JEFF MYERS, Individually and on Behalf of Others Similarly Situated, Appellant, *v.* RENO CAB COMPANY, INC., Respondent.

No. 80448

ARTHUR SHATZ and RICHARD FRANTIS, Individually and on Behalf of Others Similarly Situated, Appellants, *v.* ROY L. STREET, Individually and dba CAPITAL CAB, Respondent.

No. 80449

July 29, 2021 492 P.3d 545

Consolidated appeals from a district court order granting summary judgment in minimum wage matters. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reversed and remanded.

Leon Greenberg Professional Corporation and *Leon M. Greenberg*, Las Vegas, for Appellants.

Simons Hall Johnston PC and *Mark G. Simons*, Reno, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

The central issue in these consolidated cases is a familiar one: are the appellants "employees" or "independent contractors," and how do we tell?[1] The answer will depend on the legal context. To say that a worker is an "employee" for the purpose of a particular law usually means that the worker falls within that law's scope of coverage. But different laws may have different scopes of coverage, and so the same worker may be an "independent contractor" as concerns one law and an "employee" as concerns another.

In this opinion, we clarify that employee status for purposes of the Minimum Wage Amendment to the Nevada Constitution (MWA) is determined only by the "economic realities" test, but employee status for purposes of statutory waiting time penalties for late-paid wages may be affected by the presumption set forth in NRS 608.0155. We reaffirm that a contractual recitation that a worker is not an employee is not conclusive under either test. Finally,

[1]*Cf.* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295 (2001).

employee status for the purposes of either the MWA or NRS Chapter 608 is *not* affected by the Nevada Transportation Authority's (NTA) approval of a taxi lease under NRS 706.473. Because the district court held that the NTA's approval of appellants' leases foreclosed further inquiry into their employee status, we reverse and remand.

BACKGROUND

The respondents are taxicab companies that lease taxicabs to the appellant drivers under agreements approved by the NTA, pursuant to NRS 706.473.[2] Each agreement contains the following language:

> RELATIONSHIP. Neither Party is the partner, joint venture, agent, or representatives of the other Party. LESSEE is an independent contractor. LEASING COMPANY and LESSEE acknowledge and agree that there does not exist between them the relationship of employer and employee, principal and agent, or master and servant, either express or implied, but that the relationship of the parties is strictly that of lessor and lessee, the LESSEE being free from interference or control on the part of LEASING COMPANY.

Each lease agreement requires the driver to operate the taxicab for at least three days per week, unless the driver obtains approval for an alternate schedule. On any day that the driver operates the taxicab, the driver must pay to the leasing company a nominal fee of 5 or 10 dollars, plus one-half of the driver's "total book" (i.e., gross receipts) for the day, plus gas and administrative fees. The lease agreement states that drivers have the option, but are not required, to use the companies' dispatch service to acquire passengers.

The drivers sued in 2015, alleging that their take-home pay was often less than the minimum hourly wage required by the MWA. The MWA only applies to "employees." Nev. Const. art. 15, § 16. The drivers alleged that, notwithstanding the recital in the lease agreement that they were independent contractors, they were in fact employees under the "economic realities" test we elucidated the previous year in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879, 336 P.3d 951 (2014). Although *Terry* involved the *statutory* right to a minimum wage, *see id.* at 881, 336 P.3d at 953; *see also* NRS 608.250, the drivers argued that the same test should apply to their MWA claims. In addition, the drivers alleged that they were not paid all the wages they were owed at the time of separation, entitling them to waiting time penalties under NRS 608.040.

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[2]NRS 706.473(1) provides in relevant part that "a person who holds a certificate of public convenience and necessity which was issued for the operation of a taxicab business may, upon approval from the Authority, lease a taxicab to an independent contractor who does not hold a certificate of public convenience and necessity."

The cab companies moved for summary judgment, arguing that the drivers were independent contractors, not employees, for the purposes of the minimum wage laws. The district court initially denied the motion, finding that disputed issues of material fact prevented summary judgment. But it later granted the cab companies' renewed motion. It relied solely on the fact that the drivers held NTA-approved taxicab leases, reasoning that when the NTA approves a lease pursuant to NRS 706.473, it confirms that the parties to the lease have entered a "statutorily created independent contractor relationship." *See Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 592, 262 P.3d 699, 704 (2011). In the district court's view, a worker who is an independent contractor under NRS 706.473 is not an employee for any purpose, and thus the protections afforded to "employees" by the MWA and by NRS Chapter 608 did not apply. The drivers appealed, and this court has consolidated these appeals.

DISCUSSION

The drivers stated two claims: one claim for unpaid minimum wages under the MWA, and one claim for waiting time penalties under NRS 608.040. The drivers are entitled to assert each claim only if they are "employees" under the relevant law. We first consider whether the statement in the drivers' leases that they are independent contractors is conclusive as to employee status under these laws. Second, we consider whether the NTA's approval of the drivers' leases under NRS 706.473 is conclusive as to employee status under these laws. Finally, having held in *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 481 P.3d 860 (2021), that NRS 608.0155 does not govern employment status with respect to constitutional MWA claims, we consider whether that statute applies to NRS Chapter 608 claims that are derivative of an underlying constitutional violation.

Standard of review

"This court reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The proper legal test for employee status under the MWA and NRS Chapter 608 is a question of law, which we also review de novo. *See Doe Dancer*, 137 Nev. at 24, 481 P.3d at 866. When the facts are undisputed, the existence of an employment relationship under a given test is a question of law that can be resolved at summary judgment. *See Terry*, 130 Nev. at 889, 336 P.3d at 958. But where material facts are genuinely disputed, summary judgment should be denied. *See Jaramillo v. Ramos*, 136 Nev. 134, 139, 460 P.3d 460, 465 (2020) (reversing summary judgment where genuine issue of material fact existed).

A contractual disavowal of an employment relationship is not conclusive

We dispose of the cab companies' simplest argument first. They contend that the recitation in the lease agreement that "LESSEE is an independent contractor" is conclusive evidence that the drivers are in fact independent contractors for MWA and NRS Chapter 608 purposes, and thus no application of any other test is necessary. As the district court correctly recognized, that argument is squarely foreclosed by our caselaw. *Terry*, 130 Nev. at 882, 336 P.3d at 954 ("Particularly where, as here, remedial statutes are in play, a putative employer's self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship."); *see also Doe Dancer*, 137 Nev. at 23, 26-30, 481 P.3d at 865, 868-70 (concluding that dancers were employees under the MWA despite contract specifically disavowing any employment relationship—in all capitals, no less).

We note that employment relationships are by no means unique in their dependence on facts beyond the original contract. *Cf. Shaw v. Delta Airlines, Inc.*, 798 F. Supp. 1453, 1455 (D. Nev. 1992) (noting that whether the parties call their relationship a partnership, or believe it to be so, is "immaterial" in determining whether they are in fact partners). A dispute over whether a worker is an employee covered by remedial legislation cannot be resolved by the contract's statement to the contrary, any more than a dispute over whether a worker was paid can be resolved by the contract's statement that the worker will be paid every Friday. Just as a business may fail to *in fact* pay its workers on time, a business may fail to *in fact* treat its workers as independent contractors. The facts as proven in court control a worker's actual status.[3]

In the face of this authority, the cab companies point only to *Kaldi v. Farmers Insurance Exchange*, 117 Nev. 273, 21 P.3d 16 (2001). There, we relied on a contract provision to find that no employment relationship existed. *Id.* at 278-79, 21 P.3d at 19-20. However, *Kaldi* was not concerned with any "remedial statute" or constitutional provision, *cf. Terry*, 130 Nev. at 882, 336 P.3d at 954,

[3]Our continued refusal to treat a written disavowal of an employment relationship as conclusive, or even particularly persuasive, is supported by the overwhelming weight of authority. *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act."); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 403 (Cal. 1989) ("The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced."). Ultimately, "if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck . . . even if it is holding a piece of paper that says it is a chicken." *Wild v. Fregein Constr.*, 68 P.3d 855, 861 (Mont. 2003); *see also Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007).

but only with an alleged *contractual* right to be free from termination except for good cause. *See Kaldi*, 117 Nev. at 279 & n.4, 21 P.3d at 20 & n.4 (citing *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 211-12 (1991), which discussed "contractual rights of continued employment" in context of tortious bad-faith discharge). Of course, if a plaintiff seeks to enforce a right given by the contract, then the contract's language will be highly relevant. If the drivers' claims here were similar to those in *Kaldi*, then *Kaldi* might well be controlling. But the claims are dissimilar. The drivers here seek to enforce a right that—if they are employees under the appropriate tests—is guaranteed to them by law, not by the contract. To the extent *Kaldi* might be misread as suggesting that a contractual recitation is dispositive of a worker's status under remedial employment laws, it serves as an example of the risk of confusion caused by using the terms "employee" or "employment relationship" without specifying the legal context.

Thus, we reaffirm that a worker is not necessarily an independent contractor solely because a contract says so. Instead, the court must determine employee status under the applicable legal test, based on all the relevant facts. Courts must not allow contractual recitations to be used as "subterfuges" to avoid mandatory legal obligations. *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 403 (Cal. 1989). Otherwise, our constitutional and statutory protections for workers could (and almost certainly would) be eviscerated by contracts of adhesion disavowing an employment relationship.[4]

NRS 706.473 does not affect the test for employment status under either the MWA or NRS Chapter 608

We now turn to the grounds on which the district court actually granted summary judgment. The drivers' leases were approved by the NTA pursuant to NRS 706.473, which permits a company to lease a taxicab to an independent contractor. We have held that when "all of the statutory and administrative requirements for creating . . . an independent contractor relationship [under NRS 706.473] have been satisfied," then a "statutorily created independent contractor relationship" exists as a matter of law. *See Yellow Cab*, 127 Nev. at 592, 262 P.3d at 704. The district court reasoned that because the NTA approved the drivers' leases and all other administrative requirements were satisfied, the relationship between the drivers

[4]In their supplemental briefing, respondents urged for the first time that treating these plaintiffs as employees would impair the obligation of contracts, in violation of U.S. Constitution Article I, Section 10, and Nevada Constitution article 1, section 15. This belated argument is not properly before us, and so we decline to address it in detail, but we do note that a federal court recently rejected a similar challenge to California's employee misclassification statute. *Crossley v. California*, 479 F. Supp. 3d 901, 919-20 (S.D. Cal. 2020).

and the companies is a "statutorily created independent contractor relationship."

Next, the district court reasoned that because the drivers were independent contractors under NRS Chapter 706, they were not entitled to the protections of either the MWA or NRS Chapter 608. The district court erred at this step. Its analysis assumed that an independent contractor under NRS Chapter 706 is necessarily an independent contractor *for all purposes*. That assumption was unfounded. The phrase "independent contractor" does not have a single, universal meaning that is the same in all contexts and for all purposes. Rather, because different statutes have different scopes, it is not at all unusual for a worker to be classified as an independent contractor for some purposes and as an employee for others. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 29 (Cal. 2018) ("[W]hen different statutory schemes have been enacted for different purposes, it is possible . . . that a worker may properly be considered an employee with reference to one statute but not another."); *cf. Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004) (cautioning that "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and must constantly be guarded against"). For example, workers who would otherwise be considered "independent contractors may be deemed 'employees'" for the limited purposes of the Nevada Industrial Insurance Act. *Hays Home Delivery, Inc. v. Emp'rs Ins. Co. of Nev.*, 117 Nev. 678, 682, 31 P.3d 367, 369 (2001); *see* NRS 616A.210(1). Naturally, their status as employees for those limited purposes does not spill over and make them employees for other purposes. *See* NRS 616A.210(3); *see also, e.g.*, *Alberty-Vélez v. Corporación de P.R. para la Difusión Pública*, 361 F.3d 1, 10 (1st Cir. 2004) (holding that a worker's status for purposes of Puerto Rican unemployment insurance law was irrelevant to the same worker's status for purposes of federal antidiscrimination law).

We recognized in *Yellow Cab* itself that NRS Chapter 706's "statutorily created independent contractor relationship" did not necessarily have all of the same consequences as a "traditional independent contractor relationship[ ]." 127 Nev. at 592 & n.6, 262 P.3d at 704 & n.6. There, we explained that even though it is settled law that a *traditional* independent contractor relationship forecloses finding the principal liable in respondeat superior for the contractor's torts, the effect of the *statutory* relationship on such liability was a completely different question.[5] *Id.* Likewise, even if

[5]Because the district court in *Yellow Cab* had not addressed the effect of the statutory relationship on respondeat superior liability, we declined to answer this question in the first instance. 127 Nev. at 592-93, 262 P.3d at 704-05.

the existence of a traditional independent contractor relationship would take the worker outside the protection of the MWA and NRS Chapter 608, the existence of the statutory relationship might not. The district court's reliance on *Yellow Cab* was therefore misplaced. We must determine in the first instance whether NRS Chapter 706's "statutorily created independent contractor relationship" precludes coverage under either the MWA or NRS Chapter 608.

NRS 706.473 cannot override the constitutional minimum wage guarantee

NRS 706.473 plainly cannot preclude coverage under the MWA. We held in *Doe Dancer* that Nevada's Constitution guarantees a minimum wage to workers who satisfy the economic realities test. *See* 137 Nev. at 25-26, 481 P.3d at 867. Under the economic realities test, the court "examines the totality of the circumstances and determines whether, as a matter of economic reality, workers depend upon the business to which they render service for the opportunity to work." *Terry*, 130 Nev. at 886, 336 P.3d at 956 (emphasis omitted). Under this test, an independent contractor is one who, "as a matter of economic fact, [is] in business for himself." *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994). The inquiry is "not limited by any contractual terminology or by traditional common law concepts." *Id.* Rather, the economic realities test is "wide-reaching," *Terry*, 130 Nev. at 886, 336 P.3d at 956, in order to effectuate the "remedial purpose underlying the legislation." *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir. 1993); *cf. Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552-53 (2d Cir. 1914) (Hand, J.) ("[W]here all the conditions of the relation require protection, protection ought to be given."). There are six main factors courts should consider, though these factors are not exhaustive. *Terry*, 130 Nev. at 888-89, 336 P.3d at 958.

When a person is entitled to a right under the constitution, we do not look to a statute to second-guess that entitlement, because "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 522 (2014); *see Doe Dancer*, 137 Nev. at 34-35, 481 P.3d at 872-73. Thus, if as a matter of economic reality a worker is dependent on the business to which she or he renders service, and is not in business for herself or himself, and is not subject to the MWA's express exceptions, then the worker is constitutionally entitled to be paid a minimum hourly wage for that service. This is true no matter the worker's status under NRS 706.473 or any other statute. To dispel any lingering uncertainty, we clarify that *only* the economic realities test determines whether a worker is an employee for the purposes of the MWA.

The NTA's sweeping definition of "independent contractor" does not apply to NRS Chapter 608 waiting time penalty claims

We now turn to the next question: does the NTA's approval of a driver's lease preclude the driver from employee status under NRS Chapter 608? The answer is somewhat less plain, because while the Legislature cannot take away a constitutional entitlement, the Legislature can presumably limit the scope of statutory entitlements. Here, it has chosen to exclude "[t]he relationship between a principal and an independent contractor" from the statutory protections of NRS Chapter 608. NRS 608.255. But as we recognized in *Yellow Cab*, "independent contractor" may have different meanings depending on context. 127 Nev. at 592, 262 P.3d at 704; *cf. Dynamex*, 416 P.3d at 29. The issue is therefore whether a driver whose lease is approved by the NTA, after satisfying all relevant requirements, is necessarily an independent contractor *for purposes of NRS Chapter 608* and NRS 608.255 in particular.

We conclude that the answer, again, is no. NRS 706.473 permits a taxicab company to lease cars to independent contractors. But the NTA's own regulations define an "independent contractor," for the purposes of NRS Chapter 706, as "a person who leases a taxicab from a certificate holder pursuant to NRS 706.473." NAC 706.069; *see also* NAC 706.450(5). That circular definition is strikingly different from any definition familiar to employment law. The NTA's regulations set forth certain requirements for the lease, none of which appear to distinguish independent contractors from employees in a meaningful way. *See, e.g.*, NAC 706.5551, .5557. The NTA "shall approve" a lease agreement that meets those requirements. NAC 706.5555(2).

Thus, according to the plain language of NAC 706.069, *no* lease can ever be disapproved on the grounds that the lessee is in fact an employee rather than an independent contractor, because any lessee is necessarily an independent contractor for purposes of NRS Chapter 706. That is powerful evidence that the "statutorily created independent contractor relationship" referred to in *Yellow Cab* is of a fundamentally different type than the independent contractor relationships relevant to the MWA or NRS Chapter 608. And this makes sense: the NTA is concerned with the regulation of motor vehicles, not with the financial protection of workers.[6]

[6]Respondents urge that the NTA is tasked with ensuring drivers receive "reasonable compensation," citing NRS 706.151(1)(b). This seriously misrepresents that statute, which is a legislative declaration that *the State* should be compensated, through license fees, by private parties who use publicly maintained highways for profit. Respondents also appear to argue that the Legislature's choice to regulate certain aspects of an industry shows an intent to exclude that industry's workers from employment laws, citing *Nevada Employment Security Department v. Capri Resorts, Inc.*, 104 Nev. 527, 528, 763 P.2d 50, 52 (1988). But in *Capri Resorts*, a statute expressly excluded "licensed real estate

Therefore, consistent with the principle that a worker's status as an employee or independent contractor depends on the legal context, *cf. Hays Home Delivery*, 117 Nev. at 682, 31 P.3d at 369, we hold that the "statutorily created independent contractor relationship" recognized in *Yellow Cab* is distinct from independent contractor status for MWA or NRS Chapter 608 purposes. For the purposes of NRS Chapter 706, "independent contractor" means nothing more or less than a person who leases a taxicab from a certificate holder under an approved lease. NAC 706.069. When a cab company and a driver enter into that relationship, they submit to the jurisdiction of the NTA and acknowledge that they are subject to the regulations that govern independent contractors who lease taxicabs. But to determine whether such a person is an independent contractor for MWA or NRS Chapter 608 purposes, the court must separately engage with the facts under the appropriate test. The district court therefore erred in granting summary judgment on the ground that the NTA's approval of the drivers' leases rendered them independent contractors, and not employees, for all purposes.

NRS 608.0155 may affect a worker's entitlement to waiting time penalties

Because we have concluded that NRS 706.473 does not distinguish this case from *Doe Dancer*, the MWA claims are clearly governed by the economic realities test. 137 Nev. at 25-26, 481 P.3d at 867. But what about the waiting time penalties claim? Following our decision in *Terry*, the Legislature sought to clarify the scope of NRS Chapter 608 by setting forth a more structured test for independent contractor status under that chapter. NRS 608.0155; *see* 2015 Nev. Stat., ch. 325, § 1, at 1742-44. This test does not entirely supplant the economic realities test we announced in *Terry*: the defendant's failure to establish independent contractor status under NRS 608.0155 does not automatically mean the plaintiff is an employee, *see* NRS 608.0155(3), and thus a plaintiff must still *at least* satisfy the economic realities test in order to prevail. But, if NRS 608.0155 applies, then the plaintiff now must *also* defeat an attempt by the defendant to establish independent contractor status under the statutory test. Even if it is likely that many workers' employment status will be the same under both tests, there are sure to be cases at the margins where NRS 608.0155 excludes workers who are employees under the economic realities test. Thus, we must decide whether NRS 608.0155 applies to the waiting time penalties claim.

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salesperson[s]" from the protections of the Unemployment Compensation Law. NRS 612.133. The issue was whether timeshare salespersons were "licensed real estate salespersons" within that statute. A comparable statement about cab drivers is conspicuously absent from NRS Chapter 608.

In *Doe Dancer*, we held that "the definition of independent contractor in NRS 608.0155 (or Section 1 of S.B. 224) applies only to NRS Chapter 608 claims." 137 Nev. at 32, 481 P.3d at 871. While NRS 608.0155 does not apply to MWA claims, it must apply at least "to the statutory chapter in which it sits" if it is to apply to anything at all. *See id.* Waiting time penalties are an NRS Chapter 608 claim, and thus NRS 608.0155 would seem to apply, prima facie. Nevertheless, the drivers contend that they are entitled to seek waiting time penalties under subsection (B) of the MWA, which states that an aggrieved employee "shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section." Nev. Const. art. 15, § 16(B). In the drivers' view, waiting time penalties under NRS 608.040 can be used to remedy a violation of the MWA; thus, if they are employees for constitutional purposes, they may seek statutory waiting time penalties regardless of their status under NRS 608.0155.

We disagree. The plaintiffs each pleaded two separate claims for relief. First, as relief for their MWA claim, the plaintiffs sought "a judgment against the defendant for minimum wages owed . . . , a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs . . . ." Separately, as relief for their NRS 608.040 claim, they sought "a judgment against the defendant for the wages owed to [the plaintiffs] as prescribed by [NRS] 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees." The separateness of the claims for relief is clear. The MWA's "all remedies available" provision allows an aggrieved employee to pursue appropriate remedies under the cause of action the MWA itself provides. Under that cause of action, the plaintiffs are in fact seeking back pay, injunctive relief, punitive damages, and attorney fees and costs.[7] But nothing in the MWA appears to enlarge the availability of a separate, statutory cause of action. A claim for waiting time penalties under NRS 608.040 requires the plaintiff to prove certain elements, and we do not read the MWA as abrogating those requirements. The worker must have resigned, quit, or been discharged; the employer must have failed to pay the wages when due, if the worker resigned or quit, or within 3 days of when due, if the worker was discharged; and the worker must be an "employee" within the meaning of NRS Chapter 608. Just as the MWA clearly does not make statutory waiting time penalties available to a worker who has not separated from employment, or to a worker who was

[7]In this section, we hold that a plaintiff who pleads and pursues a claim under NRS 608.040 must be an employee within the statutory definition. We have no occasion here to consider the precise scope of remedies available under the MWA itself.

promptly paid upon separation, we do not read it as making such penalties available to a worker who does not satisfy the statutory definition of "employee."

In sum, a defendant can show that a plaintiff is an independent contractor not subject to NRS Chapter 608 by showing either (1) that the plaintiff is an independent contractor under the economic realities test, *or* (2) that the plaintiff is an independent contractor under NRS 608.0155. If a plaintiff asserts only statutory claims, then a showing of independent contractor status under either test will justify summary judgment for the defendant. In contrast, when a plaintiff alleges *both* an MWA claim and an NRS Chapter 608 claim, as here, the court will necessarily analyze the economic realities test at some point. Neither a contractual statement that the worker is an independent contractor, nor the NTA's approval of a taxicab lease, is conclusive under either test.

Remand is necessary to resolve disputed factual issues

Because both the economic realities test and the NRS 608.0155 test may be fact-intensive, it may not always be possible to resolve those questions at summary judgment. To be sure, the existence of an employment relationship is a question of law when no material facts are disputed, and we have in the past determined workers' status on appeal despite the district court's failure to apply the correct test. *See Doe Dancer*, 137 Nev. at 26-30, 481 P.3d at 868-70; *Terry*, 130 Nev. at 889-92, 336 P.3d at 958-60. Here, however, the district court expressly found that certain material facts were disputed. Among these were the extent of the drivers' control over their own work schedules; the extent of their control over which fares to pick up; whether they were in fact free to hire substitute drivers; and whether they were in fact free to work elsewhere. We agree that these facts are potentially material to the drivers' status under the MWA and NRS Chapter 608. Thus, we cannot decide as a matter of law whether the drivers are employees under either law. We therefore reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

CONCLUSION

A taxi driver is covered by the Minimum Wage Amendment if he or she satisfies the economic realities test. But that same taxi driver is *not* covered by NRS Chapter 608 if he or she is an independent contractor under NRS 608.0155. Both these inquiries can be fact-intensive, and in this case they cannot be resolved on the existing record. Finally, the NTA's approval of a driver's lease pursuant to NRS 706.473 does not render the driver an independent contractor for purposes beyond NRS Chapter 706. Because the district court erroneously granted summary judgment on the basis of the NTA's

approval of the drivers' leases, we reverse and remand for further proceedings consistent with this opinion.

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

Pickering, J., concurring:

I concur with much of the majority's analysis—as we have repeatedly and consistently held, the contractual disavowal of an employment relationship does not control whether a working relationship is that of an employer and employee within the meaning of the Minimum Wage Amendment (MWA) to the Nevada Constitution; instead, resolution of the question turns on the fact-intensive application of the economic realities test, which the majority correctly reiterates is the only applicable test for employment under the MWA. And I likewise agree that the Nevada Transportation Authority's approval of a driver's lease does not, in and of itself, demonstrate that the driver is an independent contractor for the purposes of Nevada's minimum wage laws. I write separately to make plain that, with regard to the majority's holding that "NRS 608.0155 may affect a worker's entitlement to waiting time penalties," I join on the understanding that this outcome results from the way the drivers pleaded their waiting time penalty claims in this particular case—as a distinct claim for relief, based in statute, NRS 608.040, separate and apart from their MWA claims.

Subsection (B) of the MWA inarguably endows a district court with broad remedial powers to rectify an MWA violation—"An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and *shall be entitled to all remedies available under the law or in equity* appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief." Nev. Const. art. 15, § 16(B) (emphasis added). A remedy is "anything a court can do for a litigant who has been wronged or is about to be wronged." *Remedy*, *Black's Law Dictionary* (11th ed. 2019) (quoting Douglas Laycock, *Modern American Remedies* 1 (4th ed. 2010)). And, at the time the MWA was proposed and ratified, waiting time penalties had long been statutorily available, as needed, to make an improperly compensated employee whole. *See Doolittle v. Eighth Judicial Dist. Court*, 54 Nev. 319, 322, 15 P.2d 684, 685 (1932) (awarding waiting time penalties under Comp. Laws 1925, § 2785, the predecessor to NRS 608.040, and noting the general principle that "[w]hen a person employs another, if he is honest, he expects to pay for the service, and should be ready to do so upon the completion of the work"). They were therefore also constitutionally incorporated, where appropriate to rectify an MWA violation, according to

the plain meaning of the MWA's provision for "all remedies available." *See Strickland v. Waymire*, 126 Nev. 230, 234-35, 235 P.3d 605, 608-09 (2010) (holding that "[t]he goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification'" and that a later-enacted statute "cannot furnish a construction that the Constitution does not warrant") (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010)). And it follows that the Legislature's subsequent enactment of NRS 608.0155 could not extinguish the constitutional remedy as it then existed. *Doe Dancer I v. La Fuente, Inc.*, 137 Nev. 20, 36, 481 P.3d 860, 874 (2021) (Stiglich, J., concurring) (concluding that by enacting NRS 608.0155 "the Legislature intended to limit the scope of the MWA, [but] that it lacked the power to do so"); *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 522 (2014) (stating that "the Constitution [is] superior paramount law, unchangeable by ordinary means") (internal quotation marks omitted).

Simply put, I join based on the understanding that the majority opinion does not foreclose the availability of waiting time penalties, among myriad other remedies, under the MWA's subsection (B) "all remedies" clause, where they are "available," "appropriate," and sought as part of the constitutional violation itself.

KORTE CONSTRUCTION COMPANY, DBA THE KORTE COMPANY, A MISSOURI CORPORATION, APPELLANT, *v.* STATE OF NEVADA ON RELATION OF THE BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS, A CONSTITUTIONAL ENTITY OF THE STATE OF NEVADA, RESPONDENT.

No. 80736

July 29, 2021 492 P.3d 540

Appeal from a district court summary judgment, certified as final under NRCP 54(b), in a construction contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed.

Mead Law Group LLP and *Leon F. Mead II, Sarah Mead Thomas*, and *Matthew W. Thomas*, Las Vegas, for Appellant.

Dickinson Wright, PLLC, and *Cynthia L. Alexander, Anjali D. Webster*, and *Taylor A. Anello*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HERNDON, J.:

Nevada recognizes that equitable remedies are generally not available where the plaintiff has a full and adequate remedy at law. In this opinion, we clarify that the existence of a bond pursuant to NRS 108.2415 precluded a contractor's ability to maintain a claim for unjust enrichment against the property owner where the subject of the underlying dispute was governed by an express, written contract. We also adopt the Restatement's test for determining when a contractor may maintain an unjust enrichment claim against a defendant property owner even though the contractor's contract was with the lessee, not the property owner. *See* Restatement (Third) of Restitution and Unjust Enrichment § 25 (Am. Law Inst. 2011). The district court granted summary judgment for respondent property owner because the bond provided sufficient guaranty for the lien and the factual circumstances did not warrant otherwise. We agree with the district court's reasoning that the bond provided an adequate remedy at law and the unjust enrichment claim was improper. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Respondent, Board of Regents of the Nevada System of Higher Education, on Behalf of the University of Nevada, Las Vegas (UNLV), entered into an agreement with UPA 1, LLC. The agreement contemplated UNLV purchasing certain real property and leasing it to UPA, whereby UPA and other possible third parties would fund and construct student housing and other commercial establishments.[1] UPA then entered into a construction contract with appellant Korte Construction Company.

A dispute arose between UPA and Korte regarding the work performed under the construction contract. Consequently, Korte recorded a mechanics' lien against the entire property and filed a complaint setting forth claims against multiple parties, including claims against UPA for breach of contract and foreclosure of the mechanics' lien, and against UNLV for unjust enrichment. Korte amended its claim to foreclose on the mechanics' lien against the surety bond but maintained its claim against UNLV for unjust enrichment. Korte continued receiving additional payments from UPA since recording its mechanics' liens and ultimately recorded a third amended notice of lien for $2,899,988.72.

After a hearing, the district court granted summary judgment in UNLV's favor, precluding Korte's unjust enrichment claim against UNLV on two grounds. First, the court determined that Korte had an adequate remedy at law because the bond for $5,448,592.81 exceeded the amount claimed by Korte for its services. Second, the district court determined that Korte's claim was barred given that an express, written contract governed the underlying dispute. The court certified the summary judgment as final under NRCP 54(b).

Korte now appeals, disputing whether the bond provides an adequate remedy, such that its unjust enrichment claim is barred. Korte contends that the district court's decision was contrary to established Nevada precedent and prematurely adjudicated in UNLV's favor. We disagree and thus affirm the district court's judgment.

DISCUSSION

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also* NRCP 56(a). "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a

[1]The original lease was between UNLV and UPA 1, LLC's predecessor University Park LLC. University Park LLC assigned its leasehold interest in the project to UPA 1, LLC.

light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id*. at 731, 121 P.3d at 1031.

The presence of the bond precludes recovery on the unjust enrichment claim

NRS Chapter 108 contains the procedures for obtaining and releasing mechanics' and materialmen's liens. Where the principal and a surety execute a surety bond in an amount equal to 1.5 times the lienable amount in the notice of the lien, the surety bond shall replace the property as security for the lien. *See* NRS 108.2415(1); NRS 108.2415(6)(a) ("Subject to the provisions of NRS 108.2425, the recording and service of the surety bond pursuant to . . . [NRS 108.2415(1)] releases the property described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien."). Further, relevant provisions "must not be construed to impair or affect the right of a lien claimant . . . to maintain a civil action to recover that debt against the person liable therefor or to submit any controversy arising under a contract to arbitration to recover that amount." NRS 108.238.

Korte disputes whether the bond provides an adequate remedy, such that its unjust enrichment claim is barred. Korte argues that NRS 108.238 demonstrates that the existence of the bond should have no bearing on its ability to maintain its alternative claim of unjust enrichment against UNLV. UNLV contends that because the bond provides an adequate remedy, summary judgment was proper.

Here, Korte had two options: either seek recovery against the debt itself in a breach of contact action, or file an action to enforce the lien against the debt's security. *See* NRS 108.2421. The existence of the mechanics' lien did not impair this choice. *See Lane-Tahoe, Inc. v. Kindred Constr. Co.*, 91 Nev. 385, 390, 536 P.2d 491, 495 (1975) ("The mechanics' lien law does not impair the right to sue for the debt claimed to be due."), *disapproved on other grounds by Cty. of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 491 n.2, 653 P.2d 1217, 1219 n.2 (1982). Nevertheless, Korte elected to recover on the underlying debt against UNLV and to foreclose on the lien by bringing an action on the bond. *See, e.g.*, *Benson v. State Eng'r*, 131 Nev. 772, 782 n.7, 358 P.3d 221, 228 n.7 (2015) (recognizing that under Nevada law, equitable remedies are generally not available where the plaintiff has a full and adequate remedy at law.).

As the district court recognized in its order, UPA properly posted a surety bond for the subject property. The plain language in NRS 108.2415(1) suggests that the bond for $5,448,592.81 is a sufficient guaranty of the last, and therefore operative, lien for $2,899,988.72. NRS 108.2415(1). The surety bond is deemed to replace the prop-

erty as security for the lien. *See* NRS 108.2415(6)(a). Korte's contention that the bond alone is inadequate is unsubstantiated, as the bond ensures Korte a full and adequate remedy at law because it exceeds 1.5 times the amount Korte claims to be owed. *See Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001) (recognizing equitable principles will not justify a court's disregard of statutory requirements), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Thus, the district court properly concluded that summary judgment was appropriate, as the surety bond precluded Korte from asserting its claim of unjust enrichment against UNLV.

The unjust enrichment claim against UNLV cannot succeed under the circumstances

The district court also properly concluded that Korte could not maintain a claim of unjust enrichment against UNLV because the contracts between UNLV and UPA, and UPA and Korte, precluded such a claim. Korte argues that Nevada law permits it to maintain an unjust enrichment claim against UNLV despite the contracts.[2] We take this opportunity to clarify whether a contractor's claim of unjust enrichment against a property owner may lie when there is no contract between the contractor and the property owner.

"Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (internal quotation omitted). Nevada jurisprudence relies on the First and Third Restatements of Restitution and Unjust Enrichment for guidance. *See id*. at 381-82, 283 P.3d at 256-57 (citing Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. Law Inst. 2011) and Restatement (First) of Restitution § 1 (Am. Law Inst. 1937)). Benefit "denotes any form of advantage," including but not limited to retention of money or property. *Id*. at 382, 283 P.3d at 257 (internal quotation omitted). However, "principles of unjust enrichment will not support the imposition of a liability that

[2]The parties present numerous arguments concerning whether *LeasePartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182 (1997), or *Bowyer v. Davidson*, 94 Nev. 718, 584 P.2d 686 (1978), apply here and whether the two decisions are contradictory. The parties, however, overlook the fact that the two cases are factually distinguishable from each other and from this matter. While each of these cases is persuasive to the extent the factual circumstances therein align with the circumstances present here, we take this opportunity to clarify that a court must apply the test from Section 25 of the Restatement (Third) of Restitution and Unjust Enrichment in determining whether an unjust enrichment claim may lie under these circumstances.

leaves an innocent recipient worse off . . . than if the transaction with the claimant had never taken place." *Id.* (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d).

For an enrichment to be inequitable to retain, the person conferring the benefit must have a reasonable expectation of payment and the circumstances are such that equity and good conscience require payment for the conferred benefit. *See id.* at 381, 283 P.3d at 257. But our review of the record indicates that UPA would be responsible for any work performed to assure adequate recovery for Korte. Korte did not argue that the guaranty, in which UPA and UNLV agreed to limit UNLV's liability, was invalid. Nor did Korte provide any argument that UNLV induced Korte to provide its services or promised direct payments. In this context, Korte would not be entitled to succeed on an unjust enrichment claim in addition to seeking relief under a breach of contract claim because any alleged enrichment or retention of any benefit to UNLV resulting from Korte's services was not unjust here. *See id.* at 381-82, 283 P.3d at 257 (noting that a plaintiff seeking payment for "as much as he deserves" based on a theory of restitution must establish each element of unjust enrichment (internal alterations and quotations omitted)).

The Restatement describes that restitution is available after a claimant has rendered a contractual performance to a third person, the claimant has not received the promised compensation, and the uncompensated performance confers a benefit onto the defendant. Restatement (Third) of Restitution and Unjust Enrichment § 25(1) (Am. Law Inst. 2011). The rule requires three conditions for unjust enrichment under such circumstances: (1) "[l]iability in restitution may not subject the defendant to a forced exchange"; (2) "[a]bsent liability in restitution, the claimant will not be compensated for the performance in question, and the defendant will retain the benefit of the claimant's performance free of any liability to pay for it"; and (3) "[l]iability in restitution will not subject the defendant to an obligation from which it was understood by the parties that the defendant would be free." *Id.* § 25(2)(a)-(c). It is a "fundamental requirement of unjust enrichment in these circumstances . . . that [the defendant] must stand to obtain a valuable benefit at [the plaintiff's] expense *without paying anyone* for it." *Id.* § 25 cmt. b (emphasis added).

With these principles in mind, we find that the district court properly concluded that the contracts between UNLV and UPA, and UPA and Korte, precluded Korte's claim of unjust enrichment against UNLV. Despite UNLV's ownership interest in the property, it does not have immediate possession of the project or any improvements on the property. UNLV would be placed in a worse position than it bargained for if UNLV were required to pay Korte, in addition to the consideration it paid UPA, in exchange for executing an agreement with UPA. *See also Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by

quasi-contract where a written agreement exists would constitute a subversion of contractual principles."). Thus, as a matter of law there can be no unjust enrichment, as UNLV has "paid the contract price" to UPA—that is, "the price originally fixed by contract for the work to which [Korte] has made an uncompensated contribution," and because UPA and UNLV agreed to limit UNLV's liability. Restatement (Third) of Restitution and Unjust Enrichment § 25 cmt. b.

Korte's only argument of a disputed material fact was whether it conferred a benefit upon UNLV. Section 25 of the Restatement (Third) of Restitution and Unjust Enrichment is persuasive in determining that Korte failed to raise a genuine issue of material fact to dispute that any alleged enrichment to UNLV was inequitable where the bond and viable contract claim against UPA ensures an adequate remedy at law. Accordingly, we conclude that the district court properly granted summary judgment for UNLV where Korte failed to establish the elements required to maintain an unjust enrichment claim. *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (explaining that summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law).

CONCLUSION

If a surety bond executed by a lessee provides sufficient funds to cover damages incurred by a plaintiff, the plaintiff may not seek a separate unjust enrichment claim from a defendant property owner. Further, we adopt the Restatement's test for determining when a contractor may maintain an unjust enrichment claim against a defendant property owner for services the contractor rendered to a third person. Restatement (Third) of Restitution and Unjust Enrichment § 25 (Am. Law Inst. 2011). Summary judgment for UNLV was appropriate because the surety bond ensured Korte had an adequate remedy at law and because the factual circumstances present precluded Korte's claim for unjust enrichment. We therefore affirm the district court's order granting summary judgment in respondent's favor.

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

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

No. 80902

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

No. 80907

July 29, 2021 492 P.3d 1

Consolidated appeals from a district court order denying a postconviction petition requesting a genetic marker analysis (Docket No. 80902) and a postconviction petition for a writ of habeas corpus (Docket No. 80907). Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed and remanded in Docket No. 80902; vacated and remanded in Docket No. 80907.

Rene L. Valladares, Federal Public Defender, and *C.B. Kirschner*, Assistant Federal Public Defender, Las Vegas, for Appellant.

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

Before the Supreme Court, Cadish, Pickering, and Herndon, JJ.

OPINION

By the Court, Herndon, J.:

A jury convicted appellant Tyrone David James, Sr. (James) of sexual assault of a minor, open or gross lewdness, and battery with intent to commit a crime. He was sentenced to 25 years to life. A rape kit collected from the alleged victim, and not tested prior to trial, was subjected to postconviction testing and revealed a DNA match to a man other than James. After being notified about the discovery of the DNA evidence, James filed a postconviction petition requesting a genetic marker analysis and a postconviction petition for a writ of habeas corpus. The district court denied both petitions. James appeals both decisions. He argues that the district court erred by denying his request for genetic marker analysis when there was a presumptive CODIS match to a man other than himself. He further argues that the district court erred by dismissing his petition for habeas corpus because the CODIS match constituted new evidence of actual innocence that overcame procedural bars.

We conclude that the district court erred in denying James's postconviction petition requesting a genetic marker analysis and thus reverse the decision in Docket No. 80902. We further conclude that because the district court erred in denying the petition requesting genetic marker analysis, the district court's decision in Docket No. 80907 regarding the habeas petition must be vacated. We remand both matters for further proceedings.

FACTS

On May 14, 2010, T.H., then 15 years old, reported to police that she had been sexually assaulted by James, an adult man who was dating T.H.'s mother at the time. T.H. underwent a sexual assault exam and told the examiner that her last consensual sexual encounter was one year prior. James denied engaging in any sexual activity with T.H. At trial, he admitted to briefly stopping by T.H.'s house on the morning of May 14 and giving T.H. a ride to school, but he denied assaulting T.H. James argued that T.H. "openly disliked" him prior to her allegation of assault and that there was no physical evidence against him, including "medical findings or DNA," to corroborate T.H.'s allegations. James was ultimately convicted of multiple crimes related to T.H.'s sexual assault and sentenced in 2011 to 25 years to life.[1]

James's direct appeal and postconviction proceedings in state court were unsuccessful. In early 2019, James learned that new DNA evidence had been discovered in his case that was potentially exculpatory. Specifically, James learned that postconviction testing had been conducted on a rape kit collected from T.H. and the analysis of the perineum swab from T.H.'s rape kit revealed a DNA profile that when entered into the CODIS DNA database was a presumptive match to another man. James filed a petition requesting a genetic marker analysis in order to get confirmation of the presumptive results. He also filed a second postconviction petition for a writ of habeas corpus.

At a hearing where the district court considered James's petition requesting a genetic marker analysis, the court stated the following:

> [T]here is no indication that this was anything other than an individual known to the victim. This was not the type of case where the allegations may prove that it was some—some unknown individual. And from everything I have read on the rape shield, et cetera, provided to me, and from the Supreme

[1]James was convicted by jury of two counts of sexual assault of a minor under the age of 16, two counts of open or gross lewdness, and battery with intent to commit a crime. The open or gross lewdness charges were dismissed at sentencing due to being pleaded in the alternative to the sexual assault of a minor under the age of 16 charges.

> Court on this case, that the fact that the victim may have had other sexual conduct would not be admissible.
>
> And, therefore, although I realize that the standard is very slight, it's the possibility, if there is no new evidence, meaning that this can't come in to show someone else, the—well, the statute, along with what I just quoted, preclude the testing. And therefore I'm denying the petition on that basis.

The district court failed to enter a written order directly addressing its denial of the petition requesting a genetic marker analysis. Instead, the district court issued an order denying the second post-conviction petition for a writ of habeas corpus and implicitly denying the petition requesting a genetic marker analysis. James appeals.

DISCUSSION

James contends that because there is a reasonable possibility that he would not have been convicted if exculpatory results had been obtained from the DNA evidence identified in his petition, the district court erred in denying his genetic marker petition. He further argues the district court erred in concluding the evidence obtained from genetic marker analysis would have been inadmissible under the rape shield statute. We agree.

"[A] district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong." *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Questions of law are reviewed de novo. *Bailey v. State*, 120 Nev. 406, 407, 91 P.3d 596, 597 (2004).

NRS 176.0918(1) provides that "[a] person convicted of a felony . . . may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction." NRS 176.09183(1) provides that the district court shall order genetic marker analysis if the court finds the following:

> (a) The evidence to be analyzed exists;
>
> (b) . . . the evidence was not previously subjected to a genetic marker analysis, including, without limitation, because such an analysis was not available at the time of trial; and
>
> (c) One or more of the following situations applies:
>
> (1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;
>
> (2) The petitioner alleges and supports with facts that he or she asked his or her attorney to request to have a genetic

marker analysis conducted, but the attorney refused or neglected to do so;[2] or

(3) The court previously ordered a genetic marker analysis to be conducted, but an analysis was never conducted.

"'Exculpatory evidence' is defined as '[e]vidence tending to establish a criminal defendant's innocence.'" *State v. Huebler*, 128 Nev. 192, 200 n.5, 275 P.3d 91, 96 n.5 (2012) (alteration in original) (quoting *Exculpatory Evidence*, *Black's Law Dictionary* (9th ed. 2009)).

The district court apparently concluded that there was no reasonable possibility James would not have been prosecuted or convicted because any evidence from a genetic marker analysis that indicated another male's DNA was present in the rape kit would be inadmissible under Nevada's rape shield statute. NRS 50.090 provides that in a prosecution for sexual assault, "the accused may not present *evidence of any previous sexual conduct*" of the victim in order to challenge the victim's credibility as a witness "unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct." (Emphasis added.) In cases where NRS 50.090 is arguably applicable, the defendant must be given an opportunity upon motion to demonstrate that due process requires the admission of evidence concerning the victim's past sexual conduct because such evidence's probative value substantially outweighs its prejudicial effect. *Summitt v. State*, 101 Nev. 159, 163, 697 P.2d 1374, 1377 (1985).

First, we note that it is difficult to evaluate the district court's decision on the petition requesting a genetic marker analysis because it failed to state the basis for its reasoning in the order that was entered.[3] That said, we nonetheless conclude that the district court mistakenly assumed that the CODIS match to another man's DNA was evidence of "previous sexual conduct" such that the evidence would be inadmissible at a trial. There is no evidence to support the conclusion that the match is evidence of sexual conduct preceding the assault. The district court assumed that since T.H. testified that she knew James was her assailant, any other DNA

[2]James claimed below that he did request that his counsel test the swabs, but does not assert on appeal that this request is the basis for his petition requesting a genetic marker analysis. He argues exclusively on appeal that NRS 176.09183(1)(c)(1) is the basis for his genetic marker analysis request, so we only address this argument.

[3]Indeed, although the order was intended to address both the petition requesting a genetic marker analysis and the petition for habeas corpus relief, it only directly addressed the petition for habeas corpus. The only information expressly regarding the district court's decision on the petition requesting a genetic marker analysis is found in the transcript of a hearing discussing the matter and subsequent minute order.

evidence collected through the rape kit would be indicative of T.H. having engaged in a prior consensual sexual encounter with another person and was therefore inadmissible. However, the other man's DNA was found in a rape kit collected the day of the alleged assault, and T.H. reported that she had not engaged in any sexual conduct within a year prior to the assault. This, therefore, leaves open the possibility that the evidence indicated the identity of the person that engaged in sexual acts with T.H. on the day in question and was not evidence of sexual conduct prior to the assault. Thus, the district court's assumption was not supported by evidence in the record, and it erred in concluding that the CODIS match would have been precluded by NRS 50.090.

Importantly, even if the CODIS match evidence could have been considered as falling within the scope of NRS 50.090's definition of "previous sexual conduct," such that it might arguably be inadmissible at trial, James would have been entitled to an opportunity, upon his request, to raise the issue of whether his constitutional rights would be violated by not admitting the evidence and require the court to consider whether the probative value of the evidence substantially outweighs its prejudicial effect. *Summitt*, 101 Nev. at 163, 697 P.2d at 1377. Thus, the district court's conclusion was a premature determination that the evidence would have been excluded at trial. This, coupled with the district court's refusal to even permit the requested genetic marker analysis, denied James the opportunity to litigate the admissibility of potentially critical evidence.

We must next consider if the district court nonetheless correctly denied the petition. A petitioner need only show "[a] reasonable possibility . . . that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition." NRS 176.09183(1)(c)(1). The "reasonable possibility" standard is "more favorable to the accused than the" "reasonable probability" standard. *Wade v. State*, 115 Nev. 290, 296 n.4, 986 P.2d 438, 441 n.4 (1999) (internal quotation marks omitted). While not binding precedent, this court has interpreted the meaning of "reasonable possibility" in prior unpublished orders, and typically, when the results of the analysis would be irrelevant to the State's theory of the crime or the defendant's defense, a "reasonable possibility" does not exist. *See, e.g.*, *Langford v. State*, Docket No. 77262 (Order of Affirmance, Apr. 12, 2019) (holding that when the appellant sought testing solely for the purpose of identifying the victim's DNA on bedding, when the victim testified that the appellant had laid a towel on top of the bedding before committing the assault, and the victim's and the appellant's DNA was found on the towel, a "reasonable possibility" that the appellant would not have been prosecuted or convicted did not exist). James maintained throughout his case that

he is innocent of this crime and that he did not engage in any sexual activity, consensual or nonconsensual, with T.H. Accordingly, the existence of another man's DNA on T.H.'s body, as discovered in a rape kit collected the day of the alleged assault, paired with T.H.'s report that she had engaged in no sexual activity for a year prior to the assault, would have strongly supported James's defense. This case is also not analogous to that in the unpublished order mentioned above, *Langford*, where the testing requested would not have refuted the State's narrative of events. We conclude that the district court erred in denying James's petition requesting a genetic marker analysis because there was a reasonable possibility that James would not have been prosecuted or convicted had the genetic marker analysis been conducted prior to trial. Accordingly, we reverse the decision in Docket No. 80902 and remand for further proceedings on the petition requesting a genetic marker analysis.

Due to the district court's error in denying James's petition requesting a genetic marker analysis, this court cannot adequately consider whether the denial of James's habeas petition was appropriate; after further analysis is performed, there will be new evidence for the district court to consider in evaluating his habeas petition. Thus, the district court's decision in Docket No. 80907 regarding James's postconviction petition for a writ of habeas corpus is vacated, and the matter is remanded for further proceedings to follow the reception of the genetic marker analysis results.

CONCLUSION

The district court erred in concluding that the CODIS match would have been inadmissible and denying James's petition requesting a genetic marker analysis on this basis. We thus reverse the decision in Docket No. 80902. We further conclude that because the district court erred in denying the petition requesting a genetic marker analysis, the district court's decision in Docket No. 80907 regarding the habeas petition must be vacated. These matters are remanded for further proceedings on both petitions.

Cadish and Pickering, JJ., concur.

ENDO HEALTH SOLUTIONS, INC.; ENDO PHARMACEUTICALS INC.; TEVA PHARMACEUTICALS USA, INC.; McKESSON CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6 INC.; CARDINAL HEALTH TECHNOLOGIES LLC; CARDINAL HEALTH 108 LLC, DBA METRO MEDICAL SUPPLY; CEPHALON, INC.; ALLERGAN USA, INC.; ALLERGAN FINANCE, LLC, FKA ACTAVIS, INC., FKA WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS PHARMA, INC., FKA WATSON PHARMA, INC.; AND ACTAVIS LLC; PETITIONERS, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE, RESPONDENTS, AND CITY OF RENO, REAL PARTY IN INTEREST.

No. 81121

July 29, 2021 492 P.3d 565

Original petition for a writ of mandamus challenging a district court order denying in part a motion to dismiss in a tort action.

Petition granted in part and denied in part.

McDonald Carano LLP and *Pat Lundvall* and *Amanda C. Yen*, Las Vegas; *Arnold & Porter Kaye Scholer LLP* and *John D. Lombardo* and *Jake R. Miller*, Los Angeles, California, for Petitioners Endo Health Solutions, Inc., and Endo Pharmaceuticals, Inc.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Abraham G. Smith, Joel D. Henriod*, and *J. Christopher Jorgensen*, Las Vegas; *Williams & Connolly LLP* and *Suzanne Marguerite Salgado* and *Joseph S. Bushur*, Washington, D.C., for Petitioners Cardinal Health 108 LLC, Cardinal Health 6 Inc., Cardinal Health Technologies LLC, and Cardinal Health, Inc.

Hymanson & Hymanson PLLC and *Philip M. Hymanson*, Las Vegas; *Morgan, Lewis & Bockius LLP* and *Collie F. James, IV*, and *Adam D. Teitcher*, Costa Mesa, California, for Petitioners Actavis LLC, Actavis Pharma, Inc., Cephalon, Inc., Teva Pharmaceuticals USA, Inc., and Watson Laboratories, Inc.

Morris Law Group and *Steve L. Morris* and *Rosa Solis-Rainey*, Las Vegas; *Covington & Burling LLP* and *Nathan E. Shafroth*, San Francisco, California, for Petitioner McKesson Corporation.

Semenza Kircher Rickard and *Lawrence J. Semenza, III, Christopher D. Kircher*, and *Jarrod L. Rickard*, Las Vegas; *Reed Smith LLP*

and *Rachel B. Weil*, Philadelphia, Pennsylvania; *Reed Smith LLP* and *Steven J. Boranian*, San Francisco, California, for Petitioner AmerisourceBergen Drug Corporation.

Olson Cannon Gormley & Stoberski and *Max E. Corrick, II*, Las Vegas, for Petitioners Allergan Finance, LLC, and Allergan USA, Inc.

Eglet Adams and *Robert T. Eglet, Robert M. Adams, Cassandra S. Cummings*, and *Richard K. Hy*, Las Vegas; *Bradley Drendel & Jeanney* and *Bill Bradley* and *Mark C. Wenzel*, Reno, for Real Party in Interest City of Reno.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Hardesty, C.J.:

NRS 268.0035(1), Nevada's modified version of Dillon's Rule, limits an incorporated city's powers to those expressly granted to it, those necessarily implied from an express grant of power, or those "necessary or proper to address matters of local concern." In this writ petition, we must determine whether NRS 268.0035's limitations on a city's powers apply to a city's ability to bring a lawsuit and, if so, whether the City of Reno has the power to bring the underlying action against pharmaceutical companies. We hold that NRS 268.0035's limitations apply to a city's ability to litigate, such that the city's power to maintain a lawsuit must be derived from an express grant of power or fall within a "matter of local concern" as defined in NRS 268.003(1). The City has not pointed to any express authority granting it the power to maintain the underlying action. Though the district court found that the action involved a "matter of local concern," the district court did not properly apply the statutory definition and make sufficient findings in that regard. We therefore grant the petition in part and direct the district court to determine whether the underlying action falls under the statutory definition of a "matter of local concern."

FACTS AND PROCEDURAL HISTORY

Petitioners are manufacturers and distributors of prescription opioid medications (collectively, Endo). Real party in interest City of Reno filed suit against Endo "to recover . . . damages as a result of the opioid epidemic" that the City alleges Endo caused. The City

[1]The Honorable Ron Parraguirre and The Honorable Kristina Pickering, Justices, did not participate in the decision of this matter.

asserted, among other claims, various tort claims against Endo for public nuisance, common law public nuisance, negligence, and unjust enrichment. In its prayer for relief, the City sought "to stop [d]efendants' promotion and marketing of opioids for inappropriate uses in Nevada, currently and in the future." The City cited the widespread effect that opioid addiction has brought on the entire country as a whole, the State of Nevada, and the City of Reno. This lawsuit is not unique, as governmental entities throughout the country, including the State of Nevada itself and other cities throughout the state, have filed lawsuits alleging similar claims.

Endo moved to dismiss the underlying action, arguing, as relevant here, that the action is barred under Dillon's Rule.[2] The district court denied in part Endo's motion to dismiss, finding that Dillon's Rule does not bar the underlying lawsuit for two reasons: (1) Dillon's Rule only limits a city's power to pass ordinances and regulations and conduct other nonlitigious activities and does not apply to a city's ability to bring lawsuits; and (2) even if it does apply, the underlying lawsuit falls within the "matter of local concern" exception to Dillon's Rule. Endo filed this writ petition arguing that Dillon's Rule bars the underlying lawsuit.

DISCUSSION

We elect to exercise our discretion to entertain the petition

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Traditional mandamus relief is warranted when

> (1) [t]he petitioner [demonstrates] a legal right to have the act done which is sought by the writ; (2) . . . the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) . . . the writ will be availing as a remedy, and . . . the petitioner has no other plain, speedy, and adequate remedy.

Walker v. Second Judicial Dist. Court, 136 Nev. 678, 680, 476 P.3d 1194, 1196 (2020) (internal quotation marks omitted). Although this court generally declines to consider writ petitions that challenge orders denying motions to dismiss, this court will exercise its discretion to consider one when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *City of*

[2]The traditional Dillon's Rule is set forth in NRS 268.001(3).

Mesquite v. Eighth Judicial Dist. Court, 135 Nev. 240, 243, 445 P.3d 1244, 1248 (2019) (internal quotation marks omitted).

We elect to entertain this writ petition because Endo has a clear legal right to have NRS 268.0035(1) applied to the underlying action. And, if the City does not satisfy NRS 268.0035(1)'s requirements, the district court has a plain legal duty to dismiss the underlying action in its entirety. Additionally, because we conclude that the district court has misapplied NRS 268.003, mandamus relief is warranted. *See Walker*, 136 Nev. at 680-81, 476 P.3d at 1197 (providing that "mandamus [relief] is available only where the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable" (internal quotation marks omitted)). This case also presents an important issue of first impression that affects several other pending cases, and considerations of sound judicial economy and administration militate in favor of entertaining this petition because multiple cities throughout Nevada have filed similar lawsuits, presenting the same issue.

Nevada modified the traditional Dillon's Rule as it applies to incorporated cities

Nevada courts have long applied the common-law principle known as Dillon's Rule, which "defin[es] and limit[s] the powers of local governments." NRS 268.001(1). Under Dillon's Rule, a city has only those powers (1) expressly granted to it by the Nevada Constitution, statute, or city charter; (2) necessarily or fairly implied by the express powers; or (3) "essential to the accomplishment of the declared objects and purposes of the city and not merely convenient but indispensable." NRS 268.001(3). In 2015, the Nevada Legislature enacted statutes modifying the application of Dillon's Rule to incorporated cities, *see* 2015 Nev. Stat., ch. 465, § 2, at 2700-02, reasoning that "a strict interpretation and application of Dillon's Rule unnecessarily restricts the governing body of an incorporated city from taking appropriate actions that are necessary or proper to address matters of local concern," NRS 268.001(5). In doing so, the Legislature codified part of Dillon's Rule but modified it to provide cities with greater authority to address matters of local concern. *See* NRS 268.001(6); NRS 268.0035(1). The Legislature explained that although Dillon's Rule "serves an important function in defining the powers of city government and remains a vital component of Nevada law," it should not impede cities from "responding to and serving the needs of local citizens diligently, decisively and effectively." NRS 268.001(5).

To ensure that incorporated cities can appropriately address matters of local concern, the Legislature modified Dillon's Law in two key respects. First, in addition to express and implied powers, *see* NRS 268.0035(1)(a)-(b), the Legislature granted incorporated cities

"[a]ll other powers necessary or proper to address matters of local concern for the effective operation of city government, whether or not the powers are expressly granted to the governing body," NRS 268.0035(1)(c); *see also* NRS 268.001(6) (explaining that NRS 268.0035 expressly grants and delegates these powers "so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government"). Second, it established a presumption in favor of cities' powers: "[i]f there is any fair or reasonable doubt concerning the existence of a power of the governing body to address a matter of local concern . . . , it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature." NRS 268.0035(1)(c); *see also* NRS 268.001(6)(b). Thus, as set forth in NRS 268.0035(1), the powers of an incorporated city's governing body are limited to those expressly granted to it, necessarily implied from the express powers granted to it, or "necessary or proper to address matters of local concern for the effective operation of city government."

The modified Dillon's Rule applies to a city's ability to bring lawsuits

The district court opined that Dillon's Rule only applies to a city's nonlitigious activities, such as passing local ordinances or signing contracts, not to a city's ability to litigate. Similarly, the City argues that the word "powers" in NRS 268.001(3) does not refer to a city's ability to file lawsuits; rather, it refers to a city's ability to "create, regulate, and tax." Conversely, Endo argues that the term "powers" as used in NRS 268.001(3) includes a city's ability to bring lawsuits. Otherwise, Endo asserts, cities would hold an unfettered power to sue, rendering superfluous statutes under NRS Chapter 268 that explicitly grant cities the power to file certain lawsuits.

"This court reviews questions of statutory construction de novo." *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 71, 458 P.3d 336, 339 (2020). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Id.* (alteration in original) (internal quotation marks omitted).

Although the parties reference NRS 268.001, as discussed above, NRS 268.0035, which is entitled "[p]owers of governing body," modified Dillon's Rule as set forth in NRS 268.001(3). NRS 268.0035(1)(c) makes it clear that an incorporated city has "[a]ll other powers necessary or proper to address matters of local concern." "Power" is defined as "[t]he legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another." *Power*, *Black's Law Dictionary* (10th ed. 2014). The plain meaning of "power" is broad enough to encompass

lawsuits because the definition includes authorization to act and to alter rights, liabilities, and other legal relationships.

Further, looking at the surrounding statutes within NRS Chapter 268, titled "*Powers* and Duties Common to Cities . . . ," the Legislature has enumerated specific instances in which a city may bring a civil lawsuit.[3] Interpreting the modified Dillon's Rule so as not to include lawsuits in its limitations would grant cities an unfettered power to sue, rendering the remaining civil lawsuit statutes under the chapter superfluous. *See Williams v. State, Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (declaring that "[t]his court avoid[s] statutory interpretation that renders language meaningless or superfluous, and whenever possible . . . will interpret a rule or statute in harmony with other rules or statutes" (second alteration in original) (citation and internal quotation marks omitted)); *see also Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1057 (9th Cir. 2004) (reasoning that "we must presume that, [a]bsent clear congressional intent to the contrary, . . . the legislature did not intend to pass vain or meaningless legislation" (alterations in original) (internal quotation marks omitted)).

We also decline the City's invitation to interpret NRS 268.0035(3) as the only limitations on the City's power to litigate. The City argues that "[s]o long as the City's litigation does not fit into one of the prohibited forms of action identified in NRS 268.0035(3) and does not otherwise infringe on any state regulations," the litigation is valid. This is incorrect. As provided in subsection (1), in the first instance, a city only has the powers expressly granted to it, implied from express grants of power, or those necessary or proper to address matters of local concern. NRS 268.0035(1). Subsection (3) places further limitations on a city, but it does not state that a city may exercise *any* power so long as it is not limited by NRS 268.0035(3). Thus, we hold that the modified Dillon's Rule applies to a city's power to bring lawsuits, and the district court's conclusion to the contrary was erroneous.[4]

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[3]*See* NRS 268.408(2) (enabling a "city [to] bring an action against a person responsible for placing graffiti on the property of the city to recover a civil penalty and damages"); NRS 268.4124(1), (2)(c) (enabling the city attorney to file an action to deal with a chronic nuisance); NRS 268.4126(1), (2)(c)(1) (enabling the city attorney to file an action to deal with an abandoned nuisance); NRS 268.4128(1)(b)(1) (enabling a city attorney to file a civil action to recover damages from "[a]ny member of a criminal gang that is engaging in criminal activities within the city").

[4]In reaching its conclusion that Dillon's Rule does not limit the City's ability to litigate, the district court relied upon NRS 266.190, which allows a city's mayor to sue to enforce contracts. Both parties agree that the district court's reliance upon this statute was erroneous; therefore, we do not address it. *See* NRS 266.005 (providing that the provisions in NRS Chapter 266 are "not [ ] applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter").

The subject matter of the City's lawsuit may constitute a matter of local concern

Having concluded that the modified Dillon's Rule applies to the underlying lawsuit, we must next determine whether the City has demonstrated that it has the power to bring the lawsuit. With respect to the first two pathways, express power and that necessarily implied therein, any reasonable doubt as to whether the city has a power is resolved against it. *See* NRS 268.001(4). But, "[i]f there is any fair or reasonable doubt concerning the existence of a power of the governing body to address *a matter of local concern* . . . , it must be presumed that the governing body has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature." NRS 268.0035(1)(c) (emphasis added). Thus, the City must either point to an express grant of power or one implied from an express power granted in the Nevada Constitution, a statute, or the city charter, or demonstrate that its action satisfies the definition of a matter of local concern, which is set forth in NRS 268.003.

In this case, the City has not pointed to any express power or one implied from an express power that grants it the authority to bring the underlying lawsuit.[5] The question remains, then, whether the City's lawsuit falls within the definition of a "matter of local concern." NRS 268.003(1) defines a matter of local concern in relevant part as a matter that meets the following standard:

> (a) Primarily affects or impacts areas located in the incorporated city, or persons who reside, work, visit or are otherwise present in areas located in the city, and does not have a significant effect or impact on areas located in other cities or counties;
>
> (b) Is not within the exclusive jurisdiction of another governmental entity; and
>
> (c) Does not concern:
>
> (1) A state interest that requires statewide uniformity of regulation;
>
> (2) The regulation of business activities that are subject to substantial regulation by a federal or state agency; or
>
> (3) Any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or this State to federal or state regulation that preempts local regulation.

The district court concluded that the City's lawsuit was a matter of local concern but did so based upon its own definition of that term, not NRS 268.003's definition. The district court reasoned that

[5]Upon this court's request, the parties provided supplemental briefing concerning language in the Reno City Charter that provides that the City "may sue or be sued in all courts." *See* Reno City Charter, Art. I, § 1.020. The parties did not originally brief this issue, and given our disposition, we do not address it further.

"Reno states a cognizable local concern by virtue of the impact the alleged conduct has had on its citizens' health, safety and welfare, including the concomitant stress placed on its police, fire, and social services." We conclude that this was erroneous. The district court was required to strictly apply the statutory definition of "matter of local concern" as set forth in NRS 268.003 to determine if the City's lawsuit meets that definition. If the lawsuit does not meet that definition, then the City does not have authority to maintain the underlying action.

Because we conclude that the modified Dillon's Rule applies to a city's ability to bring a lawsuit, and because the district court misapplied the definition of a matter of local concern, we grant the petition in part and instruct the clerk of this court to issue a writ of mandamus directing the district court to reconsider the motion to dismiss and, in so doing, apply the definition of a "matter of local concern," as set forth in NRS 268.003, to the City's claims. All further relief requested in Endo's writ petition is denied.

Stiglich, Cadish, Silver, and Herndon, JJ., concur.

MELVIN LEROY GONZALES, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 78152

July 29, 2021 492 P.3d 556

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

Karla K. Butko, Verdi, for Appellant.

Michael Macdonald, District Attorney, and *Anthony R. Gordon*, Deputy District Attorney, Humboldt County, for Respondent.

Aaron D. Ford, Attorney General, and *Charles L. Finlayson*, Senior Deputy Attorney General, Carson City, for Amicus Curiae Nevada Attorney General's Office.

Rene L. Valladares, Federal Public Defender, and *Ellesse D. Henderson* and *Jonathan M. Kirshbaum*, Assistant Federal Public Defenders, Las Vegas; *Brown Mishler, PLLC*, and *William H. Brown*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

NRS 34.810(1)(a) requires a district court to dismiss a postconviction habeas corpus petition if "[t]he petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." This case requires us to decide whether a defendant who pleads guilty may challenge his sentence on the ground that he received ineffective assistance of counsel at the post-plea sentencing hearing. We hold that NRS 34.810(1)(a) does not bar a claim that a petitioner received ineffective assistance of counsel at sentencing. Because we further conclude that appellant in fact received ineffective assistance of counsel at sentencing, we reverse and remand for a new sentencing hearing. Finally, we conclude that the district court did not err in denying appellant's remaining claims.

FACTS AND PROCEDURAL HISTORY

In 2013, appellant Melvin Gonzales was charged with burglary, receiving stolen property, possession of methamphetamine, and four counts of aggravated stalking. The stalking counts arose from disturbing and threatening text messages he sent to his ex-wife and her parents. Gonzales agreed to plead guilty to three counts of aggravated stalking. In exchange, the State agreed to dismiss the remaining charges. Further, while the State reserved the right to argue at sentencing, it expressly agreed to recommend that the sentences for each count run concurrently.

At the sentencing hearing, the prosecutor exercised his right to argue by emphasizing the serious nature of the crimes. But instead of recommending that those sentences run concurrently as required by the plea agreement, he stated only that he concurred with the recommendation contained in the presentence investigation report (PSI) prepared by the Division of Parole and Probation. The PSI recommended that two of the three sentences should run consecutively. Gonzales's counsel did not object. The district court ultimately sentenced Gonzales to three consecutive prison terms of 62 to 156 months. Gonzales appealed but did not argue the State breached the plea agreement, and this court affirmed his conviction. *Gonzalez v. State*, Docket No. 65768 (Order of Affirmance, Nov. 12, 2014).

Gonzales filed a timely postconviction petition for a writ of habeas corpus, which he supplemented twice. Among the grounds for the petition, and central to this appeal, was a claim that trial counsel was ineffective because he did not object to the State's breach of the plea agreement. During the hearing on the petition, Gonzales's postconviction counsel questioned trial counsel, who acknowledged that he did not object, explaining that he was unsure whether the State had in fact breached the plea agreement. He stated that when the State concurred with the PSI, he did not know which specific recommendation the State was concurring with. The district court denied the petition in its entirety. While it denied some claims on the merits, it concluded that any "[i]ssues regarding [the] sentence are outside the scope of NRS 34.810(1)(a)" and thus declined to address those issues at all. Gonzales appealed.

DISCUSSION

NRS 34.810 does not bar claims that counsel was ineffective at sentencing

Gonzales challenges the district court's determination that NRS 34.810(1)(a) precludes his claim of ineffective assistance of counsel at sentencing. NRS 34.810(1)(a) limits the types of claims that may be raised in a postconviction petition for a writ of habeas corpus challenging a conviction based upon a guilty plea:

> 1. The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

The district court's application of NRS 34.810 is a question of statutory interpretation that we review de novo. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

In construing a statute, we seek "to give effect to the Legislature's intent." *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (internal quotation marks omitted). "If the statute's language is clear and unambiguous, we enforce the statute as written." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). But if a "statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, . . . we 'look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy.'" *Id.* (alteration in original) (quoting *Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004)). In doing so, we construe statutes "in light of their purpose and as a whole," and thus look to the "entire act" to reconcile any apparent inconsistencies. *White v. Warden*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980).

The State contends that an allegation "that the plea was entered without effective assistance of counsel," NRS 34.810(1)(a), must necessarily contend that counsel's advice *to enter the plea* was deficient. In the State's view, adopted by the district court, an allegation of deficient performance *at sentencing* does not relate to the entry of the plea and is thus not cognizable in state habeas proceedings following a guilty plea. This is undoubtedly one facially reasonable reading of the statute, but it is not the only reasonable reading. Another reasonable interpretation is that NRS 34.810(1)(a) limits the types of claims arising *before* entry of the guilty plea to only those claims that relate to the validity of the guilty plea and the effective assistance of counsel in entering a plea. But NRS 34.810(1)(a) does not limit ineffective-assistance-of-counsel claims arising *after* entry of the guilty plea, as there is no express language doing so and those claims are naturally not known at the time the guilty plea is entered. As there are two reasonable interpretations, NRS 34.810(1)(a) is ambiguous, and we look to the "spirit, subject matter, and public policy" behind NRS Chapter 34 and NRS 34.810(1)(a) in particular. *Butler*, 120 Nev. at 893, 102 P.3d at 81. In this context, we conclude that the second reading—which permits Gonzales's claim here—is clearly the better one.

First, considering the chapter as a whole, our Legislature created a remedy to challenge the validity of a judgment of conviction or sentence for a person "under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." NRS 34.724(1). This remedy was made exclusive, supplanting the common-law writ and other procedures formerly available to challenge a conviction or sentence. NRS 34.724(2)(b). Because a defendant has a constitutional right to the effective assistance of counsel at sentencing, *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)), the context of NRS Chapter 34 strongly suggests that the Legislature intended to provide a remedy when "the sentence was imposed," NRS 34.724(1), without the effective assistance of counsel.

To be sure, it is clear that the Legislature meant to provide *one* remedy, not more, and thus barred petitioners from raising most claims that were or should have been raised earlier. *See* NRS 34.810(2); *see also Harris v. State*, 130 Nev. 435, 446-48, 329 P.3d 619, 626-28 (2014) (recognizing the Legislature's goal of creating a single postconviction remedy to challenge the validity of a judgment of conviction for a person in custody). This court has further recognized that claims that could have been raised on direct appeal, but were not, are waived in subsequent proceedings. *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). And of course, the Legislature can impose procedural limitations on statutory postconviction petitions. *See Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

But it is equally clear that the Legislature did *not* mean to provide *zero* remedies, and the State candidly admits that its interpretation will provide no state-law remedy whatsoever for violations of a defendant's rights that take place after the entry of a guilty plea. We are not persuaded that the potential availability of a federal remedy for such claims means that our Legislature did not provide its own remedy for ineffective-assistance-of-counsel claims arising after entry of the guilty plea. The lack of any state remedy weighs heavily against the State's interpretation. The vast majority of convictions in our system are obtained through guilty pleas. To hold that defendants who plead guilty have no remedy for such constitutional violations at sentencing would seriously undermine the purpose of NRS Chapter 34 as applied to most petitioners. We are convinced that the Legislature did not intend this. Such an interpretation, which gives a defendant *no* remedy instead of one unified

remedy, fails to implement the public policy and purpose behind "the entire act." *White*, 96 Nev. at 636, 614 P.2d at 537.

Rather than reading NRS 34.810(1)(a) as providing no remedy for a challenge to the ineffective assistance of counsel at sentencing, we conclude that the purpose of this provision was to preclude wasteful litigation of certain *pre-plea* violations. This policy is common to Nevada and federal habeas procedure and was well stated by the United States Supreme Court in *Tollett v. Henderson*, 411 U.S. 258 (1973). There, a petitioner sought federal habeas relief on the grounds that the grand jury that indicted him was unconstitutionally selected. *Id.* at 259-60. The Court held that the petitioner's "guilty plea . . . foreclose[d] independent inquiry into the claim of discrimination in the selection of the grand jury." *Id.* at 266. It explained that:

> [A] guilty plea represents a break in the chain of events which has *preceded* it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea*. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the [acceptable] standards . . . .

Id. at 267 (emphases added).

Following *Tollett*, we also recognized limitations in habeas proceedings on claims arising before the guilty plea. *See Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (recognizing in habeas proceeding that by entering a guilty plea, a petitioner "waived all constitutional claims based on events occurring prior to the entry of the pleas, except those involving the voluntariness of the pleas themselves"); *Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (approving *Tollett*'s holding that a defendant may not raise independent claims that arise before entry of the guilty plea). The Legislature added NRS 34.810(1)(a) to the statutory post-conviction remedy in 1985, and this timing suggests it was intended to codify these existing limits. *See* 1985 Nev. Stat., ch. 435, § 10(1), at 1232. Since this enactment, we have again affirmed that "[w]here the defendant has pleaded guilty, the only claims that may be raised thereafter [in a habeas proceeding] are those involving the voluntariness of the plea itself and the effectiveness of counsel." *Kirksey v. State*, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996).

In contrast to these repeated statements that claims arising before the plea are generally waived, we have never once suggested that ineffective-assistance-of-counsel claims arising after the plea might be waived. Indeed, we have repeatedly entertained

petitions alleging ineffective assistance of counsel arising after a guilty plea. *See, e.g.*, *Toston v. State*, 127 Nev. 971, 978-80, 267 P.3d 795, 800-01 (2011) (holding that an evidentiary hearing was required to determine whether counsel failed to file an appeal after being asked to do so); *Thomas*, 115 Nev. at 151, 979 P.2d at 224 (same); *Weaver v. Warden*, 107 Nev. 856, 858-59, 822 P.2d 112, 114 (1991) (holding that relief was proper where counsel failed to present evidence of defendant's PTSD in mitigation at sentencing); *see also Griffin v. State*, 122 Nev. 737, 745, 137 P.3d 1165, 1170 (2006) (recognizing that "[d]efense counsel who fail to ensure that a defendant receives the proper amount of presentence credit are subject to claims of ineffective assistance"). We have even entertained ineffective-assistance-of-counsel claims arising after the plea while rejecting other independent claims presented in the same petition as barred under NRS 34.810(1)(a), thus implicitly recognizing the limitations of the statute.[1] *Toston*, 127 Nev. at 974 & n.1, 980, 267 P.3d at 798 & n.1, 801 (remanding for hearing on appeal-deprivation claim arising after guilty plea, but rejecting prosecutorial misconduct and abuse of discretion allegations as barred under NRS 34.810(1)(a)). The Legislature has never suggested that the courts should discontinue consideration of these ineffective-assistance-of-counsel claims, despite having the opportunity to do so when it amended NRS 34.810 in other respects. *See, e.g.*, 2019 Nev. Stat., ch. 500, § 3, at 3010.

In sum, we explicitly hold today what has been implicit in our caselaw for decades. The core claims prohibited by NRS 34.810(1)(a) are "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" that do not allege that the guilty plea was entered involuntarily or unknowingly or without the effective assistance of counsel. *Tollett*, 411 U.S. at 267. Those claims are "waived" by the guilty plea. *Lyons*, 100 Nev. at 432, 683 P.2d at 505. But where a petitioner argues that he or she received ineffective assistance of counsel at sentencing, he or she could not have raised that claim before entering his or her plea. It would violate the spirit of our habeas statute and the public policy

[1]We note that both parties implicitly accept the background principle that under NRS 34.810(1)(a), each ground for the petition must be considered separately, although the statute directs the court to "dismiss a petition." We agree. That principle of ground-by-ground analysis, uncontested by the parties (but questioned by amicus Nevada Attorneys for Criminal Justice), is consistent with our unbroken practice. *See, e.g.*, *Harris*, 130 Nev. at 439, 329 P.3d at 622 (NRS 34.810(1)(a) "limit[s] the *issues* that may be raised" (emphasis added)); *Toston*, 127 Nev. at 974 n.1, 980, 267 P.3d at 798 n.1, 801 (determining that specific claims were properly dismissed under NRS 34.810(1)(a)). Because a petition may contain many separate grounds for relief, it makes no sense for the whole petition to rise and fall based on just one of those grounds. It is clear that the context of NRS 34.810(1)(a) requires consideration of the individual grounds raised within a petition.

of this state to prohibit him or her from *ever* raising that claim in state court. Therefore, the district court erred by declining to consider Gonzales's claim that counsel provided ineffective assistance at sentencing.

Ineffective assistance of counsel at sentencing

To prove ineffective assistance of counsel, a petitioner must show "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense." *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107 (internal quotation marks omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong of this test asks whether counsel's representation fell "below an objective standard of reasonableness" as evaluated from counsel's perspective at the time. *Id.* at 987-88, 923 P.2d at 1107. The second prong asks whether there is "a reasonable probability that, but for counsel's errors, the result of the [proceeding] would have been different." *Id.* at 988, 923 P.2d at 1107. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but we review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

In considering whether trial counsel's performance was deficient, we must first determine whether the State breached the plea agreement. "When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted). Here, the State agreed to recommend that the prison terms for each count run concurrently. In close cases, courts have grappled with the details of what, exactly, counts as a recommendation. *See, e.g.*, *Sullivan v. State*, 115 Nev. 383, 387-90, 990 P.2d 1258, 1260-62 (1999) (prosecution did not breach plea bargain by supporting its recommendation with facts about defendant's criminal record and the instant offenses); *Kluttz v. Warden*, 99 Nev. 681, 684, 669 P.2d 244, 245 (1983) (although prosecution expressly recommended agreed-upon sentence, the prosecutor's "insinuation that the plea bargain should not be honored" was a breach); *see also State v. Bearse*, 748 N.W.2d 211, 216 (Iowa 2008) (prosecutor should "indicate to the court that the recommended sentence is supported by the State" (cleaned up)). We have no need to do so here because this is not a close case. Uncontroverted evidence in the record shows that the prosecutor concurred with the recommendation in the PSI and that the PSI recommended two consecutive sentences with the third to run concurrently. That was in direct conflict with the agreement that the prosecutor would recommend all sentences run concurrently. *See State v. Howard*, 630 N.W.2d 244, 251 (Wis. Ct.

App. 2001) ("[W]here a plea agreement undisputedly indicates that a recommendation is to be for concurrent sentences, an undisputed recommendation of consecutive sentences that is not corrected at the sentencing hearing constitutes a material and substantial breach of the plea agreement as a matter of law."). We therefore conclude that the State materially breached its promise to recommend concurrent sentences.

We next consider whether counsel's failure to object to a breach of the plea agreement was deficient performance—that is, whether counsel's performance fell below an objective standard of reasonableness. We conclude that counsel's performance was deficient. "If the State commits a material breach of a negotiated plea agreement, it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach." *State v. Gonzalez-Faguaga*, 662 N.W.2d 581, 588 (Neb. 2003). Where the State induces a defendant's guilty plea with a promise to recommend a favorable sentence, the defendant has a right to expect that the State will perform that promise. If the State fails to do so, defense counsel must ordinarily protect the defendant's interests by objecting.

While it is certainly difficult to imagine a strategic reason why defense counsel would deliberately fail to object to a breach of the plea bargain, *see id.* at 588-89, we decline at this time to categorically rule out such a possibility, *cf. State v. Sidzyik*, 795 N.W.2d 281, 289 (Neb. 2011). But in this case, the record shows no such strategic maneuvering took place. At the evidentiary hearing on Gonzales's petition, postconviction counsel asked trial counsel whether he was aware prior to sentencing that the PSI's recommendation was inconsistent with the plea bargain; trial counsel confirmed that he was. Postconviction counsel asked trial counsel whether, in his view, the State's concurrence with the PSI's inconsistent recommendation was a breach of the plea bargain; trial counsel replied, "I guess you'd have to determine what the State, when they say recommendation, which recommendation they're talking about." Postconviction counsel pointed to the plea agreement itself, quoted the agreement's language that "the State agrees to recommend that the penalty on each count run concurrent to each other," and asked trial counsel whether the State had made any such recommendation during its argument. Trial counsel replied, "[o]rally, perhaps not, but it seems in writing it's there in the plea agreement." It appears that trial counsel believed that the State's promise to make a recommendation was *itself* the recommendation, and thus the State performed the promise as soon as the promise was made. That was, of course, mistaken. *Cf. Bearse*, 748 N.W.2d at 216 (prosecution "recommends" a sentence by "indicat[ing] to the court that the recommended sentence is supported by the State" (cleaned up)). Counsel's apparent misunderstanding of the State's duty did not render his actions strategic

or reasonable. *See State v. Sidzyik*, 871 N.W.2d 803, 808 (Neb. 2015) (holding that counsel performed deficiently by failing to object to the State's breach of a plea agreement, even though counsel believed that no breach had occurred).

Finally, we have no difficulty concluding that counsel's failure to object prejudiced Gonzales. If the district court had properly been made aware that Gonzales's guilty plea was pursuant to an agreement in which the State promised to recommend concurrent sentences, there is a reasonable probability that the district court would not have imposed three consecutive sentences. While the district court retained discretion in imposing the sentences, the State's recommendations often carry significant weight. *See, e.g.*, *State v. Adams*, 8 N.E.3d 984, 991 (Ohio Ct. App. 2014). Further, trial counsel's failure to object meant that the district court could very well have believed that the PSI was an accurate representation of the sentences agreed to by the parties—which it was not. Under these circumstances, we do not have confidence in the reliability of the outcome at sentencing. *See Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").[2] Because Gonzales's counsel performed deficiently by failing to object to the State's breach of the plea agreement, and because that deficient performance prejudiced Gonzales, we hold that Gonzales received ineffective assistance of counsel at sentencing.

Generally, a successful ineffective-assistance-of-counsel claim at sentencing results in "a new sentencing hearing in front of the same district court judge who originally sentenced appellant." *Weaver*, 107 Nev. at 859, 822 P.2d at 114. However, here, the ineffective-assistance claim is entwined with the underlying breach of the plea agreement. When we review such a breach claim directly, we require the new sentencing hearing to take place before a different judge. *Echeverria v. State*, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003). This rule ensures that the new hearing is not "tainted" by the State's breach at the prior hearing. *See State v. Boldon*, 954 N.W.2d 62, 70 (Iowa 2021). We conclude that this rule applies with equal force when counsel is ineffective by failing to object to the State's breach.

Gonzales argues that he should be permitted to withdraw his plea and proceed to trial, rather than submit to a new sentencing hearing. We disagree. When the State breaches a plea agreement,

> [c]ourts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between

[2]In view of our decision, we need not reach Gonzales's claim that his appellate counsel was ineffective for failing to raise the issue on appeal. To the extent that Gonzales raised a breach claim independently from his claim of ineffective assistance of counsel, we conclude that this claim was waived because it was not raised on direct appeal. *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059.

> acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances.

Van Buskirk v. State, 102 Nev. 241, 244, 720 P.2d 1215, 1216-17 (1986) (quoting *People v. Mancheno*, 654 P.2d 211, 215 (Cal. 1982)). Here, no "additional information or changed circumstances," *id.* at 244, 720 P.2d at 1216 (quoting *Mancheno*, 654 P.2d at 215), have come to light, and we conclude that a new sentencing hearing will best implement the parties' reasonable expectations at the time they entered the plea agreement. At the new sentencing hearing, the State must specifically perform the plea bargain by recommending that the three sentences run concurrently. The sentencing judge will retain all "normal sentencing discretion," *id.* at 243, 720 P.2d at 1216 (quoting *Mancheno*, 654 P.2d at 214), except that under the circumstances of this case, the new sentence must not exceed the original sentence, *see Citti v. State*, 107 Nev. 89, 94, 807 P.2d 724, 727 (1991).

Remaining claims

In addition to Gonzales's claim that counsel failed to enforce the plea agreement, Gonzales raised two other claims in this appeal. However, we conclude that these claims are without merit.

First, Gonzales claims that by advising him to enter a guilty plea, counsel's performance fell below an objective standard of reasonableness because any reasonable counsel would have realized that the acts alleged did not constitute aggravated stalking. We disagree. In order to prove aggravated stalking, the State had to show that Gonzales engaged in stalking and threatened his victims with the intent to place them "in reasonable fear of death or substantial bodily harm." NRS 200.575(3).[3] Gonzales asserts that "[t]here was absolutely not one shred of evidence" that he violated this statute. This claim is belied by the record. For example, the victims testified at the sentencing hearing to the grisly and threatening nature of the text messages.[4] We conclude that counsel's advice to plead guilty to aggravated stalking was not deficient.

Next, Gonzales alleges that trial counsel was ineffective for failing to move to suppress evidence related to the nonstalking charges, and for failing to move to sever those charges. This claim is at least

[3]At the time of Gonzales's conviction, the relevant statute was numbered NRS 200.575(2). 2009 Nev. Stat., ch. 497, § 1, at 3007. For simplicity, we cite the statute as it exists today; the substance has not changed.

[4]Gonzales correctly notes that text messages can support a conviction for a category C felony under NRS 200.575(4). From there, he leaps to the illogical and unsupported conclusion that text messages can never support a conviction for a category B felony under NRS 200.575(3). We conclude this argument is frivolous.

arguably barred by NRS 34.810(1)(a), since it alleges an error which occurred *before* the plea and which does not obviously relate to the entry of the plea. But even assuming without deciding that the claim is properly raised, it is meritless. Gonzales ultimately entered into a plea agreement in which the nonstalking charges were dismissed. We conclude that Gonzales was not prejudiced by the absence of a motion to sever charges, or to suppress evidence related to charges, of which he was neither tried nor convicted.[5] We thus affirm the district court's denial of Gonzales's petition on all grounds other than ineffective assistance related to breach of the plea agreement.

CONCLUSION

We conclude that NRS 34.810(1)(a) does not bar Gonzales's claim that he received ineffective assistance of counsel at his sentencing hearing. We further conclude that this claim is meritorious because counsel's failure to object to the State's breach of the negotiated plea agreement was unreasonable and prejudicial. We have considered Gonzales's other claims and conclude they lack merit. Accordingly, we affirm in part, reverse in part, and remand with instructions to grant the petition in part and to hold a new sentencing hearing before a different judge. At the new hearing, the State must recommend that Gonzales serve concurrent sentences, consistent with the plea agreement.

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

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[5]Gonzales speculates that if the stalking and nonstalking charges had been severed, and if a motion to suppress had resulted in the dismissal of the nonstalking charges, then counsel might have had more resources to argue that text messages can never support a conviction for aggravated stalking. Even if we ignore the attenuation of this proposed causal chain, such an argument would have necessarily failed, *see supra* n.4, and there is thus no reasonable probability that the outcome would have been different.