Here, the surety is not entitled to exoneration based on common law contract defenses because there is no such statutory ground for exoneration. Accordingly, we deny the petition.

HARDESTY and DOUGLAS, JJ., concur.

FCH1, LLC, A NEVADA LIMITED LIABILITY COMPANY, FKA FIESTA PALMS, LLC, A NEVADA LIMITED LIABILITY COMPANY DBA THE PALMS CASINO RESORT, APPELLANT, *v.* ENRIQUE RODRIGUEZ, AN INDIVIDUAL, RESPONDENT.

No. 59630

June 5, 2014* 335 P.3d 183

Appeal from a district court judgment following a bench trial in a tort action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Patron brought personal injury action against resort to recover damages for knee injury he sustained while sitting in bar when another patron dove for a sports souvenir that was tossed into group by promotional actor. The district court awarded patron $6,051,589 in damages. Resort appealed. The supreme court, PICKERING, J., held that: (1) the extended or limited duty doctrine did not extend to impose a duty on resort to protect a patron in resort's sports bar from injury caused by another patron diving for a sports souvenir; (2) the district court abused its discretion in excluding security and crowd control expert's testimony on the basis expert failed to state that he was testifying to a reasonable degree of professional certainty; (3) a new trial was warranted on bar patron's premises liability action against resort; (4) the district court improperly excluded testimony of resort's economic expert; (5) the district court abused its discretion in allowing one of bar patron's treating physicians to testify as to the appropriateness and value of treatments that physician did not provide to patron without an expert witness report and disclosure; and (6) the district court abused its discretion in allowing bar patron's treating physicians to testify as to the mechanism of patron's knee injury, and whether another physician's treatment of patron was causally related to the initial injury, without requiring an appropriate disclosure.

Reversed and remanded with instructions.

***Reporter's Note:** The court issued its decision in this matter on June 5, 2014. The opinion printed here is the amended opinion issued on October 2, 2014.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Appellant.

Hutchison & Steffen, LLC, and *Michael K. Wall*, Las Vegas, for Respondent.

1. Public Amusement and Entertainment.

   The extended or limited duty doctrine, which establishes the totality of the duty owed by a proprietor to protect spectators at a sporting event from injury, did not extend to impose a duty on resort to protect a patron in resort's sports bar from injury caused by another patron diving for a sports souvenir that was tossed into group by a promotional actor; unlike a baseball game, where the point is to watch athletes bat at and throw baseballs, the point of watching a televised sporting event is to watch a televised sporting event and while having souvenirs tossed in one's direction may or may not enhance the experience, as long as the event may still be viewed in that venue, the activity retains its character, and if the proprietor decided not to hire promotional actors to toss merchandise at patrons, patrons could still watch the game.

2. Negligence.

   Generally a premises owner or operator owes entrants a duty to exercise reasonable care, but courts may limit that duty.

3. Evidence.

   The district court abused its discretion in excluding security and crowd control expert's testimony at trial on bar patron's premises liability action against resort on the basis expert failed to state that he was testifying to a reasonable degree of professional certainty; the relevant inquiry should have been the purpose of the testimony and its certainty in light of its context, and the expert offered a definitive opinion based on research and expertise that he had never read anything anywhere that prohibited or inhibited or suggested that promotional items should not be thrown into a crowd of spectators, and not on speculation.

4. Evidence.

   The standard for admissibility varies depending upon the expert opinion's nature and purpose.

5. New Trial.

   A new trial was warranted on bar patron's premises liability action against resort, in which the district court awarded patron $6,051,589 in damages for knee injury he sustained while sitting in bar when another patron dove for a sports souvenir that was tossed into group by a promotional actor, insomuch as it was probable that but for the district court's erroneous ruling on the admissibility of resort's expert's testimony, a different result might have been reached on the matter of resort's breach.

6. Evidence.

   The district court improperly excluded testimony of resort's economic expert who countered bar patron's measure of damages on the basis expert did not state that he testified to a reasonable degree of professional probability; the failure to testify to a reasonable degree of professional probability was not dispositive, and expert explained that he used his expertise to make his calculations, and attempted to further instruct the court as to his methodology, which the court prohibited him from doing.

7. Pretrial Procedure.

   While a treating physician is exempt from the written report requirement for a trial expert, this exemption only extends to opinions that were formed during the course of treatment; where a treating physician's testi-

mony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements. NRCP 26(b)(4).

8. Pretrial Procedure.
The district court abused its discretion in allowing one of bar patron's treating physicians, who treated patron for pain associated with a knee injury he sustained while sitting in bar when another patron dove for a sports souvenir that was tossed into group by promotional actor, to testify as to the appropriateness and value of treatments that physician did not provide to patron without an expert witness report and disclosure. NRCP 16.1, 26(b)(4).

9. Pretrial Procedure.
The district court abused its discretion in allowing bar patron's treating physicians to testify as to the mechanism of patron's knee injury, and whether another physician's treatment of patron was causally related to the initial injury, without requiring an appropriate disclosure. NRCP 16.1(a)(2)(B).

Before Pickering, Hardesty and Cherry, JJ.

AMENDED OPINION

By the Court, Pickering, J.:

At issue is the alleged negligence of Palms Casino Resort in allowing promotional actors to toss souvenirs into a crowd of patrons watching a televised sporting event at the casino's sports bar. Specifically, we must decide whether to extend the limited-duty rule that this court established in *Turner v. Mandalay Sports Entertainment*, 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008), to these facts. We decline to do so, and thus hold there was no error in the district court's refusal to find, as a matter of law, that Palms owed no duty of care. Nonetheless, a new trial is warranted due to evidentiary errors that affected the outcome of the proceeding below.

I.

Respondent, Enrique Rodriguez, sued the Palms Casino Resort to recover damages for the knee injury he suffered while sitting in its "Sportsbook" bar watching Monday Night Football on television. The injury occurred when another patron dove for a sports souvenir that Brandy Beavers, an actress paid by the Palms to dress as a cheerleader for the Monday Night Football event, had tossed into the group.[1] Rodriguez sued Palms on a theory of negligence.

The matter was tried before the court in a bench trial. Over objection by Palms, the district court permitted several of Rodriguez's treating physicians to testify to the nature and severity of his condition, its causes, and the appropriateness of treatment, both ren-

[1]Whether or not Beavers and two other women who were also engaged in this souvenir tossing were Palms' employees is unclear and not analyzed or argued on appeal.

dered to and recommended for him. It then struck the testimony of Palms' experts on security and crowd control, and economics because they failed to "opine[ ] that their opinions were given to a reasonable degree of professional probability." Ultimately, the district court determined that Palms was liable as a matter of law and awarded Rodriguez $6,051,589 in damages. This appeal followed.

II.

[Headnote 1]

The parties and the district court assumed that Rodriguez's claim was based on a theory of premises liability, namely that the Palms had increased the risk posed to Rodriguez by not stopping the promotional actors' souvenir-tossing. This is a somewhat unusual application of the doctrine, because alleged negligent conduct and not a condition on the Palms' land caused the injury, perhaps settled upon because the employment status of the women doing the tossing could not be established below. But this court has not limited premises liability to circumstances where a condition on the land caused an injury, *see, e.g.*, *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 860, 265 P.3d 688, 692 (2011); *Basile v. Union Plaza Hotel & Casino*, 110 Nev. 1382, 1384, 887 P.2d 273, 275 (1994); *Gott v. Johnson*, 79 Nev. 330, 332, 383 P.2d 363, 364 (1963), and the Restatement sanctions such an application where the landowner has acted to increase the risk posed to entrants. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 51(a) (2012). In any case, because the district court and both parties analyzed the claim as one based on premises liability, we follow suit.

[Headnote 2]

Generally a premises owner or operator owes entrants a duty to exercise reasonable care, *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 775, 291 P.3d 150, 152 (2012), but courts may limit that duty. *See* Restatement (Second) of Torts § 496C cmt. d (1965); Restatement (Third) of Torts: Phys. & Emot. Harm § 7(b) (2010); *see also Turner v. Mandalay Sports Entm't, L.L.C.*, 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008). Typically, courts make such limitations in "the sports setting" as this court had occasion to do in *Turner*. *See Nalwa v. Cedar Fair, L.P.*, 290 P.3d 1158, 1162 (Cal. 2012). Palms analogizes the circumstances surrounding Rodriguez's injury to those in *Turner*, as well as those in similar cases cited in an annotation we relied upon in *Turner*: *Pira v. Sterling Equities, Inc.*, 790 N.Y.S.2d 551, 552 (App. Div. 2005); *Harting v. Dayton Dragons Prof'l Baseball Club, L.L.C.*, 870 N.E.2d 766 (Ohio Ct. App. 2007); *Loughran v. The Phillies*, 888 A.2d 872 (Pa. Super. Ct. 2005).

In *Turner*, a foul ball struck a baseball game attendee in the face while she sat in Cashman Fields' unfenced "Beer Garden." *Turner*,

124 Nev. at 216, 180 P.3d at 1174. We held that the duty the stadium's owners and operators owed an attendee was limited to providing covered seating and otherwise protecting her from "unduly high risk of injury," and that a foul ball did not pose such a risk because it was a "known, obvious, and unavoidable part of all baseball games." *Id.* at 216-19, 180 P.3d at 1174-76. In adopting this rule, this court acted as had many others—there is a well-established and long-standing body of case law similarly limiting the duty owed by baseball stadium owners and operators to game attendees. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 485 (5th ed. 1984).

The foreign cases relied upon by Palms are part of this body of law. Thus, in *Pira* the plaintiff was struck by a baseball that a player "tossed casually to fans as a souvenir . . . after he completed his pre-game warmup routine." *Pira*, 790 N.Y.S.2d at 551. The New York court granted summary judgment because "the plaintiff failed to raise a triable issue of fact as to whether the defendants unreasonably increased the inherent risks to spectators associated with the game of baseball." *Id.* at 552. In *Loughran*, the plaintiff was hit by a baseball thrown into the stands by a player after the player had caught it for the last out. *Loughran*, 888 A.2d at 874. The appellate court upheld the trial court's grant of summary judgment because "[c]ountless Pennsylvania court cases [had] held that a spectator at a baseball game assumes the risk of being hit by batted balls, wildly thrown balls, foul balls, and in some cases bats." *Id.* at 876. And in *Harting*, the plaintiff was struck by a foul ball while she was "distracted by the antics" of a costumed mascot chicken. *Harting*, 870 N.E.2d at 770. The Ohio court applied the limited-duty rule because the plaintiff "understood the risks associated with being a spectator at a baseball game, and management for the [baseball team] made numerous announcements designed to warn patrons of the possible dangers inherent in the sport." *Id.* at 770-71.

In sum, though the facts vary slightly among these cases, the question in each was the extent to which a baseball stadium owner or operator has a duty to protect game attendees from errant baseballs and bats, and each holding was limited to the specific facts in issue. *See Turner*, 124 Nev. at 216-19, 180 P.3d at 1174-76; *Pira*, 790 N.Y.S.2d at 551; *Harting*, 870 N.E.2d at 768-69; *Loughran*, 888 A.2d at 877. Thus they do not control the circumstances at hand in any obvious way; Rodriguez's injury occurred while he watched a televised sporting event at a bar, not while he attended a live game at a stadium, and he was hit by a third-party patron diving for promotional gear, not a piece of sporting equipment involved in the game itself.

Courts in other jurisdictions have extended the "primary-assumption-of-the-risk," "limited-duty," or "no duty" doctrine—

the names are used interchangeably, *see Turner*, 124 Nev. at 218, 180 P.3d at 1176 ("limited duty"); *Harting*, 870 N.E.2d at 768-69 ("primary assumption of risk"); *Loughran*, 888 A.2d 872 ("no duty")—from these limited circumstances to other recreational activities "involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity." *See, e.g.*, *Nalwa*, 290 P.3d at 1163. Palms claims that "tossing souvenirs to audiences at sporting events and other entertainment venues is a very common, well-accepted activity," and suggests that therefore the risk associated with such promotional tossing cannot be eliminated without altering the fundamental nature of the underlying sporting or entertainment event. But, even assuming that this court was willing to extend the *Turner* doctrine to all recreational activities involving an inherent risk of injury, we cannot agree that any risk of injury inheres in the underlying activity Rodriguez engaged in here, namely attending a televised sporting event at a casino sports bar.

"[M]any spectators prefer to sit where their view of the game is unobstructed by fences or protective netting and the proprietor of a ball park has a legitimate interest in catering to these desires." *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 222-23 (Mich. Ct. App. 2001) (quotation marks omitted). A stadium owner or operator cannot eliminate the risk errant balls might pose to spectators in such seating without fundamentally altering the game: a batter cannot predict the flight of a ball, so an owner or operator can only remove the risk that a struck ball might fly foul into uncovered seating by prohibiting all batting; and, the hope of retrieving a baseball as a souvenir has "become inextricably intertwined with a fan's baseball experience." *Loughran*, 888 A.2d at 876. The risk involved in riding in bumper cars, the activity to which the California Supreme Court extended the limited-duty rule in *Nalwa*, is inherent because "[t]he point of the bumper car is to bump." *Nalwa*, 290 P.3d at 1164. And, "[i]mposing liability would have the likely effect of the amusement park either eliminating the ride altogether or altering its character to such a degree . . . that the fun of bumping would be eliminated . . . . Indeed, who would want to ride a *tapper car* at an amusement park?" *Id.* (quotation marks omitted).

In *Nalwa*, the California Supreme Court approved a California appellate court's extension of the limited-duty doctrine where a plaintiff was burned when he "tripped and fell into the remnants of the Burning Man effigy while participating in the festival's commemorative ritual." *Id.* at 1163 (citing *Beninati v. Black Rock City, L.L.C.*, 96 Cal. Rptr. 3d 105, 106 (Ct. App. 2009)). In that case the court had noted: "As in previous years, the festival participants had set ablaze a 60-foot combustible sculpture of a man which, because of its gigantic size, was built on an equally large platform made of

combustible material and was held upright by wire cables. Once much of the material had burned, and the conflagration had subsided but was still actively burning, Beninati and others walked into the fire." *Beninati*, 96 Cal. Rptr. 3d at 110. Because "[p]ersons who attend Burning Man throw objects into the fire 'so attendees can participate . . . completely with [sic] the Burning Man experience,' " the court determined that the risk of burns associated with the fire was "necessary to the event." *Id.* at 107, 110.

Put simply: the point of attending a live baseball game is to watch athletes bat at and throw baseballs, the point of driving a bumper car is to bump, the point of attending Burning Man is to participate in a "commemorative ritual" involving a giant bonfire; so batting, throwing, bumping, and bonfires cannot be eliminated from these activities. But the point of watching a televised sporting event at a sports bar is . . . to watch a televised sporting event at a sports bar; having souvenirs tossed in one's direction may or may not enhance the experience depending on one's preference, but as long as the televised event may still be viewed in that venue the activity retains its character. And, if the proprietor of a sports bar declines to hire promotional actors to toss merchandise at attendees, participants can still watch a game with other fans in a sports-themed, alcohol-fueled venue.

So, assuming but not deciding that *Turner* could be extended along *Nalwa*'s lines—and it may be that for certain activities in certain venues the tossing of promotional items is so "inextricably intertwined with [the] . . . experience" that its elimination would alter the fundamental nature of the event in question, *see, e.g.*, *Loughran*, 888 A.2d at 876; though writers elsewhere have suggested that once the injury-causing conduct has strayed too far from the core activity the limited-duty doctrine is inapplicable,[2] *see* Scott B. Kitei, *Is the T-Shirt Cannon "Incidental to the Game" in Professional Athletics?*, 11 Sports Law. J. 37, 56 (2004)—extending it to the circumstances before us here would be a bridge too far. The district court did not err by declining to find that Palms owed no duty as a matter of law.

III.

[Headnote 3]

We thus turn to whether Palms breached the duty it owed Rodriguez as a premises owner by failing to take reasonable care. *See* Restatement (Second) of Torts § 341A; Restatement (Third) of Torts § 7 cmts. i & j. Palms called an expert on security and crowd con-

[2]Though, as we note below, even where the connection between the injury-causing conduct and the core activity is attenuated, affirmative defenses may survive.

trol, Forrest Franklin, who offered an opinion that throwing promotional items into crowds is not uncommon and generally was safe. He described his experience working crowd control and security at events where promoters threw memorabilia, in settings ranging from bicycle races to a conference for "the largest security organization on the planet," and indicated that he knew of no resulting injuries. And he stated that in his years of experience he had "never read anything anywhere that prohibits or inhibits or suggests that, or mandates that it [throwing items into an audience] shouldn't be done." Indeed, according to Franklin the activity was so commonplace that he had "hardly ever heard of anybody not doing it." This testimony suggests that the Palms' conduct was both commonly engaged in and safe, and in turn that the Palms acted reasonably and that Rodriguez's injury was not foreseeable. Given that Rodriguez did not present any expert testimony to the contrary, such evidence could reasonably have shifted the district court's verdict in the Palms' favor.

[Headnote 4]

But, the district court struck Franklin's testimony based on his failure to state that he testified to a "reasonable degree of professional probability." In doing so the district court relied on *Hallmark v. Eldridge*, 124 Nev. 492, 504, 189 P.3d 646, 654 (2008) (holding that evidence was improperly admitted where a medical expert failed to testify to a "reasonable degree of medical certainty"). This reliance was in error. As we have previously indicated, *Hallmark*'s refrain is functional, not talismanic, because the "standard for admissibility varies depending upon the expert opinion's nature and purpose." *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005). Thus, rather than listening for specific words the district court should have considered the purpose of the expert testimony and its certainty in light of its context. *See Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 529-30, 262 P.3d 360, 368 (2011).

[Headnote 5]

Perhaps recognizing this, on appeal Rodriguez attempts to reframe the district court's holding as one finding the Palms' experts' testimony unduly speculative. But Franklin stated that he based his opinion on his years of experience in crowd control and safety and that he had "never read anything anywhere that prohibits or inhibits or suggests that, or mandates that it shouldn't be done." He thus offered a definitive opinion based on research and expertise, not speculation. So, exclusion of his testimony was an abuse of discretion. Inasmuch as it is probable that but for this erroneous ruling a different result might have been reached on the matter of Palms' breach, a new trial is warranted. *Cook v. Sunrise Hosp. & Med. Ctr.,*

L.L.C., 124 Nev. 997, 1009, 194 P.3d 1214, 1221 (2008). And because we remand for a new trial on the issue of Palms' negligence, we leave for another day the question of whether Rodriguez engaged in risk assumption so as to implicate any affirmative defense that is available in Nevada.

IV.

[Headnote 6]

In light of our decision to remand for a new trial, we offer additional instruction. First, we conclude that the district court improperly excluded testimony by Dr. Thomas Cargill, an economist who countered Rodriguez's measure of damages based on the "paucity" of information that his expert relied upon as well as his "averaging" of Rodriguez's tax returns. Like Franklin, Cargill did not state that he testified to a reasonable degree of professional probability, but as we held with regard to Franklin, this failure is not dispositive. And, because Dr. Cargill explained that he used his "expertise" to make this calculation and attempted to further instruct the district court as to his methodology (though the district court prohibited him from so doing), his testimony was sufficiently certain given its purpose and context. *Williams*, 127 Nev. at 529-30, 262 P.3d at 368.

[Headnote 7]

The district court judge also admitted and considered inadmissible testimony by Rodriguez's treating physicians. Rodriguez did not provide a written NRCP 26 expert witness report for any of these physicians. While a treating physician is exempt from the report requirement, this exemption only extends to "opinions [that] were formed during the course of treatment." *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817, 826 (9th Cir. 2011); *see Rock Bay, L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. 205, 211 n.3, 298 P.3d 441, 445 n.3 (2013) (noting that when an NRCP is modeled after its federal counterpart, "cases interpreting the federal rule are strongly persuasive"). Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements. *Goodman*, 644 F.3d at 826.

[Headnote 8]

One of Rodriguez's physician-witnesses, Dr. Joseph Schifini, treated Rodriguez for pain associated with his knee injury but testified about: orthopedic surgery (noting that he often could "predict" what a surgeon would do, deeming the orthopedic surgeon's billing rate reasonable, and finding Rodriguez's surgeon to be well-educated and qualified); neurology and neurological science (predicting the reasonable cost of a "spinal stimulator" and its likely effect on Rodriguez); podiatry (suggesting that Rodriguez's injury caused his ingrown toenail); radiology (assessing what type of X-ray

allowed for the most accurate readings); and damages (criticizing a life-care plan as "one of the worst" he had seen in terms of its assessment of damages). Dr. Schifini testified that he formed these opinions during his review of a compendium of Rodriguez's medical records, which consisted of "thousands of pages of documents" from "many, many providers." To the extent that Dr. Schifini reviewed these documents in the course of providing treatment to Rodriguez, he could offer an opinion based on them. *See Goodman*, 644 F.3d at 826; *see also* NRCP 16.1 drafter's note (2012 amendment). But Dr. Schifini did not testify that he had reviewed the documents during the course of his treatment, only that he had "reviewed all the medical records in this case."

In *Ghiorzi v. Whitewater Pools & Spas Inc.*, No. 2:10-cv-01778-JCM-PAL, 2011 WL 5190804 (D. Nev. Oct. 28, 2011) (not reported), the same Dr. Schifini opined, ostensibly as the plaintiff's treating physician, as to the appropriateness and value of treatments that he did not provide to the plaintiff; that all that treatment was "directly related to" the defendants' alleged negligence; that the plaintiff "had tremendous pain and suffering"; and what future treatment the plaintiff might require. *Ghiorzi*, 2011 WL 5190804, at *8. Similar to his assertions before the state district court in this case, Dr. Schifini indicated to the federal district court in *Ghiorzi* that he formed these opinions during his review of the plaintiff's medical records, but elaborated that he undertook that review in order to form "opinions regarding the care, appropriateness of care, necessity of care and relatedness of care provided to [the plaintiff]." *Id.* The federal district court limited Dr. Schifini's testimony to "his single examination of the [p]laintiff," the results of MRIs he ordered for the plaintiff, and the necessity and cost of the epidural injection he administered to the plaintiff, because by testifying more broadly Dr. Schifini testified as an expert, not a treating physician. *Id.* at *9. Given the similar breadth in Dr. Schifini's testimony in this case and his vagueness as to the purpose of his review of Rodriguez's medical records, the federal district court's assessment is applicable. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n.2, 245 P.3d 542, 546 n.2 (2010) (this court may rely on unpublished federal district court opinions as persuasive, though nonbinding authority). Allowing Dr. Schifini to testify as he did without an expert witness report and disclosure was an abuse of the district court's discretion.

Moreover, even if Dr. Schifini reviewed records from other providers in the course of his treatment of Rodriguez and not in order to form the opinions he proffered, he could only properly testify as to those opinions he formed based on the documents he disclosed to Palms. NRCP 16.1 drafter's note (2012 amendment); *see also*

Washoe Cnty. Bd. of Sch. Trustees v. Pirhala, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (noting that the purpose of discovery is to take the "surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial"). And of the "thousands of pages" Dr. Schifini apparently read to form the opinions he expressed at trial, he disclosed only 21 pages of records in discovery.

[Headnote 9]

As to Rodriguez's remaining "treating physician" witnesses, Dr. Walter Kidwell testified for Rodriguez as to "the mechanism" of his injury, and Dr. Maryanne Shannon testified as to whether another doctor's treatment of Rodriguez was "causally related" to his initial injury. Allowing Dr. Kidwell and Dr. Shannon to so testify without requiring an appropriate NRCP 16.1(a)(2)(B) disclosure was also an abuse of the district court's discretion—once they opined as to the cause of Rodriguez's condition and treatments they should have been subject to the section's disclosure standards. *See* NRCP 16.1(a)(2)(B).

As the Palms notes, the district court judge in this case has heard the evidence that should have been excluded and formed and expressed an opinion on the ultimate merits. We therefore grant the Palms' request to have this case reassigned if remanded. *See Leven v. Wheatherstone Condo. Corp., Inc.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990).

For these reasons, we reverse and remand for reassignment and a new trial consistent with this opinion.

HARDESTY and CHERRY, JJ., concur.

CHARLES B. HARRIS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 61424

June 12, 2014 329 P.3d 619

Proper person appeal from an order denying a motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

The supreme court, HARDESTY, J., held that: (1) after sentence has been imposed, the statutory post-conviction habeas petition takes the place of a motion to withdraw a guilty plea; (2) motion to withdraw guilty plea filed after sentencing is not "incident to the proceedings in the trial court" for purposes of statute providing that

post-conviction petition for a writ of habeas corpus is not a substitute for and does not affect any remedies that are incident to the proceedings in the district court; and (3) post-conviction petition for a writ of habeas corpus provides the exclusive remedy for a challenge to the validity of the guilty plea made after sentencing for persons in custody on the conviction being challenged, overruling *Hart v. State*, 116 Nev. 558, 1 P.3d 969 (2000), and *Passanisi v. State*, 108 Nev. 318, 831 P.2d 1371 (1992).

Reversed and remanded.

Charles B. Harris, Indian Springs, in Proper Person.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. Habeas Corpus.
   After a sentence has been imposed, the statutory post-conviction habeas petition takes the place of a motion to withdraw a guilty plea, overruling *Hart v. State*, 116 Nev. 558, 1 P.3d 969 (2000).
2. Equity.
   Laches generally is asserted by a party to end untimely litigation.
3. Courts.
   Although the doctrine of stare decisis militates against overruling precedent, when governing decisions prove to be unworkable or are badly reasoned, they should be overruled.
4. Criminal Law.
   Uniform Post-Conviction Procedure Act is intended to create a single, streamlined post-conviction remedy, overruling *Passanisi v. State*, 108 Nev. 318, 831 P.2d 1371 (1992). NRS 34.724.
5. Habeas Corpus.
   A motion is "incident to the proceedings in the trial court" when it is filed prior to sentencing, and a motion to withdraw a guilty plea filed after sentencing is not "incident to the proceedings in the trial court" for purposes of statute providing that post-conviction petition for a writ of habeas corpus is not a substitute for and does not affect any remedies that are incident to the proceedings in the district court or the remedy of direct review of the sentence or conviction. NRS 34.724(2).
6. Habeas Corpus.
   Post-conviction petition for a writ of habeas corpus provides the exclusive remedy for a challenge to the validity of the guilty plea made after sentencing for persons in custody on the conviction being challenged. NRS 34.724(2)(b).
7. Courts; Habeas Corpus.
   In the case of future filings and for any currently pending post-sentence motion to withdraw a guilty plea, the district court should construe the motion to be a post-conviction petition for a writ of habeas corpus and require the defendant to cure any defects within a reasonable time period selected by the district court.

Before the Court En Banc.

OPINION

By the Court, HARDESTY, J.:

Appellant Charles Harris pleaded guilty and was convicted of several felony offenses. Harris did not challenge his guilty plea before sentence was imposed and did not file an appeal from the judgment of conviction. Instead, he filed a motion to withdraw the guilty plea approximately seven months after the judgment of conviction was entered.

[Headnote 1]

A post-conviction petition for a writ of habeas corpus is the *exclusive remedy* for challenging the validity of a conviction or sentence aside from direct review of a judgment of conviction on appeal and "remedies which are incident to the proceedings in the trial court." NRS 34.724(2)(a). However, in *Hart v. State*, 116 Nev. 558, 1 P.3d 969 (2000), this court allowed another remedy when it summarily concluded that a motion to withdraw a guilty plea filed after the judgment of conviction is a remedy that is "incident to the proceedings in the trial court." Because our *Hart* decision failed to analyze the phrase "incident to the proceedings in the trial court," or consider the purpose behind the exclusive-remedy provision in NRS 34.724(2), it is unsound. After examining the Uniform Post-Conviction Procedure Act, Nevada's post-conviction history, and the temporal definition of the phrase at issue, we conclude that, after sentence has been imposed, the statutory post-conviction habeas petition takes the place of a motion to withdraw a guilty plea. We therefore overrule *Hart* and reverse the district court's order denying the motion on the merits and remand for the district court to treat Harris' motion as a post-conviction petition for a writ of habeas corpus and to provide Harris with an opportunity to cure any pleading defects.

FACTS AND PROCEDURAL HISTORY

Harris was charged in 2010 with burglary, forgery, and theft for cashing a forged check from the Perini Building Company at the Orleans Hotel and Casino. Additionally, the State had filed a notice of intent to seek habitual criminal adjudication based on five prior felony convictions. Harris entered a guilty plea to the offenses of burglary, forgery, and theft in exchange for the State's agreement not to seek habitual criminal adjudication at sentencing. The judgment of conviction was entered on November 16, 2011, and Harris received two consecutive sentences of 24 to 60 months and a consecutive sentence of 12 to 34 months. No direct appeal was taken.

Instead, on the date the judgment of conviction was entered, Harris filed a proper person post-conviction petition for a writ of habeas

corpus in the district court alleging that he received ineffective assistance of counsel. The district court denied the petition, and this court affirmed the decision of the district court on appeal. *Harris v. State*, Docket No. 60289 (Order of Affirmance, November 15, 2012). Harris then filed a second post-conviction petition for a writ of habeas corpus on February 29, 2012, raising similar claims to those raised in the first petition.

While his second petition was pending, on June 21, 2012, Harris filed a motion to withdraw a guilty plea. In his motion, Harris claimed: (1) the information, as to the forgery count, failed to set forth the elements of ownership and lack of authority, making his plea to forgery unknowing and involuntary; (2) the prosecutor failed to disclose that it was without an accuser; (3) he received ineffective assistance of counsel; and (4) his plea was involuntary and unknowing. Despite this being Harris' third post-conviction challenge to his conviction, the district court denied the motion on the merits.

DISCUSSION

NRS 176.165 provides in relevant part that "[t]o correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." This language has in the past been construed to allow for a post-sentence motion to withdraw a guilty plea. *See, e.g.*, *Hart*, 116 Nev. at 561-62, 1 P.3d at 971 (recognizing the availability of a post-conviction motion to withdraw a guilty plea); *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (holding that claims challenging the validity of the plea should be raised in a post-conviction petition or a motion to withdraw a guilty plea); *Hargrove v. State*, 100 Nev. 498, 501-02, 686 P.2d 222, 224-25 (1984) (recognizing the right to appeal from the denial of a post-conviction motion to withdraw a guilty plea).

Because the validity of a guilty plea may be challenged in a post-conviction petition for a writ of habeas corpus, *see* NRS 34.810(1)(a) (recognizing that the scope of claims available to challenge a conviction based upon a guilty plea include a claim that the plea was involuntarily or unknowingly entered or that the plea was entered without the effective assistance of counsel), it would appear that allowing the same challenge to be raised after sentencing in a separate motion to withdraw a guilty plea would run afoul of NRS 34.724(2)(b). That statute, which was adopted in 1991 and became effective on January 1, 1993, *see* 1991 Nev. Stat., ch. 44, §§ 4, 32, at 75, 92, provides that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them." NRS 34.724(2)(b). There are,

however, two exceptions to the exclusive-remedy provision: an appeal from the judgment of conviction and "any remedies which are incident to the proceedings in the trial court."[1] NRS 34.724(2)(a). Thus, a post-sentence motion to withdraw a guilty plea, a statutory remedy, would not be eliminated by the exclusive-remedy provision if it is "incident to the proceedings in the trial court."

The question of whether a post-sentence motion to withdraw a guilty plea is a remedy that is "incident to the proceedings in the trial court" was previously posed to this court in *Hart*. Hart had filed a motion to withdraw his guilty plea more than six years after his judgment of conviction was entered. 116 Nev. at 560, 1 P.3d at 970. The lower court treated the motion as a post-conviction petition for a writ of habeas corpus and denied it as procedurally time-barred pursuant to NRS 34.726(1). *Id*. at 560-61, 1 P.3d at 970. On appeal, the *Hart* court rejected the argument that the exclusive-remedy provision eliminated the post-sentence motion to withdraw a guilty plea, holding instead that the motion was "incident to the proceedings in the trial court." *Id*. at 561-62, 1 P.3d at 971. The determination that the motion was "incident to the proceedings in the trial court" was made without any analysis beyond a statement that Nevada case law appeared to recognize the motion to withdraw a guilty plea.[2] *Id*.

The *Hart* court implicitly recognized a problem created by its decision to allow two post-conviction remedies for defendants who have pleaded guilty to attack the validity of their guilty pleas: whereas the statutory post-conviction habeas petition is subject to time restrictions, NRS 34.726; NRS 34.800, and rules that limit the issues that may be raised, NRS 34.810(1)(a), and the filing of second and suc-

---

[1]Article 6, Section 6 of the Nevada Constitution and NRS 34.724(1) require a person seeking habeas corpus relief be under a sentence of imprisonment (or death) for the conviction challenged at the time the conviction is challenged. The remedy of a post-conviction petition for a writ of habeas corpus is further limited in scope to claims challenging a violation of state law or a violation of constitutional rights. NRS 34.724(1). Thus, any remedy that is available only to a person who is no longer under a sentence of imprisonment or death or allows a person to raise a claim that is outside the scope of a post-conviction petition for a writ of habeas corpus is not subject to the exclusive-remedy language in NRS 34.724(2)(b) regardless of whether the remedy is or is not incident to the proceedings in the trial court. For example, the petition for a writ of *coram nobis* was not superseded by the post-conviction petition for a writ of habeas corpus because the petition for a writ of *coram nobis* is only available to a person who is no longer in custody on the conviction challenged. *See Trujillo v. State*, 129 Nev. 706, 708, 310 P.3d 594, 595-96 (2013).

[2]The cited examples included: *Hargrove*, 100 Nev. 498, 686 P.2d 222; *Bryant*, 102 Nev. 268, 721 P.2d 364; and *Barajas v. State*, 115 Nev. 440, 991 P.2d 474 (1999), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010), *as noted in Chaidez v. United States*, 568 U.S. 342 (2013). None of those cases addressed whether the current statutory post-conviction habeas petition took the place of a post-sentence motion to withdraw a guilty plea.

cessive petitions, NRS 34.810(2), the statute addressing withdrawal of a guilty plea contains no similar restrictions. *See generally Hart*, 116 Nev. at 563-64, 1 P.3d at 972. To correct that problem, the court placed a limitation on the filing of a motion to withdraw a guilty plea relying on the "manifest injustice" language in NRS 176.165. *Id*. at 563, 1 P.3d at 972. The court explained that "[w]hether an 'injustice' is 'manifest' will depend" in part on "whether the State would suffer prejudice if the defendant is permitted to withdraw his or her plea" and therefore "consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit withdrawal of a plea after sentencing." *Id*. at 563, 1 P.3d at 972. Laches requires the court to consider several factors including: "(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State." *Id*. at 563-64, 1 P.3d at 972. This court placed the burden of demonstrating that laches should not apply on *the defendant*.[3] *Id.* The *Hart* court further indicated that laches may be applied even when the delay was less than one year from entry of the judgment of conviction, but provided no guidance for when it would be appropriate to conclude that a delay of less than one year was inexcusable. *Id*.

The lack of guidance in determining when laches should apply is keenly present in this case. Harris filed his motion within one year from entry of the judgment of conviction, but this was Harris' third post-conviction challenge to his conviction in the one-year period following his conviction. Harris provided no explanation on the face of the motion why he should be allowed to litigate a third post-conviction challenge to his conviction. And despite the fact that *Hart* made it Harris' burden to plead facts to overcome application of laches and made laches part of the "manifest injustice" standard that determines whether a defendant should be allowed to withdraw a guilty plea after sentencing, the district court apparently overlooked the doctrine of laches in denying the motion on the merits.

[Headnote 2]

The doctrine of laches announced in *Hart* also has some peculiarities that have engendered much confusion with jurists and parties in this state. Laches generally is asserted by a party to end untimely litigation. *See, e.g.*, *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1031 (9th Cir. 2012) ("Laches is an equitable defense that limits the time in which a party may bring suit."); *see also Moguel v. State*, 966 A.2d 963, 967, 969 (Md. Ct. Spec. App. 2009) (holding that the equitable doctrine of laches is a defense to a pe-

[3]Similarly, the petitioner bears the burden of demonstrating good cause and prejudice to excuse the procedural bars that apply to a post-conviction petition for a writ of habeas corpus. *See* NRS 34.726(1); NRS 34.810(3).

tition and recognizing that generally laches must be pleaded by the party); *Johnson v. State*, 714 N.W.2d 832, 839 (N.D. 2006) (holding that laches is an affirmative defense against applications for post-conviction relief). *Hart*, however, flipped the doctrine from a defense that must be asserted by the opposing party (the State) to a filing requirement that the criminal defendant must satisfy in order to litigate the merits of his or her claims. And the factors set forth in *Hart* do not wholly lend themselves to a defendant affirmatively pleading them. For example, one of the laches factors looks at whether there are circumstances that prejudice the State. Surely the State, not the defendant, is in the best position to address that factor. The peculiar nature of the use of the doctrine of laches announced in *Hart* has led to much confusion and inconsistent application of the doctrine of laches. In many instances, the defendant neglects to address the laches factors in his motion, the State fails to raise the issue of laches (even when the motion is filed many years after the judgment of conviction), and the district court summarily denies the motion, obscuring the basis for the decision and complicating this court's appellate review.

[Headnote 3]

The confusing and inconsistent application of the doctrine of laches caused by the *Hart* decision suggests that we should reexamine the holding in *Hart* that a post-sentence motion to withdraw a guilty plea is "incident to the proceedings in the trial court" and not subject to the exclusive-remedy language of NRS 34.724(2)(b). Although the doctrine of stare decisis militates against overruling precedent, *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013), " 'when governing decisions prove to be "unworkable or are badly reasoned," they should be overruled,' " *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (quoting *Egan v. Chambers*, 129 Nev. 239, 243, 299 P.3d 364, 367 (2013) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

The court in *Hart* did not provide any analysis to explain its determination that a post-sentence motion to withdraw a guilty plea is "incident to the proceedings in the trial court." Nevada first adopted the incident-to-the-trial-court-proceedings language and the exclusive-remedy language in 1967 when the Legislature adopted the Uniform Post-Conviction Procedure Act (UPCPA) and created a post-conviction petition for relief as part of NRS Chapter 177. *See* 1967 Nev. Stat., ch. 523, § 317, at 1447; Legislative Comm'n of the Legislative Counsel Bureau, *Report of the Subcomm. for Revision of the Criminal Law to the Legislative Comm'n*, in *Revision of Nevada's Substantive Criminal Law and Procedure in Criminal Cases*, Bulletin No. 66, at 3 (Nev., Nov. 18, 1966). The Legislature maintained this language when it streamlined Nevada's dual post-conviction remedies and adopted

the singular remedy of a post-conviction petition for a writ of habeas corpus in 1991 (effective January 1, 1993). *See* 1991 Nev. Stat., ch. 44, §§ 4, 32, at 75, 92. Thus, it is useful, if not critical, to examine the UPCPA and Nevada's post-conviction history in determining whether a post-sentence motion to withdraw a guilty plea is an available remedy to challenge the validity of a guilty plea.

Uniform Post-Conviction Procedure Act

Prior to 1955, few states provided a cohesive approach to post-conviction relief despite the fact that the United States Supreme Court had recognized the obligation of the states to provide state prisoners with a means to raise claims of federal constitutional violations. *See Mooney v. Holohan*, 294 U.S. 103, 113 (1935) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."); *Young v. Ragen*, 337 U.S. 235, 239 (1949) (requiring the state to provide a "clearly defined method by which [state prisoners] may raise claims of denial of federal rights"). In response, the Commissioners on Uniform State Laws proposed the first post-conviction procedure act in 1955. Note, *The Uniform Post-Conviction Procedure Act*, 69 Harv. L. Rev. 1289 (1956). Over the next decade, few states adopted a uniform post-conviction remedy and the variability in the scope and availability of post-conviction remedies rendered those remedies largely inadequate. *Case v. Nebraska*, 381 U.S. 336, 338 (1965) (Clark, J., concurring).

In 1966, the commissioners submitted a revised version of the UPCPA with the objective of establishing a post-conviction procedure for the states to use that met the minimum standards of justice. UPCPA prefatory notes, 11 U.L.A. 663 (1966). The scope of the claims available under the 1966 UPCPA included claims: (1) that the conviction or the sentence was in violation of the United States Constitution or the constitution or laws of the enacting state; (2) that the court was without jurisdiction to impose sentence; (3) that the sentence exceeded the maximum authorized by law; (4) that there existed evidence of material facts, not previously presented and heard, that required vacation of the conviction or sentence in the interest of justice; (5) that the petitioner had expired his term or was otherwise held or restrained unlawfully; or (6) that the conviction was otherwise subject to collateral attack on grounds previously available at common law or under statute or writ. *Id*. § 1(a), at 666. The UPCPA further provided that it was the exclusive remedy, except for the remedy of direct review and any remedy incident to the proceedings in the trial court. *Id*. § 1(b), at 666.

It is not by happenstance that the commissioners used the word "uniform" to describe the remedy. The prefatory notes of the 1966

UPCPA emphasized that the post-conviction remedy "provides a single, unitary, post-conviction remedy to be used in place of all other state remedies (except direct review)." *Id*. prefatory notes, at 663. The prefatory notes further urged states to consider repealing "existing statutes on habeas corpus, *coram nobis* and statutory remedies, if any." *Id*. at 665. Even assuming that the State failed to repeal these other remedies, the prefatory notes indicate that the exclusive-remedy language "would seem to require a court to treat an application under such a remedy as made under this Act and governed by its provisions as to pleadings and procedure." *Id*. The commissioners noted that multiple remedies created confusion, delay, expense, and increased burdens on the courts. *Id*. at 663.

The commissioners once more revised the UPCPA in 1980, in pertinent part, replacing the "incident to the proceedings in the trial court" language with a provision stating that the UPCPA did not "affect any remedy incident to the prosecution in the trial court." *Id*. § 1(b), at 204 (1980). In the comments, the commissioners again emphasized that the exclusive-remedy provision "underscores the goal of eliminating the confusion of multiple, limited post-conviction remedies found in many jurisdictions that have not established a modern, simplified procedural system for determining the substantive merit of post-conviction litigation." *Id*.

Nevada post-conviction history

Nevada was one of many jurisdictions that had failed to develop a modern post-conviction remedy. Before 1967, Nevada's post-conviction relief system largely relied on a petition for a writ of habeas corpus and various motions to fill in the gaps when habeas corpus was inadequate because of the custody requirement set forth in Article 6, Section 6 of the Nevada Constitution. The challenges of this post-conviction approach were highlighted in *Warden v. Peters*, 83 Nev. 298, 429 P.2d 549 (1967). Peters sought to withdraw his guilty plea to one of two counts in a motion to vacate the conviction after his conviction had become final. *Id*. at 300, 429 P.2d at 550. The parties and district court agreed to a guilty plea to a lesser offense with concurrent terms, but problems occurred when the concurrent sentences could not be effectuated. *Id*. at 300-01, 429 P.2d at 551. The State then questioned whether a motion to vacate had been a proper vehicle for seeking post-conviction relief. *Id*. at 301, 429 P.2d at 551. The *Peters* court recognized the availability of a motion to vacate the conviction, reasoning that correction of a mistake that worked to the defendant's extreme detriment was within the inherent authority of the court, even though a petition for a writ of habeas corpus was likely the more appropriate vehicle to challenge the conviction. *Id*. The absence of a comprehensive post-conviction scheme appears to have largely driven

the decision in *Peters* and created a landscape where various post-conviction motions arose to fill the gaps in available post-conviction remedies.

The Legislature in 1967 addressed the lack of post-conviction remedies and enacted two post-conviction remedies relevant to the issue at hand.[4] First, the Legislature enacted NRS 176.165, which allowed a motion to withdraw a guilty plea to be filed only before sentencing but also allowed the district court to set aside a judgment after sentencing and permit withdrawal of a guilty plea to correct manifest injustice.[5] 1967 Nev. Stat., ch. 523, § 245, at 1434. Second, the Legislature enacted the post-conviction procedure act. *Id.* § 317, at 1447. The legislative history indicates that the Legislature intended to "offer but one remedy" in post-conviction, which was designated as habeas corpus, and that the Legislature was adopting the UPCPA. Legislative Comm'n of the Legislative Counsel, *Report of the Subcomm. for Revision of the Criminal Law to the Legislative Comm'n*, in *Revision of Nevada's Substantive Criminal Law and Procedure in Criminal Cases*, Bulletin No. 66, at 3 (Nev., Nov. 18, 1966). The procedure, set forth in former NRS Chapter 177, provided that a post-conviction relief petition could be filed by any person convicted of a crime and under a sentence of death or imprisonment to challenge a constitutional violation (United States or Nevada), a violation of the laws of Nevada, that the court was without jurisdiction to impose the sentence, the sentence exceeded the maximum authorized by law, or that the conviction or sentence was otherwise subject to collateral attack upon any ground of alleged error previously available under "common law, statutory or other writ, motion, petition, proceeding or remedy." 1967 Nev. Stat., ch. 523, § 317, at 1447. Significantly, the exclusive-remedy provision of the UPCPA was adopted by the Legislature; former NRS 177.315(2) provided that the post-conviction relief petition "comprehends and takes the place of all other common law, statutory, or other remedies which have heretofore been available for challenging the validity of the conviction or sentence, and shall be used exclusively in place of them." *Id*. The post-conviction relief petition was, however, not to be a substitute for a direct appeal or "any remedies which are incident to the proceedings in the trial court." *Id*.

Problems with the post-conviction relief petition arose quickly after its enactment. One major problem was the denomination of the

---

[4]The work of the 1967 legislative session concluded shortly before *Peters* was decided, but the new remedies had not been available to Peters and were not addressed by the court in reaching its decision.

[5]At the same time, the Legislature repealed a prior statute, NRS 174.340(2), that allowed a district court to permit a guilty plea to be withdrawn only before judgment. 1967 Nev. Stat., ch. 523, § 447, at 1472.

petition as a writ of habeas corpus when there was no custody requirement in the post-conviction relief statutes, but the Nevada Constitution only provided the district court with power to grant a writ of habeas corpus to an individual held in actual custody within the district. Nev. Const. art. 6, § 6. In *Marshall v. Warden*, this court, while acknowledging the problem with calling the post-conviction petition a "habeas corpus" petition given the custody requirement set forth in the Constitution, approved of the new post-conviction remedy. 83 Nev. 442, 444-45, 434 P.2d 437, 439 (1967), *superseded by statute as stated in Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001). However, expressing concern about eliminating the constitutional writ of habeas corpus, the court declared that individuals had a choice of remedies after conviction: a habeas corpus petition or the newly enacted and broader post-conviction relief petition. *Id*. at 445-46, 434 P.2d at 439-40. Given that the scope of claims available under the post-conviction relief petition was broader than the scope of claims available in a habeas corpus petition, the court indicated that the post-conviction relief petition would be the preferred course of action. *Id*. at 445, 434 P.2d at 439.

Despite the effort to limit post-conviction remedies reflected in the legislation adopted in 1967, the *Marshall* decision began a system of post-conviction relief in Nevada whereby convicted persons had several remedies available to challenge the validity of a guilty plea: a post-conviction relief petition pursuant to former NRS 177.315, a petition for a writ of habeas corpus under NRS Chapter 34, and a post-sentence motion to withdraw a guilty plea. The Legislature tinkered with some of these provisions over the years to try to curtail the mischief created in having separate post-conviction vehicles, *see Pellegrini v. State*, 117 Nev. 860, 870-73, 34 P.3d 519, 526-28 (2001) (setting forth a more in-depth history of the evolution of Nevada's post-conviction remedies), but ultimately the Legislature decided to adopt a single remedy.

Effective January 1, 1993, a single post-conviction remedy was created—the current post-conviction petition for a writ of habeas corpus filed pursuant to NRS 34.724. 1991 Nev. Stat., ch. 44, §§ 4, 32, at 75, 92. The new legislation included the exclusive-remedy language that had previously been a part of NRS Chapter 177. Pursuant to NRS 34.724(2)(b), a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them." And as stated earlier, excepted from the exclusive-remedy language are the remedy of a direct appeal and remedies that are "incident to the proceedings in the trial court." NRS 34.724(2)(a).

Flaws in the Hart decision

[Headnote 4]

Examining both the UPCPA and Nevada post-conviction history reveals the flaws in *Hart*'s conclusion that a post-sentence motion to withdraw a guilty plea is "incident to the proceedings in the trial court." The UPCPA was intended to create a single, streamlined post-conviction remedy. Nevada's post-conviction history undeniably has moved toward adoption of a single post-conviction remedy to challenge a judgment of conviction or sentence. The *Hart* court provided no explanation for how allowing a separate post-sentence motion to withdraw a guilty plea served the stated intention of the Legislature to create a single post-conviction remedy or why a separate remedy was necessary when a post-conviction petition for a writ of habeas corpus encompassed the scope of claims available in a post-sentence motion to withdraw a guilty plea. *See* NRS 34.810(1)(a) (indicating that a post-conviction habeas petition may be used to challenge a judgment of conviction upon guilty plea "based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel"). In fact, doing so circumvents the Legislature's intention to adopt a single remedy. A single post-conviction remedy was desired not just because of the burdens on the courts in juggling the many statutory and common-law remedies, but for defendants themselves to reduce confusion and to ensure that constitutional claims would be heard by the courts in a timely manner. Having to navigate multiple remedies, with multiple procedural hurdles, at times resulted in the default of constitutional claims due to the defendant's ignorance regarding the proper remedy and applicable rules. The decision in *Hart* fails to evaluate these concerns in concluding without analysis that the post-sentence motion to withdraw a guilty plea is "incident to the proceedings in the trial court."

Defining "incident to the proceedings in the trial court"

The decision in *Hart* also ignored this court's one prior attempt to define the meaning of the phrase "incident to the proceedings in the trial court"—*Passanisi v. State*, 108 Nev. 318, 831 P.2d 1371 (1992). In a decision addressing the availability of a motion to modify sentence and the appealability of an order denying such a motion, the *Passanisi* court indicated that challenges that directly attack the decision of the district court itself are incident to the proceedings in the trial court and are not collateral or post-conviction attacks.[6] *Id.* at 321, 831 P.2d at 1373.

---

[6]Even though *Passanisi* addresses the post-conviction-relief remedy under former NRS Chapter 177, the incident-to-the-trial-court-proceedings language is the same in both the former Chapter 177 remedy and NRS 34.724(2)(a).

However, there are problems with the definition used in *Passanisi*. The definition includes claims that are more appropriately raised on direct appeal, for example, claims challenging the sentence imposed on constitutional or other grounds, a claim that the district court was actually biased, or claims that conditions rendered the proceedings unfair. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Further, the definition in *Passanisi* may implicate claims that may be raised in a post-conviction petition for a writ of habeas corpus because the errors involve a violation of constitutional rights or state law. *See* NRS 34.724(1). This definition then is contrary to our Legislature's intention to adopt a single post-conviction remedy. A definition that focuses on the types of claims raised also creates confusion and may be abused as litigants attempt to shoehorn claims to fit within the limited framework of a claim of district court error. Because the definition in *Passanisi* includes claims that may be raised elsewhere and may be confusing or subject to abuse, we conclude that this definition is inadequate to the task of providing a meaningful understanding of the phrase "incident to the proceedings in the trial court," and we overrule this portion of the decision in *Passanisi*.

[Headnote 5]

Rather than focusing on the type of claims raised, a more meaningful definition involves a temporal element. Webster's dictionary defines "incident" as "something dependent on or subordinate to something else of greater or principal importance." *Merriam Webster's Collegiate Dictionary* 629 (11th ed. 2007). In this context, the something else of greater or principal importance is the final disposition of the proceedings in the trial court at sentencing; decisions made prior to or at sentencing are subordinate to the final disposition of the case. Thus, we hold that a motion is "incident to the proceedings in the trial court" when it is filed prior to sentencing. This temporal definition makes sense given that decisions of the district court made in an intermediate order or proceeding may be reviewed on direct appeal from the judgment of conviction. *See* NRS 177.045. The temporal definition is also in keeping with the prefatory notes in the UPCPA that the post-conviction remedy provides a "single, unitary, post-conviction remedy to be used in place of all other state remedies (except direct review)." UPCPA prefatory notes, 11 U.L.A. 663 (1966). And the temporal definition effectuates the Legislature's intention to create a single post-conviction remedy in Nevada. Expanding the remedies incident to the proceedings in the trial court to include a number of post-conviction motions ignores the important objective of the UPCPA. Thus, a motion to withdraw the guilty plea filed after sentencing is

not "incident to the proceedings in the trial court," and we overrule that portion of the decision in *Hart* that concluded otherwise.

Habeas corpus is the exclusive remedy to challenge the validity of the guilty plea after sentencing

[Headnote 6]

Given our determination that a post-sentence motion to withdraw a guilty plea is not a remedy that is "incident to the proceedings in the trial court," the motion is subject to the exclusive-remedy language in NRS 34.724(2)(b). The exclusive-remedy language in NRS 34.724(2)(b) provides that a post-conviction petition for a writ of habeas corpus takes the place of statutory remedies previously available to challenge the validity of a judgment of conviction. The statutory remedy of a post-sentence motion to withdraw a guilty plea adopted in 1967, *see* 1967 Nev. Stat., ch. 523, § 245, at 1434, was eliminated by the adoption of NRS 34.724(2)(b) in 1991 (effective January 1, 1993), *see* 1991 Nev. Stat., ch. 44, §§ 4, 32, at 75, 92. Thus, a post-conviction petition for a writ of habeas corpus provides the exclusive remedy for a challenge to the validity of the guilty plea made after sentencing for persons in custody on the conviction being challenged, and we overrule *Hart* to the extent that it concluded otherwise.

Our decision today that a motion to withdraw a guilty plea is not "incident to the proceedings in the trial court" when it is filed after sentencing and not available as a separate post-conviction remedy does not completely eviscerate the "manifest injustice" language in NRS 176.165. Rather, we believe that the Legislature's recognition that the district court may permit withdrawal of the guilty plea after sentencing to "correct manifest injustice" sets forth the standard for reviewing a post-conviction claim challenging the validity of a guilty plea, and our court has used the "manifest injustice" language of NRS 176.165 in reviewing challenges to the validity of a guilty plea raised in a post-conviction petition for a writ of habeas corpus and a post-conviction petition for relief pursuant to former NRS Chapter 177. *See, e.g.*, *Aswegan v. State*, 101 Nev. 760, 761, 710 P.2d 83, 83 (1985), *overruled in part by Little v. Warden*, 117 Nev. 845, 34 P.3d 540 (2001); *Meyer v. State*, 95 Nev. 885, 888, 603 P.2d 1066, 1067 (1979), *overruled in part by Little*, 117 Nev. 845, 34 P.3d 540.

[Headnote 7]

In the case of future filings and for any currently pending post-sentence motion to withdraw a guilty plea, the district court should construe the motion to be a post-conviction petition for a writ of habeas corpus and require the defendant to cure any defects

(filings not in compliance with the procedural requirements of NRS Chapter 34) within a reasonable time period selected by the district court.[7] *See Miles v. State*, 120 Nev. 383, 385-87, 91 P.3d 588, 589-90 (2004) (recognizing that NRS Chapter 34 does not prohibit the amendment of a petition to cure pleading defects). Because Harris should have filed a post-conviction petition for a writ of habeas corpus in compliance with the procedural requirements of NRS Chapter 34 and because the district court erroneously reached the merits of the motion to withdraw the plea without any reference to the fact that it was the third attempt to challenge the conviction, we reverse the decision of the district court and remand with instructions to construe the motion as a post-conviction petition for a writ of habeas corpus and to provide Harris an opportunity to cure any defects within a reasonable period of time set by the district court.[8]

Gibbons, C.J., and Pickering, Parraguirre, Douglas, and Cherry, JJ., concur.

Saitta, J., concurring:

I concur in the result only.

CRAIG A. DOAN, Appellant, *v.* RICHARD WILKERSON, Personal Representative, Respondent.

No. 56591

June 26, 2014 327 P.3d 498

Appeal from a district court order modifying a divorce decree to divide marital property that was disclosed in the divorce pleadings but omitted from the written divorce decree. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Ex-wife filed motion to divide a marital asset, namely, ex-husband's retirement benefit from the Federal Aviation Administration (FAA), which was not mentioned in divorce decree entered more than six

---

[7]If the defendant cannot satisfy the custody requirement of habeas corpus, this court has recognized the availability of the common-law writ of *coram nobis* for persons not in custody challenging a conviction on very limited factual grounds. *See Trujillo v. State*, 129 Nev. 706, 719, 310 P.3d 594, 603 (2013).

[8]We have reviewed all documents that Harris has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Harris has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

years earlier. On reconsideration, the district court divided the benefit. Ex-husband appealed. The supreme court, CHERRY, J., held that: (1) six-month time limitation in rule of procedure for moving from relief from judgment on ground of mistake, newly discovered evidence, or fraud applies to a motion for relief from or modification of a divorce decree on that basis; and (2) fact that husband's FAA retirement benefit was not mentioned in divorce decree was not an exceptional circumstance justifying equitable relief to ex-wife in an independent action to divide that marital asset.

Reversed.

Lemons, Grundy & Eisenberg and *Christopher M. Rusby*, Reno, for Appellant.

Willick Law Group and *Marshal S. Willick*, Las Vegas, for Respondent.

1. DIVORCE.
   The supreme court reviews district court decisions concerning divorce proceedings for an abuse of discretion.
2. APPEAL AND ERROR.
   The district court rulings supported by substantial evidence will not be disturbed absent an abuse of discretion; however, the district court must apply the correct legal standard.
3. DIVORCE.
   Six-month time limitation in rule of procedure for moving for relief from judgment on ground of mistake, newly discovered evidence, or fraud applies to a motion for relief from or modification of a divorce decree on that basis. NRS 125.090; NRCP 60(b).
4. JUDGMENT.
   Where a motion for relief or modification premised on mistake, newly discovered evidence, or fraud is filed more than six months after final judgment, the motion is untimely and must be denied. NRCP 60(b).
5. JUDGMENT.
   An independent action for relief from a judgment that has become final or unreviewable is available only to prevent a grave miscarriage of justice.
6. JUDGMENT.
   Claim preclusion does not bar independent actions for equitable relief because the exceptional circumstances justifying equitable relief also justify deviation from the doctrine of claim preclusion.
7. DIVORCE.
   Fact that husband's retirement benefit from Federal Aviation Administration was not mentioned in divorce decree was not an exceptional circumstance justifying equitable relief to ex-wife in independent action to divide that marital asset filed more than six years after entry of decree; that retirement benefit was mentioned in court documents, disclosed, and considered prior to entry of decree.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

This case presents us with the opportunity to address whether and under what circumstances a marital asset omitted from the divorce decree may be partitioned through a motion for relief from judgment that is filed many years after the divorce was finalized. Because the time frame for filing a motion for relief from judgment under NRCP 60(b) is within six months after the decree is entered, we conclude that an ex-spouse who did not timely pursue a motion for relief from a divorce decree is not entitled to partition absent exceptional circumstances justifying equitable relief. *See Bonnell v. Lawrence*, 128 Nev. 394, 399, 282 P.3d 712, 715 (2012). One such circumstance justifying equitable relief is when a community asset was not litigated and adjudicated in the divorce proceedings.

Here, the contested marital asset was disclosed and discussed during the course of the divorce proceedings and then left out of the divorce decree. The ex-spouse then waited more than six years after the final decree was entered to file a motion for relief from judgment, long after the applicable six-month period under NRCP 60(b) had expired. Furthermore, even if the motion were considered an independent action for equitable relief, the facts here do not warrant equitable relief because the asset was adjudicated in the divorce proceedings. Accordingly, we reverse the district court's order modifying the final decree of divorce.

FACTS AND PROCEDURAL HISTORY

Catherine Doan and appellant Craig Doan married in May 1985. During the course of their marriage, Craig was employed as an air traffic controller for the Federal Aviation Administration (FAA). Craig retired from the FAA with more than 23 years of service. He received multiple retirement benefits as a federal employee.

Before Craig retired, the parties filed an action for divorce, seeking dissolution of the marriage and an equitable division of community debts and assets. Catherine and Craig exchanged affidavits of financial condition setting forth their respective monthly incomes, monthly expenses, and marital assets. Although not identifying any specific account by name, both Catherine and Craig indicated in their affidavits that they owned retirement accounts or pensions, or both. Craig also listed retirement contributions as a monthly expense.

In anticipation of trial, Catherine and Craig each filed pretrial memoranda. Catherine specified in her memorandum that there were federal retirement benefits accrued during the marriage. Craig

attached statements of earnings and leave from the FAA, which indicated that he received retirement benefits. He also provided W-2 wage and tax statements, which indicated that he had a retirement plan, pension plan, and deferred compensation.

Although both Catherine and Craig were represented by counsel during most of the divorce proceedings, their respective counsel withdrew from representation shortly before trial. As a result, Catherine and Craig appeared in proper person for their scheduled trial. They agreed to participate in a pretrial settlement conference with the presiding judge. During the settlement conference, Catherine and Craig agreed to divide their property and debt. The district court awarded Catherine spousal support and ordered a final decree of divorce. The final decree of divorce, prepared by Craig and approved by Catherine, was entered in August 2003. The divorce decree did not include Craig's FAA retirement benefit. Another retirement benefit, a voluntary thrift savings plan, was distributed as part of the final decree.

Six years later, in June 2009, Catherine filed a motion for division of an omitted asset after her new counsel discovered that Catherine was not receiving Craig's FAA retirement benefits. She asserted that Craig's retirement benefits were omitted from the divorce decree and must be divided by the district court. She also requested that Craig reimburse her for her share of the retirement benefits that he had previously received.

After two hearings, the district court denied Catherine's motion to divide the omitted asset, ordering that Catherine was not entitled to Craig's retirement benefits. The district court found that the retirement benefits had been disclosed during discovery because there were references to Craig's retirement in his leave and earnings statements and W-2's. The district court also found that Catherine's first counsel knew about Craig's FAA retirement benefits. Citing *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), the district court concluded that there was full and fair disclosure of Craig's retirement and, thus, the retirement benefits could not be treated as an omitted asset.

Shortly thereafter, Catherine filed a motion for reconsideration, which the district court granted. Although the district court maintained that there was full disclosure of Craig's retirement benefits, discussion of retirement, notice of the retirement, and that the retirement was considered in determining the length of alimony, the court found that Craig's retirement benefits were omitted from the divorce decree because of a mutual mistake by the parties. The district court further determined that the four-year residual statute of limitations for civil actions did not apply. The court divided Craig's retirement benefits in accordance with a fractional formula under United States Code, Title 5, § 8445 (2012).

This appeal followed.[1] This court has stayed enforcement of the partition pending resolution of this matter.

DISCUSSION

[Headnotes 1, 2]

"This court reviews district court decisions concerning divorce proceedings for an abuse of discretion." *Shydler v. Shydler*, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998). District court rulings supported by substantial evidence will not be disturbed absent an abuse of discretion. *DeVries v. Gallio*, 128 Nev. 706, 709, 290 P.3d 260, 263 (2012). "However, . . . the district court must apply the correct legal standard." *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614, 617-18 (1992).

[Headnote 3]

NRS 125.090 requires that family law cases "conform to the Nevada Rules of Civil Procedure as nearly as conveniently possible." NRCP 60(b) places a six-month time limitation on motions for relief from judgment. In *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980), we held that NRCP 60(b)'s time limitation applied to a motion to modify the property distribution in a divorce decree, where that decree did not reserve continuing jurisdiction. We reasoned that "[i]f the legislature had intended to vest the courts with continuing jurisdiction over property rights, it would have done so expressly, as it did in NRS 125.140(2) concerning child custody and support." *Kramer*, 96 Nev. at 762, 616 P.2d at 397. The policy in favor of finality and certainty underlying NRCP 60(b) applies equally, and some might say especially, to a divorce proceeding. Therefore, in accordance with NRS 125.090 and *Kramer*, we hold that NRCP 60(b)'s time limitation applies to a motion for relief from or modification of a divorce decree.

Relief under NRCP 60(b)

[Headnote 4]

Craig argues that the district court did not have jurisdiction to entertain Catherine's motion for relief from judgment because her motion was filed more than six months after the divorce decree. Under NRCP 60(b), a motion for relief from judgment for mistake, newly discovered evidence, or fraud must be filed not more than six months after entry of final judgment.[2] Although Catherine does not

---

[1]Catherine passed away during the pendency of the appeal, and Richard Wilkerson, her son from a prior marriage, was substituted as the respondent.

[2]NRCP 60(b)(4) and (5) are not subject to the time limitation, but neither are they germane to this case. Catherine makes no suggestion that "the judgment is void," NRCP 60(b)(4), or "has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated." NRCP 60(b)(5).

specifically argue which, if any, of these bases for relief applies, it would be irrelevant in any case. Where, as here, a motion for relief or modification premised on mistake, newly discovered evidence, or fraud is filed more than six months after final judgment, the motion is untimely and must be denied. *See Kramer*, 96 Nev. at 761, 616 P.2d at 397.

Craig asserts that we must reverse the district court's ruling if Catherine's motion was untimely and she failed to file an independent action for relief. It is true that, after NRCP 60(b)'s time limitation has expired, Catherine's only means of relief is an independent action for relief on equitable grounds. *See Bonnell*, 128 Nev. at 399, 282 P.3d at 715. Yet we do not agree that this procedural issue is dispositive. "'A party is not bound by the label he puts on his papers. A motion may be treated as an independent action or vice versa.'" *NC-DSH, Inc., v. Garner*, 125 Nev. 647, 652, 218 P.3d 853, 857 (2009) (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2868 (2d ed. 1995)). Accordingly, we will consider Catherine's motion for relief as if it were an independent action and apply the standards pertinent to such actions.

Equitable relief as an independent action

[Headnote 5]

Relief in equity by independent action may be granted when the claimant meets the traditional requirements of an equitable action, which are more demanding than the requirements of NRCP 60(b)(1)-(3). *Bonnell*, 128 Nev. at 399, 282 P.3d at 715. An independent action for relief from a judgment that has become final or unreviewable "'[is] available only to prevent a grave miscarriage of justice.'" *Id.* (alteration in original) (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)).

[Headnote 6]

Claim preclusion does not bar independent actions for equitable relief because the exceptional circumstances justifying equitable relief also justify deviation from the doctrine of claim preclusion. *Bonnell*, 128 Nev. at 402, 282 P.3d at 717 (adopting the reasoning of *Beggerly* that independent actions for relief must meet a demanding standard to justify "departure from rigid adherence to the doctrine of res judicata" (internal quotation omitted)); *see also Amie*, 106 Nev. at 542, 796 P.2d at 234 ("The right to bring an independent action for equitable relief is not necessarily barred by res judicata.").[3] So-

[3]Our decision in *Tomlinson v. Tomlinson*, 102 Nev. 652, 654, 729 P.2d 1363, 1364 (1986), held that an action for partition of a military pension was barred by issue or claim preclusion. *Tomlinson* applied Michigan law in its claim preclusion analysis. *See id*. But to the extent that *Tomlinson* conflicts with our later rulings in *Amie* and *Williams*, we hold that it has been abrogated by those decisions.

ciety has no interest in the finality of a judgment that was procured by fraud upon the court. *NC-DSH*, 125 Nev. at 653, 218 P.3d at 858.

Historically, our caselaw held that ex-spouses may not bring independent actions to partition after the final judgment of the court unless they show fraud upon the court. *See Taylor v. Taylor*, 105 Nev. 384, 386-87, 775 P.2d 703, 704 (1989) ("The decisional law in this state prior to the enactment of NRS 125.161 held that, absent extrinsic fraud on the part of the party opposing post-divorce partition of retirement benefits, ex-spouses may not bring a new cause of action to partition retirement benefits after the property agreement has become a judgment of the court."). We have since recognized the nonadjudication of marital assets as an exceptional circumstance justifying equitable relief. When a community asset is omitted from divorce proceedings and is therefore not litigated or adjudicated, the asset "may be subject to partition in an independent action in equity." *Williams*, 108 Nev. at 474, 836 P.2d at 619. Hence, the determinative issue in this case is whether Craig's FAA retirement benefit was adjudicated.

In *Amie*, we held that the property at issue was unadjudicated when it simply had been omitted from consideration by the parties. 106 Nev. at 542-43, 796 P.2d at 234-35. Likewise, in *Henn v. Henn*, the seminal case regarding partition of omitted assets, the California Supreme Court stated that " 'under settled principles of California community property law, property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce.' " 605 P.2d 10, 13 (Cal. 1980) (quoting *In re Marriage of Brown*, 544 P.2d 561, 569 (Cal. 1976)), *superseded by statute as stated in In re Marriage of Thorne & Raccina*, 136 Cal. Rptr. 3d 887, 895 (Ct. App. 2012). And in *Williams*, 108 Nev. at 474, 836 P.2d at 619, we reasoned that property was unadjudicated where a party did not have a fair opportunity to present the issue of the property's disposition to the court.[4]

Unlike *Amie*, *Henn*, or *Williams*, the marital asset in this case was disclosed and discussed during the divorce proceedings and the parties had a fair opportunity to litigate its division. The district court found that there was full disclosure and that retirement benefits were considered in determining the length of alimony. The record supports this finding. Craig attached statements of earnings and leave from the FAA, which indicated that he received earnings for retirement. Craig also provided W-2 wage and tax statements that evidenced his retirement plan. Retirement contributions were listed as a monthly expense in Craig's affidavit of financial condition. Catherine's pretrial memorandum even explicitly identified Craig's FAA retirement benefit as property subject to division.

---

[4]We appear to have applied the same rule in the short opinion in *McCarroll v. McCarroll*, 96 Nev. 455, 456, 611 P.2d 205, 205 (1980), although the facts were not fully described there.

We conclude that the district court's finding, that the FAA retirement benefit was disclosed and considered, was supported by substantial evidence.[5] The district court erred as to the law, however, when it ruled that the retirement benefit was an omitted asset merely because it was not mentioned in the decree. Our caselaw, including *Amie*, 106 Nev. at 542, 796 P.2d at 234, and *Williams*, 108 Nev. at 474, 836 P.2d at 619, demonstrates that the relevant inquiry is whether the asset was litigated and adjudicated, not merely whether it was written down in the decree. Here, the evidence shows that the retirement benefit was mentioned in court documents, disclosed, and considered. Thus, the benefit was not omitted from the divorce litigation. Catherine is attempting to relitigate an issue that was already before the district court at the time of the original divorce proceeding.

[Headnote 7]

The fact that the FAA retirement benefit was not mentioned in the decree is not an exceptional circumstance justifying equitable relief. It is up to the Legislature whether to create an action, or permit continuing jurisdiction, for partitioning property that was merely left out of the divorce decree. California has done so: "A party may file a postjudgment motion . . . in order to obtain adjudication of any community estate asset or liability omitted . . . by the judgment." Cal. Fam. Code. § 2556 (West 2004); *see also In re Marriage of Thorne & Raccina*, 136 Cal. Rptr. 3d at 895 ("[T]he trial court may divide a community property asset not mentioned in the judgment."). But under current Nevada law, Catherine is barred from maintaining an independent action to partition the FAA retirement benefit without showing extraordinary circumstances justifying equitable relief, and she has not done so here. Because we so hold, there is no need to address Craig's contention that the independent action was barred by Nevada's four-year residual statute of limitations in NRS 11.220.

For the reasons stated above, we reverse the district court's judgment partitioning Craig's FAA retirement benefit.

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

---

[5]The amicus brief filed by the Family Law Section of the State Bar of Nevada addresses the danger of creating a rule that might incentivize parties to divorce proceedings to hide assets. The parties' responses argue whether the FAA retirement pension was disclosed during the divorce proceedings. As noted, we conclude that the record contains substantial evidence in support of the district court's finding that the retirement benefit was disclosed and discussed—the asset was not hidden. Amicus's worry about hidden assets, therefore, is misplaced.

CHARLES REESE CONNER, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57109

June 26, 2014 327 P.3d 503

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder and two counts of sexual assault. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The supreme court, CHERRY, J., held that: (1) evidence was sufficient to support jury's conviction of defendant for first-degree murder and two counts of sexual assault, (2) the district court erred in allowing State to exercise a peremptory challenge to dismiss African-American prospective juror in defendant's murder trial, and (3) State's reasons for using peremptory challenge to strike African-American prospective juror were a mere pretext for purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

Reversed and remanded.

[Rehearing denied December 16, 2014]

Philip J. Kohn, Public Defender, and *Howard Brooks*, Deputy Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Pam Weckerly* and *Nancy Becker*, Deputy District Attorneys, Clark County, for Respondent.

1. CRIMINAL LAW; HOMICIDE; RAPE; SODOMY.
   Evidence was sufficient to support jury's conviction of defendant for first-degree murder and two counts of sexual assault; DNA found at crime scene matched defendant's DNA, defendant admitted to hitting victim with hammer, and medical examiner testified that victim died from blunt force trauma and that there was evidence of anal and vaginal sexual intercourse. NRS 200.030(1)(a), (b), 200.366(1).
2. CONSTITUTIONAL LAW.
   The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt. U.S. CONST. amend. 14.
3. CONSTITUTIONAL LAW.
   To determine whether due process requirements are met, the standard of review in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. CONST. amend. 14.

4. Criminal Law.
   In assessing a sufficiency of the evidence challenge, a reviewing court must consider all of the evidence admitted by the district court, regardless whether that evidence was admitted erroneously.
5. Criminal Law.
   It is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses, and a verdict supported by substantial evidence will not be disturbed by a reviewing court.
6. Criminal Law.
   Even where there was sufficient evidence to sustain a conviction, that conviction cannot stand where the State engages in discriminatory jury selection.
7. Constitutional Law.
   An equal-protection challenge to the exercise of a peremptory challenge in an allegedly racially discriminatory manner is evaluated using the three-step analysis set forth by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986); first, the opponent of the peremptory challenge must make out a prima facie case of discrimination, next the production burden shifts to the proponent of the challenge to assert a neutral explanation for the challenge that is clear and reasonably specific, and finally, the district court must decide whether the opponent of the challenge has proved purposeful discrimination.
8. Jury.
   Final step of *Batson* challenge involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. U.S. Const. amend. 14.
9. Jury.
   In order to carry burden in *Batson* challenge of demonstrating that the State's facially race-neutral explanation is pretext for discrimination, the defendant must offer some analysis of the relevant considerations sufficient to demonstrate that it is more likely than not that the State engaged in purposeful discrimination; these relevant considerations include, but are not limited to, the similarity of answers to voir dire questions given by veniremembers who were struck by the prosecutor and answers by those veniremembers of another race or ethnicity who remained in the venire, the disparate questioning by the prosecutors of struck veniremembers and those veniremembers of another race or ethnicity who remained in the venire, the prosecutors' use of the jury shuffle, and evidence of historical discrimination against minorities in jury selection by the district attorney's office.
10. Jury.
    In a *Batson* challenge, the district court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination.
11. Jury.
    The district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson* objection and dismissing the challenged juror; this sensitive inquiry includes giving the defendant an opportunity to traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual.
12. Jury.
    A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual.

13. JURY.
The district court should sustain the *Batson* objection and deny the peremptory challenge if it is more likely than not that the challenge was improperly motivated.

14. CRIMINAL LAW; JURY.
The district court erred in allowing State to exercise a peremptory challenge to dismiss African-American prospective juror in defendant's murder trial, and thus, reversal of conviction was warranted; State asserted that it struck juror because he switched his answers during voir dire from what was in his juror questionnaire and stated that he could not imagine a scenario where the death penalty would be appropriate, but there was no evidence that juror had switched answers and he stated that he could impose the death penalty if necessary, and when challenged at trial for use of peremptory strike, the State offered new explanations for striking the juror, but the district court did not give defendant an opportunity to respond to the new explanations.

15. JURY.
A race-neutral explanation for State's striking of a prospective juror that is belied by the record is evidence of purposeful discrimination under *Batson* analysis.

16. JURY.
State's reasons for using peremptory challenge to strike African-American prospective juror were a mere pretext for purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); State claimed it was concerned prospective juror, who was a correctional officer, would influence other jurors, but juror stated at voir dire that he would follow the district court's instructions on the law, and State claimed it struck juror because he believed people could be redeemed or rehabilitated, but State did not strike three other non-African-American veniremembers who expressed the same views.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

In this appeal, we primarily consider whether the district court committed clear error by overruling appellant Charles Reese Conner's *Batson*[1] objection and allowing the State to exercise a peremptory challenge against an African-American prospective juror. We also explain the district court's obligation to conduct a sensitive inquiry into all the relevant circumstances before deciding whether the opponent of a peremptory challenge has demonstrated purposeful discrimination by a preponderance of the evidence. After considering all the relevant circumstances and having concluded that it is more likely than not that the State struck at least one prospective juror because of race, we hold that the district court committed clear error in its ruling on Conner's *Batson* objection, and we therefore

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

reverse and remand. Further, we reject Conner's claim that insufficient evidence supports his convictions.

I.

On the night of June 2, 1985, neighbors heard Beth Jardine enter her Las Vegas apartment with a man. When Jardine and the man walked past the neighbors' apartment, one neighbor testified that he heard "a little chuckle [or laughter] here and there." Later that night they heard what they believed to be cupboard doors banging around. When one neighbor went down to the laundry room, he noticed that Jardine's front door was ajar. The next day, a maintenance man found Jardine's nude body inside the bedroom of her apartment. She had been bludgeoned to death. After Jardine's body was transported to the Clark County Medical Examiner's Office, a crime scene investigator for the Las Vegas Metropolitan Police Department (Metro) took swabs from the victim's anal and vaginal openings. After forensic tests eliminated Metro's prime suspect, the case went cold.

In 2004, a detective from Metro's Cold Case Unit asked the Las Vegas crime lab to conduct a DNA analysis on the swabs. Two years later, the test was performed and the DNA profile from the vaginal swab was entered into the Federal Bureau of Investigation's Combined DNA Index System (CODIS). On March 2, 2007, the detective received a report indicating that the CODIS database had matched the DNA profile from the vaginal swab to Conner's DNA profile. Conner's fingerprints were then compared to those recovered from an artist lamp and bed sheet found in the apartment and determined to match.

Later that month, detectives traveled to Arkansas to confront Conner with evidence that his DNA was found inside Jardine and his fingerprints were found at the crime scene. The interview was recorded after Conner waived his *Miranda*[2] rights. Conner initially denied any knowledge of the incident, telling detectives that he was drunk most of his time in Las Vegas and he did not remember much. He eventually confessed and told detectives that he hit Jardine with a hammer in a blind rage after he just snapped. At that time, detectives had not told Conner that the weapon used was a hammer. Conner also told detectives that he remembered having sex with Jardine and had anal sex with her after he struck her with the hammer. Conner was charged with one count of open murder and two counts of sexual assault by vaginal and anal penetration.

At trial, Conner admitted that he murdered Jardine but contended that it was not premeditated or committed during the perpetration

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

of sexual assault because the sex was consensual. The State called Dr. Alane Olson, a medical examiner in the Clark County Office of the Coroner/Medical Examiner. She testified to another medical examiner, Dr. James Clark's, findings as memorialized in his 1985 autopsy report as well as her own conclusions based on the autopsy report and photographs taken during the autopsy. Dr. Olson testified that based on her review of the autopsy report and photographs, Jardine had between 20 and 25 separate injuries to her head and neck. She was also asked to relay Dr. Clark's opinion as to the cause of death as contained in the autopsy report. Dr. Olson testified that it was Dr. Clark's opinion that the manner of death was homicide, caused by "[c]erebral lacerations and hemorrhage due to fragmented and depressed skull fractures, due to heavy multiple blunt force trauma to [the] head." She also testified to Dr. Clark's opinion that there was, "[a]nal and vaginal sexual intercourse, probable rape." Other findings made by Dr. Clark were also introduced through Dr. Olson's testimony, including that a grid like pattern associated with the injury appeared to be the same pattern present on the end of the hammer that was discovered at the crime scene, there was an area of bruising near the posterior fourchette of the vagina, and sperm was present on the vaginal and anal swabs taken from Jardine before the autopsy.

After hearing all the evidence, a jury rendered a special verdict of guilty against Conner for two counts of sexual assault (vaginal and anal penetration), and one count of first-degree murder, based on both premeditated and felony murder, and sentenced him to death.

II.

[Headnote 1]

Conner contends that the State presented insufficient evidence to sustain his convictions for first-degree murder and two counts of sexual assault. *See* NRS 200.030(1)(a) and (b); NRS 200.366(1). He argues that the State failed to prove beyond a reasonable doubt that the sexual intercourse was not consensual or that the murder was "willful, deliberate and premeditated." We disagree.

[Headnotes 2-4]

"The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). To determine whether due process requirements are met, "[t]he standard of review in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"

McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In assessing a sufficiency of the evidence challenge, 'a reviewing court must consider all of the evidence admitted by the trial court, *regardless whether that evidence was admitted erroneously.*'" *Stephans v. State*, 127 Nev. 712, 721, 262 P.3d 727, 734 (2011) (emphasis in original) (quoting *McDaniel v. Brown*, 558 U.S. 120, 131 (2010)).

[Headnote 5]

When all of the evidence is viewed in the light most favorable to the prosecution, a rational juror could conclude that nonconsensual anal and vaginal penetration occurred and that Conner deliberately and with premeditation intended to kill Jardine by repeatedly striking her in the head with the hammer. "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses," and "a verdict supported by substantial evidence will not be disturbed by a reviewing court." *McNair*, 108 Nev. at 56, 825 P.2d at 573; *see also Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (explaining that circumstantial evidence alone may sustain a conviction).

III.

[Headnote 6]

Even where, as here, there was sufficient evidence to sustain a conviction, that conviction cannot stand where the State engages in discriminatory jury selection. *See Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008) (explaining that discriminatory jury selection in violation of *Batson* constitutes structural error that requires reversal). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). "That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (citation and internal quotation marks omitted). Discriminatory jury selection is particularly concerning in capital cases where each juror has the power to decide whether the defendant is deserving of the ultimate penalty, death.

A.

At the beginning of Conner's trial, the district court held four days of voir dire narrowing the venire to 32 prospective jurors who survived the for-cause challenges. The State exercised nine peremptory challenges, using six of them to strike minority members of the

remaining venire. Conner alleged that these challenges established a pattern of racial discrimination. In response to this allegation, the State provided race-neutral reasons for the six peremptory challenges. The State argued that all of the veniremembers it struck were "weak on penalty" and explained:

> Every single one of these jurors, . . . each one of them indicated either [1] they couldn't imagine a scenario where the death penalty would be appropriate or [2] they flat out switched their questions from what was in their questionnaire where they said they couldn't consider the death penalty and all of a sudden had a change of heart. And those are the reasons, and those are race neutral reasons. . . . That's the basis we used for all those jurors.

Conner argued that these general explanations for striking all six prospective jurors were insufficient and specifically pointed to prospective juror number 157, an African American who expressed no reservations about imposing the death penalty in both his questionnaire and during voir dire. Conner also argued that the State should address its reasons as to each prospective juror individually. The district court relented: "Okay. Do you know what? I'm not paying extra fees for my kid to be at daycare after 6:00 o'clock. So now let's go through it quickly." The State then addressed each of the six challenged veniremembers individually. Without giving Conner an opportunity to respond and without making specific findings as to each challenged veniremember, the district court concluded, "I don't think those explanations given are a pretext for such discrimination, so I'm denying the *Batson* challenge based on that." The jury was then immediately sworn in.

Conner contends that the district court erred by denying his *Batson* challenge because the State's general explanations for striking four of the six veniremembers were not supported by the record and were pretext for racial discrimination. The State does not respond to this contention other than stating that the general explanation was "race neutral and appropriate" and instead focuses on the individual explanations for striking each juror by criticizing Conner for failing to challenge these individual explanations as pretextual during jury selection. Having considered all the circumstances surrounding Conner's *Batson* claim, we conclude that the district court clearly erred.

B.

[Headnotes 7, 8]

An equal-protection challenge to the exercise of a peremptory challenge is evaluated using the three-step analysis set forth by the

United States Supreme Court in *Batson*. *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004); *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (summarizing the three-step *Batson* analysis). First, "the opponent of the peremptory challenge must make out a prima facie case of discrimination." *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). Next, "the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge," *id*., that is "clear and reasonably specific," *Purkett*, 514 U.S. at 768 (internal quotations omitted). Finally, "the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination." *Ford*, 122 Nev. at 403, 132 P.3d at 577. "This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (internal quotation marks omitted). We review the district court's ruling on the issue of discriminatory intent for clear error. *See Libby v. State*, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999). In this case, we only address the third step of the *Batson* inquiry because, as the State admits, the district court's decision at step one is moot, *see Hernandez v. New York*, 500 U.S. 352, 359 (1991), and Conner does not argue that the State's explanations for striking the prospective jurors were facially discriminatory, *see Purkett*, 514 U.S. at 768 (explaining that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral" at step two (internal quotation marks omitted)).

[Headnote 9]

As we recently discussed in our opinion in *Hawkins v. State*, the defendant bears a heavy burden in demonstrating that the State's facially race-neutral explanation is pretext for discrimination. 127 Nev. 575, 577-78, 256 P.3d 965, 967 (2011). In order to carry that burden, the defendant *must* offer some analysis of the relevant considerations which is sufficient to demonstrate that it is more likely than not that the State engaged in purposeful discrimination. These relevant considerations include, but are not limited to: (1) the similarity of answers to voir dire questions given by veniremembers who were struck by the prosecutor and answers by those veniremembers of another race or ethnicity who remained in the venire, (2) the disparate questioning by the prosecutors of struck veniremembers and those veniremembers of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the "jury shuffle," and (4) "evidence of historical discrimination against minorities in jury selection by the district attorney's office." *Id.* at 578, 256 P.3d at 967. "An implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." *Ford*, 122 Nev. at 404, 132 P.3d at 578.

[Headnote 10]

Although we explained the defendant's obligation in *Hawkins*, we did not emphasize the important role that the district court plays at step three of the *Batson* inquiry. "[T]he trial court has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination." *United States v. McAllister*, 693 F.3d 572, 580 (6th Cir. 2012). The answer to the decisive question about whether the race-neutral explanation for a peremptory challenge should be believed will largely turn on an evaluation of credibility and usually will involve an evaluation of the demeanor of the jurors and the attorney who exercises the challenge. *See Hernandez*, 500 U.S. at 365. "The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge." *Lewis v. Lewis*, 321 F.3d 824, 831 (9th Cir. 2003). "[A]n adequate discussion of the district court's reasoning may be critical to our ability to assess the district court's resolution of any conflict in the evidence regarding pretext." *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30.

[Headnotes 11-13]

The district court "must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and "consider all relevant circumstances" before ruling on a *Batson* objection and dismissing the challenged juror. *Batson*, 476 U.S. at 93, 96 (internal quotation marks omitted); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). This sensitive inquiry certainly includes giving the defendant an opportunity to "traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual." *Hawkins*, 127 Nev. at 578, 256 P.3d at 967; *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010) ("*Batson* requires . . . an opportunity for opposing counsel to argue that the proffered reasons are pretextual . . . ."). A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual. *See Coombs*, 616 F.3d at 263. The district court should sustain the *Batson* objection and deny the peremptory challenge if it is "more likely than not that the challenge was improperly motivated." *Johnson v. California*, 545 U.S. 162, 170 (2005); *see also Williams v. Beard*, 637 F.3d 195, 215 (3d Cir. 2011).

C.

[Headnotes 14, 15]

We turn then to the inquiry that was conducted at step three in this case. Although Conner challenges on appeal the district court's decision during step three with respect to four of the prospective jurors, we need only consider one of them here. *See*

Snyder, 552 U.S. at 478 (explaining that clear error with respect to one juror is sufficient for reversal); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."). As discussed above, two general explanations were offered by the State for striking all of the challenged veniremembers: (1) they "switched their [answers] from what was in their questionnaire" or (2) they "couldn't imagine a scenario where the death penalty would be appropriate." Conner challenged these race-neutral explanations with respect to prospective juror 157, a United States Air Force Reserve officer, who worked full-time as a correctional officer and formerly served as a naval officer and police officer in another state. Conner reminded the district court that this prospective juror told both parties during voir dire that he could consider all three forms of punishment and was not concerned about his ability to impose the death penalty. His exact answer to the question, "do you feel as though you could, if necessary, vote to impose the ultimate punishment of the death penalty" was "I could sir." Furthermore, a review of his answers during voir dire reveals that he did not switch any of his answers from what he wrote on his questionnaire. Thus, the State's general explanations for striking this prospective juror were belied by the record. A race-neutral explanation that is belied by the record is evidence of purposeful discrimination.

Without responding to Conner's allegation of pretext, the district court asked the State to provide a more specific explanation for striking each of the six challenged veniremembers. Five of the six individual explanations provided further details about how each of them (1) switched answers or (2) "couldn't imagine a scenario where the death penalty would be appropriate." Juror 157 was the exception. The State abandoned its two general explanations for striking him and produced two new explanations. Instead of giving Conner an opportunity to respond to these new explanations, the district court judge overruled Conner's objections, swore in the jury, and left the courtroom after briefly reassuring the parties that she had listened "to the six separate explanations and [that her] ruling was based on those." We conclude that the district court failed to meet its step-three obligations. At the very least, the district court should have provided Conner an opportunity to meet his burden by responding to the individual race-neutral explanations proffered by the State. Without doing so, the district court could not undertake the sensitive inquiry into all the relevant circumstances required by *Batson* and its progeny. *See Batson*, 476 U.S. at 93, 96.

[Headnote 16]

On appeal, the State asks this court to overlook the evidence of purposeful discrimination and focus on the new race-neutral explanations for striking prospective juror 157 that were not belied

by the record. We find it "difficult to credit the State's new explanation, which reeks of afterthought." *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005) (describing the State's sudden production of a new explanation and failure to defend its first explanation after defense counsel drew attention to its misstatement). Moreover, the State's new race-neutral explanations do not instill this court with confidence in the district court's rushed decision below. The State's first new explanation was that it feared the prospective juror would influence others in the jury room because of his knowledge of law enforcement and the criminal justice system. While not necessarily "[a]n implausible or fantastic justification," *Ford*, 122 Nev. at 404, 132 P.3d at 578, we find it unusual that the State based its decision on this prospective juror's law enforcement experience, especially in light of his promise during voir dire, at the State's request, that he would follow the instructions of the district court about the law. The second new explanation for striking this prospective juror was that he believed people could be redeemed or rehabilitated. If, indeed, prospective juror 157's thoughts on redemption or rehabilitation made the State uneasy, it also should have been worried about a number of other veniremembers whom it accepted with no evident reservations. *Miller-El*, 545 U.S. at 244. A comparison of prospective juror 157's responses to those of other veniremembers who were not struck reveals that his expressed views on redemption or rehabilitation were similar, if not identical, to those of at least three other non-African-American veniremembers who remained on the jury. This kind of disparate treatment of similarly situated veniremembers can support the inference that the reasons given for striking prospective juror 157 were mere pretext for purposeful discrimination. *See id*. at 244-47. Having considered all the relevant circumstances, we conclude that the district court clearly erred by allowing the State to exercise a peremptory challenge to dismiss this prospective juror.

Because this error is structural, we reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this opinion.[3]

PICKERING, HARDESTY, PARRAGUIRRE, and DOUGLAS, JJ., concur.

GIBBONS, C.J., with whom SAITTA, J., agrees, concurring:

While I agree with the majority that the district court clearly erred by denying Conner's *Batson* challenge, I write separately to express my concern with the State's introduction of the statements and opinions of Dr. James Clark as contained in his 1985 autopsy report through the testimony of Dr. Alane Olson. In its

[3]Because we reverse the judgment of conviction on these grounds we need not address the other contentions raised by Conner on appeal.

answering brief, the State argues that an autopsy report is not testimonial because it falls within the business-records exception to the hearsay rule. The United States Supreme Court has clearly explained that whether a report falls within an exception to the hearsay rule is not determinative of whether the report is testimonial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322-24 (2009). This court has "previously concluded that a statement is testimonial if it would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." *Vega v. State*, 126 Nev. 332, 339, 236 P.3d 632, 637 (2010) (internal quotations omitted); *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (determining whether statement was made for the primary purpose of establishing "past events potentially relevant to later criminal prosecution"); *Williams v. Illinois*, 567 U.S. 50, 104 (2012) (Thomas, J., concurring in judgment) (agreeing with the primary purpose analysis of Kagan, Scalia, Ginsburg, and Sotomayor, JJ.). Furthermore, the Sixth Amendment prohibits the State from introducing testimonial evidence through "surrogate testimony." *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011); *Vega*, 126 Nev. at 340, 236 P.3d at 638 (concluding that an expert witness's testimony regarding the content of a written report prepared by another person who did not testify "effectively admitted the report into evidence"). In the event of a retrial, the State should carefully consider the Confrontation Clause issues.

IAN SCOTT DRUCKMAN, Appellant, *v.*
AUDRIA BERNICE RUSCITTI, Respondent.

No. 60598

IAN SCOTT DRUCKMAN, Appellant, *v.*
AUDRIA BERNICE RUSCITTI, Respondent.

No. 61038

June 26, 2014 327 P.3d 511

Consolidated appeals from district court orders establishing child custody, granting a motion to relocate with the minor child, and awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; William B. Gonzalez, Judge.

After mother relocated with child from Nevada to California with no child custody order in place, father moved in Nevada court for child's immediate return and for an award of joint legal and primary physical custody. Mother requested sole legal and physical custody and moved to allow child to remain in California with her. The

district court awarded joint legal custody, granted primary physical custody to mother, and granted mother's motion for relocation. Father appealed. The supreme court, DOUGLAS, J., held that (1) unmarried parents have equal custody rights to their child, absent a judicial custody order to the contrary; (2) when parents have equal custody rights, one parent may not relocate child out of state over other parent's objection without a judicial order authorizing the move, and proper procedure is to file a motion for primary physical custody with a request to relocate; and (3) the district court did not abuse its discretion in awarding mother primary physical custody and in granting mother's motion for relocation.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied September 24, 2014]

SAITTA, J., with whom CHERRY, J., agreed, dissented.

Kunin & Carman and *Michael P. Carman*, Las Vegas; *Fine Law Group* and *Corinne M. Price*, Henderson, for Appellant.

McFarling Law Group and *Emily M. McFarling*, Las Vegas, for Respondent.

Katherine L. Provost, Shelley Booth Cooley, and *Michelle A. Hauser*, Las Vegas, for Amicus Curiae State Bar of Nevada, Family Law Section.

1. CHILDREN OUT-OF-WEDLOCK.
   Unmarried parents have equal custody rights to their child, absent a judicial custody order to the contrary. NRS 126.031(1), 126.036(1).
2. CHILD CUSTODY.
   When parents have equal custody rights of their child, one parent may not relocate his or her child out of state over the other parent's objection without a judicial order authorizing the move, and the proper procedure is to file a motion for primary physical custody with a request to relocate outside of Nevada.
3. CHILDREN OUT-OF-WEDLOCK.
   When considering a motion to relocate a minor child out of Nevada by an unmarried parent who shares equal custody of the child, the district court must base its decision on the child's best interest. NRS 125.480(4).
4. CHILDREN OUT-OF-WEDLOCK.
   Unmarried parent sharing equal custody of minor child who moves to relocate child out of Nevada must demonstrate a sensible, good-faith reason for the move before the court considers the motion.
5. CHILDREN OUT-OF-WEDLOCK.
   A district court must incorporate the following factors into its analysis of child's best interest when considering a motion to relocate a minor child out of Nevada by an unmarried parent who shares equal custody of child: (1) extent to which move is likely to improve quality of life for both child and relocating parent; (2) whether relocating parent's motives are honorable and not designed to frustrate or defeat visitation rights accorded to oth-

er parent; (3) whether, if permission to remove is granted, relocating parent will comply with any substitute visitation orders issued by the court; (4) whether other parent's motives are honorable in resisting motion for permission to remove or to what extent, if any, opposition is intended to secure a financial advantage in form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for other parent to maintain a visitation schedule that will adequately foster and preserve parental relationship with other parent. NRS 125.480(4).

6. Children Out-of-Wedlock.

If a parent sharing equal custody of minor child unlawfully relocates his or her child out of Nevada and later moves for primary physical custody, the district court should not consider any factors from the child's time in the new state, such as the child's new school, friends, or routine in determining best interest of child. NRS 125.480(4).

7. Children Out-of-Wedlock.

The district court did not abuse its discretion, in custody dispute between unmarried parents with no previous custody order in place, in awarding mother primary physical custody after mother relocated out of state with child, without father's knowledge or consent, and in granting mother's motion for relocation; mother showed good-faith reason for move, i.e., employment opportunities and fact that parties had previously contemplated moving together out of state, and the district court found, with respect to child's best interest, that mother's improved financial situation would benefit child, that father would have reasonable alternative visitation, and that child had formed bond with mother's older daughter. NRS 125.480(4).

8. Children Out-of-Wedlock.

Father's motion for a stay, pending appeal, of order that awarded primary custody of unmarried parties' daughter to mother, in a case in which no custody order had previously existed, and granted mother's motion to relocate out of state with daughter, was not frivolous so as to warrant an award of attorney fees to mother; motion was based on reasonable grounds because father sought stability for his child.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." NRS 126.031(1). In this case, we examine the child custody rights of unmarried parents when the father's paternity has been established pursuant to statute but the district court has not issued a child custody order. Additionally, we examine the district court's decision to award the mother primary physical custody of the child and to approve her relocation with the child outside of Nevada. Ultimately, although both parents came to the court with equal rights to custody of the child, we hold that the district court did not abuse its discretion in granting the mother's motion for primary physical custody and relocation because the court considered all the relevant and

necessary factors, including the reasons for the relocation and the child's best interest, before making the determination.

FACTS

Audria Ruscitti and Ian Druckman had a child together. The two never married, but Ian voluntarily established himself as the child's father with a written acknowledgment of paternity under NRS 126.053. After the child's birth, the parties lived and parented the child together but did not have a judicial child custody order. They discussed moving out of Nevada together, but separated before they could do so. When Ian moved out of the home, Audria relocated with the child from Nevada to California for better job opportunities, without Ian's consent or knowledge. After learning of Audria's move, Ian filed a motion in the Nevada district court for the child's immediate return and for an award of joint legal and primary physical custody.[1] In response, Audria filed an opposition and requested that the court award her sole legal and primary physical custody of the child, and allow the child to remain in California with her.

The district court determined that NRS 125C.200, the statute governing relocation by an established custodial parent, was inapplicable because the couple did not have a judicial child custody order. Further, the district court awarded Audria and Ian joint legal custody and Audria primary physical custody and granted her motion for relocation with the child outside of Nevada. In this appeal, the parties dispute the nature of their custodial rights and whether the district court properly allowed Audria to relocate out of state with the child.[2]

DISCUSSION

Child custody presumptions for unmarried parents

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." NRS 126.031(1). Thus, married and single parents are afforded the same rights and protections regarding their respective children.

Here, the parties signed a voluntary acknowledgment of Ian's paternity shortly after the child's birth. A voluntary acknowledgment of paternity is deemed to have the same effect as a judgment or order of a court determining that a parent-child relationship exists. NRS 126.053(1). This case presents an issue concerning what custody rights exist when parentage has been established by statute between

---

[1]Pursuant to NRS 125A.305(1)(a), Nevada has jurisdiction to hear this matter because Nevada was the child's home state within six months before this proceeding commenced.

[2]This court invited the Family Law Section of the State Bar of Nevada to file an amicus curiae brief addressing the relocation standard for unmarried parents.

unmarried parents, such that the parent-child relationship exists, but no court has issued a child custody order.[3]

[Headnote 1]

We conclude that unmarried parents have equal custody rights regarding their children, absent a judicial custody order to the contrary. We have held that when two parents seek custody of their children in an initial custody action, they begin as equals. *Rico v. Rodriguez*, 121 Nev. 695, 705, 120 P.3d 812, 818 (2005) (quoting *McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005)). If parents begin an initial custody action as equals, then—prior to a judicial order establishing otherwise—the parents are entitled to equal rights to their children. This conclusion derives further support from the constitutional protections parents enjoy regarding the care, custody, and control of their children, *see id.*, as well as a parent's legal rights in making major decisions regarding his or her child's upbringing, including where the child will live. *See Rivero v. Rivero*, 125 Nev. 410, 421, 216 P.3d 213, 221 (2009); NRS 126.036(1). Accordingly, in seeking the district court's resolution of this custody dispute, Audria and Ian appeared before the court holding equal custody rights over their child.

Custody and relocation

Having established that Audria and Ian begin with equal custody rights to their child, we must next determine the applicable standard for deciding the parties' motions for custody and Audria's motion to relocate with the child to California.

NRS 125C.200's applicability

NRS 125C.200 governs relocation by a custodial parent with the child out of state and provides:

> If custody has been established and the custodial parent intends to move his or her residence to a place outside of [Nevada] and to take the child with him or her, the custodial parent must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this State. If the noncustodial parent refuses to give that consent, the custodial parent shall, before leaving this State with the child, petition the court for permission to move the child.

The district court correctly determined that NRS 125C.200 was inapplicable. In *Potter v. Potter*, we concluded that the statute ap-

[3]We note that under NRS 126.031(2)(a), an unmarried mother has primary physical custody unless an order determining paternity has been entered. Here, the voluntary acknowledgment of paternity precluded Audria from having primary physical custody by operation of law. *See* NRS 126.053(1).

plied only to instances where a parent has been granted primary physical custody of his or her child and wants to relocate outside of Nevada. 121 Nev. 613, 617-18, 119 P.3d 1246, 1249 (2005). Here, no court had awarded one party primary physical custody, and the parties equally held custody rights to their child; therefore, NRS 125C.200 was inapplicable.

[Headnote 2]

Although NRS 125C.200 does not control this matter, the policy behind the statute is prudent and may be used as a guide in instances where no custodial order exists and the parents dispute out-of-state relocation. NRS 125C.200 is designed to preserve a parent's rights and familial relationship with his or her children. *See Schwartz v. Schwartz*, 107 Nev. 378, 381-82, 812 P.2d 1268, 1270 (1991).[4] Removal of a child over the other parent's objection may create unfair legal and practical advantages for the relocating parent in subsequent custody proceedings. The child would likely develop a routine and become accustomed to life in the new state. This factor would weigh in favor of awarding the relocating parent primary custody because stability is important in a child's life. Further, the non-relocating parent would have to incur substantial travel costs to maintain a relationship with the child, which could be insurmountable and result in a weakened parent-child relationship. Thus, we hold that when parents have equal custody rights of their child, one parent may not relocate his or her child out of state over the other parent's objection without a judicial order authorizing the move. The proper procedure is to file a motion for primary physical custody with a request to relocate outside of Nevada.

[Headnotes 3, 4]

Ultimately, when considering a motion to relocate a minor child out of Nevada by an unmarried parent who shares equal custody of the child, the district court must base its decision on the child's best interest. *See Potter*, 121 Nev. at 618, 119 P.3d at 1250; *see also* NRS 125.480(4). However, the requesting parent must demonstrate " 'a sensible, good faith reason for the move' " before the court considers the motion. *Cook v. Cook*, 111 Nev. 822, 827, 898 P.2d 702, 705 (1995) (quoting *Jones v. Jones*, 110 Nev. 1253, 1266, 885 P.2d 563, 572 (1994)). If the parent clears this hurdle, the district court can then consider the relocation motion. The moving parent's failure to establish a good faith reason for the move is grounds to deny the request to relocate with the child. The court may nevertheless establish the parents' custodial rights apart from the relocation if either parent so requests.

---

[4]In *Schwartz*, this court interpreted NRS 125A.350. NRS 125C.200 was substituted in revision for NRS 125A.350, but the policy behind the statute remained the same.

[Headnote 5]

In considering a motion to relocate and determining the parents' custodial rights, the court must decide "whether it is in the best interest of the child to live with parent A in a different state or parent B in Nevada." *Potter*, 121 Nev. at 618, 119 P.3d at 1250. In *Potter*, this court indicated that the district court may consider, among other factors, whether one parent has de facto primary custody. Although this court did not refer to the relocation factors set forth in *Schwartz*, we take this opportunity to clarify *Potter* and conclude that the district court must incorporate the five *Schwartz* factors into its best-interest analysis:

> (1) the extent to which the move is likely to improve the quality of life for both the child[ ] and the custodial parent; (2) whether the custodial parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the noncustodian's motives are honorable in resisting the motion for permission to remove, or to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent.[5]

Schwartz, 107 Nev. at 382-83, 812 P.2d at 1271. A court cannot adequately evaluate a child's best interest in the custody determination without considering the circumstances of the relocation request. Indeed, as we have previously recognized, "[t]he circumstances and well-being of the parents are inextricably intertwined with the best interest of the child." *See McGuinness v. McGuinness*, 114 Nev. 1431, 1433, 970 P.2d 1074, 1076 (1998).

[Headnote 6]

Moreover, removal without consent violates the spirit of the law and may subject the offending parent to negative consequences.[6] For instance, if a parent unlawfully relocates his or her child

---

[5]We recognize that this list is not exhaustive and that a district court may have to consider numerous subfactors in making its determination. *See Schwartz*, 107 Nev. at 383, 812 P.2d at 1271.

[6]This rule is inapplicable to any instance where a parent relocates his or her child to protect the child from imminent danger and reports the relocation to a law enforcement or child welfare services agency as soon as circumstances allow. Such exigent circumstances were not present in this case because Audria stated that she moved to California to further her career. For the same reason,

out of Nevada and later moves for primary physical custody, the district court should not consider any factors from the child's time in the new state—such as the child's new school, friends, or routine—in the best-interest determination.

[Headnote 7]

Here, the district court did not abuse its discretion in awarding Audria primary physical custody and approving her relocation with the child to California. The court found a good faith reason for the move: Audria's employment opportunities in California and the fact that the parties had previously contemplated moving together out of the state. As for custody, the district court—after considering all relevant factors, including the *Schwartz* factors—determined that living with Audria in California was in the child's best interest. In evaluating the child's best interest under NRS 125.480(4), the district court considered that while the child had a good relationship with both parents and they could each provide a nurturing home, the child had formed a bond with Audria's older daughter. As for the *Schwartz* factors, the court found that Audria's improved financial situation would benefit the child and that Ian would have reasonable alternative visitation. Further, the court did not incorporate any factors resulting from the child's time in California into its decision. Accordingly, we affirm the district court's order awarding Audria primary physical custody of the child and allowing the child to remain with her in California.

[Headnote 8]

Finally, Ian contends that the district court abused its discretion in awarding Audria attorney fees as a sanction against Ian for filing a frivolous motion to stay the order pending appeal. We conclude that Ian's motion was based on reasonable grounds because he sought stability for his child.

Therefore, we reverse the district court's order sanctioning Ian with attorney fees and remand the matter for reconsideration.[7]

GIBBONS, C.J., and PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

SAITTA, J., with whom CHERRY, J., agrees, dissenting:

While I agree with my colleagues in concluding that unmarried parents should be treated equally with married parents and have the

---

the custodial presumptions for child abduction are not implicated. *See* NRS 125.480(7); NRS 125C.240. The district court found that Audria's removal of the child did not constitute abduction and was made in good faith.

[7]Ian also contends that the district court improperly limited his presentation of evidence, and that the district judge should be disqualified for bias. We conclude that these contentions are without merit.

same custody rights to their children, the majority fails to fully recognize that Audria's removal of the child from the state without Ian's consent or prior judicial authorization was wrongful. I am deeply concerned that the majority opinion may encourage an unmarried parent to relocate the child without the other parent's knowledge or consent in an effort to create an unfair advantage in a custody determination.

NRS 125C.200 requires a custodial parent to obtain the noncustodial parent's consent or court permission before removing the child from the state. Although, as the majority concludes, NRS 125C.200 only applies when the moving parent has primary physical custody of the child, I see no reason why parents with equal legal custody rights should have any less protections than those afforded by this statute. This court has previously recognized that a parent with joint physical custody must move the district court for primary physical custody for the purpose of relocating. *See Potter v. Potter*, 121 Nev. 613, 618, 119 P.3d 1246, 1249 (2005). Just because our state legislature has not designed a law to address the specific factual situation presented in this case, it does not follow that an unmarried father who established his legal custody rights by an expedited process should have any less rights than a married parent, a parent with joint custody, or a noncustodial parent. To hold otherwise undermines the legislative directive in NRS 126.031(1) that the parent and child relationship extends equally to every parent regardless of marital status.

Legal custody encompasses the right to make major decisions regarding the child's upbringing and contemplates that parents consult with each other in making decisions that are in their child's best interest. *See Rivero v. Rivero*, 125 Nev. 410, 420-21, 216 P.3d 213, 221 (2009). When parents who share equal legal custody rights cannot agree on a major decision concerning their child's upbringing, they should appear before the court on equal footing to decide the custody dispute in accordance with the law. *Id.* at 421, 216 P.3d at 221-22. Deciding where and with whom the child will live constitutes a major decision in a child's upbringing.

Here, the parties established Ian's legal rights and responsibilities as the child's legal father when they executed the affidavit of paternity. *See* NRS 126.053. That affidavit also prohibited Audria from having primary physical custody of the child as a matter of law, absent any judicial determination to the contrary. *See* NRS 126.031(2)(a). The record established that Ian is an actively involved father in the child's life, and thus, he has a fundamental right to make decisions as to the care, custody, and control of his child. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983) (recognizing constitutional protections for a biological father who grasps the opportunity to

develop a relationship with his child and accepts responsibility for the child's future). Therefore, securing Ian's consent or court permission before removing the child was a requirement, not merely the better practice, as the majority suggests.

In fact, several factors weigh against awarding custody to a parent who has improperly removed a child without the other parent's consent. For instance, in determining the child's best interest, the district court must consider the parents' ability to cooperatively meet the child's needs, as well as which parent is more likely to foster the child's association and relationship with the other parent. NRS 125.480(4)(c), (e). And when deciding a relocation request, a court must consider whether the moving parent's motives are honorable and not designed to frustrate the noncustodial parent's visitation rights. *See Schwartz v. Schwartz*, 107 Nev. 378, 383, 812 P.2d 1268, 1271 (1991). Relocation without consent may be a basis for awarding custody to the other parent. *See* NRS 125C.200; *see also* NRS 125.480(7) (creating a rebuttable presumption against custody with a parent who has abducted the child).

As for the unfair legal advantage created by this type of unilateral removal by one parent, the majority acknowledges that a court should not consider any new circumstances from the move in its analysis, but then concludes that the district court did not incorporate any of these facts into the decision in this case. I disagree. Removal of the child before deciding the case necessarily creates an advantage for the relocating parent who has an opportunity to establish a new environment and status quo for the child, which cannot be easily disregarded, especially if the child has been in the new environment for a lengthy period of time. A court would be hesitant to disrupt the stability of a child living in a new home, established in a school and community, and surrounded by new friends. The need for stability in a child's life is of utmost importance. *See Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007). The relocating parent should not be rewarded for disregarding the other parent's legal custody rights.

Going forward, no one should take away from the majority opinion that a parent with equal custody rights can remove a child and obtain permission later. Audria's actions left Ian in the position of having to file a motion for custody and return of the child. Yet Audria had the burden to establish that she was entitled to primary custody and that relocation was in the child's best interest *before* removing the child from the state. The district court failed to recognize that Audria's unilateral removal of the child was improper, but rather determined that Audria relied on proper legal advice that she did not need Ian's consent. By starting with this faulty premise, the district court disregarded the effect of Audria's actions on the custodial determination and failed to place the burden squarely on

Audria to establish that removal was in the child's best interest. And even though the district court made findings that relocation was in the child's best interest after the fact, the establishment of the child in a new environment necessarily gave Audria a strategic advantage, and Audria's actions should have factored against awarding custody in her favor. *See* NRS 125.480(4)(c), (e); *Schwartz*, 107 Nev. at 382-83, 812 P.2d at 1271. Instead, the district court determined that Audria's motives were honorable and that she would continue to foster a relationship between the child and his father. But removal of the child without first obtaining permission certainly casts doubt on the findings of honorable motives and that Audria had a good faith reason for the move. Had the district court considered these factors in the proper light, the result may very well have been different. I would therefore reverse and remand to the district court for a new custody determination, and thus, I respectfully dissent.