cessibility of such service or services to its enrollees." " 'Provider' means any physician, hospital or other person who is licensed or otherwise authorized in this state to furnish health care services."). It shouldn't matter whether HPN is compensated by Medicare, by the enrollee, or by other sources.

In sum, Medicare's standards do not cover general health and safety issues like negligence claims. Furthermore, under *Munda*, Morrison's claim for negligent selection of a provider is not "with respect to" Medicare and is therefore not expressly preempted. The Medicare Act's text does not show that Congress intended the unequal result that Medicare enrollees cannot have legal recourse against a negligent HMO while non-Medicare patients may. Accordingly, I respectfully dissent.

THE STATE OF NEVADA, APPELLANT, *v.*
TROY RICHARD WHITE, RESPONDENT.

No. 62890

July 10, 2014 330 P.3d 482

Appeal from a district court order granting defendant's pretrial petition for a writ of habeas corpus, dismissing a burglary charge. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Defendant, who was charged with burglary among other crimes, filed a pretrial petition for writ of habeas corpus arguing that a person could not be charged with burglary of his own residence. The district court granted petition. State appealed. The supreme court, GIBBONS, C.J., held that in a matter of first impression, defendant could not burglarize his own home.

Affirmed.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens* and *Jonathan E. VanBoskerck*, Chief Deputy District Attorneys, and *Ryan MacDonald* and *Michelle Sudano*, Deputy District Attorneys, Clark County, for Appellant.

Philip J. Kohn, Public Defender, and *Scott L. Coffee* and *David Lopez-Negrete*, Deputy Public Defenders, Clark County, for Respondent.

1. CRIMINAL LAW.
   The supreme court reviews questions of law and statutory interpretation de novo.

2. Statutes.
When interpreting a statute, legislative intent is the controlling factor.
3. Statutes.
To determine legislative intent of a statute, the supreme court will first look at its plain language.
4. Statutes.
When the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, and the supreme court may then look beyond the statute in determining legislative intent.
5. Statutes.
When interpreting an ambiguous statute, the supreme court looks to the legislative history and construes the statute in a manner that is consistent with reason and public policy.
6. Statutes.
Statutory construction should always avoid an absurd result.
7. Common Law.
The common law, so far as it is not repugnant to or inconsistent with, the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of Nevada and should remain in force until repealed by the Legislature.
8. Burglary.
Breaking is no longer an essential element of burglary. NRS 205.060(1).
9. Burglary.
Consent to the entry is not a defense to burglary if the person acquired the entry with felonious intent. NRS 205.060(1).
10. Burglary.
A person with an absolute right to enter a structure cannot commit burglary of that structure. NRS 205.060(1).
11. Husband and Wife.
A husband does not have a right to enter the house he owns with his wife if the wife has obtained a district court order granting her possession of the house.
12. Landlord and Tenant.
A landlord does not have an absolute right to enter a property he or she owns because the landlord conveys the right of possession to the tenant.
13. Burglary.
Defendant, who had separated from his wife and moved out of the residence they shared, had an absolute right to enter the residence and did not forfeit any possessory right he had in it, and thus he did not commit burglary when he entered residence, even though he had orally agreed to stay elsewhere during the week; he still retained his keys to the house and entered the house on a weekly basis to stay with his children on weekends. NRS 205.060(1).

Before the Court En Banc.

OPINION

By the Court, Gibbons, C.J.:

In this opinion, we address for the first time whether a person can burglarize his or her own home. We conclude that a person cannot

commit burglary of a home when he or she has an absolute right to enter the home.

FACTS AND PROCEDURAL HISTORY

Troy White and Echo Lucas were married and lived together with five children in a house owned by White. In early June 2012, after having marital issues, the couple separated. White offered to move out of their residence. The couple agreed that Lucas would live in the residence with the children during the week, and White would live there with the children over the weekend. White retained his house key to use on the weekends. In late June, Lucas' new boyfriend, Joseph Averman, moved into the residence to live there with Lucas.

Averman testified that White would usually come to the residence between two and three o'clock in the afternoon on Fridays. White remained at the residence through the weekends, leaving on Sundays. During the weekends, Averman and Lucas would leave the residence and stay elsewhere until Sunday. Not surprisingly, White was unhappy that Lucas started dating Averman and began repeatedly harassing her with phone calls, voicemails, and text messages. He even threatened Averman, stating that "if you don't stay away, I'm going to . . . kill you."

On Friday July 27, 2012, around two o'clock in the morning, White began banging on Lucas' bedroom window. Lucas called him and told him to stop because the kids were asleep in the house. White returned to the house later that day around noon, entered the house with his key, and asked to speak to Lucas. She told White that he was not supposed to be at the residence at that time and they could talk later. However, she eventually agreed to talk to him for five minutes. Lucas and White went into the spare bedroom to talk while Averman tended to one of the children across the hall in the master bedroom. Averman then heard Lucas say, "[White], no, please don't, and stop." Averman, aware of prior abuse between Lucas and White, went to the room and saw Lucas attempt to leave the room before being pulled back into the room. White then pushed Lucas against the wall and shot her in the stomach. White turned toward Averman and shot him once in the right arm and twice in the abdomen. White then told Averman that "I told you this was going to happen." White fled the scene in Lucas' vehicle. Averman eventually recovered from his injuries, but Lucas died as a result of her gunshot wound.

The State filed a criminal complaint against White for (1) burglary while in possession of a firearm, (2) murder with use of a deadly weapon, (3) attempted murder with use of a deadly weapon, (4) carrying a concealed firearm, and (5) ten counts of child abuse, neglect, or endangerment. At the preliminary hearing, the justice court bound over White on all the charges and consolidated the child

abuse charges. However, White argued that he could not be charged with burglary of his own residence. The justice court instructed the parties to file a petition with the district court in order to settle this issue.

White then filed a pretrial petition for writ of habeas corpus arguing that a person cannot be charged with burglary of his or her own residence. The State filed a response arguing that Nevada's burglary statute clearly and unambiguously allows a person to be charged with burglarizing his or her own home. The district court ultimately granted White's petition, dismissing the charge for burglary while in possession of firearm, and finding that (1) at common law one could not burglarize his or her own residence; and (2) one cannot legally burglarize his or her own residence "where there is no legal impediment such as a TPO, a restraining order of some sort . . . that would otherwise limit the ability of an owner to access their own property." The State now appeals.

DISCUSSION

A person cannot commit burglary of a home when he or she has an absolute right to enter the home

[Headnotes 1-6]

We have not previously addressed whether a person can burglarize his or her own home. We review questions of law and statutory interpretation de novo. *Sheriff, Clark Cnty. v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). "When interpreting a statute, legislative intent is the controlling factor." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (internal quotation marks omitted). To determine legislative intent of a statute, this court will first look at its plain language. *Id.* "But when the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, and [this court] may then look beyond the statute in determining legislative intent." *Id.* (internal quotation marks omitted). When interpreting an ambiguous statute, "we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy." *Id*. "Additionally, statutory construction should always avoid an absurd result." *Burcham*, 124 Nev. at 1253, 198 P.3d at 329 (internal quotation marks omitted).

At common law, "burglary was generally defined as the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony." *People v. Gauze*, 542 P.2d 1365, 1366 (Cal. 1975) (emphasis and internal quotation marks omitted). However, Nevada's current burglary statute, NRS 205.060(1), states that "a person who, by day or night, enters any house, . . . or other building, . . . with the intent to commit grand or petit larceny, assault or battery on any person or any felony, . . . is guilty of burglary."

We conclude that Nevada's burglary statute is subject to two reasonable interpretations: (1) the Legislature intended to revoke the

common law rule that burglary requires entry into the building of another, or (2) the Legislature incorporated the common law requirement by failing to expressly include one's own home as a possible place of burglary. *See Gauze*, 542 P.2d at 1366.[1] In order to resolve the two possible interpretations, we consider the purposes of common law burglary, the legislative intent of Nevada's burglary statute, and California's approach to whether one can burglarize his or her own home.[2]

[Headnote 7]

The common law, "so far as it is not repugnant to or inconsistent with, the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory . . . [and] should remain in force until repealed by the legislature." *Vansickle v. Haines*, 7 Nev. 249, 285 (1872) (internal quotation marks omitted). Common law burglary was a crime against "habitation and occupancy" and "clearly sought to protect the right to peacefully enjoy one's own home free of invasion." *Gauze*, 542 P.2d at 1366 (internal quotation marks omitted) (noting that "a person's home was truly his castle"). Further, the common law was clear that a person could not be convicted of burglary for entering his own home with the intent to commit a felony. *Id.* "This rule applied not only to sole owners of homes, but also to joint occupants," thus "[t]he important factor was occupancy, rather than ownership." *Id.*

[Headnotes 8, 9]

The Nevada Legislature has moved away from the common law definition of burglary in several respects. The current statute only requires an entry with the intent to commit certain enumerated offenses. *State v. Adams*, 94 Nev. 503, 505, 581 P.2d 868, 869 (1978). Breaking is no longer an essential element of burglary. *Id.* Further, the entry does not need to be a forcible entry, nor does the burglary need to occur at night. *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1113 (2002); NRS 205.060(1). Also, consent to the entry is not a defense to burglary if the person "acquired the entry with felonious intent." *Barrett v. State*, 105 Nev. 361, 364, 775 P.2d 1276,

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[1]California's burglary statute is nearly identical to Nevada's, and that state's legislature has also similarly expanded the structures that can be burglarized and eliminated the breaking requirement. *Gauze*, 542 P.2d at 1366. The California Supreme Court explained that the California Legislature's expansion of burglary could be interpreted in the same two ways. *Id.*

[2]Even though the State argues that the plain language of Nevada's burglary statute clearly allows a person to burglarize a house that he or she owns and has an absolute right to enter, we hold that this interpretation could create absurd results and would not promote the policy behind common law burglary and its modern codification, NRS 205.060. *See Gauze*, 542 P.2d at 1369 (noting that a person could potentially commit burglary by walking into his house with the intent to forge a check, or with the intent to administer heroin to himself).

1277 (1989). While these changes certainly expanded the common law definition of burglary, the common law notion that burglary law is designed to protect a possessory or occupancy right in property remains in effect.

The basic policies underlying burglary statutes also support the conclusion that a person cannot burglarize his or her own home when he or she has an absolute right to enter the home. Burglary statutes "are based primarily upon a recognition of the dangers to personal safety . . . that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence." *Gauze*, 542 P.2d at 1368 (internal quotation marks omitted). The laws are not intended necessarily to deter the trespass or the intended crimes, but "[are] aimed at the danger caused by the unauthorized entry itself." *Id.* "The statute protects against intruders into indoor areas, not persons committing crimes in their own homes." *Id.* at 1369 (emphasis omitted).

[Headnotes 10-12]

We agree with the analysis of the California Supreme Court in *Gauze*, which relied upon these policies to reach the conclusion that a person with an absolute right to enter a structure cannot commit burglary of that structure. *Id.* at 1367. In *Gauze*, the defendant entered an apartment that he rented with two other roommates and shot one of his roommates. *Id.* at 1365-66. The court concluded that the defendant did not commit burglary because he "invaded no possessory right of habitation." *Id.* at 1367. He had an absolute right to enter the apartment and could not be refused admission to his apartment or ejected from the apartment after entry.[3] *Id.* The court explained this conclusion by stating "[i]n contrast to the usual burglary situation, no danger arises from the mere entry of a person into his own home, no matter what his intent is . . . no emotional distress is suffered, no panic is engendered, and no violence necessarily erupts merely because he walks into his house." *Gauze*, 542 P.2d at 1368.

Based on this analysis, we conclude that while the Legislature has expanded common law burglary in several respects, it has at

[3]There are common situations when a person does not have an absolute right to enter a structure. For example, a husband does not have a right to enter the house he owns with his wife if the wife obtained a district court order granting her possession of the house. *People v. Smith*, 48 Cal. Rptr. 3d 378, 384 (Ct. App. 2006). Also, while customers have a limited right to enter a store for lawful purposes, persons who possess the intent to commit a felony therein are not entitled to enter. *People v. Barry*, 29 P. 1026, 1026-27 (Cal. 1892). Lastly, a landlord does not have an absolute right to enter a property he or she owns because the landlord conveys the right of possession to the tenant. *State v. Machan*, 322 P.3d 655, 659 (Utah 2013).

least retained the notion that: (1) burglary law is designed to protect a possessory or occupancy right in property, and (2) one cannot burglarize his own home so long as he has an absolute right to enter the home. Thus, while ownership may be one factor to consider, the appropriate question is whether the alleged burglar has an absolute, unconditional right to enter the home.

The district court did not err in granting White's pretrial petition for a writ of habeas corpus

Applying our holding to the facts of this case, we now consider whether the district court erred by granting White's pretrial petition for a writ of habeas corpus. When reviewing a district court's grant of a pretrial petition for writ of habeas corpus, we must "determine whether all of the evidence received at the preliminary hearing . . . establishes probable cause to believe that an offense has been committed and that the accused committed it." *Kinsey v. Sheriff, Washoe Cnty.*, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). "The finding of probable cause may be based on slight, even marginal evidence," *Sheriff, Washoe Cnty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (internal quotation marks omitted), and we will uphold the district court's determination of factual sufficiency absent substantial error. *Burcham*, 124 Nev. at 1257, 198 P.3d at 332.

[Headnote 13]

Under the facts of this case, we conclude that the district court did not err in dismissing the charge against White for burglary while in possession of a firearm because he had an absolute right to enter the residence. Even though he orally agreed to stay elsewhere during the week, he still maintained an absolute right to enter the residence and did not forfeit any possessory right he had in it. Further, White could not be ejected or prevented from entering the residence, especially since he still retained his keys to the house and entered the house on a weekly basis to stay with his children on weekends. This conclusion supports the general burglary policy to protect against intruders, but not against persons committing crimes in their own homes, such as White. Thus, the State failed to provide slight or marginal evidence that White's entry into his residence invaded another's possessory right of habitation.

CONCLUSION

We conclude that the Legislature has not eliminated the common law notion that a person with an absolute unconditional right to enter a structure cannot burglarize that structure. As such, we conclude that the district court did not err in granting White's petition for a

writ of habeas corpus. Accordingly, we affirm the order of the district court.[4]

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

SIMMONS SELF-STORAGE PARTNERS, LLC, A NEVADA LIMITED LIABILITY COMPANY; ANTHEM MINI-STORAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; HORIZON MINI-STORAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; MONTECITO MINI-STORAGE PARTNERS, LLC, A NEVADA LIMITED LIABILITY COMPANY; COLONIAL BANK, A SUBSIDIARY OF THE COLONIAL BANCGROUP, INC., A DELAWARE CORPORATION; WESTAR DEVELOPMENT CORPORATION DBA WESTAR CONSTRUCTION, A NEVADA CORPORATION; CONTINENTAL CASUALTY COMPANY, A DELAWARE CORPORATION; WESTERN SURETY COMPANY; LAKE MEAD PROPERTY; SILVER CREEK I, LLC; SAFECO INSURANCE COMPANY OF AMERICA; STARR STORAGE SYSTEMS, LLC; AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, APPELLANTS, *v.* RIB ROOF, INC., A CALIFORNIA CORPORATION, RESPONDENT.

No. 59210

August 7, 2014 331 P.3d 850

Appeal from a final judgment in a mechanic's lien action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Steel manufacturer and supplier brought lien foreclosure action against six properties it had supplied steel to, and against the sureties and principals on respective surety bonds. Following a bench trial, the district court ordered the six properties sold to satisfy judgment in favor of manufacturer. General contractor appealed. The supreme court, DOUGLAS, J., held that: (1) under the lien on property statute, a materialman has a lien upon a property and any improvements thereon for which the materialman supplied materials; (2) substantial evidence existed to support finding that steel supplier delivered the steel at issue, as required to establish liens on each of the six properties to which the steel was delivered; (3) substantial evidence existed to support finding that steel manufacturer and supplier's bookkeeper lacked actual authority to execute lien release forms on behalf of supplier with regard to two properties; (4) substantial

[4]We have considered the parties' remaining arguments and conclude they are without merit.

evidence existed to support finding that bookkeeper lacked apparent authority to execute lien release forms on behalf of supplier; and (5) the district court was precluded from ordering four properties covered by surety bonds, along with two other properties not covered by surety bonds, to be sold in satisfaction of the total judgment.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied November 24, 2014]

Shumway Van & Hansen and *Scott A. Knight* and *Michael Van*, Las Vegas, for Appellants.

Snell & Wilmer, LLP, and *Leon F. Mead, II*, and *Kelly H. Dove*, Las Vegas, for Respondent.

1. Mechanics' Liens.
   A mechanic's lien is directed at a specific property, requiring the district court to determine the total appropriate charge attributable to that property before ordering its sale.
2. Mechanics' Liens.
   Because a surety bond replaces a property as security for the mechanic's lien, the property cannot be sold where a surety bond was posted; instead, the lien judgment should be satisfied from the surety bond.
3. Mechanics' Liens.
   Under the lien on property statute, a materialman has a mechanic's lien upon a property and any improvements thereon for which the materialman supplied materials; the materialman does not need to prove that the materials that he or she supplied were used or incorporated into the property or improvements, but rather, the materialman must prove that the materials were supplied for use on or incorporation into the property or improvements thereon. NRS 108.222.
4. Mechanics' Liens.
   A mechanic's lien is a statutory creature designed to provide contractors secured payment for their work and materials because they are generally in a vulnerable position. NRS 108.222.
5. Appeal and Error; Statutes.
   The supreme court reviews questions of statutory interpretation de novo and construes unambiguous statutory language according to its plain meaning unless doing so would provide an absurd result.
6. Statutes.
   The supreme court interprets provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes to avoid unreasonable or absurd results and give effect to the Legislature's intent.
7. Mechanics' Liens.
   Substantial evidence existed to support the district court's finding that steel supplier delivered the steel at issue, as required to establish mechanics' liens on each of the six properties to which the steel was delivered, in supplier's lien foreclosure action against each of the properties; while nineteen of eighty bills of lading lacked consignee signatures, they contained two other signatures from shipping manager and truck driver, general contractor never objected to supplier's lien notices, and each project used the type of steel supplied, and subcontractor's officer acknowledged that

supplier was owed approximately $1 million for materials it had provided. NRS 108.222.

8. Appeal and Error.
   A district court's findings must be supported by substantial evidence.
9. Evidence.
   "Substantial evidence" is that which a reasonable mind might accept as adequate to support a conclusion.
10. Appeal and Error.
    Where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party.
11. Mechanics' Liens.
    Substantial evidence existed to support the district court's finding that steel manufacturer and supplier's bookkeeper lacked actual authority to execute lien release forms on behalf of supplier with regard to two properties that steel had been delivered to, and thus, that bookkeeper was not an authorized agent with authority to release the mechanics' liens, in lien foreclosure action brought by supplier against the two properties in question; bookkeeper admitted that she lacked the authority to execute the lien release forms, her limited job duties validated that admission, and the notice that purported to make bookkeeper's signature binding on all matters related to the liens in question lacked an appropriate authorizing signature. NRS 108.2457(1) (2004).
12. Appeal and Error; Principal and Agent.
    Generally, the existence of an agency is a question of fact; accordingly, the supreme court will uphold the district court's agency determination as long as it is not clearly erroneous and supported by substantial evidence.
13. Principal and Agent.
    To bind a principal, an agent must have actual authority or apparent authority.
14. Principal and Agent.
    An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act. Restatement (Third) of Agency § 2.01.
15. Principal and Agent.
    When examining whether actual authority exists, the supreme court focuses on an agent's reasonable belief. Restatement (Third) of Agency § 2.02 comment.
16. Mechanics' Liens.
    Substantial evidence existed to support the district court's finding that steel manufacturer and supplier's bookkeeper lacked apparent authority to execute lien release forms on behalf of supplier with regard to two properties not covered by surety bonds that steel had been delivered to, and thus, that bookkeeper was not an authorized agent with authority to release the mechanics' liens, in lien foreclosure action brought by supplier against the two properties; even if subcontractor reasonably relied on bookkeeper's acts in signing lien waivers with regard to the two properties, they offered no evidence or argument that the supplier knew of or acquiesced to the acts. NRS 108.2457(1)(a) (2004).
17. Principal and Agent.
    "Apparent authority" is that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence.

18. Principal and Agent.
    There can be reliance only upon what the principal himself has said or done, or at least said or done through some other and authorized agent; the acts of the agent in question can not be relied upon as alone enough to support the theory of apparent authority.
19. Principal and Agent.
    If an agent's acts are relied upon under the doctrine of apparent authority, there must also be evidence of the principal's knowledge and acquiescence in them; moreover, the reliance must have been a reasonable one.
20. Mechanics' Liens.
    The district court was precluded from ordering four properties covered by surety bonds, along with two other properties not covered by surety bonds, to be sold in satisfaction of the total judgment, in lien foreclosure action brought by steel supplier against all six properties; the district court failed to determine the appropriate charge attributable to each property, making it impossible to determine whether the applicable bonds or property sales would satisfy those judgments, and the posting of the security bonds on four of the properties had released their respective mechanics' liens. NRS 108.2413.
21. Mechanics' Liens.
    A property subject to a mechanic's lien should not be responsible for the improvement costs of another property; apportionment must be adjudicated on the merits to determine the appropriate charge attributable to each individual property. NRS 108.237.

Before Hardesty, Douglas and Cherry, JJ.

OPINION

By the Court, Douglas, J.:

This opinion addresses a dispute regarding the validity of materialmen's liens under NRS Chapter 108 against six properties and the effect of surety bonds posted to release the liens on four of those properties. Specifically, we consider whether, to establish a lien on a property or improvements thereon under NRS 108.222, a materialman must prove merely that materials were delivered for use on or incorporation into the property or improvements thereon; or, instead, must demonstrate that the materials were actually used for the property or improvements thereon. We conclude that a materialman has a lien upon a property and any improvements thereon for which he supplied materials, in the amount of the unpaid balance due for those materials. Because the district court's finding that respondent supplied the steel at issue for the six properties is supported by substantial evidence, we hold that respondent established a materialman's lien on each of those properties for the unpaid balance due on the steel delivered.[1]

[1]This opinion uses the terms "materialman's lien" and "mechanic's lien" interchangeably as both refer to statutory rights in a property or any improvement thereon provided to a lien claimant. *See* NRS 108.22132; NRS 108.222.

[Headnotes 1, 2]

As to the judgment and surety bonds posted for four of the properties, we conclude that the district court erred by ordering the sale of all six properties. A mechanic's lien is directed at a specific property, requiring the district court to determine the total appropriate charge attributable to that property before ordering its sale. Moreover, because a surety bond replaces a property as security for the lien, the property cannot be sold where a surety bond was posted; instead, the lien judgment should be satisfied from the surety bond. Accordingly, we affirm in part and reverse in part the district court's order, and we remand this matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Respondent Rib Roof, Inc., a manufacturer and supplier of steel products, supplied steel for projects on the Anthem, Horizon, Lake Mead, Montecito, Silver Creek, and Simmons properties. Appellant Westar Construction, the general contractor for all six projects, subcontracted with Southwest Steel to furnish and install steel products for the projects. Southwest then contracted with respondent to meet its obligations to Westar.

Before delivery, respondent provided notices of intent to furnish materials to Southwest, Westar, each project's owners, and other related parties. The notice for the Lake Mead property contained a provision indicating that the person signing that notice, respondent's bookkeeper Trish Cartwright, could bind respondent in future instruments relating to respondent's right of lien. That notice lacked an authorizing signature from one of respondent's officers. Respondent then shipped the steel products to the particular job sites using bills of lading. Each bill of lading contained three copies: the first copy was signed by the shipping manager after he loaded the steel onto the truck for shipment; the second copy was signed by the truck driver; and the third copy was signed by the consignee upon delivery. Nineteen of the eighty bills of lading at issue lacked consignee signatures. Verne Moser, respondent's CFO and corporate secretary, acknowledged that where consignee signatures were missing, he was not certain that the materials were delivered to the bill of lading's destination address. Appellants did not question respondent's notices of intent to furnish materials or delivery of steel before the liens were recorded, and they presented no evidence that the steel used in the six projects came from another supplier.

Southwest made no payment for the steel furnished for the Lake Mead property but partially paid respondent for the steel furnished for the other five properties. Southwest officer Tom Carroll acknowledged that respondent was owed approximately $1,000,000. Despite only partially paying respondent, Carroll sent Moser an

email requesting several lien releases. Moser directed Cartwright to prepare the requested lien release forms. Cartwright's job duties included accounting, bookkeeping, evaluating lien release requests, and preparing lien release forms. Cartwright knew that she lacked authority to sign the lien releases; respondent's company policy granted that authority only to officers. Nevertheless, on December 15, 2004, Cartwright signed unconditional waiver and lien release forms for the Lake Mead and Silver Creek properties.

Respondent subsequently perfected its mechanics' liens on the six properties, providing the required statutory notices and recording its liens. During that process, appellants did not seek a district court determination that, under NRS 108.2275, the liens noticed were frivolous, made without reasonable cause, or excessive in amount. Respondent then filed a complaint for foreclosure against each property and, pursuant to NRS 108.239(1)-(2), filed notices of lis pendens and published notices of foreclosure. Thereafter, surety bonds totaling 1.5 times the value of respondent's mechanics' liens for the Lake Mead, Silver Creek, Anthem, and Horizon properties were posted and recorded in compliance with NRS 108.2415(1). As a result, respondent amended its complaint to dismiss its lien foreclosure claims against those four properties, replacing them with claims against the sureties and principals on the respective surety bonds.

After a bench trial, the district court issued its final judgment concluding that proving materials were delivered to a job site creates a presumption that those materials were used for the property or an improvement thereon, and that this presumption could be rebutted by showing that the materials were not used in the construction or improvements. After finding that respondent delivered the steel at issue to the job sites for the six projects and that appellants failed to rebut the presumption this delivery created, the district court concluded that respondent established liens on the six properties. The district court also determined that respondent substantially complied with NRS Chapter 108's requirements to perfect and execute those liens, and that the lien waivers were ineffective because Cartwright lacked authority to bind respondent.

In determining respondent's award, the district court calculated the amount of the mechanic's lien for each property, awarding pre- and post-judgment interest on those amounts. The district court also awarded $129,667 in attorney fees and $26,541.81 in costs to be charged jointly against all properties. The district court then ordered that, to the extent that the lien release bonds were insufficient to pay the respective sums due, the six properties were to be sold to satisfy the judgment. Thereafter, the district court ordered the sale of all six properties without determining the total appropriate charge attributable to each property or demonstrating that each surety bond

was insufficient to pay the sum due on its respective property. This appeal followed.

DISCUSSION

Lien rights

[Headnotes 3, 4]

"A mechanic's lien is a statutory creature" designed "to provide contractors secured payment for their work and materials" because they are generally in a vulnerable position. *In re Fontainebleau Las Vegas Holdings, L.L.C.*, 128 Nev. 556, 573-74, 289 P.3d 1199, 1210 (2012). To effectuate that purpose, we have held that these "statutes are remedial in character and should be liberally construed." *Id.* at 573, 289 P.3d at 1210 (internal quotation marks omitted).

[Headnotes 5, 6]

We review questions of statutory interpretation de novo, *see Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013), and we construe unambiguous statutory language according to its plain meaning unless doing so would provide an absurd result. *Cal. Commercial Enters. v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003). Additionally, this court interprets "provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes'" to avoid unreasonable or absurd results and give effect to the Legislature's intent. *S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

As a preliminary matter, appellants argue that *Opaco Lumber & Realty Co. v. Phipps*, 75 Nev. 312, 340 P.2d 95 (1959), controls. In *Opaco*, we concluded that a materialman only has a lien for materials proved either to have been delivered to the building site or to have gone into the structure. *Id.* at 316, 340 P.2d at 97. Respondent contends that the Legislature's enactment of NRS 108.222 in 1965 and its subsequent amendments supersede *Opaco*'s holding. To determine the effect of NRS 108.222 on our decision in *Opaco*, we must construe the statute's provisions.[2]

The parties dispute the plain meaning of NRS 108.222, which states that ". . . a lien claimant has a lien upon the property and any improvements for which the work, materials and equipment were furnished," in the amount of any unpaid balance

[2]Because the acts herein occurred before October 1, 2005, the effective date of the 2005 amendments to NRS Chapter 108, we interpret the 2003 version of NRS Chapter 108. *See* 2005 Nev. Stat., ch. 428, at 1892-1918; S.B. 343, 73d Leg. (Nev. 2005); 2003 Nev. Stat., ch. 427, at 2587-2620; S.B. 206, 72d Leg. (Nev. 2003). Unless otherwise stated, all further references in this opinion to NRS Chapter 108 are to the 2003 enactment.

of the agreed upon price. Reading NRS 108.22144's definition of "[m]aterial[s]" into NRS 108.222, appellants assert that a lien right only exists when a lien claimant proves that the materials were "used" for the property or an improvement thereon. Respondent avoids the definition of "[m]aterial[s]," instead advocating for a liberal construction of "furnish[ ]" requiring only delivery.

In construing NRS 108.222, we begin with the term "furnish[ ]." Furnish means "[t]o supply, provide, or equip, for accomplishment of a particular purpose." *Black's Law Dictionary* 675 (6th ed. 1990). "[F]urnish[ ]" therefore encapsulates a variety of situations, including one where a materialman delivers materials for a property or improvement thereon to a subcontractor. Notably, neither this definition nor NRS 108.222 requires materials to be delivered to a specific location, such as the work site. The absence of such a requirement comports with NRS Chapter 108's remedial purpose by protecting claimants from the possibility that lien rights could be circumvented by having materials delivered to secondary locations, such as preparatory or storage sites.

As defined in NRS 108.22144, " '[m]aterial' means appliances, equipment, machinery and substances affixed, used, consumed or incorporated in the improvement of property or the construction, alteration or repair of any improvement, property or work of improvement." Appellants incorporate this definition into NRS 108.222 and argue that supplied materials must be "used" in an improvement before a materialman is entitled to a mechanic's lien. Appellants' interpretation of NRS 108.222 incorporating NRS 108.22144's plain meaning is unsustainable because it leads to an absurd result. Specifically, reading NRS 108.22144 into NRS 108.222 is problematic because one cannot furnish "materials" for a property or improvement thereon that were already used for that property or improvement. To avoid that absurd result, we effectuate the Legislature's intent to protect lien claimants, *Fontainebleau*, 128 Nev. at 574, 289 P.3d at 1210, and construe NRS 108.222 to encompass materials used or to be used for a property or improvement thereon. This interpretation provides broader protection for materialmen and is consistent with the 2005 amendments to NRS 108.22144, which added the phrase "used or to be" used to the definition of "[m]aterial." 2005 Nev. Stat., ch. 428, § 8, at 1897; *see also In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (noting that an amendment to a statute can be persuasive evidence of what the Legislature intended in the previous statute).

We therefore hold that under NRS 108.222, a materialman has a lien upon a property and any improvements thereon for which he supplied materials. A materialman does not need to prove that the materials that he supplied were used or incorporated into the property or improvements; rather, he must prove that they were supplied for use on or incorporation into the property or improvements

thereon.[3] Accordingly, to the extent that *Opaco* is inconsistent with this construction, we conclude that it has been superseded by the Legislature's enactment of, and subsequent amendments to, the mechanic's lien statutes. *See generally Jacobson v. Estate of Clayton*, 121 Nev. 518, 119 P.3d 132 (2005) (determining that a legislative amendment superseded a previous and inconsistent decision by this court).

Supplied materials

[Headnotes 7-10]

With this holding in mind, we review the district court's finding that respondent supplied steel for the six properties and projects at issue. A district court's findings must be supported by substantial evidence. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). "[W]here conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party." *Id.*

We conclude that the district court's finding that respondent delivered the steel at issue is supported by substantial evidence. While nineteen of the eighty bills of lading lacked consignee signatures, they contained two other signatures from the shipping manager and truck driver. And, although Moser admitted that he was uncertain that the nineteen orders lacking consignee signatures were delivered to the proper addresses, appellants never objected to respondent's lien notices. Finally, each project used the type of steel that respondent supplied, and Carroll acknowledged that respondent was owed approximately $1,000,000 for materials it provided. Construing the conflicting evidence in favor of respondent as the prevailing party, a reasonable mind might accept the available evidence as adequate to support the district court's conclusion.

Based on the foregoing, we affirm the district court's decision that respondent satisfied NRS 108.222's requirements and established liens on the six properties.

Waiver

[Headnote 11]

Having determined that respondent established a valid mechanic's lien for each of the six properties, we now consider appellants' waiver argument. NRS 108.2457(1) provides specific guidelines for waivers and releases, stating in pertinent part:

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[3]This holding in no way detracts from NRS Chapter 108's other requirements to perfect and execute a lien. Recognizing the district court's diligence in examining our sister state courts' split on this issue, we decline to rely on their precedent in reaching our decision because Nevada's mechanic's lien statutes contain unique language. *Fontainebleau*, 128 Nev. at 575, 289 P.3d at 1211.

> Any written consent given by a lien claimant that waives or limits his lien rights is unenforceable unless the lien claimant:
>
> (a) Executes and delivers a waiver and release that is signed by the lien claimant or his authorized agent in the form set forth in this section; and
>
> (b) In the case of a conditional waiver and release, receives payment of the amount identified in the conditional waiver and release.

Based on these provisions, appellants assert that respondent waived its liens on the Lake Mead and Silver Creek properties because Cartwright was respondent's authorized agent and executed unconditional waiver and lien release forms for those properties per NRS 108.2457(1)(a). Respondent replies that Cartwright lacked authority to bind respondent when signing the lien release forms.

The document at issue is alleged to be an unconditional waiver, eliminating NRS 108.2457(1)(b)'s applicability. Therefore, unless the waiver at issue was signed and delivered by the lien claimant or its authorized agent, the waiver was unenforceable. *See* NRS 108.2457(1)(a). Because delivery is not at issue, we only consider whether Cartwright was authorized to bind respondent.

[Headnote 12]

Generally, the existence of an agency is a question of fact. *N. Nev. Mobile Home Brokers v. Penrod*, 96 Nev. 394, 397, 610 P.2d 724, 726 (1980). Accordingly, this court will uphold the district court's agency determination as long as it is "not clearly erroneous" and "supported by substantial evidence." *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013).

[Headnotes 13-15]

"To bind a principal, an agent must have actual authority . . . or apparent authority." *Dixon v. Thatcher*, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987). Although we have discussed actual authority in the past, we have never expressly defined it. We now adopt the Restatement's definition. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01 (2006). When examining whether actual authority exists, we focus on an agent's reasonable belief. *Id.* § 2.02 & cmt. e ("Whether an agent's belief is reasonable is determined from the viewpoint of a reasonable person in the agent's situation under all of the circumstances of which the agent has notice.").

Here, Cartwright admitted that she lacked authority to execute the lien release forms. Her limited job duties validate this admission. Although Cartwright's signature on the Lake Mead notice of intention to furnish materials purported to make her signature binding for

all matters related to respondent's liens for the Lake Mead property, the notice lacked an appropriate authorizing signature. Additionally, while Moser directed Cartwright to prepare the lien release forms, nothing in his email suggested that Cartwright should or could sign them. Thus, substantial evidence supports the district court's finding that Cartwright lacked actual authority because she had no reasonable basis for believing that respondent authorized her to sign the release forms.

[Headnotes 16-19]

"Apparent authority is 'that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself as possessing, under such circumstances as to estop the principal from denying its existence.'" *Dixon*, 103 Nev. at 417, 742 P.2d at 1031 (quoting *Myers v. Jones*, 99 Nev. 91, 93, 657 P.2d 1163, 1164 (1983)). As stated in *Ellis v. Nelson*:

> [T]here can be reliance only upon what the principal himself has said or done, or at least said or done through some other and authorized agent. The acts of the agent in question can not be relied upon as alone enough to support [this theory]. If his acts are relied upon[,] there must also be evidence of the principal's knowledge and acquiescence in them. Moreover, . . . the reliance must have been a reasonable one . . . .

68 Nev. 410, 419, 233 P.2d 1072, 1076 (1951) (internal quotation marks omitted).

Appellants offer no persuasive evidence that respondent held Cartwright out as having authority to certify the lien release forms. Therefore, under *Ellis*, appellants must show that they reasonably relied on Cartwright's acts, and that respondent knew of and acquiesced to those acts. Appellants arguably could have relied on two of Cartwright's acts: her providing them with the notice of intention to furnish materials that purportedly gave her authority to bind respondent, but was signed only by herself, and her subsequent execution of the two lien release forms. However, even assuming appellants reasonably relied on these acts, they offered no persuasive evidence or argument that respondent knew of or acquiesced to the acts. Thus, substantial evidence also supports the district court's finding that Cartwright lacked apparent authority.

Accordingly, Cartwright was not an authorized agent under NRS 108.2457(1)(a) and could not have released the liens for the Lake Mead and Silver Creek properties on respondent's behalf. We therefore affirm this portion of the district court's decision.

Surety bonds

[Headnote 20]

Appellants argue that the district court erred by ordering the sale of the Lake Mead, Silver Creek, Anthem, and Horizon properties.

Specifically, appellants claim that the posting of surety bonds for the four properties in compliance with NRS Chapter 108 released each property's mechanic's lien. Respondent contends that the district court ordered the sale of the four properties to satisfy the judgment only if the bonds were insufficient.[4]

Under NRS 108.2413, "[a] lien claimant's lien rights or notice of lien may be released upon the posting of a surety bond in the manner provided in NRS 108.2415 to 108.2425, inclusive." "To obtain the release of a lien for which notice of lien has been recorded against the property, the principal and a surety must execute a surety bond in an amount equal to 1.5 times the lienable amount in the notice of lien . . . ." NRS 108.2415(1). "Subject to the provisions of NRS 108.2425, the recording and service of the surety bond pursuant to . . . [NRS 108.2415(1)] releases the property described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien." NRS 108.2415(6)(a).

As the district court recognized in its order, appellants properly posted surety bonds for the Lake Mead, Silver Creek, Anthem, and Horizon properties, releasing the liens on these properties. NRS 108.2415(6). Respondent did not challenge the validity of the surety bonds, and thus, each surety bond replaced its corresponding property as security for the lien. *Id.* This means that a judgment awarded to respondent for one of those four properties would not be against the property, but against the respective surety, up to the amount of the bond, and against the principal for any amounts in excess of the bond amount. NRS 108.2421(6); NRS 108.2423(1). The total judgment amount includes the lienable amount, plus costs, attorney fees, and interest under NRS 108.237. *See* NRS 108.2421(6).

[Headnote 21]

For a property not released by a surety bond, NRS 108.239(10) provides that, upon determining the lien amounts owed on that property, a district court must order the sale of the property to satisfy all amounts awarded to a lien claimant. Amounts awarded to a prevailing lien claimant in such a case include the lienable amount due, interest, attorney fees, and costs. NRS 108.237. However, "a property subject to a mechanic's lien should not be responsible for the improvement costs of another property. . . . [A]pportionment must be adjudicated on the merits to determine the appropriate charge attributable to each individual property." *Pickett v. Comanche Constr., Inc.*, 108 Nev. 422, 430, 836 P.2d 42, 47 (1992). In other words, a district court cannot order the sale of a property to satisfy a lien on a separate property or charges associated with that lien per NRS 108.237.

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[4]All references to NRS Chapter 108 in this section addressing appellants' surety bonds refer to the 2005 enactment in effect when the bonds were filed.

Despite the statutory lien releases for the Lake Mead, Silver Creek, Anthem, and Horizon properties, the district court ordered these properties, along with the Montecito and Simmons properties, to be sold in satisfaction of the total judgment. In doing so, the district court erred for the following reasons. First, the district court failed to determine the total appropriate charge attributable to each individual property, *Pickett*, 108 Nev. at 430, 836 P.2d at 47, making it impossible to determine whether the applicable bonds or property sales would satisfy those judgments. Second, the district court ordered the sale of the Lake Mead, Silver Creek, Anthem, and Horizon properties despite the fact that surety bonds had been posted for these properties, releasing their respective liens.[5] We therefore reverse the district court's decision as to these issues.

On remand, the district court must calculate the appropriate charge attributable to each property based on the principal, pre- and post-judgment interest, and apportioned shares of attorney fees and costs. The district court must then charge the Montecito and Simmons properties their respective amounts of the judgment, and charge the four surety bonds their respective amounts.[6] The district court may then order the Montecito and Simmons properties sold, and enter judgment against the sureties on their respective bonds for the other four properties. Only upon showing that an individual surety bond is insufficient in relation to its respective charge can the district court take further action against that bond's principal to satisfy that judgment.

Based on the foregoing analysis, we affirm in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this opinion.

HARDESTY and CHERRY, JJ., concur.

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[5]The district court properly ordered the sale of the Montecito and Simmons properties because no surety bond released their respective liens. Still, the district court must charge the Montecito and Simmons properties their respective amounts of the judgment.

[6]We note that appellants listed a number of issues in their opening brief without substantively addressing them. Because appellants failed to provide us with relevant authority and cogent arguments on those issues, we decline to address them. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

DONNA WOOD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DANNY WOOD, APPELLANT, *v.* KEN GERMANN; MICHAEL LINTON; MERIDIAN FORECLOSURE SERVICE, INC., A FOREIGN CORPORATION; AND INDYMAC MORTGAGE SERVICES, RESPONDENTS.

No. 62768

August 7, 2014 331 P.3d 859

Appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Mortgagor filed petition for judicial review in a Foreclosure Mediation Program matter, challenging the validity of the purported assignment of his mortgage and the underlying promissory note to the trustee of a securitized mortgage loan trust. The district court denied the petition. Mortgagor appealed. The supreme court held that assignment of the mortgage and promissory note after the trust's closing date was not void, but was merely voidable.

Affirmed.

Brandon L. Phillips, Attorney at Law, PLLC, Las Vegas, for Appellant.

Brooks Hubley LLP and *Michael R. Brooks* and *Jeffrey J. Todd*, Las Vegas, for Respondents.

1. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   Foreclosure Mediation Program's judicial review process could include consideration of the veracity of the documents produced by or on behalf of the lender and was not limited to whether the proper documents were produced; purpose of the mediation program's document-production requirements was to ensure that the party seeking foreclosure was authorized to do so and that purpose could be defeated if homeowner were prohibited from challenging the veracity of a lender's documents.
2. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   The purpose of the Foreclosure Mediation Program's document-production requirements is to ensure that the party seeking to enforce the homeowner's promissory note and to proceed with foreclosure is actually authorized to do so.
3. MORTGAGES.
   Assignment of mortgagor's mortgage and underlying promissory note to trustee of securitized mortgage loan trust after the closing date established by the trust's pooling and servicing agreement (PSA) was not void, but was merely voidable, and thus mortgagor lacked standing to challenge the validity of the assignment; trustee was entitled to ratify the post-closing assignment.

Before HARDESTY, DOUGLAS and CHERRY, JJ.

OPINION

Per Curiam:

In this appeal, we examine the legal effect of a loan assignment from a homeowner's original lender to a subsequent purchaser when that assignment violates the terms of the original lender and subsequent purchaser's Pooling and Servicing Agreement (PSA). In particular, we consider whether a loan assignment that is executed after the PSA's "closing date" renders the assignment void and ineffective to transfer ownership of the homeowner's loan. We conclude that a post-closing-date loan assignment does not render the assignment void, but merely voidable, and that a homeowner therefore lacks standing to rely on the timing of the assignment as a basis for challenging the subsequent purchaser's authority to enforce the loan. We therefore affirm the district court's denial of appellant's petition for judicial review.

FACTS

In conjunction with obtaining a 2004 home loan from IndyMac Bank, F.S.B., appellant Danny Wood[1] executed a promissory note and deed of trust in favor of IndyMac F.S.B. The deed of trust indicated that IndyMac F.S.B. was appointing Mortgage Electronic Registration Systems, Inc. (MERS), as the legal beneficiary of the deed of trust. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 515-16, 286 P.3d 249, 256-57 (2012) (explaining this practice and considering its legal implications). Shortly thereafter, IndyMac F.S.B. contracted to sell appellant's loan and others to Deutsche Bank National Trust Company, who, in turn, was to maintain ownership of these loans as the trustee for investors of a securitization trust. *See BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 173 (2d Cir. 2012) (summarizing the process of loan securitization); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (same). IndyMac F.S.B.'s and Deutsche Bank's respective obligations were spelled out in a PSA. As relevant to this appeal, the PSA required IndyMac F.S.B. to transfer all subject loans into the trust by a September 2004 "closing date" and provided that IndyMac F.S.B. would retain the servicing rights to the transferred loans.

Appellant defaulted on his loan and elected to participate in Nevada's Foreclosure Mediation Program (FMP) in 2012. Appellant, who was not represented by counsel, attended mediation with respondent IndyMac Mortgage Services, who appeared as Deutsche

[1]While this appeal was pending, Donna Wood, as personal representative of Danny Wood's estate, was substituted as the appellant. NRAP 43(a)(1).

Bank's loan servicer and representative.[2] Among other documents, IndyMac Mortgage Services produced certified copies of appellant's original promissory note that IndyMac F.S.B. had endorsed in blank, appellant's deed of trust, and an assignment from MERS purporting to assign appellant's deed of trust and promissory note to Deutsche Bank in January 2012. The mediation concluded unsuccessfully, with the mediator noting summarily that appellant disputed whether IndyMac Mortgage Services had complied with the FMP's document-production requirements.

Appellant, then represented by counsel, filed a petition for judicial review in district court. Appellant argued that his loan had been improperly securitized and that, consequently, IndyMac Mortgage Services had failed to establish that Deutsche Bank owned his note and held the beneficial interest in his deed of trust. Specifically, according to appellant, because the terms of the PSA required appellant's original lender to transfer his loan to Deutsche Bank no later than the PSA's September 2004 closing date, the January 2012 MERS assignment necessarily violated the PSA's terms and was therefore "void." The district court denied appellant's petition for judicial review, and this appeal followed.

DISCUSSION

[Headnotes 1, 2]

On appeal, appellant maintains his argument that the January 2012 MERS assignment was "void" because it was executed after the PSA's closing date. According to appellant, because the assignment was void, respondents therefore failed to produce the documents necessary to demonstrate that Deutsche Bank was the entity entitled to enforce his note and to foreclose.[3] While appellant points

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[2]IndyMac F.S.B., which was Deutsche Bank's original servicer and appellant's original lender, subsequently entered FDIC receivership, and OneWest Bank acquired IndyMac F.S.B.'s assets. Respondent IndyMac Mortgage Services is a division of OneWest Bank. Although the other named respondents in this appeal were involved to some extent in the underlying mediation, the issues presented in this appeal do not directly concern those respondents.

[3]Respondents suggest that the FMP judicial review process should be limited to determining whether the required documents have been produced and that a homeowner's concerns regarding the veracity of those documents are beyond the FMP's limited scope. We disagree with this suggestion. As this court has repeatedly recognized, the purpose of the FMP's document-production requirements is to ensure that the party seeking to enforce the homeowner's promissory note and to proceed with foreclosure is actually authorized to do so. *Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 691, 290 P.3d 249, 251 (2012); *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 513-14, 286 P.3d 249, 255 (2012); *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011). It is not difficult to envision how this purpose might be defeated if a homeowner were prohibited from challenging the veracity of a lender's documents. Thus, we reject respondents' broader proposition. To

to an unpublished New York trial court decision in arguing that an assignment executed after a PSA's closing date is void, *see Wells Fargo Bank, N.A. v. Erobobo*, No. 31648/2009, 2013 WL 1831799, at *8 (N.Y. Sup. Ct. Apr. 29, 2013), and while some authority exists to support that argument, *see, e.g.*, *Glaski v. Bank of Am., N.A.*, 160 Cal. Rptr. 3d 449, 463 (Ct. App. 2013), most courts to consider this issue instead hold that the assignment is voidable at the option of the parties to the PSA.

These courts have recognized that a PSA is a contract between the originating lender and the subsequent purchaser/trustee and that, under traditional principles of contract law, a contracting party is capable of ratifying conduct that is done in violation of the contract. *See, e.g.*, *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 86-89 (2d Cir. 2014); *Calderon v. Bank of Am., N.A.*, 941 F. Supp. 2d 753, 766-67 (W.D. Tex. 2013); *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 473-74 (Vt. 2013). Thus, although a post-closing-date loan assignment violates the terms of the PSA, these courts conclude that such an assignment is not void,[4] but is merely voidable, because the trustee has the option of accepting the loan assignment despite its untimeliness. *See, e.g.*, *Rajamin*, 79 F.3d at 89; *Calderon*, 941 F. Supp. 2d at 766-67; *Dernier*, 87 A.3d at 474. Applying these traditional principles of contract law, these courts further hold that the homeowner, who is neither a party to the PSA nor an intended third-party beneficiary, lacks standing to challenge the validity of the loan assignment. *See, e.g.*, *Rajamin*, 79 F.3d at 86-87; *Calderon*, 941 F. Supp. 2d at 767; *Dernier*, 87 A.3d at 474-75.

[Headnote 3]

We are persuaded by the reasoning of these courts because their reasoning comports with Nevada law regarding who is entitled to enforce a contract.[5] *See Morelli v. Morelli*, 102 Nev. 326, 328, 720

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the extent that respondents are simply suggesting that not all document-related improprieties call into question a party's authority to enforce the note and to foreclose (and may therefore not require further district court scrutiny), we agree with this proposition.

[4]A scenario in which a loan assignment might be void is where the assignor did not possess the rights it was purporting to assign. *See Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 291 (1st Cir. 2013). Here, while appellant raises various arguments regarding the authority of MERS to assign his loan, this court has confirmed MERS' authority to assign a loan on behalf of an original lender or the original lender's successor. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 517, 286 P.3d 249, 258 (2012). Because appellant's deed of trust contains language identical to the language considered in *Edelstein*, appellant's arguments regarding MERS' authority do not warrant further consideration.

[5]Appellant contends that consideration of this issue should be governed by New York trust law, which, under N.Y. Estates, Powers & Trusts Law § 7-2.4 (McKinney 2002), purportedly renders a trustee's ultra vires act void. We note that the "vast majority" of courts to consider this argument, *Butler v. Deutsche Bank Trust Co. Ams.*, 748 F.3d 28, 37 n.8 (1st Cir. 2014), including those that

P.2d 704, 705-06 (1986) (recognizing that a nonparty to a contract has standing to enforce the contract only when the nonparty is an intended third-party beneficiary). Thus, we conclude that the January 2012 MERS assignment was not void, but was merely voidable, as Deutsche Bank was entitled to ratify the post-closing-date loan assignment; and appellant, who is neither a party nor an intended third-party beneficiary of the PSA, lacked standing to challenge the assignment's validity. Consequently, by appearing at the mediation and producing certified copies of appellant's original promissory note, deed of trust, and the January 2012 MERS assignment, IndyMac Mortgage Services produced the documents necessary to establish that Deutsche Bank was the entity entitled to enforce appellant's note and to proceed with foreclosure. NRS 107.086(4) and (5) (2011)[6] (providing that a deed of trust beneficiary must bring to the mediation the original or a certified copy of the deed of trust, mortgage note, and each assignment of the deed of trust or note, and that the beneficiary or its authorized representative must participate in good faith in order to obtain an FMP certificate); *see Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 474, 255 P.3d 1275, 1278-79 (2011) (discussing document-production requirements under the FMP's statutory and rule provisions). The district court therefore properly denied appellant's petition for judicial review and ordered the issuance of an FMP certificate. *Edelstein*, 128 Nev. at 521, 286 P.3d at 260 (noting that this court defers to the district court's factual determinations and reviews de novo its legal determinations in appeals from orders resolving FMP petitions for judicial review).

CONCLUSION

A loan assignment made in violation of a PSA is not void, but merely voidable and may be ratified or rejected at the option of the parties to the PSA. Because the homeowner is neither a party to nor an intended beneficiary of the PSA, the homeowner lacks standing to contest the assignment's validity. Here, although respondents produced an assignment at the mediation that was executed after the PSA's closing date, the assignment was nevertheless effective to transfer ownership of appellant's loan to Deutsche Bank. Conse-

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this opinion follows, *see Rajamin*, 79 F.3d at 88-90; *Calderon*, 941 F. Supp. 2d at 766; *Dernier*, 87 A.3d at 473-75, have rejected the contention that a loan assignment in violation of a PSA is void. *See also Bank of Am. Nat'l Ass'n v. Bassman FBT, L.L.C.*, 981 N.E.2d 1, 8-9 (Ill. App. Ct. 2012) (reaching the same conclusion).

[6]Effective October 1, 2013, the Legislature added a new subsection 4 to NRS 107.086. *See* 2013 Nev. Stat., ch. 536, §§ 3, 6(2), at 3480, 3484. While the previous subsections 4 and 5 were not substantively changed, they are now codified at NRS 107.086(5) and (6) (2013). Because the mediation in this case took place before the 2013 amendment's effective date, this opinion refers to the version of NRS 107.086 in effect at that time.

quently, respondents produced the documents necessary to establish that Deutsche Bank was entitled to enforce appellant's note and to proceed with foreclosure. We therefore affirm the judgment of the district court.

IMPERIAL CREDIT CORPORATION DBA A.I. CREDIT CORPORATION, A NEW HAMPSHIRE CORPORATION; AND THOMAS VAIL, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JESSIE ELIZABETH WALSH, DISTRICT JUDGE, RESPONDENTS, AND LEERAD, LP; VIRGINIA BELT; AND PATRICIA MCGILL, REAL PARTIES IN INTEREST.

No. 65737

August 7, 2014 331 P.3d 862

Original petition for a writ of mandamus challenging a district court order denying a motion to associate out-of-state counsel.

Following the departure of their attorney from the law firm representing them in underlying litigation, petitioners sought to associate out-of-state counsel to represent them. The district court summarily denied the motion. Petitioners petitioned for writ of mandamus. The supreme court held that: (1) on an issue of first impression, possibility of delay was not valid basis for denial of request to associate out-of-state counsel; and (2) petitioners were not required to establish that out-of-state counsel was more capable of handling case than local counsel in order to warrant association of out-of-state counsel.

Petition granted.

Snell & Wilmer, LLP, and *Kelly H. Dove* and *Leon F. Mead, II*, Las Vegas, for Petitioners.

Rainey Legal Group, PLLC, and *Patrick C. McDonnell* and *Charles C. Rainey*, Las Vegas, for Real Parties in Interest.

1. MANDAMUS.
   A writ of mandamus is available to control a district court's arbitrary or capricious exercise of its discretion. NRS 34.160.
2. MANDAMUS.
   While the consideration of a writ of mandamus petition is within the supreme court's sole discretion, the court may address the merits of a petition that presents important issues in need of clarification. NRS 34.160.
3. ATTORNEY AND CLIENT.
   Possibility of delay did not provide a valid basis for denying request to associate out-of-state counsel who met all requirements of rule governing

out-of-state counsel admission, where delay was not an appropriate consideration under rule governing out-of-state counsel admission, and client repeatedly asserted that it had no desire to delay the trial, and if client were to later seek to continue the trial based on its retention of new counsel, the district court itself had the power to prevent any delay of trial through the exercise of its discretion to deny any such request. SCR 42.

4. Attorney and Client.
   The admission of out-of-state counsel to practice in a state's courts for the purpose of conducting a particular case is routinely referred to as pro hac vice admission. SCR 42.
5. Appeal and Error.
   A district court's discretionary power is subject only to the test of reasonableness, which requires a determination of whether there is logic and justification for the result.
6. Appeal and Error.
   The district courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.
7. Appeal and Error.
   A district court's discretion is improperly exercised when the judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the district court.
8. Attorney and Client.
   When prospective pro hac vice counsel satisfies all of the requirements for admission under the rule governing admission of out-of-state counsel, and a proper motion to associate out-of-state counsel is filed in accordance with that rule, the motion to associate should generally be granted as a matter of course. SCR 42.
9. Attorney and Client.
   When considering a motion to associate out-of-state counsel, the district court should generally limit its analysis to the requirements for pro hac vice admission set forth in the rule governing the admission of out-of-state counsel, such that the consideration of criteria outside those set forth in that rule may well constitute an arbitrary and capricious exercise of the district court's discretion. SCR 42.
10. Attorney and Client.
    Demonstration that out-of-state counsel was more capable of handling case than local counsel was not required in order to warrant grant of request to associate out-of-state counsel, when nothing in the rule governing association of out-of-state counsel required a party seeking to associate out-of-state counsel to demonstrate that prospective counsel was more capable of handling its case than local counsel. SCR 42.

Before Hardesty, Douglas and Cherry, JJ.

OPINION

Per Curiam:

Following the departure of their attorney from the law firm representing them, petitioners sought to associate out-of-state counsel in the underlying action. Although these attorneys met all of SCR 42's requirements for admission to practice, the district court denied the

motion to associate, out of concern that granting the request would delay the imminent start of trial and because petitioners failed to show that out-of-state counsel were better able to handle the case than their local counsel. The question we must determine is whether a district court may deny a motion to associate out-of-state counsel who satisfy all of SCR 42's requirements. We conclude that such motions should generally be granted as a matter of course and that, in resolving such a request, the district court should typically limit its analysis to the requirements for admission set forth in SCR 42.

In the instant petition, we hold that the possibility of delay did not provide a valid basis for denying the association request, as petitioners repeatedly stated that they did not wish to delay trial and the district court itself can control whether a delay occurs through its resolution of any requests to continue the trial. Further, any reliance by the district court on petitioners' purported failure to prove that out-of-state counsel was more capable of handling their case was improper, as SCR 42 contains no such requirement. The denial of the motion to associate was therefore an arbitrary and capricious exercise of the district court's discretion, and extraordinary relief was warranted to compel the district court to reverse this determination.

FACTS AND PROCEDURAL HISTORY

Petitioners Imperial Credit Corporation, d.b.a. A.I. Credit Corporation, and Thomas Vail (collectively, Imperial Credit) were initially represented by Andras Babero of the law firm Black & Lobello in the defense of a lawsuit filed by real parties in interest Leerad LP, Virginia Belt, and Patricia McGill (collectively, Leerad). Several months before trial was scheduled to commence, Babero resigned his employment with Black & Lobello and a newly hired attorney at the firm was assigned to Imperial Credit's case. Concerned that new counsel was not sufficiently familiar with its insurance premium financing business to adequately represent it, Imperial Credit retained out-of-state attorneys Cynthia G. Burnside and A. Andre Hendrick, both of whom had previously handled similar cases for the company. After Burnside and Hendrick complied with SCR 42(3)-(4)'s procedural requirements for out-of-state attorneys seeking admission to practice in Nevada courts, the company's local counsel filed in the district court a motion to associate Burnside and Hendrick. *See* SCR 42(3)(c).

Without conducting a hearing on the motion, the district court summarily denied it citing only SCR 42(6), which places the decision to grant or deny a motion to associate within the district court's discretion. Imperial Credit subsequently sought reconsideration of that decision, which was also denied, and this emergency writ petition followed.

As directed, both respondent the Honorable Jessie Walsh, District Judge, and real party in interest Leerad have filed answers to the petition, and Imperial Credit has filed a reply. Because of the need for expedited resolution of the writ petition in advance of the impending June 16, 2014, trial date, this court granted extraordinary relief through an unpublished order with the caveat that an opinion would follow as the petition raised important issues in need of clarification. We now explain our holding.

DISCUSSION

Standard of review

[Headnotes 1, 2]

A writ of mandamus is available to control a district court's arbitrary or capricious exercise of its discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. While the consideration of a writ petition is within this court's sole discretion, *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), this court may address the merits of a petition that presents important issues in need of clarification. *Mineral Cnty. v. State, Dep't of Conservation & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). Because the propriety of a district court's denial of a motion to associate out-of-state counsel who satisfies all of SCR 42's admission requirements constitutes an important legal issue requiring clarification, and because Imperial Credit has no plain, speedy, and adequate remedy at law, we exercise our discretion to consider the merits of this petition. NRS 34.170; *Mineral Cnty.*, 117 Nev. at 243, 20 P.3d at 805.

The practice of attorneys not admitted in Nevada

[Headnote 3]

In challenging the denial of its motion to associate out-of-state counsel, Imperial Credit argues that the district court's decision was improper because Burnside and Hendrick met all of the requirements for pro hac vice admission set forth in SCR 42. In response, Judge Walsh contends that Imperial Credit failed to demonstrate that Burnside and Hendrick were better able to represent it than their local counsel. And both Judge Walsh and Leerad assert that allowing Imperial Credit to associate new counsel shortly before trial would delay trial to the prejudice of Leerad, and thus, denying the motion to associate was a proper exercise of the district court's discretion.

[Headnote 4]

SCR 42 authorizes an attorney licensed to practice law in another state, but not currently admitted to practice law in Nevada, to apply for a limited admission to practice in a particular action

or proceeding pending in Nevada state courts. The admission of out-of-state counsel to practice in a state's courts under these circumstances is routinely referred to as pro hac vice admission. *See Belue v. Leventhal*, 640 F.3d 567, 569 (4th Cir. 2011) (defining pro hac vice admission as a temporary admission "'for the purpose of conducting a particular case'" (quoting *Black's Law Dictionary* 1331 (9th ed. 2009))). In Nevada, an attorney seeking pro hac vice admission must file a verified application with the State Bar of Nevada and provide, among other things, certificates of good standing from the states where the applicant attorney has been admitted, information regarding the attorney's disciplinary history, and whether the attorney has previously applied for pro hac vice admission in Nevada within the last three years. SCR 42(3)-(4). If the State Bar grants the application, then local counsel may file a motion to associate the attorney in the district court. SCR 42(3)(c).

The resolution of a motion to associate out-of-state counsel rests within the district court's discretion. SCR 42(6). But this court has also recognized the importance of allowing parties to be represented by the counsel of their choice. *See Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 53, 152 P.3d 737, 743 (2007) (holding that a party's interest in being represented by counsel of its choice must be considered before disqualifying a party's attorney); *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1257, 148 P.3d 694, 702 (2006) (holding that when a party's right to counsel of its choice conflicts with a judge's duty to sit, the party's right generally prevails). Thus, in light of the importance ascribed to a party's right to select the counsel of his or her choice, the issue becomes whether the district court may properly deny a motion to associate out-of-state counsel when the prospective applicant meets all of the requirements for admission set forth in SCR 42.

We have not previously addressed the propriety of a district court's denial of a motion to associate out-of-state counsel under these circumstances, but other courts that have addressed this issue have concluded that there is generally no good reason to deny a motion to associate in the situation presented by this case. *See THI Holdings, L.L.C. v. Shattuck*, 93 So. 3d 419 (Fla. Dist. Ct. App. 2012) (concluding that when out-of-state counsel meet all of the requirements for pro hac vice admission, the motion for admission should typically be granted); *Tobacco Superstore, Inc. v. Darrough*, 207 S.W.3d 511, 517 (Ark. 2005) (determining that, when the pro hac vice applicant meets all of the requirements for admission, "there [is] simply no good reason" to deny the request for admission). The Florida District Court of Appeal's decision in this regard in *THI Holdings* is particularly persuasive.

In *THI Holdings*, the court addressed a trial court's reliance on criteria not contained in Florida's rule governing pro hac vice admission to deny a motion for admission brought by out-of-state counsel who met all of the requirements for admission to practice in Florida courts. 93 So. 3d at 424-25. The *THI Holdings* court began its analysis by noting that, while the denial of such a motion rests within the district court's discretion, the ruling should nonetheless be based on matters appearing in the record before the court, such as information casting doubt upon the applicant's admission to practice in other states or whether the applicant is in good standing in the jurisdictions in which he or she has been admitted. *Id.* at 423. Further, the court held that the discretionary nature of such motions does not free the district court to deny the request on any grounds that it sees fit, and thus, when out-of-state counsel satisfies all of the requirements set forth in the rule governing pro hac vice admission in Florida, the motion "should usually be granted on a pro forma basis." *Id.* As a result, the *THI Holdings* court determined that the failure of the subject attorney to meet criteria outside of the established requirements for admission cannot constitute "legally permissible" grounds for refusing to admit out-of-state counsel to practice. *Id.* at 424. Accordingly, the court concluded that because the out-of-state attorney met all of the rule-based requirements for admission, extraordinary relief was warranted to rectify the district court's denial of the motion to admit counsel to practice. *Id.* at 424-25.

[Headnotes 5-7]

Similar to the situation presented in *THI Holdings*, in Nevada, SCR 42(6) places the resolution of a motion to associate out-of-state counsel within the district court's discretion. But the district court's discretion in this regard is not unlimited. Instead, the district court's " 'discretionary power is subject only to the test of reasonableness, [which] requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.' " *THI Holdings*, 93 So. 3d at 423 (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)). Stated another way, such discretion is improperly exercised " 'when the judicial action is arbitrary, fanciful, or unreasonable,' " or " 'where no reasonable [person] would take the view adopted by the trial court.' " *Id.* at 422-23 (quoting *Canakaris*, 382 So. 2d at 1203); *see also Goodman v. Goodman*, 68 Nev. 484, 487, 236 P.2d 305, 306 (1951) (noting, in examining the exercise of judicial discretion, that a "court cannot act oppressively or arbitrarily under pretence of exercising discretion. Such arbitrary or oppressive action under color of exercising discretion is called abuse of discretion." (internal citations omitted)).

[Headnotes 8, 9]

Under these circumstances, we adopt the position taken by the *THI Holdings* court and conclude that, when prospective pro hac vice counsel satisfies all of the requirements for admission under SCR 42, and a proper motion to associate out-of-state counsel is filed in accordance with that rule, the motion to associate should generally be granted as a matter of course. *THI Holdings*, 93 So. 3d at 423. And when considering a motion to associate, the district court should generally limit its analysis to the requirements for pro hac vice admission set forth in SCR 42, such that the consideration of criteria outside those set forth in that rule may well constitute an arbitrary and capricious exercise of the district court's discretion. *THI Holdings*, 93 So. 3d at 422-23.

Applying this rule to the motion to associate at issue here, our examination of the district court's denial of Imperial Credit's motion to associate Burnside and Hendrick necessarily begins with the fact that these attorneys met all of SCR 42's admission requirements. Among other things, both attorneys are in good standing with the state bars of the jurisdictions in which they are admitted, they have had no disciplinary actions taken against them, and they have not previously applied for pro hac vice admission in this state. *See generally* SCR 42 (setting forth the requirements and procedures for requesting and obtaining pro hac vice admission); SCR 42(6)(a) (labeling more than five pro hac vice appearances in three years as excessive, unless special circumstances exist).

Despite Burnside's and Hendrick's complete satisfaction of SCR 42's admission requirements, however, the district court nonetheless denied Imperial Credit's motion to associate these attorneys, apparently out of concern that granting the motion shortly before trial would delay the resolution of the underlying case. But as Imperial Credit points out, it has repeatedly asserted that it has no desire to delay the trial, and if Imperial Credit were to later seek to continue the trial based on its retention of new counsel, the district court itself has the power to prevent any delay of trial through the exercise of its discretion to deny any such request. *See Bongiovi v. Sullivan*, 122 Nev. 556, 570, 138 P.3d 433, 444 (2006) (noting that the grant or denial of a trial continuance rests within the district court's discretion). As a result, the assertion that Imperial Credit's association of out-of-state counsel might delay trial cannot possibly provide a valid basis for denying the motion to associate.

[Headnote 10]

Additionally, to the extent that Judge Walsh justified her denial of the motion to associate by asserting that Imperial Credit failed to demonstrate that out-of-state counsel was more capable of handling its case than local counsel, her reliance on this position was

misplaced. Nothing in SCR 42 requires a party seeking to associate out-of-state counsel to demonstrate that prospective counsel is more capable of handling its case than local counsel. Thus, the reliance on this factor, which lies outside of SCR 42's requirements to deny the motion to associate constitutes an arbitrary and capricious exercise of the district court's discretion. *THI Holdings*, 93 So. 3d at 423.

CONCLUSION

The district court's refusal to allow Imperial Credit to associate pro hac vice counsel who met all of the requirements for admission was an arbitrary and capricious exercise of discretion. We therefore granted the petition. Accordingly, the clerk of this court issued a writ of mandamus directing the district court to vacate its order denying the motion to associate pro hac vice counsel and to instead enter an order granting that motion.

CHRISTOPHER BROWN, Appellant, *v.*
E.K. McDANIEL, Warden, Respondent.

No. 60065

August 7, 2014 331 P.3d 867

Appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

After denial of post-conviction petition for writ of habeas corpus pursuant to conviction for first-degree murder with use of a deadly weapon was affirmed, petitioner filed second petition for writ of habeas corpus. The district court dismissed petition. Petitioner appealed. The supreme court, Hardesty, J., held that: (1) first post-conviction counsel's alleged ineffective assistance did not overcome procedural bars to second petition, and (2) petitioner failed to make showing of actual innocence.

Affirmed.

Cherry, J., with whom Saitta, J., agreed, dissented.

Rene Valladares, Federal Public Defender, and *Ryan Neil Norwood* and *Megan C. Hoffman*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent.

Steven S. Owens, Las Vegas, for Amicus Curiae Nevada District Attorneys Association.

Robert Arroyo, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Catherine Cortez Masto, Attorney General, and *Jeffrey M. Conner* and *Michael J. Bongard*, Deputy Attorneys General, Carson City, for Amicus Curiae Nevada Attorney General.

1. Habeas Corpus.
   In order to overcome statutory procedural bars to filing a post-conviction petition for writ of habeas corpus, petitioner must demonstrate good cause for delay, for failure to present a claim, or for successive presentation of a claim for which impediment external to the defense prevented petitioner from complying with procedural rules. NRS 34.726(1), 34.810(1)(b), (2), (3).
2. Criminal Law.
   There is no constitutional or statutory right to assistance of counsel in noncapital post-conviction proceedings. U.S. Const. amend. 6.
3. Criminal Law.
   Where there is no right to counsel, there can be no deprivation of effective assistance of counsel. U.S. Const. amend. 6.
4. Criminal Law.
   Petitioners who are sentenced to death have statutory right to appointment of counsel in their first post-conviction proceeding and are thus entitled to effective assistance of appointed counsel in that proceeding. U.S. Const. amend. 6; NRS 34.820(1)(a).
5. Habeas Corpus.
   Purpose of single post-conviction remedy and statutory procedural bars to filing post-conviction petitions for writ of habeas corpus is to ensure that petitioners are limited to one time through post-conviction system. NRS 34.726(1), 34.810(1)(b), (2), (3).
6. Habeas Corpus.
   Doctrine of procedural default applied by federal habeas courts is based in principles of comity; it is designed to ensure that state court judgments are accorded finality and respect necessary to preserve integrity of legal proceedings within system of federalism.
7. Habeas Corpus.
   State procedural bars to post-conviction habeas relief exist to implement policies independent from those animating federal doctrine of procedural default in habeas cases. NRS 34.726(1), 34.810(1)(b), (2), (3).
8. Habeas Corpus.
   Petitioner's claim that he received ineffective assistance from his first post-conviction counsel on petition for writ of habeas corpus, filed subsequent to murder conviction for which petitioner received noncapital sentence, did not establish good cause and prejudice sufficient to overcome procedural bars to petitioner's second post-conviction habeas petition, such that second petition was barred as untimely and successive; petitioner filed second post-conviction petition more than four years after issuance of remittitur on direct appeal from judgment of conviction, first petition was denied on the merits, and claims raised in second petition were, or could have been, raised in first petition. U.S. Const. amend. 6; NRS 34.726(1), 34.810(1)(b), (2), (3).

9. Habeas Corpus.
   In order to demonstrate fundamental miscarriage of justice to avoid procedural bar to post-conviction petition for writ of habeas corpus as successive, petitioner must make colorable showing of "actual innocence," which is factual innocence, not legal innocence.
10. Habeas Corpus.
    "Actual innocence," as required to demonstrate fundamental miscarriage of justice to avoid procedural bar to post-conviction petition for writ of habeas corpus as successive, means that it is more likely than not that no reasonable juror would have convicted him in light of new evidence.
11. Habeas Corpus.
    Petitioner failed to make showing of actual innocence, as required to demonstrate fundamental miscarriage of justice to avoid procedural bar to second post-conviction petition for writ of habeas corpus, challenging first-degree murder conviction as untimely and successive absent identification of new evidence of innocence; petitioner's argument of actual innocence relied on his legal claims that there was insufficient evidence of first-degree murder presented at trial and that his trial counsel provided him with ineffective assistance. U.S. Const. amend. 6.

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

Appellant Christopher Brown appeals from the district court's dismissal of his untimely and successive post-conviction petition for a writ of habeas corpus. At issue is whether, in light of the United States Supreme Court's recent decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), the ineffective assistance of post-conviction counsel may constitute good cause under NRS 34.726(1) and NRS 34.810 to allow a noncapital petitioner to file an untimely and successive post-conviction petition for a writ of habeas corpus. We conclude that *Martinez* does not alter our prior decisions that a petitioner has no constitutional right to post-conviction counsel and that post-conviction counsel's performance does not constitute good cause to excuse the procedural bars under NRS 34.726(1) or NRS 34.810 unless the appointment of that counsel was mandated by statute. *E.g.*, *Crump v. Warden*, 113 Nev. 293, 302-03, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 163-65, 912 P.2d 255, 257-58 (1996). Because Brown failed to overcome the procedural bars, we affirm the decision of the district court to dismiss the post-conviction petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

Brown was convicted of first-degree murder with the use of a deadly weapon and was sentenced to two consecutive terms of 20 to 50 years imprisonment. This court affirmed his judgment of convic-

tion on appeal in January 2006. *Brown v. State*, Docket No. 45026 (Order of Affirmance, January 11, 2006). The remittitur issued on February 7, 2006. Brown then filed a timely post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent him, and counsel filed a supplemental petition. The district court denied Brown's petition on the merits, and this court affirmed the district court's order. *Brown v. State*, Docket No. 51847 (Order of Affirmance, August 10, 2009).

On June 10, 2010, Brown filed a second post-conviction petition for a writ of habeas corpus, alleging claims of ineffective assistance of trial and appellate counsel. Brown conceded that his petition was untimely and successive but argued that he had good cause to excuse the procedural bars because his first post-conviction counsel had provided ineffective assistance by failing to present these claims in his first post-conviction petition, and because he was actually innocent and it would be a miscarriage of justice if his claims were procedurally barred. Brown filed a notice of supplemental authority alerting the district court to a then-pending case before the United States Supreme Court, *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court dismissed Brown's petition as procedurally barred pursuant to NRS 34.726(1) and NRS 34.810 because the petition was untimely and successive. The district court found that Brown failed to overcome the procedural bars because ineffective assistance of post-conviction counsel did not constitute cause to excuse the procedural bars and Brown did not demonstrate actual innocence.

DISCUSSION

Brown challenges the district court's determination that his claims were barred under NRS 34.726(1) and NRS 34.810. Specifically, he claims that he established "good cause" to excuse these procedural bars because his first post-conviction counsel was ineffective for failing to raise or preserve meritorious claims in his initial state post-conviction proceeding. He relies on the Supreme Court's decision in *Martinez*.

The applicable procedural bars

Nevada's statutory post-conviction scheme places procedural limits on the filing of a post-conviction petition for a writ of habeas corpus. NRS 34.726(1) provides for dismissal of a post-conviction habeas petition if it is not filed within one year after this court issues its remittitur from a timely direct appeal from the judgment of conviction or, if no appeal has been prosecuted, within one year from the entry of the judgment of conviction. *See Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). NRS 34.810(1)(b) provides for dismissal of claims where the petitioner's conviction was the result of a trial and the claims could have

been raised earlier. NRS 34.810(2) provides for dismissal of a second or successive petition if the grounds for the petition were already raised and considered on the merits in a prior petition or if the grounds could have been raised in a prior petition.

[Headnote 1]

To overcome these statutory procedural bars, a petitioner must demonstrate "good cause" for the default and actual prejudice. NRS 34.726(1); NRS 34.810(3). We have defined "good cause" as a "substantial reason . . . that affords a legal excuse." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (internal quotations omitted). To show good cause, a petitioner must demonstrate that an "impediment external to the defense" prevented him from complying with the procedural rules. *Passanisi v. Dir., Nev. Dep't of Prisons*, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)); *see also Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001).

Brown filed his second post-conviction petition more than four years after the issuance of remittitur on direct appeal from the judgment of conviction. His first petition was denied on the merits, and the claims that he raised in his second petition were, or could have been, raised in his first petition. Thus, as Brown concedes, his second petition is barred as untimely and successive unless he can demonstrate good cause for the default and actual prejudice. *See* NRS 34.726(1); NRS 34.810(2), (3). He asserts that the ineffective assistance of his prior post-conviction counsel provides cause and prejudice to excuse his failure to comply with Nevada's procedural rules governing post-conviction habeas petitions.

[Headnotes 2-4]

Our case law clearly forecloses Brown's contention. We have consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute "good cause" to excuse procedural defaults. *See McKague*, 112 Nev. at 163-65, 912 P.2d at 258; *cf. Crump*, 113 Nev. at 303 & n.5, 934 P.2d at 253 & n.5; *Mazzan v. Warden*, 112 Nev. 838, 841, 921 P.2d 920, 921-22 (1996). This is because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel."[1] *McKague*, 112 Nev. at 164-65, 912 P.2d at 258.

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[1]Petitioners who are sentenced to death have a statutory right to the appointment of counsel in their first post-conviction proceeding, *see* NRS 34.820(1)(a), and are thus entitled to effective assistance of appointed counsel in that proceeding. *See McKague*, 112 Nev. at 165 n.5, 912 P.2d at 258 n.5; *see also Crump*, 113 Nev. at 303 & n.5, 934 P.2d at 253 & n.5. In contrast, the appointment of post-conviction counsel to represent noncapital petitioners is subject to the district court's discretion as provided in NRS 34.750(1).

Martinez v. Ryan does not address state procedural bars

Brown argues that *Martinez* changes this court's jurisprudence holding that ineffective assistance of post-conviction counsel provides good cause to excuse a state procedural bar only when appointment of that counsel was mandated by statute. We disagree.[2]

Martinez, an Arizona state prisoner, filed a petition for a writ of habeas corpus in federal court raising claims of ineffective assistance of trial counsel. 566 U.S. at 6-7. Because those claims had been denied in state court based on a state procedural rule (they could have been raised in a prior state collateral proceeding), *id.* at 7, federal court review of their merits normally would have been precluded by the doctrine of procedural default, *id.* at 10. Martinez did not dispute that his claims had been rejected in state court based on an independent and adequate state ground but instead relied on an exception to the procedural default doctrine by which a state "prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Id*. In particular, he argued that he had good cause for the procedural default because counsel in his first state collateral proceeding was ineffective for failing to raise the ineffective-assistance-of-trial-counsel claims in that proceeding. *Id.* at 7.

The Supreme Court in *Martinez* thus considered "whether ineffective assistance in an initial-review collateral proceeding on claim of ineffective assistance at trial may provide cause for a procedural default *in a federal habeas proceeding*." *Id.* at 9 (emphasis added). The Supreme Court answered that question in the affirmative where state law provides that ineffective-assistance-of-trial-counsel claims must be raised in a collateral proceeding:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 17.

The Supreme Court, however, expressly declined in *Martinez* to decide whether a federal constitutional right to counsel exists in post-conviction proceedings and instead emphasized that its ruling

[2]The State contends that we need not address this argument because any rule allowing the ineffective assistance of post-conviction counsel to constitute "good cause" to excuse procedural bars would not be retroactively applied to Brown. We conclude that retroactivity is not at issue because the second petition was the first opportunity for Brown to assert the ineffectiveness of post-conviction counsel as good cause to excuse a state procedural bar.

was equitable in nature rather than constitutional.[3] *Id.* at 9, 13. The Court clarified that the equitable rule did not require the appointment of counsel in initial-review collateral proceedings in state court but rather permitted the State "to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits *in federal habeas proceedings*." *Id.* at 16 (emphasis added).

Martinez does not alter our decisions in *McKague* and *Crump* for two reasons. First, *Martinez* did not announce a constitutional right to counsel in post-conviction proceedings. Rather, the Court created an equitable exception to its decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), "that an attorney's negligence in a postconviction proceeding does not establish cause" so that a federal court may review a state prisoner's defaulted claim. *Martinez*, 566 U.S. at 15. Second, the *Martinez* decision is limited to the application of the procedural default doctrine that guides a federal habeas court's review of the constitutionality of a state prisoner's conviction and sentence. *See, e.g.*, *id.* at 5 (describing the question presented as "whether a federal habeas court may excuse a procedural default"). It says nothing about the application of state procedural default rules. Thus, *Martinez* does not call into question the validity of NRS 34.750(1), which provides for the discretionary appointment of counsel to represent noncapital habeas petitioners, nor does it mandate a change in our case law holding that noncapital petitioners have no right to the effective assistance of counsel in post-conviction proceedings and that the ineffectiveness of counsel representing a noncapital petitioner does not constitute good cause to excuse a state procedural bar.[4] *Accord State v. Escareno-Meraz*, 307 P.3d 1013, 1014 (Ariz. Ct. App. 2013) (concluding that "*Martinez* does not alter established Arizona law" that a defendant is not entitled to effective assistance of counsel in post-conviction proceedings); *Gore v. State*, 91 So. 3d 769, 778 (Fla. 2012) ("It appears that *Martinez* is directed toward federal habeas proceedings and is designed and intended to address issues that arise in that context."), *cert. denied*, 566 U.S. 930 (2012); *Martin v. State*, 386 S.W.3d 179, 185-86 (Mo. Ct. App. 2012) ("*Martinez* speaks

[3]The Court recognized that its decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), left open the question of "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 566 U.S. 8. The *Martinez* Court declined to answer that question. *Id.* at 8-9.

[4]We note that because Nevada requires that ineffective-assistance-of-trial-counsel claims be raised in a post-conviction petition rather than on direct appeal, s*ee, e.g.*, *Pellegrini*, 117 Nev. at 882, 34 P.3d at 534, the equitable rule from *Martinez* will apply to Nevada state petitioners in federal habeas proceedings.

only to federal habeas corpus procedure and does not establish a constitutional right to the effective assistance of post-conviction counsel."); *Commonwealth v. Saunders*, 60 A.3d 162, 165 (Pa. Super. Ct. 2013) ("While *Martinez* represents a significant development in federal habeas corpus law, it is of no moment with respect to the way Pennsylvania courts apply the plain language of the time bar set forth in [its post-conviction act]."), *cert. denied*, 134 S. Ct. 944 (2014); *Kelly v. State*, 745 S.E.2d 377, 377 (S.C. 2013) ("Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.").

Brown and amicus curiae Nevada Attorneys for Criminal Justice (NACJ) nonetheless urge this court to adopt the rationale from *Martinez* even if *Martinez* does not require us to do so.[5] Brown contends that the reasoning behind *Martinez*—promotion of comity, finality, and federalism—applies equally to state habeas proceedings, and Nevada's cause-and-prejudice analysis is nearly identical to the federal cause-and-prejudice standard. We decline Brown's invitation to adopt an equitable exception to the general rule in Nevada that the ineffective assistance of post-conviction counsel does not establish cause for a habeas petitioner's procedural default of an ineffective-assistance-of-trial-counsel claim unless the appointment of post-conviction counsel was mandated by statute.

[Headnote 5]

The exception pressed by Brown is contrary to the statutory language in NRS Chapter 34 and the clear legislative intent behind the statutes. Nevada's post-conviction statutes contemplate the filing of one post-conviction petition to challenge a conviction or sentence. This is reflected in the plain language of the statutes themselves. For example, instruction number five to the habeas corpus petition form found in NRS 34.735 directs petitioners to include in the petition "all grounds or claims for relief" regarding the conviction or sentence and warns petitioners that failure to do so could preclude them from filing future petitions,[6] and NRS 34.810 provides for dismissal of claims that could have been or were raised in a prior post-conviction proceeding, NRS 34.810(1)(b), (2). It is also reflected in the legislative history of the statutes, which were

[5]We invited the participation of amici curiae NACJ and the Nevada District Attorneys Association (NDAA) concerning the applicability of *Martinez* to state post-conviction proceedings.

[6]*See also* NRS 34.820(4) (providing that if petitioner has been sentenced to death and the petition is the first one challenging the validity of a conviction or sentence, "[t]he court shall inform the petitioner and the petitioner's counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding").

amended in 1991 to provide for a single post-conviction remedy, effective January 1, 1993. *See Pellegrini v. State*, 117 Nev. 860, 870-73, 876-77, 34 P.3d 519, 526-28, 530 (2001) (setting forth the history of Nevada's post-conviction remedies). The purpose of the single post-conviction remedy and the statutory procedural bars is "to ensure that petitioners would be limited to one time through the post-conviction system." *Id.* at 876-77, 34 P.3d at 530. As this court made clear in *Pellegrini*, "Nevada's lawmakers never intented for petitioners to have multiple opportunities to obtain post-conviction relief absent extraordinary circumstances." *Id.* at 876, 34 P.3d at 530. The rule advanced on Brown's behalf would circumvent the Legislature's "one time through the system" intent, as every petitioner who is appointed post-conviction counsel would then have an opportunity to litigate a second petition. The filing of successive (and most likely untimely) petitions would overload the court system, significantly increase the costs of post-conviction proceedings, and undermine the finality of the judgment of conviction, precisely what the Legislature was attempting to avoid in creating the single post-conviction remedy in NRS Chapter 34.[7] *See id.*; *see also State v. Eighth Judicial Dist. Court*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." (internal quotations omitted)).

The conflict between a rule similar to that in *Martinez* and Nevada's current statutory habeas scheme becomes more apparent when the remaining part of the *Martinez* rule is considered. *Martinez* does not just allow the federal habeas courts to consider the merits of an ineffective-assistance-of-trial-counsel claim that was procedurally defaulted in state court where the petitioner was represented by allegedly ineffective post-conviction counsel in the initial-review collateral proceeding. It also allows the federal habeas courts to consider the merits of a procedurally defaulted ineffective-assistance-of-trial-counsel claim where the petitioner *did not have counsel* in the initial-review collateral proceeding. 566 U.S. at 16. Although Brown only urges this court to follow *Martinez* with respect to "cause" based on ineffective assistance of post-

[7]The lack of finality resulting from *Martinez*'s equitable rule was a major criticism by the dissenting justices:

> Criminal conviction ought to be final before society has forgotten the crime that justifies it. When a case arrives at federal habeas, the state conviction and sentence at issue (never mind the underlying crime) are already a dim memory, on average more than six years old (seven years for capital cases).

Martinez, 566 U.S. at 26 (Scalia, J., dissenting).

conviction counsel, it would be difficult for us to follow one part of *Martinez* without the other as both parts of the holding are based on the same idea—that "a prisoner likely needs an effective attorney" in order "[t]o present a claim of ineffective assistance at trial in accordance with the State's procedures," *id.* at 12. If we were to follow the failure-to-appoint-counsel part of *Martinez*, we would effectively eliminate the mandatory procedural default provisions (particularly NRS 34.810) when the district court determines that the appointment of counsel is not warranted, as it has the discretion to do under NRS 34.750(1). The only way to maintain the integrity of the mandatory procedural default provisions would be to appoint counsel in all initial-review post-conviction proceedings, effectively making the appointment of counsel mandatory in direct contravention of NRS 34.750(1).[8] Given these provisions and the Supreme Court's refusal to recognize a constitutional right to counsel in initial-review collateral proceedings, this is one more reason that we cannot reconcile the *Martinez* rule with our state habeas statutes even on the purportedly limited scope advanced by Brown.

[Headnotes 6, 7]

We also reject the suggestion that we should adopt an exception similar to that adopted in *Martinez* because the Legislature intended that the state habeas remedy be "coextensive" with the federal habeas remedy and exceptions to federal procedural bars. Although the Legislature may have created the statutory post-conviction remedy in response to United States Supreme Court decisions that implied "the need for an appropriate state post-conviction collateral remedy to review claimed violations of federally protected rights," *Marshall v. Warden*, 83 Nev. 442, 444, 434 P.2d 437, 438-39 (1967) (citing *Case v. Nebraska*, 381 U.S. 336 (1965)) (indicating that the Nevada Legislature's adoption of the post-conviction collateral remedy act in 1967 was in response to the Supreme Court's extension of numerous federal protections to state criminal cases), *superseded by statute as stated in Passanisi v. Dir., Nev. Dep't of Prisons*, 105 Nev. 63, 67, 769 P.2d 72, 75 (1989), the statutory provisions and legislative history do not evidence an intent that Nevada's statutory procedural bars be coterminous with the federal doctrine of procedural default. The doctrine of proce-

[8]The Legislature at one time made the appointment of counsel mandatory in post-conviction proceedings, *see* 1973 Nev. Stat., ch. 102, § 2, at 169, but later made appointment of counsel discretionary, *see* 1987 Nev. Stat., ch. 539, § 42, at 1230; *see also Crump*, 113 Nev. at 297 n.2, 934 P.2d at 249 n.2. This history, combined with the Legislature's enactment of the current statutes providing for mandatory appointment of counsel for capital petitioners but discretionary appointment for noncapital petitioners, *compare* NRS 34.750(1), *with* NRS 34.820(1), evinces an intent to preclude noncapital petitioners from automatically being appointed counsel.

dural default applied by federal habeas courts is based in principles of comity; it is "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez*, 566 U.S. at 9. In contrast, as explained above, Nevada's statutory procedural bars are designed to streamline the post-conviction review process and ensure the finality of judgments of conviction while leaving open a safety valve for defaulted violations of state law and constitutional rights in very limited circumstances.[9] The state procedural bars to post-conviction habeas relief thus "exist to implement policies independent from those animating the [federal doctrine of procedural default]." *In re Reno*, 283 P.3d 1181, 1233 & n.30 (Cal. 2012).

Our history of turning to federal cases defining cause and prejudice when interpreting similar language in Nevada's procedural default statutes does not undermine that conclusion or require that we blindly follow *Martinez*. While we have looked to the Supreme Court for guidance,[10] we have not followed Supreme Court decisions when they are inconsistent with state law. For example, we have rejected the prison mailbox rule to allow for tolling of the one-year period for state post-conviction habeas petitions, despite the

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[9]We agree with Brown that the State has an interest in having federal constitutional errors addressed in the first instance by a Nevada court. But that interest is not the focus of Nevada's statutory habeas remedy. The Legislature adopted mandatory procedural bars and did not include an exception to the procedural bars for procedurally defaulted claims that might nonetheless be addressed on the merits by a federal habeas court. That is understandable since doing so would mean that a petitioner's desire to exhaust a claim in state court before federal court review would always excuse a state procedural bar—a result that would render those procedural bars largely meaningless and undermine the interest in finality that animates the statutory habeas remedy and its procedural bars. *Cf. In re Reno*, 283 P.3d 1181, 1233 (Cal. 2012) (rejecting the claim that petitioner's desire to exhaust claims for federal review provided an exception to a state procedural rule precluding habeas corpus where claimed errors could have been raised on appeal because such an exception "would fatally undermine this state's substantial interest in the finality of its criminal judgments").

[10]*See, e.g.*, *Passanisi*, 105 Nev. at 66, 769 P.2d at 74 (citing *Murray v. Carrier*, 477 U.S. 478 (1986), for the requirement that good cause be some impediment "external to the defense"); *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting the Supreme Court's explanation in *Murray*, 477 U.S. at 488, as to how an impediment "external to the defense" may be demonstrated); *McKague v. Warden*, 112 Nev. 159, 164 & n.4, 165, 912 P.2d 255, 258 & n.4 (1996) (adopting the reasoning that the Supreme Court applied to federal habeas proceedings as to whether the ineffective assistance of counsel may constitute "good cause"); *Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997) (relying on *Murray* and *Coleman v. Thompson*, 501 U.S. 722 (1991), for the proposition that mere attorney error such as ignorance or inadvertence may not constitute "cause").

application of it by federal habeas courts. *See Gonzales v. State*, 118 Nev. 590, 594-95, 53 P.3d 901, 903-04 (2002). We have also rejected equitable tolling of the one-year filing period set forth in NRS 34.726 because the statute's plain language requires a petitioner to demonstrate a legal excuse for any delay in filing a petition. *See Hathaway*, 119 Nev. at 252, 254 n.13, 71 P.3d at 506, 507 n.13. We are not bound by Supreme Court decisions in our interpretation of the "cause" exceptions under NRS 34.726 and 34.810, and because the *Martinez* rule does not fit within our State's statutory post-conviction framework, we decline to extend it to state post-conviction proceedings.

[Headnote 8]

Post-conviction relief is a statutory remedy and it is up to the Legislature to define its contours. Adoption of a rule fashioned after *Martinez* would conflict with the current statutory post-conviction scheme, impose significant costs, and undermine the finality of judgments of conviction. Whether or how a rule similar to that adopted in *Martinez* should be adopted in state post-conviction proceedings is a matter of policy and lies in the hands of the Legislature. Based on the foregoing, we conclude that Brown's petition was barred as untimely and successive and that he did not demonstrate good cause and prejudice to overcome the procedural bars.

Actual innocence

[Headnotes 9-11]

Brown also argues that the failure to consider his claims on the merits would result in a fundamental miscarriage of justice because there was no evidence of premeditation and deliberation, and thus the facts at trial did not support a finding of first-degree murder. In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *see Calderon v. Thompson*, 523 U.S. 538, 559 (1998). Actual innocence means that " 'it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.' " *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. Brown does not identify any new evidence of his innocence; rather, his argument of actual innocence relies on his legal claims that there was insufficient evidence of first-degree murder presented at trial and that his counsel provided ineffective assistance at trial. Thus, the district court did not err in finding that Brown failed to make a showing of actual innocence.

CONCLUSION

We conclude that Brown is not entitled to relief in this appeal, and we affirm the district court's order dismissing his untimely and successive petition for a writ of habeas corpus.[11]

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

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

I respectfully dissent. I believe that equity and fairness require a different result. In carving out an equitable exception to the cause requirement, *Martinez* recognized that the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . . Indeed, the right to counsel is the foundation for our adversary system." 566 U.S. at 12. A post-conviction petition for a writ of habeas corpus is a defendant's first and last chance to assert a claim of ineffective assistance of trial counsel and thus is vital to safeguarding a defendant's right to counsel at trial. Although the appointment of post-conviction counsel currently is not required in Nevada, I believe that indigent noncapital petitioners like Brown who have been convicted of murder and are serving significant sentences, should have the assistance of counsel in their first state post-conviction petition. *See* NRS 34.750(1) (indicating that a court may consider the "severity of the consequences facing the petitioner" when deciding whether to appoint post-conviction counsel). Once post-conviction counsel has been appointed to represent such a petitioner, counsel should be effective. A petitioner who has been convicted of murder and is facing a severe sentence should not be denied the chance to litigate a meritorious claim of ineffective assistance of trial counsel merely because his post-conviction counsel failed to raise the claim in the initial post-conviction proceeding. Thus, in these circumstances, I agree with amicus curiae NACJ that there are compelling reasons to adopt the equitable exception from *Martinez* in state habeas proceedings. Accordingly, I would reverse and remand for the district court to determine whether Brown can demonstrate a substantial underlying ineffective-assistance-of-trial-counsel claim.

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[11]In light of this disposition on appeal, we deny as moot the State's motion for leave to file a response to Brown's notice of supplemental authorities.