his alter ego claim, we agree that he failed to show sufficient evidence to survive summary judgment.

To demonstrate alter ego status, one must show "that the subsidiary corporation is so organized and controlled, and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation." *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979) (internal quotations omitted). Alter ego liability is established when a preponderance of the evidence shows:

> (1) The corporation must be influenced and governed by the person asserted to be its alter ego; (2) There must be such unity of interest and ownership that one is inseparable from the other; and (3) The facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.

Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 635, 189 P.3d 656, 660 (2008) (internal quotation omitted).

Here, the record does not show that there was a unity of interest or ownership between SEIU and Local 1107. Generally, the commingling of funds, shared operations, shared headquarters, shared bank accounts, or failure to observe corporate formalities shows unity of interest or ownership. *Truck Ins. Exch.*, 124 Nev. at 635-36, 189 P.3d at 660-61; *Bonanza*, 95 Nev. at 467, 596 P.2d at 230. Local 1107 maintained its own accounts and was financed by its members, not SEIU. The trustees utilized Local 1107's headquarters and finances during the trusteeship. There is no evidence SEIU and the trustees or Local 1107 were inseparable from one another. Further, the Ninth Circuit upheld the imposition of the trusteeship. Thus, the trusteeship was not the progeny of fraud or injustice. Moreover, there is no evidence that SEIU imposed the trusteeship over Local 1107 for unlawful or unjust purposes, or that Clarke was under the mistaken impression that SEIU was actually his employer or would be responsible to him under his employment contract. Accordingly, we conclude that there were no genuine issues of material fact regarding the second or third elements of alter ego liability. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. Thus, the district court did not err when it granted summary judgment in SEIU's favor. *See Hannam v. Brown*, 114 Nev. 350, 357, 956 P.2d 794, 799 (1998) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons." (internal quotation omitted)).

The district court did not abuse its discretion in denying SEIU's motion for attorney fees

Because the district court properly granted summary judgment on the claims against SEIU, we must consider whether the district court abused its discretion in denying SEIU's motion for attorney fees.[5] NRCP 68(c) permits multiple offerors to make an offer of judgment to multiple offerees. Under NRCP 68(f), an offeror may recover its reasonable post-offer attorney fees if the offeree rejected its offer of judgment and did not obtain a more favorable judgment. Before awarding attorney fees under this rule, the district court must consider the four *Beattie* factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant['s] offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). "[N]o one factor under *Beattie* is determinative and [the district court] has broad discretion to grant the request so long as all appropriate factors are considered." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252 n.16, 955 P.2d 661, 673 n.16 (1998).

The district court found that it was "not grossly unreasonable" for Clarke and Gentry to reject the offer of judgment because the offer required a global resolution of all claims and it was unclear to the court "how the [p]laintiffs could have properly analyzed the Offer of Judgment." In regard to lack of clarity, the record supports the district court's findings that (1) it would be impossible for either Clarke or Gentry to settle only with one of the defendants, if they felt inclined to do so, because the offer required both plaintiffs to settle with all defendants; (2) the offer required dismissal of all claims against all defendants even though one of the defendants was unrepresented by counsel and unaware of the offer; and (3) the offer did not state who would pay Clarke and Gentry if the offer were accepted. As the record supports the district court's conclusion that it was not grossly unreasonable for Clarke and Gentry to reject the offer on the basis that it lacked clarity, we perceive no abuse of discretion in its decision denying SEIU's motion for attorney fees. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) (reviewing a district court's decision denying attorney fees for an abuse of discretion).

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[5]Because we reverse the summary judgment in Local 1107's favor and remand for further proceedings, we necessarily vacate the district court's order denying Local 1107's motion for attorney fees based on a rejected offer of judgment. *See* NRCP 68(f).

CONCLUSION

The LMRDA does not preempt Nevada wrongful termination claims, because permitting such claims would not frustrate the purpose of the LMRDA. Thus, the district court erred in granting summary judgment on Clarke's claims based on preemption. As Clarke failed to show that a genuine dispute of material fact existed regarding his alter ego theory of liability, the district court properly entered summary judgment in favor of SEIU because SEIU did not otherwise employ Clarke. Finally, the record supports the district court's finding that it was not grossly unreasonable for Clarke and Gentry to reject SEIU's offer of judgment, and thus, the court did not abuse its discretion by denying SEIU's motion for attorney fees. Accordingly, we reverse the district court's order in Docket No. 80520 to the extent that it granted summary judgment on the basis that the LMRDA preempted Clarke's wrongful termination claims and remand for further proceedings as to those claims. However, we affirm the portion of the district court's order in Docket No. 80520 granting summary judgment in favor of SEIU because even assuming the claim was properly pleaded, Clarke nevertheless failed to show a genuine dispute of material fact as to his alter ego theory of liability and SEIU did not employ or have an employment contract with Clarke. Finally, we affirm the district court's order denying SEIU's motion for attorney fees and vacate and remand the order denying Local 1107's motion for attorney fees in Docket No. 81166.

Hardesty, C.J., and Stiglich and Pickering, JJ., concur.

Herndon, J., with whom Parraguirre and Silver, JJ., agree, concurring in part and dissenting in part:

I concur with the decision to affirm the denial of the motions for attorney fees in Docket No. 81166. I disagree, however, with the majority's decision that the district court erred in granting summary judgment on the ground that the LMRDA preempted Clarke's action in Docket No. 80520.[1]

The majority takes a very narrow view of what poses an obstacle to the accomplishment of Congress's objective in enacting the LMRDA. The Local 1107 Executive Board voted to have SEIU impose a trusteeship over the chapter after an independent hearing master concluded that there was a pattern of "a President willing, and even inclined, to sideline her fellow officers so that she can function autocratically or, at best, with a small cadre of staff whose hiring was never even approved by the [Local 1107 Executive] Board." SEIU imposed the trusteeship in an effort to return the Local 1107 to a position where the democratic process

[1]Because I conclude the LMRDA preempted Clarke's claims against the SEIU, it is unnecessary to consider whether Clarke could maintain an alter ego theory of liability against the SEIU.

would sufficiently protect and progress the union members' needs and rights. In achieving this purpose, SEIU's 2016 constitution and bylaws authorized a trustee to remove employees and appoint new employees.

There was no question that the small cadre of staff hired by the Local 1107 president was loyal to the president and not interested in progressing the purpose and objectives of the union. These employees, including appellant Robert Clarke, exchanged numerous text messages critical of the trusteeship, referring to the trustees as "slimy nimrods" and "twiddle dee and twiddle dumb." They also issued a press release stating the imposition of the trusteeship was illegal, "repugnant and holy [sic] unjustified." It would be infeasible for a trustee, or even a newly elected president, to work with these employees to restore democracy to the union. To limit a newly elected union official's, or in this case an appointed trustee's, ability to replace existing staff with those whose ideologies and goals aligned with the official's, and thus with the voting union members' ideologies and goals, would only hamper the democratic process of the union. The clear and manifest purpose of the LMRDA is to protect and guarantee the democratic processes of unions. Thus, it is difficult to see how the LMRDA would not preempt a wrongful termination action in these circumstances.

I am not alone in concluding that in such instances, the LMRDA preempts state wrongful termination actions. In fact, the majority does not cite to any decision supporting its conclusion because it is contrary to every published decision considering this issue. *See Screen Extras Guild, Inc. v. Superior Court*, 800 P.2d 873, 880 (Cal. 1990); *Packowski v. United Food & Commercial Workers Local 951*, 796 N.W.2d 94, 104 (Mich. Ct. App. 2010) (recognizing that "the cases finding preemption under similar circumstances are more numerous, more factually analogous, and more persuasive than the cases finding no preemption by the LMRDA of similar wrongful-discharge claims"); *Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 75 P.3d 1250, 1255 (Mont. 2003) (providing that "a state law which interferes with the longstanding practice of union patronage, established in the union's democratically enacted constitution, is not only contrary to the overall purpose and objective of the LMRDA . . . , but is in direct conflict with the democratic process that Congress sought to protect"); *Dzwonar v. McDevitt*, 791 A.2d 1020, 1024-26 (N.J. Super. Ct. App. Div. 2002).[2]

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[2]In addition to these cases, a few jurisdictions have implicitly concluded that the LMRDA preempted the state law claim but based their holdings on a determination that the employee did not qualify as a policymaking or confidential employee. *Shuck v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. 837*, 2017 WL 908188 (E.D. Mo., Mar. 7, 2017) (refusing to adopt California's broad protection for all wrongful termination actions against unions and concluding that the subject employee was not a confidential employee because she was an

The preeminent case on the matter comes from California and was relied on by the district court here. In *Screen Extras Guild, Inc. v. Superior Court*, Barbara Smith was terminated from her management job with the Screen Actors Guild, and she sued the labor union and the chief administrative officer of the union for wrongful discharge. 800 P.2d at 875. Relying on *Finnegan v. Leu*, 456 U.S. 431 (1982), the California Supreme Court concluded that "the strong federal policy favoring union democracy, embodied in the LMRDA, preempts state causes of action for wrongful discharge or related torts when brought against a union-employer by its former management or policymaking employee." *Screen Extras Guild*, 800 P.2d at 874. The court determined that Congress intended "elected union officials [to] be free to discharge management or policymaking personnel" because "policymaking and confidential staff are in a position to thwart the implementation of policies and programs advanced by elected union officials." *Id.* at 880. Thus, "[t]o allow a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent" and "would frustrate full realization of the goal of union democracy embodied by the LMRDA." *Id.* at 881. In the 30 years since *Screen Extras Guild* was decided, no court, in a published opinion, has reached an opposite conclusion.

While I recognize *Finnegan* did not address the underlying type of case, I disagree with the majority's portrayal of the U.S. Supreme Court's analysis of the LMRDA. The U.S. Supreme Court's language strongly indicates that the LMRDA's purpose of ensuring union democracy requires that an elected union official be able to freely choose his or her staff. 456 U.S. at 441-42 (concluding that "Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff"). The court recognized that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election," *id.* at 441, which ensures the democracy of unions and is the clear and manifest purpose of the LMRDA.

In a democracy, it would be difficult, if not impossible, for an elected official to meet the goals on which the official ran for election if saddled with a prior official's staff. The majority's conclusion to the contrary creates a clear obstacle to the accomplishment of

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administrative assistant); *Lyons v. Teamsters Local Union No. 961*, 903 P.2d 1214, 1220 (Colo. Ct. App. 1995); *Young v. Int'l Bhd. of Locomotive Eng'rs*, 683 N.E.2d 420 (Ohio Ct. App. 1996) (concluding the employee was not a policymaking or confidential employee, but appearing to recognize that if the employee was, the cause of action would be preempted by the LMRDA).

Congress's objective in enacting the LMRDA to protect the democratic processes of unions. Nothing could be more evident of this than requiring a trustee, appointed to return a local chapter to an effective democracy, to continue the employment of a union employee involved in obstructing the local chapter's democracy merely because the previous president entered into a for-cause employment contract with the employee.

Therefore, I conclude the district court did not err in granting the union's motion for summary judgment because the LMRDA preempts Clarke's action. Accordingly, I dissent because I would affirm the district court's decision in Docket No. 80520.

TYERRE LANELL WHITE-HUGHLEY, AKA TYERRE LANELL WHITE, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 80549

September 16, 2021 495 P.3d 82

Appeal from a judgment of conviction, pursuant to a guilty plea, of home invasion. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Vacated and remanded.

HERNDON, J., dissented.

Nobles & Yanez Law Firm and *Dewayne Nobles*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, SILVER, J.:

Appellant Tyerre White-Hughley was arrested and booked on two separate warrants simultaneously. He subsequently pleaded guilty in both cases. White-Hughley was sentenced in the first case on December 9, 2019, and in the second case on January 7, 2020, by different judges, with each sentence imposed to run concurrently. The first sentencing judge applied credit for White-Hughley's time served to the sentence in the first case, but the second sentencing judge, voicing concerns about double-dipping credit for time served, declined to likewise apply credit for time served to the sentence in the second case.

In this opinion, we reiterate, consistent with NRS 176.055(1), *Poasa v. State*, 135 Nev. 426, 453 P.3d 387 (2019), *Johnson v. State*, 120 Nev. 296, 89 P.3d 669 (2004), and *Kuykendall v. State*, 112 Nev. 1285, 926 P.2d 781 (1996), that a district court "must give a defendant credit for any time the defendant has actually spent in presentence confinement absent an express statutory provision making the defendant ineligible for that credit." *Poasa*, 135 Nev. at 426, 453 P.3d at 388. We clarify that where a defendant simultaneously serves time in presentence confinement for multiple cases and the resulting sentences are imposed concurrently, credit for time served must be applied to each corresponding sentence. Because we conclude that

White-Hughley is entitled to have 70 days' credit for time served applied to his sentence in his second case, we vacate the judgment of conviction and remand for the district court to enter a judgment of conviction with the correct amount of presentence credit.

FACTS AND PROCEDURAL HISTORY

White-Hughley had outstanding warrants for his arrest in two felony cases: a child abuse, neglect, or endangerment and battery case (the child abuse case); and a home invasion case. He was arrested and booked on both warrants on October 1, 2019. White-Hughley entered into a "packaged deal" plea agreement whereby he pleaded guilty in the child abuse case on October 28, 2019, and pleaded guilty in the home invasion case on November 7, 2019. The parties agreed that both sentences were to run concurrently.

On December 9, 2019, Judge Tierra Jones sentenced White-Hughley to 12-36 months with 70 days' credit for time served in the child abuse case. On December 11, 2019, Judge Tierra Jones entered a judgment of conviction in the child abuse case.

On January 7, 2020, Judge David Jones sentenced White-Hughley to 12-30 months in the home invasion case. Judge David Jones ordered the sentence in the home invasion case to run concurrently with the sentence in the child abuse case. White-Hughley requested credit for time served from the date of his arrest, arguing that because the cases were concurrent, he was entitled to credit for time served on the home invasion case as well as the child abuse case. The district attorney opposed, asserting that credit for time served had already been applied in the child abuse case and that numerous unpublished dispositions by this court prohibit applying that credit toward more than one sentence. Judge David Jones agreed "we don't double dip" and declined to apply credit for time served in the home invasion case, noting "that's how I always rule." On January 16, 2020, Judge David Jones entered a judgment of conviction in the home invasion case.

White-Hughley appealed, arguing that Judge David Jones should have at least applied credit for time served from the time of his arrest until the time he was sentenced on the first case—the child abuse case. The court of appeals affirmed. We granted White-Hughley's subsequent petition for review under NRAP 40B, and we now issue this opinion addressing his arguments.

DISCUSSION

The sole issue before us is whether NRS 176.055 required the district court to give White-Hughley credit for time served in the home invasion case. We review questions of statutory construction de novo. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012). While legislative intent controls our interpretation, we will

not look beyond a statute's plain language if the statute is clear on its face. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

As we held in *Poasa v. State*, a district court "must give a defendant credit for any time the defendant has actually spent in presentence confinement absent an express statutory provision making the defendant ineligible for that credit."[1] 135 Nev. at 426, 453 P.3d at 388. At issue here is the portion of NRS 176.055(1) that provides for the award of presentence credit:

> [W]henever a sentence of imprisonment in the county jail or state prison is imposed, the court may order that credit be allowed against the duration of the sentence . . . *for the amount of time which the defendant has actually spent in confinement before conviction, unless the defendant's confinement was pursuant to a judgment of conviction for another offense.*

(Emphasis added.)

Nothing in this provision expressly makes a defendant ineligible to have credit for presentence confinement applied to multiple concurrent sentences where the defendant was in presentence confinement for those cases simultaneously. Rather, NRS 176.055(1) only precludes this credit if the presentence confinement was served "pursuant to a judgment of conviction for another offense." We consider this language in tandem with NRS 176.335(3), which establishes that a term of imprisonment imposed by a judgment of conviction begins on the date of the sentence. It follows that when a defendant is simultaneously serving time before sentencing in multiple cases, and the sentences are imposed on different dates, the time served is not "pursuant to a judgment of conviction for another offense" until a sentence is actually imposed—because serving a term of imprisonment pursuant to a judgment of conviction begins at sentencing.

This interpretation finds ample support in our jurisprudence. In construing the phrase "time which the defendant has actually spent in confinement before conviction," this court has recognized the statute's purpose "is to ensure that all time served is credited towards a defendant's ultimate sentence." *Poasa*, 135 Nev. at 427-28, 453 P.3d at 389 (quoting NRS 176.055(1) and *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783). We have therefore previously held that NRS 176.055 requires district courts to award credit for time served in presentence confinement despite the discretionary language used in the statute. *Id.* at 428, 453 P.3d at 389. This construction "comports

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[1]In *Poasa*, our unanimous court expressly rejected the argument, which the dissent now raises, that NRS 176.055(1) is permissive. 135 Nev. at 427-29, 453 P.3d at 389. We explained that NRS 176.055(1) uses "may," which is permissive, but we held that NRS 176.055(1) mandates courts to award credit for time served in presentence confinement based on the statute's purpose and decades of well-settled Nevada law, the Legislature's approval of that construction, and constitutional and fairness considerations. *Id.*

with notions of fundamental fairness, prevents arbitrary application of the statute, and avoids constitutional concerns with discrimination based on indigent status." *Id.* at 429, 453 P.3d at 389-90.

To be sure, before today, we have not had occasion to consider this statute's application where the defendant was confined simultaneously pursuant to charges in more than one case before sentencing. However, in *Johnson v. State*, we determined that the defendant was entitled under NRS 176.055(1) to have credit for presentence confinement be applied to concurrent sentences imposed for two counts in a single case. 120 Nev. at 299, 89 P.3d at 671. Relying on *Kuykendall*, we concluded that credit for time served "may not be denied to a defendant by applying it to only one of multiple concurrent sentences," as this "would render such an award a nullity or little more than a 'paper' credit." *Id.*

We recognize that *Johnson*, *Poasa*, and *Kuykendall* differ factually from this case. White-Hughley was arrested and confined on two warrants, entered guilty pleas in separate cases, was sentenced to concurrent sentences in each case, and now seeks application of his presentence confinement credit to both concurrent sentences. In contrast, *Johnson* dealt with the application of presentence confinement credit to multiple counts within a single case, and *Poasa* and *Kuykendall* dealt with presentence confinement credit in a single case. Nevertheless, the takeaway from *Poasa*, *Kuykendall*, and *Johnson* is uniform and applicable here: NRS 176.055(1) must be construed in favor of application of presentence credit for time served unless there is an express statutory provision precluding application of such credit.

Here, the district court ordered White-Hughley's sentence on the home invasion case to run concurrent to his earlier sentence on the child abuse case but gave him no credit on the home invasion sentence for the presentence time that he actually served. The court reasoned that White-Hughley had already been given credit for time served on his child abuse case—a sentence White-Hughley began serving nearly a month before he was sentenced on the home invasion case. But because White-Hughley was sentenced to identical minimum sentences, and nearly identical maximum sentences, crediting his time served solely to the earlier-imposed sentence deprives him of the full effect of credit for time he has served prior to his sentencing. Under these facts, the district court's denial of White-Hughley's credit neither comports with NRS 176.055(1)'s plain language nor furthers the statute's purpose of ensuring that credit for time served is reflected in the defendant's ultimate sentence. *Cf. Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783 (explaining the statute's purpose).

Furthermore, White-Hughley's presentence confinement was not "pursuant to a judgment of conviction for another offense" until he was actually sentenced in the first case. White-Hughley was

simultaneously booked on two warrants and spent 70 days in presentence confinement awaiting conviction on the home invasion case before being sentenced first on the child abuse case. Although the remaining 29 days between the time he was sentenced on the child abuse case and the time he was sentenced on the home invasion case were days served "pursuant to a judgment of conviction for another offense," the initial 70 days were not.[2] Therefore, because White-Hughley was in presentence confinement for multiple cases at the same time and the resulting sentences were imposed concurrently, he is entitled to receive the 70 days' credit on both of his concurrent sentences.

We have long recognized the obligation of the district court to accurately determine the amount of presentence credits to be applied in a particular case.[3] *Griffin*, 122 Nev. at 745, 137 P.3d at 1170. In doing so, the court should first consider the time spent in actual confinement prior to sentencing, and then consider whether any of that time was spent in confinement pursuant to a judgment of conviction in another case and subtract those days in order to calculate the amount of presentence credit to which the defendant is entitled.[4] Where a defendant is confined simultaneously on multiple cases before sentencing, and the district court runs the sentence in the second case concurrently to that in the first case, a defendant is entitled to credit for time served on each case up to the date of sentencing in the first case.

This is not to say that NRS 176.055 provides a defendant with a tool to hamstring the district court's discretion in determining the length of a term of incarceration so long as the sentence imposed is within the applicable statutory sentencing range. Within these statutory parameters, the district court can give a defendant more time in prison if, in its wide discretion, the court finds that additional prison time is warranted. This can be accomplished by adding more time to the defendant's minimum or maximum sentence. Moreover, the decision regarding whether to impose consecutive or concurrent sentences is committed to the district court's sound discretion. In either situation, the district court can accomplish the same result—namely, a longer term of incarceration—without depriving a defendant of the appropriate credit due.

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[2]White-Hughley initially argued that he was entitled to 99 days of credit for time served but now concedes that under NRS 176.055 he is not entitled to credit for time served after December 9, 2019, when he was sentenced in the child abuse case. *See* NRS 176.335(3) (recognizing that a term of imprisonment begins on the date of sentencing).

[3]Of course, the parties are similarly obligated to be prepared to discuss the issue of credits at sentencing. *Griffin v. State*, 122 Nev. 737, 745, 137 P.3d 1165, 1170 (2006).

[4]There may be additional exclusions to applying credit, e.g., NRS 176.055(2), that are not applicable here but should be considered in accurately determining the amount of credits.

CONCLUSION

NRS 176.055(1) requires courts to apply credit for time served in presentence confinement to the defendant's sentence, "unless the defendant's confinement was pursuant to a judgment of conviction for another offense." We conclude that where a defendant simultaneously serves time in presentence confinement for multiple cases and the resulting sentences are imposed concurrently, credit for time served must be applied to each case. This ensures that the defendant actually receives credit for time served in presentence confinement. Therefore, we vacate the judgment of conviction and remand with instructions for the district court to enter a judgment of conviction applying 70 days' credit for time served to White-Hughley's sentence for felony home invasion.

Hardesty, C.J., and Parraguirre, Stiglich, Cadish, and Pickering, JJ., concur.

Herndon, J., dissenting:

I disagree with the majority's interpretation of NRS 176.055(1) as applied to the facts of this case, and as I would affirm the district court's judgment of conviction instead, I dissent.

The majority is venturing into the duties and responsibilities of the Legislature and rewriting the statute under the guise of compliance with caselaw. However, this court can apply the statute as written and still respect *stare decisis*. While the majority quotes NRS 176.055(1), it emphasizes the wrong portion of the statute. NRS 176.055(1) provides that "whenever a sentence of imprisonment in the county jail or state prison is imposed, the court *may* order that credit be allowed against the duration of the sentence." (Emphasis added.) "'May,' as it is used in legislative enactments, is often construed as a permissive grant of authority." *Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004). And, as the majority states, when the statute's plain language is clear on its face, we will not look beyond that. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). In fact, when construing a statute, this court must not read the statute "in a way that would render words or phrases superfluous or make a provision nugatory," and "every word, phrase, and provision of a statute is presumed to have meaning." *Butler*, 120 Nev. at 892-93, 102 P.3d at 81. Thus, this court must construe NRS 176.055(1) such that it does not render the Legislature's use of the term "may" meaningless.

The majority cites to precedent as requiring the district court to provide White-Hughley with the same credit for time served in *two separate* judgments of conviction arising from *two separate* cases; however, the majority fails to acknowledge a critical factor that each of the cited cases has in common and which distinguishes those cases from this matter. All three of the cases cited by the majority

concern the application of credit for time served in a situation where the defendant is in pretrial custody on a single case, not in multiple, separate cases. Further, those cases—*Poasa v. State*, 135 Nev. 426, 426-27, 453 P.3d 387, 388 (2019), *Johnson v. State*, 120 Nev. 296, 297-98, 89 P.3d 669, 670 (2004), and *Kuykendall v. State*, 112 Nev. 1285, 1286, 926 P.2d 781, 782 (1996)—are concerned with ensuring a defendant is not deprived of credit for time served, especially when the defendant served time preconviction as a result of indigency. *Poasa*, 135 Nev. at 428, 453 P.3d at 389; *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783. However, this concern is misplaced here, as White-Hughley, in a separate child abuse case, already received credit for all of the pretrial detention time he served.

In *Kuykendall*, the defendant was in pretrial custody on a single case and pleaded guilty to one felony charge. 112 Nev. at 1286, 926 P.2d at 782. The district court declined to award him any credit for his pretrial detention, and this court appropriately held that it was error for the district court to refuse to grant him credit for time served in pretrial confinement. *Id.* at 1286-87, 926 P.2d at 782-83. In *Johnson*, the defendant was similarly in pretrial custody on a single case and pleaded guilty to three felony charges. 120 Nev. at 297, 89 P.3d at 669. The district court awarded him credit for time served in pretrial detention but only applied it to one of the three charges. *Id.* at 297, 89 P.3d at 669-70. This court held that the district court erred by failing to apply his pretrial credit to all of the charges in the case in which he was sentenced. *Id.* at 299, 89 P.3d at 671. Lastly, in *Poasa*, the defendant had been in pretrial custody on a single case and was being sentenced on one felony charge. 135 Nev. at 426-27, 453 P.3d at 388. The district court declined to award her credit for her pretrial confinement when it sentenced her to probation. *Id.* at 427, 453 P.3d at 388. Thereafter, this court once again held that the district court erred in not awarding her the credit earned in pretrial detention on her case. *Id.* at 429, 453 P.3d at 390. Despite the permissive nature of NRS 176.055(1), the holdings in *Kuykendall*, *Johnson*, and *Poasa* appropriately recognized that refusing to award a defendant credit for time served while he or she is in pretrial custody on a single case would fail to give meaning to pretrial confinement and repudiate the punitive nature of such confinement. *See Anglin v. State*, 90 Nev. 287, 290, 525 P.2d 34, 36 (1974).

The same analysis does not apply when a defendant is in pretrial custody on multiple cases. What is required there is only that the defendant receives, in at least one case, full credit for the time spent in pretrial detention. As the Supreme Court of Wyoming recognized in *Hagerman v. State*, "[i]n cases where concurrent sentences have been imposed in a single case, the defendant is entitled to have credit for time served applied equally against both sentences, but this principle does not apply where a defendant is serving concurrent sentences imposed in separate cases." 264 P.3d 18, 21 (Wyo.

2011). In *Hagerman*, the defendant was charged with a second separate crime in a separate case while he was in jail awaiting sentencing in the first case. *Id.* at 20. The Supreme Court of Wyoming concluded that the defendant was not entitled to credit for time served in the second case because he received that credit in the first case and his presentence detention was related to the first case, not the second case. *Id.* at 22. In fact, other jurisdictions have cautioned against awarding double credit for time served when a defendant is in jail on two separate cases, even when those states' statutes *require* credit for time served, compared to Nevada's discretionary statutory language. *See, e.g.*, *State v. Banes*, 688 N.W.2d 594, 598-600 (Neb. 2004) (explaining that a defendant can receive credit for time served only in one case); *Gust v. State*, 714 N.W.2d 826, 827-28 (N.D. 2006) (holding that granting credit for time served in more than one case would constitute double credit).

Turning back to White-Hughley, he received credit for all of his pretrial confinement when he was sentenced in his separate child abuse case. Thus, there was a recognition of, and application of credit for, the pretrial confinement that he served. The district court in the underlying home invasion case was not required to provide him with identical credit under *Poasa*, *Johnson*, or *Kuykendall*. To give meaning to the word "may" in NRS 176.055(1) and construe the statute in accordance with the Legislature's purpose as recognized in those cases, this court must conclude that the district court is not mandated to award credit for time served when the defendant already received credit for that time in another case, but rather, the district court has discretion to do so. Such discretion is vital because the district court should not be forced to credit a defendant twice for time served without being able to engage in a case-by-case analysis where the court evaluates the totality of facts and circumstances surrounding an individual's sentencing. A district court has always been accorded wide discretion in imposing a sentence that fits the crime as well as the individual defendant, *see Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998), and the Legislature included the word "may" in NRS 176.055(1) to ensure that discretion is not impinged.

Thus, deferring to the district court's discretionary decision regarding credit for time served in a second, independent case complies with *stare decisis* and gives meaning to every word in NRS 176.055(1). In contrast, the majority decision today thwarts the district court's sentencing discretion under NRS 176.055(1), improperly rewriting the statute and overriding the Legislature's authority. Accordingly, because I would affirm the district court's judgment of conviction, I dissent.

SAMUEL HOWARD, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81278

SAMUEL HOWARD, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81279

September 16, 2021 495 P.3d 88

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

Reversed and remanded.

Hendron Law Group LLC and *Lance J. Hendron*, Las Vegas; *Federal Defender Services of Idaho* and *Jonah J. Horwitz* and *Deborah A. Czuba*, Boise, Idaho, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Herndon, J.:

Appellant Samuel Howard was sentenced to death after being found guilty of first-degree murder. His death sentence currently depends on a single aggravating circumstance—a New York conviction for a felony involving the use or threat of violence to another person. However, a New York court recently vacated the conviction and dismissed the charge. Based on the fact that the conviction supporting the sole aggravating circumstance has been vacated, Howard argues that he is now actually innocent of the death penalty such that he overcomes the procedural bars that apply to his postconviction habeas petition and that his sentence violates the Eighth Amendment. We agree with both contentions. The aggravating circumstance at issue requires a conviction for, not just the commission of, a prior violent felony, and Howard no longer has such a conviction. We further conclude Howard promptly sought relief from the Nevada death sentence after the New York court's decision. Accordingly, we reverse the district court's order denying the postconviction habeas petition and remand for the district court to grant the petition and conduct a new penalty hearing.

BACKGROUND

In 1983, a jury convicted Howard of two counts of robbery with the use of a deadly weapon and one count of first-degree murder with the use of a deadly weapon. *Howard v. State*, 106 Nev. 713, 716, 800 P.2d 175, 177 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000). Although a jury sentenced him to death based on two aggravating circumstances, *id*. at 720, 800 P.2d at 179, this court later invalidated one of them. *Howard v. State*, Docket No. 57469 (Order of Affirmance, July 30, 2014). The remaining aggravating circumstance relied on Howard's 1979 conviction in New York for a felony offense that involved the use or threat of violence to another person—robbery. But in 2018, a New York court vacated the 1979 conviction and dismissed the indictment. Not long after, Howard filed a postconviction petition for a writ of habeas corpus claiming his death sentence constitutes cruel and unusual punishment because the prior-violent-felony-conviction aggravating circumstance is invalid in light of the order vacating the New York conviction. The district court denied the petition as procedurally barred and barred by statutory laches, and Howard appealed.

DISCUSSION

Because Howard filed his petition over one year after the remittitur issued on his direct appeal, the petition was untimely under NRS 34.726(1). The petition was also untimely because it was filed more than 25 years after the January 1, 1993, effective date of NRS 34.726. *See* 1991 Nev. Stat., ch. 44, § 33, at 92. Further, the petition was successive because Howard had previously litigated five postconviction habeas petitions. *See* NRS 34.810(1)(b)(2); NRS 34.810(2). Howard could overcome these procedural bars by demonstrating that failure to consider any constitutional claims in his petition would result in a fundamental miscarriage of justice because he is actually innocent (the "actual innocence gateway").[1] *See Lisle v. State*, 131 Nev. 356, 361, 351 P.3d 725, 729-30 (2015) ("Where a petition is procedurally barred and the petitioner cannot demonstrate good cause, the district court may nevertheless reach the merits of any constitutional claims if the petitioner demonstrates that failure to consider those constitutional claims would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice requires a colorable showing that the petitioner is actually innocent of the crime or is ineligible for the death penalty." (citation and internal quotation omitted)).

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[1]Howard also could overcome these procedural bars by showing good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). Here, we focus on the actual innocence gateway because Howard's arguments in that respect have merit, and therefore we need not determine whether he also demonstrated good cause and actual prejudice.

For his gateway claim, Howard argues that he is actually innocent of the death penalty. Where a petitioner claims he is actually innocent of the death penalty, the "focus [is] on the objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed." *Id.* at 367-68, 351 P.3d at 734. Those objective factors are the elements of the capital offense and the statutory aggravating circumstances. *Id.* at 367, 351 P.3d at 733. Here, Howard's gateway claim is focused on the sole remaining aggravating circumstance—that it is no longer valid because the New York conviction supporting it has been vacated.[2] *See State v. Bennett*, 119 Nev. 589, 597-98, 81 P.3d 1, 6-7 (2003) (applying an actual innocence gateway based, in part, on the legal validity of an aggravating circumstance).

At the relevant time, NRS 200.033(2) provided that first-degree murder is aggravated if "[t]he murder was committed by a person who was previously *convicted* of another murder or of a felony involving the use or threat of violence to the person of another." 1981 Nev. Stat., ch. 771, § 19, at 2011 (emphasis added). In proving that aggravating circumstance at the penalty hearing, the State relied on Howard's New York conviction. But a New York court has since vacated the conviction and dismissed the matter. Consequently, there is no conviction to satisfy NRS 200.033(2). The State, however, suggests the aggravating circumstance survives the New York court's order based on the substantive evidence the State presented at the penalty hearing about the facts underlying the now-vacated New York conviction. It argues that evidence shows Howard committed a violent felony in New York. That evidence does not, however, satisfy the statute's plain language, which requires a "conviction" and not merely the commission of a crime. 1981 Nev. Stat., ch. 771, § 19, at 2011. Thus, cases from other states with a statute that focuses on the defendant's "commission" of a violent felony are not persuasive. *See, e.g.*, *Gardner v. State*, 764 S.W.2d 416, 418 (Ark. 1989). Given that the statute clearly requires a conviction, we cannot salvage the aggravating circumstance based on the other evidence the State presented at the penalty hearing. *Cf. Johnson v. Mississippi*, 486 U.S. 578, 585-86 (1988) (concluding that a death sentence had to be reexamined where one of the aggravating circumstances was based on a prior conviction for a violent felony and the conviction had since been reversed, declining to consider whether the aggravating

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[2]The State suggests that this court has already rejected a challenge to this aggravating circumstance and therefore the law-of-the-case doctrine bars the current challenge. We disagree because the facts are substantially different than before, most notably Howard's New York conviction has since been vacated. *See Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (recognizing exceptions to the doctrine of the law of the case that have been adopted by federal courts); *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (explaining that the doctrine of the law of the case prohibits subsequent claims "in which the facts are substantially the same" (internal quotation omitted)).

circumstance could be sustained based solely on evidence of the conduct underlying the reversed conviction where the prosecutor did not introduce any such evidence, and noting that "[s]ince that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge"). Because the only aggravating circumstance supporting Howard's death sentence is no longer valid, he is ineligible for the penalty. *See* NRS 200.030(4)(a) (requiring "one or more aggravating circumstances" for a sentence of death). Thus, Howard demonstrated that he is actually innocent of the death penalty, establishing a fundamental miscarriage of justice to overcome the procedural bars to his untimely and successive petition. Accordingly, we conclude that the district court erred by dismissing the petition as procedurally barred under NRS 34.726 and NRS 34.810.

The State alternatively argues that the district court properly dismissed the petition because Howard did not exercise reasonable diligence. The State's argument is based primarily on NRS 34.800, which allows a district court to dismiss a petition if delay in filing it prejudices the State in responding to the petition or in its ability to retry the petitioner.[3] NRS 34.800(1). Where, as here, the petition was filed more than five years after a decision on direct appeal, the statute imposes a rebuttable presumption of prejudice to the State in its ability both to respond to the petition and to retry the petitioner. NRS 34.800(2). Relevant here, to overcome the presumption of prejudice as to the State's ability to respond to the petition, Howard had to show "that the petition is based upon grounds of which [he] could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred."[4]

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[3]The State further points to NRS 34.726 and NRS 34.960 as support for a diligence requirement. The State's reliance on NRS 34.726 is misplaced, given that Howard asserts actual innocence as a gateway to obtain review of a claim otherwise barred by NRS 34.726. And the State's reliance on NRS 34.960 is also misplaced, given that the statute did not exist when Howard filed the at-issue petition in 2018 and does not apply to that petition. *See* 2019 Nev. Stat., ch. 495, §§ 1-9, at 2976-81 (adopting provisions codified as NRS 34.900-.990).

[4]To overcome the presumption of prejudice as to the State's ability to retry him, Howard had to show "that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b). The focus on a fundamental miscarriage of justice similarly animates our actual-innocence-gateway caselaw, which equates a fundamental miscarriage of justice that is sufficient to overcome the procedural bars to an untimely or successive petition with a showing of actual innocence. *See, e.g.*, *Lisle*, 131 Nev. at 361, 351 P.3d at 729-30. It thus appears that a successful actual-innocence-gateway claim would necessarily satisfy the showing required under NRS 34.800(1)(b). *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (suggesting that a fundamental miscarriage of justice required to overcome the procedural bars to an untimely or successive petition and to rebut the presumption of prejudice to the State in conducting a retrial can be satisfied with a showing of actual innocence); *see also Berry v. State*, 131 Nev. 957, 974, 363 P.3d 1148, 1159 (2015) (indicating that if petitioner

NRS 34.800(1)(a). The State argues, and the district court agreed, that Howard did not exercise reasonable diligence because he waited too long to seek relief from the New York conviction.

The State's argument is flawed. NRS 34.800(1)(a) asks about reasonable diligence as to the ground(s) on which the petition seeks relief. Here, the substantive ground for relief asserted in the petition (an Eighth Amendment violation) depends on the New York court's order vacating the New York conviction. The same is true of the actual-innocence-gateway claim, assuming that it also is subject to the reasonable diligence showing. Howard promptly filed his Nevada petition after the New York court vacated the conviction. And we are not convinced that Howard needed to show reasonable diligence in obtaining relief from the New York conviction to satisfy his burden under NRS 34.800(1)(a). In particular, Howard obtained relief in New York because of unreasonable delay by the New York prosecutor's office. Thus, to suggest that Howard could have obtained the same relief in New York at some unidentified and speculative earlier time, when the prosecutor's delay would not have been as significant, creates a catch-22 situation. *See Catch-22*, *Webster's Ninth New Collegiate Dictionary* (1983) (defining "catch-22" as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule"). In these circumstances, we conclude that the district court abused its discretion to the extent it dismissed the petition under NRS 34.800.

The remaining question then is whether the substantive Eighth Amendment claim has merit. It does. Howard claimed that his death sentence violates the Eighth Amendment because the only aggravating circumstance is invalid and he therefore is ineligible for the death penalty. That claim depends on the same underlying premise as the actual-innocence-gateway claim, which we have determined has merit. As a result of the New York court's order, there are no aggravating circumstances remaining in this case to narrow the class of persons eligible for the death penalty. The death sentence therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment. *See McConnell v. State*, 120 Nev. 1043, 1063, 102 P.3d 606, 620-21 (2004) (recognizing that the constitutional prohibition against cruel and unusual punishment requires a sentencing scheme that "genuinely narrow[s] the class of person eligible for the death penalty" (internal quotation omitted)). Because our decision as to the actual-innocence-gateway claim necessarily disposes of the substantive Eighth Amendment claim, we need not remand for the district court to consider the substantive claim. Howard is entitled to a new penalty hearing. *See State v. Harte*, 124

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could not show a fundamental miscarriage of justice for purposes of an actual-innocence-gateway claim, his petition would also be barred by laches). The State does not argue otherwise.

Nev. 969, 975, 194 P.3d 1263, 1267 (2008) (concluding that a new penalty hearing was the appropriate remedy when the sole aggravating circumstance found by the jury had been invalidated). We therefore reverse the district court's order and remand for proceedings consistent with this opinion.

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

NATHAN ECHEVERRIA, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 82030

September 16, 2021 495 P.3d 471

Certified question under NRAP 5 concerning the scope of Nevada's statutory waiver of sovereign immunity. United States District Court for the District of Nevada; Miranda M. Du, Judge.

Question answered.

Thierman Buck LLP and *Joshua D. Buck, Leah L. Jones*, and *Mark R. Thierman*, Reno, for Appellant.

Aaron D. Ford, Attorney General, *Heidi J. Parry Stern*, Solicitor General, and *Kiel B. Ireland*, Deputy Attorney General, Carson City; *Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, and *Sheri M. Thome* and *James T. Tucker*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

NRS 41.031(1) provides that "[t]he State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations," with certain exceptions. In this case, state employees brought suit in state district court, alleging that the State violated the federal Fair Labor Standards Act (FLSA) and related state law. The State removed the action to the United States District Court for the District of Nevada, which dismissed the state-law claims. The United States District Court has now certified a question to this court under NRAP 5, asking us to decide whether NRS 41.031(1) constitutes a waiver of Nevada's sovereign immunity from damages liability under the FLSA and analogous state law.

Preliminarily, because there are no state-law claims currently pending in the federal district court, we note that attempting to answer the certified question as it pertains to analogous state law would require us to render an advisory opinion. This, we cannot do. Therefore, although we accept the federal district court's certified question as to the FLSA, we narrow the scope of the question to exclude analogous state law. Answering the certified question as reframed, we hold that the plain text of NRS 41.031(1) leaves no room for construction: Nevada has waived the defense of sovereign immunity to liability under the FLSA.

BACKGROUND

Appellant Nathan Echeverria is an employee of the Nevada Department of Corrections (NDOC). In 2014, he and several other NDOC employees filed a putative class and collective action complaint on behalf of themselves and similarly situated employees in Nevada state court, naming both the State of Nevada and NDOC (collectively, the State) as defendants. They alleged that the State required them "to work an estimated extra hour per shift 'off-the-clock'—i.e., without compensation." The employees alleged that this constituted a violation of the FLSA and the state Minimum Wage Amendment (MWA), and was also a breach of contract under state law.

The State removed the action to the United States District Court for the District of Nevada. During the ensuing years of litigation, the employees added a state-law claim for overtime under NRS 284.180. Ultimately, the federal district court dismissed the state-law claims, although it dismissed at least two of the claims without prejudice.[1] The litigation eventually came to center on the question of whether the State possessed sovereign immunity. The district court found that the State waived its "Eleventh Amendment immunity" by removing the case to federal court, citing *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 616 (2002). The State appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed, albeit on somewhat narrower grounds, in *Walden v. Nevada*, 945 F.3d 1088 (9th Cir. 2019). It held that "a State that removes a case to federal court waives its *immunity from suit* on all federal-law claims in the case." *Id.* at 1090 (emphasis added). The court reasoned that under *Lapides*, it was "anomalous or inconsistent" for a State to invoke federal jurisdiction by removing the case and simultaneously claim Eleventh Amendment immunity, thereby denying federal jurisdiction. *Id.* at 1093 (quoting *Lapides*, 535 U.S. at 619); *see also Embury v. King*, 361 F.3d 562 (9th Cir. 2004). However, the Ninth Circuit was careful to distinguish "immunity from suit" in federal court from "immunity from liability," noting that it lacked appellate jurisdiction to consider an interlocutory claim of immunity from liability. *Walden*, 945 F.3d at 1091-92 & n.1. Thus, while the Ninth Circuit affirmed the district court's holding "that Nevada waived its Eleventh Amendment immunity as to [the employees'] FLSA claims when it removed this

[1]The federal district court was uncertain whether the MWA applied to the State in its capacity as an employer and considered certifying that question to this court. Rather than litigate the issue, however, the parties agreed to dismiss the MWA claim without prejudice. The court dismissed the NRS 284.180 claim, also without prejudice, for failure to exhaust administrative remedies. The court dismissed the breach of contract claim with prejudice after finding that the claim was without merit.

case to federal court," *id.* at 1095,[2] the court left open the question of whether the State retains sovereign immunity from liability.

More recently, in *Redgrave v. Ducey*, the Ninth Circuit explained that "[a] state's invocation of sovereign immunity from liability," if such a defense exists, "would be an affirmative defense to a congressionally created private right of action for damages, such as those under FLSA," even if the state has waived Eleventh Amendment immunity from suit in federal court. 953 F.3d 1123, 1125 (9th Cir. 2020). Other federal courts, while agreeing that removal waives a state's Eleventh Amendment immunity, have held that the state may continue to assert the affirmative defense of immunity from liability *if* it could have asserted that defense in state court. *See id.*; *Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014) ("A state does not gain an unfair advantage asserting in federal court an affirmative defense it would have had in state court."); *see also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.").

On remand in this case, the employees argued that the Nevada Legislature plainly and unambiguously waived Nevada's sovereign immunity from liability by enacting NRS 41.031(1). The State responded that the statute waives the State's immunity from tort liability, but not from statutory liability, such as that created by the FLSA. The district court determined that this is an important state-law issue of first impression and certified the following question to this court:

> Has Nevada consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-207, or analogous provisions of state law, whether in enacting NRS § 41.031 or otherwise?

We accepted the certified question.

DISCUSSION

We elect to rephrase the certified question

A certified question under NRAP 5 presents a pure question of law, which this court answers de novo. *Nautilus Ins. Co. v. Access Med., LLC*, 137 Nev. 96, 99, 482 P.3d 683, 687 (2021). This "court's role is limited to answering the questions of law posed to it." *In re Fontainebleau Las Vegas Holdings, LLC*, 127 Nev. 941, 955, 267 P.3d 786, 794-95 (2011). Nevertheless, this court retains the

[2]Given the Ninth Circuit's conclusion that the State waived its Eleventh Amendment immunity, NRS 41.031(3), which states that Nevada does not waive such immunity notwithstanding the general waiver in subsection 1, is not implicated by the federal district court's certified question.

discretion to rephrase the certified questions as we deem necessary. *See, e.g.*, *Byrd Underground, LLC v. Angaur, LLC*, 130 Nev. 586, 588, 332 P.3d 273, 275 (2014).

Here, the State urges us to rephrase the question by striking the words "or analogous provisions of state law." The State contends that the issue of immunity from liability as to the state-law claims is not properly before this court because the federal district court has dismissed those claims. The employees reply that they may revive at least some of those claims later in this litigation—either on appeal to the Ninth Circuit, or potentially before that if the federal district court allows them to do so.

Our power to answer certified questions is limited to "questions of law of this state which *may be determinative of the cause then pending* in the certifying court . . . ." NRAP 5(a) (emphasis added). "The phrase, 'may be determinative of the cause then pending,' was apparently made part of the 1967 Uniform Certification of Questions of Law Act to ensure that answers to certified questions were not merely advisory opinions." *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749, 137 P.3d 1161, 1163 (2006) (footnotes omitted). This court lacks the constitutional power to render advisory opinions. *Capanna v. Orth*, 134 Nev. 888, 897, 432 P.3d 726, 735 (2018) (citing *City of N. Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969)); *see Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72, 206 P.3d 81, 85 (2009) (noting that "we avoid answering academic or abstract matters that a certifying court may have included in posing its questions to this court").

With this in mind, we conclude that it would be improper for us to directly address the State's immunity from liability as to "analogous provisions of state law," because no state-law claims are currently "pending in the certifying court."[3] *See* NRAP 5(a). The employees' argument that they may reassert state-law claims later in the case—even immediately upon the return of this case to federal court—only serves to underscore that those claims are not *now* "pending in the certifying court."[4] Whether the State is immune from state-law claims that *might* be reasserted is beyond our power to decide.

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[3]We note that because no state-law claim is currently pending, we need not decide which provisions of state law are "analogous" to the FLSA.

[4]The employees' appendix to their reply brief includes a copy of a motion that they filed in the district court on May 27, 2021—after the State filed its answering brief in this court—seeking to reassert their dismissed claim under NRS 284.180. The employees argued that they have finally exhausted all available administrative remedies. But, as all proceedings in the district court have been stayed pending our resolution of the certified question, the district court has not at this time granted the motion, and so no state-law claims are *now* pending. Of course, once this case resumes in the federal district court, the decision whether to allow employees to reassert their claim will rest squarely with that court.

It is true that we would arguably serve judicial efficiency by answering the certified question as presented by the federal district court. *Cf. Volvo Cars*, 122 Nev. at 751, 137 P.3d at 1164 (noting that court should consider judicial efficiency in deciding whether to answer a certified question). But mere considerations of efficiency cannot overcome the firm jurisdictional bar on advisory opinions. Accordingly, we elect to rephrase the certified question by striking "or analogous provisions of state law." As rephrased, the question reads:

> Has Nevada consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 206-207, whether in enacting NRS § 41.031 or otherwise?

Nevada has consented to damages liability under the FLSA

Turning to the substance of the reframed certified question, we conclude that NRS 41.031(1) waives immunity from FLSA liability.[5] States have "a residuary and inviolable sovereignty" that protects them from suit in their own courts. *Alden*, 527 U.S. at 715 (quoting The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed. 1961)). "A State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). In Nevada, the power to waive sovereign immunity is vested in the Legislature. *See* Nev. Const. art. 4, § 22; *Hill v. Thomas*, 70 Nev. 389, 398-99, 270 P.2d 179, 183-84 (1954). Exercising that power, the Legislature enacted NRS 41.031(1), which, as noted, provides that "[t]he State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." The statute further provides for certain exceptions to, and limitations on, the waiver. *See id.*; *see generally* NRS 41.032-.039. For example, the State has not waived sovereign immunity from liability "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." NRS 41.032(2); *see, e.g.*, *Clark Cty. Sch. Dist. v. Payo*, 133 Nev. 626, 635, 403 P.3d 1270, 1278 (2017) (holding that "discretionary-function immunity bars Payo's arguments that CCSD was negligent").

This court interprets statutes according to their plain language, unless the statute is ambiguous, the plain meaning produces absurd

[5]Given this conclusion, we need not consider whether Nevada "otherwise" consented to damages liability under the FLSA. In particular, we do not reach the issue of whether the State waived immunity by failing to assert it early enough in the litigation.

results, or the interpretation was clearly not intended. *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020). The plain language of NRS 41.031(1) waives the State's immunity from liability unless an express exception to the waiver applies. The State, however, has disclaimed any argument that an express exception to the waiver applies. Rather, the State contends that NRS 41.031(1) waives immunity from tort liability only, so the State retains immunity from statutory liability such as that created by the FLSA.[6]

We reject the State's contention, as it finds no support in the unambiguous text of NRS 41.031. "This court has 'repeatedly refused to imply provisions not expressly included in the legislative scheme.'" *Zenor v. State, Dep't of Transp.*, 134 Nev. 109, 110, 412 P.3d 28, 30 (2018) (quoting *State Indus. Ins. Sys. v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988)). "[I]t is not the business of this court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." *Id.* at 111, 412 P.3d at 30 (alteration in original) (quoting *McKay v. Bd. of Cty. Comm'rs of Douglas Cty.*, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987)). If the Legislature meant to pass a law that waived immunity from one category of liabilities only, it could easily have done so expressly. *Cf.* N.J. Stat. Ann. § 59:13-3 (New Jersey "waives its sovereign immunity from liability *arising out of an express contract or a contract implied in fact*" (emphasis added)); Or. Rev. Stat. § 30.265(1) (providing that "every public body is subject to civil action *for its torts*" (emphasis added)). The Legislature did not do that. We will not speculate that it simply forgot to.

Further, regarding NRS 41.031, this court has recognized "the basic notion that Nevada's qualified waiver of sovereign immunity is to be broadly construed." *Martinez v. Maruszczak*, 123 Nev. 433, 441, 168 P.3d 720, 725 (2007). "The apparent legislative thrust was to waive immunity and, correlatively, to strictly construe limitations upon that waiver." *State v. Silva*, 86 Nev. 911, 914, 478 P.2d 591, 593 (1970), *abrogated on other grounds by Martinez*, 123 Nev. at 433-34, 168 P.3d at 726-27. Thus, "[i]n a close case we must favor a waiver of immunity and accommodate the legislative scheme." *Id.* To hold that the State is immune from any claim that does not sound in tort would be a dramatic and atextual curtailment of Nevada's waiver of sovereign immunity. Doing so would also undermine this

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[6]The employees contend that even if NRS 41.031 *were* limited to waiving tort liability, claims under the FLSA *do* sound in tort. The Oregon Court of Appeals has so held. *Byrd v. Or. State Police*, 238 P.3d 404, 405 (Or. Ct. App. 2010). Because we conclude that NRS 41.031 is not limited to tort liability, we do not reach this argument or express any opinion thereon. We observe that the issue of whether FLSA claims sound in tort has the potential to affect the *extent* of the State's liability. *See* NRS 41.035(1).

state's public policy, reflected in NRS 41.031, that the State should generally take responsibility when it commits wrongs.[7]

The State cites numerous cases in which we have applied NRS 41.031 in the context of tort claims and have accordingly described the statute as a "qualified waiver of sovereign immunity from tort liability." *Martinez*, 123 Nev. at 439, 168 P.3d at 724; *see also Franchise Tax Bd. of Cal. v. Hyatt*, 133 Nev. 826, 835, 407 P.3d 717, 728 (2017) ("Nevada has waived traditional sovereign immunity from tort liability . . . ."), *rev'd and remanded on other grounds*, 139 S. Ct. 1485 (2019); *Harrigan v. City of Reno*, 86 Nev. 678, 680, 475 P.2d 94, 95 (1970) ("The purpose of the waiver of immunity statute was to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated."), *abrogated on other grounds by Martinez*, 123 Nev. at 433-34, 168 P.3d at 726-27. The State overreads these statements, however, as a statute's meaning is not necessarily limited to those cases in which it has already been applied. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1750 (2020) ("When a new application [of a statute] emerges that is both unexpected and important . . . [courts do not] decline to enforce the plain terms of the law . . . ."). The cases cited by the State all explained that Nevada has waived immunity from tort liability, with limited exceptions. But not one of these cases addresses nontort liability at all. And the State points to no case that has held that Nevada has not waived immunity from nontort liability.

The State relies particularly heavily on a 50-year-old passing reference in *Harrigan v. City of Reno* to NRS 41.031 et seq. as "the tort liability act." 86 Nev. at 680, 475 P.2d at 95. As indicated above, however, *Harrigan* was a tort case that did not address nontort forms of liability. Moreover, the Legislature did not give these statutes that name.[8] Thus, the dictum from *Harrigan* cannot bear the weight the State places on it.

The State makes several other arguments in support of its theory that NRS 41.031(1) applies only to torts. None of these arguments defeat the plain and unambiguous language of the statute. For example, the State points out that all of the exceptions to and limitations

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[7]The State cites cases from other jurisdictions that hold that those jurisdictions' waivers of sovereign immunity must be strictly construed against waiver. *E.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996). Those cases do not control our interpretation of Nevada law. And Nevada has long taken a different approach.

[8]If courts and attorneys insist upon referring to NRS 41.031 et seq. by a name rather than by a code citation, we think "government liability act" more accurately reflects the content of the statutes. *Cf. City of Stockton v. Superior Court*, 171 P.3d 20, 27-28 (Cal. 2007) (adopting the practice of referring to California's claims statute as the "Government Claims Act," rather than the "Tort Claims Act," in recognition that the statute applies to claims other than torts).

on the waiver of sovereign immunity concern torts. *See, e.g.*, NRS 41.035. This fact does not support the proposition that the *waiver itself* only concerns torts. Quite to the contrary, the fact that the Legislature expressly mentions torts in NRS 41.035 shows that the Legislature was capable of writing a statute that addressed tort liability only—and chose *not* to do so in NRS 41.031. Further, the State's resort to legislative history cannot create ambiguity where there is none. *See State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). But even if we considered the legislative history, it does not show that the Legislature waived immunity from tort liability exclusively.

We conclude by noting our agreement with the State on one point. The State argues that the Legislature would not "silently waive Nevada's sovereign immunity from statutory liability." In other words, a court should not find a major legislative decision—like waiving sovereign immunity—hidden in an unlikely place. That is absolutely correct so far as it goes. But in our view, when the Legislature enacted NRS 41.031, which declares that "[t]he State of Nevada hereby waives its immunity from liability," the Legislature did not do anything "silently." *Cf. Bostock*, 140 S. Ct. at 1753 ("We can't deny that today's holding . . . is an elephant. But where's the mousehole?"). NRS 41.031 is written in "starkly broad terms," *see id.*, and we have consistently interpreted it broadly in accordance with its text, *Martinez*, 123 Nev. at 441, 168 P.3d at 725. We continue that tradition today.

CONCLUSION

We answer the certified question, as rephrased in this opinion, as follows: Yes, by enacting NRS 41.031(1), Nevada has consented to damages liability for a State agency's violation of the minimum wage or overtime provisions of the federal Fair Labor Standards Act.

Hardesty, C.J., and Parraguirre, Cadish, Silver, Pickering, and Herndon, JJ., concur.

DAVID JAMES BURNS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 80834

September 23, 2021 495 P.3d 1091

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, two counts of robbery with the use of a deadly weapon, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Affirmed.

Resch Law, PLLC, dba Conviction Solutions, and *Jamie J. Resch*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Pamela C. Weckerly* and *Alexander G. Chen*, Chief Deputy District Attorneys, Clark County, for Respondent.

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

OPINION

By the Court, Stiglich, J.:

In this appeal, we consider the scope of a mid-trial waiver of appellate rights. During a capital trial, appellant David Burns stipulated to a sentence of life without the possibility of parole if the jury found him guilty and to waive his right to appeal issues "stemming from the guilt phase of the trial." In exchange, the State agreed to withdraw its notice of intent to seek the death penalty. The jury found Burns guilty, and the court, sitting without a jury, sentenced him to life without the possibility of parole. He now appeals, raising errors related to a pretrial motion to suppress, jury selection, closing arguments, jury deliberations, and sentencing.

We hold that Burns did not waive any errors that occurred during closing arguments because oral representations made to the court and reflected in the record indicate that the parties did not intend to extend the waiver to such errors. Further, we hold that Burns did not waive any errors that occurred during sentencing because sentencing was clearly not part of "the guilt phase of the trial." It is less clear on these facts whether voir dire is encompassed within "the guilt phase of trial," and so we construe the waiver against

the government and conclude that Burns did not waive the claim relating to jury selection. But we hold that Burns waived the other alleged errors, even those that may have arisen after the agreement was executed. While unrelated to the appellate waiver portion of his agreement, we also conclude that Burns' stipulation to the sentence the court imposed precludes his argument on appeal that the sentence is unreasonable and unconstitutional. Because we conclude that there was no reversible error in jury selection or closing arguments, we affirm the judgment of conviction.

BACKGROUND

Appellant David Burns was charged with conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, two counts of robbery with the use of a deadly weapon, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon. The charges stemmed from a home robbery in which a woman was shot and killed and her 12-year-old daughter was shot but survived. Although several individuals were involved, Burns was prosecuted as the shooter. The State filed a notice of intent to seek the death penalty, and the case proceeded to a bifurcated jury trial with a guilt phase and a penalty phase.

On the twelfth day of trial, Burns and the State presented a Stipulation and Order (Agreement) for the district court's approval. This Agreement contained two related provisions. In the first, Burns agreed to waive a penalty hearing before the jury and stipulated to a sentence of life without the possibility of parole if the jury found him guilty of first-degree murder. In the second, the State agreed to withdraw the notice of intent to seek the death penalty in exchange for Burns' waiver of "all appellate rights stemming from the guilt phase of the trial." When the parties presented the Agreement to the district court, the State was still presenting its case-in-chief. Burns' codefendant did not waive his appellate rights, and Burns' attorneys told the court that the codefendant's presence would provide a safeguard against future misconduct despite Burns' appeal waiver.

During discussion of the Agreement, Burns' attorney explained that "for purposes of further review down the road, we are not waiving any potential misconduct during the closing arguments. We understand that to be a fertile area of appeal." The State did not contest that statement and implied that the defense attorney's recounting of the Agreement was correct. The district court approved the Agreement.

The jury found Burns guilty on all charges. Burns filed a sentencing memorandum detailing a report of mitigating factors, including Burns' age at the time of the crime, a diagnosis of fetal alcohol syndrome, and other cognitive issues. The district court sentenced

Burns to life without the possibility of parole for the first-degree murder conviction.

Burns' counsel declined to file a direct appeal because of the waiver, asserting that Burns would have a better likelihood of success in a postconviction habeas proceeding. However, on appeal from a district court order denying Burns' subsequent postconviction habeas petition, this court held that Burns' trial counsel was ineffective for not filing a direct appeal when Burns desired to do so. *See Toston v. State*, 127 Nev. 971, 979, 267 P.3d 795, 801 (2011) ("[T]rial counsel has a duty to file a direct appeal when the client's desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances . . . ."). Accordingly, Burns was permitted to file this untimely direct appeal under NRAP 4(c). *Burns v. State*, Docket No. 77424 (Order Affirming in Part, Reversing in Part and Remanding, Jan. 23, 2020).

DISCUSSION

In this appeal, we consider the scope of Burns' mid-trial waiver of appellate rights and then the merits of the nonwaived claims. The State contends that Burns waived all the claims brought in this appeal, and Burns disagrees. Burns' claims on the merits include error in admitting evidence, a wrongly denied *Batson*[1] objection, prosecutorial misconduct, error in allowing the jury to review video of trial testimony, and an unreasonable and unconstitutional sentence.

Burns' waiver covered all allegations of error except those related to voir dire, closing arguments, and sentencing

The State claims that Burns waived the right to appellate review of *every* error he raises in this appeal because they all fall within the scope of "the guilt phase of the trial" referenced in the Agreement. In contrast, Burns argues that "the guilt phase of the trial" only refers to the State's case-in-chief.[2] Burns does not challenge the validity of the appeal waiver in this case, only its scope.

This court has held that contract principles apply when analyzing a written guilty plea agreement. *See, e.g.*, *State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994). The same principles apply here. Although the Agreement at issue did not include a

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

[2]In addition, Burns argues that this court's decision in his postconviction appeal determined the scope of this appeal by finding that counsel was ineffective for not filing a direct appeal. Burns incorrectly reads our prior decision as if we considered the waiver's scope. We did not. Our prior decision simply concluded that Burns' counsel had a duty to file the requested direct appeal regardless of the waiver. *Cf. Garza v. Idaho*, 139 S. Ct. 738, 747 (2019) (holding that, despite an appeal waiver, an attorney was ineffective for refusing to file an appeal upon the defendant's request). We said nothing about what issues, if any, Burns could raise in a direct appeal given the waiver.

guilty plea, it is a contract to the same extent as a written plea agreement. Similar to a written guilty plea agreement, the Agreement here involved a bargained-for exchange between a defendant and the State, with both parties relinquishing a known right. Applying contract principles, we must construe the Agreement from its plain language and enforce it as written. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) ("[W]hen a contract is clear on its face, it 'will be construed from the written language and enforced as written.'" (quoting *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990))). But any ambiguities must be construed against the State. *See United States v. Under Seal*, 902 F.3d 412, 418 (4th Cir. 2018); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003).

The Agreement stated as follows:

> [T]he parties hereby stipulate and agree to waive the separate penalty hearing in the event of a finding of guilt on Murder In the First Degree and pursuant to said Stipulation and Waiver agree to have the sentence of LIFE WITHOUT THE POSSIBILITY OF PAROLE imposed by the Honorable Charles Thompson, presiding trial judge.
>
> FURTHER, in exchange for the State withdrawing the Notice of Intent to Seek the Death Penalty, Defendant agrees to waive all appellate rights stemming from the guilt phase of the trial.

Although the Agreement does not explain what constitutes "the guilt phase of the trial," this phrase is typically used to distinguish between the parts of a bifurcated criminal trial when guilt is determined versus when a sentence is determined. "The first phase of a bifurcated capital case may be referred to as the 'guilt phase' as a convenient abbreviation, rather than using awkward terms such as the 'guilt or innocence phase' or 'determination of guilt or innocence' phase." *State v. Mason*, 694 N.E.2d 932, 948 (Ohio 1998); *see also* NRS 175.552(1) (providing that guilt phase and penalty phase in capital cases are separate proceedings for murder of the first degree); *Harte v. State*, 132 Nev. 410, 411, 373 P.3d 98, 99-100 (2016) (distinguishing the "guilt phase of trial" and the "penalty hearing" when discussing admissibility of certain forms of evidence). It is fairly clear when the guilt phase of a trial ends—when a verdict is returned as to the defendant's guilt. Thus, Burns' claim on appeal that his sentence was unconstitutional is not waived by this provision, since sentencing occurred after the guilt phase of the trial finished.

It is much less clear when the guilt phase of a trial *begins*. Does it begin with the swearing in of the venire from which the jury is selected or the swearing in of the impaneled jurors? *Black's Law Dictionary* defines "guilt phase" as "[t]he part of a criminal trial

during which the fact-finder determines whether the defendant committed a crime." *Guilt Phase*, *Black's Law Dictionary* (11th ed. 2019). That definition contemplates the fact-finder already being in place when the guilt phase begins. In jury trials, the fact-finder is the impaneled jury—which categorically does not exist until voir dire is completed. This suggests that the guilt phase begins after voir dire. Other authority is split about whether voir dire is part of the trial or an event that occurs pretrial.[3]

"Generally speaking, a plea agreement or other contract is ambiguous if it is reasonably susceptible of two meanings." *Under Seal*, 902 F.3d at 419. Therefore, we are not tasked today with deciding once and for all when the guilt phase of a trial begins. That the answer is unclear leads us to conclude that the Agreement in this case is ambiguous in that respect. Protection of defendants' rights when interpreting these kinds of bargains requires us to construe this ambiguity in the defendant's favor. For purposes of the issue before us today (the interpretation of the Agreement), we conclude that Burns' *Batson* claim is outside the scope of his waiver.

So, we necessarily reject Burns' argument that "the guilt phase of the trial" referred only to the State's case-in-chief and decline to adopt the State's argument that voir dire is categorically within "the guilt phase of the trial." In the circumstances presented here, "the guilt phase of the trial" in the Agreement's waiver provision encompassed Burns' claims stemming from every part of the proceedings after the jury was impaneled up until the verdict was returned.

Under that definition, the appeal waiver in the Agreement includes closing arguments. But, during a discussion on the record regarding the Agreement, Burns' counsel muddied the waters by stating that Burns was not waiving appellate review of any misconduct that might occur during closing arguments:

> I believe that states the agreement, other than there is a proviso that we, for purposes of further review down the road, we are not waiving any potential misconduct during the closing statements. We understand that to be a fertile area of appeal.

The State did not dispute defense counsel's representation that Burns intended to reserve the right to appellate review of any errors

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[3]*Compare State v. Melendez*, 244 So. 2d 137, 139 (Fla. 1971) ("It is settled law that trial begins when the selection of a jury to try the case commences."), *with State v. White*, 972 N.E.2d 534, 541 (Ohio 2012) ("[V]oir dire is not a substantive part of trial; rather, it is a mechanism to seat an impartial jury so that the due process rights of a defendant are protected.").

Under the federal Speedy Trial Act, "voir dire marks the technical commencement of the trial, [but] the strictures of the Speedy Trial Act are not fully satisfied by mere technical commencement." *United States v. Stayton*, 791 F.2d 17, 19 (2d Cir. 1986). But, for double jeopardy purposes, "jeopardy attaches [in a jury trial] when a jury is empaneled and sworn." *Serfass v. United States*, 420 U.S. 377, 388 (1975).

during closing arguments. Under the circumstances presented, we will give effect to Burns' oral reservation of the right to appellate review of any misconduct during closing arguments of the guilt phase of the trial.[4]

With this understanding of the appeal waiver's scope, we now consider whether it includes the claims Burns brings related to a motion to suppress evidence and jury deliberations. We conclude that it does.

Although the district court denied the motion to suppress evidence before the trial started, Burns is actually challenging the admission of that evidence during the guilt phase of the trial. Any error in denying the motion to suppress could not have prejudiced Burns until the subject evidence was admitted during the guilt phase of the trial. Therefore, any right to challenge the admission of this evidence "stemmed from" the guilt phase, and Burns waived his right to appellate review of the district court's decision.

Finally, we conclude that the appeal waiver also includes the alleged error during deliberations, given that the deliberations preceded the verdict as to Burns' guilt. But this alleged error is unique among the remaining issues Burns raises because it occurred *after* the Agreement was entered. As the jury was deliberating days after Burns signed the Agreement, this issue highlights the prospective aspect of Burns' appeal waiver—it included appellate review of errors that might happen after the Agreement was entered.

The prospective waiver of the right to appellate review raises some concerns because when a defendant agrees to such a waiver, he or she cannot know what errors may occur in subsequent proceedings. *See generally United States v. Teeter*, 257 F.3d 14, 21 (1st Cir. 2001) ("The basic argument against presentence waivers of appellate rights is that such waivers are anticipatory: at the time the defendant signs the plea agreement, she does not have a clue as to the nature and magnitude of the sentencing errors that may be visited upon her."). Nonetheless, the weight of authority, with some narrow exceptions, bends toward enforcing knowing and voluntary waivers of the right to appeal, even if it means barring appellate review of errors arising after the waiver is entered.[5]

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[4]We note that NRS 174.035(3), which provides that a reservation of the right to appellate review of an adverse pretrial decision must be in writing, does not apply here because the Agreement does not involve a plea of guilty, guilty but mentally ill, or nolo contendere.

[5]*See United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (enforcing prospective appeal waivers unless "1) a defendant's guilty plea failed to comply with Fed. R. Crim. P. 11; 2) the sentencing judge informs a defendant that she retains the right to appeal; 3) the sentence does not comport with the terms of the plea agreement; or 4) the sentence violates the law"); *United States v. Blick*, 408 F.3d 162, 172 (4th Cir. 2005) (enforcing prospective appeal waivers unless the defendants challenge "errors that the defendants could not have

Some appellate courts, however, will refuse to honor a prospective appeal waiver that is knowingly and voluntarily entered "if denying a right of appeal would work a miscarriage of justice." *Id*. at 25; *see also United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004); *Andis*, 333 F.3d at 889-92. Because that approach fairly balances the interests in enforcing valid agreements and remedying injustices that arise after entry of a prospective appeal waiver, we adopt it. Applying that rule here, we find no danger of a miscarriage of justice if the appeal waiver is applied to the alleged error during jury deliberations. The alleged error occurred when the district court provided the jury a video recording of trial testimony at the jury's request and with defense counsel's consent. We find no miscarriage of justice on these facts, and as such, we will honor the prospective appeal waiver as to this claim.

Therefore, we conclude that the appeal waiver encompasses all of Burns' claims on appeal except those related to voir dire, closing arguments, and sentencing.

The district court did not err in denying a Batson *challenge during jury selection*

Burns alleges that the district court improperly denied his challenge to the State's peremptory removal of a prospective juror. An allegation that a peremptory challenge was used with racially discriminatory intent is governed by the three-step analysis adopted by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986).

> Under [that] jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995).

We review the district court's ruling on a *Batson* challenge for an abuse of discretion. *Nunnery v. State*, 127 Nev. 749, 783, 263 P.3d 235, 258 (2011). Further, with respect to step three, "[t]he trial

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reasonably contemplated when the plea agreements were executed"); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (enforcing prospective appeal waivers unless it would result in a miscarriage of justice); *Andis*, 333 F.3d at 891-92 (adopting a miscarriage of justice exception); *People v. Panizzon*, 913 P.2d 1061, 1071 (Cal. 1996) (enforcing prospective appeal waivers unless the appeal brings up sentencing issues "left unresolved by the particular plea agreement" when the sentencing occurred after the entry of a broad appeal waiver (emphasis omitted)).

court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Walker v. State*, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (quoting *Hernandez v. New York*, 500 U.S. 352, 364 (1991)).

Burns objected to the State's use of a peremptory challenge to remove Juror 91. The juror did not identify his race, but he stated that he had emigrated from India. The district court took judicial notice that Juror 91 was a member of a cognizable group. The State alleges that Burns did nothing "more than point out that a member of a cognizable group was struck," which is insufficient to meet his burden at step one of the *Batson* analysis. *Williams v. State*, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018). The district court indicated its agreement with the State, saying, "I don't think they've met their burden . . . ." But then, "in an abundance of caution," the court asked the State to "tell [the court] what race neutral reasons there are for excusing this particular juror?" We have noted that, when "the district court asked the State to provide its explanation for the peremptory challenge solely out of an abundance of caution after the court had determined that [the defendant] failed to make a prima facie case, the first step of the *Batson* analysis was not rendered moot." *Watson v. State*, 130 Nev. 764, 780, 335 P.3d 157, 169 (2014). As a result, we may examine whether Burns made a prima facie case of racial discrimination. We agree with the district court that he did not. Counsel offered no explanation besides anecdotes from other cases counsel had argued and references to other matters before this court. Burns' only point related to this specific juror was that the court had taken judicial notice that the juror was "Black." Burns did not meet the step one standard of a prima facie showing of discrimination.

Even if Burns *had* made such a showing, the State did give a race-neutral rationale based primarily on the juror's answers in a questionnaire regarding the death penalty. According to the district court, in the questionnaire, the juror had said, "Although I could not vote to impose the death penalty, I could vote to impose a sentence of life imprisonment without any possibility of parole in the proper circumstances." While the juror walked back this questionnaire answer on direct questioning, the district court found that the juror's answers to the death penalty questions were sufficient justifications so that there had not been a showing of purposeful racial discrimination under step three of the *Batson* analysis.

We conclude the district court did not abuse its discretion in overruling the *Batson* challenge to Juror 91. It does not appear that Burns met his burden under step one, and even if he had, the race-neutral explanation and the decision by the district court were sufficient, so we find no error in steps two or three.

The State did not engage in reversible prosecutorial misconduct during closing arguments

Burns claims that the State engaged in multiple instances of prosecutorial misconduct during its closing argument. In reviewing such claims, this court determines whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). If the error is preserved and of a constitutional dimension—that is, if it involves impermissible comment on a constitutional right or has "so infected the trial with unfairness as to make the resulting conviction a denial of due process"—this court "will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id*. at 1189, 196 P.3d at 476-77 (internal quotation marks omitted). If the misconduct is not of a constitutional dimension, this court "will reverse only if the error substantially affects the jury's verdict." *Id*. at 1189, 196 P.3d at 476.

Referring to defense counsel

The State opened its rebuttal argument with the following comment: "What happens in courthouses across America and what should be happening in this courtroom by a jury of 12 people is that it's a search for a truth. And before about 20 minutes ago, that would seem to be what we were all doing here for the last four weeks." By "20 minutes ago," the State was plainly referring to the defense's closing argument, thus implying that the defense was not engaged in "a search for a truth." Burns objected, saying "[t]hat's disparaging counsel," but the court overruled the objection. Burns alleges on appeal that this was reversible prosecutorial misconduct of a constitutional dimension.

This court has found that "[d]isparaging remarks directed toward defense counsel 'have absolutely no place in a courtroom, and clearly constitute misconduct.'" *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (quoting *McGuire v. State*, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984)). We have found such misconduct in quips made solely "to belittle defense counsel," *McGuire*, 100 Nev. at 158, 677 P.2d at 1064; when a prosecutor commented that defense counsel resorted to "smoke screens and flat-out deception," *Rose v. State*, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007); and when a prosecutor made lengthy comments that defense counsel was trying to distract the jurors and to "market" them a "product," *Butler*, 120 Nev. at 897-98, 102 P.3d at 84. In contrast, the comment at issue here was not directed at opposing counsel with the purpose to belittle them; instead, it was focused particularly on the truth of the defense's version of events. Therefore, we conclude that the prosecutor's comments did not amount to misconduct.

Referring to a nontestifying witness

During his trial testimony, a detective referred to a statement made to him by a woman, Ulonda Cooper, who did not testify at trial. Defense counsel mentioned Cooper during his closing argument: “According to Detective Bunting, . . . that’s what Ulanda [sic] Cooper told me; I never got her taped statement; that’s what she told me and I just put it in there. Okay. . . . And you know what the most ironic thing about this, Ulonda Cooper was right.” In rebuttal, the State said, “There’s no connection whatsoever to him [another suspect] other than Ulonda Cooper. Oh, wait, we didn’t hear from Ulonda Cooper. She’s not a witness in this case. Did you assess Ulonda Cooper’s credibility?” The defense objected and was overruled.

This court has held “it is generally improper for a prosecutor to comment on the defense’s failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense.” *Whitney v. State*, 112 Nev. 499, 500, 502, 915 P.2d 881, 882, 883 (1996) (reversing a conviction after prosecutor “repeatedly call[ed] attention to the defense’s lack of witnesses”). But when the comment goes to the defense’s theory of what happened, it is permissible. For example, in *Rimer v. State*, we concluded that misconduct did not occur when the prosecutor pointed out that the defense failed to substantiate its theory that the defendants were sick and unable to commit the alleged crime. 131 Nev. 307, 331, 351 P.3d 697, 714 (2015). The comment at issue here is similar to that in *Rimer*. Burns’ defense was, in part, that a coconspirator was the shooter. Burns’ reference to Ulonda Cooper during his closing argument went to that theory. In these circumstances, the prosecution’s response was a permissible comment on the evidence at hand and whether it substantiated the defense theory, not impermissible shifting of the burden of proof. Therefore, we conclude that there was no prosecutorial misconduct as to the Ulonda Cooper comments.

PowerPoint display

The State used a PowerPoint presentation during its rebuttal closing argument. One slide contained an illustration purporting to set out facts that disprove any notion of coincidence, which both the State and Burns describe on appeal as “a circle of guilt.” Defense counsel objected and was overruled.

This court has held that it was reversible error for the prosecutor, during opening statements, to display a defendant’s booking photo overlaid with the word “GUILTY,” while simultaneously urging the jurors orally to find the defendant guilty. *Watters v. State*, 129 Nev. 886, 891, 313 P.3d 243, 247-48 (2013). This court found that while the oral statement was permissible, the visual slide was not because

it "directly declared Watters guilty." *Id*. at 891, 313 P.3d at 248. In doing so, we noted that making the improper argument visually (declaring a defendant guilty in an opening statement photo) was even more prejudicial than it would have been had it been made orally. *Id*. at 892, 313 P.3d at 248.

Here, the district court overruled the objection on the ground that the PowerPoint slide was used in closing argument, whereas the slide in *Watters* was used in an opening statement. We agree. *Watters* is limited to opening statements, where a prosecutor may not directly declare the defendant guilty. *See Artiga-Morales v. State*, 130 Nev. 795, 799, 335 P.3d 179, 182 (2014) (holding that the use of the defendant's photograph with the word "guilty" across the front was not error, in part because it was shown during closing arguments). And even if the district court erred, the slide alleging "a circle of guilt" did not make the proceedings so unfair as to be error of a constitutional dimension or substantially affect the verdict.

Burns' agreement to a specific sentence precludes his arguments that the sentence was unreasonable and unconstitutional

Although Burns' challenge to the life-without-parole sentence is not barred by the appeal waiver, it nonetheless is barred by his stipulation to that sentence as part of the Agreement. This court has not yet spoken to this threshold question: Can a defendant challenge a sentence that was agreed upon in a bargain with the State? Neither Burns nor the State addresses this question, although the State does point out that Burns "*agreed* to his sentence of life without the possibility of parole, but now complains it is unreasonable and unconstitutional."

Generally, "[w]hen a defendant pleads guilty and agrees to a specific sentence, he waives his right to challenge the propriety of his sentence." *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). As discussed above, we see no reason to treat the Agreement entered here any differently than a plea agreement. We therefore conclude that because Burns received the benefit of his bargain—the stipulated-to sentence of life without the possibility of parole—he cannot challenge that sentence on appeal.

Even if we were to consider Burns' arguments about the sentence, they lack merit. "A sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). Burns' sentence was certainly within the statutory limits, *see* NRS 200.030(4)(b)(1), and was not unreasonably disproportionate to his offense of murder with the use of a deadly weapon.

CONCLUSION

Burns' mid-trial appeal waiver applied to the entirety of "the guilt phase of the trial," including all parts of the trial up to the jury's verdict as to his guilt. The language of the Agreement is ambiguous as to whether the guilt phase commenced before or after jury selection, so we construe the ambiguity in Burns' favor and consider his claim of error related to jury selection. The parties also carved out a limited exception to the appeal waiver, with Burns orally reserving his right to appellate review of misconduct during closing arguments and the State implicitly agreeing to that reservation. Therefore, the mid-trial appeal waiver covered all of Burns' claims raised in this appeal, except those regarding voir dire, closing arguments, and an unconstitutional and unreasonable sentence. We conclude that the prosecutorial-misconduct and *Batson* claims are substantively without merit. Further, since Burns agreed to a specific sentence as part of the Agreement and the district court imposed that sentence, he may not challenge the imposition of the agreed-upon sentence. On these bases, we affirm the judgment of conviction.

Hardesty, C.J., and Silver, J., concur.