MICHELLE FLORES, AN INDIVIDUAL, APPELLANT, *v.* LAS VEGAS-CLARK COUNTY LIBRARY DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, RESPONDENT.

No. 72462

December 13, 2018 432 P.3d 173

Appeal from a district court summary judgment in a declaratory relief action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

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

Iglody Law, PLLC, and *Lee Iglody*, Las Vegas; *Ashcraft & Barr LLP* and *Jeffrey F. Barr*, Las Vegas, for Appellant.

Bailey Kennedy and *Dennis L. Kennedy* and *Kelly B. Stout*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In 2015, the Legislature enacted Senate Bill 175, which declares that "the regulation . . . of firearms . . . in this State . . . is within the exclusive domain of the Legislature, and any other law, regulation, rule or ordinance to the contrary is null and void." SB 175 §§ 8(1)(b), 9(1)(b) & 10(1)(b), 78th Leg. (Nev. 2015). SB 175 also provides that no "***county***," "***city***," or "***town***" may infringe upon the Legislature's domain. *Id.* §§ 8(2), 9(2) & 10(2) (emphases added). In this appeal, we must determine whether SB 175 preempts a library district from banning the possession of firearms on its premises. Because SB 175's plain language expressly pertains to only ***counties***, ***cities***, or ***towns*** with respect to firearm regulation, we conclude that library districts are not within the field of governmental entities that the Legislature expressly stated SB 175 would preempt. We therefore affirm the district court's summary judgment in favor of the respondent library district.

FACTS AND PROCEDURAL HISTORY

Respondent Las Vegas-Clark County Library District (the District) is a "Consolidated Library District" created under NRS Chapter 379, which permits "[t]he trustees of a county library district . . . and the governing body of any city within that county . . . to

establish and maintain a public library [and to] consolidate the city into the county library district." NRS 379.0221. In other words, the District, pursuant to legislative authority, has been jointly created by Clark County and the City of Las Vegas. The District is administered by a board of ten trustees, five of whom are appointed by the Clark County commissioners, and five of whom are appointed by the governing body of the City of Las Vegas. NRS 379.0222(1). The Legislature granted the District a degree of autonomy, which includes "[d]o[ing] all acts necessary for the orderly and efficient management and control of the library," *see* NRS 379.025(2)(f), and "[e]stablish[ing] bylaws and regulations for the management of the library," *see* NRS 379.025(1)(h). Clark County and the City of Las Vegas are afforded some element of control over the District, largely in terms of approving the District's budget and financing. *See* NRS 379.025(1)(f)(2) (approval of budget); NRS 379.0225 (approval of issuance of bonds); NRS 379.0227 (levy of taxes). Under these and other provisions of NRS Chapter 379, the District operates 25 library branches throughout Clark County.

In 2016, appellant Michelle Flores visited the Rainbow Branch Library, which is one of the District's libraries. While there, she was wearing a handgun in a holster on her belt, which both sides acknowledge was being carried openly and not concealed.[1] As Flores was leaving, a librarian asked her not to bring the gun with her the next time she visited the library, explaining that the District had a Dangerous Items Policy (DIP) that prohibited patrons from bringing firearms onto the District's premises.[2] In response to this request, Flores filed the underlying declaratory relief action against the District in which she sought a ruling that SB 175 preempts the District from enforcing its DIP.

Both Flores and the District moved for summary judgment based on different provisions in SB 175. Generally speaking, and as explained more fully below, Flores relied primarily on provisions stating that "[t]he regulation of . . . possession . . . of firearms . . . in this State and the ability to define such terms is within the exclusive domain of the Legislature, and any other law, regulation, rule or ordinance to the contrary is null and void." SB 175 §§ 8(1)(b), 9(1)(b) & 10(1)(b). In contrast, the District relied on provisions stating that no "county," "city," or "town" "may infringe upon [the Legislature's right to regulate firearm possession]." *Id.* §§ 8(2), 9(2) & 10(2). Because the District is a "Library District" created under NRS Chapter

[1]This case does not implicate NRS 202.3673(3), which prohibits *concealed* firearm possession in public buildings such as the Rainbow Branch Library, or NRS 202.265(1), which prohibits *all* firearm possession in certain legislatively designated buildings (not including the Rainbow Branch Library).

[2]In relevant part, the DIP provides that "[t]he Library District bans bringing or possessing on Library District owned premises any dangerous items, including, without limitation, a deadly or dangerous weapon, loaded or unloaded."

379 and not a county, city, or town, the District contended that SB 175 did not prohibit it from enforcing its DIP. Ultimately, the district court agreed with the District and granted summary judgment in its favor. The district court concluded that since the District was a "Library District" as defined in NRS Chapter 379, it was not a "county," "city," or "town" for purposes of SB 175 and that the Legislature had not taken away the District's ability under NRS 379.025(1)(h) to "[e]stablish bylaws and regulations for the management of the library" such as the DIP. This appeal followed.

DISCUSSION

Whether SB 175 preempts the District's DIP is an issue of statutory construction, which we review de novo.[3] *Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013).

To provide context for our analysis of SB 175, it is helpful to first provide an overview of the statutes that SB 175 amended and added to. In 1989, the Legislature enacted Assembly Bill 147, which added one section each to NRS Chapter 244 ("Counties: Government"; section 244.364), NRS Chapter 268 ("Cities and Towns"; section 268.418), and NRS Chapter 269 ("Unincorporated Towns"; section 269.222). By way of example, the added section of NRS Chapter 244 provided:

> Chapter 244 of NRS is hereby amended by adding thereto a new section to read as follows: [ ] Except as otherwise provided by specific statute, ***the legislature reserves for itself such rights and powers as are necessary to regulate*** the transfer, sale, purchase, ***possession***, ownership, transportation, registration and licensing ***of firearms*** and ammunition in Nevada, ***and no county may infringe upon those rights and powers.***

AB 147 § 1(1), 65th Leg. (Nev. 1989) (emphases added). The sections that were added to NRS Chapters 268 and 269 contained identical language, except those sections referred to "no city" and "no town" instead of "no county." AB 147 §§ 2(1), 3(1), 65th Leg. (Nev. 1989). As enacted, AB 147 did not apply to already existing ordinances and regulations. *Id.* § 5.

Then in 2015, the Legislature enacted SB 175, which, in addition to expressly repealing AB 147's prospective-only application, *see* SB 175 § 11, 78th Leg. (Nev. 2015), drastically expanded upon the 1989 versions of NRS 244.364, 268.418, and 269.222. By way of example, SB 175 made the following changes to NRS 244.364:

---

[3]Flores summarily argued in district court that the DIP violates the Nevada Constitution, which provides that "[e]very citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." Nev. Const. art. 1, § 11(1). At oral argument on appeal, she expressly stated that she was abandoning any constitutional arguments, and we therefore confine our analysis to whether SB 175 preempts the District's DIP.

1. The Legislature hereby declares that:

(a) ***The purpose of this section is to establish state control over the regulation of and policies concerning firearms***, firearm accessories and ammunition ***to ensure that such regulation and policies are uniform throughout this State*** and to ensure the protection of the right to keep and bear arms, which is recognized by the United States Constitution and the Nevada Constitution.

(b) ***The regulation of*** the transfer, sale, purchase, ***possession***, carrying, ownership, transportation, storage, registration and licensing ***of firearms***, firearm accessories and ammunition ***in this State and the ability to define such terms is within the exclusive domain of the Legislature, and any other law, regulation, rule or ordinance to the contrary is null and void.***

(c) ***This section must be liberally construed to effectuate its purpose.***

2. Except as otherwise provided by specific statute, ***the Legislature reserves for itself such rights and powers as are necessary to regulate*** the transfer, sale, purchase, ***possession***, carrying, ownership, transportation, storage, registration and licensing ***of firearms***, firearm accessories and ammunition in Nevada and to define such terms. ***No county may infringe upon those rights and powers.***

3. A ***board of county commissioners*** may proscribe by ordinance or regulation the unsafe discharge of firearms.

4. ***Any ordinance or regulation which is inconsistent with this section or which is designed to restrict or prohibit the sale, purchase, transfer, manufacture or display of firearms***, firearm accessories or ammunition that is otherwise lawful under the laws of this State ***is null and void***, and any official action taken by an employee or agent of ***a county*** in violation of this section is void.

5. A ***board of county commissioners shall repeal any ordinance or regulation described in subsection 4***, and any such ordinance or regulation that is posted within the county must be removed.

6. A ***board of county commissioners*** shall cause to be destroyed any ownership records of firearms owned by private persons which are kept or maintained by the county or any county agency, board or commission, including, without limitation, any law enforcement agency, for the purposes of compliance with any ordinance or regulation that is inconsistent with this section. The provisions of this subsection do not apply to the ownership records of firearms purchased and owned by any political subdivision of this State.

> 7. ***Any person who is adversely affected by the enforcement of an ordinance or regulation that violates this section*** on or after October 1, 2015, ***may file suit*** in the appropriate court for declarative and injunctive relief and damages attributable to the violation. Notwithstanding any other provision of law, such a person is entitled to:
>
> (a) Reimbursement of actual damages, reasonable attorney's fees and costs which the person has incurred if, within 30 days after the person commenced the action but before a final determination has been issued by the court, ***the board of county commissioners*** repeals the ordinance or regulation that violates this section.
>
> (b) Liquidated damages in an amount equal to two times the actual damages, reasonable attorney's fees and costs incurred by the person if, more than 30 days after the person commenced the action but before a final determination has been issued by the court, ***the board of county commissioners*** repeals the ordinance or regulation that violates this section.
>
> . . . .

SB 175 § 8(1)-(7), 78th Leg. (Nev. 2015) (emphases added). Sections 9 and 10 of SB 175 contain identical language, except that subsections 2 and 4 refer to "city" or "town" instead of "county" and subsections 3, 5, 6, and 7 refer to "governing body of a city" or "town board" instead of "board of county commissioners." *Id.* §§ 9-10.

As indicated, Flores relies on the language in subsections 1 and 2 stating in broad terms that the purpose of SB 175 is to reserve to the Legislature the exclusive authority to regulate firearm possession. In contrast, the District relies on subsections 2, 4, and 5, which prohibit only counties, cities, or towns from doing anything contrary to SB 175, as well as subsections 3 and 7, which permit a board of county commissioners, governing body of a city, or town board to regulate unsafe firearm discharges and authorize a private right of action against a county, city, or town if any of those entities enforce an ordinance or regulation that violates SB 175.

Having considered these competing positions, we conclude that Flores' reliance on subsections 1 and 2 to the exclusion of the remaining subsections is untenable and that SB 175 unambiguously preempts only counties, cities, and towns from regulating firearm possession. *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. In addition, the court will not render any part of the statute meaningless . . . . " (citations omitted)); *West-*

park Owners' Ass'n v. Eighth Judicial Dist. Court, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) ("When the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning.").[4] Certainly, subsections 1 and 2 in sections 8, 9, and 10 of SB 175 announce the Legislature's purpose of occupying the field of firearm regulation. However, subsection 2 in sections 8, 9, and 10 simultaneously defines that field as consisting of only counties, cities, and towns, and subsections 3 through 7 reinforce that definition. In so doing, the Legislature expressly defined the field of governmental entities that it sought to prevent from regulating firearms. *See Mich. Gun Owners, Inc. v. Ann Arbor Pub. Schs.*, 918 N.W.2d 756, 761-62 (Mich. 2018) (concluding that statutes restricting any "city, village, township, or county" from regulating firearm possession did not restrict school districts from regulating firearm possession in light of the legislature having expressly defined the field of local governmental entities that the legislature intended to prohibit regulating firearms); *cf. Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."); *id.* at 547 (Scalia, J., concurring in part and dissenting in part) ("The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines."); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS[,'] the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.").

The Legislature's decision to amend three specific NRS chapters in virtually the identical way belies Flores' argument that the Legislature intended for SB 175 to apply to entities other than counties, cities, and towns. Indeed, if we were to construe SB 175 as Flores is urging and conclude that sections 8(1) and (2) are conclusive as to SB 175's effect, sections 9 and 10 pertaining to cities and towns would be rendered completely meaningless since cities and towns would already be encompassed in section 8.[5] *Orion Portfolio Servs. 2, LLC*, 126 Nev. at 403, 245 P.3d at 531 ("This court has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized. In addition, the court will not render any part of the statute meaning-

[4]The dissent urges that our analysis ignores SB 175's legislative history. To be sure, having determined that the statutory language is clear and unambiguous, consideration of the legislative history would be inappropriate here.

[5]We are aware that subsection 1(c) of sections 8, 9, and 10 in SB 175 state that sections 8, 9, and 10 "must be liberally construed to effectuate [the] purpose" of those sections. However, Flores has failed to propose a liberal construction of those sections that does not entail rendering the vast majority of those sections meaningless and superfluous.

less . . . . " (citations omitted)). Moreover, even within section 8, the repeated references to "county" and "board of county commissioners" would be nonsensical insofar as those subsections would purport to apply to the District, as subsections 5 and 7 would place the responsibility on the board of county commissioners to repeal the DIP and would provide a private right of action against Clark County if the board did not repeal the DIP. Clearly, however, the authority to repeal the DIP rests with the District's trustees.[6] *Id.* ("[This court] will not read the statute's language so as to produce absurd or unreasonable results."). Additionally, if we were to adopt Flores' proffered construction of SB 175, countless other local governmental entities would likewise be prohibited from regulating firearms, including but not limited to tourism improvement districts (*see* NRS 271A.070), miscellaneous cooperative agreements (*see* NRS 277.045), regional transportation commissions (*see* NRS 277A.170), regional housing authorities (*see* NRS 315.7805), general improvement districts (*see* NRS 318.055), county hospital districts (*see* NRS 450.610), county fire protection districts (*see* NRS 474.060), and irrigation districts (*see* NRS 539.043).

We do not necessarily disagree with Flores' argument that Clark County and the City of Las Vegas could not convey authority to the District that they lacked themselves. However, this argument cannot overcome SB 175's unambiguous language, particularly since the Legislature did not contemporaneously revoke the District's authority to "[d]o all acts necessary for the orderly and efficient management and control of the library," NRS 379.025(2)(f), and "[e]stablish bylaws and regulations for the management of the library," NRS 379.025(1)(h). To be very clear, this authority came not from Clark County or the City of Las Vegas but directly from the Legislature.[7] In light of this authority, we decline to construe SB 175's express and repeated references to counties, cities, and towns as impliedly referring to library districts and the multitude of similarly situated local governmental entities.

We are not concluding in this opinion that the Legislature lacks the authority to preempt the District's DIP. We are merely conclud-

---

[6]This presupposes that the District's Dangerous Items *Policy* is even an "ordinance or regulation" subject to repeal under subsections 5 and 7, which is an issue that Flores does not address. *Cf. Doe v. Medford Sch. Dist. 549C*, 221 P.3d 787, 793 (Or. Ct. App. 2009) (upholding a school district's no-firearms "policy" when a statute only prohibited "ordinances" regulating firearm possession).

[7]We believe that these statutes are specific enough in their grant of authority to allow the District the discretion to prohibit firearm possession on the District's premises. In this respect, we disagree with Flores' argument that Dillon's Rule prohibits the District from enforcing its DIP. *Cf.* NRS 244.137(3)(b) (recognizing that under Dillon's Rule, a local government can exercise powers that are "necessarily or fairly implied in or incident to the powers expressly granted" by the Legislature). The propriety of the District's discretionary decision is not an issue that needs to be resolved in this appeal.

ing that the Legislature did not do so in SB 175. In this respect, we agree with both Flores and the District that firearm regulation presents a serious issue of public concern that deserves careful consideration by the Legislature. Given the seriousness of this issue, we cannot conclude that the Legislature haphazardly intended to prohibit all local governmental entities from regulating firearms when it specifically amended only the NRS chapters pertaining to counties, cities, and towns. If the Legislature chooses to prohibit other local governmental entities such as the District from regulating firearms, it can expressly do so by enacting legislation that contains no limiting language. In light of the foregoing, we affirm the district court's summary judgment in favor of the District.

Douglas, C.J., and Gibbons, Pickering, and Hardesty, JJ., concur.

Stiglich, J., with whom Cherry, J., agrees, dissenting:

I respectfully dissent from the majority's opinion. The majority latches on to the fact that Senate Bill 175 (2015) amended only the NRS chapters pertaining to counties, cities, and towns. But in so doing, the majority ignores the expressly stated purpose of the enactment—"*to establish state control* over the regulation of and policies concerning firearms . . . to ensure that *such regulation and policies are uniform* throughout this State and to ensure the protection of the right to keep and bear arms." SB 175 §§ 8(1)(a), 9(1)(a), and 10(1)(a) (emphases added). If this statement of purpose were not clear enough, the Legislature left no doubt as to the intended effect of enacting SB 175 when it declared that: "[t]he regulation of . . . possession . . . of firearms . . . in this State and the ability to define such terms is within the ***exclusive domain*** of the Legislature, and any other law, regulation, rule or ordinance to the contrary is null and void." *Id.* §§ 8(1)(b), 9(1)(b), and 10(1)(b) (emphasis added). I can imagine no stronger statement by the Legislature in expressing its intent to occupy the field of firearm regulation.

Further supporting this plain-language reading of the statutes is section (c) of the amended statutes, which requires the statutes to be liberally construed in favor of effectuating the above-stated purpose. *Id.* §§ 8(1)(c), 9(1)(c), and 10(1)(c). In liberally construing these statutes as they relate to counties, cities, and towns, I find *Wisconsin Carry, Inc. v. City of Madison*, 892 N.W.2d 233 (Wis. 2017), to be instructive. In *Wisconsin Carry*, a transportation commission enacted a rule prohibiting firearms on the commission's buses. 892 N.W.2d at 235-36. A Wisconsin statute provided that "no political subdivision may enact or enforce an ordinance or adopt a resolution that regulates the . . . possession . . . of any . . . firearm," and another statute defined "political subdivision" as "a city, village, town or county." *Id.* at 236 & n.6 (quoting Wis. Stat. §§ 66.0409). The

rule was challenged, and on appeal, the Wisconsin Supreme Court determined that although the transportation commission was not a city, village, town, or county, it had nevertheless been *created* by the City of Madison. *Id*. at 242. According to the *Wisconsin Carry* court, "[b]ecause a municipality cannot delegate what it does not have, the City is entirely powerless to authorize any of its sub-units to legislate on this subject [of firearms]." *Id.* The *Wisconsin Carry* court therefore held that the transportation commission's firearm prohibition was invalid. *Id*. at 254.[1]

The same reasoning applies here. If the Legislature has prohibited Clark County and the City of Las Vegas from regulating firearm possession, it stands to reason that a sub-entity *created* by those two entities, such as the Las Vegas-Clark County Library District (the District), would similarly not have the authority to regulate firearm possession. Put another way, it seems incongruous that a sub-entity of a county and city could retain power that has been stripped from the creating entities. Thus, to me, the Legislature's decision to amend only the NRS chapters pertaining to counties, cities, and towns is entirely consistent with its intent to preempt the field of firearm regulation and to uniformly administer firearm policy throughout the state.[2] In light of the Legislature's unmistakably clear statements, I cannot agree with the majority's conclusion that SB 175's preemptive effect unambiguously pertains only to cities, counties, or towns. At the very least, the above-quoted statements create an ambiguity in SB 175's reach that requires this court to examine SB 175's legislative history. *See Dykema v. Del Webb Cmtys., Inc.*, 132 Nev. 823, 826, 385 P.3d 977, 979 (2016) ("If the statute is ambiguous, meaning that it is capable of two or more reasonable

[1]It is worth noting that neither *Wisconsin Carry* nor *Michigan Gun Owners, Inc. v. Ann Arbor Public Schools (MGO)*, 918 N.W.2d 756 (Mich. 2018), cited by the majority, appear to have the benefit of express preemption language, a benefit this court clearly has when looking at the plain language of SB 175. *See MGO*, 918 N.W.2d at 760 (recognizing that "a court begins the preemption analysis by determining whether state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive" but concluding there was no express preemption at issue) (internal quotation marks omitted)); *Wisconsin Carry*, 892 N.W.2d at 253 (identifying one preemption test as "whether the legislature has expressly withdrawn the power of municipalities to act" and finding that the statute at issue did not mention local government whatsoever and thus that there was no express preemption).

[2]I agree with the majority that the Legislature's express preemption in the field of firearm regulation will prohibit some local governmental entities from regulating firearms—I believe that was the Legislature's purpose in exercising exclusive domain over the field. However, I note that the Legislature, in its quest to instill uniformity, can adopt its own regulations. *See, e.g.*, NRS 202.265(1)(f) (disallowing the possession of firearms "on the property of the Nevada System of Higher Education, a private or public school or child care facility"); NRS 202.3673(3)(b) (disallowing concealed firearms in "[a] public building that has a metal detector at each public entrance or a sign posted at each public entrance indicating that no firearms are allowed in the building").

interpretations, this court looks to the provision's legislative history and the context and the spirit of the law or the causes which induced the Legislature to enact it." (internal quotations marks and alterations omitted)).

Here, a review of SB 175's legislative history (which the majority declines to undertake) is telling. In describing the purpose behind the expanded language in SB 175 sections 8-10, Senator Greg Brower provided the following explanation:

> Sections 8 through 10 expand and clarify the Legislature's right to regulate firearms, ammunition, and accessories and to define the associated terms. These sections also stipulate that any ordinances or regulations made by political subdivisions of the state that are inconsistent with the Legislature's rights are null and void and must be repealed. ***What this bill seeks to do in those sections is to say the state is going to preempt the field with respect to the regulation of firearms*** for most purposes. As to not allow for inconsistencies between counties, ***the Legislature will make the regulation regarding firearms policy***. The local governments cannot do so in any way that is inconsistent with state law.

Hearing on S.B. 175 Before the Assembly Comm. on Judiciary, 78th Leg. (Nev. April 23, 2015) (emphases added). Senator Brower concluded his explanation by stating, "I will close by stating that our goals are simply these: . . . ***to ensure that our Second Amendment rights are administered in a fair and uniform way across the state***, and to provide a means of redress when that is not the case." *Id.* (emphasis added).

In my view, Senator Brower's comments are a clear indication that the Legislature would have intended to prevent an entity created by both a county and a city from regulating firearm possession if the Legislature had envisioned such a scenario. *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974) ("In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, the Court may look to the whole purpose and scope of the legislative scheme."). I therefore respectfully disagree with the majority's conclusion that SB 175 does not preempt the District's DIP. *See N. Nev. Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498, 500, 422 P.3d 1234, 1236 (2018) ("[I]t is the duty of this court to select the construction [of a statute] that will best give effect to the intent of the legislature." (internal quotation marks omitted)).

In sum, to the extent that SB 175's plain language does not demonstrate the Legislature's intent to occupy the *entire* field of firearm regulation, I believe that SB 175's legislative history clarifies any purported ambiguity. Consistent with this court's duty to construe statutes in a manner that gives effect to the Legislature's

intent, I would hold that SB 175 preempts the District's DIP and would reverse the district court's summary judgment in favor of the District. I therefore respectfully dissent.

THE STATE OF NEVADA, Appellant, *v.* TAREN DESHAWN BROWN, aka TAREN DE SHAWNE BROWN, aka "GOLDY-LOX," Respondent.

No. 75184

December 20, 2018 432 P.3d 195

Appeal from a district court order granting a motion to suppress in a criminal prosecution. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Dismissed.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Jennifer P. Noble*, Appellate Deputy District Attorney, and *Adam Cate*, Deputy District Attorney, Washoe County, for Appellant.

John L. Arrascada, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Emilie B. Meyer*, Deputy Public Defender, Washoe County, for Respondent.

Before the Supreme Court, Pickering, Gibbons and Hardesty, JJ.

OPINION

By the Court, Hardesty, J.:

The State brings this appeal pursuant to NRS 177.015(2), which grants the State the right to file an interlocutory appeal from a district court order granting or denying a motion to suppress evidence upon "good cause shown." We take this opportunity to address the "good cause" showing that the State must make under NRS 177.015(2) in order for the appeal to proceed. Because we conclude that the State has failed to demonstrate good cause as contemplated by NRS 177.015(2), we dismiss the appeal.

BACKGROUND

On October 28, 2017, the Reno Police Department (RPD) apprehended respondent Taren Brown after he allegedly pulled the trigger of a gun while pointing it at the alleged victim. A police

officer placed Brown in an RPD police car and conducted a recorded interrogation. During the interrogation, Brown made several incriminating statements, including an admission regarding why he approached the alleged victim and drew a gun. The State charged Brown with attempted murder with the use of a deadly weapon, assault with a deadly weapon, carrying a concealed firearm, and possession of a firearm with an altered or removed serial number.

Brown filed a motion to suppress his statements, arguing that the officer did not effectively inform him of his right to an attorney before and during the interrogation as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Brown argued that the officer's mistake made his statements involuntary. The district court agreed and granted Brown's motion to suppress the statements. The State now appeals from the district court's suppression order.

DISCUSSION

NRS 177.015(2) grants the State the right to appeal from an order suppressing evidence. That right, however, is not absolute. NRS 177.015(2) provides, in relevant part:

> The State may, *upon good cause shown*, appeal to the appellate court of competent jurisdiction . . . from a pretrial order of the district court granting or denying a motion to suppress evidence . . . . The appellate court of competent jurisdiction may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the *propriety of the appeal* and whether there may be *a miscarriage of justice* if the appeal is not entertained.

(Emphases added.)

The plain language of NRS 177.015(2) thus requires the State to first show "good cause" before this court will consider the merits of an appeal. As the statute later explains, "good cause" means the State must make a preliminary showing of the "propriety of the appeal" and that a "miscarriage of justice" would result if the appeal is not entertained.[1] Although the statute does not provide guidance regarding the meaning of the phrases "propriety of the appeal" and "miscarriage of justice," a review of the statute's legislative history reveals that its threshold requirements were intended to provide this court with the discretionary authority over whether to entertain

[1]Procedurally, once the State files a notice of appeal pursuant to NRS 177.015(2), this court orders the State to file points and authorities addressing the required preliminary showing. The defendant is given an opportunity to respond, and then this court reviews the parties' submissions to determine whether to entertain the appeal. In this case, in addition to following the aforementioned procedure, we ordered the parties to file supplemental points and authorities to assist this court in determining whether to entertain this appeal.

the appeal.[2] *See* Hearing on S.B. 349 Before the Senate Judiciary Comm., 56th Leg. (Nev., March 16, 1971). The Legislature recognized that an interlocutory appeal from a suppression order was the only opportunity the State had to seek appellate review of an erroneous suppression ruling, but it also expressed concern that an appeal could be used as a delaying tactic and interfere with the defendant's speedy trial rights. *See, e.g.*, Hearing on S.B. 349 Before the Senate Judiciary Comm., 56th Leg. (Nev., March 10, 1971). The legislative history of the statute also reflects concern that without restrictions on the State's right to appeal, it could result in numerous appeals and tie up judicial resources. Hearing on S.B. 349 Before the Senate Judiciary Comm., 56th Leg. (Nev., March 16, 1971).

The Legislature's concerns are shared by many other states, a majority of which have likewise imposed restrictions on the State's ability to bring an interlocutory appeal from a suppression order. Though these restrictive provisions employ varying language, most of them require the prosecution to show that the evidence is important enough that suppression of it would substantially impair or terminate its ability to prosecute the case. *See, e.g.*, Minn. R. Crim. P. 28.04, subd. 2(1) (2015) (requiring the prosecutor to include a statement "explaining how the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial"); N.C. Gen. Stat. Ann. § 15A-979(c) (1979) (requiring certification "that the [suppressed] evidence is essential to the case"); Pa. R. App. P. 311(d) (2016) (requiring the prosecutor to certify that the suppression order "will terminate or substantially handicap the prosecution"). In addition to this prerequisite, many states require the prosecution to certify that the appeal is not taken for the purpose of delay. *See, e.g.*, Colo. Rev. Stat. § 16-12-102(2) (2002); N.M. Stat. Ann. § 39-3-3(B)(2) (LexisNexis 2004); Tex. Code Crim. Proc. Ann. art. 44.01(a)(5) (West 2018).

We find these restrictions to be consistent with the language and legislative intent of NRS 177.015(2) and thus choose to interpret the preliminary showing requirements in NRS 177.015(2) similarly. First, we define the phrase "propriety of the appeal" to mean that the appeal is not taken for the purpose of delay. We note that though many states require the prosecutor to merely "certify" that the suppression has hindered the ability to prosecute, NRS 177.015(2) requires the prosecution to make a "preliminary showing," which requires more than simply paraphrasing the statutory language. In

[2]NRS 177.015(2) was initially enacted in 1971 but was repealed in the following legislative session. *See State v. Robles-Nieves*, 129 Nev. 537, 540, 306 P.3d 399, 402 (2013); *State v. Pearce*, 96 Nev. 383, 383-84, 609 P.2d 1237, 1237-38 (1980). The current version was adopted in 1981. *See* 1981 Nev. Stat., ch. 702, § 1, at 1706.

this case, both parties agree that the State did not take this appeal for the purpose of delay, and there is nothing in the record to suggest otherwise. Thus, the State has made a preliminary showing of the propriety of the appeal.

Second, we define the phrase "miscarriage of justice" as used in NRS 177.015(2) to mean that the suppressed evidence is of substantial importance such that its suppression would significantly impair or terminate the State's ability to prosecute the case. To make this showing, the State must do more than explain the importance of the evidence or assert that the evidence proves certain elements of a charged offense. Rather, the State must explain how it will be substantially impaired in proving those elements without the suppressed evidence. This requires an explanation of what other evidence is available to the State and how that admissible evidence may be inadequate for conviction.

In the present case, the State, despite being given the opportunity to supplement its points and authorities to specifically address how suppression of Brown's statements substantially impaired or terminated its ability to prosecute Brown, has not established that a miscarriage of justice would result if this court does not entertain its appeal. The State's assertions in support of this appeal primarily focus on the fact that the suppressed evidence—Brown's admissions to a police officer that he drew a loaded gun on the alleged victim—can prove all or most of the elements of the charged offenses as well as the identity of the perpetrator. The State mentions only one available alternative piece of evidence, a surveillance video, which the State asserts may be insufficient to prove Brown's identity, as the camera is far away and Brown was wearing a hooded sweatshirt. Though we are mindful that the State is in the best position to evaluate the strength of its evidence and the chances of succeeding at trial, we will not rely solely on the State's own assessment of the evidence when evaluating good cause under NRS 177.015(2). Here, the State's assertion that it will be impaired in its ability to prove the perpetrator's identity without the suppressed evidence is inconsistent with the record before us. The record provided by the State indicates that Brown made similar admissions in a jail telephone call, which were in the State's possession and had not been suppressed.

Accordingly, in light of the State's failure to discuss the strength of available evidence, we conclude that the State failed to make the preliminary showing that a miscarriage of justice will occur if we do not entertain this appeal. Therefore, we dismiss the State's appeal.[3]

Pickering and Gibbons, JJ., concur.

[3]In light of this opinion, we vacate the April 9, 2018, stay of trial imposed by the Nevada Court of Appeals in this matter.

HELEN NATKO, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 73048-COA

December 20, 2018 435 P.3d 680

Appeal from a judgment of conviction, pursuant to a jury verdict, of exploitation of a vulnerable person and theft. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Reversed and remanded.

Tao, J., dissented.

Foley & Oakes, PC, and *Daniel T. Foley*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jay P. Raman*, Chief Deputy District Attorney, and *Charles Thoman*, Deputy District Attorney, Clark County, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Silver, J.:

In this appeal, we consider whether the district court erred by instructing a jury, in a criminal case for exploitation of a vulnerable person and theft, that "[a] person's status as a joint account holder does not by itself provide lawful authority to use or transfer another['s] assets for their own benefit." We conclude this instruction is inconsistent with NRS 100.085, and it does not accurately and completely reflect the reasoning and conclusion in *Walch v. State*, 112 Nev. 25, 909 P.2d 1184 (1996). Accordingly, we hold the jury instruction was a misstatement of law, and it was error to give the instruction. Because the State has failed to demonstrate the error was harmless, we reverse.

FACTS AND PROCEDURAL HISTORY

Helen Natko and Delford Mencarelli began dating in 1982, a year or two after their respective spouses passed away. During a visit to Pennsylvania in May 2012, Mencarelli was hospitalized for low blood sugar, a complication of his diabetes. After the couple returned to their shared home in Las Vegas, Natko and Mencarelli gave each other durable power of attorney, purportedly so that Natko could help care for Mencarelli. Four days later, Mencarelli

added Natko as a joint account holder on his Las Vegas credit union account. In July 2013, Natko withdrew $195,000 from the couple's joint bank account and temporarily placed it into her personal bank account. She returned the money to the couple's joint account within the month. Mencarelli died approximately two years later.

Nine months after Mencarelli's death, the State charged Natko with exploitation of a vulnerable person and theft based on the act of withdrawing the money from the joint account in 2013.[1] At trial, the State proposed jury instruction 18, which stated: "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another['s] assets for their own benefit." This language was taken nearly verbatim from *Walch*. Natko objected to the instruction, arguing it was inaccurate under the current version of NRS 100.085, which was amended in 1995. The district court, relying on *Walch*, ultimately gave the instruction. A jury found Natko guilty on both counts,[2] and the district court sentenced her to a suspended aggregate prison term of 36 to 144 months and placed her on probation. This appeal follows.

ANALYSIS

Natko argues that jury instruction 18 was a misstatement of law because it directly contradicts NRS 100.085, and the district court incorrectly relied on *Walch* in giving the instruction because *Walch* was decided under a prior version of NRS 100.085. The State counters that jury instruction 18 was a correct statement of law that was not overruled by the amendments to NRS 100.085 and, therefore, the district court properly relied on *Walch*.

"District courts have broad discretion to settle jury instructions." *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). "While we normally review the decision to [give or] refuse a jury instruction for an abuse of that discretion or judicial error, we review de novo whether a particular instruction, such as the one at issue in this case, comprises a correct statement of the law." *Id*. Further, whether jury instruction 18 was an accurate statement of

---

[1]The dissent speculates that Mencarelli "may" have lacked mental capacity at the time the joint bank account was created a year prior, thus voiding the joint account and removing any legal claim Natko may have had to the funds within the account. This is mere speculation, and no evidence exists of this in our record. Tellingly, the State's information charged Natko with "willfully, unlawfully and feloniously" exploiting a vulnerable person and theft on *July 5, 2013*, by withdrawing the $195,000 from a bank account on which she was listed as a joint tenant. The withdrawal of money occurred a full year *after* the date from which she and Mencarelli set up the joint bank account. Significantly, too, the State *never* charged Natko with exploitation or fraud for any actions prior to the date of the withdrawal of funds from the joint bank account.

[2]The judgment of conviction erroneously states Natko was convicted pursuant to a guilty plea.

the law involves statutory interpretation, which we also review de novo. *See Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012). When interpreting a statute, we first examine the statute's plain meaning. *Id*. "[I]f the statute is clear, we do not look beyond the statute's plain language." *Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006).

NRS 100.085 was amended to its current version in 1995.[3] 1995 Nev. Stat., ch. 426, § 1, at 1054-55. NRS 100.085(1) provides, in relevant part: "If an account is intended to be held in joint tenancy, the account or proceeds from the account are *owned* by the persons named, and may be paid or delivered to any of them . . . ." (Emphasis added.) And, as relevant to this appeal, NRS 100.085(4) provides that, "[f]or the purposes of this section, unless a depositor specifically provides otherwise, the use by the depositor of [joint account] . . . in designating the ownership of an account indicates the intent of the depositor that the account be held in joint tenancy." When read together, the plain language of NRS 100.085(1) and (4) establishes a presumption that a person's status as a joint account holder provides that person with ownership of, and authority to use, the funds in the joint account.[4]

In contrast to NRS 100.085, jury instruction 18 stated that a person's status as a joint account holder alone does not provide the authority to use another person's assets. Jury instruction 18 was inconsistent with NRS 100.085 because it implied Natko did not have lawful authority to use or transfer the funds in the joint account for her own benefit. The State argues that the instruction was nevertheless a correct statement of the law under *Walch*. We disagree.

---

[3]We recognize that the opinion in *Walch* was issued in 1996. However, *Walch* is not controlling here, because the defendant, Walch, was charged based on acts that were committed before the amendment of NRS 100.085, and therefore, the *Walch* court would have considered the pre-amendment version of NRS 100.085 when deciding the appeal. *See State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 568, 188 P.3d 1079, 1081 (2008) (stating, in the context of addressing sentencing penalties, "the law in effect at the time of the commission of a crime governs the prosecution of criminal offenses").

[4]Because the statute is clear, we need not look to the legislative history to determine the meaning of the statute. *See Witzenburg*, 122 Nev. at 1061, 145 P.3d at 1005. Nevertheless, we note that the legislative history expressly demonstrates that the 1995 amendments to NRS 100.085 were specifically intended to clarify that each party on a joint account has a right to funds in the account and the right of survivorship to funds in the account upon the death of one of the account holders. *See* Hearing on S.B. 424 Before the Assembly Judiciary Comm., 68th Leg. (Nev., June 15, 1995) (John Sande, representing the Nevada Bankers Association, testified that "if it is held as a joint tenancy, as that is defined in [NRS 100.085] under Subsection 4 . . . either party, or any party that [is] on the account, has the right to those funds, that they will pass to the survivor on the death so that there's certainty," and, upon inquiry, he clarified that "[u]nder any interpretation," any party on a joint account, even if the parties do not live in the same house and have different families, "could take all the funds out of that account.").

In *Walch*, the elderly victim gave the defendant, Walch, durable power of attorney that "expressly precluded Walch from using [the victim's] assets for Walch's own legal obligations, including but not limited to support of the agent's dependents." 112 Nev. at 27, 909 P.2d at 1185 (internal quotation marks omitted). Walch thereafter opened two joint bank accounts with the victim's money that named Walch and the victim as joint account holders, and Walch wrote checks from those accounts for her personal use. *Id*. at 27-29, 909 P.2d at 1185-86. On appeal, Walch cited to NRS 100.085(1) and argued that she could not be guilty of theft as a matter of law because, as a party on the joint accounts, she had lawful authority to withdraw any or all of the funds from those accounts and use them as she wished. *Id*. at 30-31, 909 P.2d at 1187-88. The supreme court rejected this argument, concluding that "Walch's mere status as a party to the joint accounts did not provide her with lawful authority to use [the victim's] assets for her own benefit and therefore did not preclude her conviction for theft." *Id*. at 33, 909 P.2d at 1189. This conclusion was based on the observation that the jury "could have concluded that Walch placed [the victim's] funds into the two accounts with the intention of withdrawing them later for her own benefit." *Id*. The court reasoned that "[i]f so, Walch's felonious intent and actions commenced before such monies reached the two accounts, and her status as a joint legal owner of the account funds would not shield her from culpability for theft of funds subsequently withdrawn and misused." *Id*.

In *Walch*, therefore, the supreme court did not conclude that NRS 100.085 does not create a presumption of ownership by a joint account holder of the funds in a joint account. Rather, *Walch* is best understood to stand for the proposition that despite the presumption of ownership established by NRS 100.085, a person named on a joint account can still be, under some circumstances, convicted of theft for withdrawing and/or misusing funds from the joint account. The State is correct that this aspect of *Walch* was not impacted by the 1995 amendments to NRS 100.085. This is so because there is nothing in NRS 100.085 that precludes a joint account holder from being convicted of theft for the withdrawal and/or misuse of funds in the joint account. However, based on the reasoning in *Walch*, in order to convict a joint account holder of theft based on the withdrawal and/or misuse of funds from a joint account, the State must allege and establish that the criminal intent arose prior to the funds being deposited into the joint account.

Because jury instruction 18 broadly stated: "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another['s] assets for their own benefit," it did not accurately reflect the reasoning and conclusions in *Walch* and was therefore incomplete. Notably, the instruction did not identify the

circumstances under which a person named as a party on a joint account could be convicted of theft based on withdrawal and/or misuse of funds from the joint account.[5] Accordingly, we conclude jury instruction 18 was not a correct statement of the law and it was error to give the instruction.

Because Natko objected to the use of jury instruction 18, we review the error under the harmless error standard. *See Barnier v. State*, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). "[T]he State bears the burden of proving that the error was harmless." *Polk v. State*, 126 Nev. 180, 183 n.2, 233 P.3d 357, 359 n.2 (2010).[6] To meet this burden, it may be necessary for the State to file a respondent's appendix that includes "those documents necessary to rebut appellant's position on appeal which are not already included in appellant's appendix." NRAP 30(b)(4). Reversal will be warranted unless the State can show "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Nay v. State*, 123 Nev. 326, 334, 167 P.3d 430, 435 (2007) (internal quotation marks omitted).

The State fails to argue on appeal, let alone demonstrate from the record, that the error is harmless. A joint appendix was not filed in this appeal and, although recognizing Natko did not provide this court with a copy of the trial transcripts, the State did not file a respondent's appendix and provide the trial transcripts to this court. Nothing in the record before this court indicates that Mencarelli or Natko specifically provided that they did not intend to hold the joint account in joint tenancy. Therefore, jury instruction 18 was not a correct statement of the law, and it improperly implied to the jury that Natko did not have lawful authority to use and/or withdraw the funds in the joint account. The State alleged Natko committed the crimes of exploitation of a vulnerable person and theft based on the act of withdrawing money from Natko and Mencarelli's joint account. Thus, without the trial transcripts, or anything to show the

[5]A jury instruction that accurately reflects the reasoning and conclusions in *Walch* may have stated the following: A person's status as a joint legal owner of account funds does not shield the person from culpability for the taking of those funds if the State can demonstrate that the person's criminal intent and actions commenced before the money was placed into the joint account.

[6]The dissent argues that the lack of trial transcripts in the record demands an affirmance. However, because the State failed to argue harmless error after Natko alleged reversible error by the district court, the State waived its argument that harmless error applies. *Polk*, 126 Nev. at 183 n.2, 233 P.3d at 359 n.2 ("[A respondent] who fails to include and properly argue a contention in the [respondent's] brief takes the risk that the court will view the contention as forfeited." (internal quotations and citation omitted)). And, because the jury instruction given here was incomplete, as a matter of law, we are constrained to reverse under the circumstances of this case. *See Cortinas*, 124 Nev. at 1019, 1023-27, 195 P.3d at 319, 322-24 (reviewing de novo whether a jury instruction is a correct statement of law and addressing the effect of instructional errors).

facts are like those in *Walch*, we cannot say that the error was harmless. Because the State has failed to meet its burden and demonstrate the error is harmless, we conclude the error warrants reversal.

CONCLUSION

The district court erred by giving jury instruction 18 because it was not a correct statement of the law. The instruction was inconsistent with NRS 100.085 because it broadly stated that a person's status as a joint account holder did not give her the authority to use another's assets within the joint account for her own benefit. Further, the instruction did not accurately reflect the reasoning and conclusions in *Walch*. Because the State has failed to meet its burden to demonstrate this error was harmless, we reverse and remand for further proceedings consistent with this opinion.

Gibbons, J., concurs.

Tao, J., dissenting:

Before we can even get to the merits of Natko's arguments, there's a threshold problem: Natko was convicted following a jury trial, yet failed to supply copies of the trial transcript for us to review on appeal. We have partial transcripts of arguments of counsel surrounding the challenged jury instruction and some transcripts of post-trial motion argument. But we have no transcripts of the testimony of any trial witness reflecting the evidence admitted during the trial, no transcripts of the opening statements, and no transcripts of the closing arguments.

Consequently, we have no idea—none at all—what transpired at trial, what evidence either party introduced, or what the jury's verdict was or was not based upon. Absent that, I don't know how we can possibly analyze what effect, if any at all, jury instruction 18 may have had upon Natko's trial. To me, that omission alone demands affirmance, because we're required to presume that any missing portions of the record support, not undermine, the jury's verdict. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record. We cannot properly consider matters not appearing in that record." (citation omitted)); *Riggins v. State*, 107 Nev. 178 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record on appeal, the missing materials "are presumed to support the district court's decision"), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992).

At the very least, I don't know what business we have reversing a felony jury verdict when the appellant has failed to properly apprise us of what actually happened below. Yet not only does the majority reverse a felony conviction without a transcript of the proceedings below, it does so via a broad legal ruling that upends a large swath

of settled law. If the majority is correct, then NRS 100.085 isn't an obscure and rarely litigated statute unknown to much of the public, but rather one of the most sweeping laws ever enacted in Nevada—one that fundamentally undermines property law all the way back to the founding of this State.

Where I think the majority errs is in conflating the concept of legal authority (or possession) over personal property with the concept of ownership (or title) of the property. NRS 100.085 deals with the authority of any named account holder to withdraw money from a joint account and the bank's liability for allowing such withdrawals. But the majority makes it reach much farther to say that the act of depositing money into a joint account actually changes who owns the money. I read NRS 100.085 as saying nothing of the sort, and for all of these reasons I respectfully dissent.

I.

This appeal arises from a criminal case that implicates defenses based upon principles of banking and property law. On appeal, Natko raises a single argument: she asserts that one jury instruction given at trial (jury instruction 18) was incorrect.

Natko was convicted of two felony counts: one count of theft and one count of exploitation of a vulnerable person. The crux of the charges (as far as we can tell based upon arguments of counsel without a transcript of the trial) was that her name was added to a bank account first opened by her victim (her long-time boyfriend, according to the briefs), which changed it from a sole account to a joint one, and thereafter she withdrew large amounts of money from it at a time when the victim might not have been sufficiently lucid to agree to such financial decisions.

Her defense was this (again, based upon arguments of counsel without an actual trial transcript): once the account became a joint account, all of the money in it became hers as a "joint tenant" to use any way she pleased, and she could not possibly be convicted of stealing what already belonged to her. At common law, joint tenants could not "steal" jointly owned property from each other. *See* 3 Wayne LaFave, *Substantive Criminal Law* § 19.4(c), at 106 (3d ed. 2018) ("The common law view of larceny is that [one joint tenant] cannot steal from the other co-owner."); 3 Charles E. Torcia, *Wharton's Criminal Law* § 381, at 457-58 (15th ed. 1995) ("When, under principles of property law, property is owned by cotenants so that each one is entitled to the possession of the property jointly or in common with the others, one tenant cannot be guilty of larceny when he takes possession of the property, even though he does so with the intent to exclude the others from its use and enjoyment . . . .").

The question is whether a "joint tenancy" existed here. For support, Natko contends that NRS 100.085 mandates that all money

deposited in joint accounts, automatically and by operation of law, becomes the property of all account holders in joint tenancy. Consequently, she asserts the following jury instruction incorrectly describes the law:

> 18. A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another [sic] assets for their own benefit.

But it seems to me to be Natko, not jury instruction 18, who misstates the law. Natko confuses the act of placing a name onto a bank account with legal ownership of the assets within the account. The creation of a bank account is governed by banking law. Ownership of personal property is governed by principles of property law. These are two entirely different things.

II.

First, property law. Personal property may be owned by one person as a sole owner, or it may be owned by more than one person simultaneously. If owned by more than one person, the owners may be tenants in common, or they may be joint tenants. *See* NRS 111.063 (tenants in common in personal property); NRS 111.065(2) (joint tenants in personal property). The difference between the two is whether the ownership provides for a right of survivorship should one owner die during the tenancy. *See Smolen v. Smolen*, 114 Nev. 342, 344, 956 P.2d 128, 130 (1998) ("[T]he principal feature of the estate [is] the right of survivorship."). In Nevada, personal property may also take the form of community property when co-owned by husband and wife, but because Natko and the victim were never married, that classification has no relevance here.

The parties do not dispute (again, based solely upon arguments of counsel; we don't know what was proven at trial) that, before Natko's name was added to the existing account, every penny of the money deposited in it was the sole property of the victim. Natko agrees that she had no ownership interest in any of the money before her name was added to the account. However, she argues that once the account became joint, by operation of law everything in it became hers as a "joint tenant."

Maybe. But maybe not. The answer depends upon other evidence introduced at trial. Adding Natko's name to the joint account gave her coequal access to the money in it. Did it also give her legal title and permission to withdraw and spend it as she pleased? Not necessarily.

A foundational principle of property law is that possession is not the same thing as title. Legal title to personal property, and factual possession of it, are different things that can be severed from each other. A person can legally possess property without owning it; it's the difference between a loan that conveys possession but not title,

and a sale or gift that conveys both title and possession. It's why a house sitter doesn't become a legal owner of the home simply by residing overnight, and why a casino valet parking attendant doesn't own a car just by being handed the keys. Quite to the contrary, the civil tort of conversion occurs precisely when one person wrongfully exerts dominion over property that actually belongs to another. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 489, 376 P.3d 151, 160 (2016). Further, the crime of embezzlement occurs when, with criminal intent, a bailee entrusted with only possession and not ownership of personal property uses it for the bailee's own benefit as if he were the owner. *See* NRS 205.300.

A second foundational principle of property law is that title may transfer from one owner (a grantor) to another (a grantee) only if the grantor intended to convey such title. This has been settled law since 1865. *See Hendricks v. Perkins*, 98 Nev. 246, 250, 645 P.2d 973, 975 (1982) (examining whether evidence proved "the parties' intent to convey" an interest in the property); *Cox v. Glenbrook Co*., 78 Nev. 254, 264, 371 P.2d 647, 654 (1962) (in determining whether property was conveyed to another, "the intention of the parties [is] the object of inquiry"); *Ruhling v. Hackett*, 1 Nev. 360, 367 (1865) (the extent of any transfer of property ownership is measured by "the intention of the parties"). Indeed, acting as if title to property has been transferred when the owner never intended to convey ownership is precisely when the tort of conversion and the crime of embezzlement occur.

Natko's argument thus runs afoul of long-established principles of property law: she argues that, under NRS 100.085, merely because she possessed legal authority to withdraw money from the joint account, the money actually belonged to her as a matter of property law. But this lumps together possession and ownership and makes property change title without any evidence of intent by the owner to do so.

What's more, she argues that the property not only changed title, but the form of the title changed from sole ownership to joint tenancy. Under Nevada law, a sole owner of property may convey a sole interest in the property to another simply by expressing an intent to do so and handing over possession. However, when the owner wishes to transmute the form of ownership from sole ownership into ownership by joint tenancy, Nevada law requires considerably more. At common law, creation of a joint tenancy required the "unities of interest, time, title, and possession," *Smolen*, 114 Nev. at 344, 956 P.2d at 130, meaning an intent to convey both title as well as possession without severing them, along with the unity of "time," which means both must be conveyed at the same time in the same transaction. *Id.* Beyond that, NRS 111.065 adds a writing requirement that did not exist at common law. This is so because the essence of joint tenancy is the "right of survivorship" that gov-

erns what happens when one of the joint tenants dies. Because many years or decades may go by before one tenant dies, Nevada law requires such transfers to be evidenced by "a written transfer, agreement, or instrument," so that the parties do not become embroiled in probate disputes years after the fact based upon oral statements whose contents may now be difficult to verify. *See* NRS 111.065(2). If any of these requirements is missing, then there is no proper conveyance in joint tenancy and what was conveyed was only either a tenancy in common or just sole ownership. *Smolen*, 114 Nev. at 344, 956 P.2d at 130.

We have no evidence that any of these requirements for creating a joint tenancy were ever met. So, for NRS 100.085 to make a joint tenancy anyway, it must displace quite a lot of statutory and common law. But "[t]he Legislature is presumed not to intend to overturn long-established principles of law when enacting a statute [and] this court strictly construes statutes in derogation of the common law." *Shadow Wood HOA v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016) (internal quotation marks and citations omitted). To succeed, Natko needs NRS 100.085 to convey ownership of the victim's money to her whether or not the victim intended to give her a dime; whether or not he intended to convey title as well as possession; whether or not title and possession were conveyed in unity at the same time; whether or not anyone intended the account to be a tenancy in common instead of a joint tenancy; and whether or not any other formality of property law set forth in any other statute was followed.

To overcome these gaps and fill in the missing pieces, Natko argues that the victim's intent and all of the unities have already been established simply because once the victim agreed to comply with NRS 100.085(4) while constructively knowing what it said, he adopted and agreed to everything it imposed. In other words, by voluntarily agreeing to create a joint bank account under NRS 100.085, the victim constructively agreed to convey his money to Natko in joint tenancy because that's what the statute would make a joint account holder do. The way for the victim to avoid such a conveyance and keep the money for himself was not to deposit it into a joint bank account.

But this brings us to the next problem, which is that Natko's approach also conflicts with principles of banking law.

III.

Bank accounts may be in the name of a sole account holder or they may be in the name of joint account holders. Under traditional principles of banking law, the form of the account, and the name it may bear, may have little to do with the beneficial ownership of

anything deposited into the account. By way of example, trust accounts—such as an attorney trust account holding money for clients, or any other type of trust account used by agents or fiduciaries to hold money on behalf of principals—are classic examples of bank accounts that may bear the name of one person or entity but actually hold money beneficially owned by other people whose names appear nowhere on the accounts. Indeed, the body of federal crimes commonly known as "money laundering" punishes the act of attempting to conceal ownership of ill-gotten money by depositing it into bank accounts in the names of others while secretly retaining control of it. *See United States v. Davis*, 226 F.3d 346, 357 (5th Cir. 2000); *United States v. Rutgard*, 116 F.3d 1270, 1292 (9th Cir. 1997).

The point is that the name on an account may have little to do with who owns what's in it. Who actually owns the money in an account, both before and after it is deposited, is a question for the depositors and account holders to handle between themselves: "[g]enerally, the respective rights of the parties to a joint bank account are determined by the rules of contract law, and the intent of the parties with respect to the joint savings account is controlling." *Anderson v. Iowa Dep't of Human Servs.*, 368 N.W.2d 104, 109 (Iowa 1985). *See Brasel v. Estate of Harp*, 877 S.W.2d 923, 925 (Ark. 1994) (stating that "each owner's right to the funds may depend upon an agreement between them as to their ownership rights"); *see generally In re Estate of Greer*, 128 P.3d 1104, 1107 (Okla. Civ. App. 2005) (stating that "*actual ownership of the funds*, as opposed to the right of possession, *is a question of intent*").

Natko argues otherwise, but until now it's been long established that depositing money into a "joint account" does not automatically constitute a conveyance of money from the depositor to other account holders, either as sole owners or as joint tenants. "[A] person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership." *Deutsch Larrimore & Farnish, P.C. v. Johnson*, 848 A.2d 137, 143 (Pa. 2004). Thus, money deposited in a joint bank account does not belong to other account holders absent "clear and convincing evidence" that the depositing party intended to confer such ownership. *Enright v. Lehmann*, 735 N.W.2d 326, 331 (Minn. 2007). Some states have held that the creation of a joint account established a rebuttable presumption of joint ownership (notably not a conclusive or irrebuttable one), and at one time Nevada employed such a presumption. *See Sly v. Barnett*, 97 Nev. 587, 589, 637 P.2d 527, 528 (1981). Courts in those states recognized that an irrebuttable presumption of the kind Natko proposes would create a "hardship . . . on parties having 'convenience' ac-

counts, as where an incapacitated person might have a joint account for the sole purpose of financial management." *Id*. (Which, by the way, in view of the victim's alleged lack of mental capacity might be just what was intended here.)

But it is simply not true that depositing money into a bank account by itself constitutes a transfer of ownership in the money to someone else just because their name also happens to be on the account, with no consideration of any evidence to the contrary no matter how weighty or persuasive that evidence might be, and no opportunity for ownership to be disputed or challenged by any other party. *See id.*; *see also South v. Smith*, 934 S.W.2d 503, 507 (Ark. 1996) ("[E]ven though one has a right to withdraw funds from a joint bank account, a joint tenant may not, by withdrawing funds in a joint tenancy, acquire ownership to the exclusion of the other joint tenant . . . ." (citation omitted)). Quite the opposite: a party who merely has his name on a joint account and proves nothing more "fail[s] to establish his ownership of all the funds in the joint accounts." *Marcucci v. Hardy*, 65 F.3d 986, 992 (1st Cir. 1995). Indeed, if one owner of a joint bank account tries to withdraw more from the joint account than he owns or is entitled to, the other account holders may sue him for the tort of conversion because he has taken something that was not his to take. *Newbro v. Freed*, 409 F. Supp. 2d 386, 395 (S.D.N.Y. 2006); *see Matter of Kleinberg v. Heller*, 345 N.E.2d 592 (N.Y. 1976); *see also Kettler v. Sec. Nat'l Bank*, 805 N.W.2d 817, 823 (Iowa Ct. App. 2011) (stating that "a cotenant may not withdraw from the account in excess of his interest; if he has done so, he is liable to the other joint tenant for the excess so withdrawn" (quotation and citation omitted)); *South*, 934 S.W.2d at 507 ("[W]hen one [joint account holder] withdraws in excess of his moiety, he is liable to the other joint tenant for the excess withdrawn.").

The Nevada Supreme Court long ago rejected the very argument advanced here, in which "plaintiff contends that by depositing the money in the joint account defendant made a valid, completed gift to the plaintiff." *Weeks v. Weeks*, 72 Nev. 268, 275, 302 P.2d 750, 753 (1956). It rejected this argument summarily, pointedly noting that no authority existed for this proposition but "literally hundreds of cases" stood for the opposite. *Id*. at 276, 302 P.2d at 754; *see Edmonds v. Perry*, 62 Nev. 41, 140 P.2d 566 (1943) (under prior statute, merely because a bank account is joint does not mean that it is intended to be a joint tenancy with right of survivorship). Since then, the Nevada Supreme Court's position has consistently remained the same right through 2016: money retains its original ownership even when deposited into a joint account, and consequently "[a] judgment creditor may garnish only a debtor's funds that are held in a joint bank account, not the funds in the account owned by the nondebtor." *Brooksby v. Nev. State Bank*, 129 Nev. 771, 772, 312 P.3d

501 (2013). This is simply because "joint bank account funds [may] truly belong to someone other than the judgment debtor." *Id*. at 773, 312 P.3d at 502; *see Brooks v. Mejia*, 2016 WL 197396, Docket No. 67794 (Order of Affirmance, Jan. 14, 2016) (concluding that creditor could not garnish account to pay off debt owed by other account holder because appellant successfully "demonstrated that the funds in the bank account belonged to her alone"). In other words, even when funds from different sources are commingled in a joint bank account, the ownership of the funds does not automatically change merely by being deposited in the joint account. Rather, even when commingled, the funds retain their original ownership status at least so long as ownership can be traced. *In re Christensen*, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006) (ownership over funds stays unchanged even when commingled with other funds "so long as tracing is possible").

None of these cases makes any sense (and all would have to be overruled) if Natko is correct about what NRS 100.085 does. These cases make sense only if Natko is wrong. Indeed, they show, conclusively, that she is.

What a joint bank account does is give every account holder some right of access to the money. But access is not the same thing as ownership. "The joint owner of a bank account . . . has the right to withdraw all of the funds, thereby totally divesting the other joint owner of all interest. [But] the creator of a joint account has a cause of action against the other owner for having completely withdrawn the funds, upon establishing that in creating the account the creator did not intend to transfer [all of the funds]." *In re Rauh*, 164 B.R. 419, 424 (Bank. Ct. D. Mass. 1994); *see Kettler*, 805 N.W.2d at 823; *South*, 934 S.W.2d at 507. As another court described a virtually identical statute to NRS 100.085:

> The intent of [the statute] is to protect a financial institution from liability for distributing funds from a multiple-party account to any of the individual account holders. However, the relationship between a banking institution and the holders of a joint account does not in any manner shape the relationship between the account holders themselves. As such, while [one account holder] was authorized to withdraw the funds, she was not authorized to use the funds for her personal benefit.

Sandler v. Jaffe, 913 So. 2d 1205, 1207 (Fla. Dist. Ct. App. 2005). *See Erhardt v. Leonard*, 657 P.2d 494, 497 (Idaho Ct. App. 1983) (noting that "[a]ccount contracts . . . define the power of withdrawal held by each party to the account, as a means of protecting the financial institution," but that they do not affect the actual ownership of the funds therein, which is determined by looking to the intent of the depositor).

IV.

Natko argues that she is right and all of this is wrong because NRS 100.085 overturned it all in 1995, when the statute was last amended; ever since then, none of these statutes or common law principles has applied to any money held in joint bank accounts.

If she is correct, that raises an interesting question: what happened to money that was deposited into joint bank accounts before 1995 and remained there after the amended statute took effect? Natko concedes that, prior to 1995, money deposited into a joint account was not necessarily held in joint tenancy, agreeing that the Nevada Supreme Court said exactly that in *Starr v. Rousselet*, 110 Nev. 706, 712, 877 P.2d 525, 530 (1994) (holding that "a simple reference to a 'joint' account . . . will not suffice for purposes of establishing a joint tenancy"). She argues, though, that money deposited into any joint account became automatically held in joint tenancy beginning in 1995 when the last amendment to NRS 100.085 took effect, thereby overruling *Starr* at least *sub silentio.*

Would this not be a governmental seizure of private property and conveyance to others of all money held in joint bank accounts at the moment the 1995 amendments took effect—possibly tens of millions of dollars of it across Nevada? Nev. Const. art. 1, § 8(5) stipulates that "[n]o person shall be deprived of . . . property, without due process of law," and art. 1, § 22 provides that "[p]ublic use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party." Yet Natko seems to read the 1995 amendments as accomplishing something very much along those dangerous lines: taking all money deposited in any joint account before 1995 away from any original sole owner and giving it away in joint tenancy whether the owner wanted to or not.

Furthermore, it seems to me that this interpretation creates serious problems with the Contract Clause of the Nevada Constitution, which prohibits any "law impairing the obligation of contracts." Nev. Const. art. 1, § 15. Following Natko's reasoning, any contract governing the ownership of money held in a joint account before 1995—say, a 1994 contract that provided that money held in a joint account was expressly not held in joint tenancy between the parties—would have been voided, ex post facto, by the 1995 amendment to NRS 100.085. That would make NRS 100.085 unconstitutional. But we're not supposed to read statutes that way; to the contrary, "when a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored." *State v. Kopp*, 118 Nev. 199, 203, 43 P.3d 340, 342-43 (2002) (internal quotation marks omitted).

Central to the concept of liberty in our constitutional republic is the right to freely convey or dispose of private property as the own-

er, not the government, sees fit. Indeed, the right to own real and personal property free from government interference is the individual right most frequently mentioned in the U.S. Constitution. *See* U.S. Const. amend. III (protecting "any house"); amend. IV (protecting "houses" from unreasonable search and seizure); amend. V (prohibiting deprivation of life, liberty, or "property" without due process of law, and preventing "private property" from being taken without just compensation); amend. XIV (prohibiting deprivation of life, liberty, or "property" without due process of law). Government ownership and control of property is the hallmark of communist societies, not free ones. Yet that comes perilously close to what Natko seems to propose here: that the Legislature can simply take one's private property and give it to someone else (or at least make the original owner share it with others against his will) by enacting a statute like NRS 100.085.

V.

Natko argues that this is what NRS 100.085 demands. But the statute doesn't really say what she claims it does.

When reviewing statutes, we start with the statutory language and give it the meaning most reasonably supported by the text, structure, and context. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170, 174 (2012). If one is an "intentionalist" or "purposivist," one might also peek at the legislative history or announced purpose lurking behind a statute. But neither the stated purpose nor anything in the legislative history can ever override the plain meaning framed by the statute's own language and structure, because the language and structure were all that the Legislature voted on and all that the Governor signed.

As a starting point, the structure of NRS 100.085 tells us that it isn't the general all-purpose banking and property law statute that Natko says it is. Quite to the contrary, and quite notably, the general banking statute is located very far away, in NRS Chapter 657. The personal property statute is also located elsewhere, in NRS Chapter 111.

In contrast, NRS 100.085 is located within Chapter 100, a chapter directed specifically at "Special Relations of Debtor and Creditor," and NRS 100.085 is further located adjacent to a series of subchapters titled "Marshaling of Assets," "Suretyship," and "Transfer of Creditor's Rights." The statute is immediately preceded by a series of other statutes addressing "Agreements between principals and sureties for joint control of assets" (NRS 100.060); "Deposits authorized in lieu of cash payment or surety bond for protection of State" (NRS 100.065); and "Creditor's rights transferable without consent of debtor" (NRS 100.075). The statute immediately following NRS 100.085 is NRS 100.091, titled "Impound account required under loan secured by real property . . . ."

What does this tell us? That NRS 100.085 doesn't govern how bank accounts are set up for all purposes, nor does it supplant centuries of common law (along with several current statutes) to dictate who owns personal property; this chapter would be a pretty incongruous place to bury a statute that revolutionary. Rather, being placed here tells us that it's much narrower and is directed toward problems that may arise in debtor/creditor relations. As the Nevada Supreme Court has described the statute, "[t]he effect of NRS 100.085(1) is to protect a depository, such as a bank, from liability if it pays money out to a joint tenant of an account." *Walch v. State*, 112 Nev. 25, 31, 909 P.2d 1184, 1188 (1996).

Structure aside, here are what the plain words of the statute say. Under NRS 100.085(1) and (3), any "deposit made in the name of [two or more persons] and intended to be paid or delivered to any one of them" is the property of all named persons that can be withdrawn by any account holder, and the bank will suffer no liability if the withdrawal turns out to have been against the wishes of other account holders. NRS 100.085(4) specifically states that, "[f]or purposes of this section," the bank may treat a "deposit" into a joint account as if it were intended in joint tenancy so long as the deposit was made in the name of one or more persons into the joint account, unless the "depositor" indicates otherwise.

Take these words at face value, and notice what they don't say: they don't say that all joint bank accounts create joint tenancies all the time. Here's why. There are three ways that money can end up in a joint account: it can be deposited in a sole account to which more names are added later to make it joint; it can be deposited into a joint account in the name of only one account holder; or it can be deposited into a joint account in the names of multiple account holders. Yet NRS 100.085 addresses only one of these (the third). The plain words of NRS 100.085 state that the entire statute comes into play only when a joint account has already been established and a "deposit [is] made in the name of the depositor and one or more other persons." *See* NRS 100.085(1) ("When a deposit has been made in the name of the depositor and one or more other persons . . . ."); NRS 100.085(3) ("When a deposit has been made in the name of the depositor and one or more other persons . . . .").

By its plain terms, NRS 100.085 isn't triggered by the initial creation of a joint account, but rather only by the making of certain kinds of deposits into one already established. That's the very title of the statute: "Deposits in names of two or more persons" (and not, by contrast, "joint bank accounts" or "joint tenancies"). Even NRS 100.085(4), the section that refers to joint tenancies (and upon which Natko most obviously hangs her hat), is triggered only by the actions of a "depositor" who makes the kind of deposit outlined in sections (1) and (3). In fact, here is the language from (4) that forms the backbone of Natko's entire argument:

> 4. For the purposes of this section, unless a *depositor* specifically provides otherwise, the use by the *depositor* of any of the following words or terms in designating the ownership of an account indicates the intent of the *depositor* that the account be held in joint tenancy . . . . (emphasis added).

On their face, these words don't apply to all joint bank accounts from inception but only when activated by the actions of a "depositor" following a deposit pursuant to (1) or (3). This would not be Natko if she never deposited any of her own money into the account herself in the specific manner provided by (1) or (3) (which she seems to concede); Natko couldn't trigger this statute herself as a mere account holder who never made a deposit in the name of more than one person. Did the victim ever trigger section (4)? That depends on evidence we don't have before us.

But let's keep going through the text. What happens with the other two situations? Say no such deposits are made in the names of multiple account holders. Or, say deposits were made only back when the account was a sole account before it became joint. Notably, neither of these is covered by NRS 100.085(1), (3), or (4). The statute omits bank accounts that began as sole accounts and then were later converted into joint ones without any more deposits having been made. It also omits bank accounts that are joint, but in which no deposits have yet been made "in the name of the depositor and one or more other persons." These seem like rather glaring omissions, omissions that may potentially encompass thousands of joint accounts, weirdly making some bank accounts into joint tenancies but leaving out quite a lot of them.

So if NRS 100.085 creates joint tenancies at all (which I doubt, but let's assume it does for the moment), it does so only sporadically and unpredictably: some joint bank accounts are joint tenancies because the right kind of "deposit" was made into them; some joint bank accounts are not joint tenancies right now but may become joint tenancies in the future upon the making of the right kind of "deposit"; and some joint bank accounts may never become joint tenancies if the right kind of "deposit" is never made. That's a pretty odd scheme.

More pointedly, oddity aside, those omissions matter very much to this appeal because at least one of the situations omitted may be precisely the situation at hand. Here, the victim originally deposited what had unequivocally been his own money into a sole account and Natko's name was added to the account only later. Absent a transcript it's not clear whether all of the money at stake was deposited before or after her name was added (your guess is as good as mine on the precise sequence of events). If all of the victim's money was deposited while the account was still sole, then there was never a deposit into any joint account made in the name of more than one

person. If so, this case would be precisely one of the situations that the express words of NRS 100.085 would not cover, and Natko's interpretation of the statute leaves her own appeal out.

The strangeness of these results suggests something more broad: Natko is simply wrong about what the statute says. Why would a comprehensive banking and property statute omit so much and include so little? The answer must be: because NRS 100.085 is not the comprehensive banking and property statute that Natko argues it is. Rather, it is what *Walch* said it is: a statute that protects banks from liability. 112 Nev. at 31, 909 P.2d at 1188. It applies in only extremely limited circumstances, and says nothing about whether the mere creation of a joint account universally gifts every dollar deposited to everyone else whose name happens to be on the account. NRS 100.085(4) simply protects banks from being sued by a decedent's estate for allowing a surviving account holder to withdraw funds after the depositor has died and the bank mistakenly thought that a right of survivorship was intended. That's all it does. NRS 100.085(4) insulates the bank by allowing it to assume for purposes of the withdrawal that there existed a right of survivorship; but whether there actually was one is a matter to be resolved in probate court as a question of property law.

VI.

If Natko wanted to prove that the money was hers, she could have done so by introducing evidence of the victim's intent to gift the money to her, and perhaps the creating of the joint account may have constituted some evidence of such intent. But it did not become hers just by operation of law without any evidence that the victim intended a conveyance.

Alternatively, perhaps one might say that the creation of a joint bank account established a prima facie rebuttable presumption that the money in it might be intended to be held in joint tenancy. *See Sly*, 97 Nev. at 589, 637 P.2d at 528. But even then the jury must consider any and all evidence of intent offered to rebut that presumption.

Either way, NRS 100.085 is not the alpha and omega of the inquiry, with nothing more to ask. Accordingly, jury instruction 18 is more or less correct. It states that a person's status as a joint account holder by itself says nothing about who owns the money within the account or who can use it for their own personal benefit. That's manifestly true. Status as a joint account holder may constitute evidence pointing to ownership of the money. It may even create a rebuttable presumption of joint tenancy in some cases. But no legal conclusion can be drawn from the status itself, without anything more.

Although jury instruction 18 is poorly worded (including an obvious grammar and punctuation error), in substance it's a reasonable approximation of the law. It probably would have been more accurate had it stated that "a person's status as a joint account hold-

er does not by itself provide lawful authority to use or transfer the assets in the account for their own benefit," or perhaps "a person's status as a joint account holder does not by itself convey legal ownership of the funds deposited in the account." But it's not that far off the mark. I do not think the district court erred in giving it, and therefore reversal is not warranted.

VII.

Even if one could read NRS 100.085 as broadly as Natko proposes—to make the name on a bank account single-handedly preempt any other principle of property ownership—I would still affirm the conviction. Without a transcript of the trial, we have no idea what the State or Natko proved about the money in the bank account or the victim's capacity or intent to convey it. We also don't know whether jury instruction 18 related to the evidence introduced at trial or whether it may have been entirely superfluous and irrelevant to everything that happened below. Those gaps require affirmance.

But there's more. The central issue in this case appeared to be that, at the time the joint account was created, the victim may have lacked the mental capacity to make any serious financial decisions. If the trial evidence confirmed this (we can only guess), the jury could have concluded that the establishment of the joint bank account itself occurred without the victim's legal consent, and if so, then any withdrawal from it thereafter was either void or at least voidable due to the victim's lack of capacity. If the account itself and any deposit into it or withdrawals from it were legally void, then Natko never legally owned the money even under her theory of NRS 100.085, because the victim lacked the mental capacity to give it to her. A rational jury could have concluded that Natko committed theft and exploitation by inducing the victim to convert his money into joint tenancy and thereby gift it to her at a time when he had no legal capacity to agree, and I would affirm on this basis as well as for the other reasons set forth herein.

VIII.

For all of these reasons, I respectfully dissent. At common law, joint tenants could not steal from each other. But joint bank account holders might be able to, because not every joint bank account holder is necessarily a joint tenant to every penny ever deposited in the account by anyone at any time. In the absence of a trial transcript we simply do not know whether Natko was a joint tenant to the money deposited into the account, or whether she might have been a joint account holder without being a joint tenant. Consequently, we do not know whether any error occurred, and I would affirm the conviction.

JAMES MARLIN COOPER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 72091

December 27, 2018 432 P.3d 202

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of battery constituting domestic violence and two counts of child abuse, neglect, or endangerment. Eighth Judicial District Court, Clark County; David B. Barker, Senior Judge.[1]

Reversed and remanded.

Howard Brooks, Public Defender, and *Sharon G. Dickinson*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *William C. Rowles*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Cherry, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Stiglich, J.:

The use of a peremptory challenge to remove a potential juror on the basis of race is a violation of the United States Constitution. The Supreme Court of the United States has outlined a three-part test to help courts determine whether a peremptory challenge is improperly based on race, *see Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), and this court has adopted and utilized this test numerous times. In this opinion, we consider the first step of the test, specifically what evidence satisfies the prima facie showing of race-based discrimination. Because we conclude the district court clearly erred when it found that a prima facie showing was not made, we reverse and remand for a new trial.

FACTS

The State charged appellant James Cooper with two counts of child abuse, neglect, or endangerment, and one count each of battery constituting domestic violence committed by strangulation and battery constituting domestic violence. The charges stemmed from

[1]Judge Jessie Elizabeth Walsh presided over the trial in this matter, and Senior Judge David Barker signed the judgment of conviction.

Cooper's conduct at an apartment he shared with the victim and her two children.

During jury selection, and after for-cause challenges were resolved, the State exercised two of its five peremptory challenges to remove prospective Juror No. 217 and prospective Juror No. 274, both African-American women, the same race as Cooper. At the time the State exercised these strikes, the venire included 23 prospective jurors, 3 of whom were African American. Cooper objected to the State's challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), alleging that the two prospective jurors indicated they could be fair and that circumstances evinced a pattern of strikes against African Americans. The State responded that two African-American males were excused for cause and that Cooper had not made out a prima facie case of discrimination. The State argued that it only had to provide its reason for each of the strikes if the district court found a prima facie showing of discrimination. The district court indicated that it did not think Cooper could make the prima facie showing, that it believed Cooper's concern was with the racial make-up of the entire venire, and that it could think of many reasons why the State would want to strike either of the two prospective jurors. Without a more specific analysis from Cooper, the district court denied the *Batson* challenge.

DISCUSSION

The Equal Protection Clause of the United States Constitution prohibits any party from utilizing a peremptory challenge to strike a juror based on race. *See Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008). When an objection has been made to the alleged use of a race-based peremptory challenge, the district court must resolve the objection utilizing a three-part test. *See Batson*, 476 U.S. at 93-100; *Kaczmarek v. State*, 120 Nev. 314, 332-35, 91 P.3d 16, 28-30 (2004). "First, the opponent of the peremptory strike must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Williams v. State*, 134 Nev. 687, 689, 429 P.3d 301, 305 (2018) (internal quotation marks omitted). "Second, if that showing has been made, the proponent of the peremptory strike must present a race-neutral explanation for the strike." *Id*. at 689, 429 P.3d at 306. The third step consists of the district court "hear[ing] argument and determin[ing] whether the opponent of the peremptory strike has proven purposeful discrimination." *Id.* We afford great deference to the district court's findings regarding discriminatory intent, and we will not reverse "unless clearly erroneous."[2] *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30.

[2]Cooper argues that this court should review the district court's prima facie determination de novo. However, we decline to consider this argument as it was not raised until Cooper's reply brief. *See Francis v. Wynn Las Vegas*, 127 Nev.

The case before us involves the first step—the opponent's prima facie showing that the challenge was race based. "To establish a prima facie case under step one, the opponent of the strike must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Watson v. State*, 130 Nev. 764, 775, 335 P.3d 157, 166 (2014). We have held that the standard for establishing a prima facie case "is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under *Batson*." *Id*. "Rather, the opponent of the strike must provide sufficient evidence to permit the trier of fact to draw an inference that discrimination has occurred." *Id*. (internal quotation marks omitted). And "an inference" is "a conclusion reached by considering other facts and deducing a logical consequence from them." *Id*. (internal quotation marks omitted).

There is no one way to satisfy step one. The question is whether there is evidence, other than the fact that a challenge was used to strike a member of a cognizable group, establishing an inference of discriminatory purpose to satisfy the burden of this first step. *See Watson*, 130 Nev. at 775-76, 335 P.3d at 166. "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. But a pattern is not the only way to satisfy step one. *Watson*, 130 Nev. at 775-76, 335 P.3d at 166. Other evidence that may be sufficient includes "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167.

Both Cooper and the State agree that African Americans made up 13.04 percent of the venire (3 of 23). The State used 40 percent of its peremptory challenges (2 of 5) to remove 67 percent of the African Americans (2 of 3). *See Watson*, 130 Nev. at 778, 335 P.3d at 168 (approving of a method that compares the percentage of "peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire"). While numbers alone may not give rise to an inference of discriminatory purpose, we conclude that the percentage of peremptory challenges used against African Americans in this case was disproportionate to the percentage of African Americans in the venire such that an *inference* of purposeful discrimination was shown in this case. *Cf. Fernandez*

657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (stating that arguments raised for the first time in an appellant's reply brief need not be considered); *see also Watson v. State*, 130 Nev. 764, 775 n.2, 335 P.3d 157, 166 n.2 (2014) (acknowledging split of authority as to the standard of review for step one but declining to address the standard of review because the parties failed to raise the issue).

v. Roe, 286 F.3d 1073, 1078 (9th Cir. 2002) (stating prima facie case established where prosecutor used 29 percent of peremptory challenges to remove 57 percent of a targeted group that only comprised 12 percent of the venire); *Turner v. Marshall*, 63 F.3d 807, 813-14 (9th Cir. 1995) (holding prima facie case established where prosecutor used 56 percent of peremptory challenges to completely remove targeted group that only comprised 30 percent of the venire), *overruled in part on other grounds by Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999); *see also Shirley v. Yates*, 807 F.3d 1090, 1101 (9th Cir. 2015) ("The fact that a prosecutor peremptorily strikes all or most veniremembers of the defendant's race—as was the case here—is often sufficient on its own to make a *prima facie* case at [s]tep [o]ne."). The State's use of two challenges to strike members of a cognizable group along with the composition of the venire before and after the strikes suggest not only a pattern but a disproportionate effect resulting from the challenges. Thus, the totality of the circumstances evinces an inference of purposeful discrimination. We reach this conclusion particularly in light of the fact that the burden for step one is not intended to be onerous or to be clearly demonstrative of purposeful discrimination. *See Watson*, 130 Nev. at 775, 335 P.3d at 166. Therefore, the district court clearly erred when it found that Cooper had not satisfied step one of *Batson*.

Because the district court concluded that Cooper had not met his burden under step one, the State correctly averred below that it was not required to provide an explanation for the peremptory strikes. *See Watson*, 130 Nev. at 779-80, 335 P.3d at 169. But that choice has consequences if a reviewing court determines that the district court erred at step one—the record may be inadequate for the reviewing court to consider step two of the *Batson* analysis. *Cf. Kaczmarek*, 120 Nev. at 334-35, 91 P.3d at 30 (addressing steps two and three even though the district court did not adequately articulate its analysis where the record included the State's reasons for exercising the peremptory challenges and did not demonstrate any discriminatory motives). Without a record of the State's reasons for the peremptory strikes, we are left to speculate as to any race-neutral explanations for striking the two African-American women from the venire. While the district court said it could "think of a whole host of reasons" for the State wanting to strike either of the two African-American women, it did not articulate any of them.[3] More impor-

[3]We note that a district court's comment about possible justifications for a peremptory challenge, without input from the prosecution, could be viewed as the court resolving the *Batson* objection before all evidence and argument are presented. *Cf. Brass v. State*, 128 Nev. 748, 753 n.4, 291 P.3d 145, 149 n.4 (2012) (noting this court's concern that the district court's dismissal of a prospective juror before conducting a *Batson* hearing could be indicative of judicial bias as it may show the district court has closed its mind to the presentation of evidence).

tantly, judicial speculation about the State's reasons is inconsistent with the *Batson* framework. As the Supreme Court has explained, "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained asking a simple question." *Johnson v. California*, 545 U.S. 162, 172 (2005) (considering a case where the trial court did not seek a race-neutral explanation from the prosecution but instead explained that its own examination of the record was enough to convince the court that the strikes could be supported with race-neutral explanations). The Court has warned against "the imprecision of relying on judicial speculation to resolve plausible claims of discrimination." *Id*. at 173. Thus, when a *Batson* objection is erroneously rejected at step one and the record does not clearly reflect the State's reasons for its peremptory strikes, whether because the district court did not inquire into them after ruling against the defendant on step one or because the State declined to provide its reasons unless the district court first made a finding of a prima facie case under step one, this court cannot proceed to steps two and three for the first time on appeal.[4]

The silence as to the State's reasons for exercising the two challenged peremptory strikes is particularly problematic in this case because the State posed a question with race-based implications during voir dire: it asked whether any of the veniremembers had strong opinions about the Black Lives Matter movement.[5] The question had, at best, minimal relevance to the circumstances of this case.[6] *See Valdez v. People*, 966 P.2d 587, 595 (Colo. 1998) (chastising the prosecutor's reference to the O.J. Simpson case and questions to prospective jurors regarding race, made during voir dire, in part because the "case did not have any apparent racial issues"). The

[4]As we indicated in *Watson*, when the district court determines that the defendant has not made the prima facie showing required by *Batson*'s step one, it can be a good idea for the district court to inquire into the State's race-neutral reasons to ensure that there is a complete record for appellate review. *See* 130 Nev. at 779-80, 335 P.3d at 169 (stating step one of *Batson* was not rendered moot where a district court asked the State to articulate its reasons for the strike "out of an abundance of caution after the court had determined that [the defendant] failed to make a prima facie case").

[5]The Black Lives Matter movement "is a social movement" established "in response to the perceived mistreatment of African-American citizens by law enforcement officers." *Doe v. Mckesson*, 272 F. Supp. 3d 841, 849 (M.D. La. 2017).

[6]We do not conclude that this type of question could never be relevant. Rather, we do not perceive its relevance given the facts in *this* case.

question did not examine an issue apparent in this case, and the State fails to credibly explain how this question helped expose whether a prospective juror could "consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (discussing the purpose of voir dire). And we are concerned that by questioning a veniremember's support for social justice movements with indisputable racial undertones, the person asking the question believes that a "certain, cognizable racial group of jurors would be unable to be impartial, an assumption forbidden by the Equal Protection Clause." *Valdez*, 966 P.2d at 595; *see also Batson*, 476 U.S. at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."). The Black Lives Matter question, coupled with the State's use of 40 percent of its peremptory challenges (2 of 5) to remove 67 percent (2 of 3) of the veniremembers in a particular cognizable group that made up just over 13 percent of the venire, could support a finding of purposeful discrimination.

Having concluded that the district court clearly erred when it terminated the *Batson* analysis at step one and that the record does not clearly support the denial of Cooper's objection, we reverse the judgment of conviction and remand to the district court for a new trial.[7] *See Diomampo*, 124 Nev. at 423, 185 P.3d at 1037 (observing that *Batson* error is structural).

Cherry and Parraguirre, JJ., concur.

---

[7]Cooper raises additional arguments on appeal regarding alleged error in the proceedings below. We have considered and reject his claim that insufficient evidence supports his convictions. And given our disposition, we do not reach the merits of his remaining claims.

IN THE MATTER OF THE ESTATE OF THELMA AILENE SARGE.

ESTATE OF THELMA AILENE SARGE, BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE; AND ESTATE OF EDWIN JOHN SARGE, BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE, APPELLANTS, *v.* QUALITY LOAN SERVICE CORPORATION; AND ROSEHILL, LLC, RESPONDENTS.

No. 73286

December 27, 2018 432 P.3d 718

Jurisdictional prescreening of an appeal from a district court order granting a motion to dismiss in consolidated district court cases. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appeal may proceed.

Tory M. Pankopf Ltd. and *Tory M. Pankopf*, Reno, for Appellants.

McCarthy Holthus LLP and *Kristin A. Schuler-Hintz* and *Thomas N. Beckom*, Las Vegas, for Respondent Quality Loan Service Corporation.

Walsh, Baker & Rosevear and *James M. Walsh* and *Anthony J. Walsh*, Reno, for Respondent Rosehill, LLC.

Before the Supreme Court, PICKERING, GIBBONS and HARDESTY, JJ.

OPINION

By the Court, PICKERING, J.:

In *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990), this court held that cases consolidated by the district court become a single case for all appellate purposes. By extension, *Mallin* holds that an order that resolves fewer than all claims in a consolidated action is not appealable as a final judgment, even if the order resolves all of the claims in one of the consolidated cases. Based on foundational problems with *Mallin*, the history of NRCP 42(a), and the United States Supreme Court's recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), we overrule the consolidation rule announced in *Mallin* and hold that an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending. Because the order challenged on appeal here finally

resolved one of three consolidated cases, it is appealable and this appeal may proceed.

FACTS AND PROCEDURAL HISTORY

Appellant estates through proposed executrix Jill Sarge (Sarge) filed a complaint for reentry onto real property, asserting that respondent Quality Loan Service Corporation violated NRS 107.080 with respect to its foreclosure of the property.[1] On the same day, Sarge also filed petitions to set aside the estates. The district court consolidated the three cases, stating that "all future pleadings and papers shall be filed under the real property case number" corresponding to the complaint for reentry. Later, the district court dismissed the reentry complaint, concluding that the trustee complied with applicable law. This appeal from the dismissal order followed.

The docketing statement suggested that the order dismissing the complaint for reentry was not appealable as a final judgment under NRAP 3A(b)(1), because the claims in the consolidated cases appeared to remain pending. *See Mallin*, 106 Nev. at 609, 797 P.2d at 980. We thus ordered appellants to show cause why the appeal should not be dismissed for lack of jurisdiction. After appellants filed their response, the United States Supreme Court decided *Hall v. Hall*, holding that an order resolving one of several cases consolidated pursuant to FRCP 42(a) is immediately appealable. 138 S. Ct. 1118. We directed the parties to file supplemental briefs discussing the impact of *Hall* on our interpretation of NRCP 42(a); specifically, we asked the parties to address whether in light of *Hall*, cases consolidated in the district court should continue to be treated as a single case for appellate purposes.[2]

Appellants urge us to interpret NRCP 42(a) as the Supreme Court interpreted FRCP 42(a) in *Hall.* They assert that NRCP 42(a) is modeled after FRCP 42(a) and cases interpreting FRCP 42(a) are thus strongly persuasive. Further, one of the cases *Mallin* relied upon, *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984), was overturned by *Hall* and no longer supports the holding in *Mallin*.

Quality Loan asserts that the holding in *Hall* is not binding on this court and the doctrine of stare decisis requires that *Mallin* remain the law. Quality Loan also contends that the holding of *Hall* is not well suited to Nevada and its courts of general jurisdiction. Rosehill

[1]Sarge later amended the reentry complaint to add respondent Rosehill LLC as a defendant.

[2]The district court cites no authority in its order allowing consolidation. It appears that NRCP 42(a) is the only provision permitting consolidation, and the parties do not contend that the cases were consolidated under a different provision. We thus presume that consolidation was ordered pursuant to NRCP 42(a).

argues that *Hall* did not overrule *Huene* and has no application to this court's decision in *Mallin*.

DISCUSSION

In *Mallin*, the court sua sponte questioned whether an order resolving one of two consolidated cases is appealable as a final judgment without a certification of finality under NRCP 54(b). 106 Nev. at 608-09, 797 P.2d at 980. The court answered in the negative based on policy considerations. Allowing an appeal before the entire consolidated action was resolved, the court reasoned, could complicate the district court proceedings and cause duplication of efforts by the appellate court. *Id*. at 609, 797 P.2d at 980. The district court, it concluded, "is clearly in the best position to determine whether allowing an appeal would frustrate the purpose for which the cases were consolidated." *Id*. Accordingly, "when cases are consolidated by the district court, they become one case for all appellate purposes." *Id*. Under this rule, an order resolving fewer than all claims in a consolidated action is not an appealable final judgment unless it is certified as final under NRCP 54(b). *Id*.

The court in *Mallin* did not acknowledge the rule allowing consolidation, NRCP 42(a). But analyzing consolidation must necessarily start with the rule authorizing it. And as discussed below, NRCP 42(a) does not support the result reached in *Mallin*.

This court applies the rules of statutory interpretation when interpreting the Nevada Rules of Civil Procedure. *In re Estate of Black*, 132 Nev. 73, 76, 367 P.3d 416, 418 (2016). Rules are enforced as written if their text is clear. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). If a rule is ambiguous, we consult other sources to decipher its meaning, including its history. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)). "When a legislature adopts language that has a particular meaning or history, . . . a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer*, 120 Nev. at 580-81, 97 P.3d at 1135-36.

NRCP 42(a) states:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Before *Mallin*, this court recognized the ambiguity of the term "consolidation." The term can mean that "several actions are combined into one, lose their separate identities and become a single action"

or that "several actions are tried together but each retains its separate character." *Randall v. Salvation Army*, 100 Nev. 466, 470, 686 P.2d 241, 243 (1984). Based on this ambiguity, the court must consider the history of the rule to decipher the meaning of consolidation.

Before adoption of the Nevada Rules of Civil Procedure, consolidation was permitted under Nevada Compiled Laws § 9025 (Supp. 1943-1949). This law was based on the Federal Rules of Civil Procedure and contained the exact language found in FRCP 42(a). *Mikulich v. Carner*, 68 Nev. 161, 169-70, 228 P.2d 257, 261 (1951). In *Mikulich*, this court considered the effect of Nevada Compiled Laws § 9025 on cases joined for trial. The respondent argued that because two cases against defendants/appellants were consolidated in the district court, the same jury rendered verdicts against defendants/appellants, and defendants/appellants paid one of the judgments without reservation, defendants/appellants admitted liability and had no right of appeal from the judgment in favor of respondent. *Id*. at 169, 228 P.2d at 262. The *Mikulich* court rejected the respondent's argument, noting that the district court had not consolidated the actions, but joined them together for trial, and such joinder did not merge the two cases into a single case. *Id*. at 168-69, 228 P.2d at 260-61. In support, *Mikulich* cited *Johnson v. Manhattan Railway Co.*, 289 U.S. 479 (1933), where the United States Supreme Court, construing FRCP 42(a), held that consolidation does not merge suits. *Id*. at 169, 228 P.2d at 261. The *Mikulich* court recognized that Nevada Compiled Laws § 9025 was identical to FRCP 42(a) and the federal courts consistently held that consolidation for the purpose of joint trial does not merge the cases into a single cause of action. *Id*. at 169-70, 228 P.2d at 261.

Thus, when Nevada adopted its Rules of Civil Procedure in 1952, this court had already held in *Mikulich* that joinder for trial under Nevada Compiled Laws § 9025 does not merge two suits into a single suit and cited with approval authority holding that consolidation under a rule containing language identical to § 9025 did not result in merger. The language of Nevada Compiled Laws § 9025 carried over to NRCP 42(a), unchanged. *Compare* Nev. Compiled Laws § 9025 (Supp. 1943-1949), *with* NRCP 42(a) (1953). And nothing in the discussions regarding the adoption of the Nevada Rules of Civil Procedure indicates that any changes to the meaning of consolidation were intended. To the contrary, the discussions contain numerous recommendations that Nevada's rules be based on the federal rules. *E.g*., *Report of Committee on Civil Practice*, Vol. 16, No. 1 Nev. State Bar Journal, Jan. 1951, at 20-22; *Proceedings of the Twenty-Third Annual Meeting of the State Bar of Nevada*, Vol. 16, No. 2 Nev. State Bar Journal, Apr. 1951, at 76-77, 101. Accordingly, it is proper to presume that the meaning of the rule under NRCP

42(a) was consistent with the interpretation given to it under Nevada Compiled Laws § 9025.[3] *See Beazer*, 120 Nev. at 580-81, 97 P.3d at 1135-36. *Mallin* did not acknowledge the history of NRCP 42(a) or this court's opinion in *Mikulich*.

Compounding the problem, the federal cases relied upon in *Mallin* have now been overruled. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the United States Supreme Court considered whether an order that resolves fewer than all the claims in a consolidated action is appealable as a final judgment absent certification from the district court. The Supreme Court first determined that the term "consolidate," as used in FRCP 42(a), is ambiguous; it can mean "the complete merger of discrete units" or "joining together discrete units without causing them to lose their independent character." *Id*. at 1124-25. It therefore turned to the historical meaning of the term, reaching back to the enactment of the first consolidation statute in 1813. *Id*. at 1125-31. Citing several cases, including *Johnson*, the Supreme Court concluded "that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Id*. at 1131.

"[U]nder the doctrine of stare decisis, [this court] will not overturn [precedent] absent compelling circumstances for so doing. Mere disagreement does not suffice." *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011) (alterations in original) (quoting *Sec'y of State v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008)). We are reluctant to depart from the doctrine of stare decisis; however, we will not adhere to it so stringently "that the . . . law is forever encased in a straight jacket." *Id*. (quoting *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974)). Given that *Mallin* did not consider the rule authorizing consolidation or acknowledge relevant case law and that the federal cases it relied on have since been overruled, *Mallin*'s holding that consolidated cases become one case for appellate purposes is no longer sound. In addition, the Supreme Court's decision in *Hall* interpreting FRCP 42(a) is "strong persuasive authority" regarding the interpretation of NRCP 42(a). *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co*., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotation marks omitted). For these reasons, we conclude weighty and compelling circumstances exist warranting the departure from the doctrine of stare decisis. *See Burk*, 124 Nev. at 597, 188 P.3d at 1124; *Nettles v. Rumberger, Kirk & Caldwell, P.C*., 276 So. 3d 663 (Ala. 2018) (overruling prior case law construing Alabama Rule of Civil Procedure 42(a) and adopting the Supreme Court's decision in *Hall*). We thus overrule our decision in *Mallin* to the extent it holds that cases consolidated in the district court become a single case for all appellate purposes. Consolidated

[3]NRCP 42 was amended in 1971, but the amendment affected only NRCP 42(b).

cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1).

The district court order challenged in this appeal completely resolved the reentry complaint. Accordingly, the order is appealable under NRAP 3A(b)(1), and this appeal may proceed. Appellants shall have 60 days from the date of this opinion to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). We caution the parties that failure to timely file briefs may result in the imposition of sanctions. NRAP 31(d).

Gibbons and Hardesty, JJ., concur.