CARYNE SHEA, Individually and as Next Friend of Her Minor Children A.S. and M.S.; VENECIA SANCHEZ, Individually and as Next Friend of Her Minor Child Y.S.; BETH MARTIN, Individually and as Next Friend of Her Minor Children R.M. and H.M.; CALEN EVANS, Individually and as Next Friend of His Minor Child C.E.; PAULA ARZOIAN, Individually and as Next Friend of Her Minor Child A.A.; KAREN PULEO, Individually and as Next Friend of Her Minor Children J.D. JR., JAS. D., and JAC. D.; CHRISTINA BACKUS, Individually and as Next Friend of Her Minor Child D.B.; CAMERON BACKUS, Individually and as Next Friend of His Minor Child D.B.; and ALEXANDRA ELLIS, Individually and as Next Friend of Her Minor Children L.E., M.E., and B.E., Appellants, *v.* THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF EDUCATION; JHONE EBERT, NEVADA SUPERINTENDENT OF PUBLIC EDUCATION, in Her Official Capacity; and THE STATE OF NEVADA BOARD OF EDUCATION, Respondents.

No. 82118

May 26, 2022 510 P.3d 148

Appeal from a district court order of dismissal in a civil action seeking declaratory and injunctive relief. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed.

Cadish, J., dissented.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Daniel Bravo*, Las Vegas; *Educate Nevada NOW* and *Amanda J. Morgan*, Las Vegas, for Appellants.

Aaron D. Ford, Attorney General, *Heidi J. Parry Stern*, Solicitor General, *Steven G. Shevorski*, Chief Litigation Counsel, and *Sabrena K. Clinton*, Deputy Attorney General, Carson City, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

Appellants are nine parents, individually and as next friends of their minor children, who are students attending public schools

in the districts of Clark, Washoe, and White Pine Counties (collectively, Shea). Respondents are the State of Nevada, the Nevada Department of Education, Jhone Ebert, in her official capacity as Nevada Superintendent of Public Education, and the Nevada State Board of Education (collectively, the State), all of whom are responsible for implementing Nevada's public education policy.

Shea filed a complaint against the State alleging that Nevada's system of public education has failed its students, as evidenced by the State's ongoing poor rankings and continued failure to achieve the standards that she contends are required for a sufficient, basic education under Article 11, Sections 1, 2, and 6 of the Nevada Constitution. The district court dismissed the complaint, determining that Shea's claims presented nonjusticiable political questions. We conclude, after clarifying our jurisprudence regarding the political question doctrine, that the plain language of the relevant constitutional provisions demonstrates a clear, textual commitment of public education to the Nevada Legislature by granting the Legislature broad discretionary authority over such matters. Because Shea's claims are inextricably linked to the textual commitment of public education to the Legislature under the Nevada Constitution, we conclude that her claims are nonjusticiable. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Shea filed a complaint for declaratory and injunctive relief in the First Judicial District Court. Among other things, Shea alleged that years of inaction by the State and inadequate funding by the Legislature created a systemic failure within Nevada's public education system. Shea contended that, because of these shortcomings, Nevada's students are ill-equipped to succeed in higher education and future careers. Shea challenged the adequacy of the Nevada public education system, arguing that the amount of funding and other resources provided by the State fall hideously short of the sufficiency required by the Nevada Constitution, state law, and the various benchmarks established by the Nevada Department of Education. Shea alleged that the State's deficiencies created a public education system that fails to meet the standards of a basic, sufficient, uniform, and constitutional education by continually failing to provide adequate physical facilities and classrooms, access to adequate learning instrumentalities, adequate teaching in classes of appropriate size, and reasonably current basic curriculum.

Shea supported her claims with various statistics[1] that she alleged evince the State's failure to meet the needs of the state's

[1]While we take judicial notice of the public statistics cited in Shea's complaint and opposition to the motion to dismiss, addressing any concerns purportedly raised by such statistics rests squarely on the shoulders of the Legislature under the Nevada Constitution for the reasons explained in this opinion.

diverse student population. Shea asserted causes of action based on the State's purported failure to provide Nevada's students with a qualitatively and quantitatively sufficient education as required by Article 11, Sections 1, 2, and 6 of the Nevada Constitution (the education clauses).[2] Shea sought declaratory and injunctive relief, requesting that the district court, among other things, (1) declare that a sufficient education is a basic right under the Nevada Constitution, (2) declare that the Nevada public education funding system is inadequate to provide or guarantee the basic right of a sufficient education in violation of the Nevada Constitution, (3) enjoin the State from implementing any school finance system that does not meet the sufficiency required by Nevada law and policy, and (4) retain jurisdiction until the court ensures that the State's public education financing system comports with the sufficiency requirements established by the court.

The State moved to dismiss for failure to state a claim pursuant to NRCP 12(b)(5). The State argued, in pertinent part, that Shea's claims presented nonjusticiable political questions. The district court granted the State's motion to dismiss with prejudice based on the political question doctrine. Specifically, the district court determined that Article 11 of the Nevada Constitution textually commits Nevada's education policy to the Legislature. The district court emphasized that the Nevada Constitution grants the Legislature discretion to (1) appropriate the amount of money it deems to be sufficient to fund public school operations and (2) determine what programs and processes should be adopted to provide for a uniform system of public education in Nevada. Additionally, the district court found that the aspirational nature of the education clauses does not mandate or guarantee a public education system of a particular quality or quantity or attainment of specific educational outcomes. The district court also found that it is inappropriate for the judiciary to resolve issues relating to the adequacy of the public education system because it lacks judicially discoverable and manageable standards to effectively resolve such issues and would require the judicial branch to make public policy in violation of the separation of powers guarantee. Shea appealed.

[2]Additionally, Shea claimed that the State's public education funding system violates students' due process rights under Article 1, Section 8(2) of the Nevada Constitution. Shea fails, however, to offer any cogent arguments on appeal specifically showing how due process rights are implicated here. Accordingly, we decline to consider this issue. *See Gonor v. Dale*, 134 Nev. 898, 902 n.2, 432 P.3d 723, 726 n.2 (2018) (refusing to consider an argument not addressed by appellants on appeal); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority).

DISCUSSION

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal, with all factual allegations in the complaint presumed true and all inferences drawn in favor of the complainant. *Id*. at 227-28, 181 P.3d at 672. Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id*. at 228, 181 P.3d at 672.

Shea's complaint presents a nonjusticiable political question

The State argues that while an adequate education of a particular level of quality is good public policy, the education clauses of the Nevada Constitution do not permit the courts to participate in decisions as to what constitutes an adequate education or what level of education funding is sufficient. We agree.

The political question doctrine

"This court has a long history of requiring an actual justiciable controversy as a predicate to judicial relief." *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630, 218 P.3d 847, 850 (2009) (internal quotation marks omitted). "The separation of powers doctrine is the most important foundation for preserving and protecting liberty by preventing the accumulation of power in any one branch of government." *Berkson v. LePome*, 126 Nev. 492, 498, 245 P.3d 560, 564 (2010). The Nevada Constitution allocates governmental power between "three distinct and coequal branches of government, as set forth in Article 4 (legislative), Article 5 (executive), and Article 6 (judicial)." *Id*. "The Legislature enacts laws, and in turn, the executive branch is tasked with carrying out and enforcing those laws." *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (internal quotation marks omitted). The judicial branch has "the *authority* to hear and determine justiciable controversies" and "to declare what the law *is*[,] *or has been*." *Id*. (alterations in original) (internal quotation marks omitted). "As coequal branches, each of the three governmental departments has inherent power to administer its own affairs and perform its duties, so as not to become a subordinate branch of government." *Berkson*, 126 Nev. at 498, 245 P.3d at 564 (internal quotation marks omitted).

"The political question doctrine stems from the separation of powers essential to the American system of government." *N. Lake Tahoe Fire Prot. Dist.*, 129 Nev. at 686, 310 P.3d at 586. "This doc-

trine exists for one very important reason—'to prevent one branch of government from encroaching on the powers of another branch.'" *Id*. (quoting *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009)). "Under the political question doctrine, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." *Id*. (internal quotation marks omitted).

In *North Lake Tahoe Fire Protection District*, this court formally adopted the *Baker*[3] factors to assist in determining whether an issue presents a nonjusticiable political question. *Id*. at 688, 310 P.3d at 587. Specifically, this court considers whether there is

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Id. (quoting *United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990)); *see also Baker*, 369 U.S. at 217. However, while we recognized that "[t]he political question doctrine . . . provides for a narrow exception limiting justiciability," *N. Lake Tahoe Fire Prot. Dist.*, 129 Nev. at 687, 310 P.3d at 587, we stated that "[a] determination that any one of these factors has been met necessitates dismissal based on the political question doctrine," *id*. at 688, 310 P.3d at 587. This statement did not, however, sufficiently convey the narrowness of this exception.

In *Baker*, the United States Supreme Court recognized that, "[u]nless one of these formulations is *inextricable from the case at bar*, there should be no dismissal for non-justiciability on the ground of a political question's presence." 369 U.S. at 217 (emphasis added). As the Supreme Court persuasively reasoned, "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Id*. Therefore, we take this opportunity to clarify *North Lake Tahoe Fire Protection District* and to expressly hold that, in Nevada, dismissal based on the political question doctrine requires a showing that the political question has an *inextricable link* between one of the *Baker* factors and the controversy at issue.

[3]*Baker v. Carr*, 369 U.S. 186 (1962).

Here, as noted, the district court dismissed the complaint pursuant to NRCP 12(b)(5), citing the political question doctrine. Specifically, the district court concluded that a political question existed based on two of the *Baker* factors: a textual commitment of public education to the Legislature in Article 11 of the Nevada Constitution and, because of the complex nature in administering a statewide system of public education, "the courts . . . lacked judicially discoverable and manageable standards to effectively resolve those issues."

The Nevada Constitution makes a textually demonstrable commitment of public education to the Legislature

When determining whether there is a textually demonstrable commitment of an issue to a coordinate branch of government under the first *Baker* factor, we note that the commitment need not be explicit. *Alperin v. Vatican Bank*, 410 F.3d 532, 549 (9th Cir. 2005). Rather than relying on explicit language, courts "are usually left to infer the presence of a political question from the text and structure of the Constitution." *Id*. (quoting *Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J., concurring)). In that vein, the State argues that the aspirational nature of Article 11's plain language and the broad discretion granted to the Legislature to establish education policy evince the framers' intent to textually commit education solely to the Legislature. The State contends that the expansive authority granted to the Legislature to frame and enact laws regarding public education provides the Legislature with almost plenary authority, except where expressly limited by the state or federal constitution. We agree.

Unless a constitutional provision is ambiguous, we apply it in accordance with its plain language. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). Further, "the Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision." *Id.* at 944, 142 P.3d at 348. The plain language of the education clauses does not create an obligation for the Legislature to provide public education at a particular service level or to provide specific educational outcomes. In *Schwartz v. Lopez,* we previously observed that "the Nevada Constitution contains two distinct duties set forth in two separate sections of Article 11—one to encourage education through all suitable means (Section 1) and the other to provide for a uniform system of common schools (Section 2)." 132 Nev. 732, 749-50, 382 P.3d 886, 898 (2016).

Section 1, we indicated, contains an aspirational legislative duty "to encourage the promotion of" educational endeavors in specified areas and leaves the determination of the types of programs and services, and the quality of education, provided to public school students within the Legislature's broad discretion. *Id*. at 747, 382 P.3d at 897 (emphasis omitted). As we noted, "[u]se of the phrase

'by all suitable means' reflects the framers' intent to confer broad discretion on the Legislature in fulfilling its duty to promote" education. *Id*.

We indicated that Section 2 likewise grants wide discretion to the Legislature, explaining that "[t]he legislative duty to maintain a uniform public school system is not a ceiling but a floor upon which the [L]egislature can build additional opportunities for school children." *Schwartz*, 132 Nev. at 750, 382 P.3d at 898 (internal quotation marks omitted); *see also Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 897 (Ct. App. 2016) (construing the analogous provisions of the California Constitution and stating that the text of these two sections together "speak[ ] only of a general duty to provide for a [uniform] system of common schools and does not require the attainment of any standard of resulting educational quality"). Of significance, we recognized that "although the debates surrounding the enactment of Article 11 reveal that the delegates discussed the establishment of a system of public education and its funding, they also . . . acknowledged the need to vest the Legislature with discretion over education into the future." *Schwartz*, 132 Nev. at 747, 382 P.3d at 897 (citing *Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 565-77 (Andrew J. Marsh off. rep. 1866)).

Similarly, nothing in the plain language of Article 11, Section 6 of the Nevada Constitution requires public education be funded at a certain level or to achieve certain educational outcomes. As we have previously recognized, the education clauses require the Legislature to fund public education, but "the Legislature is not required to . . . fund[ ] education at any particular level." *Rogers v. Heller*, 117 Nev. 169, 176, 18 P.3d 1034, 1038 (2001). To be sure, "concerns about the public funding of education[ ] are of significant statewide importance [to the citizens of this state,] . . . so much so that our Constitution was amended [in 2006] to require the Legislature to sufficiently fund public education before making any other appropriation." *Schwartz*, 132 Nev. at 744, 382 P.3d at 895. But the plain language of Section 6, even as amended in 2006 to prioritize education over other appropriations, explicitly leaves the determination of funding sufficiency to the sole discretion of the Legislature. Indeed, when the people of Nevada amended the Constitution in 2006, they unmistakably gave their representatives in the Legislature unfettered discretion to enact "appropriations to provide the money *the Legislature deems to be sufficient* . . . to fund the operation of the public schools." Nev. Const. art. 11, § 6(2) (2006) (emphasis added); *accord Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 901 (stating that nothing in the plain language of California's education clauses creates a "constitutional mandate for the Legislature 'to provide funds for each child in the State at some magic level

to produce . . . an adequate-quality educational program' " (quoting *Serrano v. Priest*, 569 P.2d 1303, 1307 n.6 (Cal. 1977))). Therefore, we conclude that the plain language of Article 11, Section 6 of the Nevada Constitution vests sole discretion to determine the sufficiency of Nevada's education funding in the Legislature.

In sum, reading the education clauses as a whole, so as to give effect to and harmonize each provision, shows that the Nevada Constitution confers broad, discretionary authority to the Legislature to (1) encourage various educational pursuits, (2) provide for a uniform system of common schools, and (3) fund education at a level that it deems to be sufficient.[4]

While some courts have concluded that separation of powers does not preclude judicial review of a legislature's public education funding decisions, courts in states with constitutional provisions similar to Nevada's have found these issues to be nonjusticiable political questions because of the textual commitment granting their legislatures broad, discretionary authority over public education. *See Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 903 (holding that California's education clauses "do not allow the courts to dictate to the [l]egislature, a coequal branch of government, how best to exercise its constitutional powers to encourage education and provide for and support a [statewide] system of common schools"); *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012) (stating that the constitutional "text and history of [Iowa's education] clause indicate a commitment of authority to the general assembly"); *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 792, 794 (R.I. 2014) (stating that "the Rhode Island Constitution imposes an affirmative duty upon the General Assembly to promote public schools" and declining to interfere with the legislative duty of implementing a system of education); *see also State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001) (explaining that where constitutional language is like that of "a sister state, it is presumably adopted with the construction given it by [its] highest court").

We conclude that the plain language of Nevada's education clauses demonstrates a clear, textual commitment of public education to the Legislature by granting the Legislature broad, discretionary authority to determine public education policy in this

[4]Shea asserts that adequate education funding is a concern to all Nevadans. However, she does not argue that the State's funding mechanism violates Article 11, Section 2 of the Nevada Constitution or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Cf. Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1254-55 (Cal. 1971) (holding that the structure of the education funding system in California denied students equal protection). Because Shea did not raise such a challenge in the district court, we do not decide this question on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

state.[5] Thus, even if couched in terms of judicial review, opining as to the adequacy of public education funding and the allocation of resources in this state would require us to venture into issues that entail quintessential value judgments that the Nevada Constitution expressly entrusts to the broad discretion of the Legislature. *See Heller v. Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (concluding that claims regarding the qualifications of Legislators are not justiciable because the Nevada Constitution expressly commits that function to the Legislature); *see also Woonsocket*, 89 A.3d at 793 (declining to "impos[e] our own judgment over that of the Legislature in order to determine whether a particular policy benefits public education"). We decline to do so. Shea's complaint raises issues that are more properly resolved in the Legislature or by initiative petition. Therefore, we conclude that the district court properly determined that the education clauses demonstrate a textual commitment of public education to the Legislature. The allegations of Shea's complaint are inextricably linked to this constitutional textual commitment.[6] Thus, we affirm the dismissal on this basis.

CONCLUSION

The Nevada Constitution textually commits broad, discretionary authority to the Legislature over public education. We conclude that the claims in Shea's complaint do not present justiciable questions appropriate for adjudication. Consequently, judicial review is precluded by the political question doctrine. Accordingly, we affirm the district court's order granting the State's motion to dismiss.

Parraguirre, C.J., and Stiglich, Silver, Pickering, and Herndon, JJ., concur.

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[5]Our dissenting colleague relies on decisions from states whose constitutions lack this plain delegation of authority to the state legislature regarding whether the legislature has met its constitutional duties as to education. *See, e.g.*, *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 140 (Del. Ch. 2018) (quoting the Delaware Constitution's Education Clause, which contains no language giving the Delaware Legislature the authority to determine whether it satisfied its constitutional duties under that clause); *Gannon v. State*, 319 P.3d 1196, 1209 (Kan. 2014) (quoting the Kansas Constitution, which similarly lacks such language); *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018) (same regarding the Minnesota Constitution); *Neely v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 752 (Tex. 2005) (same regarding the Texas Constitution). Thus, while we agree with the dissent that the educational clauses of Nevada's Constitution impose a duty on the Legislature to provide a basic education—as we recognized in this decision and in *Schwartz*, 132 Nev. at 749-50, 382 P.3d at 898—the plain language of Nevada's Constitution belies the dissent's conclusion that the Legislature lacks the sole authority to determine whether it met that duty.

[6]Because we conclude that the Nevada Constitution's education clauses demonstrate a clear textual commitment of public education to the Legislature, we need not address whether judicially discoverable and manageable standards exist or whether judicial involvement would require courts to make public policy decisions.

CADISH, J., dissenting:

> [E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954). Nearly 70 years ago, the United States Supreme Court thus recognized the intrinsic importance of education as a vital function of state government, and the Nevada Constitution has long reflected this truth. *See Guinn v. Legislature of Nev.* (*Guinn II*), 119 Nev. 460, 474-75, 76 P.3d 22, 32 (2003) ("Our State Constitution's framers explicitly and extensively addressed education, believing strongly that each child should have the opportunity to receive a basic education." (footnote omitted)); *Debates & Proceedings of the Nevada State Constitutional Convention of 1864*, at 567 (Andrew J. Marsh Off. Rep., 1866) ("I really think there should be some provision by which the children of the State, growing up to be men and women, should have the privilege secured to them of attending school . . . . We have no right, and we cannot afford to allow children to grow up in ignorance. The public is interested in that matter, and it is one of too great importance to be neglected." (statement of John A. Collins)). In fact, as the State concedes, our Constitution provides Nevadans this right to a basic education. *Guinn v. Legislature of Nev.* (*Guinn I*), 119 Nev. 277, 286, 71 P.3d 1269, 1275 (2003), *overruled on other grounds by Nevadans for Nev. v. Beers*, 122 Nev. 930, 944, 142 P.3d 339, 348 (2006).

Moreover, Nevada citizens do not simply hold this right to a basic education in the abstract; the right imposes "an affirmative mandatory duty upon the legislature" that is "judicially enforceable." *Id.* (quoting *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995)). This court has long recognized that obligation. *See Schwartz v. Lopez*, 132 Nev. 732, 750, 382 P.3d 886, 898 (2016) ("The legislative *duty* to maintain a uniform public school system is not a ceiling but a floor upon which the legislature can build additional opportunities for school children." (emphasis added and internal quotation marks omitted) (quoting *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998))). Because this positive right exists and imposes a judicially enforceable and mandatory affirmative obligation on the Legislature, I cannot agree with the majority's conclusion that the matter before us presents a nonjusticiable political question. Therefore, I must dissent.

Consistent with the axiomatic principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid,'" *N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Cty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012)). Because of this emphatic duty, courts have been loath to dismiss active controversies, *see, e.g.*, *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); however, various courts have recognized a "narrow exception" for political questions, *see, e.g.*, *Zivotofsky*, 566 U.S. at 195 (explaining that federal courts "lack[ ] the authority" to decide political questions); *N. Lake Tahoe Fire Prot. Dist.*, 129 Nev. at 687, 310 P.3d at 587. Under the political-question doctrine, courts will not hear cases "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). As this doctrine "is one of 'political questions,' not one of 'political cases,'" *Baker*, 369 U.S. at 217, the political question must be inextricably linked to the at-issue controversy to warrant dismissal, Majority Op. at 350, because otherwise, "there should be no dismissal for non-justiciability on the ground of a political question's presence," *Baker*, 369 U.S. at 217.

The majority's conclusion that "[t]he plain language of the education clauses does not create an obligation for the Legislature to provide public education at a particular service level or to provide specific educational outcomes," Majority Op. at 351, contradicts our precedent regarding the right to a basic education, the Legislature's duty to fund that right, and this court's duty to "read [the Nevada Constitution] as a whole, so as to give effect to and harmonize each provision," *see Nevadans for Nev.*, 122 Nev. at 944, 142 P.3d at 348. As discussed above, the education clauses create a constitutional right to a basic education,[1] which the Framers placed special importance on. *Guinn I*, 119 Nev. at 286-87, 71 P.3d at 1275-76. However, the majority does not reconcile that right and the accompanying duties it imposes on the Legislature with the Legislature's obligation

[1]At oral argument, the State conceded that the education clauses provide a right to a basic education. While the State attempted to distinguish a "basic" education from a "sufficient" education, it failed to provide cogent arguments to support that distinction. Moreover, the Framers' clear intent was to provide a sufficient education. *See Debates and Proceedings*, *supra*, at 577 (explaining that the framers intended to confer a duty upon the Legislature "to build the educational superstructure, by means of which we can afford every child a *sufficient* amount of instruction to enable it to go creditably through life" (emphasis added)).

to "provide the money the Legislature deems to be sufficient . . . to fund the operation of the public schools in the State." Nev. Const. art. 11, § 6(2). Instead, it simply concludes that the broad discretion regarding education policy and the commitment to fund education at a level the Legislature deems sufficient renders this suit a nonjusticiable political question. But that interpretation does not "give effect to and harmonize each [education] provision." Majority Op. at 353. Rather, the majority's reasoning renders the right to a basic education meaningless, as the Legislature can decline to fund education at any meaningful level with no recourse for the public. *See Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018) ("Deciding that appellants' claims are not justiciable would effectively hold that the judiciary cannot rule on the Legislature's noncompliance with a constitutional mandate, which would leave Education Clause claims without a remedy. Such a result is incompatible with the principle that where there is a right, there is a remedy."). Moreover, the majority's reasoning also ignores our recognition that the Legislature *must* maintain a "floor" in the education system, *Schwartz*, 132 Nev. at 750, 382 P.3d at 898, and renders such duty illusory, as the Legislature can refuse to fund education at a basic threshold level with no remedy for those left without the fundamental education needed to be successful adults, *see Wyphoski v. Sparks Nugget, Inc.*, 112 Nev. 413, 416, 915 P.2d 261, 263 (1996) (Steffen, C.J., dissenting) (explaining "the fundamental principle of our civil justice system that 'where there is a wrong, there is a remedy' "); *Sparrow & Trench v. Strong*, 2 Nev. 362, 368 (1867) ("If we are to err, it is better to err on that side where there is a remedy than where there is none.").

Instead, I would conclude that while this case undoubtedly contains "political" overtones, it is not a "political question." To harmonize the education clauses—as well as our past precedents—I conclude that the education clauses (1) establish a right to a basic education, (2) impose a duty on the Legislature to reach this "floor" of a basic education while providing the Legislature with broad authority to build upon the floor, and (3) establish the Legislature's ability to provide whatever funding it deems to be sufficient to fund public education, but which must at least be adequate to provide a basic education. While we would not presume to dictate what specific amount of money is necessary to provide a basic education—indeed, the State has a multitude of options to address how to provide a basic education beyond simply increasing funding—it is our duty to determine whether the Legislature is complying with its constitutional obligation to provide a basic education. *See Marbury*, 5 U.S. at 177; *see also Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 175-76 (Del. Ch. 2018) (recognizing that the Delaware Constitution granted "broad and expansive authority" to the legislature over education, but holding

that the case was justiciable because "[a] direction to perform a task does not mean that the party performing it judges its own performance," and concluding that "[t]he Education Clause obligates the General Assembly to create and maintain a system of public schools" but "[i]t does not say that the General Assembly has the authority to determine for itself whether its actions meet the constitutional requirement"); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005) (explaining that the Texas Constitution "assign[s] to the Legislature a duty [that] both empowers and obligates" and grants the legislature "the authority to determine the broad range of policy issues involved in providing for public education[,] [b]ut . . . nowhere [does it] suggest[ ] that the Legislature is to be the final authority on whether it has discharged its constitutional obligation"); *Cruz-Guzman*, 916 N.W.2d at 10 (holding that "there is no breach of the separation of powers for the [judiciary] to determine the basic issue of whether the Legislature is meeting the affirmative duty that the Minnesota Constitution places on it").

Accordingly, I would hold that the determination regarding whether the State is satisfying Nevadans' right to a basic education is not a political question, as an overwhelming majority of our sister states have.[2] *See, e.g.*, *Gannon v. State*, 319 P.3d 1196, 1230 (Kan. 2014) (recognizing that "the majority of states" have "conclude[d] that the separation of powers does not preclude the judiciary from determining whether the legislature has met its constitutional obligation to the people to provide for public education"). I therefore dissent.

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[2]As the majority opinion does not address the lack of judicially manageable standards, I note that all the jurisdictions that have found similar cases to be justiciable have noted a plethora of standards that courts may adopt. *See, e.g.*, *Delawareans for Educ. Opportunity*, 199 A.3d at 177 (explaining that the court "should use in the first instance the standards for school adequacy and grade-level proficiency that the political branches have established"); William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 Stan. L. & Pol'y Rev. 301, 307 (2001) (explaining that when using standards developed by the political branches, "concerns about judicial fact-finding, expertise, and legitimacy are ameliorated").

MARLO THOMAS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 77345

May 26, 2022 510 P.3d 754

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied August 4, 2022]

Rene L. Valladares, Federal Public Defender, and *Joanne L. Diamond* and *Jose A. German*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

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

Before the Supreme Court, En Banc.

OPINION

By the Court, Herndon, J.:

Appellant Marlo Thomas was convicted of two murders (among other felony offenses) and sentenced to death for each murder. He obtained relief from the death sentences in the first postconviction proceeding challenging his conviction and sentences, but a jury again imposed death sentences in a penalty phase retrial. This appeal involves Thomas's third postconviction petition for a writ of habeas corpus, a petition that the district court denied without conducting an evidentiary hearing after determining it is subject to multiple procedural bars under NRS Chapter 34. Consistent with our recent decision in *Chappell v. State*, 137 Nev. 780, 501 P.3d 935 (2021), we conclude that Thomas timely asserted the alleged ineffective assistance of second postconviction counsel as good cause and prejudice to raise procedurally barred grounds for relief from the death sentences imposed at the penalty phase retrial. But also consistent with *Chappell*, we conclude that he failed to demonstrate good cause and prejudice to raise any other procedurally barred grounds for relief.

Among Thomas's numerous allegations that second postconviction counsel provided ineffective assistance, we conclude two of his claims warrant an evidentiary hearing: (1) his claim that sec-

ond postconviction counsel failed to present compelling mitigation evidence to support the claim that penalty phase counsel provided ineffective assistance in developing and presenting the mitigation case at the penalty phase retrial; and (2) his claim that second postconviction counsel should have alleged that penalty phase counsel provided ineffective assistance during jury selection by failing to question, challenge for cause, or peremptorily challenge a veniremember who indicated she favored the death penalty, was not open to a sentence that would allow for parole, and could not consider mitigating circumstances. We therefore reverse the district court's order as to those two claims and remand for an evidentiary hearing limited to those claims. Because none of Thomas's remaining arguments warrant relief, we otherwise affirm the district court's order.

FACTS

On April 15, 1996, Thomas and Kenya Hall robbed Thomas's former employer, Lone Star Steakhouse in Las Vegas, Nevada, while armed with pistols. While Hall watched the manager, Thomas found two employees in the men's restroom. They tried to leave and struggled with Thomas. Thomas grabbed a knife from the counter and repeatedly stabbed one victim and chased down the other and stabbed him as well. Both died as a result of their injuries. Thomas and Hall escaped with the money in a car driven by Angela Love (now Angela Thomas).

The jury convicted Thomas of two counts of murder with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, conspiracy to commit murder and/or robbery, and burglary while in possession of a firearm. The jury sentenced Thomas to death for each murder. This court affirmed the convictions and sentences on direct appeal. *Thomas v. State* (*Thomas I*), 114 Nev. 1127, 967 P.2d 1111 (1998).

Thomas successfully challenged the death sentences in a timely postconviction habeas petition and was granted a new penalty phase trial. *Thomas v. State* (*Thomas II*), 120 Nev. 37, 45, 83 P.3d 818, 824 (2004). At the penalty phase retrial, the jury sentenced Thomas to death for each murder. This court affirmed the death sentences on appeal, *Thomas v. State* (*Thomas III*), 122 Nev. 1361, 148 P.3d 727 (2006), and later affirmed the district court's order denying Thomas's second postconviction petition, which had been Thomas's first opportunity to collaterally challenge the death sentences imposed at the penalty phase retrial, *Thomas v. State* (*Thomas IV*), No. 65916, 2016 WL 4079643 (Nev. July 22, 2016) (Order of Affirmance).

Thomas filed the postconviction habeas petition at issue in this appeal—his third such petition—on October 20, 2017. He alleged

that trial, appellate, first postconviction, second penalty phase, and second postconviction counsel provided ineffective assistance. The district court denied the petition as procedurally barred. This appeal followed.

DISCUSSION

Thomas's petition was untimely, given that he filed it roughly 18 years after the remittitur issued in his direct appeal from the original judgment of conviction and 9 years after the remittitur issued in his direct appeal from the judgment of conviction entered after the penalty phase retrial. *See* NRS 34.726(1). The petition included grounds for relief that Thomas waived because he could have raised them on direct appeal or in the previous postconviction petitions. *See* NRS 34.810(1)(b)(2). The petition was also successive to the extent it alleged grounds for relief that had been considered on the merits in a prior proceeding, and it constituted an abuse of the writ to the extent it raised new and different grounds for relief. *See* NRS 34.810(2).

To avoid dismissal based on those procedural bars, Thomas had to demonstrate good cause and prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b), (3). As this court has explained,

> Under Nevada law, a petitioner cannot relitigate his sentence decades after his conviction by continually filing postconviction petitions unless he provides a legal reason that excuses both the delay in filing and the failure to raise the asserted errors earlier, and further shows that the asserted errors worked to his "actual and substantial disadvantage."

Castillo v. State, 135 Nev. 126, 127-28, 442 P.3d 558, 559 (2019) (quoting *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012)). Thomas argues that the district court erred in denying his petition as procedurally barred without conducting an evidentiary hearing. He asserts that ineffective assistance of prior postconviction counsel is sufficient to excuse his untimely and successive petition as to claims related to the guilt phase and the penalty phase retrial.[1] He also argues that *Williams v. State*, 134 Nev. 687, 429 P.3d 301 (2018), provides good cause to revisit the *Batson*[2] claim he previously raised; that the Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), provides good cause to assert a penalty-phase

[1]Thomas also argues that the ineffective assistance of trial and appellate counsel provides good cause to excuse the procedural bars. We disagree because the claims themselves are procedurally barred. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (stating that an ineffective-assistance claim may excuse a procedural default only if that claim is not itself procedurally defaulted).

[2]*Batson v. Kentucky*, 476 U.S. 79 (1986).

instructional error for the first time; and that he is entitled to the cumulative consideration of procedurally barred claims.

Thomas did not timely raise the good-cause claims based on ineffective assistance of first postconviction counsel

Thomas contends that, because he had obtained relief from the death sentences imposed in the original judgment of conviction and first postconviction counsel (David Schieck) continued to represent him through the penalty phase retrial and the subsequent direct appeal in *Thomas III*, the third petition was his first opportunity to assert first postconviction counsel's ineffectiveness as good cause to raise procedurally barred grounds for relief from the convictions. We recently considered similar arguments and circumstances in *Chappell v. State*, 137 Nev. 780, 501 P.3d 935 (2021). There, we concluded that a petitioner must assert good-cause claims based on postconviction counsel's performance as to guilt-phase issues within 1 year after the remittitur issues on appeal from the district court order denying postconviction relief as to the convictions even where that postconviction proceeding resulted in a penalty phase retrial. *Id.* at 785-86, 501 P.3d at 948. Our decision in *Chappell* reiterated and applied several prior decisions explaining that the alleged "[i]neffective assistance of postconviction counsel can constitute good cause for an untimely and successive petition where postconviction counsel was appointed as a matter of right, if the postconviction-counsel claim is not itself untimely and therefore procedurally barred." *Id.* at 783, 501 P.3d at 946 (citing *Rippo v. State*, 134 Nev. 411, 423 P.3d 1084 (2018); *Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 728 (2015); *Huebler*, 128 Nev. at 198 n.3, 275 P.3d at 95 n.3; *State v. Eighth Judicial Dist. Court* (*Riker*), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003)). Thomas thus had to assert first postconviction counsel's ineffectiveness as good cause to raise procedurally barred claims challenging his convictions within 1 year after the remittitur issued in *Thomas II* on March 9, 2004. Because the instant petition was filed well beyond that date, the claims about first postconviction counsel's performance were untimely and could not provide good cause. Accordingly, the district court did not err in denying the petition as to the asserted grounds for relief related to the issue of Thomas's guilt because those grounds are procedurally barred under NRS 34.726(1), NRS 34.810(1)(b)(2), and NRS 34.810(2).

Thomas timely raised good-cause claims based on second postconviction counsel's alleged ineffective assistance

Thomas argues that counsel's ineffectiveness during the second postconviction proceedings provides good cause to raise procedur-

ally barred grounds for relief from the death sentences imposed during the penalty phase retrial.[3] Because the second postconviction petition was Thomas's first opportunity to collaterally challenge the death sentences imposed at the penalty phase retrial, he had the statutory right to appointed counsel to assist him in that effort. *See* NRS 34.820(1)(a) (requiring the district court to appoint postconviction counsel "[i]f a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's . . . sentence"); *Chappell*, 137 Nev. at 786 n.2, 501 P.3d at 948 n.2 ("The appointment of second postconviction counsel . . . was statutorily mandated only because the petition was the first one challenging the validity of the death sentence imposed at the penalty phase retrial."). As a result, he can assert counsel's ineffectiveness in challenging the validity of the death sentences as good cause to raise procedurally barred grounds for relief from those sentences. *See Crump v. Warden*, 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997) (recognizing that ineffective assistance of postconviction counsel may establish good cause and prejudice to file second postconviction petition where first postconviction petition counsel was appointed as a matter of right). Thomas asserted second postconviction counsel's ineffectiveness as good cause to raise procedurally barred grounds for relief from the death sentences within 1 year after the second-postconviction-counsel claims became available (i.e., when remittitur issued in *Thomas IV*). *See Rippo*, 134 Nev. at 419-22, 423 P.3d at 1095-97.[4] Thus, Thomas has "met the first component of the good-cause showing required under NRS 34.726(1)." *Id.* at 422, 423 P.3d at 1097. But he also had to satisfy the second component of the showing required under NRS 34.726(1)(b)—undue prejudice—and the cause-and-prejudice showings required under NRS 34.810(1)(b) and NRS 34.810(3). To do so, Thomas had to prove that his second-postconviction-counsel claims have merit, i.e., that had second postconviction counsel raised the underlying trial- and appellate-counsel claims related to the penalty phase

[3]Thomas also argues that second postconviction counsel's ineffectiveness and the district court's denial of funding for second postconviction counsel's investigation excuse any delay in raising good-cause claims based on first postconviction counsel's ineffectiveness. As we recently explained in *Chappell*, the argument based on second postconviction counsel's ineffectiveness lacks merit, given that Thomas did not have a right to the appointment of second postconviction counsel to litigate guilt-phase claims. *See Chappell*, 137 Nev. at 786 n.2, 501 P.3d at 948 n.2. And because his contention that the district court erred in denying funding could have been addressed in the appeal from the order denying that petition, it cannot provide good cause to excuse the procedural bars with regard to this petition. *See* NRS 34.810(1)(b)(2); *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506.

[4]Thomas has also demonstrated that he could not raise these claims earlier, one of the two showings required to overcome the presumption of prejudice to the State for statutory laches pursuant to NRS 34.800(2).

retrial, he would have shown "that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." *Id.* at 424-25, 423 P.3d at 1098-99.

Only two of Thomas's claims regarding second postconviction counsel's ineffectiveness warrant an evidentiary hearing

To determine whether a postconviction-counsel claim has merit, this court has adopted the two-part test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires the petitioner to demonstrate both deficient performance and prejudice. *Rippo*, 134 Nev. at 424-25, 423 P.3d at 1098-99. So, when a postconviction-counsel claim is based on the omission of a trial- or appellate-counsel claim, "the petitioner must prove the ineffectiveness of both attorneys." *Id.* at 424, 423 P.3d at 1098. Thus, the merits of the procedurally barred grounds for relief are often intertwined with the merits of the postconviction-counsel claim asserted as good cause and prejudice. *Chappell*, 137 Nev. at 788-89, 501 P.3d at 950. Accordingly, we address the merits of the procedurally barred grounds for relief only in that context. *Id.*

Before turning to Thomas's postconviction-counsel claims, we must address the adequacy of Thomas's pleading below. In his petition, Thomas detailed how *penalty phase counsel* provided ineffective assistance, but he did not describe how *second postconviction counsel* should have litigated the second petition beyond a bare assertion that postconviction counsel's ineffectiveness provides good cause to raise some penalty-phase claims for the first time and to re-raise others because they were inadequately litigated. As we recently reiterated in *Chappell*, this kind of sparse pleading does not satisfy the provisions of NRS Chapter 34 that "require[ ] a petitioner to identify the applicable procedural bars for *each* claim presented and the good cause that excuses those procedural bars" or "[t]he specificity required to plead an ineffective-assistance claim as good cause" as reflected in the *Strickland* standard. 137 Nev. at 788, 501 P.3d at 949-50; *see also Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001) (explaining that petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just "in a *pro forma*, perfunctory way" or with a "conclusory, catchall" statement that counsel provided ineffective assistance), *overruled on other grounds by Lisle*, 131 Nev. at 366 n.5, 351 P.3d at 732 n.5. We address Thomas's claims to the extent that he met his pleading burden.

The pleading requirements also inform the district court's decision whether to conduct an evidentiary hearing. We have "long recognized a petitioner's right to a postconviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him

to relief." *Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154 (2015) (quoting *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002)).

Failure to present certain mitigation evidence

Thomas argues that second postconviction counsel did not adequately challenge penalty phase counsel's effectiveness with respect to the mitigation case presented at the penalty phase retrial. Thomas argues that second postconviction counsel also should have attacked penalty phase counsel's failure to present evidence painting a more comprehensive picture of Thomas's childhood and his cognitive deficits. We conclude that the district court erred in denying this claim without conducting an evidentiary hearing.

Thomas supported his claim with exhibits that contrasted the evidence proffered with the first postconviction petition challenging the original death sentences, the evidence presented at the penalty phase retrial, and the evidence he now alleges that penalty phase counsel and second postconviction counsel should have discovered and proffered. *See Chappell*, 137 Nev. at 788, 501 P.3d at 950 (requiring petitioner to support ineffective-assistance-of-postconviction-counsel claim with explanation of "how postconviction counsel's performance was objectively unreasonable and how postconviction counsel's acts or omissions prejudiced the petitioner in the prior postconviction proceeding"). The breadth and depth of the mitigation evidence proffered with the instant petition stands in stark contrast to the mitigation case presented at the penalty phase retrial and mitigation evidence offered in support of the penalty-phase-counsel claim asserted in the second postconviction petition. The jury in the original penalty hearing found *no* mitigating circumstances based on a defense mitigation case that relied primarily on an evaluation by Dr. Kinsora and testimony from Thomas's mother, Georgia. In particular, Dr. Kinsora opined that Thomas was an emotionally disturbed child with learning difficulties and antisocial personality traits likely stemming from neurological dysfunction due to fetal alcohol exposure and his upbringing. And Georgia testified that she strictly disciplined Thomas, she may have paid less attention to him after the birth of her youngest son, and Thomas's father abused him. Counsel called additional family members to testify at the penalty phase retrial about Thomas's upbringing and conversion to Christianity and presented a psychological assessment that suggested Thomas suffers from cognitive impairments associated with Fetal Alcohol Spectrum Disorder (FASD), but the mitigation case still focused largely on Georgia's testimony. This time, one or more jurors found three mitigating circumstances relevant to Thomas's upbringing and cognitive functions—that he suffered learning and emotional disabilities, he found religion,

and he had been denied by his father. When second postconviction counsel alleged that counsel provided ineffective assistance with respect to the mitigation case presented at the penalty phase retrial, the supporting allegations focused predominantly on evidence of Thomas's neurological deficits due to FASD to explain his propensity toward impulsivity and dysregulation of aggressive behavior, which carried a significant risk of opening the door to unfavorable rebuttal evidence had the evidence been presented at the penalty phase retrial. *Thomas IV*, 2016 WL 4079643, at *2.

In contrast, the factual allegations supporting the second-postconviction-counsel claim in the current petition present a far more compelling mitigation case. For example, the instant petition includes specific factual allegations (supported by affidavits from several generations of Thomas's immediate and extended family) that Georgia beat Thomas as severely and as often as his father did, unlike Georgia's testimony at the penalty phase retrial. The new allegations do not depict her as merely inattentive or unduly strict, but instead as callously neglectful of her responsibilities toward Thomas's care and well-being and capable of excessive abuse. They describe Thomas as neglected and detail how his struggles for attention were met with violence. Additionally, the pleadings allege that Thomas suffered head trauma, exhibited cognitive delays as a child, and had not learned proper socialization. These circumstances resulted in Thomas believing there was something wrong with him and being emotionally numb. Expert psychological reports submitted with the third petition opine that Thomas suffers from Alcohol Related Neurodevelopmental Disorder (ARND),[5] learning disabilities, poor cognitive function, and the inability to control his anger and handle stress. The psychological evidence submitted with the current petition considers the environmental factors that contributed to Thomas's conditions and describes the effect that abuse, neglect, and lack of psychological intervention had on his ability to control his reactions. This evidence goes far beyond the report included with the second postconviction petition, which did not illuminate how childhood abuse and neglect and Thomas's psychological conditions impacted his development and behavior. The evidence proffered with the current petition arguably also explains Thomas's continued misconduct in prison, which was potent other matter evidence introduced by the State at the penalty phase retrial.

Thomas's allegations were sufficient to warrant an evidentiary hearing on whether penalty phase counsel and second postconviction counsel performed deficiently. Because the breadth of potential mitigating evidence is virtually limitless, merely developing more

[5]ARND is one of several disorders caused by fetal alcohol exposure. *Fetal Alcohol Spectrum Disorders (FASDs)*, Centers for Disease Control and Prevention, http://cdc.gov/ncbddd/fasd/facts.html.

evidence than what was presented in prior proceedings is generally insufficient to show that prior counsel were deficient. *In re Reno*, 283 P.3d 1181, 1211 (Cal. 2012). But the petition before us alleges more than that. It asserts that penalty phase counsel presented a mitigation case at the penalty phase retrial that was comparable to the case presented at the first penalty hearing, whereas reasonably effective counsel, who was aware that the original mitigation presentation was unsuccessful, would be expected to seize upon the opportunity to develop more compelling mitigation evidence. And where penalty phase counsel fails to exploit that chance, reasonably effective postconviction counsel should have presented it to challenge penalty phase counsel's effectiveness. Thomas has shown that more compelling mitigation evidence was discoverable, much of it through the reasonably prudent practice of interviewing members of Thomas's immediate and extended family, reviewing school records, and employing psychological experts who can provide a thorough assessment based on testing, interviews, and the evidence discovered during counsel's investigation.

We further conclude that Thomas alleged sufficient facts not belied by the record to suggest he was prejudiced by counsel's performance. A more comprehensive approach, as presented in Thomas's pleadings, could have provided context for Thomas's behavior. The psychological evidence suggests that Thomas suffered from several neurocognitive disorders from his birth and that the effects of these disorders were exacerbated by his lack of structure and a support system to deal with them. Lastly, a more complete depiction of Thomas's youth and home life stood a much greater chance of softening Thomas in the eyes of the jurors and possibly position him for mercy.

Based on the allegations in the petition, we conclude that the district court erred in denying this claim without conducting an evidentiary hearing. On remand, the district court should focus on whether objectively reasonable second postconviction and penalty phase counsel should have discovered the aforementioned evidence, whether the evidence is credible, and whether the introduction of the evidence would have had a reasonable probability of altering the outcome of the proceedings.

Failure to challenge veniremembers based on unwillingness to consider mitigation or all available sentences

Thomas asserts that second postconviction counsel should have claimed that reasonably effective penalty phase counsel would have challenged Jurors Cunningham, McIntosh, and Jones because they indicated they would not consider mitigating evidence; Jurors Adona, Cunningham, and Jones because they were unlikely to consider his background as a mitigating circumstance; Jurors

Cunningham and Adona because they would not consider a sentence with parole; and Juror Shaverdian because she had expressed bias in favor of the victims' families.

For the most part, Thomas's allegations would not entitle him to relief because they are insufficient to demonstrate that penalty phase counsel acted unreasonably during jury selection for the penalty phase retrial. Decisions regarding the questioning of potential jurors generally involve trial strategy. *See, e.g.*, *Stanford v. Parker*, 266 F.3d 442, 453-55 (6th Cir. 2001) (observing that defendant has right to life-qualify jury upon request but not doing so may be reasonable trial strategy); *Brown v. Jones*, 255 F.3d 1273, 1279 (11th Cir. 2001) (remarking that it was reasonable trial strategy for counsel to focus jurors' attention on the death penalty as little as possible and therefore not life-qualify jurors); *Camargo v. State*, 55 S.W.3d 255, 260 (Ark. 2001) ("[T]he decision to seat or exclude a particular juror may be a matter of trial strategy or technique."). A court's review of counsel's strategic decisions is "highly deferential," taking into account the "countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689; *see also Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." (internal quotation marks omitted)).

Applying that deferential standard here, we conclude that penalty phase counsel could have reasonably concluded that McIntosh, Jones, Adona, and Shaverdian were favorable to the defense for other reasons. *See Knox v. Johnson*, 224 F.3d 470, 479 (5th Cir. 2000) (recognizing that potential jurors may hold differing views on different aspects of criminal prosecutions and that counsel is not necessarily ineffective for failing to peremptorily challenge a juror with pro-prosecution views in one aspect if that juror has pro-defense views in another). For instance, McIntosh was open to considering how Thomas behaved while incarcerated, and Jones considered Thomas's state of mind at the time of the crime to be a more powerful mitigating circumstance than Thomas's childhood. Both of these views were consistent with the defense's mitigation case and belie Thomas's broad argument that these jurors would not consider mitigating evidence. Adona acknowledged that he could consider mitigating evidence and would not automatically vote for the death penalty. And Shaverdian was generally more ambivalent about the death penalty than most of the other veniremembers and was more likely to consider Thomas's background and upbringing as mitigating circumstances. Given that these jurors had appeal to the defense apart from their noted drawbacks, it is not clear that penalty phase counsel acted unreasonably in not challenging them.

However, we conclude that Thomas's allegations are sufficient to warrant an evidentiary hearing with respect to whether second post-

conviction counsel should have challenged penalty phase counsel's performance during voir dire with respect to Juror Cunningham. Some of the views this juror expressed in her questionnaire suggested that she would be unable to discharge her duties fairly and impartially by applying the law to the facts of the case. *See Lamb v. State*, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) ("The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (internal quotation marks omitted)). In particular, in her questionnaire, she indicated that she was generally in favor of the death penalty, was not open to considering a sentence that had the possibility of parole, and could not consider mitigating circumstances. The State conducted a very limited voir dire of Juror Cunningham that did not explore or seek further comment on these issues and the defense did not conduct voir dire of Juror Cunningham at all. Based on these circumstances, objectively reasonable counsel may have needed to inquire further, ask the trial court to remove this juror for cause, or use a peremptory challenge to remove her. And as Cunningham sat on the jury, Thomas may have been prejudiced by penalty phase counsel's omissions in this respect. *See Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (recognizing that a defendant is entitled to a new sentencing proceeding if he was sentenced to death by a jury that included a biased juror); *cf. Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (stating that "[i]f the impaneled jury is impartial, the defendant cannot prove prejudice" resulting from district court's limitation of voir dire). Because these facts supporting a penalty-phase-counsel claim appear from the record, it is possible that second postconviction counsel knew or should have known of them and unreasonably failed to assert a claim based on them. It also is possible that second postconviction counsel made a reasonable decision to omit the claim based on information not in the record or an evaluation of the relative strength of other claims. *See Reno*, 283 P.3d at 1210-11. Accordingly, Thomas alleged sufficient good cause based on second postconviction counsel's omission of this penalty-phase-counsel claim and prejudice in that the claim was potentially meritorious. The district court therefore erred in denying this claim as procedurally barred without conducting an evidentiary hearing.

Failure to litigate claim regarding jury misconduct

Thomas argues that second postconviction counsel should have investigated and alleged that penalty phase counsel provided ineffective assistance by failing to assert that jurors engaged in misconduct. According to Thomas, the jurors improperly discussed Thomas's release from incarceration, closed their minds to possible sentences before deliberation, and learned of his prior death

sentences before deliberation. We conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Thomas has not demonstrated that second postconviction counsel unreasonably omitted a meritorious claim. The juror misconduct alleged by Thomas generally falls into the category of intrinsic juror misconduct—"conduct by jurors contrary to their instructions or oaths."[6] *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) (recognizing that intrinsic juror misconduct involves, among other things, jurors not following admonitions or instructions, basing their decision on evidence other than that admitted at trial, or discussing sentencing or the defendant's failure to testify). Intrinsic juror misconduct will justify a new trial "only in extreme circumstances" because it "can rarely be proven without resort to inadmissible juror affidavits that delve into the jury's deliberative process." *Id.* at 565, 80 P.3d at 456. Thus, any juror statements about disregarding instructions, closing their minds to sentencing options, and discussing the death sentences imposed in the first penalty phase trial would have been inadmissible. *See* NRS 50.065(2)(a) (prohibiting a court from considering testimony or an affidavit of a juror about "the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith"); *Meyer*, 119 Nev. at 562, 80 P.3d at 454 ("[I]ntra-jury or intrinsic influences involve improper discussions among jurors . . . that are generally not admissible to impeach a verdict."). It thus would have been extremely difficult for second postconviction counsel (or penalty phase counsel) to prove through admissible evidence the nature of the juror misconduct and a reasonable probability that it affected the verdict. *See Meyer*, 119 Nev. at 565, 80 P.3d at 456. The record also belies some of the jurors' recollections offered many years later. For example, as even Thomas agrees, neither the trial court's instructions nor counsel's arguments informed the jurors that Thomas had been sentenced to death in a prior proceeding. Based on the record, we conclude that Thomas's allegations are not sufficient to establish that second postconviction counsel's omission of this claim was objectively unreasonable. Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.

[6]Juror Cunningham's alleged statements during deliberations, in which she relayed statements from her family member about child abusers receiving parole after 6 years, may constitute extrinsic misconduct, *see Meyer*, 119 Nev. at 562, 80 P.3d at 454, but her statement that Thomas could be paroled if sentenced to life without parole was her own inference and thus was not extrinsic misconduct, *see Valdez v. State*, 124 Nev. 1172, 1186-87, 196 P.3d 465, 475 (2008) (concluding that a juror closing his or her mind to sentencing options constituted intrinsic misconduct).

Failure to allege that the State did not comply with SCR 250

Thomas argues that the State did not comply with SCR 250's notice requirements and failed to file a new notice of its intent to seek the death penalty before the penalty phase retrial. He argues that penalty phase trial and appellate counsel should have raised the issue and second postconviction counsel should have litigated their failure to do so. We disagree because the underlying legal argument lacks merit.

The State filed a timely notice of intent to seek the death penalty in 1996. *See* SCR 250(II)(A)(1)-(3) (1993) (providing that if the State had not decided whether to seek the death penalty at the time of arraignment, the State had to file a notice of intent not less than 15 days before the date set for trial). This court's decision in *Thomas II* granting a penalty phase retrial did not affect the previously filed notice of intent, which was timely even under the version of SCR 250 in effect when the penalty phase retrial commenced, *see* SCR 250(4)(c) (2000) (requiring that the notice of intent be filed no later than 30 days after the filing of the information or indictment). And nothing in SCR 250 required a new notice before the penalty phase retrial. Thomas therefore did not allege sufficient facts to show that second postconviction counsel acted unreasonably in omitting these trial- and appellate-counsel claims or that he was prejudiced by postconviction counsel's omission. Thus, the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Failure to raise a fair-cross-section challenge

Thomas argues that second postconviction counsel should have asserted that penalty phase trial and appellate counsel should have objected to the venire on the ground that it was not composed of a fair cross section of the community. We conclude that Thomas did not allege sufficient facts to show that he would be entitled to relief.

To establish a prima facie violation of the fair-cross-section requirement, a defendant must demonstrate that (1) the group he alleges was "excluded is a distinctive group in the community;" (2) the group's representation "in jury venires is not fair and reasonable in relation to the number of such persons in the community;" and (3) the underrepresentation is due to "systematic exclusion of the group in the jury-selection process." *Rippo v. State*, 122 Nev. 1086, 1097, 146 P.3d 279, 286 (2006) (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Although Thomas has identified a distinctive group, he has not alleged sufficient facts to show either underrepresentation or systematic exclusion. Because Thomas has not established a prima facie violation of the fair-cross-section requirement, he also did not demonstrate that second postconviction counsel unreasonably omitted the trial- or appellate-counsel claim.

Accordingly, the district court did not err in denying these claims as procedurally barred without conducting an evidentiary hearing.

Failure to move to exclude evidence of prior convictions

Thomas argues that second postconviction counsel should have claimed that penalty phase counsel provided ineffective assistance by failing to move to exclude evidence of his prior convictions on the grounds that one of the convictions was a juvenile conviction and the other was tainted by an erroneous identification.[7] We conclude that Thomas has not demonstrated that the omitted claim was one that any reasonably competent postconviction counsel would have raised, given that the evidentiary issues underlying the claim lack merit.

First, this court held in *Johnson v. State* that juvenile convictions are admissible during a capital penalty hearing. 122 Nev. 1344, 1353, 148 P.3d 767, 774 (2006). Given that *Johnson* was decided more than a year before Thomas filed his second postconviction petition, it was not objectively unreasonable for second postconviction counsel to omit a trial- or appellate-counsel claim based on their failure to argue against admission of Thomas's juvenile record. *See Reno*, 283 P.3d at 1211-12 (explaining that habeas counsel was not required to raise claims that had been previously rejected in other cases in order to provide effective assistance); *cf. Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Second, the evidentiary challenges to the other conviction, obtained in 1990, are unavailing. The 1990 conviction was "no longer open to direct or collateral attack in its own right." *See Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394, 402 (2001) (holding that petitioner seeking relief under 28 U.S.C. § 2254 may not collaterally challenge a prior state conviction used to enhance a sentence for the conviction under attack). Thomas also has not alleged that the 1990 conviction was constitutionally infirm on its face, *Dressler v. State*, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991), or that it was obtained without the assistance of counsel or a valid waiver of the right to counsel, *Hamlet v. State*, 85 Nev. 385, 387, 455 P.2d 915, 916 (1969). And because the State presented the prior judgment of conviction, he cannot show that the evidence was impalpable or highly suspect. *See Nunnery v. State*, 127 Nev. 749, 769, 263 P.3d 235, 249 (2011) (noting that evidence may be excluded from penalty hearing

[7]Thomas also argues that the district court erred in denying his claim that the trial court should have excluded evidence about his juvenile convictions at the penalty phase retrial. The district court did not err, given that Thomas did not allege good cause for not raising this claim on appeal from the judgment entered after the penalty phase retrial. *See* NRS 34.810(1)(b)(2).

if impalpable or highly suspect). For these reasons, it was not objectively unreasonable for second postconviction counsel to omit an ineffective-counsel claim based on penalty phase trial and appellate counsel's failure to challenge the 1990 conviction. Therefore, the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Failure to argue that excessive courtroom security during the penalty phase retrial prejudiced the defense

Thomas argues that second postconviction counsel should have claimed that penalty phase trial and appellate counsel provided ineffective assistance by failing to challenge excessive security during the penalty phase retrial. He asserts that he was visibly shackled, his mitigation witnesses appeared in shackles and prison clothing, and an overwhelming number of uniformed officers were in the courtroom.[8]

Thomas did not allege sufficient facts to demonstrate deficient performance by second postconviction counsel with respect to the omission of ineffective-assistance claims based on Thomas being shackled. Penalty phase counsel objected to the use of visible physical restraints on Thomas during the penalty phase retrial. The trial court recognized that a penalty phase retrial in a death penalty case came with a greater risk of flight and ensured that any restraints used with Thomas were not visible to the jurors. Based on this record, it was not objectively unreasonable for second postconviction counsel to omit a trial- or appellate-counsel claim based on the use of leg restraints on Thomas during the penalty phase retrial, despite the trial court's failure to hold a hearing. *See Nelson v. State*, 123 Nev. 534, 545, 170 P.3d 517, 525 (2007) (concluding that failure to hold hearing before requiring leg restraints was harmless where there was no record that any juror saw restraints and defendant was not made to walk in front of the jury in restraints).

Thomas also did not allege sufficient facts to demonstrate deficient performance by second postconviction counsel with respect to the omission of a trial- or appellate-counsel claim related to the restraints and prison clothing worn by some of the mitigation witnesses who testified at the penalty phase retrial. The controlling law at the time of the penalty phase retrial did not support a challenge by trial or appellate counsel, given that this court did not recognize a "constitutional right accorded to a defendant to have his prison

[8]Thomas also argues that the trial court erred in permitting the security measures employed during the penalty phase retrial. The district court did not err in denying this claim, given that Thomas did not allege good cause for not raising this issue on appeal from the judgment entered after the penalty phase retrial. *See* NRS 34.810(1)(b)(2).

witness[es] appear in civilian clothes."[9] *White v. State*, 105 Nev. 121, 123, 771 P.2d 152, 153 (1989). Although this court later concluded that "compelling an incarcerated witness to appear at trial in the garb of a prisoner may taint the fact-finding process," *Hightower v. State*, 123 Nev. 55, 59, 154 P.3d 639, 642 (2007), that decision came after Thomas's penalty phase retrial. Second postconviction counsel could not have demonstrated that trial and appellate counsel were ineffective for not "anticipat[ing] a change in the law." *Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008). Thomas also did not demonstrate prejudice from the witnesses' restraints and prison garb, given that each witness's testimony acknowledged that the witness was incarcerated with Thomas.

Lastly, it was not objectively unreasonable for second postconviction counsel to omit a trial- or appellate-counsel claim based on the number of officers in the courtroom given the totality of the circumstances surrounding the penalty phase retrial. In particular, Thomas had been convicted of two murders and sentenced to death before, faced potential death sentences, and was calling multiple prisoners as witnesses, one of whom was designated as high-risk. *See Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986) (recognizing that deployment of additional, conspicuous security personnel was not as inherently prejudicial as shackling a defendant). Therefore, the district court did not err in denying these claims without conducting an evidentiary hearing.

Waiver of selection phase opening statement

Thomas argues that penalty phase counsel should not have agreed to forgo opening statements before the second part of the bifurcated penalty phase retrial because it left the jury without proper guidance as to how it should consider the evidence that would be presented. To overcome the procedural bars to raising this claim for the first time in an untimely and successive petition, Thomas alleges that second postconviction counsel provided ineffective assistance by omitting it. We disagree.

Thomas did not allege sufficient facts to demonstrate deficient performance or prejudice based on second postconviction counsel's omission of this penalty-phase-counsel claim. First, reasonably competent postconviction counsel could decide to omit this claim because penalty phase counsel's strategy was reasonable, given that the trial court instructed the jury on how to properly consider the evidence introduced at the penalty phase retrial and counsel addressed the evidence in closing argument. Second, Thomas cannot demon-

[9]Although the Ninth Circuit Court of Appeals recognized such a right in 1985, *Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985), that decision was not controlling in state court, *see Rahn v. Warden, Nev. State Prison*, 88 Nev. 429, 431, 498 P.2d 1344, 1345-46 (1972).

strate prejudice because the jury's decision between life and death was not close based on the evidence introduced at the penalty phase retrial and therefore there was not a reasonable probability of a different outcome but for penalty phase counsel's decision not to give an opening statement. The aggravating circumstances found are compelling. They show that Thomas, who had previously engaged in violent crimes, callously stabbed to death two former coworkers during the course of a robbery. And other evidence showed that the murders were not out of character—Thomas's criminal conduct escalated to include more violent conduct and eventually culminated in these murders, and he continued to engage in violent and disruptive behavior while incarcerated. While mitigation evidence was presented, it mostly mirrored the evidence presented at the first penalty hearing that a jury found unpersuasive or included evidence that was significantly undermined by evidence of Thomas's violent behavior while incarcerated. Accordingly, the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Failure to challenge limitation of a defense mitigation theory

Thomas argues that second postconviction counsel should have claimed that penalty phase counsel provided ineffective assistance when they did not challenge a trial court decision limiting their ability to argue mitigation based on evidence that Thomas's girlfriend drove him and Hall to and from the Lone Star Steakhouse but had not been charged with any crime. We conclude that this claim lacks merit at both levels (postconviction counsel and penalty phase counsel).

Thomas cannot demonstrate deficient performance at either level because the legal premise supporting the asserted mitigation theory is tenuous at best. *See Nika*, 124 Nev. at 1289, 198 P.3d at 851 (recognizing that counsel is not ineffective for failing to anticipate changes in controlling precedent). In particular, this court has not held that evidence of a codefendant's sentence, let alone whether another potential participant was charged with a crime, constitutes mitigation evidence and therefore must be admitted. Rather, this court has held only that the district court has the discretion to admit such evidence as "any other matter which the court deems relevant . . ." under NRS 175.552. *Harte v. State*, 132 Nev. 410, 412-13, 373 P.3d 98, 100-01 (2016); *Flanagan v. State*, 107 Nev. 243, 247-48, 810 P.2d 759, 762 (1991). Thomas further has not demonstrated prejudice. Regardless of what Thomas now alleges about his girlfriend's involvement in planning and carrying out the robbery, her involvement was not similar to Thomas's. Thomas and Hall entered the business and conducted the robbery. Thomas directed Hall during the robbery, and Thomas ultimately stabbed the two vic-

tims to death. Considering those circumstances and the evidence in aggravation, we conclude there was no reasonable probability of a different outcome at the penalty phase retrial if the defense had been allowed to point to his girlfriend's involvement and her disparate treatment by investigators and prosecutors as a mitigating circumstance. Therefore, the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Failure to challenge instances of prosecutorial misconduct

Thomas argues that second postconviction counsel should have alleged that penalty phase and appellate counsel provided ineffective assistance by neglecting to challenge several instances of prosecutorial misconduct during the penalty phase retrial. These claims lack merit for the reasons discussed below, and therefore, the district court did not err in denying them without conducting an evidentiary hearing.

First, Thomas argues that penalty phase counsel should have objected to an inflammatory presentation, in which the victims' high school prom photographs were digitally morphed into photographs of their bodies.[10] The presentation was objectionable as an improper attempt to inflame passion and prejudice in the jury. *See Flanagan v. State*, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988) ("At the sentencing phase, it is most important that the jury not be influenced by passion, prejudice, or any other arbitrary factor."); *cf. Watters v. State*, 129 Nev. 886, 890, 313 P.3d 243, 247 (2013) ("[A] PowerPoint may not be used to make an argument visually that would be improper if made orally."). But that does not necessarily mean that counsel had to object to provide effective assistance. Indeed, reasonably competent counsel could have believed that an objection would draw more attention to the presentation. And even if objectively reasonable penalty phase counsel would have objected, that does not mean the ineffective-assistance claim is one that any reasonably competent postconviction counsel would have brought. *See Reno*, 283 P.3d at 1210 (stating that "the mere omission of a claim developed by new counsel does not raise a presumption that prior habeas corpus counsel was incompetent" (internal quotation omitted)). In particular, the penalty-phase-counsel claim likely would have failed on the prejudice prong because, as discussed above, the jury's decision between life and death was not close given the evidence presented. Thus, there was not a reasonable probability of a different outcome at the penalty phase retrial had counsel objected to the photographic presentation.

[10]To the extent Thomas also argues that the district court erred in denying his standalone claim of prosecutorial misconduct, we disagree because Thomas did not allege good cause for not raising the claim on appeal from the judgment entered after the penalty phase retrial. *See* NRS 34.810(1)(b)(2).

Second, Thomas argues that second postconviction counsel should have alleged that penalty phase counsel provided ineffective assistance by not objecting to the State's cross-examination of Georgia on the ground that the State violated the bifurcation order and prematurely elicited unfavorable character evidence. Thomas did not allege sufficient facts to demonstrate deficient performance by second postconviction counsel. Reasonably competent postconviction counsel could decide to omit this penalty-phase-counsel claim because this court concluded on direct appeal that the State's cross-examination was not objectionable. *See Thomas III*, 122 Nev. at 1368-69, 148 P.3d at 733*; see also Rippo v. State*, 134 Nev. 411, 436, 423 P.3d 1084, 1107 (2018) (concluding that postconviction counsel's failure to raise claims that had been rejected on direct appeal did not fall below an objective standard of reasonableness given that the law-of-the-case doctrine barred further litigation of those claims); *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (recognizing that counsel need not make futile objections to not be held ineffective).

Third, Thomas argues that second postconviction counsel should have alleged that penalty phase counsel provided ineffective assistance by failing to object to a comment by the prosecutor on the ground that it incorrectly defined mitigating circumstances. We disagree. It was not objectively unreasonable for second postconviction counsel to omit this ineffective-assistance claim where penalty phase and appellate counsel raised the issue, and therefore, the record belies any allegation of ineffective assistance on their part. *See Reno*, 283 P.3d at 1210 (indicating that allegations of ineffective assistance by prior counsel in omitting claims were belied by the record where those claims were actually raised on appeal or in a prior habeas petition).

Fourth, Thomas argues that second postconviction counsel should have alleged that penalty phase counsel provided ineffective assistance by not objecting to an argument that compared the victims' rights with those of the defendant and asked the jury to consider the victims' last thoughts. The comments suggesting that the victims were not afforded the same rights or process as Thomas were improper appeals to the passions and prejudices of the jury. *See Berry v. State*, 882 So. 2d 157, 164 (Miss. 2004) (concluding that comparison of victim's rights to defendant's rights was egregious and "possibly rose to the level of prosecutorial misconduct"). But even assuming that penalty phase counsel should have objected, there was no reasonable probability of a different outcome given the circumstances of the murders, the compelling aggravating circumstances found for each murder, and Thomas's weak mitigation case. And Thomas cannot demonstrate deficient performance by second postconviction counsel in omitting a claim based on the comments about the victims' thoughts. Those comments were not improper

because they asked the jurors to consider the victims' final moments without asking them to place themselves in the victims' positions. *See Williams v. State*, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) (noting that a prosecutor is not forbidden from inviting the jury to consider the victim's final moments), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000); *see also Epps v. State*, 901 F.2d 1481, 1483 (8th Cir. 1990) (concluding that counsel was not ineffective for failing to object to prosecutorial statements that were not, in fact, improper).

Fifth, Thomas argues that second postconviction counsel should have alleged that penalty phase counsel provided ineffective assistance by not challenging the prosecutor's statements characterizing his allocution as "lip service" and asserting that criminals are selfish and do not feel remorse. Thomas cannot demonstrate deficient performance by second postconviction counsel or prejudice. Although the prosecutor's comments were objectionable because they "ridicule[d] or belittle[d] the defendant or the case," *Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995); *see Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008) (noting that a prosecutor's disparagement of defense counsel or the legitimate tactics of defense counsel is improper conduct), that does not necessarily mean that penalty phase counsel had to object to provide reasonably competent assistance. Given its brevity, the prosecutor's comment arguably did not "so infect[ ] the proceedings with unfairness as to make the results a denial of due process," *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002), and an objection may have only served to emphasize the prosecutor's point. Objectively reasonable counsel therefore could have decided not to object. Additionally, there is no reasonable probability of a different outcome given the circumstances of the murders, the compelling aggravating circumstances found for each murder, and the mitigation case presented at the penalty phase retrial. For these reasons, it was not objectively unreasonable for second postconviction counsel to omit this ineffective-assistance claim. *See Reno*, 283 P.3d at 1210 ("Habeas corpus counsel, like appellate counsel, 'performs *properly* and *competently* when he or she exercises discretion and presents *only* the strongest claims instead of every conceivable claim.'" (quoting *In re Robbins*, 959 P.2d 311, 338 (Cal. 1998))). In sum, the district court did not err in denying these claims as procedurally barred without conducting an evidentiary hearing.

Failure to raise trial-error claims on appeal from the judgment entered after the penalty phase retrial

Thomas asserts that second postconviction counsel should have claimed that appellate counsel provided ineffective assistance by failing to raise trial errors that occurred during the penalty phase retrial. We decline to address this claim because Thomas's appel-

late brief does not present relevant authority or cogent argument beyond generally listing the alleged trial-error claims omitted by appellate counsel. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Failure to allege judicial bias

Thomas argues that second postconviction counsel should have claimed that this court did not conduct a fair and adequate review in *Thomas III* because Justice Nancy Becker participated in the decision while negotiating for employment with the Clark County District Attorney's office.

Thomas did not demonstrate deficient performance by second postconviction counsel. Whether Justice Becker was actively negotiating with the district attorney's office when this court decided *Thomas III* is purely speculative. Regardless, appellate counsel raised the issue in a motion, and this court concluded that even if Thomas had presented an arguable basis for questioning Justice Becker's participation in the court's decision, the result would have been the same because all of the justices agreed that the death sentences should be affirmed. *Thomas v. State*, Docket No. 46509 (Order Denying Motion, June 29, 2007). Given this court's prior decision on this allegation of judicial bias, it was not objectively unreasonable for second postconviction counsel to omit this issue.[11] Therefore, the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Cumulative error as good cause

Throughout his appellate brief, Thomas argues that the district court should have considered several errors and claims raised and rejected in *Thomas I* and *Thomas III* so that their effect is weighed cumulatively with other claims for which he can avoid the procedural bars. Because these claims were rejected previously on the merits, they cannot logically be used to support a cumulative-error claim. *See Rippo*, 134 Nev. at 436, 423 P.3d at 1107; *see also Reno*, 283 P.3d at 1223-24 (rejecting "cumulative error" as good cause where prior claims were rejected on the merits). Therefore, he has not demonstrated good cause to overcome the procedural bars to those claims.

[11]This court's handling of the bias allegation in *Thomas III* is consistent with the United States Supreme Court's decision almost 10 years later in *Williams v. Pennsylvania*, 579 U.S. 1 (2016). There, the Court indicated that the opportunity for "an appellate panel to reconsider [an appellate issue] without the participation of the interested member . . . permit[s] judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations" and remedies participation by a panel member who should have been disqualified. *Id*. at 16. Although this court declined to rehear *Thomas III*, it did so after concluding, without Justice Becker's participation, that the result would have been the same.

Hurst v. Florida *as good cause to raise an instructional error at the penalty phase retrial*

Relying on *Hurst v. Florida*, 577 U.S. 92 (2016), Thomas argues that the trial court erred in not instructing the jury during the penalty phase retrial that it had to determine that the mitigating circumstances do not outweigh the aggravating circumstances beyond a reasonable doubt before it imposed a sentence of death. He further argues that *Hurst* provides good cause for not raising this instructional error on appeal or in the second postconviction petition. We disagree. This court has rejected the interpretation of *Hurst* advocated by Thomas. *See, e.g.*, *Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019); *Jeremias v. State*, 134 Nev. 46, 58, 412 P.3d 43, 54 (2018). Therefore, *Hurst* does not provide good cause. And to the extent that Thomas argues that second postconviction counsel provided ineffective assistance by omitting this and related instructional-error claims, we again disagree because the legal premise underlying those claims lacks merit—the weighing of aggravating and mitigating circumstances is not subject to the beyond-a-reasonable-doubt standard. *See, e.g.*, *Nunnery v. State*, 127 Nev. 749, 770-76, 263 P.3d 235, 250-53 (2011); *McConnell v. State*, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009); *accord Kansas v. Carr*, 577 U.S. 108, 119 (2016) ("[O]f course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it."). Therefore, the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

Actual innocence

Thomas argues that even if he has not demonstrated cause and prejudice, he can overcome the procedural bars because he is actually innocent of the death penalty. *See Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (explaining that a fundamental miscarriage of justice based on actual innocence requires "a colorable showing [that the petitioner] is actually innocent of the crime or is ineligible for the death penalty"), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12. Specifically, he argues that two of the aggravating circumstances were invalid and he is ineligible for the death penalty based on his age and borderline intellectual functioning.[12]

[12]Thomas also argues that he is actually innocent of the death penalty because no reasonable juror would have sentenced him to death in light of new mitigation evidence presented with the third postconviction petition. We have held, however, that a gateway claim that a petitioner is actually innocent

Thomas's actual-innocence claim based on the aggravating circumstances lacks merit. Even if this court were to agree with Thomas's arguments about the validity of two of the aggravating circumstances, that still leaves two valid aggravating circumstances with respect to each murder. Accordingly, that claim fails. *See Moore v. State*, 134 Nev. 262, 268-69, 417 P.3d 356, 362-63 (2018) (concluding that existence of valid aggravating circumstance rendered defendant "still eligible for death such that he is not actually innocent of the death penalty"); *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537.

Thomas also has not demonstrated that he is ineligible for the death penalty based on his youth and borderline intellectual functioning. Offenders who were under 18 when they committed their crimes and those who are intellectually disabled are categorically exempt from the death penalty under the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Thomas concedes that he was over the age of 18 when he committed the crimes and that he is not intellectually disabled. He nonetheless argues that those categorical exclusions should be extended to defendants who were under the age of 25 at the time of the crime and those who suffer from borderline intellectual functioning that puts their "functional age" under 18. We recently declined a similar invitation in *Chappell v. State*, 137 Nev. 780, 803, 501 P.3d 935, 960 (2021), and we again decline the invitation here.[13]

Statutory laches

In addition to the procedural bars discussed above, Thomas's petition was also subject to dismissal under NRS 34.800. That statute states that a petition may be dismissed if the delay in filing the petition prejudices the State in either responding to the petition or retrying the petitioner. NRS 34.800(1). Although we have indicated that application of the procedural bar in NRS 34.800 is mandatory, *see State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), the statute clearly uses permissive language, *see* NRS 34.800(1) ("[a] petition *may* be dismissed" (emphasis added)); *see also* Hearing on A.B. 517 Before the Assembly Comm. on Judiciary, 63d Leg. Ex. D (Nev., May 7, 1985) ("[T]he language of the subdivision, 'a petition may be dismissed,'

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of the death penalty must focus on the elements of the capital offense and the aggravating circumstances and cannot be based on new mitigation evidence. *See Lisle v. State*, 131 Nev. 356, 363-68, 351 P.3d 725, 730-34 (2015).

[13]In *State v. Tucker*, the Louisiana Supreme Court recognized that immaturity and below average intellectual functioning are mitigating circumstances but rejected a categorical prohibition against the death penalty under the Eighth Amendment based on those characteristics. 181 So. 3d 590, 628 (La. 2015).

is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation." (internal parenthetical omitted) (quoting 28 U.S.C. foll. § 2254, Rule 9 (1982) (effective January 14, 1983))).

Where the State specifically pleads laches, a rebuttable presumption of prejudice arises when the delay is more than 5 years from a decision on direct appeal. NRS 34.800(2). To overcome the presumption of prejudice to the State in responding to the petition, the petitioner must show that "the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). And to overcome the prejudice to the State in retrying the petitioner, the petitioner must demonstrate that "a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b); *see also Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001).

Here, the State specifically pleaded laches, and the district court found that laches barred Thomas's petition. As Thomas's claims of ineffective assistance of second postconviction counsel were not available before resolution of the postconviction petition challenging the death sentences imposed at the penalty phase retrial, it is arguable that Thomas, exercising reasonable diligence, could not have raised them sooner. *See Rippo*, 134 Nev. at 419-20, 423 P.3d at 1095 ("The basis for the [ineffective-assistance-of-postconviction-counsel] claim thus depends on the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred."). While the district court largely did not abuse its discretion in applying laches to Thomas's petition, we have concluded that the district court erred in denying two claims of ineffective assistance of postconviction counsel without conducting an evidentiary hearing. If the district court, after conducting an evidentiary hearing on the two claims for which we are remanding this matter, concludes that Thomas exercised reasonable diligence in pursuing those claims, Thomas will have rebutted the presumption of prejudice under NRS 34.800(1)(a), and we believe the district court could exercise its discretion and decline to dismiss those claims under NRS 34.800. *See State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006) (noting that whether to dismiss a petition under NRS 34.800 is discretionary).

CONCLUSION

While we conclude the district court properly denied most of the claims in Thomas's postconviction petition as procedurally barred, we conclude the district court erred when it denied two of the claims

without conducting an evidentiary hearing. Specifically, we conclude that the district court should have conducted an evidentiary hearing on Thomas's good-cause and prejudice arguments based on second postconviction counsel's failure to litigate a penalty-phase-counsel claim with respect to one of the veniremembers who was seated on the jury and second postconviction counsel's failure to adequately investigate and support a penalty-phase-counsel claim based on the mitigation case presented at the penalty phase retrial. No other claims of error have merit. Accordingly, we affirm the district court's order in part, reverse it in part, and remand for proceedings consistent with this opinion.

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

MAX VARGAS, Individually, Appellant, *v.*
J MORALES INC., Respondent.

No. 82218

June 2, 2022 510 P.3d 777

Appeal from a district court order setting aside a default judgment pursuant to NRCP 60(b)(1) and (6). Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Reversed and remanded.

Peralta Law Group and *Oscar Peralta*, Las Vegas, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Ogonna M. Brown* and *Adrienne R. Brantley-Lomeli*, Las Vegas, for Respondent.

Before the Supreme Court, Hardesty, Stiglich, and Herndon, JJ.

OPINION

By the Court, Herndon, J.:

NRCP 60(b) provides various grounds for relief from a final judgment, including mistake or excusable neglect, *see* NRCP 60(b)(1), newly discovered evidence, *see* NRCP 60(b)(2), fraud, *see* NRCP 60(b)(3), or "any other reason that justifies relief," *see* NRCP 60(b)(6). Any such relief must be sought within a "reasonable time" and, more specifically, when the relief is sought under NRCP 60(b)(1), (2), or (3), within 6 months after service of written notice of the judgment's entry. *See* NRCP 60(c)(1). Furthermore, NRAP 3A(b)(8) provides for appeals from "[a] special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment."

The instant appeal was taken from a district court order that granted a motion for relief from a default judgment under NRCP 60(b)(1) and (6), although the motion was filed over 14 months after service of written notice of entry of the default judgment.

In resolving this appeal, we address two separate issues. First, we clarify that, per NRAP 3A(b)(8), this court has appellate jurisdiction over orders granting NRCP 60(b)(1) relief when the motion is filed more than 60 days after entry of judgment. Second, we clarify that the "any other reason that justifies relief" provision under NRCP 60(b)(6) is mutually exclusive of the relief provided in NRCP 60(b)(1)-(5) and may not be used to circumvent the 6-month time constraints imposed under that rule. Applying these principles,

we conclude that we have jurisdiction over this appeal but that the underlying NRCP 60(b)(1) motion was untimely because it was filed more than 6 months after written notice of the default judgment's entry was served. Furthermore, because the requested relief was based on allegations constituting only mistake or excusable neglect, which fall under NRCP 60(b)(1), relief under NRCP 60(b)(6) was not available. Thus, the district court abused its discretion in granting NRCP 60(b) relief. Accordingly, we reverse the district court's order and remand this matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Appellant Max Vargas filed a complaint alleging that he was attacked by security guards on a premises owned by respondent J Morales Inc. (JMI) and that JMI was negligent in its duty to maintain the premises in a reasonably safe condition. JMI was served with the complaint through its registered agent on February 16, 2018. It is undisputed that Jose Morales, the owner and sole corporate officer for JMI, received the complaint but did not follow up on it. Instead, he allegedly relied on the advice of his insurance agent, who told him he was not liable in the matter because he did not own the subject property at the time of the incident. On April 13, 2018, default was entered against JMI, and JMI was properly served with a copy of the notice of entry of default on April 17, 2018. Subsequently, a default judgment of over $1.7 million in compensatory and punitive damages was entered against JMI on July 25, 2019, and JMI was served with notice of entry of the default judgment on August 6, 2019. JMI, however, claims that it learned about the judgment in September 2020, when its bank account was garnished.

On October 26, 2020, over 14 months after entry of the default judgment, JMI filed a motion to set aside the judgment and stay execution on the grounds of mistake or excusable neglect under NRCP 60(b)(1) and "any other reason justifying relief" under NRCP 60(b)(6). The district court granted JMI's motion, finding sufficient grounds for relief under both NRCP 60(b)(1) and (6).

DISCUSSION

This court has jurisdiction over this appeal

As a preliminary matter, JMI asserts that this court lacks appellate jurisdiction over this matter, pointing to *Estate of Adams v. Fallini*, 132 Nev. 814, 816, 386 P.3d 621, 623 (2016), which determined that an order granting relief from fraud upon the court under NRCP 60(b)(3) was not appealable. We take this opportunity to clarify that we have appellate jurisdiction over orders granting an NRCP 60(b)(1) motion that was filed more than 60 days after entry of a default judgment.

This court has jurisdiction to consider an appeal only when authorized by statute or court rule. *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). NRAP 3A(b)(8) provides for appeals from "[a] special order entered after final judgment, *excluding* an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment." (Emphasis added.) To be appealable, a special order entered after final judgment "must be an order affecting the rights of some party to the action, growing out of the judgment previously entered . . . affecting rights incorporated in the judgment." *Gumm v. Mainor*, 118 Nev. 912, 914, 59 P.3d 1220, 1221 (2002).

In 1978, NRAP 3A(b)[1] was amended to exclude orders granting NRCP 60(b)(1) motions made within 60 days after entry of a default judgment from the ambit of appealable special orders. Before then, this court regularly accepted appeals from orders setting aside judgments, implicitly treating such orders as special orders entered after a final judgment. *See, e.g.*, *Helitzer Advert., Inc. v. Seven Star Media Corp.*, 89 Nev. 411, 412, 514 P.2d 214, 214 (1973) (appeal from order setting aside); *Johnston, Inc. v. Weinstein*, 88 Nev. 7, 9, 492 P.2d 616, 617 (1972) (same); *Blakeney v. Fremont Hotel, Inc.*, 77 Nev. 191, 193, 360 P.2d 1039, 1040 (1961) ("[A]ppeal is from the order setting aside the entry of default and the judgment."); *Cicerchia v. Cicerchia*, 77 Nev. 158, 159, 360 P.2d 839, 840 (1961) (same).

In 2004, we confirmed in *Lindblom v. Prime Hospital Corp.*, that "[a]n order setting aside a default judgment is appealable as a special order after judgment if the motion to set aside is made more than sixty days after entry of the judgment." 120 Nev. 372, 374 n.1, 90 P.3d 1283, 1284 n.1 (2004). Subsequently, in *Fallini*, we concluded that an order granting NRCP 60(b)(3) relief for *fraud upon the court* was interlocutory and not appealable, having merged with the final judgment. 132 Nev. 814, 816, 386 P.3d 621, 623 (2016) (emphasis added). More recently, in *Meisel v. Archstone Investment Partners, LP*, we cited NRAP 3A(b)(8) and *Lindblom* in concluding that this court had jurisdiction over an appeal from a district court order granting NRCP 60(b)(1) relief through a motion filed more than 6 months after the entry of judgment. *See* No. 68122, 2017 WL 4618618, at *1 n.1 (Nev. Oct. 13, 2017) (Order of Reversal and Remand).

While JMI contends that *Fallini* abrogated *Lindblom*, JMI overlooks the fact that *Fallini* dealt only with the narrow instance where the NRCP 60(b) motion was granted for fraud upon the court pursuant to NRCP 60(b)(3). That is not the issue presented here and was not the issue raised in *Lindblom* or *Meisel*. The sole issue here is this court's jurisdiction over NRCP 60(b)(1) orders. And we see

[1]Special orders after final judgment were formerly addressed under NRAP 3A(b)(2). The rule was renumbered as NRAP 3A(b)(8). *See Yonker Constr., Inc. v. Hulme*, 126 Nev. 590, 592, 248 P.3d 313, 314 (2010) (noting that NRAP 3A(b)(8) was formerly NRAP 3A(b)(2)).

no reason to depart from our previous decisions—*Lindblom* and *Meisel*—that specifically acknowledged our appellate jurisdiction over orders granting NRCP 60(b)(1) motions filed more than 60 days after the entry of judgment.

We now explicitly hold that all orders granting NRCP 60(b)(1) motions filed more than 60 days after entry of the judgment are appealable as special orders in accordance with *Lindblom*, *Meisel*, and the plain language of NRAP 3A(b)(8).[2] *See also Gumm*, 118 Nev. at 914, 59 P.3d at 1221. A contrary holding would render the 60-day exception in NRAP 3A(b)(8) meaningless. Moreover, Nevada has a long-standing history of treating orders granting NRCP 60(b)(1) motions as special orders after final judgment, *see generally Banks v. Heater*, 95 Nev. 610, 600 P.2d 245 (1979) (impliedly determining the court's jurisdiction by reviewing the district court's NRCP 60(b)(1) order); *Ogle v. Miller*, 87 Nev. 573, 491 P.2d 40 (1971) (same), and this court in *Fallini* seemingly did not intend to overturn this long-standing practice.

Here, the district court's order granted a motion to set aside the default judgment filed and served over 60 days after entry of the default judgment, thus falling outside the exclusion in NRAP 3A(b)(8). Thus, this court is authorized to consider Vargas's challenge to the order, and we must now turn to the merits of Vargas's appeal.

The district court abused its discretion in granting NRCP 60(b) relief

The district court has wide discretion to grant or deny a motion to set aside a judgment under NRCP 60(b), and its determination will not be disturbed on appeal absent an abuse of that discretion. *See Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). A district court may abuse its discretion in ruling on an NRCP 60(b)(1) motion if it disregards legal principles. *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 469, 469 P.3d 176, 179 (2020).

JMI's NRCP 60(b)(1) motion was untimely

Generally, an aggrieved party must seek relief under NRCP 60(b) "within a reasonable time." NRCP 60(c)(1). However, a motion seeking relief under NRCP 60(b)(1) *must be filed within 6 months*

[2]We do not address our jurisdiction over orders granting relief under NRCP 60(b)(2)-(5) at this time, as that issue is not currently before the court. The court's jurisdiction over NRCP 60(b)(6) orders is also not at issue because, as discussed *post*, the underlying motion only supported a request for relief pursuant to NRCP 60(b)(1).

Likewise, we need not address our jurisdiction over orders granting NRCP 60(b) relief where the order has merged into the final judgment. *See Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) (noting that "a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment"); *see also Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (noting that this court may review an interlocutory order in the context of an appeal from a final judgment).

of service of written notice of entry of the judgment. NRCP 60(c)(1); *see also Doan v. Wilkerson*, 130 Nev. 449, 454, 327 P.3d 498, 501 (2014) (providing that any NRCP 60(b)(1) motion filed outside of 6 months is untimely and must be denied), *superseded by statute on other grounds as recognized in Kilgore v. Kilgore*, 135 Nev. 357, 449 P.3d 843 (2019).

Here, JMI filed its motion to set aside the default judgment on October 27, 2020. This was more than 14 months after the notice of the entry of default judgment was served on August 6, 2019. Thus, because JMI filed its motion beyond the 6-month time limit, the district court abused its discretion in granting NRCP 60(b)(1) relief.

NRCP 60(b)(6) relief was unavailable

NRCP 60(b)(6) was added as part of the 2019 amendments to Rule 60 and permits a judgment to be set aside for "any other reason that justifies relief." The purpose of these amendments was to "generally conform [NRCP] 60 to FRCP 60, including incorporating FRCP 60(b)(6) as [NRCP] 60(b)(6)." NRCP 60 advisory committee note to 2019 amendment. Because we have not yet had an opportunity to consider NRCP 60(b)(6), which is identical to its federal analog, we look to federal cases for guidance. *See McClendon v. Collins*, 132 Nev. 327, 330, 372 P.3d 492, 494 (2016) (noting that the "[f]ederal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts" (internal quotations omitted)); *see also Byrd v. Byrd*, 137 Nev. 587, 591-92, 501 P.3d 458, 462-63 (Ct. App. 2021) (finding NRCP 60(b)(6) relief was unavailable where relief sounded in NRCP 60(b)(1) or NRCP 60(b)(3)).

The United States Supreme Court has stated that FRCP 60(b)(6) relief is available only under "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). FRCP 60(b)(6) was enacted to go *beyond* the grounds for relief previously provided where justice so requires. *See* 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2864 (3d ed. 2012). Implicitly, this means a party cannot utilize FRCP 60(b)(6) for the relief provided by FRCP 60(b)(1)-(5). *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) (explaining that FRCP 60(b)(6) and the other subsections of FRCP 60(b) provide mutually exclusive grounds for relief); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988) ("clause (6) and clauses (1) through (5) are mutually exclusive"); *United States v. Fernandez*, 797 F.3d 315, 319 (5th Cir. 2015) ("[I]f a motion was of a type that must be brought within a year, and that year passed without filing, the movant cannot resort to Rule 60(b)(6); rather, it finds . . . itself without Rule 60(b) remedy altogether."); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088 (9th Cir.

2001) (time bar could not be avoided to pursue remedy under Rule 60(b)(6) where relief under other provisions of Rule 60(b) was available, but not timely sought). As these authorities are sound, we see no reason to depart from the federal interpretation of FRCP 60(b)(6). Thus, we hold that relief may not be sought under NRCP 60(b)(6) when it would have been available under NRCP 60(b)(1)-(5). *See Byrd*, 137 Nev. at 592, 501 P.3d at 462-63.

In this case, the relief JMI requested would have fallen under NRCP 60(b)(1) had it been timely sought.[3] The district court recognized two bases for NRCP 60(b) relief: (1) Morales allegedly relied on the advice of his insurance agent, who told him that he would not face liability related to this matter because he did not own the subject property at the time of the underlying incident, and (2) Morales lacks knowledge of the procedural rules and has a significant language barrier. These bases for NRCP 60(b) relief would be available under NRCP 60(b)(1) as mistake or excusable neglect. Thus, the district court abused its discretion when it granted relief for "any other reason" under NRCP 60(b)(6), as JMI's grounds for seeking relief were available to it under NRCP 60(b)(1) but JMI failed to timely file an NRCP 60(b)(1) motion.[4]

CONCLUSION

First, we clarify that NRAP 3A(b)(8) provides this court with appellate jurisdiction over orders granting NRCP 60(b)(1) relief when the motion is filed more than 60 days after the judgment. Second, we adopt the federal approach and conclude that NRCP 60(b)(6)'s "any other reason justifying relief" provision is mutually exclusive with the provisions outlined in NRCP 60(b)(1)-(5). Importantly, NRCP 60(b)(6) may not be used as a subterfuge to circumvent the time limits that apply to a request for relief based on NRCP 60(b)(1). Accordingly, we conclude that the district court abused its discretion when granting JMI relief, and we reverse the district court's order and remand this matter for proceedings consistent with this opinion.

Hardesty and Stiglich, JJ., concur.

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[3]NRCP 60(b)(1) provides that a district "court may relieve a party or its legal representative from a final judgment, order, or proceeding" based on a finding of "mistake, inadvertence, surprise, or excusable neglect."

[4]To the extent Vargas challenges the timeliness of JMI's NRCP 60(b)(6) motion, we need not reach this issue because the motion was not properly seeking relief under NRCP 60(b)(6).

RONNEKA ANN GUIDRY, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 80156

June 2, 2022 510 P.3d 782

Appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder, robbery, grand larceny, and leaving the scene of an accident that resulted in bodily injury. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Rehearing denied July 1, 2022]

[En banc reconsideration denied July 27, 2022]

Darin F. Imlay, Public Defender, and *Sharon G. Dickinson*, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, and *Michael J. Scarborough*, Deputy District Attorney, Clark County, for Respondent.

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

OPINION

By the Court, Pickering, J.:

Appellant Ronneka Guidry challenges her convictions for second-degree murder, robbery, grand larceny, and leaving the scene of an accident that resulted in bodily injury. She argues that the district court's instruction on murder was inaccurate and caused prejudice because the court instructed on an irrelevant legal principle—second-degree felony murder—in an incomplete way. We agree, especially because the instruction had the effect of relieving the jury of its burden to find beyond a reasonable doubt that Guidry acted with implied malice aforethought. Guidry's challenges to her remaining convictions fail. We therefore reverse Guidry's murder conviction, affirm her remaining convictions, vacate the sentences on those convictions, and remand.

I.

While Eduardo Osorio was on vacation in Las Vegas, he met Ronneka Guidry, a stranger to him, inside Caesars Palace at two in the morning. Osorio was wearing an $8,000 Rolex watch that his father had given him for his 18th birthday. According to Guidry,

Osorio asked her for a ride, and she agreed. The two walked to Guidry's car, occasionally touching each other, then drove to an open-air self-parking lot attached to the Westin Las Vegas Hotel & Spa. Seven minutes later, Osorio left the car, and Guidry drove into the parking garage structure in the Westin, exiting the property and returning to the public street.

Eyewitness Timothy Landale was at the nearby intersection of East Flamingo Road and Koval Lane when he saw someone, later identified as Osorio, run past him into the street and jump in front of a moving car. The car stopped, and Osorio got on the hood of the car, screaming, and began punching the windshield. Osorio's screaming, which may have been in a language other than English, was incomprehensible to Landale. Landale said that Osorio "just kept punching the windshield"—"[h]e was trying to break the windshield it looked like"—and "when it looked like [Osorio] was going to the [driver's] side to try to punch the other window," the driver accelerated and drove forward. Osorio hung on to the car for a few seconds, then either let go or fell, hitting his head. He died of multiple blunt force injuries, and the forensic pathologist determined his manner of death to have been an accident.

Osorio's Rolex, however, was missing. Using security footage from Caesars and the Westin, Las Vegas Metropolitan Police identified Guidry's car as the vehicle involved in Osorio's death, arrested her on an outstanding, unrelated traffic warrant, and brought her in for questioning. Under questioning, Guidry stated that Osorio "attacked" her car and "[j]ust imagine if I wasn't in the car." She said that the way Osorio was banging on her window scared her, made plain that she believed she would be harmed, and said, "I'm a female, I can't beat this man up." She also repeatedly denied ever taking property belonging to Osorio, including his watch. The footage shows that under two minutes had passed between the time Osorio left Guidry's car and the time Landale saw him jump on the hood of her car.

The police executed search warrants at Guidry's house and on her iPhone. On Guidry's iPhone, police found a photo of her badly fractured windshield, as well as photos of Osorio's Rolex. Detective Kenneth Salisbury testified that, looking at the type of fracturing of Guidry's windshield and the lacerations on Osorio's hand, he believed that Osorio's punching had caused the fracturing, although he could not rule out the possibility that Osorio had fallen into the windshield as the car accelerated. There were also text messages showing that Guidry had negotiated the sale of the Rolex for $4,500 and had shipped the watch to a buyer in Florida.

The State charged Guidry with first-degree murder with use of a deadly weapon, robbery with use of a deadly weapon, grand larceny, and leaving the scene of an accident that resulted in bodily injury (leaving the scene). At trial, the State presented evidence

that Guidry's car was traveling at around 23 miles per hour when Osorio fell from its hood, then reached a speed of around 59 miles per hour by the time it left the surveillance footage. The jury convicted Guidry of second-degree murder, robbery, grand larceny, and leaving the scene, acquitting her of first-degree murder on a felony-murder theory. Guidry appealed.

II.

It is appropriate to reverse Guidry's conviction for second-degree murder because the district court's murder instruction was plainly inaccurate and caused prejudice. Specifically, Guidry argues that the murder instruction set out a theory of murder that was both irrelevant to her case and inaccurate. We review whether a particular instruction gives the jury a correct statement of law de novo. *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). Because Guidry did not object to the phrasing of the instructions in question, plain-error review applies. To secure reversal based on plain error Guidry must show that (1) "there was 'error,'" (2) it "was 'plain' or clear," and (3) it "affected [her] substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). The "'plainness' of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*." *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003). When assessing whether an error affected the defendant's substantial rights, we look to whether it had a "prejudicial impact on the verdict," contributed to a miscarriage of justice, or otherwise "seriously affects the integrity or public reputation of the judicial proceedings." *Gaxiola v. State*, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (quoting *Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002)); *Green*, 119 Nev. at 545, 80 P.3d at 95.

Murder is the "unlawful killing of a human being" with express or implied malice aforethought. NRS 200.010(1); *see* 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.1(a) (3d ed. 2017) (summarizing the modern categories of murder). To find a defendant guilty of killing with express malice, the jury must find that the defendant intended to kill. NRS 200.020. Or, for implied malice under a "depraved heart" theory of second-degree murder, the defendant must have acted with extreme recklessness regarding the risk to and conscious disregard for human life. *Collman v. State*, 116 Nev. 687, 715-18 & n.13, 7 P.3d 426, 444-45 & n.13 (2000) (citing *People v. Mattison*, 481 P.2d 193, 196-97 (Cal. 1971)); *see also id.* at 712-13, 7 P.3d at 442; Model Penal Code § 210.2(1)(b) (providing that criminal homicide is murder when committed "recklessly under circumstances manifesting extreme indifference to the value of human life"); *see also Labastida v. State*, 115 Nev. 298, 307-08, 986 P.2d 443, 449 (1999) (suggesting that a defendant's lack of subjective awareness that her child was in serious or mortal danger showed that she did not act with malice). Absent either of these per-

mutations of malice, a jury could convict of second-degree *felony* murder, but only if it finds that the defendant committed an inherently dangerous predicate felony and that there was an immediate and direct causal relationship between the defendant's acts and the victim's death. *Ramirez v. State*, 126 Nev. 203, 207, 235 P.3d 619, 622 (2010) (explaining the elements "critical to any second-degree felony-murder instruction").

In this case, the instructions on murder described the concept of malice but also allowed the jury to convict without finding that Guidry acted with malice. Specifically, instruction 11 provides the following:

> All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the second degree includes:
>
> 1. A killing with malice aforethought, but not committed in the perpetration or attempted perpetration of a robbery.
>
> 2. An unintentional killing occurring in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent. However, if the felony is Robbery, the crime is First Degree Murder.

The instruction begins by stating that murder "includes" two individually numbered subsections, indicating to the jury that it may choose between the options, the second being an "unintentional killing occurring in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent." This language regarding an "unintentional killing" derives from NRS 200.070(1), the involuntary manslaughter statute, but it is not a complete statement of the elements of any type of murder explained above.

The State first argues that subsection two does not matter because it relates only to second-degree felony murder, which the State concedes it did not, and could not, have pursued given the facts. But this is unavailing—along with the duty to correctly instruct the jury on relevant general principles of law, the trial court "has the correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." *Gonzalez v. State*, 131 Nev. 991, 997-98, 366 P.3d 680, 684 (2015) (quoting *People v. Alexander*, 235 P.3d 873, 935 (Cal. 2010)). Here, instruction 11 had both unwanted effects. The court instructed on an irrelevant legal principle—second-degree felony murder—in an incomplete way, which relieved the jury from making findings relevant to the theory of murder actually at issue. And even if second-degree felony murder were in play, instruction 11(2) did not inform the jury of the critical "restrictions" that we have placed on the doctrine. *Rose v. State*, 127 Nev. 494, 500, 255

P.3d 291, 295 (2011). Namely, the instruction did not require the jury to find an appropriate predicate felony; it did not explain that the predicate felony must be inherently dangerous; and it did not instruct the jury that it must find an immediate and direct causal relationship between Guidry's acts and Osorio's death. *See id.* at 501, 255 P.3d at 296 (citing *Ramirez*, 126 Nev. at 207, 235 P.3d at 622).[1] Last, the language regarding an unintentional killing did not require the jury to find that Guidry acted with malice aforethought, as required under the depraved heart theory of murder. *See United States v. Perez*, 43 F.3d 1131, 1139 (7th Cir. 1994) (explaining that the "difference between omitting a discussion of an element of the offense" and failing to instruct a jury clearly on an element "ought not be outcome determinative" and that "the effect rather than the character of an instructional error is what is important").

The State argues that, given the other instructions on malice, there was no error. For example, instruction 5 states that murder is the "unlawful killing of a human being with malice aforethought, either express or implied." But even "[t]aken as a whole, the jury instructions do not cure the ambiguity," *Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997), because the jury could have understood instruction 5 to be the general rule and instruction 11 the exception or the specific application of that rule. This is especially so given that the jury was instructed on inferring malice in the context of first-degree felony murder. *See Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005) (observing that jurors should not be "expected to be legal experts" or to make "legal inferences").

Accordingly, there was error and the error was plain, but Guidry did not object. So, she must show that the error affected her "substantial rights." NRS 178.602. The evidence that Guidry acted with malice was not overwhelming, especially as to whether she acted with "extreme recklessness regarding the risk to human life," as opposed to the risk of injury. *Collman*, 116 Nev. at 717, 7 P.3d at 445; *see People v. Knoller*, 158 P.3d 731, 741 (Cal. 2007) (holding that implied malice is not established by proving that a defendant acted with "conscious disregard of the risk of serious bodily injury"). And with these instructions, it is impossible for us to conclude whether the jury in fact found that Guidry acted with malice.

Applying instruction 11, subsection 2, the jury could have, for example, concluded that Guidry was guilty of second-degree murder because she committed an unlawful act that was dangerous in the abstract and Osorio died in the process—without finding that Guidry's specific conduct was sufficiently dangerous and Guidry was conscious of its risk to life. *Cf. Collman*, 116 Nev. at 717-18 &

[1]The State has not argued that Guidry committed any felony that would serve as an appropriate predicate for second-degree felony murder, nor does the charging document clarify the matter.

n.13, 7 P.3d at 444-45 & n.13. Alternatively, the jury could have concluded that Guidry was guilty of second-degree murder because she committed an unlawful act (any unlawful act, even failing to exercise due care to avoid a collision with a pedestrian, *see* NRS 484B.280(1)(a)) with a felonious intent (meaning, to a jury, possibly just a wrongful intent), and Osorio died in the process—again, without making the requisite finding of malice. The fact that this instruction relieved the jury from its obligation to find a necessary element of the crime signals a serious problem, especially when the jury might have entertained a doubt as to that element. *See Perez*, 43 F.3d at 1139 (explaining that while failure to instruct clearly on the elements of an offense is not always plain error, "the gravity of such an error makes reversal the usual outcome in such circumstances").

The concern is not theoretical or academic. During deliberations, the jury asked, "If we find defendant guilty of robbery, can involuntary manslaughter be the accompanying verdict? Or, does by definition, it turn into first degree murder?" This indicates that some on the jury may have considered convicting Guidry of involuntary manslaughter, not murder, for lack of evidence of her malice. In response, the court referred the jury to six instructions for guidance, including instruction 11. Even though a jury could have ultimately concluded that Guidry did act with implied malice, the error identified here fundamentally undermines our confidence in the murder conviction. We therefore hold that the error in instruction affected Guidry's substantial rights by causing actual prejudice, and we reverse her conviction for second-degree murder. *See Green*, 119 Nev. at 545, 80 P.3d at 95.

III.

Guidry makes numerous arguments challenging her convictions for robbery, grand larceny, and leaving the scene. However, the evidence at trial supporting these convictions was strong, and many of the errors she asserts are not preserved and therefore subject to the demanding plain-error standard.

A.

Guidry's sufficiency-of-the-evidence challenges fail. Given the deferential standard that applies, the evidence was sufficient to support the convictions for grand larceny, robbery, and leaving the scene. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Although Guidry's defense at trial was that Osorio gave her the watch, considering the watch's economic and sentimental value to Osorio, Osorio's behavior after leaving Guidry's car, and Guidry's false statement to police that she never touched the watch, a rational trier of fact could have found otherwise beyond a reasonable doubt. *See Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766

(2001) ("Intent [to permanently deprive] . . . can be inferred from conduct and circumstantial evidence.").

As for robbery, when a person takes personal property from another and uses force or fear to retain possession of that property, such use of force may elevate the taking to a robbery. *See* NRS 200.380(1). Specifically, a "taking constitutes a robbery where the use of force follows the taking, *and* where the forcible conduct is part of a continuous transaction." *Abeyta v. State*, 113 Nev. 1070, 1078, 944 P.2d 849, 854 (1997) (emphasis added); *see* 77 C.J.S. *Robbery* § 16 & n.13 (2021 update) (discussing the "continuous sequence of events" theory of robbery); 2 Jens David Ohlin, *Wharton's Criminal Law* § 31:10 (16th ed. 2021) (explaining that the statutory extension of common-law robbery to include use of force during asportation "is not necessarily inconsistent with the common-law theory of robbery" because "the thief has not 'taken' possession of the property until the defendant's use of force or threatened force has effectively cut off any immediate resistance to the defendant's 'possession' "). Under the unique facts here, a rational jury could have found beyond a reasonable doubt that when Guidry accelerated with Osorio on her car, that was part of a continuous transaction that began with her physically taking his watch while he was inside the car.[2] *See, e.g.*, *Barkley v. State*, 114 Nev. 635, 636-37, 958 P.2d 1218, 1218-19 (1998); *Young v. State*, 725 N.E.2d 78, 80-81 (Ind. 2000). In addition, contrary to Guidry's assertion, a vehicle crashing into something is not an element of leaving the scene. *See Clancy v. State*, 129 Nev. 840, 849, 313 P.3d 226, 232 (2013) (concluding that "actual physical contact between two vehicles is not required for a person to be involved in an accident under NRS 484E.010").[3]

Similarly, Guidry's dual convictions for robbery and grand larceny do not violate the Double Jeopardy Clause. *See Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) ("The *Blockburger* test 'inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.' ") (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)). An element of robbery, but not of grand larceny, is the use of force or coercion. *See* NRS 200.380(1); NRS 205.220. And an element of grand larceny, but not of robbery, is the specific intent to permanently deprive another of property. *See* NRS 205.220; *Burnside v. State*, 131 Nev. 371, 394-95, 352 P.3d 627, 643-44 (2015) (indicat-

[2]Guidry appears to concede this in her reply brief, disavowing that she ever said that "the robbery was completed when [Osorio] jumped on her car." And while we agree with Guidry that instruction 10 could have been worded more precisely—to reflect our holding in *Abeyta*, 113 Nev. at 1078, 944 P.2d at 854—the unobjected-to error does not warrant reversal.

[3]The evidence was also sufficient to support second-degree murder. *See McNair*, 108 Nev. at 56, 825 P.2d at 573. However, we reverse that conviction due to the instructional error identified *supra*.

ing robbery is a general intent crime); *Harvey v. State*, 78 Nev. 417, 419, 375 P.2d 225, 226 (1962) (indicating larceny is a specific intent crime). The Legislature can, of course, provide greater protection than the Double Jeopardy Clause affords. *See, e.g.*, Cal. Penal Code § 654(a) (West 2022 update) (providing that "in no case shall [an] act or omission be punished under more than one provision"). But there is no such legislative protection here.

B.

Guidry's instructional error arguments also fail. As to Guidry's robbery conviction, she vaguely argues on appeal that unpreserved errors in the self-defense instructions mean her robbery conviction must be reversed for plain error, but she cites no decisional authority reversing a robbery conviction for analogous reasons. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Moreover, the question whether a robbery can be committed in self-defense appears nuanced. *See People v. DeGreat*, 428 P.3d 541, 545 (Colo. 2018) ("[O]ther courts have opined that under certain circumstances, robbery may indeed be committed in self-defense."); *Commonwealth v. Rogers*, 945 N.E.2d 295, 306-07 (Mass. 2011) (declining to resolve the question whether an armed robber forfeits the right of self-defense in case where the defendant used a weapon only during the attempted escape).

Even setting that foundational uncertainty aside, Guidry's arguments are not sufficiently supported. She first argues that NRS 200.120(1) applies, which states that a killing is justified in specific self-defense circumstances that may fall short of the classic self-defense scenarios codified in NRS 200.200. But NRS 200.120(1) also indicates that, before a person may use deadly force under that statute, the person must retreat, unless the person is not the original aggressor, has a right to be present at the location where deadly force is used, and is not "actively engaged in conduct in furtherance of criminal activity at the time deadly force is used." This latter limitation is notable here. By convicting Guidry of robbery, the jurors indicated that they would not have acquitted her based on NRS 200.120(1). A necessary component of the jury's robbery conviction in this case was its holding that Guidry used force during the course of a continuing larceny, i.e., while actively engaged in conduct in furtherance of criminal activity.

A distinct self-defense statute, NRS 200.200, does not have such a criminal conduct limitation, and it provides that a killing is justified if the danger was so urgent and pressing that the killing of the other was absolutely necessary to prevent the person from receiving great bodily harm. But if the person asserting self-defense was "the assailant," the law requires that he or she have "really, and in good

faith, endeavored to decline any further struggle before the mortal blow was given." NRS 200.200(2). Guidry does not argue that she in good faith endeavored to decline any further struggle. Thus, these facts present the question whether Guidry was "the assailant," and if so whether, even if she failed to withdraw, she regained a right to act in self-defense if Osorio reasonably appeared to threaten her with imminent great bodily harm or death. *See* Justin F. Marceau, *Killing for Your Dog*, 83 Geo. Wash. L. Rev. 943, 998 (2015) ("[T]he dominant rule seems to be that a *nondeadly* aggressor is treated the same as *nonaggressor*; when either is confronted with deadly force, he or she probably has a right to use deadly force without retreating, at least in no-retreat, majority jurisdictions.").

We observe that states are not uniform in how they define assailants, more commonly referred to as initial aggressors, and the related concept of provocateurs. John D. Moore, Note, *Reasonable Provocation Distinguishing the Vigilant From the Vigilante in Self-Defense Law*, 78 Brook. L. Rev. 1659, 1663 (2013); *see Andrews v. United States*, 125 A.3d 316, 322 (D.C. 2015) (reflecting an imbalanced split of authority regarding what makes one a provocateur); Kimberly Kessler Ferzan, *Provocateurs*, 7 Crim. L. & Phil. 597 (2013) (arguing "provocateurs need to be distinguished from their cousins, initial aggressors"). Further, our own law does not clearly mandate a particular outcome here: *Johnson v. State*, 92 Nev. 405, 407-08, 551 P.2d 241, 242 (1976), provides that an aggressor is a person who acts with the fraudulent intent to force a deadly issue in order to create the necessity for his own assault; however, *State v. Grimmett*, 33 Nev. 531, 112 P. 273, 273 (1910), states more broadly that an aggressor is one who voluntarily seeks, provokes, invites, or willingly engages in a difficulty of his own free will. Ultimately, "[f]or an error to be plain, it must, 'at a minimum,' be 'clear under current law.'" *Gaxiola*, 121 Nev. at 648, 119 P.3d at 1232 (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001)).[4]

Guidry next argues that the district court erred by refusing to instruct the jury that, if the jury found she acted because of legal necessity or self-defense, it could not convict her of leaving the scene. Yet the evidence did not suggest that Guidry was under any real or reasonably perceived threat when she drove off; Osorio had already fallen from her car and sustained mortal injuries. *See Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) (holding that a defendant is entitled to a requested theory-of-the-case jury instruction "so long as there is some evidence, no matter how weak or incredible, to support it"). Similarly, even if Guidry is correct

[4]If the State retries Guidry on the murder charge, the district court may consider these issues with fresh eyes—here we only consider the self-defense issues in the context of plain-error review and in the context of the robbery charge.

in her assertion that there were errors in instruction 26, defining grand larceny; instruction 29, defining leaving the scene; and instruction 35, defining highway, these errors were not preserved and Guidry has not shown that they affected her substantial rights, NRS 178.602, as required for us to reverse on plain-error review.

C.

Guidry raises various other trial errors, but many were not preserved or were inadequately developed on appeal, and none warrants reversal, individually or cumulatively.[5] She first argues that the court unreasonably restricted voir dire by preventing her from repeating her statement that she worked as a prostitute, but she failed to object at trial. And because the record shows that Guidry was free to explore juror bias respecting prostitution—as long as she did not tell the venire panel members what the evidence at trial would show—and because both she and the prosecutor did just that, she has not shown that she was prejudiced or that any error in jury selection affects the integrity or public reputation of the judicial proceedings. *Cf. State v. Ousley*, 419 S.W.3d 65, 73, 75 (Mo. 2013) (holding that a trial court erred by prohibiting a defendant from asking the venire panel members whether they could consider the possibility of a fact that the defendant intended to explore at trial, where the question was not otherwise improper).

She next argues that the prosecutor committed misconduct in characterizing the evidence, and we agree. A prosecutor "has a duty to refrain from making statements in opening arguments that cannot be proved at trial." *Rice v. State*, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997), *modified on other grounds by Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). But "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith." *Id.* at 1312-13, 949 P.2d at 270. Here, toward the end of his opening statement, the prosecutor said the following:

> When you put that altogether the evidence is going to show exactly what happened. That Mr. Osorio had contact with Ms. Guidry. He thought he was going to have some sort of sexual contact with her. She lured him into [her] vehicle. She drove him to the Westin. And during the course of that interaction, she slipped off his watch and then got him out of the vehicle. And when he realized his watch was missing, he ran to the vehicle and tried to stop her. *And when he jumped out in front*

[5]We specifically address Guidry's major claims but find that none of the trial-error arguments she asserts challenging the robbery, grand larceny, and leaving the scene convictions presents a basis for relief.

> *of her and put his hands on her hood and said, Stop, I want my watch back.*
>
> You're going to hear from the detective in this case—

(emphasis added). Defense counsel objected, and the prosecutor responded, "This is all—what the evidence is going to show." But despite the prosecutor's assurance to the court that the evidence would support his statement about what the victim said before he died, it did not. Instead, eyewitness Landale testified that Osorio was screaming, maybe in another language, and that he did not understand what Osorio said. Nothing in the record supports that the prosecutor could have had a good-faith belief that the evidence would show that Osorio said, "Stop, I want my watch back," before he died. At the grand jury hearing, for example, one witness testified that her car windows were closed so she could not hear anything, and Landale testified that he did not know if Osorio was even yelling words. Nor did the prosecutor submit any document to the court that would support his good-faith belief that he would be able to prove what he said. In this context, we reject the State's argument that the remark was a mere turn of phrase.

The prosecutor misstated the evidence in rebuttal closing argument as well. *See Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). With regard to Osorio's initial exit from the car, the prosecutor argued that "17 seconds elapsed between the time [Guidry] pulls away and her car door shuts. And if you even look, she uses the momentum of the car to close that car door. She pulls out and turns right. That's what causes the door to close. She doesn't even wait for [Osorio] to be fully out of the vehicle." The State posits that this was a turn of phrase too—an argument that verges on a concession, and which we reject, as the chain of events that the prosecutor described does not appear on the grainy video and is not a fair inference from the evidence. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (noting that argument left without response was conceded). Nonetheless, in light of the strong evidence supporting the robbery, grand larceny, and leaving the scene convictions, prosecutorial misconduct does not undermine the soundness of those convictions. *See Valdez v. State*, 124 Nev. 1172, 1192, 196 P.3d 465, 478-79 (2008) ("[W]e apply the harmless-error analysis for prosecutorial misconduct of a nonconstitutional dimension. In doing so, we conclude that the prosecutor's comment alone did not substantially affect the verdict because [it] was made early on in the proceedings, and there was substantial evidence that Valdez attempted to kill S.E.").

Guidry goes on to challenge the admission of different pieces of evidence. The factual record is undeveloped and therefore insufficient to support her claims that the police unreasonably seized her car when they impounded it, that they used trickery to ensure

that she left her phone in the car at that time, that the lengths of her detention and her questioning were unreasonable, or that her statement was involuntary.[6] And the district court did not abuse its discretion by admitting a somewhat graphic photograph of Osorio's injuries because it provided context to the events and was unlikely to inflame the jury. *See Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 211 (2018) (explaining that the "district court [acts] as a gatekeeper by assessing the need for the evidence on a case-by-case basis and excluding it when the benefit it adds is substantially outweighed by the unfair harm it might cause"). Further, any error in admitting exhibit 89, a photograph taken during a search of Guidry's home of a purse and the cash found inside, did not cause prejudice because it is unlikely that a reasonable jury would find that simply because Guidry had cash, that meant she stole Osorio's watch, especially given the other strong evidence.

As these issues at trial were unfolding, Guidry's counsel stated that he had not received Detective Salisbury's (a testifying expert witness) full report. While this is clearly concerning, *see* NRS 174.234(2)(c), Guidry's counsel then readily accepted the district court's suggestion that, after reviewing the full report, counsel could call Salisbury for additional questioning. "We will not find an abuse of discretion . . . unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant, and that such prejudice has not been alleviated by the trial court's order." *Langford v. State*, 95 Nev. 631, 635, 600 P.2d 231, 234-35 (1979). This record discloses neither. In brief, we affirm.

IV.

Because the district court may have sentenced Guidry differently if Guidry had been convicted of only robbery, grand larceny, and leaving the scene, we remand this matter for resentencing. *Powell v. State*, 113 Nev. 258, 264, 934 P.2d 224, 228 (1997). The court properly considered the "nature and seriousness" of the offenses in determining the sentence, and we cannot say whether the court would have imposed a lower sentence had Guidry been convicted of less serious offenses. We are also concerned by the court's repeated references to jail calls that primarily showed that Guidry was upset that her daughter had given the police the passcode to her cell phone. While the calls may not have been wholly irrelevant, they had lim-

[6]Moreover, Guidry has not supported her claims that the police coerced her daughter into giving them Guidry's cell-phone passcode or that a search warrant that is alleged to be overbroad in part requires all evidence obtained pursuant to that warrant to be suppressed with cogent argument and relevant authority. We therefore do not consider them. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

ited probative value, especially given that Guidry maintained her innocence. *See Brake v. State*, 113 Nev. 579, 585, 939 P.2d 1029, 1033 (1997) ("[T]he district court's consideration of Bryan's 'lack of remorse' after he had maintained his innocence violated Bryan's Fifth Amendment rights and constituted an abuse of discretion.").

V.

In sum, the district court's murder instruction was inaccurate in that it provided an alternate theory of murder liability that was both incomplete and irrelevant, and which had the effect of relieving the jury of its burden to find beyond a reasonable doubt that Guidry had acted with malice aforethought. This error affected Guidry's substantial rights, and we therefore reverse the murder conviction and remand. Otherwise, we affirm the convictions for robbery, grand larceny, and leaving the scene of an accident, but we vacate the sentences and remand for resentencing.

Silver and Cadish, JJ., concur.

ANTHONY JOSEPH HARRIS, Appellant, *v.* THE STATE OF NEVADA; NEVADA BOARD OF PRISON COMMISSIONERS; THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; JAMES DZURENDA; BRIAN WILLIAMS; ROMEO ARANAS; MICHAEL MINEV; JEREMY BEAN; JULIE MATOUSEK; MR. FALISZEK; MRS. ENNIS; NAPHCARE INC.; BOB FAULKNER; N. PERET; G. WORTHY; G. MARTIN; and G. BRYAN, Respondents.

No. 81430

June 2, 2022 510 P.3d 802

Appeal from district court orders dismissing an inmate's civil-rights complaint. Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

Reversed and remanded.

Holland & Hart LLP and *Joshua M. Halen* and *Matthew B. Hippler*, Reno, for Appellant.

Aaron D. Ford, Attorney General, and *Gregory L. Zunino*, Deputy Solicitor General, Carson City, for Respondents.

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

OPINION

By the Court, Cadish, J.:

The district court dismissed appellant's civil rights complaint, finding deficiencies in the pleading as to one of the defendants and in the service of the pleading as to the remaining defendants. First, we consider the standard for sufficiency in pleading a deprivation-of-rights claim under 42 U.S.C. § 1983. Second, we consider the timing requirements for proper service of such a pleading on state officials or employees under NRCP 4.2(d)(2), which requires service on both the attorney general and on the individual official or employee, and in particular, whether NRCP 4.2(d)(6) provides additional time, beyond the generally applicable 120-day service period in NRCP 4(e)(1), to complete one of the two service requirements when the plaintiff timely completed the other requirement. Because we conclude that appellant alleged sufficient facts to state a claim for relief under 42 U.S.C. § 1983 against respondent Brian Williams based on an alleged deliberate indifference to serious medical needs and that NRCP 4.2(d)(6) gives appellant additional time to complete service on the remaining respondents, we reverse.

FACTS AND PROCEDURAL HISTORY

Appellant Anthony Harris, an inmate in the custody of Nevada Department of Corrections (NDOC) at High Desert State Prison (HDSP), alleged in a civil-rights complaint that he began to experience "extreme chest pains" in early December 2018. He alerted a nurse at HDSP to the chest pains. The nurse, defendant Jane Doe, told Harris to "fill out a kite, but did nothing else."[1] Harris's extreme chest pains persisted, and in early January 2019, he notified the same nurse of the continuing chest pains. She again told Harris to fill out a kite. Nothing came of the kites Harris completed. In late March 2019, Harris "suffered such extreme chest pains that" he fell "to his knees . . . in front of a different" nurse, respondent James Tolman. Tolman told Harris to drink water and "stay off his feet."

Harris filed an informal grievance the same day regarding the denial of medical treatment for the chest pains. A nurse at HDSP, respondent N. Peret, denied the informal grievance a little over two months later in early June 2019. Harris filed a first-level grievance the next day. Williams admits that NDOC's administrative regulations required him, as HDSP's warden, to review, investigate, and respond to Harris's first-level grievance, even though the regulations also permit him to use staff to develop the response. Approximately one month later, Harris received a denial of the first-level grievance signed by the director of nursing at HDSP, respondent Bob Faulkner. That same day, Harris filed a second-level grievance, which the medical director at HDSP, respondent Michael Miner, denied around two months later in early September 2019.

On June 14, 2019, Harris was taken to see a cardiologist. However, he was told on arrival that the cardiologist could not see him because the appointment had been scheduled for two days earlier. Officers at HDSP did not take Harris to see a cardiologist until over five weeks later, on July 23, 2019. Although the doctor instructed Harris to return in 30 days, officers did not take him to the cardiologist again until over two months later, on October 4, 2019. During these gaps in care, Harris continued to experience extreme chest pains that rendered him bedridden. In November 2019, Harris filed this lawsuit pro se against various officials and employees of NDOC, asserting a cause of action under 42 U.S.C. § 1983 for their alleged deliberate indifference to his serious medical needs.[2]

As relevant to this appeal, Harris directed the Carson City Sheriff to serve the complaint and summons on defendants Romeo Aranas, Michael Minev, Jeremy Bean, Julie Matousek, Mr. Faliszek, Mrs. Ennis, Bob Faulkner, N. Peret, G. Worthy, G. Martin, G. Bryan,

[1]A kite is "a written request for services or other assistance within the prison." *Ybarra v. State*, 127 Nev. 47, 59 n.9, 247 P.3d 269, 277 n.9 (2011).

[2]We omit discussion of the other parties and claims in Harris's complaint that are not at issue in this appeal.

James Tolman, Jane Doe 1, and NaphCare, Inc., all parties associated with NDOC (collectively, NDOC parties).[3] Harris stated in court filings that the Carson City Sheriff served the NDOC parties by way of the Office of the Attorney General's (OAG) authorized individual on December 13, 2019, and December 16, 2019.

In January 2020, respondent Williams brought a motion to dismiss for failure to state a claim under NRCP 12(b)(5), asserting that the complaint contained no facts that identified Williams by name, let alone alleged his personal involvement in Harris's medical care or lack thereof. Williams alternatively argued that he was entitled to qualified immunity because the complaint contained no facts to establish that he violated Harris's constitutional rights. Harris opposed, alleging additional facts to support Williams's notice of Harris's serious medical needs. Harris described the contents of the first-level grievance as stating that he "was experiencing a violation of [his] rights, both medical and [E]ighth [A]mendment, and that it was constituting cruel and unusual punishment." He also pointed to NDOC's regulations that require Williams, by virtue of his position as HDSP's warden, to respond to Harris's first-level grievance. Harris alleged that he attempted to speak about "this matter" with Williams in the prison's chapel sometime between July and September 2019, but that Williams rebuffed the conversation. Harris also requested to amend his complaint to add facts and a claim. Williams replied that the court could not consider the allegations that Williams reviewed the first-level grievance and that this review put Williams on notice of Harris's serious medical needs, as they were alleged for the first time in Harris's opposition. Williams also contended that his personal involvement in the review and denial of the grievance process did not "establish personal participation." Williams did not address Harris's request to amend the complaint.

At a hearing,[4] the district court granted the motion, dismissed the complaint with prejudice, and declined to allow Harris to amend the complaint. The court agreed that the complaint contained no allegations to establish Williams's personal participation in or awareness of the alleged constitutional violation. Moreover, the court concluded that a response to a grievance does not, by itself, expose Williams to liability. Alternatively, the court concluded that Williams was entitled to qualified immunity because Harris failed to allege facts that

[3]The record contains alternate spellings of Michael Minev's, Jeremy Bean's, and James Tolman's names: Michael Miner, Jeremy Dean, and James Tulman, respectively. Respondents, in their motions to dismiss, did not make any arguments specific to NaphCare. They similarly make no arguments as to NaphCare on appeal.

[4]Harris requested that the district court compel his telephonic appearance at the hearing on the motion to dismiss. Nothing in the record indicates that the district court ruled on the motion. However, Harris ultimately did not appear.

Williams violated Harris's rights.[5] The district court did not provide any rationale for denying Harris's request to amend.

Thereafter, Harris moved the court to reconsider its order and permit him to amend his complaint. While Harris claimed to possess, among other items, "35+ evidence/exhibits spanning 66+ pages" to support his allegations, he did not describe the contents of the documents. Williams opposed, arguing that Harris failed to establish grounds for relief under NRCP 60(b), but Williams did not address Harris's request for leave to amend the complaint. The district court denied Harris's motion to reconsider the judgment and, alternatively, to amend his complaint, finding that Harris failed to establish grounds for relief under NRCP 60(b).

The remaining NDOC parties collectively filed a motion to dismiss pursuant to NRCP 4(e)(2) in June 2020, approximately five months after the latest date on which Harris alleged that he served all parties. They maintained that Harris failed to satisfy one of two requirements for the service of state officials or employees within the 120-day service period. Further, they asserted that Harris neither sought by motion to extend the service period nor showed good cause to grant such a motion. They argued, therefore, that Harris's failure to properly serve them within the 120-day period provided in NRCP 4(e)(1) required dismissal of the complaint pursuant to NRCP 4(e)(2). The NDOC parties omitted any citation to or mention of NRCP 4.2(d)(6) (requiring "a reasonable time to cure" defects in service if preconditions are met). Harris opposed, arguing that he had perfected service within the 120-day period and that, nonetheless, good cause existed for an untimely request to extend the service period because the prejudice to the NDOC parties was mitigated by their actual knowledge of the lawsuit.

The district court granted the NDOC parties' motion and dismissed the complaint without prejudice. While the court found that Harris "attempted to effectuate service" on the NDOC parties, it concluded that Harris's failure to "personally serve any of the [NDOC parties] with a copy of the summons and complaint" within the service period warranted dismissal. Further, the court concluded that Harris neither sought an extension of time nor established good cause for his failure to do so. This appeal followed.

DISCUSSION

Harris properly pleaded a § 1983 claim against Williams

We review de novo a dismissal for failure to state a claim upon which relief can be granted under NRCP 12(b)(5). *Buzz Stew,*

[5]Although Harris challenges this decision on appeal, we do not need to reach whether the district court erred in concluding that Williams was entitled to qualified immunity because Williams concedes that "[i]t was premature for the [d]istrict [c]ourt to address qualified immunity" and that the district court placed the "burden" on Harris "to plead facts that negate qualified immunity."

LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Factual allegations in the complaint are accepted as true, while inferences in the complaint are drawn in favor of the plaintiff. *Facklam v. HSBC Bank USA*, 133 Nev. 497, 498, 401 P.3d 1068, 1070 (2017). A plaintiff fails to state a claim for relief only "if it appears beyond a doubt that [he] could prove no set of facts" that "if true . . . entitle [him] to relief."[6] *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672. Under our notice-pleading standard, we "liberally construe [the] pleadings" for "sufficient facts" that put the "defending party" on "adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Although we have not adopted the "less stringent" pro se standard used in federal courts, *see Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)), our notice-pleading standard does not require the plaintiff to indicate a specific "legal theory" or use "precise legalese" to give notice to the defending party. *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578-79, 908 P.2d 720, 723 (1995).

Williams argues that Harris's complaints of chest pains do not establish serious medical needs, and therefore, any "inattentive" response to those complaints by prison officials does not amount to deliberate indifference. Moreover, Williams asserts that Harris's complaint does not "make a direct connection between" Williams and the "alleged constitutional injury," as there are no allegations that Williams knew of Harris's medical needs or that prison officials denied Harris care. We disagree.

Section 1983, which vindicates federal constitutional rights, imposes liability where a defendant acts under color of state law to deprive the plaintiff of a constitutional right. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). The Eighth Amendment guarantees an inmate's right to adequate medical care. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). Liability for constitutionally inadequate medical care attaches if the defendant acted with deliberate indifference to the plaintiff's "serious medical needs," *id.* at 106, and such deliberate indifference caused harm to the plaintiff, *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). The deliberate-indifference standard, for Eighth Amendment purposes, comprises a subjective and an objective component "consistent with recklessness in . . . criminal law." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The subjective component requires that "the official knows of and disregards an excessive risk to [the] inmate['s] health." *Id.* The objective component considers whether the risk to the inmate qualifies as sufficiently serious to

[6]Contrary to Williams's suggestion, our notice-pleading standard is not analogous to the federal plausibility standard for a motion to dismiss for failure to state a claim. We have not adopted the federal standard. *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 18 n.2, 293 P.3d 869, 871 n.2 (2013).

warrant treatment, or in other words, sufficiently serious to constitute "unnecessary and wanton infliction of pain" in the absence of such treatment. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (quoting *Estelle*, 429 U.S. at 104), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014).

Addressing the objective component first, Harris's complaint alleges a set of facts that, if true, support a finding that he suffers or has suffered from ailments that constitute serious medical needs. Harris described chest pains so severe that at one point they caused him to fall on his knees in front of a nurse. While, as Williams points out, Harris did not allege specific symptoms of cardiac distress, he alleged that the chest pains persisted over months and appeared to worsen over that period such that Harris became debilitated and bedridden by those pains. Harris also averred that the delay in the provision of treatment of the chest pains created a risk of heart attack, stroke, and even death. *See Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (explaining that serious medical needs "exist[ ] if [the] failure to treat the injury or condition 'could result in further significant injury' " (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006))). Further, Harris alleged that the cardiologist he eventually saw on July 23, 2019, seven months after he initially complained of the chest pains, told Harris to return in 30 days, an indication that "a reasonable doctor" deemed these multiple incidents of chest pains as "worthy of comment or treatment." *See id.* (noting that indications of "serious medical need[s] include 'the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain' " (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled in part on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997))).

Turning to the subjective component second, the complaint also alleges a set of facts that, if true, support a finding of Williams's deliberate indifference. Harris described that he filed several grievances, one of which—the first-level grievance—the parties agree Williams was required by regulation to review, investigate, and answer, even though he was also permitted to utilize staff to develop such response. Harris was not required to cite NDOC regulations in his complaint in order for the allegations regarding the first-level grievance to implicate Williams's involvement in the constitutional violation. *See Liston*, 111 Nev. at 1578-79, 908 P.2d at 723. Moreover, the complaint's narrative of events permits the inference that the grievance made Williams aware of multiple instances where prison staff members ignored, or at least minimized, Harris's complaints of extreme chest pains and provided no contemporaneous treatment

on any of those multiple occasions on which he complained over an approximately six-month period. By the time Harris received the denial of the first-level grievance, he had been taken to a cardiologist two days after the scheduled appointment, and still, no medical professional had treated or diagnosed the extreme chest pains. These allegations support that Williams knew of Harris's repeated complaints of extreme, debilitating chest pains over a six-month period and of prison staff's failure to respond to those complaints.

Faced with this knowledge, Williams denied, through staff, the grievance and made no efforts to ensure Harris received treatment, effectively ignoring persistent and credible complaints of inadequate care of serious medical needs. And, as noted already, Harris alleged that the denial of care both caused his condition to worsen, such that he became bedridden, and created a risk of further harm, such as a heart attack, stroke, and even death. Because the grievance alerted Williams to these issues, the denial of the grievance, coupled with the failure to act, constituted an affirmative decision to continue to deny or delay adequate treatment and to disregard an excessive risk of further injury to Harris.[7] Therefore, we conclude that the district court erred by dismissing Harris's complaint on the basis that he failed to allege a set of facts that, if true, entitle him to relief against Williams under 42 U.S.C. § 1983 for Williams's deliberate indifference to Harris's serious medical needs.[8]

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[7]Contrary to Williams's assertion, the foregoing shows that the complaint implicated Williams's personal participation because Harris alleged facts to infer Williams knew of Harris's need for medical attention, consciously failed to act, and thereby subjected Harris's health and safety to an excessive risk. *See, e.g.*, *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013) (explaining that § 1983 does not permit vicarious liability against a supervisor for the acts of his or her subordinates based only on his or her status as a supervisor, and therefore requiring personal involvement or participation in the constitutional violation); *Arnett v. Webster*, 658 F.3d 742, 755, 757 (7th Cir. 2011) (explaining that actions "satisf[y] the personal responsibility requirement" if the official "know[s] about the conduct and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye" to it (internal quotation marks omitted) (quoting *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995))).

[8]Even if Harris's complaint failed to meet the notice-pleading standard, we conclude that the district court abused its discretion in refusing to allow Harris leave to amend. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 23, 62 P.3d 720, 734, 735 (2003) (noting that leave to amend is favored, particularly where "the request . . . c[omes] at an early stage of the proceedings and in response to the motion to dismiss"). Harris's opposition papers included additional allegations that implicated Williams in the constitutional violation and suggested a proposed amendment would not have been futile, such as the fact that Williams rebuffed Harris's attempts to talk to Williams in the chapel about the lack of medical care, as well as the fact that Harris described the contents of the first-level grievance. *See Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013) (explaining that leave to amend is not warranted "if the proposed amendment would be futile," or in other words, the party's amendment presents no chance of survival past a motion to dismiss).

Harris was entitled to additional time under NRCP 4.2(d)(6) to serve the state officials or employees

While we generally review a dismissal based on the failure to timely serve process for an abuse of discretion, *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010), we review the interpretation of the Nevada Rules of Civil Procedure de novo, *Vanguard Piping v. Eighth Judicial Dist. Court*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013). The rules "are subject to the same" interpretative methods "as statutes." *Id.* Accordingly, we begin with the text of the rule to determine its "plain meaning." *Id.* We enforce a rule's "clear and unambiguous" meaning without resorting to interpretative methods of statutory construction. *Id.*

Harris argues that the district court erroneously dismissed his complaint against the NDOC parties based on his failure to satisfy one of the two service requirements under NRCP 4.2(d)(2) within the 120 days provided in NRCP 4(e)(1), because NRCP 4.2(d)(6) provided him with additional time to cure the defect in service. We agree.

The interplay between NRCP 4(e) and NRCP 4.2(d) is an issue of first impression for this court. NRCP 4(e)(1) generally requires the plaintiff to serve the summons and copy of the complaint on the defendant according to one of the methods prescribed therein "no later than 120 days after the complaint is filed." The failure to serve within the 120-day period requires dismissal of the action "without prejudice" either on motion by the defendant or by "the court's own order to show cause." NRCP 4(e)(2). But the court "must extend the service period" on request by motion before the service period has expired if a party shows "good cause" to grant the extension. NRCP 4(e)(3). Further, even if the request to extend the period comes after its expiration, the court nevertheless "must extend the service period" so long as the party shows "good cause" to explain the failure to bring a timely motion and "good cause" to grant the extension. NRCP 4(e)(4).

NRCP 4.2 provides the various methods to serve a party within the state, depending on the categorization of the party. Specific to actions against former or current state officers and employees sued in their official or individual capacities, NRCP 4.2(d)(2) imposes a dual-service requirement. The plaintiff must deliver within the 120-day period "a copy of the summons and complaint" to both of the following persons:

> (A) the Attorney General, or a person designated by the Attorney General to receive service of process, at the Office of the Attorney General in Carson City; *and*
>
> (B) the current or former public officer or employee, or an agent designated by him or her to receive service of process.

NRCP 4.2(d)(2) (emphasis added). NRCP 4.2(d)(6) further provides that "[t]he court must allow a party a reasonable time to cure its failure to . . . serve a person required to be served under" subsection (d)(2) if the party has timely served at least one of the other required parties (i.e., the Attorney General or public employee).

NRCP 4.2(d)(6) does not require a party to file a motion to take advantage of this cure period. Indeed, the "reasonable time to cure" does not hinge on the failure to timely serve, but rather on the failure to serve the appropriate individuals. While NRCP 4.2(d)(6) does not explicitly state whether a party may take advantage of the cure period after the generally applicable 120-day service period under NRCP 4(e)(1) has expired, the need for additional time to cure service defects only makes sense if the period supplements, or applies after, the 120-day service period. If we were to interpret NRCP 4.2(d)(6) to apply only when the generally applicable service period has not expired, we would render NRCP 4.2(d)(6) superfluous because a party would still have time to cure the defect in service by effectuating proper service within the 120-day period under NRCP 4(e). However, we avoid interpretations that render language meaningless or superfluous. *See Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

Moreover, NRCP 4.2(d)(6)'s cure period implicitly acknowledges the unique, and potentially confusing, dual-service burden imposed on a plaintiff who brings a lawsuit against a public employee for acts related to employment. *Compare* NRCP 4.2(d)(2)(A)-(B), *with* NRCP 4.2(a) (requiring service only on a singular individual to serve a public employee if the lawsuit is related to acts outside of employment). Additionally, accomplishment of at least one service requirement ensures that either the individual defendant or the individual defendant's counsel (i.e., the Attorney General) has notice of the lawsuit, thereby rendering the other service requirement less critical. In such circumstances, additional time beyond the 120-day service period to perfect the dual-service requirement does not prejudice the defendant, as he or she already has notice individually or through counsel. Thus, NRCP 4.2(d)(6) recognizes the additional dual-service burden for lawsuits against public officers or employees over acts related to their employment by allowing plaintiffs a reasonable time to cure defective service while NRCP 4.2's other provisions do not make this allowance for other lawsuits that do not impose this dual-service requirement.

Accordingly, we conclude that NRCP 4.2(d)(6) requires a district court to "allow" a plaintiff "a reasonable time" to cure his or her failure to complete service on a state official or employee if he or she has served one of the two required service recipients according to the requirements set forth in NRCP 4.2(d)(2), even where the generally applicable 120-day service period has expired. Our conclusion

accords with federal courts' interpretation of the analogous federal rule. *See, e.g.*, *Lawrence v. Las Vegas Metro. Police Dep't*, 451 F. Supp. 3d 1154, 1166 (D. Nev. 2020) ("The Advisory Committee describes the cure provision as requiring that 'a reasonable time to effect service on the United States must be allowed *after the failure is pointed out*.'" (emphasis in original) (quoting Fed. R. Civ. P. 4 advisory committee's note to 2000 amendment)), *appeal dismissed on other grounds sub nom. Lawrence v. Bohanon*, 847 Fed. Appx. 516 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 901 (2022). Moreover, we conclude that NRCP 4(e)'s procedures to request an extension of the service period do not apply to this cure period under NRCP 4.2(d)(6). Applying those principles here, we further conclude that the district court's dismissal of Harris's complaint based on his failure to comply with NRCP 4.2(d)(2) was erroneous.[9] The parties do not dispute that Harris complied with NRCP 4.2(d)(2)(A) within the 120-day period but failed to comply with NRCP 4.2(d)(2)(B) within the 120-day period. Harris's compliance with one of the two service requirements triggered NRCP 4.2(d)(6)'s cure period, which required the court to allow Harris additional, albeit reasonable, time to cure defects in service.[10]

CONCLUSION

We conclude that Harris alleged sufficient facts to put respondent Williams on notice of the nature of the § 1983 claim against him and to state such a claim for relief. Harris's allegations that he filed a first-level grievance, which Williams was, by regulation, required to review and answer, he received no medical care for repeated complaints of extreme chest pains over a six-month period, he became debilitated and bedridden by the persistent extreme chest pains, and Williams denied the grievance all support Williams's knowledge and disregard of an excessive risk to Harris's health.

We also conclude that NRCP 4.2(d)(6) requires the district court to allow a plaintiff a reasonable time to cure defects in service, even

[9]Because we conclude that NRCP 4.2(d)(6) required the district court to allow Harris to cure the service defects within a reasonable time, we do not address Harris's alternative argument that the district court abused its discretion in concluding that no good cause existed for Harris's failure to file a timely request or for an extension of the service period.

[10]We decline to consider respondents' arguments that Harris's failure to identify the "Jane Doe" defendants warrants dismissal of all claims against them and that Harris's failure to raise the issue on appeal constitutes waiver, because respondents did not raise this argument below in moving to dismiss, and the failure to identify the Doe defendants did not factor into the district court's decision. *See Garcia v. Prudential Ins. Co. Am.*, 129 Nev. 15, 19, 293 P.3d 869, 872 (2013) (noting that this court "generally" does "not address an issue raised for the first time on appeal" (quoting *Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 658, 661, 98 P.3d 691, 693 (2004))).

after the generally applicable 120-day service period under NRCP 4.2(e) expires, if the party has timely fulfilled at least one of the two service requirements under NRCP 4.2(d)(2) for service on public officers and employees sued over acts or omissions relating to their duties or employment, regardless of whether the plaintiff has filed a motion for an extension of time pursuant to NRCP 4(e)(3). Because Harris timely served the remaining respondents according to NRCP 4.2(d)(2)(A), he was entitled to additional time under NRCP 4.2(d)(6) to comply with the second service requirement under NRCP 4.2(d)(2)(B), despite that the 120-day service period under NRCP 4(e) had passed. We therefore reverse the district court's orders dismissing Harris's complaint and remand for further proceedings consistent with this opinion.

Silver and Pickering, JJ., concur.