TRP FUND VI, LLC, a Delaware Limited Liability Company, Appellant, *v.* PHH MORTGAGE CORPORATION, a Foreign Corporation; and Federal National Mortgage Association, a National Banking Entity, Respondents.

No. 84407

March 31, 2022 506 P.3d 1056

Emergency motion for stay and/or injunction pending appeal.

Motion denied.

The Wright Law Group and *John Henry Wright*, Las Vegas, for Appellant.

Wright, Finlay & Zak, LLP, and *Christina V. Miller*, Las Vegas, for Respondents.

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

OPINION

Per Curiam:

When filing emergency motions and motions for stay, moving parties must meet certain requirements designed to provide prompt notice, quick access to the information needed to resolve the motion, and proof that they have first sought relief in the district court or that doing so is impracticable. Failure to comply with these requirements may result in summary denial of the motion.

FACTS

In the underlying quiet title and declaratory relief action, appellant TRP Fund VI, LLC, sought a preliminary injunction to enjoin respondents PHH Mortgage Corporation and Federal National Mortgage Association from foreclosing under the first position deed of trust on its property. On March 10, 2022, the district court entered an order denying the preliminary injunction, and TRP Fund appealed.

TRP Fund filed in this court an emergency motion for stay and/or injunction on March 21, seeking relief before a foreclosure sale scheduled for April 1, and paid the filing fee the next day. *See* NRAP 3(e) (requiring the payment of a filing fee); NRAP 45(f) ("The clerk shall not be required to file any paper or record in the clerk's office or docket any proceeding until the fee required by law and these Rules has been paid."). An NRAP 27(e) certificate, which must accompany emergency motions, was not attached to the stay motion but was attached to a simultaneously filed motion to exceed

the page limit. In the stay motion, TRP Fund asserted that it was "clearly impracticable" to seek a stay pending appeal in the district court as set forth in NRAP 8(a) because the district court had just refused to grant it a preliminary injunction seeking similar relief, such that it "would be a waste of time and resources" to ask that court for a stay.

Respondents timely filed a response to the stay motion,[1] arguing that the stay motion should be summarily denied because TRP Fund failed to include the NRAP 27(e) certificate with the emergency motion and failed to first seek stay relief in the district court or to demonstrate that doing so was impracticable. In the response, respondents contend that TRP Fund did not attempt to comply with the NRAP 27(e) requirement to notify them of its intent to seek emergency relief before it filed the stay motion.

DISCUSSION

Due to their urgent nature, emergency motions use considerable court and party resources. When relief is needed within 14 days to avoid irreparable harm, NRAP 27 requires the movant to take certain enumerated steps to ensure both that the parties and the court are notified of the emergency as soon as possible and that the information needed to process the motion is readily available. To those ends, NRAP 27(e)(1) requires the movant, *before filing the motion*, to "make every practicable effort to notify the clerk of the Supreme Court, opposing counsel, and any opposing parties proceeding without counsel and to serve the motion at the earliest possible time." The motion must be accompanied by a certificate providing the contact information for the parties, the facts demonstrating both the existence and the nature of the asserted emergency, and when and how the other parties were notified of the emergency and served with the motion. NRAP 27(e)(3). Further, the movant must explain in the motion whether relief was available and sought in the district court and, if not sought, why the motion should not be denied. NRAP 27(e)(4). Finally, when the movant is seeking a stay or injunction, the movant must also comply with NRAP 8(a)(1), which states that "[a] party must ordinarily move first [for such relief] in the district court." Any movant that seeks a stay from this court without first applying in the district court must demonstrate that first seeking relief in the district court would be "impracticable." NRAP 8(a)(2)(A)(i).

Here, TRP Fund's NRAP 27(e) certificate fails to meet the stated requirements. It was not attached to the emergency stay motion and, while certifying that the motion was made "at the earliest

[1]TRP Fund's and respondents' motions for leave to file a stay motion and an opposition thereto that exceed the NRAP 27(d)(2) page limits are granted. The motion and opposition were filed on March 21 and March 28, respectively.

opportunity," TRP Fund does not further explain that statement or demonstrate that it attempted to notify respondents of the emergency before filing the motion.

More problematically, TRP Fund admittedly did not first seek relief in the district court and failed to demonstrate that doing so was impracticable. "Impracticable" requires the movant to show that it was "not capable" of first seeking relief in the district court or that such an act could not be done. *Webster's II New College Dictionary*, at 556 (1995). TRP Fund argues only that seeking a stay in the district court was unwarranted because the district court denied it a preliminary injunction, not that it was unable to file the motion or that the court was incapable of granting the requested relief. While considerations in determining whether to grant a preliminary injunction overlap with those in determining whether to grant a stay or injunction pending appeal, they are not the same. *Compare Excellence Cmty. Mgmt., LLC v. Gilmore*, 131 Nev. 347, 350-51, 351 P.3d 720, 722 (2015) (noting that a preliminary injunction may issue when the moving party has demonstrated a reasonable likelihood of success on the merits of its claims and irreparable harm), *with* NRCP 62(c) (providing that when an appeal from preliminary injunction is pending, the district court may "grant an injunction on terms for bond or other terms that secure the opposing party's rights"), *and* NRAP 8(c) (listing four factors for courts to consider when determining a motion for stay or injunction pending appeal). Although both analyses look to the likelihood of success on the merits, in determining whether to grant a stay or injunction pending appeal, the district court may also take into consideration the purposes of the requested stay or injunction, the novelty or unsettledness of a legal issue, and any other issues of security and harm.

Here, the district court denied a preliminary injunction based on its review of the merits but did not delve into other considerations that may weigh in favor of a stay or injunction pending appeal. As we have acknowledged before, this court's strong policy favoring an initial stay decision from the district court is based on that court's vastly greater familiarity with the facts and circumstances of the case and better position to resolve such factual issues, including those of duration and bond necessity and amount.[2] *Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005), *as modified* (Jan. 25, 2006); *see generally In re Grand Jury Proc. U.S.*, 626 F.2d 1051, 1059 (1st Cir. 1980) (recognizing that the federal rule analogous to NRAP 8 "embodies a strong policy that a request for a stay or injunction pending appeal be directed in the first instance to the district court, which is familiar with the controversy and better able to assess potential prejudice to a party from the grant or denial of

[2]We note, for example, that respondents argue that the lis pendens TRP Fund has recorded against the property is sufficient to protect its interest.

interim relief"), *receded from on other grounds by In re Kave*, 760 F.2d 343, 356 (1st Cir. 1985). Thus, unless movants can demonstrate that first asking the district court for relief is truly impracticable, they are required to seek stay and injunctive relief pending appeal in the district court even when that court has denied them a preliminary injunction. TRP Fund's failure to do so here bars relief, and we deny the emergency motion for stay or injunction.

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Appellant/Cross-Respondent, *v.* U.S. BANK N.A., a National Banking Association; and NATIONSTAR MORTGAGE, LLC, a Foreign Limited Liability Company, as Trustee for the Certificateholders of the LXS 2006-4N TRUST FUND, Erroneously Pleaded as U.S. BANK, N.A., Respondents/Cross-Appellants.

No. 81293

April 7, 2022 507 P.3d 194

Petition for rehearing of an order affirming a district court judgment in a quiet title action.

Rehearing denied.

[En banc reconsideration denied June 23, 2022]

Hanks Law Group and *Karen L. Hanks* and *Chantel M. Schimming*, Las Vegas, for Appellant/Cross-Respondent.

Kravitz Schnitzer Johnson Watson & Zeppenfeld, Chtd., and *Gary E. Schnitzer*, Las Vegas; *Troutman Pepper Hamilton Sanders LLP* and *Aaron D. Lancaster*, Atlanta, Georgia, for Respondents/Cross-Appellants.

Fennemore Craig P.C. and *Leslie Bryan Hart* and *John D. Tennert*, Reno, for Amicus Curiae Federal Housing Finance Agency.

Before the Supreme Court, Hardesty and Stiglich, JJ., and Gibbons, Sr. J.[1]

OPINION

By the Court, Hardesty, J.:

NRS 106.240 provides a means by which liens on real property are automatically cleared from the public records after a certain period of time. In particular, NRS 106.240 provides that 10 years after the debt secured by the lien has become "wholly due" and has remained unpaid, "it shall be conclusively presumed that the debt has been regularly satisfied and the lien discharged."

During the financial crisis that began in the 2000s, thousands of Nevada homeowners defaulted on their home loans, and their lenders recorded notices of default. Those notices accelerated the homeowners' loan balance, thereby arguably making the loan

[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

"wholly due" for purposes of NRS 106.240.[2] Now, roughly 10 years after the notices of default were recorded and the loans have remained unpaid, disputes have arisen between property owners (such as appellant) and lenders (such as respondents) over whether NRS 106.240 extinguishes the deeds of trust securing those loans, such that the lenders no longer have any security interest in the properties.

The specific question presented in this case is what effect a notice of rescission has on NRS 106.240's 10-year time frame when it is recorded after a notice of default. We previously answered this question in an unpublished decision in *Glass v. Select Portfolio Servicing, Inc.*, No. 78325, 2020 WL 3604042 at *1 (Nev. July 1, 2020) (Order of Affirmance), reasoning that because a notice of rescission rescinds a previously recorded notice of default, the notice of rescission "effectively cancelled the acceleration" triggered by the notice of default, such that NRS 106.240's 10-year period was reset. Consistent with *Glass*, we affirmed the district court's judgment in this case in an unpublished decision. *SFR Invs. Pool 1, LLC v. U.S. Bank N.A.*, No. 81293, 2021 WL 4238769 (Nev. Sept. 16, 2021) (Order of Affirmance). Appellant now seeks rehearing, arguing that we misapprehended material facts. As explained below, we disagree and therefore deny rehearing.

FACTS AND PROCEDURAL HISTORY

The subject property was previously owned by nonparty Magnolia Gotera, who, in 2005, obtained a loan from nonparty Countrywide Home Loans. That loan was secured by a deed of trust, which included a paragraph relating to Countrywide's right to accelerate the unpaid balance of the loan if Gotera defaulted. In 2007, Gotera stopped making payments on her loan, and in 2008, Countrywide's trustee recorded a notice of default. This notice explained that Countrywide "has declared and hereby does declare all sums secured [by the deed of trust] immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." Later that year, Countrywide's trustee recorded a notice of rescission, which stated, among other things, that the notice of default was being rescinded. After the notice of rescission was recorded, ownership of Gotera's loan was assigned to respondent U.S. Bank, which remains the loan's owner. The loan is serviced by respondent Nationstar Mortgage (U.S. Bank and Nationstar are collectively referred to as "the bank").

[2]Given the procedural posture of this case, we decline to definitively resolve whether acceleration of a loan makes the loan "wholly due" for purposes of triggering NRS 106.240's 10-year time frame. This opinion assumes that acceleration makes the loan "wholly due."

Around the time that Gotera defaulted on her mortgage payments, she also defaulted on her homeowners' association (HOA) dues. From 2008 to 2013, the HOA sent Gotera and others various foreclosure notices. In 2011, Countrywide's agent tendered the superpriority portion of the HOA's lien to the HOA's agent, thereby curing the superpriority default. *See generally Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 612-13, 427 P.3d 113, 116, 121 (2018) (holding that tendering the superpriority portion of an HOA's lien cures the default as to that portion of the HOA's lien by operation of law and that an ensuing HOA foreclosure sale does not extinguish a first deed of trust). When the HOA's remaining balance was not paid, the HOA held a foreclosure sale in 2014. At the sale, appellant SFR Investments placed the winning bid in the amount of $59,000.

Following the sale, the HOA's agent filed the underlying interpleader action, seeking direction from the district court as to how the foreclosure proceeds should be distributed. SFR and the bank filed answers and asserted claims against each other for quiet title, in essence disputing whether SFR owned the property free of the bank's deed of trust. The district court held a bench trial in 2020, at which evidence was introduced showing that Countrywide had made a superpriority tender.

At the close of the bank's case in chief, SFR filed a motion for judgment on partial pleadings under NRCP 52(c). In particular, SFR argued that it was entitled as a matter of law to a judgment that the bank's deed of trust no longer encumbered the property based on NRS 106.240. SFR argued that the 2008 notice of default had accelerated the loan balance and made it "wholly due" for purposes of triggering NRS 106.240's 10-year time frame. It further argued that because neither the bank nor its predecessor took an affirmative step to decelerate the loan, NRS 106.240 dictated that the deed of trust securing that loan was "conclusively presumed [to be] discharged" in 2018, i.e., 10 years after the notice of default was recorded.

The district court denied SFR's NRCP 52(c) motion and ultimately granted judgment for the bank, reasoning that the superpriority tender preserved the deed of trust and that SFR owned the property subject to the deed of trust. In so doing, the district court rejected SFR's arguments regarding NRS 106.240 on alternative grounds. First, the district court reasoned that NRS 106.240's 10-year time frame was tolled by virtue of the bank asserting its claim for quiet title. Second, the district court reasoned that the statute does not apply in cases like this one—outside the borrower/lender context—because SFR was not personally liable for paying the loan that the bank's deed of trust secured.

SFR appealed, taking issue with both grounds upon which the district court denied its motion based on NRS 106.240. In response, the bank argued that this court could affirm on a different ground,

namely that consistent with *Glass*, the notice of rescission effectively reset NRS 106.240's 10-year time period. SFR replied that *Glass* was not only a nonbinding unpublished decision, *see* NRAP 36(c)(2)-(3), but was also wrongly decided. Finding SFR's latter argument unpersuasive, we affirmed the district court's judgment consistent with *Glass* and did not address either of the district court's two grounds.[3] *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, No. 81293, 2021 WL 4238769 (Nev. Sept. 16, 2021) (Order of Affirmance). This petition for rehearing followed.

DISCUSSION

This court will consider a petition for rehearing "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case." NRAP 40(c)(2)(A). Alternatively, this court will consider a rehearing petition "[w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(B).

SFR makes two arguments that this court misapprehended material facts in the record, one of which primarily focuses on language in the notice of default, the other of which primarily focuses on language in the notice of rescission. As explained below, we are not persuaded by either of SFR's arguments.

SFR's first argument is based on the notice of default's statement that Countrywide "*has declared* and hereby does declare all sums secured [by the deed of trust] immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby." (Emphasis added.) SFR contends that the "has declared" phrase means that Countrywide accelerated the loan *before* it recorded the notice of default, meaning that rescinding the notice of default did not decelerate the loan. We disagree. Assuming Countrywide was legally permitted to accelerate the loan before it recorded the notice of default,[4] we conclude that the ensuing language "and hereby does declare" served to redeclare Countrywide's acceleration of the loan. *See Streck v. Bd. of Educ. of the E. Greenbush Cent. Sch. Dist.*, 408 F. App'x 411, 414 (2d Cir. 2010) (holding that the "[i]nterpretation of a legal document is [an issue] of law"); *Sanders v. Dias*, 947 A.2d 1026, 1031 (Conn. App. Ct. 2008) ("Intent as expressed in deeds and *other recorded documents* is a matter of law." (emphasis added) (internal quotation

[3]Based on our resolution of this rehearing petition, we need not address those grounds here, either.

[4]SFR observes that NRS 107.080(3) permits a bank to accelerate the loan *after* the notice of default is recorded. Because the statute does not expressly prohibit a bank from accelerating the loan *before* the notice of default is recorded, SFR contends that Countrywide was legally permitted to do so here. In light of our disposition, we need not address this contention.

marks omitted)). Thus, we reject SFR's argument that some prior unidentified acceleration remained intact after the bank rescinded the notice of default.

SFR's second argument is based on the first sentence in the notice of rescission. In a lengthy sentence, the notice of rescission provided that

> [Countrywide] does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell hereinafter described, ***provided, however, that this rescission*** shall not be construed as waiving, curing, extending to, or affecting any default, whether past present or future, . . . or as impairing any right or remedy thereunder, and it ***shall be deemed to be only an election without prejudice not to cause a sale to be made pursuant to such [Notice of Default]***, and it shall not in any way alter or change any of the rights, remedies or privileges secured to the Beneficiary and/or Trustee under such Deed of Trust, nor modify, nor alter in any respect any of the terms, covenants, conditions or obligations contained therein.

(Emphasis added.) SFR correctly observes that this sentence is substantively identical to the sentence in the notice of rescission at issue in *Glass*. SFR also correctly observes that the *Glass* decision quoted only the introductory, non-emphasized portion of this sentence. *See Glass*, 2020 WL 3604042 at *1 ("SPS's rescission clearly states that it 'does hereby rescind, cancel and withdraw the Notice of Default and Election to Sell.'"). From there, SFR contends that when the emphasized language is taken into consideration, the notice of rescission states that the only thing being rescinded is the election to sell the property at foreclosure, *not* the acceleration of the loan. Accordingly, SFR contends that we overlooked or misapprehended the effect of the emphasized language.

We are not persuaded by SFR's argument, as we did not overlook or misapprehend the effect of this language.[5] We concluded in this case that the relied-upon language did not have the effect SFR proffers. The statement, "this rescission . . . shall be deemed to be only an election without prejudice not to cause a sale to be made pursuant to such [notice of default]" does not change the fact that the bank rescinded the notice of default—the document that accelerated the loan. Nor is it self-evident from any of the remain-

[5]This is not to say that SFR's argument is wholly meritless, as we recognize that SFR has provided for comparison an example of a notice of rescission from an unrelated matter that expressly states the loan's acceleration is being rescinded, and we also recognize that Nevada's federal district court has agreed with SFR. *See Bank of Am., N.A. v. Madeira Canyon Homeowners Ass'n*, 423 F. Supp. 3d 1029, 1033 (D. Nev. 2019), *rev'd and remanded sub nom. Bank of Am., NA v. SFR Invs. Pool 1, LLC*, 849 F. App'x 211 (9th Cir. 2021) (reversing based on *Glass*). Nonetheless, we conclude that rehearing is unwarranted.

ing language that Countrywide was trying to rescind the document that accelerated the loan while also keeping the loan accelerated. Such an intent would make Gotera (or anyone else obligated under the loan) perpetually liable for the full loan balance even without the bank recording a subsequent notice of default. This would in essence eliminate NRS 107.080(3)'s 35-day right to "make good of the deficiency in performance or payment" following the recordation of a notice of default, because under SFR's view, the entire loan balance would continually be due. We decline to adopt such a reading of the notice of rescission in this case. *Cf.* 17A Am. Jur. 2d Contracts § 335 (2021) ("Courts are obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute.").[6]

In sum, we did not overlook or misapprehend any material facts in the record. NRAP 40(c)(2)(A). We therefore deny SFR's petition for rehearing.

Stiglich, J., and Gibbons, Sr. J., concur.

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[6]We recognize that a notice of rescission is not necessarily a contract. Nonetheless, we see no reason why principles of contract interpretation should not apply to the interpretation of publicly recorded documents.

DEQUINCY BRASS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81142

April 7, 2022 507 P.3d 208

Appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of lewdness with a child under the age of 14; nine counts of sexual assault of a minor under 14; one count of child abuse, neglect, or endangerment; three counts of first-degree kidnapping of a minor; two counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution; and one count of battery with the intent to commit sexual assault of a victim under 16. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Reversed and remanded.

Darin Imlay, Public Defender, and *Deborah L. Westbrook*, Chief Deputy Public Defender, Clark County, for Appellant.

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

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

OPINION

By the Court, Cadish, J.:

Appellant retained Mitchell Posin as defense counsel in a 22-count criminal matter. After four continuances over two years at appellant's request, appellant moved to substitute counsel on the eve of the trial based on Posin's alleged failure to adequately prepare the defense. After two hearings, the district court denied appellant's motion even though a defense investigator testified to various shortcomings in Posin's preparation—shortcomings that Posin conceded at the hearings. A jury convicted appellant of most of the counts, and the district court sentenced him to an aggregate term of 115 years to life in prison. On appeal, appellant argues that the district court's decision denying his motion to substitute violated his Sixth Amendment right to counsel.

The Sixth Amendment right to counsel "encompasses two different rights, namely, the right to effective assistance of counsel and the right of a non-indigent defendant to be represented by the counsel of his or her choice." *Patterson v. State*, 129 Nev. 168, 175,

298 P.3d 433, 438 (2013). A decision denying a motion to substitute appointed counsel with different appointed counsel implicates the right to effective assistance of counsel, while a motion to substitute retained counsel with different counsel implicates a non-indigent defendant's Sixth Amendment right to counsel of his or her choice. Separate tests apply to determine whether a court should grant a motion to substitute depending on whether counsel is appointed or retained. Here, the district court applied the wrong test in deciding Brass's motion to substitute counsel because Posin was retained, not appointed. Under the appropriate test, as set forth in *Patterson* and clarified in this opinion, we conclude that the district court abused its discretion by denying the motion to substitute counsel, as the record shows that Brass promptly sought relief after learning of his counsel's inadequate preparation and the serious concerns raised outweighed the disruption caused by another trial continuance. Because the error was structural, we reverse the judgment of conviction and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In September 2017, the State charged appellant Dequincy Brass with five counts of lewdness with a child under the age of 14; ten counts of sexual assault of a minor under the age of 14; one count of child abuse, neglect, or endangerment; three counts of first-degree kidnapping of a minor; two counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution; and one count of battery with the intent to commit sexual assault of a victim under 16. The charges were based on allegations that between May 2015 and February 2017, while he was dating the mother of two children who were 8 and 3 years old in 2015, Brass kidnapped and sexually assaulted and/or abused those children, as well as another child who was 13 years old at the time, and then used intimidation or threats to dissuade the children from reporting his crimes. The justice court concluded that Brass was indigent and appointed the Clark County Public Defender's office to represent him. However, Brass's family retained Mitchell Posin, and the court substituted Posin as Brass's counsel in January 2018 before Brass's preliminary hearing.

Brass pleaded not guilty and waived his right to a speedy trial on February 14, 2018. Shortly thereafter, Posin filed an ex-parte motion requesting that the district court appoint and pay an investigator to investigate Brass's case. On March 12, 2018, Posin filed a motion to withdraw as Brass's attorney, alleging that Brass's family had not paid his fee. Posin did not inform Brass of his motion to withdraw, and Posin did not appear for the hearing on his motion. Posin later withdrew his motion because Brass's family agreed to pay him.

The district court set trial for April 30, 2018. Brass requested his first continuance at an April 3, 2018, status check hearing because

his counsel needed more time to prepare. The district court granted the motion and rescheduled the trial for July 23, 2018. The district court then entered an order granting Brass's motion for an investigator on June 8, 2018. At a July 19, 2018, calendar call, Brass requested a second continuance, to which the State did not object. The district court granted the continuance and rescheduled the trial for November 13, 2018.

At a November 8, 2018, calendar call, the State announced that it was ready for trial. Brass, however, requested his third continuance, at which point Posin stated that he did not "feel that . . . I can provide, um adequate assistance of counsel understand [sic] the circumstances." Posin explained that the State "made some discovery ready and available some time back" but that he did not get that discovery "until recently" due to "financial reason[s] of my client's family."[1] The district court offered to reschedule the trial to July 8, 2019, but Posin requested an earlier trial date in May or June. The district court rescheduled trial for May 13, 2019.

At the May 7, 2019, calendar call, Posin stated that he had an issue with his investigator, who had, by that point, "sent out some [subpoenas]," and that Posin was trying to determine the status of those subpoenas. He asked the court to continue the calendar call until May 9, at which time he would give the court "an updated report" on his readiness for trial. The State pointed out that Posin had not noticed any witnesses, so it did not "know what subpoenas he's waiting for." The court continued the hearing, and when it resumed, Brass requested his fourth continuance. Posin explained that the initial investigator, who was employed by Investigator Robert Lawson to work on Brass's case, had "apparently quit" and had not responded to Posin's phone calls "over the last week or two." The State opposed the continuance, pointing out that it had issued subpoenas to the alleged minor victims and their parents four times, and the State was ready to proceed. The district court denied the motion, concluding that there was no good reason to grant a continuance and pointing out that the matter had been pending for over a year after having granted several continuances at Brass's request.

On May 13, 2019, the first day of trial, Brass renewed his motion for a continuance. Posin stated that Lawson was now personally handling the case but was not available to help at that point because he was working on a murder case. Posin claimed that he received new discovery from the State on the prior Friday, which included photographs of the motel where some of the alleged acts occurred, and that he needed time to investigate. The State argued that Brass was not prejudiced by the disclosure of photographs because the

[1]Following this hearing, the State filed a receipt showing that it had produced the discovery on July 19, October 9, and October 19, 2018, but Posin did not pick it up until November 2, 2018—only 11 days before trial was set to begin.

information regarding the motel was "available to him by reading the discovery." It further contended that "all that information has been available to [Posin] since the preliminary hearing . . . which was almost two years ago."

Brass personally expressed to the district court that he had not spoken with Posin since "December of last year." He stated, "I don't think [Posin is] prepared to represent me," and explained that Posin had not discussed the case with him in any detail. Posin stated that he had spoken with Brass on the phone and saw him the previous Friday or Saturday, as well as at the preliminary hearing almost two years earlier. The court asked the State to comment on the "assistance of counsel" issue raised by Brass, to which the State answered that Posin was retained counsel who had been on the case since the preliminary hearing and there had been no showing that warranted another continuance. The State further pointed out that Brass had proffered nothing specific in terms of what he wanted Posin to do or what Posin had failed to do, and an investigator had been working on the case as well, who presumably had provided Posin with information. Posin replied that he had not prepared for the case or communicated with his client because the investigator who worked for Lawson, and whose employment had since been terminated, had not followed up on any assignments or responded to his calls. After asking why none of these concerns were raised until the day of trial, the court continued the hearing and instructed Posin to bring Lawson to the hearing later that day. Before recessing, the court stated that it disagreed with Posin's statement that another continuance would be only a minor inconvenience to the State, pointing out that roughly 90 people (potential jurors, witnesses) were waiting in the hallway, the prosecution was prepared, and the alleged victims were waiting to testify, having prepared for trial for the fourth time.

At the continued hearing, Lawson explained that he had fired the investigator he assigned to Brass's case because the investigator "didn't do any" investigative work, such as interview witnesses and contact experts. While he acknowledged that he did not follow up with his investigator, Lawson did not know why Posin never called him "in [the] three weeks that [Posin] tried to get ahold of [the other investigator]." While the State objected to the continuance, pointing out that the victims, who were now 7, 11, and 15 years old, have had to "rehash this multiple times in preparation for trial," with every continuance being at the defense's request, the court continued the trial a fourth time over its concerns that proceeding to trial at that time would raise an ineffective-assistance-of-counsel issue. Thus, the court rescheduled the trial for February 24, 2020, which gave the defense roughly nine additional months to prepare for trial.

Nevertheless, at the August 2019 status check, the State pointed out that although the defense had raised issues about records and other items it was investigating and for which it needed the trial

continuance, the defense still had not provided any of that information to the State. At the October 2019 status check, the court asked Lawson whether he had communicated with Brass and Posin, and Lawson stated he had spoken with Posin on several occasions but had yet to meet with Brass, and that Posin had provided direction on what to investigate. After Posin stated he would be ready for trial, the court asked Brass if there was any information he would like to communicate to Posin, privately, or anything he would like to tell the court on the record, explaining, "I want this to be a real trial date. I don't want a jury . . . literally in the hallway, witnesses all lined up," like last time, with "time and money spent to give you a good trial," if his defense was not ready. Brass stated that he understood. When asked if he communicated everything he needed to communicate to Posin, Brass said, "not completely, but I think that he is supposed to come and visit me." The court told Posin to make sure to get whatever information Brass had so that Lawson can complete the investigation, and Posin agreed.

At the December 2, 2019, status check, the State expressed concerns that Posin had not prepared because he had not provided any discoverable material. The State pointed out that seven months earlier, the court continued the matter at the start of trial after the defense represented that Brass wanted an investigation into his phone and for the defense to retain a phone expert. Posin explained that while he had not retained an expert, he "anticipate[d] on having one shortly." He further explained that he had consulted with Lawson and reviewed documents related to the case. The court asked if "shortly" meant by the end of the year, and Posin responded affirmatively. The court set a status check for two weeks later, observing that the history of the case and "vagueness and the lack of an expert in the last seven months" required it to follow up again.

At the December 17 status check, Posin reiterated that he was "working on" getting an expert and that he had "made inquiries" into various experts, but he had not yet retained one.[2] Posin further explained that he had prepared for the February trial by meeting with Brass and Lawson and reviewing the preliminary hearing transcripts. At the January 2020 status check, Posin stated that he no longer believed an expert was necessary and had been "working diligently" to be ready for trial. The State confirmed that it had provided all discovery to the defense, including data from the victims' phones. Posin denied receiving transcripts of certain recordings,

[2]Posin stated that the defense wanted an expert "who can tell us what a particular program can or cannot do," because he understood that the State alleged that Brass "remotely deleted information from these cell phones." The State's attorney stated that she spoke to Lawson, who confirmed he was speaking to someone about the phones, but it was unclear why because the State was never in possession of Brass's phone, and although the victims believed that at certain times Brass remotely connected to their phones, the State had no evidence to proceed on that and there was no data for an expert to examine.

and the State responded that it had a receipt showing the information was delivered to the defense. Lawson stated that the defense "might have" the transcripts and that he was going to follow up with the State's attorney, who had been "bending over backward for [the defense]" and very helpful in providing information. Posin told the court there was no need for another status check before trial, and the State's attorney said she was counting on Posin's statement that the defense would be ready.

At a February 20, 2020, calendar call, Posin explained that Brass told Posin that morning that he had mailed a motion to have the court appoint substitute counsel. Although the district court had not received a written motion from Brass, it conducted a sealed hearing pursuant to *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004), outside the State's presence. Brass stated that Posin "hasn't done anything in preparation for trial." He asserted that Posin had not subpoenaed any witnesses, visited with Brass, or discussed the trial strategy with Brass. According to Brass, his concerns were prompted by the fact that Lawson visited him one week earlier and stated that he had been unable to contact Posin to discuss the case or get subpoenas issued. Brass believed that Posin was "kind of trying to freestyle at trial with nothing prepared."

When the court asked when Posin last met with Brass, Posin said "about a month ago," to which Brass agreed, despite having just claimed that Posin had not visited him. Brass stated that the last time Posin visited, which lasted "all of about five minutes," Posin suitably answered a question Brass had, but they "did not discuss the case" or anything about the trial. When asked what he had done to prepare, Posin explained that he had met with the investigators several times and "extensively" gone over all the documents. Posin stated he had a strategy but acknowledged that Brass "[did] not seem to feel that [strategy] was adequately explained to him." When asked why he had not raised these concerns before, Brass stated that, "as [Posin] does when he comes in for status checks, he leads me on to believe that he's working" on the case. While Brass could not identify whom he would call as witnesses beyond his brother as a character witness, he claimed that Lawson informed him of individuals who "needed to be subpoenaed" and could discuss the victims' characters, as well as testify as to job records purporting to show where Brass was at "certain dates and times." Posin explained that he did not intend to call witnesses and only planned to cross-examine the State's witnesses.[3] He did not believe the witnesses Brass wanted to testify should be called.

[3]The district court went off the record for the express purpose of allowing Posin to explain his strategy to Brass; however, Posin did not do so because he had previously told Brass what his strategy was generally, and he did not see how explaining his exact strategy would be "a useful exercise just now."

The court called the State back into the hearing, and the State objected to Brass's request for a continuance because it had three minor victims who had been ready to testify since May 2019, but who had to come back to court several times because of defense continuances, one of which was last minute, and the continued delays were stressful to the victims. It explained that it was prepared for trial and that its witnesses, all of whom were prepared to testify, included the law enforcement officers, the victims' mothers, and an out-of-state physician. The State argued that the motion, which no one had a written copy of, was untimely and suspect considering the continuance granted on what was supposed to be the first day of trial in May 2019, and that because this case began in 2017, the length of time created a risk that the victims' memories would fade. The State also argued that Brass failed to demonstrate why the court should appoint someone new, especially since Brass had retained Posin as his attorney since the preliminary hearing over two years earlier.

The district court denied the motion. The court concluded the motion was untimely because Brass first raised his concerns right before trial was set to start when he could have raised them at one of the prior status checks. It concluded that "it appeared [Brass] did not want to proceed to trial" and noted that the only witness Brass identified was his brother, who would testify without being subpoenaed. It also concluded that another continuance would be "highly prejudicial" to the State, alleged victims, witnesses, and "the potential for justice through the trial process," as the case was extremely old for a criminal matter and memories fade. The court stated that the fact that the public defender originally represented Brass and that Brass chose Posin "weighed against" granting the motion.

On the first day of trial, before voir dire began, the court held a second sealed *Young* hearing to consider Brass's renewed oral motion to substitute counsel. At the hearing, Posin acknowledged he was "concerned that there may be an issue of whether I'm providing adequate representation of counsel based on whether perhaps I have dropped the ball." Specifically, Posin was "increasingly concerned that some of the subpoenas that [he] perhaps could have and should have sent out may affect [his] ability to provide that adequate representation of counsel." Because of his concerns about the adequacy of his investigation after speaking to Lawson, Posin had asked Lawson to appear and speak to the court.

Lawson expressed deep and serious concerns about the failure of Posin to follow up on investigative leads and prepare for trial. As an experienced investigator in connection with numerous criminal trials, Lawson stated that during the investigation, "it became apparent to me that Mr. Posin had literally no knowledge of this case." Lawson noted that he and Posin had "never done a file review on this case." He informed Posin that the investigators "developed

exculpatory evidence" that "Mr. Brass likel[y] didn't commit this crime," but Posin did not subpoena this evidence. Specifically, he explained that (1) one of the victim's accounts had not remained consistent; (2) a coworker could provide timesheets showing when Brass and "the alleged victim's mother worked together and they could provide us a printout of the times that they were working, where they were working, and if they're on the computer at the same time"; (3) a hotel employee could confirm that an alleged incident did not occur at "the Palm Hotel"; (4) "we don't even know if" one of the victims, who Lawson claimed had a reputation for lying in general, was in Las Vegas at the time of one of the alleged incidents; (5) the older victim would often dominate one of the younger victims; and (6) one of the victims had a "substantial CPS history" that should have been subpoenaed and reviewed in camera. Lawson also stated that Posin had not talked to Brass about whether Brass would testify and that "on several occasions" Brass expressed to Lawson and the other investigator "his dissatisfaction with Mr. Posin." Lawson stated that he "cannot let this [c]ourt believe for one minute that Mr. Brass is getting any kind of a defense, let alone a bad defense."[4]

Posin confirmed that he had not issued any subpoenas, and while he disagreed with Lawson's characterization that he had done nothing to prepare, as he had reviewed the evidence provided by the State, including transcripts and recordings, discussed defense strategy with Lawson, and prepared opening statements and cross-examinations, Posin conceded that it was insufficient preparation.[5] He confirmed he did not follow up with Brass's employer or the hotel employee. He stated that he last met with Brass yesterday, and before that, about a month earlier. Brass agreed that Posin met with him on those occasions but claimed it was only for about 15 or 20 minutes the first time and an hour the second time. Posin acknowledged that while he initially focused on defending this case through cross-examination of the State's witnesses as opposed to presenting his own evidence, he became "more and more convinced" after talking to Lawson over the past few days "that this is the type of case that some of our . . . own evidence in the defense case would have been appropriate. Not only appropriate but perhaps necessary."

[4]The court pointed out that Lawson had been present for numerous status checks and assured the court that things were on track for trial and that the issues Lawson now raised were issues that had been dealt with a year ago. Lawson, after apologizing to the court, explained that he "cannot write a motion on behalf" of Brass or "contact the [c]ourt ex parte on behalf" of Brass.

[5]While Posin initially stated that he felt he did not sufficiently prepare for trial in light of his conversations with Lawson, he affirmed that he could provide competent representation at trial after the district court asked if it should refer Posin to the State Bar for potential discipline related to his conduct in this case.

The court took a recess, after which the State was permitted back in the courtroom. Not knowing what happened during the sealed hearing, the State opposed the motion. It pointed out that during the multiple status checks since the fourth continuance, at which Lawson and Brass were present, no one ever raised the diligence and competence issues they now claimed warranted a last-minute substitution of an attorney who had been on the case for over two years, and instead, they had assured the court that the defense would be ready for the rescheduled trial. The court denied Brass's motion. It concluded the motion was untimely,[6] as Brass failed to raise these concerns at multiple status checks when he had the opportunity to do so, and the prejudice to the State and its witnesses was high. The court also concluded that Posin, Brass, and Lawson had multiple meetings and communications and the issue between Brass and Posin "boils down to potential strategy differences," which the court concluded did not warrant granting the motion. Brass went to trial, the jury convicted him of 20 of the 22 counts, and the district court sentenced Brass to an aggregate term of 115 years to life. Brass appeals.

DISCUSSION

Brass argues that his motion to substitute counsel was timely and that the district court's denial of his motion violated his Sixth Amendment rights.[7] Reviewing the district court decision for an abuse of discretion, *Patterson*, 129 Nev. at 175, 298 P.3d at 438, we agree.

A district court abuses its discretion when it "fails to give due consideration to the issues at hand." *Id.* at 176, 298 P.3d at 439. "The Sixth Amendment right to counsel encompasses two different rights, namely, the right to effective assistance of counsel and the right of a non-indigent defendant to be represented by the counsel of his or her choice." *Id.* at 175, 298 P.3d at 438 (citing *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010)). When a defendant "seeks to replace court-appointed counsel with privately

[6]The court observed that Brass's written motion, which he apparently mailed on February 19 (one day before the calendar call), was not received and filed until after calendar call.

[7]While the parties in their briefs focus their attention on whether the district court's order violates the standards announced in *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004), the motion in this case qualifies as one seeking to substitute retained counsel, so the right to counsel of choice discussed in *Patterson v. State*, 129 Nev. 168, 298 P.3d 433 (2013), applies. Since we have the authority to "address . . . constitutional error *sua sponte*," *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992), we directed the parties to discuss *Patterson*'s application to this case at oral argument. Because the district court's findings of fact and conclusions of law effectively addressed the *Patterson* factors, and the parties had the opportunity to argue the *Patterson* factors at oral argument, we apply the *Patterson* analysis here.

retained counsel, or previously retained counsel with newly retained counsel, or *privately retained counsel with court-appointed counsel*[,] . . . the focus is on the right to counsel of one's choice."[8] *Id.* (emphasis added). In general, a defendant can replace his retained lawyer "for any reason or no reason" at all. *Rivera-Corona*, 618 F.3d at 979-80. However, the right to counsel of choice is not absolute, and a district court has "wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar." *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)).

Thus, a defendant may substitute his retained counsel at any time, unless the motion to substitute is "untimely and would result in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' "[9] *Id.* at 176, 298 P.3d at 438 (quoting *People v. Lara*, 103 Cal. Rptr. 2d 201, 211-12 (Ct. App. 2001)); *see also People v. Maciel*, 304 P.3d 983, 1010 (Cal. 2013) (explaining that a court must "consider[ ] the totality of the circumstances" when deciding whether a motion to discharge retained counsel is timely). Because "the defendant's right to . . . counsel need not always yield to judicial efficiency," *Lara*, 103 Cal. Rptr. 2d at 212, the evaluating court must "balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution," *Patterson*, 129 Nev. at 176, 298 P.3d at 438 (quoting *Lara*, 103 Cal. Rptr. 2d at 212).

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[8]We note that *Patterson*'s conclusion that the right to counsel of choice is implicated when a defendant attempts to discharge retained counsel and seeks appointed counsel due to the defendant's indigent status is consistent with most other courts' interpretation of the scope of the Sixth Amendment right to counsel of choice. *See, e.g.*, *United States v. Brown*, 785 F.3d 1337, 1344 (9th Cir. 2015) (holding that "a defendant's request to substitute appointed counsel in place of a retained attorney 'implicate[s] the qualified right to choice of counsel' " (alteration in original) (quoting *Rivera-Corona*, 618 F.3d at 981)). Thus, while we often refer to "the right of a *non-indigent* defendant to be represented by the counsel of his or her choice," *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (emphasis added), the right is also implicated if an indigent defendant attempts to replace *retained* counsel with appointed counsel.

[9]We recognize that, in *Patterson*, we instructed the evaluating court to also consider whether denying the motion to substitute would significantly prejudice the defendant. 129 Nev. at 176, 298 P.3d at 438. However, *Patterson* misstated the test from *Lara*, and we take this opportunity to clarify that the proper test when evaluating a motion to substitute retained counsel is whether (1) *granting* the motion "would cause 'significant prejudice' to the defendant, e.g., by forcing him to trial without adequate representation," or (2) the motion "was untimely and would result in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' " *Lara*, 103 Cal. Rptr. 2d at 211-12 (quoting *People v. Ortiz*, 800 P.2d 547, 552 (Cal. 1990)). No party here argues that granting Brass's motion to substitute counsel would cause him significant prejudice; thus we only address whether the motion is untimely and would result in an unreasonable disruption of the orderly processes of justice.

We emphasize that the *Patterson* analysis is distinct from the *Young* analysis, which is used when a defendant seeks to replace appointed counsel with different appointed counsel. *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (noting that the *Young* inquiry "is used to evaluate an attempt to substitute one appointed attorney for another"). *Patterson* focuses on the defendant's right to retained counsel of choice and the court's countervailing interests in the timely and orderly administration of justice, while *Young*'s three-part inquiry focuses on "(1) the extent of the conflict [between client and counsel]; (2) the adequacy of the [district court's] inquiry [into the conflict]; and (3) the timeliness of the motion." 120 Nev. at 968, 102 P.3d at 576 (quoting *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The focus is distinct because the *Young* inquiry "is designed to determine whether [an] attorney-client conflict is such that it impedes the adequate representation that the Sixth Amendment guarantees to all defendants, including those who cannot afford to hire their own attorneys," *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (quoting *Rivera-Corona*, 618 F.3d at 979), while *Patterson* "balanc[es] the right to counsel of choice against the needs of fairness . . . and against the demands of [the district court's] calendar," *id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 152). Thus, under the *Patterson* test, a defendant need not show inadequate representation or an irreconcilable conflict to have his motion granted. *See People v. Ortiz*, 800 P.2d 547, 553 (Cal. 1990) ("While we do require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney provided inadequate representation, or that he and the attorney are embroiled in irreconcilable conflict, we have never required a *nonindigent* criminal defendant to make such a showing in order to discharge his *retained* counsel." (citations omitted)); *cf. United States v. Brown*, 785 F.3d 1337, 1348 (9th Cir. 2015) (explaining that the defendant's reasons "for wanting to discharge his retained lawyer were not properly the court's concern" because the defendant had the right to discharge his counsel "for any reason or [for] no reason" (alteration in original) (emphasis and internal quotation marks omitted)).

The district court here erroneously relied on the factors in *Young*, 120 Nev. at 968-69, 102 P.3d at 576, rather than *Patterson*, when it denied Brass's motion. The district court's misplaced reliance on *Young* does not require reversal, however, if its decision effectively addressed the issues the district court should have considered under *Patterson*. *See Lara*, 103 Cal. Rptr. 2d at 214. Because the district court's findings of fact and conclusions of law did so here, we address whether the district court's decision to deny the motion was an abuse of discretion under *Patterson*.

To reiterate, in this case the relevant inquiry under *Patterson* is whether the motion to substitute retained counsel is untimely and

the resulting disruption of the orderly processes of justice outweighs the defendant's right to counsel of choice. *Patterson*, 129 Nev. at 176, 298 P.3d at 438. In deciding whether a motion to discharge retained counsel is timely, the court must "consider[ ] the totality of the circumstances." *Maciel*, 304 P.3d at 1010; *see also Patterson*, 129 Nev. at 176, 298 P.3d at 438 (analyzing whether the motion to substitute retained counsel was timely "under the circumstances of the particular case" (internal quotation marks omitted)). Brass first moved to substitute retained counsel at the calendar call four days before the February 24, 2020, trial date, just seven days after Lawson visited Brass in jail and informed him that Posin had not prepared for trial. The district court deemed the motion untimely, finding that both Brass and Lawson could have raised their concerns with Posin's preparation at one of the numerous pretrial hearings in this case, but we cannot agree. The record shows that at each status check, Posin represented that he was diligently preparing for trial and that he would not need another continuance. Brass was entitled to rely on Posin's in-court representations that he was preparing for trial. *Cf. Oak Grove Inv'rs v. Bell & Gossett Co.*, 99 Nev. 616, 622, 668 P.2d 1075, 1078-79 (1983) ("The rationale for the [discovery rule in legal malpractice cases] is that a client has the right to rely on the attorney's expertise . . . ."), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000). Brass thus raised his concerns about Posin's competence and preparation at the first opportunity after discovering those circumstances.[10] *See Lara*, 103 Cal. Rptr. 2d at 219 (concluding the defendant's motion to substitute retained counsel filed on the first day of trial was timely where the defendant "was unaware of the nature of [his attorney's] preparation until the moment the trial was finally set to begin"); *cf. Daniels v. Woodford*, 428 F.3d 1181, 1200 (9th Cir. 2005) ("Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay.").

Moreover, although a defendant generally can discharge retained counsel for any reason or no reason at all and therefore does not have to demonstrate inadequate representation or an irreconcilable conflict, the court can consider the absence or presence of such circumstances, and when the defendant became aware of them, in deciding whether the motion to discharge retained counsel is untimely. *See*

[10]While Lawson stated that Brass expressed dissatisfaction with Posin "on several occasions," nothing in the record indicates that Brass knew Posin was not adequately preparing for trial prior to Lawson's February visit to Brass. Similarly, the fact that Lawson did not raise his concerns with Posin's behavior at an earlier status check does not weigh against the timeliness of Brass's motion because we cannot impute Lawson's knowledge to Brass when the record does not show that Lawson had informed Brass of his concerns with Posin's preparation prior to any of the earlier status checks.

Maciel, 304 P.3d at 1010-11 (observing that the trial court "did nothing improper" when it discussed the concerns the defendant raised about retained counsel during a hearing on the defendant's motion to discharge retained counsel). At the hearing on Brass's renewed motion, Posin acknowledged that "there may be an issue of whether I'm providing adequate representation of counsel based on whether perhaps I have dropped the ball." He conceded that "this is the type of case that some of . . . our own evidence in the defense case would have been appropriate," "[or] perhaps necessary." Despite acknowledging that it was "necessary" to prepare and produce exculpatory evidence in this case and noting that Lawson provided several detailed leads on potentially exculpatory evidence, Posin conceded that he did not "issue a single subpoena" to follow up on that evidence. Further, Lawson—an experienced investigator appointed by the district court—told the court that "it became apparent to me that Mr. Posin had literally no knowledge of this case." After explaining both that "[he and Posin have] never done a file review on [Brass's] case" and the potentially exculpatory evidence he and his investigators discovered, Lawson declared that he "cannot let this [c]ourt believe for one minute that Mr. Brass is getting any kind of a defense, let alone a bad defense." The district court correctly noted the inadequacy of Posin's preparations when it discussed referring him to the State Bar for potential discipline, assuming the truth of "a substantial portion" of Lawson's testimony.[11] The record thus shows ample evidence that Posin did not adequately prepare for trial in this case.[12] Few derelictions by counsel are more significant than inadequate preparation for trial. *Cf. Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970) ("Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful

[11]While a potential conflict between Brass and Posin, who undertook Brass's case during a stayed 18-month bar suspension, *In re Discipline of Posin*, No. 69417, 2016 WL 1213354, at *1 (Nev. Mar. 25, 2016), is not a required consideration under *Patterson*, Posin's desire to avoid any potential bar discipline ties into the timeliness inquiry, as Posin initially expressed concern that he did not adequately prepare for trial yet immediately stated he could go to trial once the district court indicated it was considering referring him to the State Bar for potential discipline. Thus, Posin apparently gave false assurances when convenient for his own purposes at the status hearings and even at the hearing on Brass's renewed motion held on the day trial was set to begin.

[12]Although the district court found that Brass's complaints amounted to a disagreement with Posin's trial strategy, this finding is not supported by the record. Brass contended that Posin was not adequately prepared to represent him at trial because he did not adequately investigate the case, and Posin conceded that further review of the record convinced him that he should have issued subpoenas to follow up on the potentially exculpatory evidence Lawson identified. Thus, at the renewed motion hearing, there was no disagreement in strategy, as Posin conceded that his prior trial strategy to rely on cross-examination of the State's witnesses was inadequate.

analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge."). In other words, this is not a situation where a defendant arbitrarily sought to discharge retained counsel on the first day of trial. *Cf. People v. Keshishian*, 75 Cal. Rptr. 3d 539, 542 (Ct. App. 2008) (concluding that the trial court did not abuse its discretion in denying a defendant's motion to discharge retained counsel where the case had been pending for 2½ years; the defendant made a "last-minute" request on the day set for trial based solely on having "inexplicably 'lost confidence' in his experienced and fully prepared counsel"; and granting the request would have required an "indefinite continuance").

We recognize that granting the motion would have disrupted the orderly processes of justice. In particular, it would have necessitated another continuance in the trial of a case that had been pending for more than two years and inconvenienced the State, victims, witnesses, and potential jurors. But that disruption was not unreasonable considering the totality of the circumstances: Brass promptly moved to discharge retained counsel after learning that counsel had not adequately prepared for trial; he faced going to trial with admittedly unprepared counsel in a 22-count felony case; and he was indigent and requested appointed counsel to replace Posin, not an indefinite delay to find new retained counsel.

Accordingly, while the district court understandably and appropriately had concerns about the prejudice to the State, as well as to the victims, witnesses, and potential jurors from the multiple defense-instigated trial continuances, it abused its discretion here because the motion was timely under the circumstances and any disruption to the orderly process of justice was reasonable under the unique facts of this case.[13] As this error is structural, *Gonzalez-Lopez*, 548 U.S. at 150; *Patterson*, 129 Nev. at 177-78, 298 P.3d at 439, we reverse the judgment of conviction and remand for a new trial.[14]

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[13]The district court also erred in concluding that the fact Brass retained Posin weighed against granting Brass's motion to substitute counsel. *See Rivera-Corona*, 618 F.3d at 979-80 ("Unless the substitution would cause significant delay or inefficiency or run afoul of the other considerations we have mentioned, a defendant can fire his retained or appointed lawyer and retain a new attorney for any reason or no reason." (emphasis omitted)). Indeed, the fact that Brass retained Posin gave him a greater ability to substitute counsel in recognition of his right to counsel of his choice. *See Patterson*, 129 Nev. at 175-76, 298 P.3d at 438. It is issues with Posin's representation, not Brass's manipulation, that results in the need to conduct a new trial here, and Posin's retention and payment as private counsel may not be held against Brass.

[14]In light of our disposition, we need not consider and express no opinion on Brass's remaining arguments, including his challenges to the sufficiency of the evidence. *See Buchanan v. State*, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014) ("Because we reverse the district court's decision on the independent grounds of structural error, we decline to consider Buchanan's challenge to the sufficiency of the evidence supporting his convictions.").

Further, Posin's conduct in this case may violate the Rules of Professional Conduct. Consequently, we refer Posin to the State Bar of Nevada for such disciplinary investigations or proceedings as are deemed warranted. *See* SCR 104(1)(a). Accordingly, we direct the clerk of this court to provide a copy of this opinion to the State Bar of Nevada.[15] Bar counsel shall, within 90 days of the date of this opinion, inform this court of the status or results of the investigation and any disciplinary proceedings in this matter.

CONCLUSION

The Sixth Amendment right to counsel includes the right of a non-indigent defendant to the retained counsel of his or her choice. When a defendant moves to substitute retained counsel, the evaluating court analyzes whether the motion is timely and whether the defendant's right to counsel of choice outweighs countervailing interests in the efficient and orderly administration of justice. Here, the motion was timely under the circumstances, given retained counsel's assurances at the status checks about his trial preparation compared to his last-minute concession that he was not prepared, given that his choices not to subpoena records or witnesses were not strategy-based, and given that Brass did not become aware of these deficiencies until a week before calendar call. Brass's right to counsel of choice outweighs the disruption and inconvenience of a further trial continuance, as the record shows retained counsel took no steps to follow up on potentially exculpatory evidence his investigator identified and Brass raised these issues at the first opportunity after learning about them. Because the erroneous denial of a motion to substitute counsel at the trial level is structural error, we reverse the judgment of conviction and remand for a new trial.

Pickering and Herndon, JJ., concur.

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[15]While our decision is based solely on the pretrial motion to substitute counsel, the State Bar's review of Posin's conduct may take into consideration Posin's actions at trial—many of which are raised in the appellate briefing herein—as well.

JEROME MORETTO, Trustee of the JEROME F. MORETTO 2006 TRUST, Appellant, *v.* ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC., Respondent.

No. 82565

April 7, 2022 507 P.3d 199

Appeal from a district court judgment in an action for injunctive and declaratory relief concerning a common-interest-community homeowners association's power to adopt rules. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Affirmed in part, reversed in part, and remanded.

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

Resnick & Louis, P.C., and *Prescott T. Jones* and *Carissa Yuhas*, Las Vegas, for Respondent.

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

OPINION

By the Court, Cadish, J.:

In this appeal, we are asked to consider the extent of a common-interest-community homeowners association's power to adopt rules restricting the use and design of individually owned properties. Specifically, we are asked to adopt sections 6.7 (use restrictions) and 6.9 (design restrictions) of the Restatement (Third) of Property: Servitudes. Both sections provide that a homeowners association does not have the implied power to impose use or design restrictions on individually owned properties and that the association's governing documents must expressly authorize the imposition of such restrictions to do so. In addition, these sections suggest that any such restrictions should be subject to a "reasonableness" requirement.

We conclude public policy favors the adoption of sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes. These two sections, when read in conjunction, provide well-reasoned limits on construing an association's implied power to act with respect to individually owned property. Therefore, we now adopt the approach from these two sections. As applied to the underlying matter, we conclude that article 16, section 3 of the respondent homeowners association's bylaws includes an express provision allowing it to adopt design restrictions for individually owned property. However, during the proceedings before the district court, neither party addressed whether the respondent's exercise of its design-control power was reasonable, which is a central tenet of section 6.9. As a

result, we reverse the district court's grant of summary judgment with respect to appellant's claim for declaratory relief, which sought to invalidate respondent's newly adopted architectural and design rules. Additionally, we reverse the district court's grant of summary judgment with respect to appellant's accompanying violation of property rights claim. We remand the case back to the district court to consider whether respondent's rules are reasonable under sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes.

FACTS AND PROCEDURAL BACKGROUND

Respondent Elk Point Country Club Homeowners Association, Inc. (hereinafter EPCC), is the governing body of the Elk Point subdivision, a common-interest community located at Lake Tahoe's Zephyr Cove, in Douglas County, Nevada. EPCC was initially established in 1925 to manage land owned by the Northern Nevada chapter of the Elks Club. At that time, the land was held as a vacation area for local Elks Club members. Beginning in 1929, EPCC began selling individual lots within the subdivision. Since then, the subdivision has consisted of both individual lots held in private ownership and common property held by EPCC for the benefit of all individual property owners within the community. EPCC has retained control of the operation of common areas and facilities within the community.

EPCC, as part of its management structure, has both articles of incorporation and bylaws. Like most bylaws, EPCC's bylaws set forth the governing rules by which EPCC operates, including establishing a five-person executive board tasked with managing the affairs of the community. Also included in its bylaws is a provision giving EPCC's executive board the power to adopt rules and regulations necessary to carry out its powers. Specifically, EPCC's bylaws authorize the executive board to "make rules and regulations not inconsistent with the laws of the State of Nevada, the Articles of Incorporation and the Bylaws of the Corporation."

EPCC's governing documents are somewhat different from most modern common-interest communities in that the covenants restricting individual property owners are included in its bylaws, as opposed to having a separate declaration of covenants, conditions, and restrictions (CC&Rs). Pertinent to this appeal, however, the bylaws include article 16, section 3, which imposes a restriction requiring individual landowners to seek approval of EPCC's executive board prior to constructing any structures on their individually owned property.

Appellant Jerome Moretto took title to property in the Elk Point subdivision in 1990. Included in Moretto's chain of title was a provision stating that his property was subject to any and all bylaws, rules, and regulations that EPCC establishes. At all relevant times, EPCC's bylaws included article 16(3)'s restriction requiring EPCC

to pre-approve construction of any structure on individually owned lots prior to its commencement.

In 2018, EPCC's executive board, exercising its rulemaking authority, adopted a regulation establishing an architectural review committee. At the same time, the executive board adopted a set of guidelines titled, "Architectural and Design Control Standards and Guidelines" (Architectural Guidelines). These guidelines created detailed restrictions on individually owned lots, including restrictions regarding building height and setbacks as well as design-control restrictions regarding exterior lighting, building materials, and landscaping. The new regulations required any landowner wanting to develop their lot to comply with these new guidelines and to submit any proposed plans to the architectural review committee, which, in turn, would recommend to the executive board whether to approve the proposed development.

In response to these new guidelines, Moretto filed a complaint seeking, among other things, a declaration that the new guidelines exceed the scope of EPCC's rulemaking authority. EPCC filed its answer, and both parties subsequently filed competing motions for summary judgment. EPCC pointed to article 16(3) of the bylaws regarding its authority to approve construction on individually owned lots and its general rulemaking authority as the basis for its ability to adopt the Architectural Guidelines. Moretto argued EPCC did not have any express power to adopt the Architectural Guidelines and advocated that the district court interpret an association's implied power to adopt rules under NRS Chapter 116 as being limited consistent with sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes. The district court, without addressing Moretto's argument regarding sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes, held that EPCC did have the authority to adopt rules to control the design of individually owned property and therefore did not exceed the scope of its authority when adopting the Architectural Guidelines. This appeal followed.

DISCUSSION

We review de novo a district court's grant of summary judgment. *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when no genuine issue of material fact exists, such that the moving party is entitled to judgment as a matter of law. *Id*.

On appeal, the parties' arguments are similar to the ones presented to the district court. Moretto advocates that this court should adopt sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes. He contends that section 6.9 requires that an association must have express power to adopt design control restrictions, which EPCC does not have. Instead, he suggests that under the principles

outlined in section 6.7, EPCC only possesses a general rulemaking power and therefore is limited in its power to adopt restrictions concerning individually owned property. EPCC does not address whether we should adopt sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes but instead argues that its adoption of the Architectural Guidelines was within the scope of its authority under its bylaws.

Restatement (Third) of Property: Servitudes sections 6.7 and 6.9

Moretto urges this court to adopt sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes.[1] Where parties raise issues of a purely legal nature, we will conduct a plenary review. *St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009).

Sections 6.7 and 6.9 concern an association's authority to adopt rules regarding the use and design of individually owned properties in a common-interest community. Section 6.7 of the Restatement (Third) of Property: Servitudes provides that an association authorized to adopt rules under a general grant of such power may adopt rules concerning the use of individually owned property only to the extent they relate to the protection of common property or to the prevention of nuisance-like activities. Restatement (Third) of Prop.: Servitudes § 6.7(3) (Am. Law Inst. 2000). General rulemaking powers are construed narrowly because a contrary interpretation runs counter to the traditional expectation that landowners are free to use their property in any manner not expressly prohibited, with the limited exception being that an association is permitted to protect against neighborhood nuisances by adopting preventative rules. *Id.* at cmt. b.

While section 6.7 concerns an association's power to adopt rules governing the *use* of property, section 6.9 concerns an association's power to adopt rules to control the *design* of individually owned properties. *See generally* Restatement (Third) of Prop.: Servitudes § 6.9 (Am. Law Inst. 2000). Section 6.9 states this:

[1]We reject EPCC's contention that Moretto did not properly preserve the issue of whether this court should adopt the Restatement's approach. It is a well-recognized rule that issues not raised by a party in the district court are deemed waived on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). However, as EPCC concedes, Moretto raised the argument regarding the Restatement's approach in its briefing to the district court. *Old Aztec*'s bar applies in the limited circumstances where the issue has not been "urged in the trial court." *See id.* While Moretto is now urging this court to expressly adopt the Restatement's approach, as opposed to asking the district court to interpret NRS Chapter 116 as being limited by the Restatement's nonbinding principles, we do not consider this to be materially different from the point he "urged in the trial court." Moreover, because we are considering this issue de novo, we do not concern ourselves with the parties' arguments regarding whether the district court properly considered this issue.

> Except to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used.

"The purpose of this section is to negate the existence of implied design-control powers." *Id.* at cmt. b. Section 6.9's rationale parallels the reasoning of section 6.7, that an association does not have the implied power to restrict the design of individually owned property because such restrictions are neither necessary for "the effective functioning of the community" nor "further public interests or fulfill reasonable expectations of the property owners." *Id.* at cmt. a. This stance—that design control powers are valid only when expressly stated—protects individual landowners' reliance interest that an association cannot impose design-control restrictions absent express authorization by the association's declaration. *Id.* Specifically, "[l]ong tradition supports the individual's right to determine the aesthetic qualities of the home and, within limits imposed by zoning and building codes, to construct structures that suit his or her tastes and needs." *Id.*

Sections 6.7 and 6.9's stance regarding an association's implied authority to act with respect to individually owned property comes from the broader discussion in comment b to section 6.7 addressing the differences between restrictions that are imposed as part of the association's declaration versus those adopted through the association's rulemaking power. *See generally* Restatement (Third) of Prop.: Servitudes § 6.7 cmt. b. Specifically, "rules are usually adopted by the governing board, or by a simple majority of the owners who vote on the question, and are seldom recorded." *Id.* This can be contrasted with restrictions included in a declaration that "is recorded before individual properties are sold and usually can be amended only with the consent of a supermajority of the property owners." *Id.* The drafters worried that if an association's implied power to act is construed broadly, an association may be able to adopt restrictions concerning the use of individually owned property without the "notice and the safeguards afforded by the supermajority vote needed for an amendment to the declaration." *Id.*

Additionally, the drafters described the difference between an association's power and responsibility over common property and that over individually owned property. *Id.* While "an association enjoys an implied power to make rules in furtherance of its power over the common property," it "has no inherent power to regulate use of the individually owned properties in the community, . . . except as implied by its responsibility for management of the common property." *Id.* It is this rationale that underlies the conclusion that unless an association is expressly given a more

expansive power, a generally worded rulemaking power included in an association's declaration does not provide an association with a broad implied power to adopt rules to regulate either the use or design of individually owned property.

We have previously adopted sections of the Restatement (Third) of Property: Servitudes when doing so furthered public policy and was consistent with Nevada law. *See St. James Vill.*, 125 Nev. at 218-19, 210 P.3d at 195 (adopting section 4.8 of the Restatement (Third) of Property: Servitudes and holding the public policy interests advanced by adopting the rule outweighed the potential of any increased litigation associated with its adoption); *see also Artemis Expl. Co. v. Ruby Lake Estates Homeowner's Ass'n*, 135 Nev. 366, 372, 449 P.3d 1256, 1260 (2019) (applying Restatement (Third) of Property: Servitudes section 6.2). Moreover, the Restatement's approach is consistent with the importance and high value Nevada law places on private property ownership and use. *See McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 659, 137 P.3d 1110, 1120 (2006) (stating "it is clear that Nevadans' property rights are protected by our State Constitution"); *State v. Hill*, 59 Nev. 231, 239, 90 P.2d 217, 220 (1939) (stating unconstitutional regulation of private property constitutes an "invasion of . . . [individual] property rights"). Additionally, we conclude that the Restatement's approach is consistent with NRS 116.31065's requirement that an association's rules be reasonably related to the specified purpose for which they are adopted, sufficiently explicit in their prohibition, and in all other aspects consistent with the association's governing documents. *See* NRS 116.31065(1), (2), and (4).

In weighing the interests discussed above, we conclude that public policy interests and Nevada's strong protection of private property owners' expectations and ownership rights are best served by adopting the Restatement's approach. Specifically, we believe that the drafters' rationale for these two sections is particularly persuasive. Taking the approach that an association does not have an inherent power to regulate individually owned property protects the traditional expectations of landowners, ensures landowners are afforded proper notice before restrictions are imposed on their individual property, and prevents an association from circumventing the procedural protections landowners would be afforded if the association had adopted the design-control restrictions as covenants in the association's declaration. Additionally, we recognize that design-control restrictions, where legitimately promulgated, may benefit individual property owners within a community. Specifically, requiring a uniform design among individual properties may contribute to an increase in property values by preventing aesthetic nuisances. Restatement (Third) of Prop.: Servitudes § 6.9 cmt. d. Further, uniformly applied restrictions may improve residents' quality of life. *See id*.

For these reasons, we adopt sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes to govern issues concerning an association's authority to enact rules regarding the restriction of individually owned property.

Under Restatement sections 6.7 and 6.9, EPCC had the authority to adopt the Architectural Guidelines

Moretto contends that, under the Restatement's approach, EPCC did not possess the authority to adopt the Architectural Guidelines. Specifically, he appears to argue that (1) EPCC's bylaws only provide the association with a generally worded rulemaking power and (2) even if the bylaws did expressly authorize EPCC to adopt the Architectural Guidelines, EPCC does not have a recorded *declaration of CC&Rs* that expressly authorizes it to do so.

The district court concluded that article 16(3) of EPCC's bylaws authorized EPCC to adopt the Architectural Guidelines. Applying the Restatement's approach, we agree with the district court's conclusion.

Article 16(3) states that "[n]o structure of any kind shall be erected or permitted upon the premises of any Unit Owner, unless the plans and specifications shall have first been submitted to and approved by the Executive Board." We conclude that article 16(3) falls squarely within the type of express authorization that section 6.9 requires to allow an association to adopt design-control restrictions. Restatement (Third) of Prop.: Servitudes § 6.9 cmt. c (stating a provision authorizing an association to "approve or disapprove any construction or alteration of the landscape within the community" constitutes a valid express design-control power). By requiring approval of the plans and specifications for any new construction, article 16(3) plainly contemplates the ability of the executive board to review and apply appropriate standards to evaluate those items. Adopting rules to carry out that express power is thus permissible.

Instead of addressing this section of EPCC's bylaws, Moretto addresses only article 3(2), which states, "[t]he Executive Board shall have the power to conduct, manage and control the affairs and business of the Corporation and to make rules and regulations not inconsistent with the laws of the State of Nevada, the Articles of Incorporation and the Bylaws of the Corporation." Neither party disagrees that this provision constitutes a generally worded rulemaking power and, if standing alone, would be insufficient to adopt the Architectural Guidelines based on Restatement section 6.7.[2] But we disagree with Moretto's overall conclusion that EPCC has no authority to adopt design-control restrictions because, as

[2]As Moretto points out, even EPCC admitted in its motion for summary judgment that it does not view article 3(2) as constituting a specific grant of authority.

indicated, article 16(3) is a valid restrictive covenant that authorizes EPCC to adopt rules to control the design of individually owned property within the Elk Point community.

We also disagree with Moretto's second argument that for a restrictive covenant affecting individually owned property to be valid, it must be included in a separate declaration of CC&Rs. Restatement section 6.9 requires only that an express grant of authority be included in the association's "declaration," which is defined as "[a] recorded document or documents containing servitudes that create and govern the common-interest community." Restatement (Third) of Prop.: Servitudes § 6.2(5) (Am. Law Inst. 2000). EPCC's bylaws were recorded in Douglas County and, thus, fall squarely under the Restatement's definition of a declaration.[3] Because these restrictions were contained in EPCC's bylaws that were publicly recorded, Moretto and others within the Elk Point community were on notice that the association had the authority to pre-approve the construction of structures on individually owned property.[4]

In conclusion, under the Restatement's approach, article 16(3) constitutes a valid restrictive covenant expressly authorizing EPCC to adopt the Architectural Guidelines.

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[3]We note that NRS 116.037 defines a "declaration" as "any instruments, however denominated, that create a common-interest community, including any amendments to those instruments." Under this definition, most common-interest communities' bylaws would not constitute a "declaration," and this opinion should not be construed as generally equating a common-interest community's bylaws with its "declaration." Here, however, Moretto has not relied on NRS 116.037, and EPCC was created in 1925, long before NRS Chapter 116 took effect in 1992. *See* 1991 Nev. Stat., ch. 245, § 142, at 587 (adopting the Uniform Common-Interest Ownership Act effective Jan. 1, 1992). Moreover, we have previously declined to apply sections of NRS Chapter 116 to common-interest communities that formed prior to the Legislature's adoption of the Uniform Common-Interest Ownership Act when doing so is inconsistent with legislative intent and strict adherence would lead to unreasonable results. *See Artemis*, 135 Nev. at 372-74, 449 P.3d at 1260-62 (holding NRS 116.3101(1)'s requirement did not apply to pre-1992 common-interest communities). Applying the same rationale discussed in *Artemis*, we hold NRS 116.037's definition does not apply to EPCC as a pre-1992 common-interest community because strict adherence to NRS 116.037's definition of a declaration would otherwise frustrate the purpose of subjecting communities such as EPCC, which does not have a separate declaration of CC&Rs, to NRS Chapter 116. EPCC's bylaws can only be amended by a supermajority vote, so they in essence function as a declaration of CC&Rs insofar as EPCC and its individual property owners are concerned. Thus, based on the specific facts and arguments presented in this case, we conclude that NRS 116.037's definition does not apply and EPCC's bylaws fall within the Restatement's definition of a "declaration."

[4]Although Moretto purchased his property in 1990 and the record on appeal only contains a copy of EPCC's bylaws recorded in 2005, Moretto acknowledges that he had notice of and was subject to the bylaws at the time of his purchase.

The record on appeal does not demonstrate whether the Architectural Guidelines are reasonable

Although we agree with the district court's conclusion that EPCC had the authority to adopt the Architectural Guidelines, we nevertheless remand for the district court to consider whether the Architectural Guidelines are reasonable and thus valid under Restatement section 6.9.

We recognize the concerns that arise when an association's declaration, like EPCC's, affords the association a highly discretionary power to effectuate design-control restrictions. In fact, comment d to section 6.9 highlights these concerns:

> Discretionary design controls create two kinds of risks for property owners. [First,] [t]hey may not be able to develop in accordance with their expectations because they cannot predict how the controls will be applied. Second, property owners may be subject to arbitrary or discriminatory treatment because there are no standards against which the appropriateness of the power's exercise can be measured.

Restatement (Third) of Prop.: Servitudes § 6.9 cmt. d. To safeguard against these concerns, the drafters note that courts that have considered this issue have, instead of invalidating the power, imposed a reasonableness requirement. *Id.* In the context of the adoption of association guidelines, as occurred here, the Restatement notes that consistent application of the guidelines is

> nearly always upheld if within the scope of the design-control power granted by the declaration. Decisions made without deliberation and articulation of reasons for the decision, decisions based on irrelevant criteria or erroneous information, and decisions that violate association guidelines are nearly always held unreasonable. Determining whether design-control powers have been unreasonably exercised requires a fact-specific, case-by-case inquiry.

Id. Thus, while we hold that EPCC had authority to adopt the Architectural Guidelines based on article 16(3) of the bylaws, this does not mean it has unfettered authority to impose any and all restrictions. Rather, we hold its authority is cabined by a reasonableness requirement in order to protect the rights and expectations of the individual property owners.

The reasonableness test strikes a balance between ensuring an association's action is not beyond the scope of its authority while otherwise deferring to the substance of the association's action. *Id*. Under a reasonableness standard, the court's focus is on whether "the committee informs itself of the facts and is consistent in its treatment of community members," as opposed to focusing on

whether the court agrees with the "aesthetic judgment" of the association's decision. *Id*.

With respect to this reasonableness test, we find the Appellate Court of Connecticut's decision in *Grovenburg v. Rustle Meadow Associates, LLC*, 165 A.3d 193 (Conn. App. Ct. 2017), to be particularly instructive. The *Grovenburg* court discussed, in detail, the factors trial courts should balance to determine whether an association's exercise of its design-control authority is reasonable. Specifically, it suggested courts should consider the following factors:

> the rationales proffered by the association for its exercise of discretionary authority; the specific nature of the activity proposed by the plaintiffs; the relationship between any legitimate interests of the association and its exercise of discretionary authority; the purposes of the association and the general plan of development for the common interest community, as reflected in its governing instruments; and the extent to which discretionary authority was exercised in good faith or in an arbitrary manner.

Id. at 233. We believe these factors are well suited for the type of analysis a court should conduct when evaluating the reasonableness of design-control restrictions. While this case is distinguishable from *Grovenburg* in that Moretto's challenge arises from the adoption of the Architectural Guidelines themselves, rather than a specific decision under them, the court can look to these factors, to the extent they apply to the circumstances here presented, in evaluating the reasonableness thereof. The district court must also consider the extent to which the new rules depart from the preexisting community design standards in Elk Point and whether the restrictions imposed are consistent with similarly situated communities. *See, e.g.*, Restatement (Third) of Prop.: Servitudes § 6.9 ills. 8 & 9 (illustrating how natural or technological changes may render prior architectural guidelines impractical or unwarranted justifying changes to an association's guidelines); *see also Kies v. Hollub*, 450 So. 2d 251, 256 (Fla. Dist. Ct. App. 1984) (considering whether a landowner's development of his property was consistent with properties in similarly situated communities). To the extent these guidelines do impose a change in applicable standards, the court must weigh the "strength of the reasons supporting the change against the fairness claims of the property owners who will be harmed by the change." Restatement (Third) of Prop.: Servitudes § 6.9 cmt. d. These factors are to be considered on a case-by-case basis and are highly dependent on the underlying facts. *Id*.

Reviewing the district court's order and the record on appeal, we conclude that the parties did not present sufficient evidence for the district court to evaluate the reasonableness of the restrictions or

for us to do so on appeal. Consequently, we remand to the district court to consider this issue. On remand, the parties should address, and the district court should consider, whether (1) the Architectural Guidelines themselves are reasonable and (2) to the extent the restrictions regarding the design of individually owned property changed as a result of the new rules in comparison to the prior plan approval process, to what extent that change is justified and reasonable, consistent with section 6.9 and the factors outlined above. The burden will be on Moretto to make a prima facie showing that the Architectural Guidelines are unreasonable. *See generally* Restatement (Third) of Prop.: Servitudes § 6.9 cmt. d (stating an association's member has the burden of showing rules adopted under an express design-control power are unreasonable, and upon a prima facie showing, the burden shifts to the association to prove that the rules are fair and reasonable). Therefore, if Moretto makes a satisfactory showing, the burden will shift to EPCC to establish that the rules are both fair and reasonable under all the circumstances. *Id*.

Moretto's other arguments

Moretto's complaint asserted four other claims for relief in addition to his claim for declaratory relief, including a claim that the Architectural Guidelines constitute a violation of his property rights. Other than the declaratory relief claim, Moretto's appeal challenges only the district court's dismissal of his violation of property rights claim as noncognizable. We disagree with the district court's conclusion that Moretto's claim is noncognizable. Courts are to analyze claims according to their substance regardless of their label. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 809, 312 P.3d 491, 498 (2013). Based on the foregoing, to the extent EPCC's Architectural Guidelines are determined unreasonable and thus beyond EPCC's authority, such restrictions would be a violation of Moretto's rights as an owner in the community and potentially would warrant relief if proven. Therefore, we reverse the district court's summary judgment with respect to this claim. We otherwise affirm the district court's summary judgment with respect to Moretto's other three claims not addressed on appeal.

CONCLUSION

We expressly adopt sections 6.7 and 6.9 of the Restatement (Third) of Property: Servitudes. We conclude that, under the Restatement's approach, EPCC's bylaws provide it the express power to adopt design-control restrictions on individually owned property in the Elk Point community. Although EPCC possesses the authority to adopt design-control restrictions for individually owned property, it must exercise that power reasonably. Here, the

parties did not address this issue below. Thus, we reverse the district court's order granting summary judgment in favor of EPCC with respect to Moretto's declaratory relief claim and violation-of-property-rights claim, and we remand for consideration of whether the Architectural Guidelines are reasonable in light of the discussion herein.

SILVER and PICKERING, JJ., concur.

KEITH JUNIOR BARLOW, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 77055

April 14, 2022 507 P.3d 1185

Appeal from a judgment of conviction, pursuant to a jury verdict, of home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied May 17, 2022]

JoNell Thomas, Special Public Defender, *Alzora B. Jackson* and *Monica R. Trujillo*, Chief Deputy Special Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Marc P. DiGiacomo*, Chief Deputy District Attorney, and *John Niman*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Silver, J.:

A jury found appellant Keith Barlow guilty of multiple charges and sentenced him to death for murdering two people. During the guilt phase of Barlow's trial, the State presented overwhelming evidence that he broke into the victims' apartment and shot each of them multiple times. Before penalty phase closing arguments, the district court prohibited Barlow from arguing that if a single juror determines that there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the death penalty is no longer an option and the jury must then consider imposing a sentence other than death. The district court reasoned that if the jury cannot reach a unanimous decision as to the weighing of aggravating and mitigating circumstances, the result is a hung jury. We take this opportunity to clarify that when a jury cannot reach a unanimous decision as to the weighing of aggravating and mitigating circumstances, the jury cannot impose a death sentence but must

[1]The Honorable Douglas W. Herndon, Justice, did not participate in the decision of this matter.

consider the other sentences that may be imposed. The jury is hung in the penalty phase of a capital trial only when it cannot unanimously agree on the sentence to be imposed. Thus, we conclude that the district court abused its discretion by prohibiting Barlow's argument. This error, in conjunction with others that occurred in the penalty phase, worked cumulatively to deprive Barlow of a fair penalty hearing. But we conclude that no relief is warranted on Barlow's claims regarding the guilt phase. Accordingly, we affirm the judgment of conviction in part, reverse it in part, and remand for a new penalty hearing.

FACTS AND PROCEDURAL HISTORY

Barlow and the female victim Danielle Woods maintained a tumultuous, off-and-on romantic relationship. Woods also had a romantic relationship with the male victim Donnie Cobb and lived in his apartment. On February 1, 2013, Woods' niece Tamara Herron encountered Barlow, who asked her about Woods' whereabouts. Herron testified that Barlow appeared angry and agitated and told her that he was tired of the "games" Woods was playing. When Herron told Barlow she did not know Woods' whereabouts, he stated that he knew Woods was with Cobb.

Two days later, in the early morning hours, Barlow accosted Woods outside of a convenience store near Cobb's apartment. Barlow screamed at Woods, threatened her with an electronic stun device, and attempted to force her into his vehicle. When Cobb intervened, Barlow drew a firearm and aimed it at Cobb. Barlow told Woods and Cobb that he would "be back" and then he left the scene. Law enforcement responded to the incident and attempted to contact Barlow but could not locate him. About two hours after the incident, Barlow went to Cobb's apartment, broke in the door, and shot Woods and Cobb to death.

Responding to a report of gunshots, police officers discovered the dead bodies of Woods and Cobb. Law enforcement recovered a total of eight spent bullet casings from Cobb's apartment, including casings found in Woods' hair and on her chest. The ammunition was branded as Blazer .40 caliber Smith & Wesson casings. A Ruger .40 caliber semiautomatic handgun was found in Barlow's vehicle. The gun's magazine contained Blazer .40 caliber Smith & Wesson ammunition. A forensic examiner identified Barlow's thumbprint on the magazine loaded in the firearm. Additional testing also matched DNA found on the magazine to Barlow. A forensic examiner conducted a microscopic comparison of the casings found at the scene and the test-fired casings from the Ruger handgun. That analysis showed that the casings recovered from the scene were fired by the handgun found in Barlow's vehicle.

The State charged Barlow with home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon and filed a notice of intent to seek the death penalty for both murders.[2] The jury returned guilty verdicts on all counts. Following the penalty hearing, the jury sentenced Barlow to death for both murders. This appeal followed.

DISCUSSION

Penalty phase claims

Because the primary issues addressed in this opinion—the limitations placed on Barlow's penalty phase argument, prosecutorial misconduct, the great-risk-of-death aggravating circumstance, and cumulative error—concern the penalty phase of the trial, we focus on that phase of trial first. We then address the guilt-phase claims.

Limitation of Barlow's penalty-phase argument

Barlow argues that the district court erred in prohibiting him from making an argument based on a portion of the capital instruction this court provided in *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). We review a district court's determination about "the latitude allowed counsel in closing argument for abuse of discretion." *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (internal citation omitted).

Barlow, relying upon *Evans*, argues that he should have been allowed to argue that if at least one juror decides that there are mitigating circumstances sufficient to outweigh the aggravating circumstances, he could not be sentenced to death and the jury must then consider imposing a punishment other than death. The State contends that despite the *Evans* instruction saying just that, the district court properly prohibited the argument because a disagreement as to the weighing of aggravating and mitigating circumstances results in a hung jury such that the jury could not consider any other punishment. We hold that if at least one juror finds there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the jury cannot impose a death sentence but nonetheless must consider the other sentences. Therefore, we conclude that the district court abused its discretion in prohibiting Barlow from making that argument to the jury. *See Collier v. State*, 101 Nev. 473, 481-82, 705 P.2d 1126, 1131-32 (1985) (explaining that the district court abused its discretion by placing undue limits on

[2]The State also charged Barlow with possession of a firearm by a prohibited person and unlawful possession of an electronic stun device but later dismissed those charges.

the argument of counsel); *cf. Lloyd v. State*, 94 Nev. 167, 169, 576 P.2d 740, 742 (1978) ("[I]t is improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories.").

In *Evans*, this court set forth a jury instruction for use in capital penalty hearings. 117 Nev. at 635-36, 28 P.3d at 516-17. That instruction provides, in part: "if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence," and, if the jury makes that determination, they must then "consider all three types of evidence in determining a sentence other than death." *Id*. at 636, 28 P.3d at 517. While the *Evans* instruction primarily addresses the jury's consideration of evidence during deliberations, it also provides guidance about the steps the jury must follow before imposing a sentence. *Id.* at 635-36, 28 P.3d at 516-17.

The *Evans* instruction accurately reflects the statutory scheme for capital penalty hearings. Under NRS 175.554(1), the district court must instruct the jury on the aggravating and mitigating circumstances alleged by the parties. The jury is charged to first determine unanimously if the State has proved at least one aggravating circumstance beyond a reasonable doubt. NRS 175.554(2)(a), (4). Next, each juror must individually determine whether any mitigating circumstances exist. NRS 175.554(2)(b); *see also Jimenez v. State*, 112 Nev. 610, 624, 918 P.2d 687, 696 (1996) ("There [is] no constraint on the right of individual jurors to find mitigators, such as a requirement of unanimity or proof by a preponderance of the evidence or any other standard."). The jurors then weigh the aggravating and mitigating circumstances on their individual moral scales as part of "the selection phase of the capital sentencing process . . . to determine what penalty shall be imposed." *Lisle*, 131 Nev. at 366, 351 P.3d at 732 (internal quotation marks omitted); *see also Jeremias v. State*, 134 Nev. 46, 58-59, 412 P.3d 43, 54 (2018) (reaffirming that weighing the aggravating and mitigating circumstances is part of the selection phase, which does not require proof beyond a reasonable doubt). If the jurors unanimously agree that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they may impose a death sentence, NRS 175.554(4), but they are not obligated to do so, *Bennett v. State*, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995) (observing that even if jurors unanimously find there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they "still ha[ve] the discretion to return a penalty other than death"). In contrast, if the jurors do not unanimously agree that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they cannot impose a death sentence. NRS 200.030(4)(a). In other words, if even one juror determines there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the death penalty is no

longer an option. *See Bennett*, 111 Nev. at 1110, 901 P.2d at 683 ("[T]he death penalty is only a sentencing *option* if, after balancing and evaluating the aggravating and mitigating circumstances, the former are found to outweigh the latter.") *see also Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) (disapproving of a jury instruction that "implied that jurors had to agree unanimously that mitigating circumstances outweigh aggravating circumstances, when actually a jury's finding of mitigating circumstances in a capital penalty hearing does not have to be unanimous" (internal quotation marks omitted)); *Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001) (providing that if the jurors find the defendant not eligible for the death penalty, they "may consider 'other matter' evidence under NRS 175.552 in deciding on the appropriate sentence"). But in those circumstances, the jury can still impose a lesser sentence.[3] *See* NRS 200.030(4)(b). A hung jury occurs only when the jury cannot unanimously agree on the sentence to be imposed. *See* NRS 175.556(1) (providing the procedure in a capital case when a jury cannot render a unanimous verdict as to the sentence to be imposed). Accordingly, the district court abused its discretion by prohibiting Barlow from making this argument regarding the weighing determination.[4] In this case, the district court correctly instructed the jury before deliberations began, and the jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (recognizing that jurors are presumed to follow their instructions). Therefore, we conclude that the error was harmless, *see* NRS 178.598, but, as discussed below, contributed to the cumulative error during the penalty hearing.

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[3]To the extent the State asserts that this interpretation of the *Evans* instruction permits a single juror to usurp the process by announcing at the start of deliberations that he or she believes the mitigating circumstances are sufficient to outweigh the aggravating, thus foreclosing any further discussion, we do not share that concern. The *Evans* instruction lays out the process the jury must follow in considering the evidence presented at the penalty phase. Following the process set forth in that instruction, reasonable jurors would understand that the weighing decision is made only after full, good faith deliberations as to the existence of aggravating and mitigating circumstances. *See Evans*, 117 Nev. at 635-36, 28 P.3d at 516-17; *see also* NRS 175.111 (requiring jurors to swear to "truly try" a case and return "a true verdict"); *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (providing that "this court generally presumes that juries follow district court orders and instructions").

[4]To the extent Barlow contends the district court erred by denying his request to amend the non-death verdict forms to reflect the *Evans* language, we discern no abuse of discretion because the verdict must include a weighing determination only when the jury imposes a death sentence. *See* NRS 175.554(4). But given the technical and precise nature of the capital sentencing process, we provide a verdict form in an appendix to this opinion. Using this verdict form in future capital penalty hearings will aid the jurors and provide a clear record that they followed the necessary steps in determining the appropriate sentence.

Prosecutorial misconduct

Barlow argues that prosecutorial misconduct during the penalty phase warrants reversal. In reviewing claims of prosecutorial misconduct, this court must determine whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). If the error was preserved, reversal is not warranted where the misconduct is harmless. *Id.* at 1189, 196 P.3d at 477. Misconduct of a constitutional nature does not warrant reversal if it is harmless beyond a reasonable doubt. *Id.* at 1189, 196 P.3d at 476. And errors of a nonconstitutional nature require reversal "only if the error substantially affects the jury's verdict." *Id.*

Barlow challenges the prosecutor's argument that had Barlow killed only Woods, a life sentence might be appropriate but "if you decide that, what justice does Donnie Cobb get?" After Barlow objected, the prosecutor defended his argument: "I said, if there had been only one victim in this case" then "your verdict would have been life without. But because there's two, there's got to be more."

We conclude that the prosecutor's comments improperly "suggest that justice requires a death sentence because the defendant killed more than one person." *Jeremias*, 134 Nev. at 57, 412 P.3d at 53. The prosecutor implicitly argued that Barlow deserved the death penalty because he killed two people by arguing that a sentence of life without the possibility of parole might be appropriate if Barlow only killed Woods but was inappropriate because he also killed Cobb. We conclude that implication is just as improper as an explicit argument that Barlow deserved the death penalty simply because he killed two people. While we believe the prosecutor's comment was improper, the prosecutor also told the jury that the State would respect whatever verdict the jury rendered and that it would be "fine" if the jury decided Barlow did not deserve the death penalty, and the district court instructed the jury that the law never requires a death sentence. Thus, we conclude this error is harmless after considering the remark in context.[5] *See Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) ("[S]tatements should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." (internal quotation marks omitted)). However, as discussed below, the prosecutor's improper

[5]Barlow also ascribes misconduct to the prosecutor (1) misstating the definition of mitigating circumstances, (2) arguing for imposition of the death penalty because Barlow should not be allowed to mistreat prison staff, (3) comparing him to his sister, and (4) asking the jurors to perform their duty. Having reviewed each alleged instance in context, we discern no misconduct. *See Burnside v. State*, 131 Nev. 371, 403-04, 352 P.3d 627, 649-50 (2015) (concluding that a prosecutor did not make improper comments after considering them in context); *Hernandez v. State*, 118 Nev. 513, 526, 50 P.3d 1100, 1109 (2002) (finding no misconduct where "the prosecutor was fairly responding to an earlier contention by defense counsel").

argument contributed to the cumulative error during the penalty hearing.

Great-risk-of-death-to-more-than-one-person aggravating circumstance

Barlow argues that the great-risk-of-death-to-more-than-one-person aggravating circumstance under NRS 200.033(3) is invalid for two reasons: the State did not provide sufficient notice and insufficient evidence supports it.

Inadequate notice of the State's alternative theory

SCR 250(4)(c) provides that a notice of intent to seek the death penalty "must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." In other words, "a defendant should not have to gather facts to deduce the State's theory for an aggravating circumstance; the supporting facts must be stated directly in the notice itself." *Nunnery v. State*, 127 Nev. 749, 779, 263 P.3d 235, 255 (2011).

The State's notice of intent to seek the death penalty alleged that Barlow knowingly created a great risk of death to more than one person based on the close proximity of the victims to one another when he shot them. While the State argued that theory at trial, it also argued that Barlow created a great risk of death to more than one person because a bullet went through a wall, out the window of an adjoining apartment, and into a public area. But the State never alleged in the notice that it would rely on the bullet exiting the apartment and the resulting risk of death to other residents to prove this aggravating circumstance.

The State asserts that this case is similar to *Nunnery* where this court found the notice of intent to seek the death penalty contained sufficient detail for the great-risk-of-death aggravating circumstance. The State's reliance on *Nunnery* is misplaced. Unlike the notice in *Nunnery* that alleged "that the [great-risk-of-death] aggravator was based on the crimes committed by the defendant in a location 'which the public has access to and which several citizens are located nearby,'" 127 Nev. at 780, 263 P.3d at 256, the notice in this case made no mention of the bullet entering a public area or that other persons were in that area. Accordingly, because the State did not provide adequate notice of the public-area theory, the State improperly argued those facts in support of the great-risk-of-death aggravating circumstance. *See Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 339, 184 P.3d 369, 376 (2008) (explaining that a notice of intent to seek the death penalty functions primarily "to provide the defendant with notice of what he must defend against at trial and a death penalty hearing"). While we find the presentation of the unnoticed theory improper, the State alleged

six aggravating circumstances and only mentioned the public-area theory briefly when describing the evidence in aggravation. Thus, the brief remarks on the unnoticed theory were harmless beyond a reasonable doubt. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (recognizing that a prosecutor's improper comments that are "merely passing in nature" are harmless beyond a reasonable doubt). But again, they contributed to cumulative error during the penalty hearing.

Sufficiency of the evidence

Next, Barlow contends that insufficient evidence supports the great-risk-of-death aggravating circumstance. We review the record to determine whether evidence supports the jury's finding of an aggravating circumstance beyond a reasonable doubt. *Leslie v. State*, 114 Nev. 8, 20, 952 P.2d 966, 975 (1998). Having concluded that the State failed to adequately notice its public-area theory, we look only to the evidence supporting the theory the State did include in the notice of intent to seek the death penalty.

NRS 200.033(3) provides that first-degree murder is aggravated if it "was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person." This court has concluded that the great-risk-of-death aggravating circumstance includes "a 'course of action' consisting of two intentional shootings closely related in time and place," *Hogan v. Warden*, 109 Nev. 952, 957, 860 P.2d 710, 714 (1993) (quoting *Hogan v. State*, 103 Nev. 21, 24, 732 P.2d 422, 424 (1987)) (rejecting challenge to great-risk-of-death aggravating circumstance where the defendant shot his female companion and her daughter but only one of them died), even when only the deceased victims were put at risk by that course of action, *Flanagan v. State*, 112 Nev. 1409, 1420-21, 930 P.2d 691, 698-99 (1996) (upholding great-risk-of-death aggravating circumstance where defendants shot and killed two people in a home with no one else present). But in *Flanagan*, we suggested that the great-risk-of-death aggravating circumstance no longer applies in the latter circumstance for murders committed after October 1, 1993, given the Legislature's adoption of the multiple-murder aggravating circumstance in 1993. 112 Nev. at 1421, 930 P.2d at 699. Specifically, we explained that the amendment, which provided that first-degree murder is aggravated if the defendant "has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree," NRS 200.033(12), "apparently requires that for murders committed after October 1, 1993, the aggravator set forth in NRS 200.033(12), rather than the one in NRS 200.033(3), be applied to cases such as this one" where the defendant's course of action created a great risk of death only to the murder victims, *Flanagan*, 112 Nev. at 1421,

930 P.2d at 699. Thus, absent evidence that Barlow put other people at risk, the great-risk-of-death aggravating circumstance should not have been applied in this case. *See Leslie*, 114 Nev. at 21-22, 952 P.2d at 975-76 (concluding that the State did not prove defendant knowingly created a great risk of death to others because no evidence showed defendant knew other people were in a room where a bullet entered through the wall); *Moran v. State*, 103 Nev. 138, 142, 734 P.2d 712, 714 (1987) (holding that aggravating circumstance did not apply where no other persons were in the apartment, no neighbor was at immediate risk of death, and the defendant was not aware of any other person within close proximity when he shot the victim).

The two murdered victims being near each other when shot by Barlow constitutes the only properly noticed evidence. Therefore, we conclude that the State did not present sufficient evidence to support the jury's finding of the great-risk-of-death aggravating circumstance beyond a reasonable doubt.[6] However, "[a] death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review." *Archanian v. State*, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006).

Here, we conclude the error in presenting the invalid aggravating circumstance was harmless beyond a reasonable doubt. Barlow did not contest that the State proved five other aggravating circumstances. Each of those aggravating circumstances was more compelling than the invalid aggravating circumstance: Barlow was convicted in the immediate proceeding of more than one offense of murder, the murders were committed during a home invasion or burglary, and Barlow had been convicted of three violent felonies—assault with the use of a deadly weapon in the instant case, a prior conviction for attempting to murder Woods, and a prior conviction for breaking into an apartment and shooting his ex-girlfriend's new boyfriend. Accordingly, the invalid aggravating circumstance did not constitute a significant part of the State's case. *Cf. State v. Haberstroh*, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003) (providing that the prosecutor emphasizing an invalid aggravating circumstance caused "concern that this argument likely induced the jurors to rest their sentence to a significant degree on the invalid aggravator"). And the jurors found only three mitigating circumstances—Barlow received an honorable military discharge, he sought help for mental health, and his daughters' love. Thus, we conclude beyond a reasonable doubt that, absent the invalid aggravating circumstance, the jury still would have found the mitigating circumstances were insufficient to outweigh the aggravating circumstances. *See*

[6]Having found that the State did not present sufficient evidence to prove this aggravating circumstance, we need not consider Barlow's claim that it is duplicative of the multiple-murder aggravating circumstance under NRS 200.033(12).

Archanian, 122 Nev. at 1040-41, 145 P.3d at 1023; *see also Clemons v. Mississippi*, 494 U.S. 738, 750 (1990) (observing "nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence"). Because the invalid aggravating circumstance did not affect the jury's sentencing determination, the error was harmless, but we further conclude that it contributed to the cumulative error in the penalty hearing.

Cumulative error in the penalty phase

Barlow argues that, even if harmless individually, cumulatively the errors during the penalty phase warrant relief. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Butler v. State*, 120 Nev. 879, 900, 102 P.3d 71, 85-86 (2004) (internal quotation marks omitted) (discussing cumulative error in appellant's penalty hearing). Generally, when considering a cumulative error claim, we look to the nature and number of errors, the evidence presented, and the gravity of the consequences a defendant faces. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error).

Here, the following errors occurred: the district court improperly prohibited Barlow from making an important and legally accurate argument regarding the jury's deliberative process, the prosecutor improperly implied to the jury that a life sentence may have been appropriate if Barlow had only killed Woods but was inappropriate because he also killed Cobb, and the invalid great-risk-of-death aggravating circumstance and the related improper argument. And Barlow faced the gravest consequence—the death penalty. Individually, each of these errors was harmless, but we consider their effect collectively on the jury's decision to impose the death penalty. Barlow did not contest that the State proved multiple aggravating circumstances. Instead, he focused his defense on mercy and compassion. Thus, the district court erroneously prohibiting Barlow from making a legally valid argument that appealed to the individual jurors' ability to bestow mercy—in conjunction with the prosecutor's improper argument—creates a likelihood that Barlow was prejudiced. Viewed together, we conclude that the cumulative effect of these errors deprived Barlow of a fair penalty hearing. Therefore, we reverse the judgment of conviction as to the death sentences and remand for a new penalty hearing. Given this conclusion, we need not review Barlow's death sentences under NRS 177.055.[7]

[7]Barlow also argues that the death penalty is unconstitutional and the district court admitted evidence during the penalty hearing in violation of his confrontation rights. We have considered these claims and conclude they lack merit and Barlow has not presented any persuasive reason to overrule this

Guilt phase claims

Jury selection

Barlow argues that the jury selection process was unconstitutional based on the district court limiting his questioning, denying his objection to the State's use of its peremptory challenges, and denying his for-cause challenge.

First, Barlow argues that the district court improperly prevented him from "life qualifying" the prospective jurors. The district court proscribed a single question about whether the prospective jurors would impose death sentences because the case involved two victims. We conclude it was not improper to disallow questions aimed at acquiring information as to "how a potential juror would vote during the penalty phase of the trial" because such questions go "well beyond determining whether a potential juror would be able to apply the law to the facts of the case." *Witter v. State*, 112 Nev. 908, 915, 921 P.2d 886, 892 (1996), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). And the district court did not otherwise prohibit questions about whether the prospective jurors could consider all the aggravating and mitigating evidence, all four potential penalties, and whether there were circumstances where first-degree murder would or would not warrant the death penalty. Therefore, the district court did not abuse its discretion. *See* NRS 175.031 (providing that the district court shall allow supplemental examination of potential jurors "as the court deems proper"); *Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006) (providing that conducting voir dire "rests within the sound discretion of the district court, whose decision will be given considerable deference by this court").

Next, pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), Barlow objected to the State's use of four peremptory challenges to strike one African-American and three Hispanic veniremembers. The district court found that Barlow had not satisfied the first *Batson* step (prima facie showing that the peremptory challenges were based on race) and overruled the objection. *See Cooper v. State*, 134 Nev. 860, 861, 432 P.3d 202, 204 (2018) (discussing the three-step *Batson* test). We agree that Barlow did not meet his burden. Other than the fact that the State used four peremptory challenges to remove members of two cognizable groups, Barlow did not point to anything to show that the peremptory challenges were based on race. Merely identi-

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court's precedent. *See Belcher v. State*, 136 Nev. 261, 278, 464 P.3d 1013, 1031 (2020) (listing cases that have rejected similar challenges to the constitutionality of the death penalty); *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (providing that the Sixth Amendment right to confrontation does not apply to capital sentencing hearings); *see also Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("Under the doctrine of stare decisis, we will not overturn precedent absent compelling reasons for so doing." (internal quotation marks and alterations omitted)).

fying minority veniremembers struck by the State does not meet the burden of showing an inference of discriminatory purpose.[8] *See id*. at 862, 432 P.3d at 205 ("The question is whether there is evidence, other than the fact that a challenge was used to strike a member of a cognizable group, establishing an inference of discriminatory purpose to satisfy the burden of this first step."). Therefore, the district court did not clearly err in denying Barlow's *Batson* objection. *See id*. at 863, 432 P.3d at 205 (reviewing a district court's resolution of a *Batson* objection at the first step for clear error).

Finally, Barlow argues that the district court improperly denied his for-cause challenge of a prospective juror based on his inability to consider childhood evidence in mitigation. We discern no error. The prospective juror stated that he could be fair and impartial and was willing to consider everything presented in aggravation and mitigation. Reviewing the entirety of the challenged prospective juror's responses during voir dire, the record does not show he exhibited any bias or unwillingness to consider the evidence presented in mitigation. Therefore, we conclude that the district court did not abuse its discretion. *See Browning v. State*, 124 Nev. 517, 530, 188 P.3d 60, 69 (2008) (providing that "[g]reat deference is afforded to the district court in ruling on challenges for cause"); *see also* NRS 175.036 (providing that a juror should be excused for cause when voir dire reveals information "which would prevent the juror from adjudicating the facts fairly").

Expert testimony

Barlow argues that the district court erred by allowing an unqualified expert to testify about firearms and toolmark identification. To testify as an expert under NRS 50.275, the witness must be qualified to give specialized testimony, the testimony must assist the jury, and the testimony must be limited to the scope of the expert's knowledge. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). "Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion." *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

Based on the record, we conclude the district court did not abuse its discretion in admitting the expert's testimony. First, the witness qualified as an expert to testify about firearm and toolmark compar-

[8]We decline Barlow's invitation to undertake comparative juror analysis as he did not raise this argument below, *see Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (the Supreme Court has "recognize[d] that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial"), and he failed to make a prime facie case of discrimination, *cf. Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (stating that comparative juror analysis may be considered at *Batson*'s third step).

ison. The witness had ample experience and technical knowledge in the field. While Barlow claims that the witness lacked knowledge of scientific standards, under NRS 50.275 an expert is someone with special knowledge, skill, or experience; thus, a forensic analyst's knowledge and experience about firearm and toolmark analysis is sufficient. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (explaining that the federal analog to NRS 50.275 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge"). Second, the witness provided testimony that assisted the jury and was within the scope of her expertise. Specifically, after conducting a microscopic comparison of the casings, the witness determined that the firearm recovered from Barlow's vehicle fired the bullet casings found at the scene of the murders. Finally, Barlow had the opportunity to attack the witness's credibility and methodology during his extensive cross-examination. Thus, it was for the jury to evaluate and weigh the testimony. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("The established rule is that it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."); *Allen v. State*, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983) ("Expert testimony is not binding on the trier of fact; jurors can either accept or reject the testimony as they see fit."). And although Barlow had sufficient notice of the testimony to retain his own expert to testify at trial, he did not do so. *Cf. Turner v. State*, 136 Nev. 545, 554, 473 P.3d 438, 448 (2020) (providing that unnoticed expert testimony "prevented [the defense] from preparing for cross-examination" and consulting or retaining an expert for rebuttal purposes).

Prosecutorial misconduct

Barlow contends that the prosecutor improperly argued that Barlow saved the final bullet for the headshot to Woods because no evidence supported this comment. We agree but conclude the error was harmless. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) ("A prosecutor may not argue facts or inferences not supported by the evidence." (internal quotation marks omitted)). After the district court sustained Barlow's objection, the prosecutor conceded that the medical examiner could not determine the sequence of the gunshots and asked the jury to look at the physical evidence. Moreover, the State presented overwhelming evidence of Barlow's guilt, including testimony about his earlier confrontation with the victims, the discovery of a handgun in Barlow's vehicle with his fingerprint and DNA, and the expert testimony that the weapon fired the spent casings found at the crime scene. Thus, we conclude that the comment did not have a substantial effect on the guilt phase verdict. *See King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)

(providing that prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt).

Barlow also argues that the prosecutor improperly commented on his right to remain silent by asserting at the end of closing argument that "there's at least one person in this room who knows who executed Donnie Cobb and Danielle Woods." Barlow did not object at trial, therefore, we review for plain error. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). "It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest . . . ." *Morris v. State*, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (internal quotation marks omitted). However, in *Taylor v. State*, this court considered a similar comment and found no error. 132 Nev. 309, 325-26, 371 P.3d 1036, 1047 (2016). While the prosecutor's isolated remark indirectly touched upon Barlow's decision not to testify, it tracks with the comment in *Taylor*. Therefore, we conclude that Barlow has not shown plain error, which must be "clear under current law from a casual inspection of the record." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018); *see also Coleman v. State*, 111 Nev. 657, 665, 895 P.2d 653, 658 (1995) (considering "the frequency and intensity of the references to" a defendant's silence when determining if reversal is warranted).

Jury instructions

Barlow argues that the district court erroneously instructed the jury. Barlow first contends that the burglarous-intent instruction unconstitutionally shifted the burden of proof by allowing a finding of guilt without the State proving intent beyond a reasonable doubt. We disagree because the instruction accurately reflects NRS 205.065, and we have consistently upheld the statute's constitutionality. *See, e.g.*, *Redeford v. State*, 93 Nev. 649, 653-54, 572 P.2d 219, 221-22 (1977) (explaining that "an inference of criminal intent logically flows from the fact of showing unlawful entry"); *White v. State*, 83 Nev. 292, 296, 429 P.2d 55, 57 (1967) ("There is clearly rational connection between the fact proven, i.e., unlawful entry, and the presumption. It is clear that the [L]egislature has the power to establish inferences from facts proven, provided there is such rational connection."). Barlow also contends that the state-of-mind and intent-to-kill instructions misled the jury. The instructions told the jury that the State is not required to present direct evidence to prove Barlow's state of mind and the jury may infer his state of mind from the circumstances proved at trial, including the use of a deadly weapon. We discern no error, as the instructions correctly state Nevada law. *See Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."); *State v.*

Hall, 54 Nev. 213, 240, 13 P.2d 624, 632 (1932) (approving the same instruction challenged here that stated "[t]he intention [to kill] may be ascertained or deduced from the facts and circumstances of the killing such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act"). Therefore, the district court did not abuse its discretion in instructing the jury. *See Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (providing that we review a district court's decision to give or refuse a jury instruction for an abuse of discretion or judicial error); *see also Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) (whether an instruction correctly states the law presents a legal question that is reviewed de novo).

Cumulative error in the guilt phase

Barlow argues that cumulative error during the guilt phase warrants relief. Because we discern only one error, there is nothing to cumulate. *See Lipsitz v. State*, 135 Nev. 131, 140 n.2, 442 P.3d 138, 145 n.2 (2019) (concluding that there were no errors to cumulate when the court found only a single error).

CONCLUSION

Having considered all of Barlow's guilt phase claims, we conclude no relief is warranted as to the guilt phase and therefore affirm the judgment of conviction in part. Due to cumulative error during the penalty phase of trial, we reverse the judgment of conviction as to the death sentences for first-degree murder with the use of a deadly weapon and remand for a new penalty hearing.

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

APPENDIX

Barlow v. State

SPECIAL VERDICT

We, the Jury in the above-entitled case, having found the Defendant, [list name], guilty of Count [#] – [list the offense], find:

Section I: Aggravating Circumstances

Instructions: Answer by checking "Yes" or "No" as to whether the jury unanimously finds that the State has proven the listed aggravating circumstances beyond a reasonable doubt.

1. [list individual aggravating circumstance]

☐ Yes

☐ No

[list any additional aggravating circumstance(s)]

Instructions: If you answered "No" to all of the above aggravating circumstances, proceed to Section V to record your verdict as to the sentence to be imposed for Count [#].

If you answered "Yes" to any of the above aggravating circumstances, proceed to Section II to record your findings as to any mitigating circumstances.

Section II: Mitigating Circumstances

Instructions: Answer by checking "Yes" as to each mitigating circumstance that any individual juror has found and checking "No" as to any mitigating circumstance that no juror has found.

1. [list individual mitigating circumstance]

☐ Yes

☐ No

[list any additional mitigating circumstances and allow space for the jury to record any mitigating circumstances not listed]

Instructions: Proceed to Section III to record your findings as to the weighing of aggravating and mitigating circumstances.

Section III: Weighing of Aggravating and Mitigating Circumstances

Instructions: Check only one of the following findings.

☐ We unanimously find there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s).

Instructions: Proceed to Section IV to record your verdict as to the sentence to be imposed for Count [#].

☐ At least one juror finds there are one or more mitigating circumstances sufficient to outweigh the aggravating circumstance(s).

Instructions: Proceed to Section V to record your verdict as to the sentence to be imposed for Count [#].

Section IV: Sentencing Decision (death sentence available)

Instructions: Complete this section if the jury has unanimously determined in Section III above that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s). You must unanimously decide the sentence and the foreperson must sign and date the final verdict.

VERDICT

We, the Jury in the above-entitled case, having found the Defendant, [list name], guilty of Count [#] – [list the offense], and having unanimously found that at least one aggravating circumstance exists beyond a reasonable doubt and that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s), unanimously impose a sentence of:

☐ A definite term of 50 years in prison, with eligibility for parole beginning when a minimum of 20 years has been served.

☐ Life in prison with the possibility of parole.

☐ Life in prison without the possibility of parole.

☐ Death.

Section V: Final Sentencing Decision (death sentence not available)

Instructions: Complete this section if (1) the jury determined in Section I above that the State did not prove any aggravating circumstance(s) beyond a reasonable doubt or (2) at least one juror found in Section III above that there are mitigating circumstances sufficient to outweigh the aggravating circumstance(s). If you have determined a sentence under Section IV, do not fill out this section. You must unanimously decide the sentence and the foreperson must sign and date the final verdict.

VERDICT

We, the Jury in the above-entitled case, having found the Defendant, [list name], guilty of Count [#] – [list the offense], unanimously impose a sentence of:

☐ A definite term of 50 years in prison, with eligibility for parole beginning when a minimum of 20 years has been served.

☐ Life in prison with the possibility of parole.

☐ Life in prison without the possibility of parole.
