LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC.; AND SUMMIT TECHNOLOGIES, LLC, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE ELISSA F. CADISH, DISTRICT JUDGE; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND IRA AND EDYTHE SEAVER FAMILY TRUST; IRA SEAVER; AND CIRCLE CONSULTING CORPORATION, REAL PARTIES IN INTEREST.

No. 65409

December 3, 2015 362 P.3d 91

Original petition for a writ of mandamus or prohibition challenging district court orders setting an evidentiary hearing on a motion to set aside a settlement agreement pursuant to NRCP 60(b) and denying a motion to dismiss.

Consultants brought action against sellers and purchasers of company, claiming contract and tort-based causes of action, and more than three years after settling with sellers, and one year after a bench trial with purchasers, consultants moved to set aside the settlement agreement and for voluntary dismissal. The district court ordered an evidentiary hearing and permitted discovery. Sellers petitioned for writ of prohibition. The supreme court, CHERRY, J., held that consultants' voluntary dismissal started six-month period for motion to set aside judgment, order, or proceeding.

Petition granted.

Foley & Oakes, PC, and *J. Michael Oakes*, Las Vegas, for Petitioners.

Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson and *Jeffrey R. Albregts*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. PROHIBITION.
   A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320.
3. MANDAMUS; PROHIBITION.
   A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted.
4. MANDAMUS; PROHIBITION.
   Determining whether to consider a petition for extraordinary relief is solely within the supreme court's discretion.

5. Mandamus; Prohibition.
   The supreme court generally declines to consider petitions for writs of mandamus or prohibition challenging interlocutory district court orders, but the supreme court may consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served.
6. Mandamus; Prohibition.
   In the context of petitions for writs of mandamus or prohibition, the supreme court reviews district court orders for an arbitrary or capricious abuse of discretion.
7. Appeal and Error; Mandamus; Prohibition.
   The supreme court reviews questions of law de novo, even in the context of petitions for writs of mandamus or prohibition.
8. Judgment.
   Filing of voluntary dismissal started six-month period for consultants to file motion to set aside settlement agreement and voluntary dismissal for mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud, and therefore consultants' motion, filed 40 months after voluntary dismissal, was time-barred, assuming that voluntary dismissal was final judgment, order, or proceeding from which consultants could have received relief. NRCP 41(a)(1), 60(b).

Before Parraguirre, Douglas and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

To resolve this original writ petition, petitioner asks us to consider whether NRCP 60(b) can be used to set aside a voluntary dismissal or a settlement agreement. While NRCP 60(b) imposes a 6-month time limit, real parties in interest filed their NRCP 60(b) motion 40 months after filing the voluntary dismissal. Without reaching whether NRCP 60(b) may be used to set aside a voluntary dismissal or a settlement order, we hold that NRCP 60(b)'s 6-month limitation begins running when the order, judgment, or proceeding at issue is filed. Thus, even if NRCP 60(b) applies, the motion is time-barred. We therefore grant the petition.

FACTS AND PROCEDURAL HISTORY

Real parties in interest Ira Seaver, the Ira Seaver and Edythe Seaver Family Trust, and Circle Consulting Corporation (collectively, Seaver) filed a complaint in the district court against petitioners Lewis and Madalyn Helfstein; Summit Laser Products, Inc.; and Summit Technologies, LLC (collectively, the Helfsteins) and against Uninet Imaging, Inc., and Nestor Saporiti (collectively, Uninet). Seaver alleged contract and tort-based causes of action arising out of agreements between the Helfsteins and Seaver fol-

lowing Uninet's purchase of the Helfsteins' Summit companies. When Uninet purchased Summit, Uninet refused to be liable for the consulting agreement between the Helfsteins and Seaver. Seaver objected to the purchase agreement, but the Helfsteins proceeded with the sale.

Prior to answering the complaint, the Helfsteins settled with Seaver, and Seaver voluntarily dismissed their claims against the Helfsteins.[1] Fourteen months after voluntarily dismissing the Helfsteins from the suit, Seaver filed a notice of rescission. In the notice, Seaver alleged that the Helfsteins fraudulently induced them to settle and that the Helfsteins failed to inform them of material facts or produce relevant documents, which the Helfsteins were obligated to produce pursuant to their fiduciary duties and discovery obligations.

Without the Helfsteins as a party to the litigation,[2] Seaver and Uninet tried the claims between them at a bench trial, and the district court issued findings of fact and conclusions of law that resolved those claims. One year after the bench trial and 26 months after filing the notice of rescission, Seaver filed an NRCP 60(b) motion to set aside the settlement agreement, and, implicitly, the voluntary dismissal and sought to proceed on their claims against the Helfsteins. The Helfsteins opposed the motion claiming, *inter alia*, that the motion was procedurally improper. At the hearing on Seaver's motion, the district court ordered an evidentiary hearing and permitted discovery. The Helfsteins subsequently filed a motion to dismiss, arguing that the district court lacked jurisdiction over them and that the NRCP 60(b) motion was procedurally improper. The district court denied the motion. Finally, the Helfsteins moved to have Judge Gonzalez disqualified from the case, which the district court chief judge heard and denied. The Helfsteins then filed the instant petition. The district court stayed the evidentiary hearing pending this court's resolution of this writ petition.

DISCUSSION

The Helfsteins' petition seeks the following relief: (1) that this court order the district court to deny as untimely Seaver's motion

[1]The voluntary dismissal stated that the action was dismissed pursuant to NRCP 41(a)(1)(ii). However, the dismissal is not a stipulation and should have stated that the action was dismissed pursuant to NRCP 41(a)(1)(i).

[2]After the Helfsteins settled with Seaver, Uninet answered the complaint, filed a counterclaim, and filed a cross-claim against the Helfsteins. The Helfsteins moved to, *inter alia*, compel arbitration. That motion was ultimately granted, completely dismissing the Helfsteins from the underlying action. *Helfstein v. UI Supplies*, Docket No. 56383 (Order of Reversal and Remand, April 7, 2011) (reversing the district court's order denying the motion to compel arbitration and remanding the matter to the district court to enter an order compelling arbitration and dismissing Uninet's causes of action against the Helfsteins).

to set aside the settlement agreement and proceed on the original complaint; (2) that this court order the district court to grant their motion to dismiss Seaver's original complaint against them because the lower court does not have personal jurisdiction over them; and (3) if this court denies their requests for the preceding relief, that this court order the district court to grant their motion to disqualify Judge Gonzalez. The Helfsteins additionally argue that NRCP 60(b) cannot be used to set aside a voluntary dismissal or a settlement agreement.

Writ relief

[Headnotes 1, 2]

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* NRS 34.160; *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); *see also Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991).

[Headnotes 3, 4]

Where there is no "plain, speedy, and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; NRS 34.330; *see Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014). A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Determining whether to consider a petition for extraordinary relief is solely within this court's discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851.

[Headnote 5]

This court has consistently held that an appeal is generally an adequate remedy precluding writ relief. *Pan*, 120 Nev. at 224, 88 P.3d at 841; *see also Bradford v. Eighth Judicial Dist. Court*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). Because an appeal is ordinarily an adequate remedy, this court generally declines to consider writ petitions challenging interlocutory district court orders. *Oxbow Constr.*, 130 Nev. at 872, 335 P.3d at 1238. But we may consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335

P.3d 199, 202 (2014). We elect to consider this writ petition because consideration of the writ petition will serve judicial economy.

Standard of review

[Headnotes 6, 7]

In the context of writ petitions, we review district court orders for an arbitrary or capricious abuse of discretion. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. However, we review questions of law, such as the interpretation of and interplay between NRCP 41(a)(1) and 60(b), de novo, even in the context of writ petitions. *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

NRCP 41(a)(1) and NRCP 60(b)

Seaver settled with the Helfsteins and filed a voluntary dismissal pursuant to NRCP 41(a)(1)(i). Nevertheless, more than three years after filing the voluntary dismissal, Seaver filed a motion to set aside the settlement agreement and voluntary dismissal pursuant to NRCP 60(b). The district court did not grant the motion, but it ordered an evidentiary hearing to determine whether the Helfsteins fraudulently induced Seaver to settle.

NRCP 60(b) permits a court to set aside a final judgment, order, or proceeding in certain circumstances:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reason[ ]: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party . . . . *The motion shall be made within a reasonable time, . . . not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served.*

(Emphasis added.) The primary "purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party." *Nev. Indus. Dev., Inc. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). We have not previously considered whether a settlement agreement or an NRCP 41(a)(1) voluntary dismissal qualifies as a "final judgment, order, or proceeding" that may be set aside under NRCP 60(b). However, we need not reach this issue here.

[Headnote 8]

An NRCP 60(b) motion must be made "not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served." This 6-month period begins

to run from the date of the challenged proceeding or upon service of "written notice of entry" of the challenged judgment or order; nothing in NRCP 60(b) bases the 6-month time frame on a subsequent judgment, order or proceeding. *See Union Petrochemical Corp. of Nev. v. Scott*, 96 Nev. 337, 338-39, 609 P.2d 323, 323-24 (1980). We have also previously held that an NRCP 60(b) "motion must be made within a reasonable time and that the six-month period represents the extreme limit of reasonableness." *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 272, 849 P.2d 305, 308 (1993). Accordingly, assuming that an NRCP 60(b) challenge may also be made to a settlement agreement, such a challenge is also time-barred here because it was made well after 6 months had elapsed.

In this matter, Seaver voluntarily dismissed the Helfsteins on November 23, 2009, and filed his NRCP 60(b) motion 40 months later, far beyond the 6-month time limit. Thus, if a voluntary dismissal is a final judgment, order, or proceeding from which a party may receive relief through NRCP 60(b), then the filing of the voluntary dismissal starts the 6-month clock. Because Seaver filed the motion more than three years after he voluntarily dismissed the Helfsteins from the suit, we conclude that Seaver's NRCP 60(b) motion is time-barred and that the district court erred in scheduling an evidentiary hearing.

CONCLUSION

Accordingly, we grant the Helfsteins' writ petition.[3] The clerk of this court shall issue a writ of prohibition instructing the district court to vacate its previous order regarding Seaver's NRCP 60(b) motion and enter a new order denying the motion.

PARRAGUIRRE and DOUGLAS, JJ., concur.

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[3]In light of our decision, we decline to reach the remaining issues in the Helfsteins' petition.

VIVIAN MARIE LEE HARRISON, APPELLANT, *v.*
NORTON A. ROITMAN, M.D., RESPONDENT.

No. 64569

December 17, 2015 362 P.3d 1138

Appeal from a district court order dismissing a medical malpractice action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Wife filed a complaint against husband's psychiatrist, who submitted a report diagnosing wife with personality disorder during divorce proceeding, alleging causes of action for medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and conspiracy. The district court granted psychiatrist's motion to dismiss. Wife appealed. The supreme court, DOUGLAS, J., held that psychiatrist was entitled to absolute immunity from wife's lawsuit for damages arising from statements in psychiatrist's report.

Affirmed.

John Ohlson, Reno, for Appellant.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *John J. Savage*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
When reviewing an order granting a motion to dismiss, the supreme court recognizes all factual allegations in the complaint as true and draws all inferences in favor of the complainant. NRCP 12(b)(5).

2. OFFICERS AND PUBLIC EMPLOYEES.
Absolute immunity, a doctrine rooted in the common law, is a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation, generally.

3. OFFICERS AND PUBLIC EMPLOYEES.
Questions of immunity are driven by public policy, requiring a balancing of the social utility of the immunity against the social loss of being unable to attack the immune defendant.

4. OFFICERS AND PUBLIC EMPLOYEES.
The functional approach to resolving questions of immunity is made up of three separate inquiries: first, a court asks whether the person seeking immunity performed functions sufficiently comparable to those of persons who have traditionally been afforded absolute immunity at common law; second, it considers whether the likelihood of harassment or intimidation by personal liability is sufficiently great to interfere with the person's performance of his or her duties; and third, it asks whether procedural safeguards exist in the system that would adequately protect against illegitimate conduct by the person seeking immunity.

5. CONSPIRACY; DAMAGES; HEALTH.
Husband's psychiatrist, who issued a report during divorce proceeding that diagnosed wife with a personality disorder, was entitled to abso-

lute immunity from wife's lawsuit for damages arising from statements in psychiatrist's report in action for medical malpractice, liability intentional infliction of emotional distress, negligent infliction of emotional distress, and conspiracy; party-retained expert witnesses played an integral role in the judicial process, and the looming threat of liability could interfere with party-retained experts' duties.

6. Torts.

Imposing civil liability on expert witnesses would discourage anyone who is not a full-time professional expert witness from testifying; only professional witnesses will be in a position to carry insurance to guard against such liability.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this opinion, we consider whether a party-retained expert providing a psychiatric analysis of an adverse party during divorce proceedings may later be sued by the adverse party based on statements made in his written psychiatric analysis report. In accordance with long-established precedent extending absolute immunity to judicial participants, we recognize that party-retained expert witnesses have absolute immunity from suits for damages arising from statements made in the course of judicial proceedings.

FACTS AND PROCEDURAL HISTORY

This action arose from a divorce proceeding to which Vivian Harrison (Vivian) and Kirk Harrison (Kirk) were parties. During the divorce proceeding, Kirk hired psychiatrist Norton Roitman, M.D., to conduct a psychiatric analysis of his then-wife, Vivian. Despite never examining or meeting Vivian, Dr. Roitman prepared and submitted to the court a written report diagnosing Vivian with a personality disorder and concluding that her prognosis was poor.

Consequently, Vivian filed a complaint against Dr. Roitman, alleging that the statements made in his report constituted medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. According to Vivian, Dr. Roitman's statements were founded solely on information obtained from Kirk, and his diagnosis, given without meeting or examining her, fell below the standard of care for a psychiatrist.

Dr. Roitman subsequently filed an NRCP 12(b)(5) motion to dismiss, which was granted by the district court. The district court concluded that, as a witness preparing an expert report in connection with the matter in controversy, Dr. Roitman was absolutely immune from liability for each of Vivian's causes of action. Vivian appealed.

DISCUSSION

[Headnote 1]

An order granting a motion to dismiss pursuant to NRCP 12(b)(5) is subject to a rigorous review. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). This court recognizes all factual allegations in the complaint as true and draws all inferences in favor of the complainant. *Id.* at 228, 181 P.3d at 672. Thus, Vivian's complaint should only be dismissed if it appears beyond a doubt that no factual allegations, taken as true, would entitle her to relief. *Id.* In this case, the validity of the district court's order granting dismissal turns on whether it correctly applied the doctrine of absolute immunity, which is a question of law that we review de novo. *See Fink v. Oshins*, 118 Nev. 428, 432, 49 P.3d 640, 643 (2002).

On appeal, Vivian contends that the district court improperly dismissed her complaint because Nevada limits the availability of an absolute immunity defense to claims for defamation. Because her complaint alleges medical malpractice rather than defamation, she argues that Dr. Roitman's defense of absolute immunity does not apply. In opposition, Dr. Roitman contends that he is entitled to the protection of absolute immunity because he made the challenged statements as an expert participating in a judicial proceeding. He further contends that his claim of absolute immunity is not contingent upon the type of action brought by Vivian.

[Headnotes 2, 3]

Absolute immunity, a doctrine rooted in the common law, "is a broad grant of immunity not just from the imposition of civil damages, but also from the burdens of litigation, generally." *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 615, 55 P.3d 420, 423 (2002) (citing James L. Knoll, *Protecting Participants in the Mediation Process: The Role of Privilege and Immunity*, 34 Tort & Ins. L.J. 115, 122 (1998)). Questions of immunity are driven by public policy, requiring a balancing of "the social utility of the immunity against the social loss of being unable to attack the immune defendant." *Id.* at 614-15, 55 P.3d at 423. The doctrine is further "'justified and defined by the *functions* it protects and serves.'" *Rolon v. Henneman*, 517 F.3d 140, 145 (2d Cir. 2008) (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)); *see also Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories."). Thus, in analyzing this issue, we are mindful that "'functional categories, not . . . the status of the defendant' control[s] the immunity analysis." *Rolon*, 517 F.3d at 145.

The United States Supreme Court has applied this "functional approach" to resolving questions of immunity. *See, e.g.*, *Briscoe*,

460 U.S. at 335-36 (determining by application of the functional approach that a testifying police officer was protected by absolute witness immunity because while testifying he served the same functions as other witnesses); *Buckley v. Fitzsimmons*, 509 U.S. 259, 259 (1993) (applying the functional approach to determine whether qualified or absolute immunity applied to state actors accused of malicious prosecution).[1] This court applied the Supreme Court's functional approach in *Ducharm* to reach the conclusion that child protective service agents, integral constituents of the court process, act under the protection of absolute immunity when they provide information to the court.[2] 118 Nev. at 615-19, 55 P.3d at 424-26. We similarly employ the functional approach here to determine whether the social utility of recognizing absolute immunity for party-retained experts is sufficiently great to justify their pardon from the burdens of litigation. We are convinced that, much like the child protective service agents in *Ducharm*, party-retained expert witnesses play an integral role in our judicial process.[3]

The functional approach

[Headnote 4]

The functional approach is made up of three separate inquiries. *Id.* at 616, 55 P.3d at 424. First, we ask "whether the [person seeking immunity] performed functions sufficiently comparable to those of [persons] who have traditionally been afforded absolute immunity at common law." *Id.*; *see also Butz v. Economou*, 438 U.S. 478, 513 (1978) (comparing the role of a federal hearing examiner with the role of a judge and concluding that they are "functionally comparable"). Second, we consider "whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the [person's] performance of his or her duties." *Ducharm*, 118 Nev. at 616, 55 P.3d at 424; *see also Butz*, 438 U.S. at 513 (concluding that the fractious nature of adjudications within a federal administrative agency, and the likelihood of harassing litigation evolving therefrom, are similar to the judicial process). Third, we ask "whether procedural safeguards exist in the system that would adequately protect against [illegitimate] conduct by the [person

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[1]In his concurrence, Justice Kennedy squarely rejects an analysis supplemented by bright-line rules rather than one established entirely on function. 509 U.S. at 289 (Kennedy, J., concurring). He explains that "ensuring parity in treatment among . . . actors engaged in identical functions" was the precise goal of the functional analysis. *Id.* at 288-89.

[2]In *Ducharm*, we ultimately held that the district court did not err by refusing to dismiss the claims based on a defense of absolute immunity because the alleged negligence occurred after the court order was entered. 118 Nev. at 620, 55 P.3d at 427.

[3]*See also Briscoe*, 460 U.S. at 345-46 (noting that the participation of witnesses "in bringing the litigation to a just—or possibly unjust—conclusion is . . . indispensable").

seeking immunity]." *Ducharm*, 118 Nev. at 616, 55 P.3d at 424-25 (citing Caroline Turner English, *Stretching the Doctrine of Absolute Quasi-Judicial Immunity: Wagshal v. Foster*, 63 Geo. Wash. L. Rev. 759, 765-66 (1995)); *see also Butz*, 438 U.S. at 513 (concluding that federal administrative law requires many of the same safeguards as the judicial process and extending immunity to persons performing adjudicatory functions within federal agencies).

Immunity at common law

At common law, "[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established." *Briscoe*, 460 U.S. at 330-31[4] (footnote omitted) (citing *Cutler v. Dixon* (1585) 76 Eng. Rep. 886; 4 Co. Rep. 14 b.; *Anfield v. Feverhill* (1614) 2 Bulst. 269; 1 Ro. Rep. 61; *Henderson v. Broomhead* (1859) 157 Eng. Rep. 964, 968; 4 H. & N. 569). Quoting a 19th century court, the United States Supreme Court reasoned that "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Id.* at 332-33 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)). The Court further explained that "[a] witness's apprehension of subsequent damages liability might induce two forms of self-censorship." *Id.* at 333. First, a witness may be reluctant to present testimony due to fear of subsequent damages liability. *Id.* Second, even if a witness makes it to the stand, he may color his testimony as a consequence of the same fear. *Id.* In particular, "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Id.* Rather than subject witnesses to potential liability for their statements, "the truth-finding process is better served if the witness's testimony is submitted to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Id.* at 333-34 (internal quotation omitted); *see also Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (White, J., concurring) (stating that to find where the truth lies, a witness "must be permitted to testify without fear of being sued if his testimony is disbelieved"). The common law's protection for

[4]As noted, *Briscoe* extended witness immunity to testifying police officers. 460 U.S. at 346. Justice Marshall dissented. *Id.* Notably, he argued that support for witness immunity at common law was not as well-recognized as the majority presumed. *Id.* at 363 (Marshall, J., dissenting). Nonetheless, the U.S. Supreme Court has continued to recognize witness immunity as a well-established, common-law principle. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 226 (1988).

witnesses is therefore "a tradition . . . well grounded in history and reason." *Briscoe*, 460 U.S. at 334.

The looming threat of liability

We next consider whether harassment or intimidation by threat of personal liability may interfere with a party-retained expert's duties. As to experts appointed by the court, we have concluded that "[e]xposure to liability could deter their acceptance of court appointments or color their recommendations." *Duff v. Lewis*, 114 Nev. 564, 569, 958 P.2d 82, 86 (1998) (internal quotation omitted). When we recognized immunity for court-appointed experts, we offered that our purpose was to "preserve the . . . truthfulness of critical judicial participants without subjecting them to the fear and apprehension that may result from a threat of personal liability." *Id.* at 568-69, 958 P.2d at 85. Our decision to extend absolute immunity, then, removed the possibility that court-appointed experts would become a "lightning rod for harassing litigation." *Id.* at 569, 958 P.2d at 86 (internal quotation omitted).

[Headnote 5]

After considering the threat of liability posed to court-appointed experts together with the threat faced by party-retained experts, we conclude that the threat faced by party-retained experts is as great as, or greater than, the threat to court-appointed experts, for whom we have previously recognized absolute immunity. *See, e.g.*, *id.* at 571, 958 P.2d at 87 (recognizing immunity for a court-appointed psychologist making a child custody recommendation). Both classes of experts, notwithstanding source of hire, risk exposure to lawsuits when providing expert opinions as participants in contentious judicial proceedings. *See Butz*, 438 U.S. at 512 (explaining that devoid of absolute immunity, judicial participants risk exposure to liability). Court-appointed experts, however, are afforded the cloak of neutrality associated with their appointments. *See Duff*, 114 Nev. at 570, 958 P.2d at 86 (noting that court-appointed experts' purpose is to act in an objective and independent manner). In contrast, party-retained experts, like the often imposed label "hired gun" denotes, are strongly associated with the hiring party. And as a consequence of their relationship with the hiring party, the hired gun will likely share in the threat of liability arising from the losing party's animus. As the *Butz* Court explained: "[C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with [unlawful] animus." 438 U.S. at 512. Accordingly, to grant absolute immunity to court-appointed experts, who might avoid a losing party's animus by demonstrating objectivity, but to refuse it to party-retained experts, who likely face greater animus by association, would be to expose party-retained experts as

a " 'lightning rod for harassing litigation.'" *Duff*, 114 Nev. at 569, 958 P.2d at 86 (quoting *Lavit v. Superior Court*, 839 P.2d 1141, 1144 (Ariz. Ct. App. 1992)).

[Headnote 6]

We further conclude that the looming threat of liability would interfere with party-retained experts' duties. The potential for liability could encumber access to experts in two ways. First, party-retained experts would be discouraged from accepting retainers. *See id.* at 570, 958 P.2d at 86 (noting that exposure to liability could deter court-appointed experts from accepting appointments). Second, experts would be forced to carry insurance or set retainers exorbitantly high to warrant the risk of taking the stand, putting their price tag out of reach for many parties. The Washington Supreme Court explained: "[I]mposing civil liability on expert witnesses would discourage anyone who is not a full-time professional expert witness from testifying. Only professional witnesses will be in a position to carry insurance to guard against such liability." *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 776 P.2d 666, 670 (Wash. 1989). Even if a party is able to retain an expert who dares to risk collateral suit by taking the stand, and is additionally able to afford the expert's price tag, the retained expert may dilute or distort disagreeable conclusions to reduce the risk of liability. *See Briscoe*, 460 U.S. at 332 (noting that the threat of liability would cause witnesses to distort candid opinions). Thus, we conclude that to permit collateral actions against party-retained experts based on statements made during judicial proceedings would be to discourage candid expert opinions and to suppress access. *See Duff*, 114 Nev. at 570, 958 P.2d at 86 (noting that exposure of court-appointed experts to suit would likely cause a chilling effect on acceptance of court appointments). And in so doing, we will have stifled the ascertainment of truth, a result we seek to avoid. *See Briscoe*, 460 U.S. at 332 (noting that the path to truth is obstructed by witness's self-censoring).

Procedural safeguards as remedies

As to the final consideration, whether remedies and safeguards other than civil liability are sufficient to hold party-retained experts accountable for their conduct, we conclude that they are. In *Duff*, we recognized the availability of cross-examination, change of venue, imposition of sanctions, and appellate review as adequate safeguards. 114 Nev. at 571, 958 P.2d at 87. Other jurisdictions have similarly recognized the adequacy of procedural safeguards built into the judicial system. *See Lythgoe v. Guinn*, 884 P.2d 1085, 1089 (Alaska 1994) (recognizing that change of venue and appellate review are adequate procedural safeguards to hold court-appointed experts accountable for negligence); *LaLonde v. Eissner*, 539 N.E.2d 538, 542 (Mass. 1989) (observing as adequate

the availability of cross-examination, appellate review, and a request for modification). The United States Supreme Court has additionally acknowledged the check on unpersuasive evidence provided by the impartial trier of facts as a procedural safeguard. *See Butz*, 438 U.S. at 517 ("Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact.").

Here, Vivian was at liberty to avail herself of any number of remedies. For instance, she might have cross-examined Dr. Roitman to establish the negligent method from which his diagnosis and prognosis were derived. We note, however, that the extent to which Vivian actually took advantage of available remedies is unclear from the record.[5] Even so, our determination is not contingent upon a factual finding that Vivian successfully utilized the remedies at her disposal. Thus, we satisfy the final query of the functional approach by simply noting the existence of these safeguards. *See Duff*, 114 Nev. at 570, 958 P.2d at 86 (noting the existence of procedural remedies, but not questioning whether the claimant actually availed himself); *see also Ducharm*, 118 Nev. at 616, 55 P.3d at 425 (noting that the third inquiry is "whether procedural safeguards *exist*" (emphasis added)).

Absolute immunity under Nevada law

Despite our conclusions, derived from the United States Supreme Court's functional approach and grounded in common law, Vivian argues that Nevada has not, and should not now, extend the defense of absolute immunity beyond defamation claims. We note that the cases of *Duff* and *Foster* negate Vivian's assertion. In *Duff*, we applied absolute immunity to a court-appointed psychologist accused of negligence in making a child custody recommendation amidst allegations of child abuse. 114 Nev. at 571, 958 P.2d at 87. Similarly, in *Foster v. Washoe County*, we granted absolute immunity to court-appointed special advocates sued for negligent investigation of child abuse. 114 Nev. 936, 943, 964 P.2d 788, 793 (1998). These applications of absolute immunity to claims for negligence demonstrate that we have not limited the doctrine's application to claims for defamation.[6] This court has not in fact made an issue of the type

[5]The district court questioned Vivian's failure to exclude Dr. Roitman as an expert witness, to impeach his testimony, or to seek sanctions, but this discussion failed to make the record more clear.

[6]The common-law and United States Supreme Court jurisprudence indicate that absolute immunity protects witness statements made during judicial proceedings from tort liability *in general* and do not limit absolute immunity's application to defamation claims. *See Briscoe*, 460 U.S. at 335 ("[T]he common law provided absolute immunity from subsequent *damages liability* for all persons—governmental or otherwise—who were integral parts of the judicial process." (emphasis added)). We note, however, that our application of absolute immunity has limitations. *See Alioto v. City of Shively*, 835 F.2d 1173, 1174 n.1 (6th Cir. 1987) ("[T]he doctrine of witness immunity does not shield from liability alleged conspiracies to falsify nontestimonial evidence."). Our adoption of the doctrine does not protect an expert's fraudulent acts.

of claim brought when considering the availability of an absolute immunity defense, and we do not at present find good reason to depart from that convention.

An unobstructed path to truth

Vivian additionally argues that because expert witnesses are procured to testify to the benefit of a hiring party, the goal of ensuring that the path to truth is unobstructed is not advanced by immunizing experts from negligence. She argues that the immunity that applies to a court-appointed expert, who is a neutral expert appointed by the court to assist the trier of fact, should not be afforded to a party-retained expert, who is a partisan witness advocating a position for a party. We disagree. Experts may be sought after and procured subject to the understanding that they will provide statements in support of a party's particular position. However, under the law, an expert opinion is not admitted to assist one party or the other; rather, it is admitted to assist the trier of fact by providing specialized knowledge. NRS 50.275;[7] *see also Panitz v. Behrend*, 632 A.2d 562, 565 (Pa. 1993) ("The primary purpose of expert testimony is not to assist one party or another in winning the case but to assist the trier of the facts in understanding complicated matters."). Once testimony is admitted, it is for the trier of fact to weigh the credibility of the expert's opinion and for additional safeguards to advance truth-finding. *See Briscoe*, 460 U.S. at 333-34 (noting that the fact-finder determines where the truth lies). It is in this light we conclude that the path to truth is best paved by immunizing expert witnesses, court-appointed or party-retained, from tort liability.

Accordingly, even if the factual allegations contained in Vivian's complaint were true, as a matter of law, Dr. Roitman's defense of absolute immunity precludes her claim, and the district court properly dismissed each of her causes of action.[8]

Based on the foregoing, we affirm the district court's order of dismissal.

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

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[7]NRS 50.275 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

[8]Dr. Roitman also contends that there was no doctor-patient relationship, and thus, he owed no duty of care to Vivian. We conclude that our holding as to absolute immunity is dispositive, and we therefore need not address this issue.

MATTHEW LEON MOULTRIE, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 65390

December 24, 2015 364 P.3d 606

Appeal from a judgment of conviction, pursuant to a conditional guilty plea, of possession of a controlled substance with intent to sell, a category D felony under NRS 453.337(2)(a). Fifth Judicial District Court, Esmeralda County; Robert W. Lane, Judge.

The court of appeals, Gibbons, C.J., held that: (1) the district court did not abuse its discretion by finding that defendant failed to demonstrate actual prejudice resulting from State's filing an information by affidavit 63 days after he was discharged by the justice court; (2) magistrate's error is "egregious error" when the magistrate commits plain error that affects the outcome of the proceedings for purposes of statute providing that, if, upon preliminary examination, accused has been discharged, the district attorney may, upon affidavit, file an information; and (3) the justice court committed "egregious error," which resulted in defendant's discharge, when it erroneously found that officer's testimony was hearsay, and thus, the district court did not abuse its discretion by granting State's motion to file an information by affidavit.

Affirmed.

Law Offices of Chris Arabia, PC, and *Christopher R. Arabia*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; and *Robert E. Glennen, III*, District Attorney, Esmeralda County, for Respondent.

1. Indictment and Information.
   The district court did not abuse its discretion by finding that defendant failed to demonstrate actual prejudice resulting from State's filing an information by affidavit 63 days after he was discharged by the justice court; although defendant asserted he did not confer with counsel or pursue any defense because he was unaware that he could be recharged, defendant failed to allege how this lack of preparation prejudiced his defense, or alternatively, how conferring with counsel or establishing a defense during the delay would have benefited his defense, and fact that defendant did not live in county during the delay did not demonstrate actual prejudice to his defense. NRS 173.035(2).
2. Indictment and Information.
   It is within the discretion of the district court to grant a motion to file an information by affidavit. NRS 173.035(2).
3. Indictment and Information.
   To establish that the district court abused its discretion by granting a motion to file an information by affidavit more than 15 days after the preliminary examination, defendant must demonstrate actual prejudice resulting from the untimely filing; the prejudice alleged cannot be hypothetical or speculative. NRS 173.035(2).

4. Criminal Law.
   The court of appeals reviews a district court's determination that magistrate committed egregious error in determining probable cause de novo. NRS 173.035(2).
5. Indictment and Information.
   Information by affidavit may be filed to correct a magistrate's egregious error, but not to correct deficiencies in evidence at the preliminary examination. NRS 173.035(2).
6. Indictment and Information.
   Magistrate's error is "egregious error" when the magistrate commits plain error that affects the outcome of the proceedings for purposes of statute providing that, if, upon preliminary examination, accused has been discharged, the district attorney may, upon affidavit of any person who had knowledge of commission of offense, file an information; statute contemplates a safeguard against egregious error by a magistrate in determining probable cause. NRS 173.035(2).
7. Criminal Law.
   Although the appellate court could treat State's failure to respond to defendant's claim regarding validity of search as a confession of error, the appellate court would decline to do so since the issue was not raised below and, therefore, was not preserved for appeal and issue did not affect the outcome of defendant's appeal, challenging the district court's allowing State to file an information by affidavit more than 15 days after the preliminary examination. U.S. Const. amend. 4; NRS 174.035(3); NRAP 31(d)(2).
8. Criminal Law.
   Without a motion or suppression hearing, an alleged illegal search and seizure could not be a basis to reverse the judgment of the district court. U.S. Const. amend. 4.
9. Criminal Law.
   Generally, a motion to suppress evidence must be filed to exclude evidence on constitutional grounds. U.S. Const. amend. 4; NRS 174.125, 179.085.
10. Criminal Law.
    The justice court's decision to exclude all evidence obtained from the search of the backpack as fruit of the poisonous tree was error, given that neither an oral or written motion to suppress was presented nor a hearing held, as required by statute. U.S. Const. amend. 4; NRS 174.125, 179.085.
11. Criminal Law.
    Officer's testimony that driver consented to search of car was not hearsay because it did not go to the truth of the matter asserted; rather, State offered it to establish why officer proceeded with the search of the car. U.S. Const. amend. 4; NRS 51.035.
12. Indictment and Information.
    The justice court committed egregious error, which resulted in defendant's discharge, when it erroneously found that officer's testimony was hearsay, and thus, the district court did not abuse its discretion by granting State's motion to file an information by affidavit; the justice court's error regarding the hearsay ruling was plain from a casual inspection of the record and resulted in defendant's discharge. NRS 51.035, 173.035(2).
13. Criminal Law.
    The justice court's role at the preliminary hearing is to determine whether there is probable cause to find that an offense has been committed and that defendant has committed it.
14. Criminal Law.
    Accused may be held to answer for a public offense other than that charged in the complaint.

15. Indictment and Information.
The justice court may permit State to amend the complaint to conform to the evidence presented.

16. Criminal Law; Indictment and Information.
During the preliminary examination, the justice court committed egregious error by denying State's motion to amend the complaint to charge defendant with a category D felony, and not a category C felony, and discharging defendant, and thus, the district court did not abuse its discretion in granting State's motion to file an information by affidavit; error in the complaint referring to a category C felony (a second offense) compared to a category D felony (a first offense) was immaterial in the preliminary examination, and at the preliminary examination, State presented sufficient proof to demonstrate that defendant had committed first offense possession of a controlled substance with the intent to sell, a category D felony. NRS 173.035(2), 453.337(2)(a), (b).

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

OPINION

By the Court, Gibbons, C.J.:

In this appeal, we address whether a district court abused its discretion by allowing the State to file an information by affidavit more than 15 days after the preliminary examination concluded where the defendant was discharged but was not prejudiced by the delay. Additionally, we define the term "egregious error" and address whether a justice court commits egregious error if the error results in the dismissal of a charge or discharge of a criminal defendant for lack of probable cause.

STATEMENT OF THE FACTS

Appellant Matthew Moultrie was a passenger in a car stopped for a traffic violation by Deputy Sheriff Matthew Kirkland. The driver orally consented to a search of the car. Kirkland discovered a backpack on the seat or floor behind Moultrie that contained $50, a glass pipe, and a plastic bag holding a crystalline substance. Moultrie claimed the items belonged to someone else. Kirkland arrested Moultrie for drug possession because Kirkland believed the substance was methamphetamine and it belonged to Moultrie. Moultrie admitted ownership of the items after being advised of his *Miranda*[1] rights and admitted he planned to sell the drugs. The substance tested presumptively positive for amphetamine.

The Justice Court of Esmeralda Township held a preliminary examination, and the State called Kirkland and another deputy as witnesses. Moultrie objected on hearsay grounds to Kirkland's testimony that the driver provided oral consent for a search of the car, and the justice court sustained the objection. Moultrie then objected to

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

any testimony about evidence seized during the search as fruit of the poisonous tree. The justice court briefly inquired into whether there was consent to search the backpack, but no testimony was given and no ruling was made. The justice court allowed the hearing to proceed but ultimately excluded the testimony describing the evidence seized during the search.

Possession of a controlled substance with intent to sell is a category D felony under NRS 453.337(2)(a). It is a category C felony if the defendant has a prior conviction and is convicted under NRS 453.337(2)(b). The State charged Moultrie in the criminal complaint with the category C felony but did not allege a prior conviction in the complaint or produce any evidence at the preliminary examination demonstrating that a prior conviction existed. During its rebuttal closing argument, the State moved to amend the complaint to charge Moultrie under NRS 453.337(2)(a) in order to conform to the evidence produced. The justice court denied the State's motion. The justice court concluded that the State did not meet its burden of proof for the category C felony and discharged Moultrie.

The State moved for leave to file an information by affidavit in the district court and included a proposed information charging Moultrie with the category D felony, asserting egregious error by the justice court. The State filed the motion 63 days after the justice court discharged Moultrie. Moultrie opposed the State's motion, claiming the motion was untimely, was filed without good cause for the delay, and was prejudicial. Moultrie also responded that the justice court did not commit egregious error; therefore, the State had no basis to file an information by affidavit.

The district court granted the State's motion 34 days after it was filed, concluding the State presented sufficient evidence during the preliminary examination to support a finding of probable cause for the category D felony. Additionally, the district court concluded that (1) the State's delay in filing the motion did not prejudice Moultrie, (2) the justice court committed egregious error by sustaining Moultrie's hearsay objection, and (3) the justice court committed egregious error by denying the State's motion to amend the complaint.

Moultrie pleaded guilty as charged but reserved the right to appeal the district court's order granting the State's motion to file an information. *See* NRS 174.035(3). The district court imposed a prison sentence of 19 to 48 months but suspended it and placed Moultrie on probation for five years. This appeal follows.

ANALYSIS

Timeliness of the motion

[Headnote 1]

Moultrie first contends that the district court erred by permitting the State to file an information by affidavit when the State filed its

motion for leave of court 63 days after he was discharged by the justice court. We disagree.

[Headnotes 2, 3]

It is within the discretion of the district court to grant a motion to file an information by affidavit. *See* NRS 173.035(2). To establish that the district court abused its discretion by granting a motion to file an information by affidavit more than 15 days after the preliminary examination,[2] the defendant must demonstrate actual prejudice resulting from the untimely filing. *See, e.g.*, *Berry v. Sheriff, Clark Cnty.*, 93 Nev. 557, 558-59, 571 P.2d 109, 110 (1977) (holding that where no prejudice was demonstrated, the district court did not abuse its discretion by denying a motion to dismiss an information that was filed more than 15 days after the preliminary examination); *Thompson v. State*, 86 Nev. 682, 683, 475 P.2d 96, 97 (1970) (same). The prejudice alleged cannot be hypothetical or speculative. *See Wyman v. State*, 125 Nev. 592, 601, 217 P.3d 572, 579 (2009) (rejecting claim of prejudice resulting from pre-indictment delay where the defendant failed "to make a particularized showing of actual, nonspeculative prejudice resulting from the delay"); *State v. Autry*, 103 Nev. 552, 555-56, 746 P.2d 637, 639-40 (1987) (reversing district court order granting a pretrial petition for a writ of habeas corpus where defendant's claims of prejudice were speculative and premature).

Here, the State did not file the motion for leave of court to file an information by affidavit until 63 days after the preliminary examination.[3] Moultrie asserted he was prejudiced by the delay because he did not confer with counsel or pursue any defense as he did not know he could be recharged. He also claimed that the effectiveness

[2]Although not argued below or on appeal, we note that applying the 15-day time limit to the filing of an information by affidavit pursuant to NRS 173.035(2) is problematic. Pursuant to NRS 173.035(3), an information must be filed within 15 days of the holding of a preliminary examination. If a defendant is held to answer, the State exercises an executive or administrative function by filing the information in district court. *See* NRS 173.045. The 15-day limitation is a logical restriction in the case of a defendant being held to answer because filing an information simply involves retitling the complaint as an information and endorsing the names of witnesses. *Id*. If a defendant is discharged, however, an information by affidavit may only be filed if the State first obtains leave of court, a judicial decision, without a statutory- or rule-imposed deadline on the court. *See* NRS 173.035(2). The State is thus put in an untenable position because it cannot comply with the time requirement in NRS 173.035(3) without judicial sanction, in contrast to when a defendant is held to answer. Therefore, the only deadline the State could meet would be with regard to its motion for leave to file the information by affidavit. *Cf.* NRS 34.700 (defendant may challenge the commitment to district court by filing a pretrial petition for writ of habeas corpus within 21 days of the first appearance in district court).

[3]The district court granted the motion for leave to file the information by affidavit 97 days after the preliminary examination was conducted; the information was filed 9 days after that order was signed.

of his defense was diminished because he did not live in Esmeralda County. The district court concluded that Moultrie's allegations of prejudice were speculative and did not warrant denial of the motion.

Although Moultrie asserted he did not confer with counsel or pursue any defense because he was unaware that he could be recharged, Moultrie failed to allege how this lack of preparation prejudiced his defense, or alternatively, how conferring with counsel or establishing a defense during the delay would have benefited his defense. Thus, we conclude the district court did not abuse its discretion by finding that Moultrie failed to demonstrate actual prejudice resulting from the delay and rejecting Moultrie's request to deny the motion based on the delay. *See id.* (concluding no actual prejudice was demonstrated where defendant alleged delay rendered potential witnesses unavailable but did not allege how the testimony of the absent witnesses would have benefited his defense). Moreover, the fact that Moultrie did not live in Esmeralda County during the delay does not demonstrate actual prejudice to Moultrie's defense.[4] *See id.*

Egregious error

Moultrie asserts that the district court erred by allowing the State to file an information by affidavit based on a finding that the justice court committed egregious error.

[Headnotes 4, 5]

We review a district court's determination of egregious error de novo. *See Martin v. Sheriff, Clark Cnty.*, 88 Nev. 303, 306, 496 P.2d 754, 755 (1972) (applying de novo review to determine whether the magistrate committed egregious error). An information by affidavit may be filed to correct a magistrate's egregious error but not to correct deficiencies in evidence at the preliminary examination. *State v. Sixth Judicial Dist. Court*, 114 Nev. 739, 741-42, 964 P.2d 48, 49 (1998). Although the Nevada Supreme Court has applied egregious error in discussing the propriety of filing an information by affidavit on numerous occasions, it has not defined the term. We take this opportunity to review its usage and to clarify what constitutes egregious error.

The Nevada Supreme Court first addressed the purpose of NRS 173.035(2) when it held that the statute "provides a safety valve against an arbitrary or mistaken decision of the magistrate." *Maes*

[4]To the extent Moultrie asserts that the district court erred by not addressing the State's failure to assert good cause for the delay in filing the motion to file an information by affidavit, Moultrie fails to support the claim with relevant authority and cogent argument; therefore, we decline to address this claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Nevertheless, parties should move diligently to resolve criminal proceedings. *See* NRS 169.035 (providing criminal procedure statutes "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay").

v. Sheriff, Clark Cnty., 86 Nev. 317, 319, 468 P.2d 332, 333 (1970), *holding limited in part on other grounds by Sheriff, Washoe Cnty. v. Marcus*, 116 Nev. 188, 995 P.2d 1016 (2000). In *Maes*, however, the court did not analyze the safeguard provision because no preliminary examination occurred. In *Martin*, the court held, because there was sufficient evidence to support the rape charge, the magistrate clearly erred by dismissing the charge, and the district attorney's only course of action was to refile the rape charge under NRS 173.035(2) and NRS 178.562(2). 88 Nev. at 306, 496 P.2d at 755.

In *Cranford v. Smart*, the Nevada Supreme Court first used the term "egregious error" in describing the safeguard provided by NRS 173.035(2) but did not define the term. 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976) ("[NRS 173.035(2)] contemplates a safeguard against egregious error by a magistrate in determining probable cause, not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary examination, through affidavit."). In *Feole v. State*, the court relied on its usage of "egregious error" in *Cranford* to conclude a justice court did not commit egregious error when it discharged a defendant based on insufficient evidence to support a finding of probable cause to support the charges. 113 Nev. 628, 631, 939 P.2d 1061, 1063 (1997), *overruled on other grounds by State v. Sixth Judicial Dist. Court*, 114 Nev. 739, 964 P.2d 48 (1998); *see also Murphy v. State*, 110 Nev. 194, 198, 871 P.2d 916, 918 (1994) (relying on the use of "egregious error" from *Cranford* to determine a justice court did not commit egregious error when it discharged a criminal defendant and the State had "utterly failed to produce evidence to show probable cause existed"), *overruled on other grounds by State v. Sixth Judicial Dist. Court*, 114 Nev. 739, 964 P.2d 48 (1998).

[Headnote 6]

The Nevada Supreme Court has thus applied the term "egregious error" in *Cranford* and its progeny when a charge was erroneously dismissed or a defendant was erroneously discharged based on a magistrate's error. Further, the error described in those cases is plain error, although that label is not used. *See Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) ("An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record." (internal quotation omitted)). Thus, we conclude a magistrate's error is "egregious error" when the magistrate commits plain error that affects the outcome of the proceedings. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that a court conducts plain error review by determining "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights" (citing *United States v. Olano*, 507 U.S. 725, 734 (1993) (clarifying that an error affects a party's substantial rights if it "affected the outcome of the district court proceedings"))).

Hearsay objection and exclusion of evidence

During the preliminary examination, Moultrie objected to Kirkland's testimony regarding the driver's consent to search as hearsay. Moultrie also objected to any evidence that followed the consent as fruit of the poisonous tree. The justice court sustained both objections and did not consider the evidence produced as a result of the search.

[Headnote 7]

Moultrie contends that, although the driver of the vehicle may have consented to the car search, he, as the owner of the backpack, never consented to a search of the backpack. Moultrie claims that a search of the backpack required third-party consent because Kirkland allegedly knew it was Moultrie's backpack. The State does not address Moultrie's claim regarding the validity of the search. Rather, the State responds that the hearsay ruling was egregious error, thereby allowing the filing of an information by affidavit.[5] We address this issue to the extent Moultrie is challenging the district court's determination that the justice court committed egregious error in sustaining the hearsay objection.

The justice court sustained Moultrie's hearsay objection to Kirkland's testimony that the driver provided oral consent for a search of the car. Although Moultrie had not filed a motion to suppress evidence based on the legality of the search, he then objected to any testimony about evidence seized during the search as fruit of the poisonous tree. The justice court did not rule on the legality of the search but ultimately excluded the testimony describing the evidence seized during the search.

In its motion for leave to file an information by affidavit, the State contended the justice court committed egregious error by not finding probable cause to support the drug possession charge. Specifically, the State claimed the justice court's incorrect hearsay ruling precluded the court from considering the evidence properly before it. Moultrie maintained that egregious error did not occur when the justice court sustained the hearsay objection.

The district court determined that the justice court erred by sustaining the hearsay objection. The district court further determined

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[5]Moultrie urges this court to treat the State's failure to respond to this issue as a confession of error. The issue raised by Moultrie challenges the validity of the search. We note, however, that Moultrie never filed a motion to suppress evidence and no court has ruled on the legality of the search. Although we could treat the State's failure to respond as a confession of error, *see* NRAP 31(d)(2); *Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984), where, as here, the issue was not raised below and was therefore not properly preserved for appeal and does not affect the outcome of this appeal, we decline to do so, *see Diaz v. State*, 118 Nev. 451, 453 n.2, 50 P.3d 166, 167 n.2 (2002) (stating that this court need not consider new issues on appeal).

that, although an evidentiary ruling normally would not be significant enough to rise to the level of plain error, in this case, the error substantially affected the State's rights because the error prevented the justice court from considering admissible evidence when making the probable cause determination. When the district court reviewed the evidence excluded by the justice court, it concluded there was sufficient evidence to support Moultrie being held to answer.

[Headnotes 8-10]

The justice court's decision to exclude all evidence obtained from the search of the backpack as fruit of the poisonous tree was error. Generally, a motion to suppress evidence must be filed to exclude evidence on constitutional grounds.[6] *See* NRS 174.125; NRS 179.085. Neither an oral or written motion to suppress was presented nor was a hearing held as required by NRS 174.125.

[Headnotes 11, 12]

Further, the justice court erred by finding Kirkland's testimony that the driver consented to a search of the car was hearsay. Kirkland's testimony was not hearsay because it did not go to the truth of the matter asserted. *See* NRS 51.035. Rather, the State offered it to establish why Kirkland proceeded with the search of the car. *See People v. Nelson*, 212 Cal. Rptr. 799, 803 (Ct. App. 1985) (holding that oral words of consent are not offered to prove the truth of the matter, rather they are relevant as words of authorization; they are therefore nonhearsay); *see also Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (holding that a statement is not hearsay when it is offered to show the effect on the listener and not for the truth of the matter).

Because the justice court's error regarding the hearsay ruling was plain from a casual inspection of the record, and resulted in Moultrie's discharge, we conclude the district court did not err by finding that the justice court committed egregious error.

Motion to amend the complaint

Moultrie also contends the district court erred in finding the justice court committed egregious error by denying the State's motion to amend the complaint. We disagree.

[Headnotes 13-15]

"The justice court's role at the preliminary hearing is to determine whether there is probable cause to find that an offense has

[6]This court is not holding that a motion to suppress evidence must be filed in justice court before a constitutional objection may be raised during a preliminary examination. Rather, only that no such motion was filed in justice or district court; therefore, without a motion or suppression hearing, the alleged illegal search and seizure cannot be a basis to reverse the judgment of the district court.

been committed and that the defendant has committed it." *State v. Justice Court of Las Vegas Twp.*, 112 Nev. 803, 806, 919 P.2d 401, 402 (1996). An "accused may be held to answer for a public offense other than that charged in the complaint." *Singleton v. Sheriff, Clark Cnty.*, 86 Nev. 590, 593, 471 P.2d 247, 249 (1970) (internal quotation omitted).[7] A justice court may permit the State to amend the complaint to conform to the evidence presented. *See generally Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005) (concluding that the district court did not abuse its discretion by allowing the State to amend the information to conform to the victim's testimony); *Grant v. State*, 117 Nev. 427, 433-34, 24 P.3d 761, 765 (2001) (holding that the district court did not err by amending a grand larceny charge from a category B to a category C offense to conform to the evidence presented, where the State raised the alternative of amending the criminal information, and the defendant was not prejudiced because he had sufficient notice of the lesser charge); *see also* NRS 178.610 (providing that a court may proceed in any lawful manner when procedure is not specifically prescribed).

[Headnote 16]

In its rebuttal closing argument during the preliminary examination, the State moved to amend the complaint to charge Moultrie with a violation of NRS 453.337(2)(a), a category D felony, and not NRS 453.337(2)(b), a category C felony. The State never alleged a prior conviction in the complaint, nor tried to prove a prior conviction during the hearing. The error in the complaint referring to a category C felony (a second offense) compared to a category D felony (a first offense) was immaterial in the preliminary examination. *See* NRS 173.075(3) (stating that error in citation of statute is not a ground for dismissal unless error resulted in prejudice).

Even if the complaint had alleged a prior offense, the State requested the prior conviction allegation be *removed*. The amendment to the complaint would have required Moultrie to defend the same underlying crime and because Moultrie had sufficient notice of the charge he was facing, granting the motion to amend would not have affected his substantial rights.[8]

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[7]"10785 N.C.L. 1929 and NRS 171.206 are found to be comparable." *Singleton*, 86 Nev. at 593 n.5, 471 P.2d at 249 n.5.

[8]An omission or inaccuracy in the description of a prior offense does not preclude its use without a showing of prejudice. *Dressler v. State*, 107 Nev. 686, 689, 819 P.2d 1288, 1290 (1991). Moreover, Moultrie's reliance on *Parsons v. State*, 116 Nev. 928, 934-36, 10 P.3d 836, 839-41 (2000), to assert that the State must substantiate the existence of prior convictions at preliminary examinations is inapposite because prior convictions are not part of the probable cause determination when they are used solely for penalty enhancement purposes, and not as part of the underlying charge. Moultrie is also misguided in relying on *Hobbs v. State*, 127 Nev. 234, 241, 251 P.3d 177, 181-82 (2011), where the State presented evidence of the prior convictions at the preliminary examination but failed to present the evidence at sentencing. Moultrie's comparison to these

At the preliminary examination, the State presented sufficient evidence to demonstrate that Moultrie had committed first offense possession of a controlled substance with the intent to sell, a category D felony under NRS 453.337(2)(a). Thus, the justice court abused its discretion in denying the motion to amend the complaint. This error is plain from the record and resulted in Moultrie's discharge. Therefore, we conclude that the district court did not err in finding the justice court committed egregious error by denying the motion to amend the complaint and discharging Moultrie.

Because we conclude the district court did not err in finding the justice court committed egregious error, we conclude the district court did not abuse its discretion by granting the motion to file an information by affidavit pursuant to NRS 173.035(2).

CONCLUSION

We conclude the district court did not abuse its discretion in finding that Moultrie failed to demonstrate actual prejudice resulting from the delay in filing the motion for leave to file an information by affidavit. We further conclude the district court did not err in finding that the justice court committed egregious error that resulted in Moultrie's discharge. Therefore, we conclude the district court did not abuse its discretion in granting the State's motion to file an information by affidavit. Accordingly, we affirm the judgment of conviction.

SILVER, J., concurs.

TAO, J., concurring:

I agree that the majority opinion addresses the only argument that Moultrie presents in his appeal, which relates to the prejudice that he has allegedly suffered but which, unfortunately for Moultrie, the record does not support. Both Moultrie and the district court assume that a court possesses some discretion to waive the deadline to file an information by affidavit; the arguments below were framed almost entirely around the question of how that discretion should be exercised. But I am not sure that any discretion exists in view of the plain language of the statutes.[1]

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cases, which involve defendants charged with crimes involving prior convictions such as DUI and domestic battery, is further misplaced because those crimes are misdemeanors and those defendants would be held to answer on felony charges only if two or more prior convictions were shown to exist. Here, the drug charge was a felony with or without an alleged prior felony conviction. The justice court's role is only to determine whether there is probable cause that the defendant committed an offense. *Parsons*, 116 Nev. at 933, 10 P.3d at 839.

[1]Therefore, this concurrence can be said to be *dubitante*. *See Lloyd v. J.P. Morgan Chase & Co.*, 791 F.3d 265, 274 (2d Cir. 2015) (Sack, J., concurring *dubitante*); *United States v. Jeffries*, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., concurring *dubitante*); *Majors v. Abell*, 361 F.3d 349, 355 (7th Cir. 2004)

By its terms, the 15-day deadline of NRS 173.035(3) applies not just to the filing of an information by affidavit; it applies to the filing of any information in district court regardless of whether the defendant (a) was held to answer the charges and bound over for trial as a result of a preliminary hearing, (b) was bound over to district court because he waived his right to a preliminary hearing, or (c) was discharged from custody after all charges were dismissed during the preliminary hearing and the State now seeks to reinstate the charges in district court by way of an information by affidavit.

In any of those scenarios, NRS 173.035(3) says rather plainly that the information "must" be filed no later than 15 days after the holding or waiver of the preliminary hearing. When a statute says "must," we are required to rigorously interpret that word as meaning that the Legislature intended to deprive courts of the discretion to refuse to do what the statute directs. *See* NRS 0.025(1)(c) (defining "must" as expressing a requirement); *see also Goudge v. State*, 128 Nev. 548, 553, 287 P.3d 301, 304 (2012) ("The use of the word 'shall' in the statute divests the district court of judicial discretion. This court has explained that, when used in a statute, the word 'shall' imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute." (internal citations omitted)); *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) ("[T]his court has stated that 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature . . . , [a]nd as it is used here, 'must' is a synonym of 'shall.'" (internal citation and quotation omitted)); *Johanson v. Eighth Judicial Dist. Court*, 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008) ("'[S]hall' is mandatory and does not denote judicial discretion." (alteration in original) (quoting *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006))); *Nev. Comm'n on Ethics v. JMA/Lucchesi*, 110 Nev. 1, 9-10, 866 P.2d 297, 302 (1994) ("It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory.").

Thus, "must" means "must," and an information of any kind, whether following a bind-over or following a discharge, cannot be filed more than 15 days following a preliminary hearing—unless the Legislature chose to give some leeway to that deadline in another statute. In the case of an information filed after a defendant has been held to answer, there is another statute that excuses the deadline: NRS 178.556 states that when a defendant has been held to answer, the district court "may" dismiss an information that was

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(Easterbrook, J., *dubitante*); *Bierenbaum v. Graham*, 607 F.3d 36, 59 (2d Cir. 2010) (Calabresi, J., concurring *dubitante*); *see also* Jason J. Czarnezki, *The Dubitante Opinion*, 39 Akron L. Rev. 1, 2 (2006).

not filed before the expiration of the 15-day deadline. The Nevada Supreme Court has interpreted this to mean that NRS 178.556 operates to give a district court some discretion to permit a late-filed information to proceed where a defendant has not suffered any prejudice arising from the delay and quite possibly also when the State cannot show "good cause" for the delay. *See Berry v. Sheriff, Clark Cnty.*, 93 Nev. 557, 558, 571 P.2d 109, 110 (1977); *Thompson v. State*, 86 Nev. 682, 683, 475 P.2d 96, 97 (1970) (discussing, but not resolving, argument that "good cause" was required to file belated information); *see also Huebner v. State*, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987) (speedy trial portion of NRS 178.556 can only be waived upon showing of good cause); *Anderson v. State*, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970) ("NRS 178.556 states that the court 'may' dismiss the information or indictment if the defendant is not brought to trial within 60 days. This rule is only mandatory if there is not good cause shown for the delay." (internal footnote omitted)); *Adams v. Sheriff, White Pine Cnty.*, 91 Nev. 575, 576, 540 P.2d 118, 119 (1975) (dismissal when State could not show "good cause" for delay between issuing of indictment and arraignment).

The district court interpreted this discretion as something that exists just as much when a defendant has been discharged as when he has been held to answer. But the statute does not say that. On its face, NRS 178.556 operates to supply this discretion only when the defendant has been held to answer the charges. *See* NRS 178.556(1) ("If no indictment is found or information filed against a person within 15 days *after the person has been held to answer* for a public offense which must be prosecuted by indictment or information, the court may dismiss the complaint." (emphasis added)). NRS 178.556 says nothing about cases in which a defendant has been discharged and the State seeks to file a late information by affidavit.

Therefore, the question raised by this appeal can be characterized as whether, notwithstanding the text of NRS 173.035(3) and 178.556, a district court also possesses the same, or at least similar, discretion to waive the deadline when the State seeks to file an information by affidavit more than 15 days (in this case, 63 days) after a defendant has been discharged rather than held to answer the charges.

If we are "strict constructionists" guided only by the words of the statutes and the intention of the Legislature as expressed in those words, I would say that the answer to that question is no. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("[T]he words of a governing text are of paramount concern."). Where the Legislature has expressly prohibited the exercise of judicial discretion, we do not have the power to create it ourselves except perhaps in the most compelling of circumstances. Here, NRS 173.035(3) limits judicial discretion subject to

the exception of NRS 178.556, which creates some discretion, but only when the defendant has been held to answer. NRS 178.556 says nothing about defendants who have been discharged, and the inclusion of one thing within a statute is normally read as the exclusion of other normally related things ("*expressio unius est exclusio alterius*"). *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'Expressio Unius Est Exclusio Alterius,' the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State."); *see also* Scalia & Garner, *supra*, at 170 ("a material variation in terms suggests a variation in meaning."). *See generally Sheriff, Pershing Cnty. v. Andrews*, 128 Nev. 544, 548, 286 P.3d 262, 264 (2012) (inferring that where the Legislature "clearly knows how to prohibit" an act under one statute and does not prohibit it under a second statute, the Legislature did not intend to prohibit it under the second statute). In the absence of statutory sanction, I would conclude that a district court does not possess any discretion to permit the filing of an information by affidavit more than 15 days after a defendant has been discharged, no matter how much "good cause" the State might be able to show and how little "prejudice" the defendant might be able to claim.[2]

Even if we look outside of the statutes, a close reading of existing Nevada Supreme Court precedent also suggests that the answer to the question before us must be no. In *Berry* and *Thompson*, the defendant was bound over and the court applied NRS 178.556 to excuse a late information filed more than 15 days after a defendant was held to answer the charges. *Berry*, 93 Nev. 557, 571 P.2d 109; *Thompson*, 86 Nev. 682, 472 P.2d 96. Neither of these cases involved an information by affidavit belatedly filed after a defendant was discharged. *Id.* No existing judicial precedent in Nevada that I can find contemplates or creates discretion to permit the late filing of an information by affidavit more than 15 days after a defendant was discharged rather than held to answer the charges.

Consequently, I would conclude that neither the Legislature nor the Nevada Supreme Court have created any discretion for a district court to ignore or waive the deadline of NRS 173.035(3) in the filing of an information by affidavit after a defendant's discharge. Thus, when confronted by a motion seeking leave to file an information by affidavit following discharge, a district court cannot grant leave to the State when more than 15 days have elapsed since the preliminary hearing.

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[2]There may be an interesting question regarding whether the discretion embodied in NRS 178.556 applies when a defendant has been held to answer some charges but was discharged from others, and the State seeks to restore (in other words, add) the dismissed charges by way of information by affidavit. In that case, the defendant has been bound over as required by NRS 178.556, but the State seeks to file an information by affidavit that normally would not fall within NRS 178.556's purview. But that question is not before us in this case.

One might wonder why the Legislature would divide things up in this way to create judicial discretion when it comes to an information filed after bind-over, but not in the case of an information by affidavit following a discharge. But whether a statute represents sound or wise policy is for the political branches of government to decide, not the judiciary. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 577, 289 P.3d 1199, 1212 (2012) (" 'When a statute is clear, unambiguous, not in conflict with other statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public policy grounds. That decision is within the sole purview of the legislative branch.' " (quoting *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578 n.4, 97 P.3d 1132, 1134 n.4 (2004))). *See generally Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."). When the Legislature has acted and its intention is clear and unambiguous, we must enforce the statute as written even if we think that the statute operates in an unfair way or was just a bad idea. *See Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001) ("[E]quitable principles will not justify a court's disregard of statutory requirements." (internal footnote omitted)).

Furthermore, the distinction is not without logical basis. The filing of an information after a defendant has been bound over represents a mere ministerial act that occurs after a judicial finding that the charges were supported by probable cause and the defendant ought to stand trial for the alleged crimes. The missing of that deadline may represent little more than a technicality, and it makes sense for the district court to have some discretion to overlook technical errors supported by good cause rather than be reluctantly compelled to dismiss serious felony charges based on a clerical error that may have been utterly excusable.

But when a defendant has been discharged, a judicial officer has affirmatively found that the charges were not worth pursuing any further, either because they lacked enough evidence to even constitute probable cause or perhaps because some material, nontechnical error existed in the State's pleadings that required dismissal. When the State seeks to file an information by affidavit after a defendant has already been discharged from custody, it effectively seeks to have one judicial officer overrule another and reinstate charges that have already been dismissed. On its merits the State's request might be warranted; after all, overworked judges do sometimes commit "egregious error" and charges might be erroneously dismissed when they should not have been. But it would not be utterly illogical for the Legislature to have decided that there ought to be a very tight, nondiscretionary deadline for the State to make this request and

thereby force the defendant to again face charges that were already dismissed.[3] At the very least, the Legislature would have been well within its constitutional powers in making that decision and purposefully depriving us of the discretion to second-guess it.[4]

Accordingly, I interpret NRS 173.035(3) as creating an absolute statutory bar to the filing of an information by affidavit more than 15 days after a defendant has been discharged from custody after a preliminary hearing, without any inquiry into the presence or absence of either "good cause" or prejudice.

BRYAN FERGASON, Appellant, *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.

No. 62357

December 24, 2015 364 P.3d 592

Appeal from a district court summary judgment in a forfeiture action. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

State filed complaint seeking forfeiture of money seized from bank accounts of claimant, who had been convicted of burglary and larceny, claiming the money seized represented proceeds attributable to the commission or attempted commission of a felony. The district court granted State summary judgment. Claimant appealed.

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[3]If we read the statutes otherwise, a logical flaw would exist. As a practical matter, the State possesses the right to file an information in district court without judicial intervention whenever a defendant has been held to answer. If filed late, the court may entertain a subsequent motion seeking dismissal for untimeliness under NRS 178.556, which the court has the discretion to grant or deny based upon the presence or absence of good cause and prejudice. But the State has no right to file an information by affidavit following discharge without judicial intervention; it cannot be filed without first obtaining leave of court. NRS 173.035(2). Because the district court would already have considered the timeliness of the State's filing when it considered the request for leave, there would have been no logical need for the Legislature to also create a separate ground for dismissal based on timeliness within NRS 178.556 for a late-filed information by affidavit; doing so would strangely require the district court to consider the same question of timeliness in two different motions.

[4]One could perhaps argue that, practically speaking, the State could easily tiptoe around the deadline and re-charge the defendant any time it wants, even months or years later, by simply submitting the same charges to a grand jury (at least in counties where one sits regularly). But having a grand jury reconsider charges and overrule a prior judge's finding of probable cause is, constitutionally speaking, an entirely different animal than having a later judge overrule a prior one through the submission of affidavits. In any event, the Legislature is entitled to be as arbitrary as it wants, and it is not required to draft statutes that are perfectly consistent and close every imaginable loophole.

The supreme court, PICKERING, J., held that: (1) claimant's burglary conviction did not establish that bank account funds were proceeds of such crime and subject to forfeiture, (2) claimant's conviction of possession of stolen property did not establish that bank account funds were proceeds of such crime and therefore subject to forfeiture, (3) fact issue as to whether funds seized from claimant's bank accounts were subject to forfeiture as proceeds attributable to the commission of a felony precluded summary judgment, and (4) claimant's failure to strictly comply with statute requiring him to describe the nature of his interest in seized property did not deprive him of standing to contest forfeiture.

Reversed and remanded.

Bailey Kennedy and *Dennis L. Kennedy* and *Paul C. Williams*, Las Vegas, for Appellant.

Thomas Joseph Moreo, Chief Deputy District Attorney, Clark County; *Marquis Aurbach Coffing* and *Micah S. Echols*, Las Vegas for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.
2. JUDGMENT.
   If the moving party on a motion for summary judgment will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence. NRCP 56(c).
3. JUDGMENT.
   The burden of proving the nonexistence of a genuine issue of material fact is on the moving party seeking summary judgment. NRCP 56(c).
4. JUDGMENT.
   When the party moving for summary judgment fails to bear his or her burden of production, the opposing party has no duty to respond on the merits and summary judgment may not be entered against the movant. NRCP 56(c).
5. JUDGMENT.
   The district court ruling on a motion for summary judgment must view the evidence presented through the prism of the substantive evidentiary burden. NRCP 56(c).
6. FORFEITURES.
   Forfeiture of funds seized from a bank account will not stand in the absence of evidence linking the money to criminal activity. NRS 179.1164(1).
7. FORFEITURES.
   Clear and convincing evidence required in a forfeiture action is a higher standard than proof by the preponderance of the evidence and requires evidence establishing every factual element to be highly probable. NRS 179.1164(1).
8. FORFEITURES.
   Defendant's burglary conviction, premised on unlawful entering with intent to commit larceny, bore no proceeds and, thus, did not establish that

funds in defendant's bank accounts were proceeds of such crime subject to forfeiture. NRS 179.1173(6), 205.060.

9. Forfeitures.
Defendant's conviction of possession of stolen property, without more, did not establish that funds in defendant's bank accounts were proceeds of such crime and therefore subject to forfeiture, where possession charge related to specific items of stolen property. NRS 179.1173(6), 205.275.

10. Forfeitures.
Without evidence that property on which defendant's larceny conviction was based had been converted to money, State could not demonstrate that such money came to rest in defendant's seized bank accounts and that such evidence was "necessary to sustain" larceny conviction, as required to establish basis for forfeiture of funds from defendant's bank accounts. NRS 179.1173(6), 205.220.

11. Courts.
Under the law of the case doctrine, when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case.

12. Courts.
Application of the law of the case doctrine requires that the appellate court actually address and decide the issue explicitly or by necessary implication.

13. Courts.
A significant corollary to the law of the case doctrine is that dicta have no preclusive effect.

14. Courts.
The supreme court opinion affirming defendant's criminal convictions and indicating, in context of conspiracy charge, that officers who executed search warrants on defendant's storage units, bank accounts, and safety deposit box testified, and that searches resulted in discovery of evidence that directly or inferentially linked defendant to the crimes of burglary and/or possession of stolen property, was a description, not a disposition, as it related to defendant's bank account and, thus, did not qualify for deference, pursuant to law of the case doctrine, in subsequent forfeiture action with respect to funds in bank account. NRS 179.1164(1).

15. Judgment.
Genuine issue of material fact as to whether funds seized from claimant's bank accounts were subject to forfeiture as proceeds attributable to the commission of a felony precluded summary judgment in forfeiture action. NRS 179.1164(1).

16. Appeal and Error.
Matters outside the record on appeal may not be considered by the supreme court.

17. Forfeitures.
Under the federal Civil Asset Forfeiture Reform Act, the government bears the entire burden to prove all elements of forfeiture by a preponderance of the evidence. Civil Asset Forfeiture Reform Act of 2000, 21 U.S.C. § 881(a)(6).

18. Forfeitures.
Under federal forfeiture law, a party asserting standing must fulfill both statutory and constitutional standing requirements. U.S. Const. art. 3, § 1.

19. Action.
State law does not require constitutional standing where the legislature has provided a statutory right to sue.

20. Action.
Standing is a self-imposed rule of restraint; state courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.

21. Action.
The supreme court looks to the language of a statute itself to determine a party's qualification to have standing.

22. Forfeitures.
Claimant's failure to strictly comply with statute requiring a claimant to describe the nature of his interest in seized property did not deprive him of standing in forfeiture action in which State asserted that money seized from bank accounts represented proceeds attributable to the commission or attempted commission of a felony; claimant asserted that State impermissibly seized funds from a bank account registered in his name, giving State notice that claimant was asserting an interest in the funds, which was all that was required. NRS 179.1158(1), 179.1171(6), (7).

23. Action.
State courts are free to reject procedural standing frustrations in favor of just and expeditious determination on the ultimate merits.

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

Bryan Fergason appeals the district court's entry of summary judgment in favor of the Las Vegas Metropolitan Police Department (the State), which resulted in the forfeiture of approximately $125,000 from his bank accounts. Because the State failed to present evidence showing an absence of genuine issue of material fact regarding whether the funds seized from Fergason's bank accounts were subject to forfeiture as proceeds attributable to the commission of a felony, the district court erred by granting summary judgment; and we reverse and remand for further proceedings.

I.

In 2010 Bryan Fergason was convicted of burglary, possession of stolen property, conspiracy to possess stolen property and/or to commit burglary, possession of burglary tools, and larceny. During the preceding criminal investigation, the State had located and seized, among other things, approximately $125,000 from bank accounts kept by Fergason at Bank of America. The State filed a complaint against the seized money in March 2007, pleading a single cause of action in forfeiture pursuant to NRS 179.1164(1). The complaint alleges that the money seized represents proceeds attributable to the commission or attempted commission of a felony.

The State served the forfeiture complaint and summons on Fergason, and he answered, affirming that he was a claimant to the

property. The case was then stayed pending the outcome of criminal proceedings. Following this court's affirmance of Fergason's criminal convictions, *Fergason v. State*, Docket No. 52877 (Order of Affirmance, August 4, 2010), the district court lifted the stay in the forfeiture proceedings, and the State moved for summary judgment four days later. After the State filed its motion, Fergason's attorney moved to withdraw from the case, and the motion was granted. Fergason filed his opposition to summary judgment in pro se while incarcerated. In his opposition, Fergason argues straightforwardly: "None of the cited to allegations in the Complaint or Motion for Summary Judgment indicate that the amounts seized from Fergason's account were attributable to felonies allegedly committed by Fergason."

Following a hearing, the district court granted summary judgment in favor of the State. In its findings of undisputed fact, the district court recited the convictions in the criminal cases; and in its conclusions of law, the district court said, "[t]he Judgments of Conviction in the criminal cases have become final. The proof of the facts necessary to sustain the conviction are, therefore, conclusive evidence in this forfeiture action against [Fergason] and satisfy all elements of the forfeiture complaint." The court further stated that as to Fergason, "the money was seized from his bank account as proceeds from illegal activities." This appeal followed.

II.

A.

[Headnote 1]

We review a district court's grant of summary judgment "de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001)). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c).

[Headnotes 2, 3]

"If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Put more simply: "The burden of proving the nonexistence of a genuine issue of material fact is on the moving party." *Maine v. Stewart*, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993) (citing *Shapro v. Forsythe*, 103 Nev. 666, 668, 747 P.2d 241, 243 (1987)).

[Headnote 4]

When the party moving for summary judgment fails to bear his burden of production, "the opposing party has no duty to respond on the merits and summary judgment may not be entered against him." *Maine*, 109 Nev. at 727, 857 P.2d at 759 (reversing summary judgment where burden of production never shifted) (citing *Clauson v. Lloyd*, 103 Nev. 432, 435, 743 P.2d 631, 633 (1987) (reversing summary judgment where movant did not meet the test in NRCP 56)); *see* NRCP 56(e) (summary judgment burden shifts to the non-movant only when the motion is "made and supported as provided in this rule"). Because the State was the plaintiff and the movant, it was required to show that no genuine issue of material fact existed as to its claim for forfeiture. *Cuzze*, 123 Nev. at 602, 172 P.3d at 134.

[Headnote 5]

The district court ruling on a motion for summary judgment "must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254 (1986) (applying rule to "clear and convincing" standard); *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992) (affirming summary judgment for defendant where plaintiff failed to show genuine issue of material fact as to fraud by clear and convincing evidence); *see also Kaelin v. Globe Commc'ns Corp*., 162 F.3d 1036, 1039 (9th Cir. 1998); *Flowers v. Carville*, 310 F. Supp. 2d 1157, 1161 (D. Nev. 2004).

In this case the State's complaint consists of a single cause of action pursuant to NRS 179.1164(1), which provides that "[a]ny proceeds attributable to the commission or attempted commission of any felony" are property "subject to seizure and forfeiture in a proceeding for forfeiture." NRS 179.1164(1)(a). " 'Proceeds' means any property, or that part of an item of property, derived directly or indirectly from the commission or attempted commission of a crime." NRS 179.1161.

[Headnote 6]

Nevada law is clear that forfeiture of funds seized from a bank account will not stand in the absence of evidence linking the money to criminal activity. *Schoka v. Sheriff, Washoe Cnty.*, 108 Nev. 89, 91, 824 P.2d 290, 291-92 (1992) (reversing forfeiture where there was "no evidence which traced any of the funds in the account to any criminal activity"). At the time the court decided *Schoka*, the State's burden of proof was by a preponderance of the evidence, and the burden is even higher today. As amended in 2001, NRS 179.1173(4) now requires the State to "establish proof by clear and convincing evidence that the property is subject to forfeiture," *see* 2001 Nev. Stat., ch. 176, § 1, at 874; Hearing on S.B. 36 Before the Senate Comm. on the Judiciary (Statement of Sen. Mark A. James, Chair-

man, Senate Comm. on Judiciary) (amendment raising the State's burden to clear and convincing evidence is designed to avoid "injustice" where government's proof is "not so compelling"), a burden that applies to each element of the claim. *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260-61, 969 P.2d 949, 957-58 (1999) (citing *Bulbman*, 108 Nev. at 111, 825 P.2d at 592, for the proposition that each element of a fraud claim must be proven by clear and convincing evidence). Therefore, the State must establish by clear and convincing evidence (1) that a felony was committed or attempted, and (2) that the funds seized from Fergason's bank account are "attributable to" or "derived directly or indirectly from" the commission or attempt. NRS 179.1161; NRS 179.1164(1)(a); NRS 179.1173(4).

[Headnote 7]

Clear and convincing evidence is a higher standard than proof by the preponderance of the evidence and requires " 'evidence establishing every factual element to be highly probable.' " *In re Discipline of Drakulich*, 111 Nev. 1556, 1567, 908 P.2d 709, 715 (1995) (quoting *Butler v. Poulin*, 500 A.2d 257, 260 n.5 (Me. 1985)). Thus, to determine whether the State's motion was properly supported, we must assess whether the record contains evidence from which a reasonable jury could find it highly probable that the money seized from Fergason was attributable to the commission of a felony. We examine each argument offered by the State to determine whether it satisfied its burden.

1.

In Nevada, where a forfeiture plaintiff presents proof that the claimant has been convicted of a criminal offense and that the conviction is final, then such proof is "conclusive evidence of all facts necessary to sustain the conviction." NRS 179.1173(6). The State argued below that Fergason's convictions for burglary, larceny, and possession of stolen property provide conclusive evidence sufficient to satisfy its summary judgment burden because "[t]he cause of action set forth in this forfeiture action mirrors the criminal charges set forth in the criminal cases" and is "supported by the same facts." However, the State did not demonstrate that the source of funds in Fergason's bank account was "necessary to sustain" his convictions as required by NRS 179.1173(6), and in fact the record indicates otherwise.

[Headnotes 8-10]

Fergason's criminal informations detail the facts on which his burglary charge is premised, as well as catalog the tangible items on which his larceny and possession of stolen property charges are based. First, burglary—unlawful entering with intent to commit

larceny—bears no "proceeds" as a matter of law; it concerns the act of unlawful entry and does not require the acquisition of money or property. *See* NRS 205.060. Possession of stolen property, without more, likewise does not establish the funds in Fergason's bank accounts as the proceeds of those crimes but, rather, his possession of specific items of stolen property. *See* NRS 205.275.[1] And while Fergason's larceny charge allegedly includes some money, in addition to property, and could have concerned property stolen and converted to money via sale, s*ee* NRS 205.220, the State presented the district court with no evidence even suggesting that it was. Without evidence that the property on which Fergason's larceny conviction was based had been converted to money, the State cannot begin to demonstrate both (1) that such money came to rest in Fergason's seized bank accounts and (2) that this evidence was "necessary to sustain" the conviction,[2] which is the predicate for applying NRS 179.1173(6).

In this case NRS 179.1173(6) does not apply to satisfy the State's summary judgment burden.

2.

The State further argues that this court's opinion affirming Fergason's criminal convictions constitutes law of the case, precluding him from contending that no evidence connects his convictions to the seized funds. Specifically, the State relies on the following two sentences of our order as "dispositive": "The officers who executed search warrants on Fergason's storage units, apartment, bank accounts, and safety deposit box also testified. These searches resulted in the discovery of evidence that directly or inferentially linked Fergason to the crimes of burglary and/or possession of stolen property." *Fergason v. State*, Docket No. 52877 (Order of Affirmance, Aug. 4, 2010).

[Headnote 11]

Under the doctrine of the law of the case, "when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Cre-*

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[1]Fergason's conspiracy conviction was based on his agreement to "commit burglary and/or possess stolen property," thus the same analysis governs. *See* NRS 199.480. In addition, because both the conspiracy charge and possession of burglary tools charge are gross misdemeanors, *see* NRS 205.080, "proceeds attributable to" these charges could not be a predicate for forfeiture under NRS 179.1164 because that statute requires connection to a felony. *See* NRS 179.1164(1)(a).

[2]Even if the State had shown that the property listed in the larceny count of Fergason's information had been converted to proceeds *and* placed in his bank account, whether those facts would be "necessary to sustain the conviction" so as to invoke NRS 179.1173(6) is unlikely but not evaluated here.

ative Mgmt. Servs., LLC, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010); *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998) (doctrine generally precludes a court from "'reconsidering an issue that has already been decided by the same court, or a higher court in the identical case'") (quoting *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)).

[Headnotes 12, 13]

Application of the doctrine requires that the appellate court "actually address and decide the issue explicitly or by necessary implication." *Dictor*, 126 Nev. at 44, 223 P.3d at 334 (citing *Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006)); *Rebel Oil Co.*, 146 F.3d at 1093. "'A significant corollary to the doctrine is that dicta have no preclusive effect.'" *Rebel Oil Co.*, 146 F.3d at 1093 (quoting *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703, 715 (9th Cir. 1990), and rejecting application of law of the case where based on dicta).

[Headnote 14]

In this case Fergason's bank account was not relevant to the crimes with which he was charged, as discussed above. Nor did our order in the criminal case relate them: We said, in the context of the conspiracy charge, that (1) officers who executed search warrants on various places including his bank testified, and (2) the totality of the searches resulted in discovery of evidence linking Fergason to the crimes. As it concerns the bank account, the court's order is a description, not a disposition, and therefore does not qualify for deference pursuant to law of the case. *See Rebel Oil Co.*, 146 F.3d at 1094 (explaining that where a court's statements are "better read as descriptions rather than dispositions" of claims, law of the case does not apply).

3.

[Headnote 15]

Because the State has failed to establish that its summary judgment burden was satisfied by the fact of Fergason's convictions or by law of the case, it was required to present evidence below sufficient to allow a reasonable jury to find that it was highly probable the money seized from Fergason's bank account was related to a felony.

In the district court, the State first supported its motion with grand jury testimony by Tonya Trevarthen, the girlfriend of Fergason's co-defendant Daimon Monroe. According to her testimony,

- "probably the majority of everything taken [by police]" had been stolen, but Trevarthen had not read a list of the items seized,
- Daimon Monroe considered stealing to be his job,

- Monroe came home with cash,
- Monroe kept cash at the home he shared with her,
- Monroe deposited cash into Trevarthen's bank account via ATM,
- the cash described above came from burglaries and selling stolen items, and
- Monroe sold property from their home almost every weekend.

None of the attached grand jury testimony refers to Fergason or his bank account.

[Headnote 16]

The State further presented testimony by Trevarthen from the trials of Fergason and Monroe. At trial Trevarthen repeated much of her grand jury testimony and added that

- she knew Fergason "pretty well" and saw him "pretty often,"
- Fergason and Monroe "never hid" that they committed burglaries and returned with stolen property,
- "cash would accumulate" in the home she shared with Monroe,
- she and Monroe deposited accumulated cash into her bank accounts,
- Monroe did not always have a job,
- income from her teaching job did not pay all the bills she and Monroe incurred,
- the home she shared with Monroe contained items of personal property that she did not pay for,
- she either knew or believed that "those items" had been stolen,[3]
- she withdrew $145,000 from her bank account and gave it to defendant Robert Holmes, and
- she characterized the money she gave Holmes as cash that was made by selling stolen property.

None of the trial testimony offered by the State in support of summary judgment refers to Fergason's bank account, any possession of

[3]The transcript does not make clear whether Trevarthen knew or believed items were stolen, or the exact items to which she refers.

cash by Fergason, or any conversion of stolen property to proceeds by Fergason.[4]

In *Schoka v. Sheriff, Washoe County*, this court held that where "there was no evidence which traced any of the funds in the [claimant's] account to any criminal activity," the account was not forfeitable as the proceeds of crime under NRS Chapter 179. 108 Nev. 89, 91, 824 P.2d 290, 291-92 (1992). In that case, the State alleged that Schoka conducted a scheme of real estate fraud: specifically, that he would purchase properties with assumable loans, collect rent, and then fail to make the mortgage payments. *Id.* at 90-91, 824 P.2d at 291. The State sought forfeiture of an investment account and a Mercedes Benz vehicle; and following an evidentiary hearing, the district court ordered forfeiture. *Id.* We reversed, concluding that although the State presented "several witnesses who testified to fraudulent conduct on the part of Schoka," forfeiture would not lie because the evidence relating to the car and account was "very limited." *Id.* at 91, 584 P.2d at 291.

The forfeiture decisions of other jurisdictions are in accord. In *Dobyne v. State*, an Alabama appellate court held that summary judgment was improper where the state had failed to present evidence "indicating that the money Dobyne carried on his person was derived from the sale of illegal drugs, was intended to be used to purchase illegal drugs, or was intended to be used in some way to facilitate Dobyne's illegal-drug trade." 4 So. 3d 506, 512 (Ala. Civ. App. 2008). That court announced that "[m]oney cannot be seized and forfeited merely because the person to whom it belongs is a convicted drug dealer. The State must prove to a 'reasonable satisfaction' an actual link between the money sought to be forfeited and a violation of the controlled-substances laws of this State." *Id.* at 512 (citing *Thompson v. State*, 715 So. 2d 224, 226 (Ala. Civ. App. 1997)); *McHugh v. Reid*, 324 P.3d 998, 1005-06 (Idaho Ct. App.

[4]In its answering brief on appeal, the State relies on pages of additional factual statements that were never presented to the district court below. Some statements are supported by materials in its three volumes of supplemental appendix, which consists of trial transcripts from the criminal cases that were never presented to the district court. Other statements are not supported at all. This evidence may not be considered on appeal: "Matters outside the record on appeal may not be considered by an appellate court." *Hooper v. State*, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979); *Smith v. U.S. Customs & Border Prot.*, 741 F.3d 1016, 1020 n.2 (9th Cir. 2014) (refusing to consider claim that "rest[ed] on facts and documents that were never before the district court"). "Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (citing *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979)); s*ee* NRAP 10(a) ("trial court record consists of the papers and exhibits filed in the district court").

2014) (reversing partial summary judgment where, despite claimants' guilty pleas to manufacture and distribution of a controlled substance, state failed to establish "essential" element of forfeiture: "the required nexus between the vehicle [seized] and its use for the purpose of distribution or receipt of marijuana").

In *Ivy v. State*, an Indiana court reversed summary judgment due to lack of a connection between the seized money and criminal activity under similar circumstances. 847 N.E.2d 963, 967 (Ind. Ct. App. 2006). Ivy's money was seized from his person at the time of arrest for giving a false name to an officer. *Id.* at 964. Ivy's false informing charge was eventually dismissed, but he was convicted on separate drug charges arising six weeks after the first arrest. *Id.* at 964-65. The state presented no evidence in the forfeiture case other than relating the circumstances of Ivy's first arrest. *Id.* at 967. The court concluded,

> In short, there was a complete lack of evidence that Ivy's money was connected to drug dealing. This is not to say that the State cannot establish the connection . . . at a full trial, but in the context of this summary judgment hearing, Ivy was deprived of his day in court.

Id.; *see also Bolden v. State*, 127 So. 3d 1195, 1201 (Ala. Civ. App. 2012) (following its decision in *Dobyne* to reverse summary judgment, concluding that "[e]vidence indicating that Bolden has sold drugs at some indefinite time in the past coupled with the discovery of $8,265 in his vehicle is insufficient to establish that the $8,265 was due to be forfeited").

The State cites *United States v. Thomas*, 913 F.2d 1111 (4th Cir. 1990), to argue that certain factors have been held "suggestive of proceeds of criminal activity," including possession of quantities of cash that vastly exceed income. *Thomas* does not guide this court's decision for two important reasons: First, no such evidence was presented by the State below, *see supra* (listing entire body of evidence presented to the district court), and the district court made no such findings. In fact, the district court made no findings other than recognizing the judgments of conviction; it relied *exclusively* on application of NRS 179.1173(6).

[Headnote 17]

Second, *Thomas* was governed by a statutory scheme that was abrogated by the federal Civil Asset Forfeiture Reform Act (CAFRA) in 2000. *See United States v. $80,180.00 in U.S. Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002) (explaining that CAFRA was enacted "[i]n response to widespread criticism of [the existing proof] regime"). At the time of *Thomas*, the government's only burden in forfeiture cases was to show "probable cause" that the seized property was subject to forfeiture, then the burden shifted to the *claim-*

ant, to prove by the preponderance of the evidence that the property was *not* forfeitable. *Thomas*, 913 F.2d at 1114. Under CAFRA, however, the government bears the entire burden to prove all elements of forfeiture by a preponderance of the evidence. *$80,180.00*, 303 F.3d at 1184 (also noting that probable cause is a lower standard than preponderance of the evidence). As discussed above, Nevada requires even more than that—*clear and convincing evidence* of every element.

The Nevada statutory forfeiture scheme indicates that *One 1979 Ford 15V v. State*, 721 So. 2d 631 (Miss. 1998), provides the better result. In that case, the trial court determined forfeiture of bank accounts was proper where the proof showed that the claimant was convicted of felony drug crimes and had "amounts of cash in excess of what would normally be expected from the operation of a store or working at a factory," despite no evidence of "any drug sale or transaction that contributed proceeds to" the accounts. *Id.* at 636-37. The supreme court found the trial court's decision clearly erroneous, concluding there was "no nexus between the bank and the crime committed" by the claimant. *Id.* at 637.

Finally, the State suggests that Fergason's conspiracy conviction "raises the notion" that he was jointly and severally liable for forfeited proceeds of the conspiracy, relying on *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000), and *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998). These two decisions were expressly rejected by the D.C. Circuit in a lengthy, detailed discussion. *United States v. Cano-Flores*, 796 F.3d 83, 91 (D.C. Cir. 2015).

We need not evaluate an inter-circuit disagreement, however, because the State offered no evidence that Fergason's bank account contained proceeds of *anyone's* criminal activity, which is required under its own cited authority. *See Corrado*, 227 F.3d at 552 (prior to assigning joint and several liability to RICO coconspirators, district court must determine whether "the facts support a finding of a sufficient nexus between the property to be forfeited and the RICO violation"); *Simmons*, 154 F.3d at 771 (finding forfeiture proper as to amount district court determined was " 'achieved through these specific wrongful acts,' " but not the total income of the codefendants' public relations firms); *cf. United States v. $814,254.76 in U.S. Currency*, 51 F.3d 207, 209 (9th Cir. 1995) (discussing federal provision allowing money in a bank account to be forfeited when not directly traceable to laundered funds *so long as* account previously contained funds traceable to illegal activity).

Had the State presented clear and convincing evidence that Fergason's bank account contained proceeds of Monroe's crimes, for example, the court could begin to determine whether joint and several liability should apply to cause forfeiture as to Fergason. However, it did not, speculating without record support that "Monroe had the

ability to transfer funds to and from Trevarthen's Bank of America account, which would presumably include Fergason's accounts." For this and foregoing reasons, the State failed to establish it was entitled to judgment as a matter of law, and the burden to produce evidence never shifted to Fergason.

B.

The State argues that Fergason lacks standing in this case because he failed to describe in his answer the interest he asserts in the seized bank funds. The State presented this argument for the first time on appeal, but we briefly address it because Fergason's standing is clear under Nevada law.

[Headnotes 18-20]

The primary authority cited by the State, *United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629 (9th Cir. 2012), concerns federal, Article III constitutional standing. *Id*. at 637-38. Under federal forfeiture law, a party asserting standing must fulfill both statutory and constitutional standing requirements. *United States v. 17 Coon Creek Rd.*, 787 F.3d 968, 973-74 (9th Cir. 2015). Nevada, however, does not require constitutional standing where the Legislature has provided a statutory right to sue. *Stockmeier v. Nev. Dep't of Corr.*, 122 Nev. 385, 393-94, 135 P.3d 220, 226 (2006), *disavowed in part on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008); *accord Heller v. Nev. State Leg.*, 120 Nev. 456, 461 n.3, 93 P.3d 746, 749 n.3 (2004) ("State courts are not bound by federal standing principles, which derive from the 'case or controversy' component of the United States Constitution."). In particular, we have adopted the view that

> "[s]tanding is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."

Stockmeier, 122 Nev. at 393, 135 P.3d at 225 (quoting 59 Am. Jur. 2d *Parties* § 30 (2002)).

[Headnote 21]

Instead, this court looks to "the language of the statute itself" to determine a party's qualification. *Id*. (reversing dismissal for failure to state a claim where open meeting law provided that "[a]ny person denied a right conferred by this chapter may sue"). Nevada has a "long-standing history of recognizing statutory rights that are broader than those afforded to citizens by constitutional standing." *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 633, 218

P.3d 847, 852 (2009) (following *Hantges v. City of Henderson*, 121 Nev. 319, 322-23, 113 P.3d 848, 850 (2005), to apply "the principle of statutory standing").

In *Cold Springs*, the plaintiff challenged an annexation decision by Reno pursuant to NRS 268.668, which confers standing on "any person . . . claiming to be adversely affected by" an annexation proceeding. 125 Nev. at 628-30, 218 P.3d at 849-50. There we held that under the statute, "only a claim of adverse effect is necessary for standing purposes"—whether the plaintiff could actually demonstrate an adverse effect did not relate to standing but rather to the merits. *Id.* at 633-34, 218 P.3d at 852-53; *see also id.* at 628, 218 P.3d at 849 (finding standing despite district court's characterization of claims of injury as "speculative").

Following our holding in *Cold Springs*, in this case only a *claim* to any right, title, or interest of record is necessary to establish standing under Nevada's forfeiture law. NRS 179.1171(7) provides that the proper parties to a Nevada civil forfeiture case are "the plaintiff and any claimant." A claimant is "any person who claims to have . . . any right, title or interest of record in the property or proceeds subject to forfeiture." NRS 179.1158(1).

Fergason alleged in the district court that the State impermissibly seized funds from a bank account registered in his name, therefore he is a person claiming to have a right, title, or interest of record in the property subject to forfeiture. Moreover, the State conceded Fergason's title to the bank account in its complaint, when it pleaded that officers "seized U.S. CURRENCY $124,216.36 from the account of BRYAN FERGASON . . . at Bank of America," thus it conceded Fergason's standing under NRS 179.1158(1) and the "statutory standing" principle recognized by *Hantges* and confirmed in *Cold Springs*.

[Headnote 22]

The State nevertheless contends that Fergason lacks standing because he did not comply with NRS 179.1171, which provides that "[t]he claimant . . . shall, in short and plain terms, describe the interest which the claimant asserts in the property." NRS 179.1171(6). The State cites no Nevada law holding or suggesting that the failure to strictly comply with NRS 179.1171(6) vitiates standing to contest a forfeiture, and we see nothing to suggest that Fergason's minor omission is fatal to his case.

[Headnote 23]

First, as we said in *Stockmeier*, state courts are "'free to reject procedural [standing] frustrations in favor of just and expeditious determination on the ultimate merits.'" *Stockmeier*, 122 Nev. at 393, 135 P.3d at 225 (quoting 59 Am. Jur. 2d *Parties* § 30 (2002)). Second, NRS 179.1171(6) mirrors the "short and plain statement of the

claim" language found in NRCP 8(a),[5] which courts, including this one, have long construed liberally, requiring only that the adverse party have notice of the claims being pleaded. *See Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978).

In this case, the State was on notice that Fergason claimed an interest in the money at issue because it seized the money from his bank account. In addition, the State recognized Fergason as a claimant when it named him as such in the complaint and caused him to be served with the forfeiture complaint pursuant to NRS 179.1171(5), which requires plaintiffs to serve "each claimant whose identity is known to the plaintiff or who can be identified through the exercise of reasonable diligence."

Ninth Circuit law also supports this conclusion: In *17 Coon Creek Road*, the court noted that courts may "'overlook'" the failure to comply with similar pleading requirements in federal forfeiture law. 787 F.3d at 974 (quoting *United States v. $11,500 in U.S. Currency*, 710 F.3d 1006, 1012 (9th Cir. 2013), and citing *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1262 (2d Cir. 1989), for the proposition that courts may "excus[e] technical noncompliance with procedural rules governing filing of claims on ground that claimant made sufficient showing of interest in property.")

The government argued in *17 Coon Creek Road* that the claimant lacked standing because he failed to respond to special interrogatories requesting him to describe his interest in the property. *Id.* at 971. The Ninth Circuit concluded,

> [B]ecause it cannot reasonably be disputed that Pickle's interest in the defendant property was sufficient to establish his *statutory* standing at the inception of the proceedings—recall that both parties alleged that Pickle was the "recorded owner" of the defendant property, and the government further alleged that Pickle and his son both resided on the property—Pickle's failure to respond to the government's special interrogatories did not alone vitiate his ability to maintain his claim.

Id. at 977; *see also id.* (citing *United States v. $154,853 in U.S. Currency*, 744 F.3d 559, 564 (8th Cir. 2014) (reversing district court's striking of claim for noncompliance with same procedural requirements where claimant "had adequately claimed to have earned the defendant funds through legitimate employment")).

In this case, where the State was unquestionably on notice that Fergason claimed an interest in the funds, to characterize his answer as defective for failing to further describe his interest would

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[5]"A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." NRCP 8(a).

be nothing more than a "procedural frustration" hindering the just determination of the merits in this case. *See Stockmeier*, 122 Nev. at 393, 135 P.3d at 225.

Because the State failed to present evidence sufficient to satisfy its burden, the burden of production did not shift to Fergason, and the district court improperly granted summary judgment. Accordingly, we reverse and remand to the district court for further proceedings.

Saitta and Gibbons, JJ., concur.

In the Matter of P.S., a Minor Child.

P.S., Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 66410

December 24, 2015 364 P.3d 1271

Appeal from a juvenile court order affirming the recommendation of the juvenile court master to adjudicate the amount of restitution appellant owed. Second Judicial District Court, Family Court Division, Washoe County; Egan K. Walker, Judge.

After master recommended adjudication of amount of restitution owed by juvenile, the district court denied juvenile's request for hearing de novo. Juvenile appealed. The supreme court, Gibbons, J., held that juvenile court had discretion regarding whether to grant hearing.

Affirmed.

[Rehearing denied February 1, 2016]

[En banc reconsideration denied March 25, 2016]

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

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

1. Appeal and Error.
   Issues of statutory interpretation are reviewed de novo.
2. Statutes.
   When the language of a statute is plain and unambiguous, such that it is capable of only one meaning, the supreme court should not construe that statute otherwise.
3. Infants.
   A juvenile court has discretion to direct a hearing de novo when, after a master of the juvenile court provides notice of the master's recommen-

dations, a person who is entitled to such notice files a timely request for a hearing de novo. NRS 62B.030(4).

Before SAITTA, GIBBONS and PICKERING, JJ.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we consider whether NRS 62B.030(4) requires the juvenile court to direct a hearing de novo if, after a master of the juvenile court provides notice of the master's recommendations, a person who is entitled to such notice files a timely request for a hearing de novo. We conclude that, under NRS 62B.030 the district court has discretion whether to direct a hearing de novo when one is timely requested.

DISCUSSION

Appellant P.S. argues that, pursuant to NRS 62B.030, a district court must conduct a hearing de novo after reviewing the recommendations of a master of the juvenile court if one is timely requested. We disagree.

Standard of review

[Headnotes 1, 2]

This case raises issues of statutory interpretation, which this court reviews de novo. *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 226, 209 P.3d 766, 768 (2009). "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *Id.* at 228, 209 P.3d at 769. "Thus, when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise." *Id.* at 228-29, 209 P.3d at 769.

NRS 62B.030 gives the district court discretion whether to grant a hearing de novo

NRS 62B.030(4) directs the district court's review of a juvenile court master's recommendation. NRS 62B.030(4) states:

> After reviewing the recommendations of a master of the juvenile court and any objection to the master's recommendations, the juvenile court *shall*:
>
> (a) Approve the master's recommendations, in whole or in part, and order the recommended disposition;
>
> (b) Reject the master's recommendations, in whole or in part, and order such relief as may be appropriate; *or*

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

(Emphasis added.)

[Headnote 3]

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

SAITTA and PICKERING, JJ., concur.