THE STATE OF NEVADA STATE ENGINEER; THE STATE OF NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES; AND KOBEH VALLEY RANCH, LLC, APPELLANTS, *v.* EUREKA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; KENNETH F. BENSON, AN INDIVIDUAL; DIAMOND CATTLE COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, A NEVADA REGISTERED FOREIGN LIMITED PARTNERSHIP, RESPONDENTS.

No. 70157

September 27, 2017 402 P.3d 1249

Appeal from a district court order granting a petition for judicial review in a water law matter. Seventh Judicial District Court, Eureka County; Gary Fairman, Judge.

Affirmed.

Adam Paul Laxalt, Attorney General, and *Micheline N. Fairbank*, Senior Deputy Attorney General, Carson City, for Appellants State of Nevada State Engineer and the State of Nevada Department of Conservation and Natural Resources, Division of Water Resources.

Taggart & Taggart, Ltd., and *Paul G. Taggart* and *David H. Rigdon*, Carson City; *Parsons Behle & Latimer* and *Ross E. de Lipkau* and *Gregory H. Morrison*, Reno, and *Francis M. Wikstrom*, Salt Lake City, Utah, for Appellant Kobeh Valley Ranch, LLC.

Allison MacKenzie, Ltd., and *Karen A. Peterson, Dawn Ellerbrock*, and *Kyle A. Winter*, Carson City; *Theodore Beutel*, District Attorney, Eureka County, for Respondent Eureka County.

Schroeder Law Offices, P.C., and *Therese A. Ure* and *Laura A. Schroeder*, Reno, for Respondents Kenneth F. Benson; Diamond Cattle Company, LLC; and Michel and Margaret Ann Etcheverry Family, LP.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, C.J.:

We previously determined in *Eureka County v. State Engineer* (*Eureka I*), 131 Nev. 846, 359 P.3d 1114 (2015), that the State Engineer failed to rely upon substantial evidence in finding that Kobeh Valley Ranch, LLC (KVR) would be able to mitigate conflicts to pri-

or water rights when approving KVR's applications to appropriate water. Specifically, we concluded that the State Engineer's "decisions must be supported by substantial evidence in the record before him," and that for these permits that "[was] not the case." *Eureka I*, 131 Nev. at 855, 359 P.3d at 1120. As a result, we reversed the district court's previous order denying judicial review and remanded to the district court for further proceedings.

On remand, the district court granted the previously denied petition for judicial review and vacated KVR's permits. KVR and the State Engineer contend that the district court violated our mandate by not further remanding to the State Engineer for additional fact-finding.

We conclude that the district court properly granted the petition for judicial review and properly vacated KVR's permits. The district court's actions were proper because (1) we did not direct the district court to remand to the State Engineer, and (2) KVR is not entitled to a second bite at the apple after previously failing to present sufficient evidence of mitigation.

FACTS AND PROCEDURAL HISTORY

Appellant KVR filed numerous applications to amend water usage in the Kobeh Valley. Respondents Eureka County and several existing holders of water rights protested the applications. The State Engineer granted KVR's applications in Ruling Number 6127. In R6127, the State Engineer recognized that the ruling *would* impact some senior water rights but that KVR *might be able to* mitigate the impact. Even though the State Engineer had already approved the applications, R6127 required KVR to prepare a monitoring, management, and mitigation plan (3M Plan) before diverting any water.

Respondents petitioned the district court to review R6127. The district court denied the petition for judicial review, finding that substantial evidence supported R6127. While review of R6127 was pending in the district court, KVR submitted its 3M Plan and the State Engineer approved it. The district court denied a petition for judicial review of the 3M Plan.

Respondents appealed the district court's decision claiming, *inter alia*, that the State Engineer was required to deny applications for permits that would conflict with prior water rights under NRS 533.370(2). We acknowledged our concern that the State Engineer may have exceeded his authority by considering mitigation at all, but we did not reach that issue. Instead, we concluded that even if the State Engineer had the authority to consider mitigation, he failed to rely upon substantial evidence that KVR would be able to actually mitigate the conflicts. As a result, we reversed and remanded

the case "to the district court for proceedings consistent with [the] opinion."[1] *Eureka I*, 131 Nev. at 857, 359 P.3d at 1121.

Shortly after the remittitur issued following *Eureka I*, KVR submitted proposed orders to the district court to remand the case to the State Engineer for additional fact-finding. Respondents filed a joint objection to the proposed orders, in which they argued that *Eureka I* required the district court to vacate KVR's permits outright, rather than remand to the State Engineer.

The district court ruled in favor of respondents, sustaining their joint objection to KVR's proposed orders, granting their petition for judicial review, and vacating KVR's permits. Specifically, the district court interpreted *Eureka I* as a mandate to vacate KVR's permits without remanding for further fact-finding.

DISCUSSION

KVR and the State Engineer argue that the district court exceeded its authority and violated our instructions by vacating the permits rather than remanding the case to the State Engineer for further fact-finding. We disagree.

Whether the district court has complied with our mandate on remand is a question of law that we review de novo. *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263, 71 P.3d 1258, 1260 (2003). "[W]here an appellate court deciding an appeal states a principal or rule of law, necessary to the decision, the principal or rule becomes the law of the case and must be adhered to throughout its subsequent progress both in the lower court and upon subsequent appeal." *LoBue v. State ex rel. Dep't of Highways*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976). When an appellate court remands a case, the district court "must proceed in accordance with the mandate and the law of the case as established on appeal." *E.E.O.C. v. Kronos Inc.*, 694 F.3d 351, 361 (3d Cir. 2012) (internal quotation marks omitted). The district court commits error if its subsequent order contradicts the appellate court's directions. *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016).

In *Eureka I*, we determined that the State Engineer's determination that KVR could mitigate any conflicts to preexisting water rights was not based upon substantial evidence and could not stand. 131 Nev. at 856, 359 P.3d at 1121. At no point did we direct the district court to remand to the State Engineer for additional fact-finding. Because (1) the State Engineer relied on insufficient facts before granting KVR's applications, (2) we gave no order to remand to the State Engineer, and (3) KVR is not entitled to a do-over after failing

[1]A more detailed recital of the facts up to and including our prior opinion can be found in *Eureka I*, 131 Nev. at 848-56, 359 P.3d at 1116-21.

to provide substantial mitigation evidence, we conclude that the district court acted consistently with *Eureka I*.

CONCLUSION

Because the district court acted consistently with our instructions set forth in *Eureka I*, we affirm the district court's order.[2]

DOUGLAS, GIBBONS, PARRAGUIRRE, and STIGLICH, JJ., concur.

PICKERING, J., with whom HARDESTY, J., agrees, concurring:

Eureka I did not mandate that the district court grant the petitions for judicial review. It reversed and remanded the district court's order denying judicial review for further proceedings consistent with the court's opinion. An open-ended reversal and remand such as this permits further proceedings on motion in district court. The law of the case doctrine applies "to issues previously determined, not to matters left open by the appellate court." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003); *compare Recontrust Co. v. Zhang*, 130 Nev. 1, 8, 317 P.3d 814, 818 (2014) (for a prior appellate disposition to establish law of the case that is binding on the district court "the appellate court must actually address and decide the issue explicitly or by necessary implication") (quoting *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010)), *with Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997) ("Broadly speaking, [appellate] mandates require respect for what the higher court decided, not for what it did not decide.").

The record and briefs in *Eureka I* did not afford a basis for this court to resolve whether, as an equitable matter, KVR should be allowed to reopen the proceedings before the State Engineer to present additional evidence. *See Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 199, 234 P.3d 912, 919 (2010) ("We have previously recognized the district court's power to grant equitable relief when water rights are at issue.") (collecting cases); *cf. Standard Oil Co. v. United States*, 429 U.S. 17, 18-19 (1976) (holding that the mandate branch of the law of the case doctrine does not preclude a trial court from entertaining a Rule 60(b) motion that, if granted, would disturb the judgment entered in accordance with the appellate mandate). Further, neither the record and briefs nor this court's opinion in *Eureka I* ruled out the possibility of a mixed result, by which, for example, the applications and permits pertaining to Diamond Valley could be sustained but not others. These and other potential issues were left open to the parties and the district court—and not precluded by—the doctrine of law of the case and our decision in *Eureka I*.

[2]We have considered the State Engineer's and KVR's other theories of error and conclude that they are without merit.

Although not required by the law of the case doctrine or *Eureka I*, I nonetheless concur in the result. Under *Great Basin*, this court, equally with the district court, "has the power to grant equitable relief in water law cases." 126 Nev. at 199, 234 P.3d at 920. After examining the arguments of the parties and applicable law, I am not convinced equitable relief is warranted or that the arguments presented to the district court establish a basis for reversing its decision to grant the petitions for judicial review. I therefore concur, but only in the result.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO A.D.L. AND C.L.B., JR., MINORS.

KEAUNDRA D.; A.D.L.; AND C.L.B., JR., APPELLANTS, *v.* CLARK COUNTY DEPARTMENT OF FAMILY SERVICES, RESPONDENT.

No. 69047

October 5, 2017 402 P.3d 1280

Appeal from a district court order terminating a mother's parental rights as to her minor children. Eighth Judicial District Court, Family Court Division, Clark County; Robert Teuton, Judge.

Reversed.

[Rehearing denied December 22, 2017]

[En banc reconsideration denied February 27, 2018]

Legal Aid Center of Southern Nevada, Inc., and *Christal L. Dixon*, Las Vegas, for Appellants A.D.L. and C.L.B., Jr.

David M. Schieck, Special Public Defender, and *Deanna M. Molinar* and *Melinda E. Simpkins*, Deputy Special Public Defenders, Clark County, for Appellant Keaundra D.

Steven B. Wolfson, District Attorney, and *Ronald L. Cordes*, Chief Deputy District Attorney, Clark County, for Respondent.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

In this opinion, we consider whether a parent's Fifth Amendment rights are violated when he or she is required to admit to a criminal

act in order to maintain his or her parental rights. We conclude that a parent cannot be compelled to admit to a crime under the threat of termination of parental rights.

Appellant Keaundra D. was required to admit to a criminal act for her to be considered in compliance with her case plan, which we conclude was a violation of her Fifth Amendment rights. Additionally, we conclude that Keaundra overcame the presumptions in NRS 128.109(1)-(2) that terminating parental rights was in the best interests of the children. In the absence of such presumptions, there was not substantial evidence supporting the district court's termination of Keaundra's parental rights. Accordingly, we reverse.

FACTS AND PROCEDURAL HISTORY[1]

In April 2010, respondent Clark County Department of Family Services (DFS) received an anonymous call through its child abuse hotline alleging that Keaundra's children were being abused and neglected. The caller alleged that the face of Keaundra's infant child had been burned. During an interview with a DFS investigator, Keaundra stated that she was the only adult at home when C.L.B., Jr. was burned. Her two children, A.D.L. and C.L.B., Jr., were in the master bedroom while she was preparing for work in the attached bathroom. She had recently ironed her clothes and had placed the iron on her dresser. Keaundra heard the iron fall and when she came out to investigate, A.D.L. told her that C.L.B., Jr. had "tried to kiss the iron." Keaundra then called her mother, a nurse, who told her to put ointment on the injury and to take C.L.B., Jr. to the emergency room if the burn blistered.

Following the initial contact with DFS, Keaundra moved her family to Louisiana, where her father was stationed with the U.S. Air Force. Upon learning that Keaundra moved to Louisiana, DFS sought help from U.S. Air Force authorities to gain protective custody of the children. The children were removed from Keaundra's care, and C.L.B., Jr. was taken to see Dr. Thomas A. Neuman, a physician in Louisiana. Dr. Neuman reported that the injury was well healed and that there was no evidence of abuse.

In May 2010, DFS filed a petition for protective custody of A.D.L. and C.L.B., Jr. under NRS Chapter 432B, alleging that Keaundra had either physically abused or negligently supervised C.L.B., Jr. A plea hearing was held wherein Keaundra entered a denial, and DFS requested placement of the children with their maternal grandmother.

At a subsequent adjudicatory hearing, the hearing master took testimony from Dr. Neha Mehta, a medical examiner who had re-

[1]This matter previously came before us on appeal challenging a separate district court order terminating Keaundra's parental rights, and we entered an opinion of reversal and remand. *See In re Parental Rights as to A.L. and C.B.*, 130 Nev. 914, 337 P.3d 758 (2014). The facts and procedural history here are largely taken from that opinion.

viewed photographs of C.L.B., Jr.'s injuries. Dr. Mehta opined that the shape of the injury was not consistent with an accident and that the iron had been deliberately held to C.L.B., Jr.'s face. Keaundra offered Dr. Neuman's report to rebut Dr. Mehta's testimony. The hearing master excluded the report on the ground that the report was not a certified copy. The hearing master found that Keaundra had physically abused C.L.B., Jr., had medically neglected him, and had absconded. Based on those findings, the hearing master recommended sustaining the abuse and neglect petition and that A.D.L. and C.L.B., Jr. remain in DFS custody. The juvenile court affirmed the hearing master's recommendation and concluded that C.L.B., Jr.'s injury was nonaccidental.

In light of these findings, Keaundra received a case plan which required that she maintain stable housing and income, keep in contact with DFS, and complete parenting classes. She was also required to complete a physical abuse assessment and "be able to articulate in dialogue with the Specialist and therapist(s) the sequence of events which result[ed] in physical abuse, as sustained by the Court, and how he/she will be able to ensure that no future physical abuse to [C.L.B.,] Jr. occurs." One month after giving Keaundra the case plan, DFS recommended termination of parental rights as the goal for the children. DFS then filed a petition to terminate Keaundra's parental rights as to A.D.L. and C.L.B., Jr.

At her six-month review, DFS reported that Keaundra had completed her parenting classes, maintained housing, held regular jobs, and completed both her assessment and therapy. At that point, the children had been placed with their maternal grandmother in Louisiana, where Keaundra was also living. DFS stated that it was satisfied with Keaundra's progress. DFS further stated that Keaundra had "successfully completed her case plan and has the knowledge and tools to effectively parent her children." Despite DFS's satisfaction with Keaundra's progress, it nonetheless maintained its recommendation that her parental rights be terminated because she had not admitted that she abused C.L.B., Jr. by holding an iron to his face. DFS later stated at trial that, with such an admission, it would not have sought termination of parental rights.

At the next six-month review, DFS again noted that Keaundra had completed her case plan in all other regards and that she acknowledged that negligence and improper supervision caused C.L.B., Jr.'s injury. Again, DFS maintained its recommendation to terminate parental rights due to Keaundra's refusal to admit that she held the iron to C.L.B., Jr.'s face.

In the meantime, Keaundra moved to South Carolina and was referred to a new therapist, who was in regular contact with a DFS caseworker. At the parental termination trial, the new therapist testified that therapy resulted in a marked change in Keaundra's behavior and demeanor. She noted that despite signs of depression and

anxiety at the start of therapy, Keaundra's demeanor had substantially changed over the course of treatment and her risk to reoffend was low. The therapist saw no signs that she would expect to see in an abusive parent.

At the conclusion of the trial, the district court issued a decision terminating Keaundra's parental rights as to C.L.B., Jr. and A.D.L. The district court relied on the hearing master's findings, as affirmed by the juvenile court, that Keaundra was at fault for C.L.B., Jr.'s injuries and that his injuries were not accidental. Because Keaundra was unable to remedy the "circumstances, conduct or conditions" leading to C.L.B., Jr.'s removal, the district court terminated her parental rights based on token efforts, failure of parental adjustment, and unfitness. The district court further found that termination was in the best interests of the children.

Keaundra appealed that decision to this court. We reversed the district court's order based on the failure to admit the report of Dr. Neuman and remanded the matter for a new trial on the issue of parental fault and consideration of additional evidence.

As a result of this court's decision, Keaundra filed a motion to immediately reinstate her visitation with A.D.L. and C.L.B, Jr., to have a Children's Attorneys Project attorney appointed for the children, and to change her permanency plan to reunification. The district court initially denied Keaundra's motion for visitation but later ordered visitation at the discretion of the children's therapist.

Before the second trial, the parties stipulated to admission of all evidence from the prior termination trial, retaining only the issue of the inappropriate finding of parental fault based on the exclusion of Dr. Neuman's report. At the new parental termination trial, the district court admitted Dr. Neuman's report over the objection of DFS, and Dr. Mehta again testified over the objection of Keaundra's counsel. Dr. Mehta once again opined that the injury to C.L.B., Jr.'s face was inconsistent with the explanation given, but she admitted that this opinion was based only on viewing the photographs before the initial trial. Dr. Mehta testified that generally her practice in ascertaining the nature of an injury would be to obtain as much information as possible. Dr. Mehta only recalled being told of an iron and a child kissing the iron; she did not interview any witnesses to the incident, did not see the child in person, and was unaware of the previous report from Dr. Neuman stating that there was no sign of abuse. Dr. Mehta noted that although an accidental cause of injury was possible, she could not conceive of such an explanation.

After closing arguments, the district court inquired as to whether any offer of immunity had been given to Keaundra, as well as why that immunity was not offered in order to further reunification efforts. The district court further opined that because the court's purpose in protective custody proceedings is to reunify children, parents need to be open and honest, and, as such, the judge's practice

is to offer immunity from statements made to treatment providers or DFS. DFS acknowledged that Keaundra was not offered immunity. DFS further indicated that it was unaware of any legal authority that would preclude the offer of immunity. While acknowledging that the offer of immunity would cure any Fifth Amendment concerns, DFS indicated that immunity did not apply in Keaundra's case.

The district court ultimately reaffirmed its prior decision to terminate Keaundra's parental rights, due largely to Dr. Mehta's credentials and compelling testimony. The district court ended its decision by noting that Keaundra "continued to insist that the burn was accidental in nature in spite of all physical evidence being to the contrary." Keaundra now appeals.

DISCUSSION

On appeal, Keaundra argues that terminating her parental rights on the sole basis that she refused to admit that she intentionally harmed C.L.B., Jr. violated her Fifth Amendment right against self-incrimination. Keaundra further argues that the district court's decision to terminate her parental rights was erroneous as it was not supported by substantial evidence.

The district court's termination of Keaundra's parental rights constituted a violation of her Fifth Amendment right against self-incrimination

Keaundra contends that the district court abused its discretion by finding that she did not exhibit behavioral changes that would warrant the return of her children since that finding was based solely on her noncompliance with her case plan because she refused to admit that she abused C.L.B., Jr. Thus, she argues, reunification and the avoidance of the termination of her parental rights were conditioned on her admitting a criminal act, in violation of her Fifth Amendment right against self-incrimination. We agree.

The Fifth Amendment right against self-incrimination, which applies to the states through the Fourteenth Amendment, states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *See Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting U.S. Const. amend. V). The Fifth Amendment not only protects individuals in criminal proceedings, "but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Further, an individual cannot be penalized for invoking his Fifth Amendment right. *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967).

The United States Supreme Court has held that the state may not compel a person to choose between the Fifth Amendment privilege

against self-incrimination and another important interest because such a choice is inherently coercive. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-08 (1977). This court has recognized that "the parent-child relationship is a fundamental liberty interest." *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126, 133 (2000). Thus, we agree with other courts that have held that a parent may not be compelled to admit a crime under the threat of the loss of parental rights. *See, e.g.*, *In re A.W.*, 896 N.E.2d 316, 326 (Ill. 2008) ("We agree with those courts that have held a juvenile court may not compel a parent to admit to a crime that could be used against him or her in a subsequent criminal proceeding by threatening the loss of parental rights."); *In re Amanda W.*, 705 N.E.2d 724, 727 (Ohio Ct. App. 1997) (finding that a "penalty for failure to satisfy the requirements of a particular case plan is the loss of a parent's fundamental liberty right to the care, custody, and management of his or her child," as "this is the type of compelling sanction that forces an individual to admit to offenses in violation of his right not to incriminate himself"); *Dep't of Human Servs. v. K.L.R.*, 230 P.3d 49, 54 (Or. Ct. App. 2010) ("[R]equiring an admission of abuse as a condition of family reunification violates a parent's Fifth Amendment rights . . . ."); *In re M.C.P.*, 571 A.2d 627, 641 (Vt. 1989) ("The trial court cannot specifically require the parents to admit criminal misconduct in order to reunite the family.").

The state, on the other hand, has an important interest in protecting the welfare of children. *See In re N.J.*, 116 Nev. at 802, 8 P.3d at 133; *see also* NRS 128.005(2)(c) ("The continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights."). When a child has been removed from a parent's custody because of abuse, the court must consider whether the parent has adjusted the circumstances for the child's safe return. *See generally* NRS 128.107(3); *In re M.C.P.*, 571 A.2d at 640 ("It would be irresponsible for the court to return an abused child to the custody of abusive parents unless and until it can be assured that there will be no repetition of the abusive actions.").

In balancing a parent's Fifth Amendment right against self-incrimination and the need for meaningful rehabilitation in cases where a child has been removed from the parent's custody because of alleged child abuse, courts have generally concluded that while a court can require a parent to complete therapy as part of a family reunification plan, courts cannot explicitly compel a parent to admit guilt, either through requiring a therapy program that specifically mandates an admission of guilt for family reunification, or otherwise through a direct admission, because that violates the parent's Fifth Amendment right. *In re A.W.*, 896 N.E.2d at 326 ("[A] trial court may order a service plan that requires a parent to engage in effective counseling or therapy, but may not compel counseling or therapy re-

quiring the parent to admit to committing a crime."); *In re C.H.*, 652 N.W.2d 144, 150 (Iowa 2002) ("The State may require parents to otherwise undergo treatment, but it may not specifically require an admission of guilt as part of the treatment."); *In re J.W.*, 415 N.W.2d 879, 883 (Minn. 1987) ("While the state may not compel therapy treatment that would require appellants to incriminate themselves, it may require the parents to otherwise undergo treatment."); *see also Minh T. v. Ariz. Dep't of Econ. Sec.*, 41 P.3d 614, 617-18 (Ariz. Ct. App. 2001) ("[T]he State may require therapy and counseling for the parents. . . . However, there is a distinction between a treatment order that requires parents to admit criminal misconduct and one that merely orders participation in family reunification services.").

Accordingly, there is a distinction between a court-ordered case plan that mandates admission of culpability for family reunification and one that requires meaningful therapy for family reunification. Invoking the Fifth Amendment may have consequences and "[o]ne such consequence may be a person's failure to obtain treatment for his or her problems," and a failure to participate in meaningful therapy may result in the termination of parental rights without a violation of the Fifth Amendment, so long as the court did not mandate an admission of guilt. *In re C.H.*, 652 N.W.2d at 150; *In re P.M.C.*, 902 N.E.2d 197, 203 (Ill. App. Ct. 2009) (observing that where a parent fails to comply with an order to complete meaningful therapy because the refusal to admit guilt inhibits rehabilitation, there is no constitutional violation); *K.L.R.*, 230 P.3d at 54 (concluding that "terminating or limiting parental rights based on a parent's failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent's failure to acknowledge past wrongdoing inhibits meaningful therapy, may not violate the Fifth Amendment").

We need not resolve the tension created by a parent's exercise of his or her Fifth Amendment right and its importance to meaningful therapy or rehabilitation. Notably, in Keaundra's case, DFS's six-month report confirmed that Keaundra's therapy was indeed effective without the need for an admission of guilt.

This approach is consistent with existing Nevada caselaw regarding the invocation of the Fifth Amendment in civil proceedings. *See Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 664, 262 P.3d 705, 711 (2011) ("The Fifth Amendment privilege against self-incrimination may be invoked in both criminal and civil proceedings."). Because Keaundra's case plan required her to admit that she intentionally caused C.L.B., Jr.'s injury, she could not fully comply with the case plan without admitting that she committed a criminal act. *See* NRS 200.508 (defining and providing penalties for abuse, neglect, and endangerment of a child). And, in terminating Keaundra's parental rights, the court based its decision on its finding that Keaundra "continued to insist that the burn was accidental

in nature." Accordingly, we conclude that the district court violated Keaundra's Fifth Amendment rights by terminating her parental rights based on her refusal to admit that she intentionally caused C.L.B., Jr.'s injury.[2] *See In re J.W.*, 415 N.W.2d at 882-83 (holding that conditioning termination on compliance with a court-ordered case plan that requires admission to criminal conduct is a threat that triggers the Fifth Amendment).

There was not substantial evidence to support the district court's decision to terminate Keaundra's parental rights

"A party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exits." *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006). This court has held that "[a]lthough the best interests of the child and parental fault are distinct considerations, the best interests of the child necessarily include considerations of parental fault and/or parental conduct." *In re N.J.*, 116 Nev. 790, 801, 8 P.3d 126, 133 (2000). Because the termination of parental rights "is an exercise of awesome power that is tantamount to imposition of a civil death penalty," a district court's order terminating parental rights is subject to close scrutiny. *In re A.J.G.*, 122 Nev. at 1423, 148 P.3d at 763 (internal quotation marks omitted). This court reviews the district court's findings of fact for substantial evidence. *Id*.

The district court abused its discretion in concluding that terminating Keaundra's parental rights was in the children's best interests

Keaundra argues that the district court's reasoning for determining that it was in the best interests of the children to terminate her parental rights remains unclear. She argues that it is unclear whether that decision was based upon the presumption under NRS 128.109(2) or, if that presumption had been rebutted, whether there was clear and convincing evidence that it was in the best interests of the children to terminate her parental rights. DFS argues that the district court applied the statutory presumption regarding the termination of parental rights because at the time of the second trial, the children had been in a placement for 58 months.

NRS 128.109(2) creates a presumption that termination of parental rights is in the best interests of the child where the child has been placed outside the home for 14 of any 20 consecutive months. To rebut this presumption, the parent must establish by a preponderance of the evidence that termination is not in the child's best interest. *In*

[2]Because Keaundra was not offered immunity in this case, we decline to address whether such immunity could avoid a Fifth Amendment violation.

re Parental Rights as to J.D.N., 128 Nev. 462, 472, 283 P.3d 842, 849 (2012). "[D]eciding whether to terminate parental rights requires weighing the interests of the children and the interests of the parents." *In re N.J.*, 116 Nev. at 802, 8 P.3d at 134. NRS 128.107(2) further requires the district court to consider the "physical, mental or emotional condition and needs of the child and the child's desires regarding the termination, if the court determines the child is of sufficient capacity to express his or her desires." We conclude that the district court erred by not considering the physical, mental, or emotional condition and needs of the children, nor the children's desires regarding the termination as required by NRS 128.107(2).

We further conclude that the record contains substantial evidence demonstrating that Keaundra overcame the presumption in NRS 128.109(2). For example, the record demonstrates that Keaundra maintained regular contact with the children after they were removed from her care and placed with her mother in Louisiana. Although she later moved to South Carolina for work, Keaundra continued to talk to the children on the phone several times a day, and her mother would bring the children to visit on a regular basis. A.D.L. repeatedly asked when she could go home to her mother and she would cry and beg to go home to her mother. The record also shows that Keaundra helped her mother support the children financially and sent gifts. Moreover, we note that after the district court's termination of Keaundra's parental rights in 2013, both children were forced to wait in foster care for 17 months before being placed with relatives in South Carolina, despite a formal request for such placement in April 2013.

Accordingly, because Keaundra was able to rebut NRS 128.109(2)'s presumption by a preponderance of the evidence, we conclude that the district court abused its discretion in concluding that termination of Keaundra's parental rights was in the best interests of A.D.L. and C.L.B., Jr.

The district court abused its discretion in concluding that there was clear and convincing evidence of parental fault

In its initial decision in 2013, the district court found that Keaundra made only token efforts in completing her case plan because she failed to "address the risk factors and sequence of events that [led] to the physical injury" of C.L.B., Jr. Accordingly, the district court found that DFS raised a presumption that Keaundra only engaged in token efforts under NRS 128.109(1)(a), and that she failed to rebut the presumption. Upon remand, the district court reaffirmed its 2013 decision and held that "there have been no behavioral changes" in Keaundra "that would warrant return of [the] children to her care."

In addition to considering the child's best interest, the district court must make a finding regarding parental fault. NRS 128.105(1).

Among the factors to be considered by the district court in a parental fault analysis are whether the parent is unfit or failed to adjust, NRS 128.105(1)(b)(3), (4); or only made token efforts to "support or communicate with the child," "prevent neglect of the child," "avoid being an unfit parent," or "eliminate the risk of serious physical, mental or emotional injury to the child," NRS 128.105(1)(b)(6)(I)-(IV). Pursuant to NRS 128.109(1)(a), a parent is presumed to have made only token efforts where a child is placed outside of the home "for 14 months of any 20 consecutive months." A presumption of failure of parental adjustment is raised "[i]f the parent or parents fail to comply substantially with the terms and conditions of a plan to reunite the family within 6 months after the date on which the child was placed or the plan was commenced." NRS 128.109(1)(b).

Keaundra argues that because she completed the case plan in all regards other than admitting to abusing C.L.B., Jr., the district court abused its discretion in determining that she did not substantially comply with the case plan. We agree. Our review of the record demonstrates that Keaundra complied with all other aspects of her case plan, such as maintaining housing and employment, maintaining contact with her children and DFS, providing financial support for her children, and completing assessment and therapy to the satisfaction of the therapist. In fact, DFS reported that Keaundra had completed her case plan in all respects apart from the admission of physical abuse and DFS agreed that Keaundra had the knowledge and tools to effectively parent the children.[3] Based on the substantial evidence in the record, we conclude that the district court abused its discretion when it found that Keaundra did not rebut the presumptions in NRS 128.109(1)(a) and (b) by a preponderance of the evidence and thus terminated her parental rights.

CONCLUSION

In reaffirming its decision that terminating Keaundra's parental rights was in the best interests of A.D.L. and C.L.B., Jr., the district court based its findings squarely on the fact that Keaundra refused to admit that she caused C.L.B., Jr.'s injury, which we conclude was a violation of Keaundra's Fifth Amendment rights. We further conclude that Keaundra was able to rebut NRS 128.109(1) and (2)'s presumptions by a preponderance of the evidence. In the absence of these presumptions, we conclude that there was not substantial evidence supporting the district court's findings of parental fault

[3]Although in closing arguments counsel for DFS argued that Keaundra has failed to complete her case plan, the September 13, 2011, Report for Permanency and Placement Review from DFS states that Keaundra "has successfully completed her case plan and has the knowledge and tools to effectively parent her children."

and that termination of Keaundra's parental rights was in the best interests of A.D.L. and C.L.B., Jr. Accordingly, we conclude that the district court's order terminating Keaundra's parental rights was an abuse of discretion and we thus reverse.

PARRAGUIRRE and STIGLICH, JJ. concur.

DONTE JOHNSON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65168

October 5, 2017 402 P.3d 1266

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Affirmed.

[Rehearing denied January 19, 2018]

Christopher R. Oram, Las Vegas, for Appellant.

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

Before the Court EN BANC.

OPINION

By the Court, CHERRY, C.J.:

Appellant Donte Johnson was convicted of numerous felonies including multiple counts of first-degree murder and was sentenced to death. On direct appeal, this court affirmed his convictions but reversed his death sentences and remanded with instructions for the district court to conduct a new penalty hearing. At the penalty hearing on remand, a jury returned death sentences for the murder convictions, and the district court entered a judgment of conviction setting forth the death sentences. This court affirmed that judgment on direct appeal. Within one year after remittitur issued from that decision, Johnson filed his first postconviction petition for a writ of habeas corpus in which he challenged both his convictions and the death sentences. At issue in this appeal is whether Johnson had to file a postconviction petition within one year after remittitur issued on direct appeal from his original judgment of conviction where the

direct appeal resulted in reversal and remand for another penalty hearing such that his sentences were unsettled. We hold that when this court reverses a death sentence on direct appeal and remands for a new penalty hearing, there no longer is a final judgment that triggers the one-year period set forth in NRS 34.726(1) for filing a postconviction petition for a writ of habeas corpus. Johnson's petition therefore was timely filed. Because the district court entertained and denied the petition on the merits and we conclude that the district court did not err, we affirm.

FACTS AND PROCEDURAL HISTORY

In August 1998, Johnson bound the hands and feet of four young men, robbed them, and killed them by shooting them in the head, execution style. The evidence of his guilt was overwhelming: his DNA and fingerprints were found at the crime scene, the DNA of one of the victims was found on a pair of his pants, he was in possession of the victims' property, and several witnesses testified that he confessed. After a jury trial, Johnson was convicted of four counts each of first-degree murder, first-degree kidnapping, and robbery (all with the use of a deadly weapon), as well as one count of burglary while in possession of a firearm. The jury was unable, however, to reach an agreement as to the penalty to impose for the murders. Thus, a three-judge panel was appointed and, after a second penalty hearing, imposed death sentences for each murder.

This court affirmed Johnson's convictions on direct appeal but vacated his death sentences upon concluding that the three-judge panel procedure was unconstitutional. *Johnson v. State*, 118 Nev. 787, 799, 59 P.3d 450, 458 (2002) (*Johnson I*), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). After a third penalty hearing, a jury found that the State had proven the single aggravating circumstance alleged—that Johnson had been convicted of more than one murder in the proceeding—beyond a reasonable doubt, and that there were no mitigating circumstances sufficient to outweigh the aggravating circumstance. The jury unanimously imposed death sentences for each murder. This court affirmed the sentences on direct appeal from the newly entered judgment of conviction. *Johnson v. State*, 122 Nev. 1344, 1360, 148 P.3d 767, 778 (2006) (*Johnson II*).

Johnson filed a postconviction petition for a writ of habeas corpus within one year after remittitur from *Johnson II*. In his petition and supplemental petitions, he challenged counsel's performances during the trial in 2000 and the penalty hearing on remand in 2005, as well as the appeals in *Johnson I* and *Johnson II*. The State argued that the ineffective-assistance claims relating to the 2000 trial and *Johnson I* were barred pursuant to NRS 34.726(1) because they were not raised within one year after remittitur issued from *Johnson*

I. After supplemental briefing and argument on the issue, the district court concluded that Johnson's judgment of conviction was not final until this court affirmed his death sentences on direct appeal in *Johnson II*, and therefore, the one-year period in NRS 34.726(1) did not begin until remittitur issued from that decision. After an evidentiary hearing, the district court denied Johnson's claims on their merits. This appeal followed.

DISCUSSION

Nevada's postconviction scheme contemplates filing one petition from a final judgment of conviction

NRS 34.726(1) provides that a postconviction petition for a writ of habeas corpus "must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court . . . issues its remittitur." We have previously held that NRS 34.726(1) contemplates a final judgment to trigger the one-year period. *See Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012). Johnson and the State do not dispute this, but they disagree as to when his convictions became final for the purposes of the statute. The State argues, as it did below, that because this court affirmed Johnson's convictions and only reversed his death sentences in *Johnson I*, the one-year period for challenging the convictions in a postconviction proceeding began when remittitur issued from that decision. Johnson argues that the statutory scheme envisions the filing of a single petition challenging the validity of a petitioner's convictions *and* sentences. And since the judgment of conviction was not final until the sentences for the murder convictions were settled on remand following *Johnson I*, he argues that the one-year period did not begin until remittitur issued from *Johnson II*. We conclude that Johnson's position is supported by the statute and the legislative intent behind the statutory postconviction scheme, as well as reasoned policy concerns.

While this is an issue of first impression, our decision in *Whitehead* provides some guidance. There, the sentencing court entered a judgment of conviction that set forth the sentence for each offense but indicated that restitution would be determined at a later date. 128 Nev. at 261, 285 P.3d at 1054. Months later, the court held a restitution hearing and entered an amended judgment of conviction that included the restitution amount. *Id*. The defendant did not appeal the judgment of conviction but filed a postconviction petition. *Id*. The district court denied the petition as untimely under NRS 34.726(1) because the defendant had filed the petition more than one year after entry of the original judgment of conviction. *Id*. at 261-62, 285 P.3d at 1054. This court reversed, concluding that the original judgment of conviction was not a final judgment for the purposes of NRS 34.726(1) because it imposed restitution but did not specify the

amount as required by NRS 176.105(1) and therefore the original judgment was "not sufficient to trigger the one-year period under NRS 34.726 for filing a postconviction petition." *Id*. at 262-63, 285 P.3d at 1055.

This case is analogous. After this court vacated the death sentences on direct appeal in *Johnson I*, there was no judgment providing the sentences for Johnson's murder convictions as required by NRS 176.105. Because the sentences for the murders were not determined and a new judgment of conviction setting forth those sentences was not filed until after the third penalty hearing, the one-year period set forth in NRS 34.726(1) did not trigger until remittitur issued on direct appeal from the judgment of conviction entered after the new penalty hearing.

We find further support in the clear intent behind Nevada's statutory postconviction scheme. *See State Office of the Attorney Gen. v. Justice Court of Las Vegas Twp*., 133 Nev. 78, 81, 392 P.3d 170, 173 (2017) (explaining that a statute's intent may be "ascertained by examining the context and language of the statute as a whole" (quoting *Karcher Firestopping v. Meadow Valley Contractors, Inc*., 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009))). As we have explained in prior opinions, Nevada's current postconviction statutes are the result of decades of legislative efforts to craft a system that provides petitioners "one time through the system absent extraordinary circumstances" and "evinces intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." *Pellegrini v. State*, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001); *see Whitehead*, 128 Nev. at 262, 285 P.3d at 1055. That intent is particularly clear in cases where the petitioner has been sentenced to death. In those cases, the Legislature had directed that "[t]he court shall inform the petitioner and the petitioner's counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding." NRS 34.820(4). While we agree with the State that we should avoid endorsing any rule that would allow criminal proceedings to linger in perpetuity, the State's position, which would require bifurcated, piecemeal postconviction litigation, would exacerbate this issue and undermine the Legislature's expressed goals in enacting the postconviction habeas provisions set forth in NRS Chapter 34.

What is more, the State's position would be unworkable in practice, particularly in capital cases. In those cases, a petitioner is entitled to the appointment of counsel in the first postconviction proceeding, NRS 34.820(1)(a), and to the effective assistance of that counsel, *Crump v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253

(1997) (providing that a postconviction "petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel"). But the approach urged by the State raises questions regarding whether those rules would apply to a petition challenging the validity of the petitioner's conviction where the death sentence has been vacated and there is a pending penalty hearing to determine the sentence, or whether the rules that govern noncapital cases would apply such that the district court would have discretion to appoint postconviction counsel under NRS 34.750(1) even though the petitioner might later be sentenced to death (as was the case here). As these questions suggest, accepting the State's position would introduce the type of confusion and inefficiency that the current postconviction scheme was enacted to avoid.[1]

In sum, we agree with the district court that Johnson's ineffective-assistance-of-counsel claims relating to his 2000 and 2005 trials and the direct appeals from those judgments of conviction were not barred by NRS 34.726(1). We therefore turn to whether the district court appropriately denied the ineffective-assistance claims, giving deference to its factual findings but reviewing its legal conclusions de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).[2]

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[1]The cases cited by the State are not persuasive. For example, two of the cases—*People v. Kemp*, 517 P.2d 826 (Cal. 1974), and *People v. Jackson*, 429 P.2d 600 (Cal. 1967)—are distinguishable because they involve death sentences that were vacated as the result of postconviction relief proceedings, not death sentences that were reversed on direct appeal. Where a defendant has secured sentencing relief through postconviction proceedings, he or she has had the opportunity to raise guilt- and penalty-phase claims in a single postconviction proceeding. And in *Phillips v. Vasquez*, which also is procedurally distinguishable, the Ninth Circuit Court of Appeals merely held that because there had been excessive delay in imposing a new sentence after the state court vacated the defendant's death sentence on direct appeal and in reviewing the new sentence on appeal, it would allow the defendant to seek review of his conviction through a federal habeas proceeding before his sentence became final even though "jurisprudential concerns" normally would require the defendant to await the outcome of the state proceedings before seeking federal habeas relief. 56 F.3d 1030, 1033, 1035-37 (9th Cir. 1995). The court in *Phillips* did not suggest that the petitioner was *required* to seek habeas review of his conviction while the state sentencing proceedings were pending.

[2]Johnson's appendix violates the Nevada Rules of Appellate Procedure in several respects: transcripts are not in chronological order, *see* NRAP 30(c)(1); it includes numerous documents that bear no rational relationship to the claims raised on appeal and contains several volumes' worth of unnecessary duplicates, *see* NRAP 30(b); several volumes exceed 250 pages, *see* NRAP 30(c)(2); and the pro se postconviction petition filed on February 13, 2008, does not appear to be included, *see* NRAP 30(b)(2). Such derelictions needlessly burden this court and its staff, cause significant confusion, and result in unnecessary delay in resolving appeals. We urge counsel to be more careful in complying with the Nevada Rules of Appellate Procedure.

The district court correctly denied the claims raised in Johnson's petition

Our focus is on the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a petitioner to demonstrate that counsel's performance fell below an objective standard of reasonableness (deficient performance) and a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different (prejudice). *See also Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the *Strickland* test). With respect to the prejudice prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The same test also applies to appellate-counsel claims, *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996), but with a different gloss given the natural limitations of the appellate process that force an attorney to make strategic decisions regarding which claims to argue and which to ignore, *Knox v. United States*, 400 F.3d 519, 521 (7th Cir. 2005) ("Lawyers must curtail the number of issues they present, not only because [appellate] briefs are limited in length but also because the more issues a brief presents the less attention each receives, and thin presentation may submerge or forfeit a point.").

The *Strickland* test is familiar, but certain points bear emphasis. First, an attorney is not constitutionally deficient simply because another attorney would have taken a different approach. *Strickland*, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."). Instead, the question is whether a petitioner's counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 689; *see also Siripongs v. Calderon*, 133 F.3d 732, 736-37 (9th Cir. 1998). In the context of appellate counsel, this means that an attorney is not ineffective for omitting a particular claim—even a claim supported by existing law—to focus on claims with a better chance of success. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (recognizing that "appellate counsel is most effective when she does not raise every conceivable issue on appeal"). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.").

Second, a reviewing court begins with the presumption that counsel performed effectively. *Strickland*, 466 U.S. at 689-90. To overcome this presumption, a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently. *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001) (explaining that this court will reject conclusory ineffective-assistance claims), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). Instead, he must specifically explain how his attorney's performance was objectively unreasonable and how that deficient performance undermines confidence in the outcome of the proceeding sufficient to establish prejudice.

With these key points in mind, we turn to Johnson's ineffective-assistance claims. Those claims challenge the performance of counsel at the 2000 trial, the 2005 penalty hearing, and both direct appeals (*Johnson I* and *Johnson II*).[3]

Johnson failed to demonstrate that he received ineffective assistance of counsel at the 2000 jury trial or in the related appeal (Johnson I)

Johnson argues that counsel provided ineffective assistance during his 2000 jury trial and the related appeal. We disagree.

Jury selection

Johnson argues that appellate counsel should have raised several challenges to the jury selection process. We conclude that he failed to show deficient performance or prejudice because, as explained below, he has not established that the omitted issues were clearly stronger than other issues raised by appellate counsel and had a reasonable probability of success on appeal.

First, he asserts that appellate counsel should have raised a fair-cross-section challenge because only 3 of the 80 veniremembers were African American, a ratio that did not adequately reflect the presence of that group in the community. But the Sixth Amendment does not demand a certain number of members of a particular race in a venire, it requires that the jury-selection process not *systematically exclude* members of a particular race. *See Williams v. State*, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005). And during voir dire, Johnson's counsel did not allege or present facts to demonstrate that

[3]Johnson also argues that the death penalty is unconstitutional because: (1) Nevada's death penalty scheme fails to narrow death eligibility, (2) it constitutes cruel and unusual punishment, (3) Nevada law does not afford the opportunity for executive clemency, (4) it is applied in an arbitrary and capricious manner, and (5) it violates international law. Because these claims should have been raised on direct appeal and Johnson has not demonstrated good cause to overcome the procedural default, *see* NRS 34.810(b)(2), the district court properly denied them.

the underrepresentation of African Americans in the venire was due to systematic exclusion.

Second, Johnson argues that appellate counsel should have asserted that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising a peremptory challenge to remove a veniremember based on her race. But the prosecutor provided race-neutral reasons for the peremptory challenge, and the district court did not find them to be pretextual. Although Johnson now argues that the proffered reasons were discriminatory, trial counsel did not make those arguments—an omission that would have thwarted appellate review had appellate counsel pressed the alleged *Batson* violation. *See Hawkins v. State*, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011) ("Failing to traverse an ostensibly race-neutral explanation for a peremptory challenge as pretextual in the district court stymies meaningful appellate review which, as noted, is deferential to the district court.").

Third, Johnson asserts that appellate counsel should have argued that the trial court erred by denying his for-cause challenges to veniremembers who indicated they would automatically impose the death penalty. But Johnson removed those veniremembers with peremptory challenges and has not demonstrated that the empaneled jurors were not impartial, so an appellate challenge to any error in denying the for-cause challenges would not have succeeded. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000) (holding that no constitutional violation lies when a defendant uses a peremptory challenge to remove a juror who should have been excused for cause); *accord Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). And even if the trial court's actions implicated the scenario left unaddressed in *Martinez-Salazar*—the "deliberate[ ] misappli[cation of] the law in order to force the defendant[ ] to use a peremptory challenge to correct the court's error," 528 U.S. at 316—appellate counsel was not ineffective for failing to litigate a claim "based on admittedly unsettled legal questions," *Ragland v. United States*, 756 F.3d 597, 601 (8th Cir. 2014).[4]

Fourth, pointing to *Castillo v. State*, 114 Nev. 271, 956 P.2d 103 (1998), Johnson contends that appellate counsel should have argued that the prosecutor committed misconduct by asking whether a veniremember had the "intestinal fortitude" to issue a death verdict and arguing future dangerousness. But trial counsel did not object to the comments, and it does not appear that appellate counsel could have demonstrated plain error as the comments were made in a different

[4]To the extent Johnson challenges appellate counsel's failure to raise the prosecutor's use of peremptory challenges to strike "life affirming jurors," he presents no cogent argument or authority in support of his claim, and we decline to consider it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (recognizing that this court need not consider claims that are not supported by cogent argument or authority).

context than those in *Castillo*. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (holding that an unpreserved claim of prosecutorial misconduct does not warrant relief on appeal unless an appellant demonstrates an error that is plain from a review of the record and that the error affected his or her substantial rights).

Fifth, Johnson contends that appellate counsel should have argued that the trial court erred by denying his motion to change venue based on veniremembers' exposure to pretrial publicity. But "[e]ven where pretrial publicity has been pervasive, this court has upheld the denial of motions for change of venue where the jurors assured the district court during voir dire that they would be fair and impartial in their deliberations," *Floyd v. State*, 118 Nev. 156, 165, 42 P.3d 249, 255 (2002), *abrogated on other grounds by Grey v. State*, 124 Nev. 110, 118-19, 178 P.3d 154, 160-61 (2008), and Johnson points to nothing in the record suggesting that the empaneled jurors were not impartial.

None of these issues had a reasonable probability of success on appeal. And Johnson does not explain why a reasonable attorney would have raised them instead of other issues that his appellate counsel did raise. We therefore conclude that the district court did not err by denying these claims of ineffective assistance of appellate counsel.

Unrecorded bench conferences

Johnson contends that trial counsel should have ensured that all bench conferences were recorded or made a better record of what occurred during the unrecorded bench conferences. *See* SCR 250(5)(a). Even assuming that an objectively reasonable attorney would have taken these actions, Johnson does not explain how the result of trial would have been different but for trial counsel's performance.[5] He therefore fails to establish that counsel were ineffective, and we conclude that the district court did not err by denying this claim.

Admission of evidence

Johnson contends that appellate counsel should have challenged various evidentiary decisions by the trial court. We conclude that he fails to show deficient performance or prejudice because, as explained below, he has not established that the issues had a reasonable probability of success on appeal and were clearly stronger than other issues raised by appellate counsel.

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[5]To the extent Johnson suggests that he was prejudiced on appeal, he has not identified any issue that could not be raised or reviewed on direct appeal due to an unrecorded bench conference. *See Daniel v. State*, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003).

First, he contends that appellate counsel should have challenged the trial court's decision to admit autopsy photographs. The trial court concluded that the photographs were necessary to show the severity and manner of the wounds inflicted, and Johnson has not established that the trial court abused its discretion. *See Archanian v. State*, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

Second, he contends that appellate counsel should have challenged the trial court's ruling precluding him from inquiring into a witness's bias. Johnson mischaracterizes the ruling: the trial court permitted him to ask the witness about issues relating to bias but instructed Johnson to not get into details about an unrelated case.

Third, he contends that appellate counsel should have argued that the trial court erroneously admitted testimony that he sold drugs. The use and sale of drugs was an integral part of this case because both parties argued that Johnson knew one of the victims because he had sold drugs to him previously. Trial counsel did not object to the drug references and, in fact, used it to support Johnson's defense.

Fourth, he contends that appellate counsel should have argued that the trial court erred by admitting a witness's testimony that he heard another witness tell the police "we knew who did it." Trial counsel did not object to the testimony, and therefore, appellate counsel would have been required to demonstrate plain error. *See* NRS 178.602. Appellate counsel could not have done so as it appears the comment was not offered for the truth of the matter asserted, *see* NRS 51.035 (defining hearsay), and additional testimony established that Johnson confessed in front of both witnesses.[6]

None of these issues had a reasonable probability of success on appeal. And Johnson does not explain why a reasonable attorney would have raised them instead of other issues that appellate counsel did raise. We therefore conclude that the district court did not err by denying these ineffective-assistance claims.

Prosecutorial misconduct

Johnson contends that appellate counsel should have argued that the prosecutor committed misconduct by vouching for the State's witnesses, commenting on facts not in evidence, making a golden rule argument, failing to disclose witness benefits, and using the term "guilt phase." Johnson fails to show deficient performance or prejudice: the prosecutor did not vouch for the State's witness or draw an improper inference from the evidence, trial counsel's ob-

[6]Johnson also contends that trial and appellate counsel should have challenged the admission of evidence about an encounter between Johnson and a police officer after the murders. These claims are belied by the record with respect to trial counsel at the 2000 and 2005 trials and appellate counsel in *Johnson I*. And as to appellate counsel in *Johnson II*, Johnson has not shown deficient performance or prejudice because the district court correctly ruled that the evidence was admissible.

jection to the golden-rule argument was sustained, the notion that the prosecutor failed to disclose benefits lacked support in the record, and Johnson points to no authority holding that use of the term "guilt phase" constitutes misconduct.[7] Because none of these issues had a reasonable probability of success on appeal and Johnson does not explain why a reasonable attorney would have raised them instead of other issues appellate counsel raised, we conclude that the district court did not err by denying these claims.

Kidnapping offenses

Johnson argues that trial and appellate counsel should have challenged the kidnapping charges as incidental to the robbery charges. Johnson fails to show deficient performance or prejudice. Other than reciting the facts and holdings of several decisions by this court, he fails to explain how the kidnappings were incidental to the robberies. And since the victims were bound with duct tape, which prevented them from escaping or defending themselves, and were killed by gunshot wounds to the head, there is not a reasonable probability that trial or appellate counsel could have successfully challenged the kidnapping charges under the prevailing caselaw at the time. *See Hutchins v. State*, 110 Nev. 103, 108, 867 P.2d 1136, 1139-40 (1994). Accordingly, we conclude that the district court did not err in determining that Johnson failed to demonstrate that counsel performed deficiently.

Improper defense comments

Johnson contends that trial counsel provided ineffective assistance by referring to the victims as "kids" during closing argument where the trial court had granted counsel's pretrial motion in limine to preclude use of the term. Johnson fails to show deficient performance or prejudice, as we have previously held that describing the victims as kids was not improper given their youth. *Johnson v. State*, 122 Nev. 1344, 1356, 148 P.3d 767, 776 (2006) (*Johnson II*). Accordingly, we conclude that the district court did not err by denying this claim.

Jury instructions

Johnson argues that trial and appellate counsel should have challenged certain instructions. We disagree for the reasons explained below.

[7]To the extent that the prosecutor's comments were improper, they were not so egregious "as to make the resulting conviction a denial of due process," *Bennett v. State*, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995) (internal quotation marks omitted), and therefore a reasonable appellate attorney would have focused her attention elsewhere.

First, he asserts that appellate counsel should have challenged the coconspirator liability instruction on the ground that it failed to advise the jury of the intent required to find him guilty of kidnapping. Johnson fails to show deficient performance, as he was charged with first-degree kidnapping as a principal or an aider and abettor, not as a coconspirator. Further, he does not explain why an objectively reasonable appellate attorney would have forgone some of his other appellate issues to challenge the kidnapping convictions under the circumstances.

Second, he contends that appellate counsel should have challenged the premeditation and reasonable doubt jury instructions. Johnson fails to show deficient performance. Because the instructions comported with the law, *see* NRS 175.211 (defining reasonable doubt); *Byford v. State*, 116 Nev. 215, 237, 994 P.2d 700, 714-15 (2000) (defining premeditation), appellate counsel had no basis upon which to challenge them.

Third, Johnson argues that trial counsel should have offered an instruction defining express and implied malice. Even assuming that counsel were deficient, the evidence produced at trial overwhelmingly shows that Johnson was guilty of first-degree murder under the theories that the murders were willful, deliberate, and premeditated or were committed during the course of a felony. *See* NRS 200.030(1). Therefore, he fails to demonstrate a reasonable probability that the jury would have returned a different verdict had it been instructed on express and implied malice.

Johnson failed to demonstrate that he received ineffective assistance of counsel during the 2005 penalty hearing and related appeal (Johnson II)

Johnson argues that trial and appellate counsel were ineffective with respect to his third penalty hearing in 2005 and the appeal from the judgment of conviction entered thereafter. We disagree.

Bifurcation of the 2005 penalty hearing

Johnson argues that trial counsel should not have sought a bifurcated penalty hearing. He fails to show deficient performance. Trial counsel testified at the evidentiary hearing that she made a strategic decision to request a bifurcated penalty hearing. Johnson has not demonstrated that trial counsel's strategy fell below an objective standard of reasonableness. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (observing that strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)); *see also Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). In fact, the strategy was consistent with

that employed by the attorneys who represented Johnson at the first penalty hearing, the only difference being that the judge presiding over the 2005 penalty hearing granted the request.[8] *See Johnson v. State*, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002) (*Johnson I*). Johnson also fails to demonstrate a reasonable probability of a different outcome at the penalty hearing but for counsel's successful strategy of seeking a bifurcated penalty hearing. Accordingly, we conclude that the district court did not err by denying this claim.

Additional mitigation evidence

Johnson argues that trial counsel conducted an inadequate investigation and should have presented additional mitigation evidence concerning fetal alcohol disorder, the results of a Positron Emission Tomography scan, and testimony from his abusive father. He fails to show deficient performance or prejudice. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. The testimony at the evidentiary hearing indicated that counsel made reasonable decisions regarding which evidence to investigate and how to present the evidence deemed worthy of presentation. Johnson does not specifically identify the testimony that counsel should have presented and did not do so at the evidentiary hearing. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (requiring more than a bare assertion that counsel failed to uncover evidence and indicating that, to demonstrate prejudice, a petitioner must present the evidence that a better investigation would have revealed). Accordingly, we conclude that the district court did not err by denying this claim.

Evidence of codefendants' sentences

Johnson argues that trial counsel should have presented evidence that his coconspirators received lesser penalties. He fails to show deficient performance or prejudice. A reasonable attorney might have decided to forgo presenting this evidence because it would have reinforced the State's argument that Johnson deserved a more significant sentence due to his greater role in the crimes. *See Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (explaining that a court reviewing counsel's performance is required to "affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did" (internal quotation marks omitted)). For the

[8]Notably, appellate counsel in *Johnson I* argued that the district court erred in denying the motion to bifurcate. We disagreed, observing that this court had "never required distinct phases in capital penalty hearings." *Johnson I*, 118 Nev. at 806, 59 P.3d at 462.

same reason, Johnson fails to demonstrate a reasonable probability of a different outcome had the jury heard of his coconspirators' sentences. Accordingly, we conclude that the district court did not err by denying this claim.

First penalty hearing mitigating circumstances

Johnson argues that trial counsel should have provided the jury at his 2005 penalty hearing with all of the mitigating circumstances found by the jury at his first penalty hearing. He fails to show deficient performance or prejudice. The jurors at the 2005 penalty hearing heard evidence concerning most of the mitigating circumstances found in the first trial and were instructed that they could find "any other mitigating circumstance," even if those circumstances were not specifically listed. To the extent Johnson argues that trial counsel should have argued to the jury or sought an instruction advising the jurors of the mitigating circumstances found by the previous jury, he has not shown that such an argument or instruction was proper, as it was the duty of the jurors at the 2005 penalty hearing to decide what mitigation existed and the weight to give any mitigation evidence presented. *See Kansas v. Carr*, ___ U.S. ___, ___, 136 S. Ct. 633, 642 (2016) ("Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not."). Accordingly, we conclude that the district court did not err by denying this claim.

Impeachment of defense witnesses

Johnson argues that trial counsel should not have caused the mitigation expert to prepare a report and that trial and appellate counsel should have challenged the State's use of the mitigation expert's report to impeach a defense mental health expert. He fails to show deficient performance or prejudice. Trial counsel had an obligation to make a reasonable investigation into mitigating evidence or a reasonable decision that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 520-23 (2003) (recognizing counsel's duty to investigate potential mitigating evidence). Trial counsel's decision in this case to employ a mitigation expert to assist in the investigation of mitigation evidence and prepare a report was not unreasonable. And Johnson has not identified any basis on which trial or appellate counsel could have successfully challenged the State's use of the mitigation report in cross-examining another defense expert, particularly as the State is entitled to explore the bases underlying an expert's opinion. *See* NRS 50.305; *Blake v. State*, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005) ("It is a fundamental principle in our jurisprudence to

allow an opposing party to explore and challenge through cross-examination the basis of an expert witness's opinion."); *Singleton v. State*, 90 Nev. 216, 219, 522 P.2d 1221, 1222-23 (1974) (holding that the credibility of a source used by an expert witness in arriving at an opinion is an underlying fact properly pursued in cross-examination).[9]

Johnson next argues that appellate counsel should have challenged the prosecutor's impeachment of a defense witness by asking the witness whether he had a misdemeanor conviction. Johnson fails to show deficient performance or prejudice because the trial court alleviated any prejudice when it sustained a defense objection and instructed the jury to disregard the exchange. *See Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) (holding that improper statements by prosecutor were harmless beyond a reasonable doubt because "the district court sustained the defense's objection and instructed the jury to disregard the statements, which supplied [the defendant] with an adequate remedy"); *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) ("[I]nstruct[ing] the jury to disregard improper statements, thus remed[ies] any potential for prejudice.").

Disagreement between trial counsel

Johnson complains that counsel contradicted each other in closing argument regarding the presence of drugs in prison. While it would have been better for counsel to have settled on a unified strategy before making their arguments, Johnson has not demonstrated deficient performance under the circumstances, as counsel explained at the evidentiary hearing that she sought to preserve the defense's credibility in front of the jury by challenging her co-counsel's statement on this relatively minor point. Moreover, Johnson has not shown prejudice considering the unlikelihood that a more consistent argument on this point would have changed the outcome of the penalty hearing. Accordingly, we conclude that the district court did not err by denying this claim.

Jury instruction

Johnson argues that trial counsel should have requested an instruction advising the jury that a mitigating circumstance may be found by one juror. Johnson fails to show deficient performance or prejudice. The jurors were instructed that they "need not find miti-

[9]To the extent Johnson argues that the trial court erred by permitting the State to use the report in its cross-examination of the defense expert, that claim was appropriate for direct appeal, and Johnson has not articulated good cause for raising it for the first time in his postconviction petition. *See* NRS 34.810(1)(b)(2).

gating circumstances unanimously," and other instructions, as well as the special verdict forms, made it clear that the mitigating circumstances could be found by one or more of the jurors. Considering the instructions as a whole and the special verdict forms, trial counsel's failure to seek an additional instruction did not fall below an objective standard of reasonableness. And, as there appears to be no reasonable probability that the jurors did not understand that they could each make an individual determination as to whether a mitigating circumstance existed, there is no reasonable probability of a different outcome at the penalty hearing but for counsel's failure to request an additional instruction. *See Boyde v. California*, 494 U.S. 370, 380-81 (1990) (explaining that where the claim is that an "instruction is ambiguous and therefore subject to an erroneous interpretation," the inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" with a "commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hair-splitting"). Accordingly, we conclude that the district court did not err by denying this claim.

Having determined that Johnson is not entitled to relief, we affirm the order of the district court.[10]

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

KRISTI RAE FREDIANELLI, APPELLANT, *v.*
FINE CARMAN PRICE, RESPONDENT.

No. 69992

October 5, 2017 402 P.3d 1254

Appeal from a district court order adjudicating an attorney's lien and entering judgment for attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; T. Arthur Ritchie, Jr., Judge.

Affirmed.

HARDESTY, J., with whom PICKERING, J., agreed, dissented.

Patricia A. Marr, Henderson, for Appellant.

[10]We reject Johnson's assertion that relief is warranted under a cumulative-error analysis.

Fine Carman Price and *Corinne M. Price* and *Frances-Ann Fine*, Henderson, for Respondent.[1]

Before the Court EN BANC.

OPINION

By the Court, CHERRY, C.J.:

NRS 18.015 provides for the enforcement of liens for attorney fees. In this appeal, we clarify that NRS 18.015, as amended in 2013, provides for the enforcement of a retaining lien for attorney fees. Because respondent met the statutory requirements for the enforcement of a retaining lien, we affirm the district court's order adjudicating an attorney's lien and entering judgment for attorney fees.

FACTS AND PROCEDURAL HISTORY

Fine Carman Price (Fine) represented Kristi Rae Fredianelli in a paternity action. After the district court issued its final order in the paternity action, Fine filed a notice of withdrawal as attorney of record. Fine subsequently filed and served a notice of a retaining lien against Fredianelli for $13,701.82, of unpaid legal fees.

Fine moved the district court to adjudicate the rights of counsel, for enforcement of attorney's lien, and for a judgment for attorney fees. Fredianelli opposed the motion. Fredianelli did not dispute the amount of the attorney fees but argued that Fine was asserting a charging lien, not a retaining lien. Relying solely on *Leventhal v. Black & LoBello*, 129 Nev. 472, 305 P.3d 907 (2013), Fredianelli claimed that the purported charging lien failed as a matter of law. The district court granted Fine's motion and awarded Fine $13,701.82, plus interest and post-judgment costs.

DISCUSSION

The district court did not err by enforcing Fine's retaining lien against Fredianelli under NRS 18.015

On appeal, Fredianelli concedes that the lien at issue is a retaining lien, not a charging lien. She nevertheless argues that the district court erred by enforcing Fine's lien because, under NRS 18.015 and our caselaw interpreting it: (1) a retaining lien is a passive lien

[1]Because appellant challenges only the adjudication of Fine Carman Price's attorney's lien, the correct respondent to this appeal is appellant's former counsel, Fine Carman Price, and not the defendant below, Sebastian Martinez. Accordingly, the clerk of this court shall amend the caption on this court's docket so that it is consistent with the caption on this opinion.

that cannot be enforced by an attorney, (2) there was no affirmative recovery in the paternity action to which a lien could attach, and (3) a retaining lien cannot be reduced to a monetary judgment. We disagree.

NRS 18.015 governs attorney liens, and the parties' arguments require us to interpret the Legislature's 2013 amendments to NRS 18.015.[2] "This court reviews a district court's interpretation of a statute . . . de novo." *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1156, 146 P.3d 1130, 1136 (2006). "When interpreting a statutory provision, this court looks first to the plain language of the statute." *Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). If the statute is unambiguous, this court does not "look beyond the statute itself when determining its meaning." *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007).

Prior to 2013, NRS 18.015 only provided rules regarding enforcement of "charging lien[s]," or liens "against the client's claim or recovery." *See Leventhal*, 129 Nev. at 475, 305 P.3d at 909. Retaining liens were solely "established at common law" and "allow[ed] a discharged attorney to withhold the client's file and other property until the court . . . adjudicate[d] the client's rights and obligations with respect to the lien." *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009). Retaining liens were considered a "passive lien," meaning that they could not "be actively enforced by the attorney in judicial proceedings." *Id.* at 533, 216 P.3d at 783.

Since 2013, however, amendments made to NRS 18.015 provide a method for attorneys to actively enforce retaining liens "[i]n any civil action, upon any file or other property properly left in the possession of the attorney by a client." NRS 18.015(1)(b). The amount of attorney fees subject to the retaining lien must be the fee "agreed upon," or "[i]n the absence of an agreement . . . a reasonable fee for the services . . . rendered." NRS 18.015(2). The lien must be "perfect[ed]," which means that the attorney "serv[ed] notice in writing, in person or by certified mail, return receipt requested, upon his or her client[,] . . . [and] claim[ed] the lien and stat[ed] the amount of the lien." NRS 18.015(3). NRS 18.015(4)(b) provides for the timing with which the lien "attaches" to the property: a retaining lien "attaches to any file or other property properly left in the possession of the attorney by his or her client, . . . from the time of service of the notices required by this section."

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[2]2013 Nev. Stat., ch. 79, § 1, at 270-71; S.B. 140, 77th Leg. (Nev. 2013). In *Leventhal*, we expressly stated that the opinion was "governed by the pre-amendment version of NRS 18.015." 129 Nev. at 475 n.2, 305 P.3d at 912 n.2. Thus, we reject Fredianelli's argument that *Leventhal* governs the 2013 amendments made to NRS 18.015 by virtue of its timing.

If the above requirements are met, NRS 18.015 then requires the attorney to file a motion for adjudication and enforcement of the lien:

> On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.

NRS 18.015(6).

Here, each of Fredianelli's arguments lack merit based on the plain language of NRS 18.015. First, the Legislature's 2013 amendments to NRS 18.015 created an entirely new statutory method for enforcing a retaining lien. Thus, while *Argentena* and our other cases remain good law concerning common-law retaining liens, their description of a retaining lien as "passive" does not apply to the method in NRS 18.015, which permits an attorney to actively enforce a retaining lien. Accordingly, we reject Fredianelli's argument that an attorney cannot actively enforce a retaining lien under NRS 18.015.

Second, while we have extensively considered the previous version of NRS 18.015 and held that an attorney cannot perfect a charging lien in a custody action because there is nothing to which a lien can attach, *Leventhal*, 129 Nev. at 477-78, 305 P.3d at 910, NRS 18.015(4)(b) does not require an affirmative recovery for a retaining lien to attach. Instead, it merely states that retaining liens "attach[ ] to any file or other property properly left in the possession of the attorney by his or her client." NRS 18.015(4)(b). Therefore, we reject Fredianelli's argument that an affirmative recovery is necessary in the retaining lien context because the retaining lien attaches to the client's files and property in an attorney's possession, not to any recovery.

Third, NRS 18.015(6) provides that on an attorney's motion, the court shall "adjudicate the rights of the attorney . . . and enforce the lien." In the context of a retaining lien, which attaches to a client's file or other property left in the attorney's possession and is for specified fees or a reasonable amount, this contemplates reducing a retaining lien to a monetary judgment. *See* NRS 18.015(2), (4)(b), and (6). This is consistent with the legislative history of the amendments, which contemplated that the court hearing the underlying matter would "interpret how much in fees would be owed fairly by the client, and then enter a judgment if the court saw fit" on the attorney fees. Hearing on S.B. 140 Before the Assembly Comm. on Judiciary, 77th Leg., at pp. 13-17 (Nev., May 3, 2013) (statement of Mr. Thomas Standish describing the amendments' effects on behalf of the Senate). Moreover, holding otherwise would mean the 2013 amendments merely codified the common-law retaining

lien approach, when the Legislature's clear intent was to alter that approach. *Id.* Therefore, we reject Fredianelli's argument that a retaining lien cannot be reduced to a monetary judgment under NRS 18.015.

Applying the unambiguous language of NRS 18.015 to the case at hand, the district court properly adjudicated and enforced Fine's retaining lien. Fine asserted its lien against Fredianelli upon Fredianelli's papers and files left in Fine's possession under NRS 18.015(1)(b). The lien was for an undisputed, "agreed upon" amount of attorney fees. *See* NRS 18.015(2).[3] Fine perfected the lien by properly serving notice of the retaining lien and the amount of the lien. *See* NRS 18.015(3). Therefore, the lien attached to Fredianelli's papers and files. *See* NRS 18.015(4)(b). With each of NRS 18.015's elements satisfied, Fine properly moved the district court for adjudication and enforcement of the lien and, after more than five days' notice to Fredianelli, the district court adjudicated Fine's rights and enforced the lien for attorney fees. *See* NRS 18.015(6). Therefore, we conclude that, based on the facts presented and the arguments made herein, the district court did not err by enforcing Fine's retaining lien against Fredianelli because its lien was supported by the plain language of NRS 18.015.

CONCLUSION

Because we conclude that the plain language of NRS 18.015 unambiguously permits an attorney to enforce a retaining lien, we conclude that the district court did not err by enforcing Fine's valid retaining lien against Fredianelli under NRS 18.015. Accordingly, we affirm the district court's order.

Douglas, Gibbons, Parraguirre, and Stiglich, JJ., concur.

Hardesty, J., with whom Pickering, J., agrees, dissenting:

Fine Carman Price (Fine) brought a motion for enforcement of an attorney's retaining lien and sought entry of a personal monetary judgment for attorney fees against its former client Fredianelli. This appeal raises, once again, the question whether an attorney may obtain a monetary judgment in a summary proceeding while attempting to enforce a retaining lien.

I would reverse the district court judgment for attorney fees on two grounds. First, the district court lacked jurisdiction to consider Fine's motion under our decision in *SFPP, L.P. v. Second Judicial*

[3]Fredianelli does not dispute the amount or reasonableness of the fees in this appeal, and, therefore, we do not consider those issues. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that when a party fails to present cogent argument and supporting authority, this court need not consider those claims).

District Court, 123 Nev. 608, 173 P.3d 715 (2007), because the notice of lien and motion were filed after the final order in the underlying case.[1] And, second, nothing in the Legislature's 2013 amendments to NRS 18.015 altered the general rule expressed in *Morse v. Eighth Judicial District Court*, 65 Nev. 275, 195 P.2d 199 (1948), and *Argentena Consolidated Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 216 P.3d 779 (2009), that the enforcement of a retaining lien results in an adjudication of the ownership of the client's files and property retained by the lawyer, not a personal monetary judgment for fees.

The district court entered its order resolving the underlying paternity action on October 21, 2015. On the same day, Fine filed a notice of withdrawal from representing Fredianelli, which it could not have done by simple notice if anything remained to be done in the case. *See* SCR 1.16; EDCR 7.40. Neither party in the underlying action filed post-order motions. Yet, 28 days after the final order was entered, Fine filed a notice of retaining lien and 50 days thereafter, on January 7, 2016, Fine brought its motion for enforcement of an attorney's retaining lien and judgment for attorney fees.

Once the district court enters a final order, it lacks jurisdiction to conduct any further proceedings. *SFPP*, 123 Nev. at 612, 173 P.3d at 718 ("[T]he district court lost jurisdiction over the judgment once the order for dismissal with prejudice was entered and lacked jurisdiction to conduct any further proceedings with respect to the matters resolved in the judgment unless it was first properly set aside or vacated.")

I would extend the rule from *SFPP* to preclude a district court from adjudicating attorney-client lien disputes attempted to be initiated by filing a notice of lien and motion to enforce the lien after a final order resolving the case has been entered. Once the district court has entered a final order, it is divested of jurisdiction to entertain previously unasserted attorney lien claims. Following a final order, the proper process by which to adjudicate the fee dispute is through the filing of a new complaint. Thus, when Fine filed its motion to enforce a retaining lien and for attorney fees after a final order, the district court lacked jurisdiction to consider the motion and improperly awarded Fine a personal monetary judgment against its former client.

Fine claims, and the majority concludes, that the 2013 amendments permit an attorney to obtain a personal monetary judgment within five days after filing a motion for fees in a summary proceed-

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[1]Although Fredianelli did not raise the question of the district court's jurisdiction, "whether a court lacks subject matter jurisdiction can be raised. . . . sua sponte by a court of review, and cannot be conferred by the parties." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (internal quotation marks omitted).

ing to adjudicate a retaining lien. I disagree. NRS 18.015 addresses the adjudication of the parties' rights with respect to the resolution of a lien in a summary proceeding. The statute does not contemplate the award of a personal monetary judgment in a summary proceeding upon five days' notice with respect to a lien not asserted until the underlying action has completely finished. That process was reserved to resolve the parties' conflicting claims to the enforcement of a lien in an ongoing case, or a case in which the claims produced a recovery to which a perfected charging lien attached.

Argentena describes a retaining lien as one that "allows a discharged attorney to withhold the client's file and other property until the court, at the request or consent of the client, adjudicates the client's rights and obligations with respect to the lien." *Argentena*, 125 Nev. at 532, 216 P.3d at 782. "Because a retaining lien is a passive lien, the client determines whether it wants to extinguish the lien by requesting that the court compel the former attorney to deliver the client's files." *Id.* at 533, 216 P.3d at 783. "If the court lacks jurisdiction to resolve the retaining lien, the attorney may keep possession of the former client's files and the attorney's recourse is to file a separate action to recover for the services expended on behalf of the former client." *Id.*

The common law retaining lien did not allow for a monetary judgment, it was "simply a right to retain the papers as against the client until the attorney is paid in full." *Morse*, 65 Nev. at 284, 195 P.2d at 203. "[T]he only advantage gained by the attorney through such lien is the possibility of forcing the client to settle because of the embarrassment, inconvenience or worry caused the client by the attorney's retention of the papers." *Id. Argentena* and *Morse*'s explanation of a retaining lien is consistent with the American Jurisprudence, which states that "[t]he main disadvantage of the general or retaining lien is that it is a passive lien only, and it cannot ordinarily be actively enforced, either at law or in equity." 31 Am. Jur. 2d *Proof of Facts* 125 (2017). Neither the majority opinion nor respondent's brief seeks to modify *Argentena* and *Morse*'s description of the remedies available to an attorney for the enforcement of a retaining lien. Nor do the 2013 statutory amendments to NRS 18.015.

In 2013, the Legislature added subsections 1(b), 4(b), and 5 to NRS 18.015. 2013 Nev. Rev. Stat., ch. 79, § 1, at 271. As amended, NRS 18.015 states in relevant part as follows:

> 1. An attorney at law shall have a lien:
>
> . . . .
>
> (b) In any civil action, upon any file or other property properly left in the possession of the attorney by a client.
>
> . . . .
>
> 4. A lien pursuant to:
>
> . . . .

> (b) Paragraph (b) of subsection 1 attaches to any file or other property properly left in the possession of the attorney by his or her client, including, without limitation, copies of the attorney's file if the original documents received from the client have been returned to the client, and authorizes the attorney to retain any such file or property until such time as an adjudication is made pursuant to subsection 6,
>
> from the time of service of the notices required by this section.
>
> 5. A lien pursuant to paragraph (b) of subsection 1 must not be construed as inconsistent with the attorney's professional responsibilities to the client.

The new subsections 1(b) and 4(b) simply add to the statute what *Argentena* already described as a retaining lien.

Notably, however, the Legislature did not amend subsection 6 of NRS 18.015, which outlines the remedy for an attorney who enforces a lien:

> On motion filed by an attorney having a lien under this section, the attorney's client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.

A retaining lien simply affords a lien on the file, not on any recovery by the client, and indeed, there was no monetary recovery in the instant case. As a consequence, the extent of an enforcement motion for a retaining lien is to adjudicate ownership of a file or any personal property in possession of the attorney. This conclusion is underscored by the language added to NRS 18.015(4)(b) in 2013, which "authorizes the attorney to retain such file or property [in his or her possession] until such time as an adjudication is made pursuant to subsection 6." But nothing in that amendment or subsection 6 permits the court in a summary proceeding to enter a monetary judgment where the attorney is enforcing a retaining lien.

The majority opinion cites to the legislative history of NRS 18.015 to support its determination that a monetary judgment is proper in the adjudication of a retaining lien. *See* Majority opinion *ante* p. 589-90. However, the portion of the legislative history relied upon by the majority explicitly refers to a charging lien rather than a retaining lien.

> The statute in question . . . provided a *charging lien*—the procedure being that an attorney could . . . ask the court, by motion, to adjudicate the lien. In other words, to interpret how much in fees would be owed fairly by the client, and then enter a judgment if the court saw fit to do this.

Hearing on S.B. 140 Before the Assembly Judiciary Comm., 77th Leg. (Nev., May 3, 2013) (statement of Thomas Standish describing

the effects of the statutory amendments) (emphasis added). However, nothing in the legislative history alters the remedy in subsection 6.

In its motion, Fine relied on *Gordon v. Stewart*, 74 Nev. 115, 324 P.2d 234 (1958), to show that an attorney's recovery is not limited to his or her lien, and that a monetary judgment is appropriate. However, we have since expressly overturned *Gordon*. *See Argentena*, 125 Nev. at 538, 216 P.3d at 786 (rejecting *Gordon* "to the extent that [it] indicate[s] that the district court has the power to resolve a fee dispute in the underlying action irrespective of whether the attorney sought adjudication of a lien").

As Fredianelli observes in her reply brief, the court can award ownership of the files to her attorney and nothing in the statutory amendment alters *Argentena*'s remedy to enforce a retaining lien. "[W]hen . . . a client does not move the court to resolve the retaining lien, . . . the proper method by which the attorney should seek adjudication of the fee dispute is an action against his or her former client in a separate proceeding." *Id*. at 539-40, 216 P.3d at 787. Accordingly, Fine may keep Fredianelli's property it currently possesses pursuant to the retaining lien, but NRS 18.015 does not provide a basis for entry of a personal monetary judgment for attorney fees.

For these reasons, I would reverse the decision of the district court.

JESSICA WILLIAMS, APPELLANT, *v*. THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; AND JO GENTRY, WARDEN, RESPONDENTS.

No. 71039

October 5, 2017 402 P.3d 1260

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus challenging the computation of time served. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Reversed and remanded.

Ellen J. Bezian and *John Glenn Watkins*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, and *Daniel M. Roche*, Deputy Attorney General, Carson City, for Respondents.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

NRS 209.4465(7)(b) provides that credits earned pursuant to NRS 209.4465 "[a]pply to eligibility for parole unless the offender was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole."[1] In this opinion, we consider whether credits earned pursuant to NRS 209.4465 apply to eligibility for parole as provided in NRS 209.4465(7)(b) where the offender was sentenced pursuant to a statute that requires a minimum term of not less than a set number of years but does not mention parole eligibility. Where an offender was sentenced pursuant to such a statute, we conclude that credits do apply to eligibility for parole as provided in NRS 209.4465(7)(b). Because appellant Jessica Williams was sentenced pursuant to such a statute, the credits she earns under NRS 209.4465 should be applied to her eligibility for parole. The district court erred in ruling to the contrary. We therefore reverse and remand.

FACTS AND PROCEDURAL HISTORY

On March 19, 2000, Williams struck and killed six teenagers with her vehicle. She was convicted of six counts of driving a vehicle with a prohibited substance in her blood or urine causing death in violation of NRS 484.3795 (now codified as NRS 484C.430). For each count, Williams was sentenced to a minimum term of 36 months and a maximum term of 96 months with each sentence to be served consecutively.[2]

Williams petitioned the district court for a writ of habeas corpus in 2016, arguing that she was entitled to have credits earned pursuant to NRS 209.4465 apply to her eligibility for parole. The district court concluded that the legislative intent was for a prisoner to serve his or her minimum term before being eligible for parole and therefore that credits did not apply to Williams' eligibility for parole. Accordingly, the district court denied the petition. This appeal followed.

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[1]NRS 209.4465 was adopted in 1997. 1997 Nev. Stat., ch. 641, § 4, at 3175. It has been amended several times since then, most notably in 2007 when the Legislature adopted exceptions to NRS 209.4465(7) that currently are codified in subsection 8 of the statute, 2007 Nev. Stat., ch. 525, § 5, at 3177. The 2007 amendments do not apply here. All statutory references in this opinion are to the provisions in effect in 2000, *see* 1999 Nev. Stat., ch. 552, § 8, at 2881-82, when the offenses in this case were committed.

[2]Williams was also convicted of unlawfully using a controlled substance and possession of a controlled substance. She received probation for these counts.

DISCUSSION

A postconviction petition for a writ of habeas corpus is "the only remedy available to an incarcerated person to challenge the computation of time that the person has served pursuant to a judgment of conviction." NRS 34.724(2)(c). Williams' claim—that credits are not being applied to her eligibility for parole—challenges the computation of time served and therefore is raised properly in a postconviction petition for a writ of habeas corpus. *See Griffin v. State*, 122 Nev. 737, 742-43, 137 P.3d 1165, 1168-69 (2006) (interpreting the language of NRS 34.724(2)(c) as logically referring to "credit earned after a petitioner has begun to serve the sentence specified in the judgment of conviction").

Williams asserts that NRS 209.4465(7)(b) requires credits be applied to her eligibility for parole (i.e., her minimum terms) whereas the State contends that both NRS 209.4465(7)(b) and NRS 213.120(2) require that she serve her minimum terms without any reduction for credits earned pursuant to NRS 209.4465. The State argues, and the district court agreed, that the Legislature intended for prisoners to serve the minimum term imposed before becoming eligible for parole.

The issue before us is a matter of statutory interpretation. "Statutory interpretation is a question of law subject to de novo review." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The goal of statutory interpretation "is to give effect to the Legislature's intent." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). To ascertain the Legislature's intent, we look to the statute's plain language. *Id.* "[W]hen a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Edgington v. Edgington*, 119 Nev. 577, 582-83, 80 P.3d 1282, 1286 (2003). This court "avoid[s] statutory interpretation that renders language meaningless or superfluous," *Hobbs*, 127 Nev. at 237, 251 P.3d at 179, and "whenever possible . . . will interpret a rule or statute in harmony with other rules or statutes," *Watson Rounds v. Eighth Judicial Dist. Court*, 131 Nev. 783, 789, 358 P.3d 228, 232 (2015) (quotation marks omitted).

NRS 209.4465(7) provides that credits earned pursuant to NRS 209.4465: (a) "[m]ust be deducted from [a prisoner's] maximum term" of imprisonment and (b) "[a]pply to eligibility for parole unless the offender was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole." The first part of subsection 7(b) establishes a general rule—that credits earned pursuant to NRS 209.4465 apply to eligibility for parole. The second part of subsection 7(b) sets forth a limitation—the general rule does not apply if the offender "was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole."

Thus, if the sentencing statute did not specify a minimum sentence that had to be served before parole eligibility, credits should be deducted from a prisoner's minimum sentence, making an inmate eligible for parole sooner than he or she would have been without the credits.

Williams was not sentenced pursuant to a statute that specified a minimum sentence that must be served before she becomes eligible for parole

For purposes of NRS 209.4465(7)(b), the question is whether Williams was sentenced pursuant to a statute that specified a minimum sentence she had to serve before she would be eligible for parole. Williams was sentenced pursuant to former NRS 484.3795(1) (currently codified as NRS 484C.430(1)), which provided that a person convicted of driving with a prohibited substance in the blood or urine causing death "shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years." 1999 Nev. Stat., ch. 622, § 28, at 3422. Although that statute required a minimum term of not less than two years, it was silent regarding *parole eligibility*.[3] The plain language of the sentencing statute therefore does not specify a term that an offender must serve before becoming eligible for parole.

The State argues that, based on legislation passed in 1995, all statutes that require a minimum term of not less than a set number of years inherently require that the offender serve the minimum term before becoming eligible for parole. That argument has some appeal, as indicated by the district court decisions in this case and numerous similar cases currently pending before this court. We nonetheless discern two problems with it that render the interpretation unreasonable.

The first problem is the plain language used in the sentencing statute at issue here in contrast to the language used in other sentencing statutes. The Legislature has used language in other sentencing statutes that expressly requires a particular sentence be served before a person becomes eligible for parole. These "parole-eligibility" statutes delineate a "[maximum sentence], with eligi-

[3]We acknowledge that NRS 213.120(2) provided that a prisoner "may be paroled when he has served the minimum term of imprisonment imposed by the court." 1995 Nev. Stat., ch. 443, § 235, at 1260. But NRS 213.120 is not a sentencing statute. In applying the limiting language in NRS 209.4465(7)(b), only sentencing statutes are relevant. The relationship between NRS 209.4465(7)(b) and NRS 213.120 is addressed further *infra*.

We also acknowledge that the judgment of conviction in this case includes language indicating that the minimum term had to be served before Williams would be eligible for parole. As with NRS 213.120, the language in the judgment of conviction is not relevant in determining whether the limiting language in NRS 209.4465(7)(b) applies.

bility for parole beginning when a minimum of [x] years has been served." *See, e.g.*, NRS 200.030(4)(b)(2)-(3) (listing sentencing options for first-degree murder, including "life with the possibility of parole, *with eligibility for parole beginning when a minimum of 20 years has been served*," or "a definite term of 50 years, *with eligibility for parole beginning when a minimum of 20 years has been served*" (emphases added)); NRS 200.366(2)(a)(2) (providing that person convicted of sexual assault that results in substantial bodily harm may be sentenced to "life with the possibility of parole, *with eligibility for parole beginning when a minimum of 15 years has been served*" (emphasis added)); NRS 200.366(2)(b) (providing that person convicted of sexual assault that does not result in substantial bodily harm may be sentenced to "life with the possibility of parole, *with eligibility for parole beginning when a minimum of 10 years has been served*" (emphasis added)); NRS 453.334(1)-(2) (specifying that a person convicted for a second or subsequent offense of selling a controlled substance to a minor must be sentenced to "life with the possibility of parole, *with eligibility for parole beginning when a minimum of 5 years has been served*" or "a definite term of 15 years, *with eligibility for parole beginning when a minimum of 5 years has been served*" (emphases added)). In contrast, sentencing statutes like the one at issue in this case provide for "imprisonment in the state prison for a minimum term of not less than [x] year(s) and a maximum term of not more than [y] years" and do not reference parole eligibility. *See, e.g.*, NRS 200.380(2) (designating the penalty for robbery as "a minimum term of not less than 2 years and a maximum term of not more than 15 years"); NRS 200.481 (providing minimum-maximum penalties for certain types of battery); *see also* NRS 193.130(2)(b)-(e) (outlining minimum-maximum penalties for category B, C, D, and E felonies). In some instances, the Legislature has utilized both formats within a single statute. *See* NRS 453.3385(1) (providing minimum-maximum sentences for trafficking under 28 grams of a controlled substance but parole-eligibility sentences for trafficking 28 grams or more of a controlled substance).

We must presume that the variation in language indicates a variation in meaning. *See generally Henson v. Santander Consumer USA Inc.*, 582 U.S. ___, ___, 137 S. Ct. 1718, 1723 (2017) ("And, usually at least, when we're engaged in the business of interpreting statutes we presume differences in language . . . convey differences in meaning."); *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("[W]hen [the Legislature] includes particular language in one section of a statute but omits it in another . . . this Court presumes that [the Legislature] intended a difference in meaning." (internal quotation marks and alteration omitted)); *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) ("[The Legislature's] explicit decision to use one word over another in drafting a statute is material. It is a

decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning." (internal citations omitted)). In other words, where the Legislature intended to set forth a specific term that must be served before an offender becomes eligible for parole, it did so with express language to that effect, but where the Legislature did not so intend, it omitted such express language.[4]

The second problem is that interpreting the minimum-maximum sentencing statutes as the State suggests would render the general rule in NRS 209.4465(7)(b), that credits apply to parole eligibility, meaningless. Offenders in Nevada receive either a minimum-maximum sentence, a parole-eligibility sentence, or a determinate sentence.[5] NRS 209.4465(7)(b) does not apply at all to determinate sentences because a determinate sentence only has a maximum term and NRS 209.4465(7)(a) already provided that credits "[m]ust be deducted from the maximum term imposed by the sentence," 1997 Nev. Stat., ch. 641, § 4, at 3175. The general rule in NRS 209.4465(7)(b) does not apply to parole-eligibility statutes because they expressly identify a term that must be served before an offender becomes eligible for parole and therefore are excluded by the limiting language in NRS 209.4465(7)(b). And, under the State's interpretation of the minimum-maximum sentencing statutes, the general rule in NRS 209.4465(7)(b) would not apply to a minimum-maximum sentence because such a sentence would also be excluded by the limiting language in the statute. In sum, under the State's interpretation, there are no offenders who could benefit from the general rule set forth in NRS 209.4465(7)(b) that allows credits to be applied to eligibility for parole, making that statutory language meaningless. We generally try to "avoid statutory interpretation that renders language meaningless or superfluous." *Hobbs*, 127 Nev. at 237, 251 P.3d at 179.[6]

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[4]The State suggests that this court interpreted a minimum-maximum sentencing statute consistent with its position in *Breault v. State*, 116 Nev. 311, 996 P.2d 888 (2000). Although the defendant in that case was sentenced under a minimum-maximum sentencing statute and this court referred to the minimum sentence as a minimum for parole eligibility, this court was not asked in *Breault* to interpret the sentencing statute for purposes of NRS 209.4465(7)(b) or the similar provision in subsection 6(b) of NRS 209.446, which was the credits statute that applied at the time.

[5]Most determinate sentencing statutes were amended to fit the minimum-maximum format in 1995. *See, e.g.*, 1995 Nev. Stat., ch. 443, § 5, at 1170; § 37, at 1178-79; § 39, at 1179; § 40, at 1180; § 45, at 1182; § 47, at 1182; § 48, at 1183; and § 52, at 1183-84. But some remain. For example, NRS 645C.560(1) does not provide for a minimum sentence or for a specified term of imprisonment before parole eligibility when it states that punishment shall be "imprisonment in the state prison for not less than 1 year nor more than 6 years."

[6]The State argues that our interpretation would render NRS 209.4465(8), added in 2007, meaningless. Subsection 8 sets forth exceptions to NRS 209.4465(7), providing that credits do not apply to eligibility for parole where

After our de novo review of the statutes at issue, we conclude that the relevant sentencing statute did not specify a term that must be served before parole eligibility as contemplated by the limiting language in NRS 209.4465(7)(b). As such, the general rule set forth in NRS 209.4465(7)(b) applies and provides for the deduction of credits from Williams' minimum sentence.[7]

NRS 213.120(2) does not control over NRS 209.4465(7)(b)

The State alternatively focuses on NRS 213.120(2), arguing that the statute clearly and unambiguously provided that credits earned under NRS Chapter 209 must not reduce a prisoner's minimum sentence. At the time of Williams' offense, NRS 213.120(2) stated that "[a]ny credits earned to reduce [a prisoner's] sentence pursuant to chapter 209 of NRS while the prisoner serves the minimum term of imprisonment may reduce only the maximum term of imprisonment imposed and must not reduce the minimum term of imprisonment." 1995 Nev. Stat., ch. 443, § 235, at 1259-60. That provision conflicts with the language in NRS 209.4465(7)(b) that provided for the application of credits to a prisoner's minimum sentence under certain circumstances.

When two statutory provisions conflict, we employ the rules of statutory construction to resolve the conflict. *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 508, 306 P.3d 369, 380 (2013). Two rules of statutory construction guide our decision in this matter: the general/specific canon and the implied repeal canon. We address both below but start with the general/specific canon as the implied repeal canon is not favored. *See Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1137 (2001) (observing that the implied repeal approach "is heavily disfavored, and [this court] will not consider a statute to be repealed by implication unless there is no other reasonable construction of the two statutes").

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the offender has been convicted of certain offenses. *See* 2007 Nev. Stat., ch. 525, § 5, at 3177. Although some aspects of subsection 8 likely were unnecessary, such as those excluding category A felony offenses, most of the provisions set additional limitations on the application of credits to eligibility for parole that were not previously covered in subsection 7(b).

[7]Our interpretation of NRS 209.4465(7)(b) applies only to crimes committed on or between July 17, 1997 (the effective date of NRS 209.4465) and June 30, 2007 (the effective date of NRS 209.4465(8)). Because the application of credits under NRS 209.4465(7)(b) only serves to make an offender eligible for parole earlier, no relief can be afforded where the offender has already expired the sentence, *see Johnson v. Dir., Nev. Dep't of Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989) (providing that "any question as to the method of computing" a sentence is rendered moot when the sentence is expired), or appeared before the parole board on the sentence, *see Niergarth v. Warden*, 105 Nev. 26, 29, 768 P.2d 882, 883-84 (1989) (recognizing no statutory authority or caselaw allowing for retroactive grant of parole).

Under the general/specific canon, the more specific statute will take precedence, *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005), and is construed as an exception to the more general statute, *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012), so that, when read together, "the two provisions are not in conflict, but can exist in harmony," *id.* at 185. *See also Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) ("Where a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute controls." (internal quotation marks omitted)). We conclude that NRS 213.120(2), which included a blanket prohibition against the application of credits to all minimum sentences, is the more general statute whereas NRS 209.4465(7)(b), which limited the application of credits to minimum sentences imposed under statutes that did not specify a term before parole eligibility, is the more specific. As the specific statute, NRS 209.4465(7)(b) sets forth an exception to NRS 213.120(2).[8]

The same result follows under the less favored implied repeal canon. That canon provides that "when statutes are in conflict, the one more recent in time controls over the provisions of an earlier enactment." *Laird v. State of Nev. Pub. Emps. Ret. Bd.*, 98 Nev. 42, 45, 639 P.2d 1171, 1173 (1982). NRS 213.120 was amended in 1995 to add the blanket prohibition in subsection 2. 1995 Nev. Stat., ch. 443, § 235, at 1260. NRS 209.4465(7)(b) was enacted in 1997. 1997 Nev. Stat., ch. 641, § 4, at 3175. As NRS 209.4465(7)(b) is the one more recent in time, it controls.

Based on our interpretation of NRS 209.4465(7)(b) and the applicable sentencing statute, credits that Williams has earned under NRS 209.4465 should be applied to her parole eligibility for any sentence she is currently serving and on which she has not appeared before the parole board. Accordingly, we reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this order.

HARDESTY and PARRAGUIRRE, JJ., concur.

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[8]Treating NRS 209.4465(7)(b) as the general statute and NRS 213.120(2) as the specific would lead to a result that is inconsistent with the general/specific canon because NRS 213.120(2) would exempt all offenders from the general provision (NRS 209.4465(7)(b)) thereby eliminating the general provision rather than allowing both provisions to exist in harmony.