MARIO LaBARBERA, an Individual, Appellant, *v.* WYNN LAS VEGAS, LLC, dba WYNN LAS VEGAS, a Nevada Limited Liability Company, Respondents.

No. 71276

July 19, 2018 422 P.3d 138

Appeal from a final judgment in a breach of contract action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed and remanded with instructions.

Jeffrey R. Albregts, LLC, and *Jeffrey R. Albregts*, Las Vegas, for Appellant.

Semenza Kircher Rickard and *Lawrence J. Semenza, III, Christopher D. Kircher*, and *Jarrod L. Rickard*, Las Vegas, for Respondent.

Before the Supreme Court, Douglas, C.J., Pickering and Hardesty, JJ.

OPINION

By the Court, Hardesty, J.:

Respondent Wynn Las Vegas, LLC, filed a breach of contract action to collect $1,000,000 in unpaid casino markers from appellant Mario LaBarbera. In this appeal, we must determine whether the district court erred when it precluded LaBarbera from testifying at trial by video conference from Italy and excluded evidence of his intoxication.

We conclude that the district court abused its discretion under the Nevada Supreme Court Rules Part IX-B(B) when its written order summarily denied LaBarbera's request to testify at trial using audio-visual equipment. While recognizing the very high burden required for a voluntary intoxication defense in a contract action, we also conclude that the district court abused its discretion when it applied an incorrect standard to exclude any evidence of intoxication. We reverse the judgment and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

LaBarbera is an Italian citizen and business owner who serves as a consultant for the pharmaceutical industry. He claims to suffer from gambling addiction, as certified in Italy, and does not speak any English. LaBarbera visited Las Vegas in late March through early April of 2008 after being recruited by Alex Pariente, an Italian-speaking former employee and VIP host of Wynn. While staying at the Wynn,

LaBarbera gambled and lost $1,000,000 of his own money. Wynn then extended $1,070,000 worth of gaming credit in the form of casino markers to LaBarbera, $1,000,000 of which was left unpaid. LaBarbera claims he was intoxicated at the time he signed the casino markers and that the signatures on the markers are not his.

Shortly after LaBarbera left Las Vegas, Wynn filed a complaint with the Clark County District Attorney's Office for passing bad checks in violation of NRS 205.130,[1] resulting in a bench warrant being issued for LaBarbera's arrest. Wynn also filed a breach of contract suit against LaBarbera. Before the jury trial, Wynn filed three motions in limine seeking to exclude evidence or argument of LaBarbera's gambling addiction, intoxication, and any alleged forgery. The district court granted the first two motions, prohibiting LaBarbera from arguing about his gambling addiction or intoxication at trial, but denied the third motion, allowing LaBarbera to argue that the casino markers were invalid forgeries. Because LaBarbera's outstanding bench warrant would cause him to be arrested if he came to Clark County to testify, he moved for permission to testify at trial from Italy via video conference and an interpreter. The district court denied LaBarbera's motion and the trial proceeded without his presence.

The jury returned a verdict in favor of Wynn in the principal amount of $1,000,000. Thereafter, the district court entered a final judgment awarding Wynn contract interest at a rate of 18 percent per annum, attorney fees, costs, and prejudgment interest, totaling $2,626,075.81. This appeal followed.

DISCUSSION

LaBarbera seeks reversal of the judgment, arguing, among other things, that the district court abused its discretion when it refused to let him testify by audiovisual communication and excluded evidence of his intoxication.[2]

---

[1]NRS 205.130 was amended in 2011 and now states that an instrument's amount must be greater than $650, not $250. 2011 Nev. Stat., ch. 41, § 11, at 162-63. This change in law is irrelevant to our rulings here.

[2]LaBarbera also argues that Wynn's claims should have been barred by the doctrines of unclean hands and laches, that the casino markers were improperly classified under the bad check statute, and that the district court abused its discretion by excluding evidence of his bench warrant and allowing Wynn to call untimely disclosed witnesses. We conclude that these arguments lack merit. LaBarbera also claims that the district court erred when it excluded evidence of his gambling addiction, but we conclude this claim lacks merit under NRS 463.368(6) (stating that a patron's claim of having a gambling disorder is not a defense in an action to enforce a gambling debt). Further, LaBarbera argues that the district court abused its discretion when it gave jury instruction number 36, which read: "[s]imilarly, whether a person cannot read, write, speak or understand the English language is also immaterial to whether an agreement written in English is enforceable. Prior to signing a contract, a person has the

The district court abused its discretion by denying LaBarbera's motion to testify via video conference and an interpreter

LaBarbera argues that the district court abused its discretion when it denied his motion to testify from Italy via video conference with an interpreter. Specifically, LaBarbera points to NRCP 43(a), which states that "[t]he court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." LaBarbera contends that he made a sufficiently compelling showing of special circumstances, and it was an abuse of discretion for the district court to refuse to accommodate him. Citing *Barry v. Lindner*, 119 Nev. 661, 668, 81 P.3d 537, 542 (2003), Wynn argues that telephonic or video conference testimony is not permissible at trial absent a showing of special circumstances. Wynn contends that LaBarbera failed to demonstrate such a showing or how he would preserve appropriate safeguards.

Neither LaBarbera, Wynn, nor the district court reference Part IX-B(B) of the Nevada Supreme Court Rules, which addresses this issue. Part IX-B(B), Rule 2 states that "[t]o improve access to the courts and reduce litigation costs, courts shall permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules." We note that the rule includes the word "shall," and "[i]n these rules . . . '[s]hall' is mandatory." SCR Part IX-B(B)(1)(5). "Appropriate proceedings" include "[t]rials . . . provided there is good cause as determined by the court in accordance with Rule 1(6)." SCR Part IX-B(B)(4)(1)(a). "'Good cause' may consist of one or more of the following factors as determined by the court: . . . [w]hether any undue surprise or prejudice would result; . . . convenience of the parties, counsel, and the court; . . . cost and time savings." SCR Part IX-B(B)(1)(6)(b)-(d). The *Barry* case cited by Wynn predates Part IX-B(B) of the Nevada Supreme Court Rules—which became effective on July 1, 2013—by ten years and thus does not control here. *See generally* SCR Part IX-B(B); *Barry*, 119 Nev. at 661, 81 P.3d at 537.

We conclude that the district court abused its discretion in denying LaBarbera's request to testify via video conference. The Nevada Supreme Court Rules favor accommodation of audiovisual testimony upon a showing of good cause. LaBarbera demonstrated in his motion that good cause existed since he showed convenience and cost and time savings, and he otherwise would be unable to testify at all. Additionally, Wynn's arguments fail to establish how LaBar-

---

duty to learn the terms of the contract." However, because LaBarbera did not object to the inclusion of this instruction at trial, his argument is waived. *See J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 285, 89 P.3d 1009, 1015 (2004) ("No party may assign as error the giving or the failure to give an instruction unless he objects . . . ." (quoting NRCP 51(c))).

bera's testimony by video conference would have caused any undue surprise or prejudice. During discovery, Wynn took LaBarbera's deposition in Italy and some of the deposition testimony was used at trial. Moreover, the district court summarily denied LaBarbera's motion without explanation. We conclude that the district court abused its discretion and violated the policy promoted by NRCP 43(a) and SCR Part IX-B(B), Rule 2. Additionally, we perceive this error to be prejudicial because LaBarbera's absence conveyed to the jury a lack of interest in the case and prevented him from responding to other testimony presented at trial.

The district court abused its discretion by excluding evidence of LaBarbera's intoxication

LaBarbera argues that a lack of capacity due to excessive intoxication is a valid defense to a contract claim and the district court abused its discretion when it excluded evidence of his intoxication at the time he signed the casino markers. In his deposition, LaBarbera claimed that Wynn continually brought drinks he did not order, that he was especially intoxicated while gambling, and that on one occasion he became intoxicated to the point where he became physically ill and vomited. Wynn argues that LaBarbera never complained or brought attention to his intoxication while he executed multiple gaming markers over several days. Wynn cites to cases showing the extremely high burden required to prove a voluntary intoxication defense and claims that LaBarbera's argument fails because he cannot identify any specific facts about how much or how long he drank.

In the context of capacity to contract, this court has held that intoxication may render a person incompetent where "actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed." *Seeley v. Goodwin*, 39 Nev. 315, 324-25, 156 P. 934, 937 (1916) (internal quotation marks omitted). According to the Restatement,

> [a] person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication
>
> (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
>
> (b) he is unable to act in a reasonable manner in relation to the transaction.

Restatement (Second) of Contracts § 16 (Am. Law Inst. 1981). In addition, in dicta, *Seeley* recognizes a duty on the part of an intoxicated person to promptly disaffirm the contract. *See Seeley*, 39 Nev. at 323, 156 P. at 936; *see also* Restatement (Second) of Contracts § 16 cmt. c ("On becoming sober, the intoxicated person must act promptly to disaffirm [the contract]."). The rule in the Restatement

is an extension of what this court previously held in *Seeley*, and we adopt it as the appropriate standard for an intoxication defense in a contract action.

In proving intoxication, or a subsequent ratification, the burden of proof is usually the higher standard of clear and convincing evidence.

> In an action on a contract, a party must present convincing proof of claims that due to intoxication at the time of making a contract, the party was bereft of mental faculties. When a party to a contract was lacking in mental capacity at the time of execution by reason of drunkenness, proof of a subsequent ratification must be clear and convincing.

17B C.J.S. *Contracts* § 988 (2018) (footnote omitted). Although some courts have applied a preponderance of the evidence standard, *see Ewert v. Chirpich*, 211 N.W. 306, 307 (Minn. 1926), most courts that have reviewed this issue have applied the clear and convincing evidence standard, *see In re Wills*, 126 B.R. 489, 497 (Bankr. E.D. Va. 1991); *Van Meter v. Zumwalt*, 206 P. 507, 508-09 (Idaho 1922); *Coppolina v. Radice*, 164 N.E. 643, 644 (Ohio Ct. App. 1928); *In re Amending & Revising Okla. Unif. Jury Instructions—Civil*, 217 P.3d 620, 625 (Okla. 2009). We adopt the clear and convincing standard. On remand, the district court should instruct the jury on both the correct rule of law and burden of proof.

When the district court granted Wynn's motion in limine to exclude evidence of intoxication, it relied on *FGA, Inc. v. Giglio*, 128 Nev. 271, 278 P.3d 490 (2012). The district court stated:

> In [*Giglio*], there was evidence of drinking, but they precluded anybody from talking about that because there's nobody to testify regarding the fact that the individual was—had drank so much that they were, in fact, intoxicated.

The district court further stated, "I think that the case law and the statutes are clearly—you know, voluntary intoxication is not a defense. If it was, half the people in the casino could ask for their money back because they would say: Hey, they gave me a free drink, I kept drinking."

Giglio was a tort case in which this court affirmed the district court's decision to exclude evidence of the plaintiff's alcohol consumption because there was insufficient evidence that she was intoxicated or that the intoxication caused the injury. 128 Nev. at 285-86, 278 P.3d at 499. *Giglio* did not involve a contract dispute nor hold that intoxication was not a valid contract defense. *Id.* at 275-76, 278 P.3d at 493. We conclude that *Giglio* does not provide the district court with an adequate basis for excluding LaBarbera's intoxication evidence, as it is too factually dissimilar and does not provide the applicable rule of law. Here, LaBarbera, as the defendant, was trying

to use evidence of his own intoxication to show lack of capacity in a contract dispute.

Wynn does not argue that the district court's legal analysis was correct. Instead, the essence of Wynn's argument is that the voluntary intoxication defense is disfavored and the standard of proof is very high. Wynn also argues that even if LaBarbera was legally incapacitated, he was required to disavow the contract after regaining capacity. *See Hernandez v. Banks*, 65 A.3d 59, 67 (D.C. 2013) ("The power of avoidance also terminates if the incapacitated party, upon regaining capacity, affirms or ratifies the contract."). Wynn's arguments tend to show that LaBarbera may have difficulty proving his voluntary intoxication defense at trial, but those arguments do not justify the district court's decision to bar LaBarbera from making his argument altogether.

We conclude that the district court abused its discretion in excluding the intoxication evidence because its ruling was erroneous under *Seeley* and misinterpreted the holding in *Giglio*. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007) (stating that "the district court abuses its discretion if it applies an incorrect legal standard"). On remand, we instruct the district court to apply the correct standard, set forth in the Restatement, to determine the admissibility of LaBarbera's intoxication evidence.

CONCLUSION

The district court abused its discretion by denying LaBarbera's request to appear via video conference in violation of SCR Part IX-B(B), which states that courts shall, "to the extent feasible," permit parties to appear via simultaneous audiovisual transmission at trial where good cause is shown. We further hold that the district court abused its discretion by excluding evidence of LaBarbera's intoxication when it improperly relied on *FGA, Inc. v. Giglio*, 128 Nev. 271, 278 P.3d 490 (2012).

Accordingly, we reverse the district court's judgment and remand with instructions for the district court to conduct a new trial on all issues, consistent with this opinion. Additionally, we reverse the district court's award of contract interest, attorney fees, costs, and prejudgment interest.

Douglas, C.J., and Pickering, J., concur.

KAMESHA JOANN COOPER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71402

July 26, 2018 422 P.3d 722

Appeal from a district court's revocation of probation. First Judicial District Court, Carson City; James E. Wilson, Judge.

Reversed and remanded.

Pickering, J., dissented.

Karin L. Kreizenbeck, Public Defender, and *Sally S. deSoto*, Chief Appellate Deputy Public Defender, Carson City, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Jason D. Woodbury*, District Attorney, and *Kristin Luis* and *Meredith N. Beresford*, Deputy District Attorneys, Carson City, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

We have long recognized that the Fifth Amendment is not violated when a probationer is faced with the difficult choice of testifying at a revocation hearing or remaining silent so as not to incriminate herself should the alleged probation violation result in subsequent criminal prosecution. In this opinion we consider whether to adopt a rule of admissibility that would limit the use of the probationer's testimony in a subsequent criminal proceeding. Having considered the compelling reasons behind adopting such a rule, we choose to invoke our supervisory powers to address the tension surrounding a probationer's testimony at a revocation hearing and adopt an admissibility rule in the interest of basic fairness and the administration of justice. Accordingly, we reverse the district court's revocation of probation and remand for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

In March 2014, appellant Kamesha Cooper was placed on probation for a term not to exceed five years. In July 2016, Cooper was arrested, and a criminal complaint was filed alleging possession of false identification and concealment or destruction of evidence in the commission of a felony. The charges were subsequently dismissed without prejudice because the State needed more time to investigate and develop the case.

Meanwhile, the Division of Parole and Probation filed two reports with the district court alleging various probation violations, including a violation for failure to obey laws that was based on Cooper's arrest. At the revocation hearing, defense counsel indicated that Cooper would concede the fact that she had been arrested but requested that the district court not allow testimony related to the arrest because Cooper was placed in a tenuous position of having to choose between her right to present mitigating evidence at the revocation hearing and her right against self-incrimination regarding the potential charges. The district court opined that Cooper could be prejudiced at the revocation hearing if she did not testify and opted to proceed with evidence of Cooper's other alleged violations due to Fifth Amendment concerns. However, after the district court heard the evidence for Cooper's other alleged violations, it noted that "the evidence at this point is close to the line on whether she would be revoked or not" and allowed testimony related to Cooper's arrest. The district court acknowledged that Cooper was "either going to be prejudiced here by not testifying or prejudiced potentially in [the county where she was arrested] and potentially in other jurisdiction[s] if she does testify." Nevertheless, the district court took testimony from the arresting officer and the district attorney's office regarding the circumstances of the arrest. On the advice of counsel, Cooper did not testify to the circumstances of the arrest. Based on testimony regarding the arrest, the district court found sufficient evidence to support probation violations of intoxicants, laws, and travel and revoked Cooper's probation. This appeal was taken.

DISCUSSION

Because probation revocations are not criminal prosecutions, probationers are not afforded "the full panoply of constitutional protections" to which a criminal defendant is entitled. *Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980). However, revocation proceedings "may very well result in a loss of liberty, thereby triggering the flexible but fundamental protections of the due process clause of the Fourteenth Amendment." *Id*. The Supreme Court has held that, at a minimum, due process at a revocation hearing requires a probationer be given "an opportunity to be heard and to show . . . that he did not violate the conditions, or, . . . that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

The issue before us concerns the tension at a revocation hearing between two important rights: the due process right to have an opportunity to be heard and present mitigating evidence and the right against self-incrimination as to pending or potential criminal charges related to the alleged probation violation. We are not unfamiliar with the tension at issue, as we have previously contemplated this very

dilemma in *Dail v. State*, 96 Nev. 435, 610 P.2d 1193 (1980). In that case, we considered whether:

> [T]o permit the holding of a probation violation hearing prior to the trial of the underlying criminal charge forces an alleged violator to make a *constitutionally unfair* election of either foregoing his right to take the stand and to speak in his own behalf at the revocation hearing, or testifying at such hearing and facing the prospect that the evidence elicited through him might be used against him at or in the subsequent criminal trial.

Id. at 437, 610 P.2d at 1194 (emphasis added). We held that the conflict between the two rights was not one of constitutional import and that the lack of a constitutional conflict "le[ft] this court with a policy determination." *Id*. at 438, 610 P.2d at 1194. After examining a split in authority between those jurisdictions that utilized court supervisory powers to fashion a remedy and those that found no chilling effect by requiring the probationer to decide between the two rights, we declined to establish a rule or requirement. *Id*. at 438-40, 610 P.2d at 1194-96. Instead, we elected to "exercise judicial restraint and defer to the legislature the determination of whether public policy considerations, as distinguished from constitutional mandates, dictate a modification of revocation procedures." *Id*. at 439, 610 P.2d at 1195.[1]

Now, nearly 40 years later, this dilemma still exists for probationers at a revocation hearing to choose between the same two important rights, and there has been no undertaking to address this tension. While this court recognizes the gravity of exercising judicial restraint and deferring to the Legislature, we find ourselves in a situation akin to one the Rhode Island Supreme Court encountered in *State v. DeLomba*, 370 A.2d 1273 (R.I. 1977). There, the court had initially been reluctant to adopt a rule to ease the same tension at issue in this case and deferred the matter to the state legislature. *Id*. at 1275 ("[W]e did not close the door to future consideration of the argument now advanced. Instead, we deferred, at least for the moment, to the Legislature the determination of whether public policy considerations, as distinguished from constitutional imperatives, dictated an alteration of revocation procedures."). However, after three years of inactivity, the Rhode Island Supreme Court decided that no "useful purpose would be served by [its] continued absten-

[1]We also noted two other reasons for not adopting a rule or requirement: "our existing revocation procedures do not substantially undermine the probationer's opportunity to present an adequate defense," and "in some cases [the probationer] may profit by knowing the status of his sentence on the initial criminal charges so that if he is successfully prosecuted on the second charge the court . . . can consider imposing a concurrent or reduced sentence." *Id*. at 439, 610 P.2d at 1195-96.

tion" and utilized its supervisory jurisdiction to hold that a probationer must be given use and derivative use immunity for any testimony given at the revocation hearing or that the revocation hearing must be postponed until after the criminal trial. *Id*. at 1275-76. We, like the Rhode Island Supreme Court, initially deferred addressing this issue but, decades later, find no useful purpose in continued abstention.[2]

We emphasize that we affirm the conclusion in *Dail* that the tension at issue is not one of constitutional import. *See Dail*, 96 Nev. at 437, 610 P.2d at 1194 ("[W]e perceive no unconstitutional dilemma for the alleged violator who desires to defend himself or present mitigating evidence at a revocation proceeding. Appellant's predicament does not run afoul of constitutional due process."). It is, instead, one involving public policy and fairness. And it is with these tenets in mind that we now consider the dilemma a probationer faces at a revocation hearing involving two constitutional rights—the "right to be heard and [the] right against self-incrimination." *Id*.

"The principal policy underlying a probationer's right to an opportunity to be heard at a revocation hearing . . . is to assure *informed, intelligent and just revocation decisions*." *People v. Coleman*, 533 P.2d 1024, 1031 (Cal. 1975) (emphasis added). The district court has an interest in exercising its discretion in an informed and accurate manner. *See* NRS 176A.630 (providing the district court with disposition options after a determination that probation was violated). The probationer and the State also have an interest in "the informed use of discretion—the probationer . . . to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon*, 411 U.S. at 785. Indeed, the Supreme Court has recognized society's interest in not having supervised release rescinded "because of erroneous information or because of an erroneous evaluation of the need to revoke [supervised release], given the breach of [probation] conditions." *Morrissey*, 408 U.S. at 484. In addition, society has an interest in treating a supervised individual with basic fairness so as to improve the probability of rehabilitation. *Id*.

These interests "are seriously undermined when a probationer is deterred by the possibility of self-incrimination from taking advantage of his right to be heard at his probation revocation hearing." *Coleman*, 533 P.2d at 1031. Understandably a probationer might feel that the opportunity to be heard is "more illusory than real" when the probationer must endanger the chance of acquittal at a future trial in order to explain his or her actions while on probation. *Id*. And the probationer's explanation for his or her actions, testimony

[2]Nothing in this opinion precludes the Legislature from enacting a statute that addresses the tension at issue.

that "is likely to be more readily accepted, and hence more useful to the court," will likely be withheld due to the "probationer's fear of self-incrimination, since mitigating evidence often involves damaging factual admissions coupled with more or less compelling moral excuses." *Id*.

On the other hand, the policies underlying the right against self-incrimination are challenged when a probationer chooses to risk self-incrimination and to testify at a probation revocation hearing. At a criminal trial, the prosecution alone bears the burden of presenting sufficient evidence to establish the guilt of a defendant who is presumed innocent, and that burden must be met *before* a defendant decides to exercise the right to testify in his or her own behalf or to remain silent. *Id*. at 1032. That burden is "substantially lightened if the prosecution is allowed to take advantage of the defendant's testimony at a prior probation revocation hearing." *Id*. A probationer ends up between the proverbial rock and a hard place as the chances of revocation may be enhanced when the probationer, out of fear of self-incrimination, chooses not to testify while at the same time the chances of a future conviction may also be enhanced when the probationer testifies, thus becoming "one of the prosecution's principal witnesses in its case in chief." *Id*. at 1033.

By balancing the interests and policies behind these two constitutional rights, we are convinced that the tension at issue presents an unfair dilemma for the probationer.[3] "[B]asic fairness demands that a defendant must not be forced to forfeit one constitutional right to preserve another constitutional right." *Barker v. Commonwealth*, 379 S.W.3d 116, 123 (Ky. 2012); *see also Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (considering a defendant's choice between testifying at a hearing on a motion to suppress and waiving his right against self-incrimination or forfeiting the Fourth Amendment claim and "find[ing] it intolerable that one constitutional right should have to be surrendered in order to assert another"). Probationers in situations similar to Cooper's are faced with asserting their due process rights to be heard and present mitigating testimony, but only by forfeiting their right against self-incrimination. Indeed, the district court noted this unfairness when it remarked that either Cooper was going to be prejudiced in the revocation hearing by not testifying or potentially in another court on charges related to the arrest if she did testify. This unfairness, "even if not so severe as to rise to the level of a constitutional deprivation, is nevertheless so real and substantial that it calls for action by [the court] on public

[3]While we held in *Dail* that our "revocation procedures do not substantially undermine the probationer's opportunity to present an adequate defense" and that the probationer could possibly benefit from knowing the outcome of his revocation proceeding before any subsequent criminal trial, we note that we did not fully consider fairness to the probationer or public policy concerns, as we do now. *Dail*, 96 Nev. at 439, 610 P.2d at 1195.

policy grounds and in furtherance of [the court's] responsibility to assure a sound and enlightened administration of justice." *DeLomba*, 370 A.2d at 1275.

Thus, to ensure basic fairness and to further the administration of justice, we invoke our inherent supervisory power to adopt a rule to ease this tension. *See State v. Second Judicial Dist. Court (Marshall)*, 116 Nev. 953, 962-63, 11 P.3d 1209, 1214-15 (2000) ("[T]his court indisputably possesses inherent power to prescribe rules necessary or desirable to handle the judicial functioning of the courts."); *see also Halverson v. Hardcastle*, 123 Nev. 245, 261-62, 266, 163 P.3d 428, 439-41, 443 (2007) (recognizing this court's supervisory authority to administrate rules and procedures "when reasonable and necessary for the administration of justice" (internal quotation marks omitted)).[4] We recognize that there are limitations on this court's use of inherent power, as "inherent power should be exercised only when established methods fail or in an emergency situation." *Halverson*, 123 Nev. at 263, 163 P.3d at 441. However, it is clear to us that established methods have failed to address the quandary faced by Cooper and other probationers in her situation and that invocation of our inherent power to create a rule addressing the issue is "reasonable and necessary for the administration of justice." *Id*. at 261, 163 P.3d at 440 (internal quotation marks and emphasis omitted).

Therefore, we join our sister courts in adopting a rule to limit the use of a probationer's testimony given at a probation revocation hearing.[5] *See id*. at 438, 610 P.2d at 1194-95 (listing jurisdictions that had adopted use and derivative use immunity for a probationer's testimony or the option of proceeding with the criminal trial before the revocation hearing); *see also McCracken v. Corey*, 612 P.2d 990, 997-98 (Alaska 1980) (providing for an exclusionary rule

[4]The dissent criticizes the adoption of an exclusionary rule not statutorily or constitutionally required. Neither party argues that this court is without the power to create a rule; indeed, the State argues in its brief that this court could develop an evidentiary rule to address the tension at issue. And this court has in the past developed rules when the need has arisen, even when not mandated by a statute or the constitution. *See, e.g.*, *State v. Eighth Judicial Dist. Court (Romano)*, 120 Nev. 613, 623, 97 P.3d 594, 601 (2004) (holding that the State cannot introduce expert evidence when a sexual assault victim has refused to submit to a psychological examination ordered by the district court), *overruled by Abbott v. State*, 122 Nev. 715, 718, 138 P.3d 462, 464 (2006).

[5]Cooper urges this court to find error where the district court proceeds with a probation violation hearing prior to the resolution of criminal proceedings on the same facts. As in *Dail*, "we decline to *require* that a criminal trial be conducted prior to a probation revocation hearing." *Dail*, 96 Nev. at 439-40, 610 P.2d at 1196 (emphasis added). Such a requirement would not best serve the interests of the State and the probationer to resolve the allegation of a probation violation expeditiously and would unduly fetter the district court's "discretion to impose an appropriate sanction against a probationer who appears not to be amenable to the probationary order." *Id.* at 438-39, 610 P.2d at 1195.

of evidence or testimony presented at a probation revocation hearing and any "fruits of the . . . revocation hearing"); *State v. Boyd*, 625 P.2d 970, 972 (Ariz. Ct. App. 1981) (referencing state rules of criminal procedure that limit the use of a probationer's testimony at a probation revocation hearing to impeachment at a trial); *State v. Heath*, 343 So. 2d 13, 16 (Fla. 1977) (recognizing the right against self-incrimination applies to specific conduct and circumstances related to a separate crime); *Barker*, 379 S.W.3d at 127-28; *State v. Begins*, 514 A.2d 719, 722-23 (Vt. 1986) (adopting use and derivative use immunity).

While some jurisdictions have opted to frame this remedy as a rule of immunity, we consider it a rule of admissibility, akin to the rule created in NRS 47.090, wherein testimony by a defendant at a suppression hearing "is not admissible against the accused on the issue of guilt at the trial." Thus, it is in the interest of basic fairness and in furtherance of our responsibility in the administration of justice that we declare:

> [U]pon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruit in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing.

Coleman, 533 P.2d at 1042. At the probation revocation hearing, the district court should advise probationers that any testimony related to separate crimes at issue at the hearing cannot be substantively used in a subsequent criminal proceeding in Nevada except for purposes of impeachment or rebuttal.[6]

We believe this rule balances the probationer's and the State's interests at the probation revocation hearing. Our belief is only strengthened when we consider that such a rule would not prejudice the State. Indeed, not only did the State fail to identify any prejudice

[6]As discussed in *Coleman*, the rule may not be expanded by a probationer but serves to protect testimony related to circumstances at issue at the revocation hearing. *Id*. at 1042-43. Additionally, the rule does not alter jurisprudence regarding the presentation of evidence derived from an independent source. *See generally Kastigar v. United States*, 406 U.S. 441, 461 (1972) (reaffirming the application of the independent source doctrine in the Fifth Amendment context).

in its briefing, it failed to identify any prejudice when asked directly at oral argument. The rule also advances the district courts' interest in the informed exercise of discretion pursuant to NRS 176A.630. As noted, the Legislature has adopted a similar rule in the context of hearings on a motion to suppress. *See* NRS 47.090. And this rule will remove any improper incentive to proceed with probation revocation hearings "as a way to gain an unfair advantage at a subsequent criminal trial." *Begins*, 514 A.2d at 723. Moreover, the probationer is not shielded from prosecution for perjury or similar crimes resulting from testimony or evidence produced either at the probation violation hearing or at the criminal trial as "[t]he protection extended does not give [the probationer] a right to lie in his own behalf." *DeLomba*, 370 A.2d at 1276.

In the instant matter, Cooper did not testify at the probation violation hearing as to the circumstances surrounding her alleged law violation. We need not conjecture whether her decision was one based on her desire to preserve her privilege against self-incrimination. She clearly acknowledged that she had been advised by counsel not to testify regarding the circumstances of her arrest and that she felt she could not go further in defending her actions without risking her right against self-incrimination. The district court acknowledged that it was proceeding in spite of Cooper's quandary.[7]

In accordance with our discussion, the order revoking probation is reversed, and this matter is remanded to the district court for further proceedings consistent with this opinion.

Douglas, C.J., and Cherry, Gibbons, Hardesty, and Parraguirre, JJ., concur.

Pickering, J., dissenting:

I respectfully dissent, for three reasons. First, this court's "supervisory powers" do not authorize it, in deciding an individual case, to promulgate new evidentiary exclusionary rules that are neither statutorily nor constitutionally based. Second, even if the court had such broad supervisory powers, this case is a poor candidate for their exercise, given that Cooper asked the district court for a continuance, not a ruling she could testify and have her testimony excluded in a later proceeding, and with good reason: Cooper faced possible federal or out-of-state prosecution for the offense giving rise to her probation revocation proceeding, and a Nevada state court's promise to exclude evidence in future proceedings lacks extrajurisdictional force. Finally, *Dail v. State*, 96 Nev. 435, 610 P.2d 1193

[7]The dissent remarks on the district court's attempt to avoid any entanglement with Cooper's right against self-incrimination by bifurcating the hearing. We agree the district court acted laudably in its efforts, but in the absence of the rule adopted in this opinion, the district court was unable to ameliorate Cooper's dilemma.

(1980), rejected the exclusionary rule the majority today adopts. Stare decisis counsels against overruling precedent unless the precedent has proved unworkable or badly reasoned and, as the district court's expert handling of Cooper's probation revocation hearing illustrates, *Dail* is functioning well and should not be overruled.

1. *The court's "supervisory powers" do not authorize it to promulgate exclusionary rules that are not statutorily or constitutionally based*

Nevada adopted its evidence code in 1971. *See* 1971 Nev. Stat., ch. 402. In doing so, Nevada adopted the broad rule of admissibility stated in NRS 48.025(1), which declares: "All relevant evidence is admissible, except: (a) As otherwise provided in this title [the Nevada Evidence Code; or] (b) As limited by the Constitution of the United States or of the State of Nevada." Like its federal counterpart, Federal Rule of Evidence 402, NRS 48.025(1) "abolished the prior decisional law of evidence" such that, from the time of its adoption forward, "courts could not use their common law powers to create new exclusionary rules except through constitutional interpretation, statutory amendment [or interpretation], or the Supreme Court's [formal] rulemaking powers." 22A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5199, at 95 (2d ed. 2014).[1]

The majority acknowledges that its new exclusionary rule is not statutorily based or constitutionally required. Maj. op., *supra*, at 401, 404. Lacking statutory or constitutional predicate, it invokes its "supervisory powers" to justify creating a new exclusionary rule. *Id.* at 404. But without a basis in statute or constitutional text, this new rule conflicts with NRS 48.025(1)'s declaration that "all relevant evidence is admissible" and, ultimately, with the point of having a uniform evidence code. *See* 22A Charles Alan Wright & Kenneth W. Graham, Jr., *supra*, § 5199, at 99 & n.26 (criticizing the California Supreme Court for "continu[ing] to churn out new exclusionary rules despite the adoption of the Evidence Code" and for "using 'supervisory power' to [judicially] create [an exclusionary] rule barring use of probationer's testimony at a revocation hearing against him at a later criminal trial," citing *People v. Coleman*, 533 P.2d 1024 (Cal. 1975)). It is unwise to invoke supervisory powers to promulgate

[1]NRS 2.120 authorizes this court to adopt rules by formal rule-making procedures, which this court has construed to require public notice and hearing before adoption. NRS 48.025(1) was adopted in 1971 and did not include the exception for "rules prescribed by the Supreme Court pursuant to statutory authority" that Fed. R. Evid. 402, as adopted in 1974, did. *See* 22A Charles Alan Wright & Kenneth W. Graham, Jr., *supra*, § 5191.1, at 7. We have not decided whether, given this omission, this court could use its formal rule-making authority under NRS 2.120(1) to promulgate exclusionary rules that conflict with NRS 48.025(1), and are not based on a statute or constitutional provision.

evidentiary exclusionary rules that not only lack a basis in statute or constitutional text but conflict with the evidence code.

2. *The new exclusionary rule the majority announces will not advance Cooper's cause, as her failure to request such relief in district court confirms*

This case does not fairly present the issue the majority undertakes to decide. In district court, Cooper asked to postpone the probation revocation hearing altogether. She did *not* ask the district court to let her testify at the probation revocation hearing without having the testimony used against her in future criminal proceedings. *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, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."). Strategically, this made sense. No charges were pending against Cooper when the probation revocation hearing took place. The conduct that led to Cooper's arrest in Elko crossed state lines, from California, to Nevada, to Utah, and beyond, and involved Homeland Security and potential federal charges; at the time the probation revocation hearing occurred, the different jurisdictions were still sorting out what charges to bring, and where.

The majority's new exclusionary rule might protect a probationer like Cooper from having her probation-revocation-hearing testimony used against her in a later Nevada state-court criminal case. But, that protection would not extend to the federal courts, should Cooper be federally prosecuted, *see* 22A Charles Alan Wright & Kenneth W. Graham, Jr., *supra* § 5201, at 110 n.11 (federal not state law governs the admissibility of evidence in federal court) (collecting cases), and might or might not apply in other states' courts. To reverse and remand so the district court can extend Cooper a limited immunity she didn't request and that would not protect her from the non-Nevada charges she potentially faced does not help her cause and I would deem the issue waived. *See People v. Koba*, 371 N.E.2d 1, 3 (Ill. App. 1977) (affirming probation revocation order and holding that the appellant probationer waived the argument for use immunity by not seeking it in district court); *State v. Watts*, No. A12-0317, 2012 WL 6734455, at *2 (Minn. App. Dec. 31, 2012) (rejecting argument that the district court abused its discretion by revoking appellant's probation without offering him limited use immunity where, as here, the appellant did not request this relief in district court).

3. *Dail has not proved unworkable*

The majority *sub silentio* overrules *Dail v. State*, 96 Nev. 435, 610 P.2d 1193 (1980), without the justification *stare decisis* requires to overrule existing case law. In *Dail*, we held that a defendant who

is arrested while on probation and faces new criminal charges as a result does not have the right to delay a probation revocation hearing or to testify at such hearing under a grant of limited use immunity. *Id.* at 438-39, 610 P.2d at 1194-95. In doing so, we considered and rejected California's *People v. Coleman* decision. *Id.* at 439, 610 P.2d at 1195 ("[t]here exists a number of . . . cogent reasons why we are unable to subscribe to the holding in *People v. Coleman*"). *Dail* did not call on the Legislature to adopt the exclusionary rule judicially created in *Coleman*, as the majority suggests; *Dail* held that it was for the Legislature, not the court, to decide whether public policy supported adoption of such an exclusionary rule and, if so, to enact a statute creating one. *Id.*; *see* NRS 48.025(1)(a).

The doctrine of *stare decisis* requires adherence to past precedent unless "compelling," "weighty," or "conclusive" reasons exist for overruling it. *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008); *compare id.* at n.63 ("a court generally will not disavow one of its precedents unless serious detriment prejudicial to the public interest is demonstrated"), *with State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (prior case law will not be overruled unless "badly reasoned" and "unworkable"). The proceedings in district court do not establish the "compelling," "weighty," and "conclusive reasons" required to overturn *Dail*. In fact, they establish the opposite. First, as discussed above, the exclusionary rule will not help probationers like Cooper who face federal and possible out-of-state charges—and might even harm them by offering a false assurance Nevada courts cannot provide. Second, Nevada's district courts have taken to heart *Dail*'s concerns and are balancing them effectively on a case-by-case basis.

Apprised of the potential new charges Cooper faced, the district judge in this case took steps to minimize the prejudice to Cooper, yet protect the public and avoid undue delay. To those ends, the district judge bifurcated the probation revocation hearing, proceeding first on the probation violations alleged that predated and thus did not involve the potential new charges stemming from Cooper's Elko arrest. It was not until Cooper's California probation officer satisfactorily explained her non-reporting to Nevada, eliminating that basis for revoking probation, that the judge heard from the highway patrol officer who arrested Cooper in Elko. The officer testified that Cooper and her companion admitted they had been in Idaho, Utah, and Wyoming and that, when searched incident to her arrest, Cooper had concealed in her underwear fake identification and thousands of dollars in bogus gift and credit cards in other people's names.

The district judge then gave Cooper the opportunity to speak, advising her as follows:

> Ms. Cooper, I want to give you a chance to speak to me if you want to. You do need to be aware that anything you say here could be used against you in some other jurisdiction.

> So, with that caution, and you're not required to say anything, if you don't say anything I'm not going to hold that against you in any way, but I want to give you the opportunity if you do want to say anything.

The judge allowed Cooper to exercise her right of allocution without being sworn. Though she did not address her Elko arrest, Cooper spoke at length about her successes and failures while on probation and potential mitigation, and the State did not cross-examine her. Before ruling, the judge again addressed Cooper's Fifth Amendment concerns, reiterating that he did not "hold against her that she didn't talk about the facts of the [potential Elko charges]," and acknowledging that "[s]he did make a statement and the court has considered that."

"[T]he law is well-established that revocation of probation is within the exercise of the trial court's broad discretionary power and such an action will not be disturbed in the absence of a clear showing of abuse of that discretion." *Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974). The evidence supporting a decision to revoke probation need only "satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation." *Id.* The district judge revoked Cooper's probation based on her unauthorized travel out of California to Nevada, Idaho, Utah, and Wyoming and the fact that, when stopped, "she had a fake Utah driver's license" and "concealed credit cards in her [underpants and] bra" that did not appear genuine.

The record supported the district judge's decision to revoke Cooper's probation. More important, it provides a roadmap for how, under *Dail*, a district judge should proceed when a probationer faces revocation based on conduct giving rise to potential new state, federal, and extra-jurisdictional charges. The district judge did not abuse his discretion; he exercised it admirably.

For these reasons, I would affirm, not reverse, and therefore respectfully dissent.

MICHAEL DAMON RIPPO, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 53626

August 2, 2018 423 P.3d 1084

Appeal from the denial of a postconviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; David Wall, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied December 7, 2018]

Pickering, J., dissented in part. Cherry, J., dissented in part.

Rene L. Valladares, Federal Public Defender, and *David Anthony* and *Michael Pescetta*, Assistant Public Defenders, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.[1]

Before the Supreme Court, En Banc.[2]

OPINION

By the Court, Hardesty, J.:

This matter is before us on remand from the United States Supreme Court. Our prior opinion in this case, *Rippo v. State (Rippo III)*, 132 Nev. 95, 368 P.3d 729 (2016), affirmed a district court order denying appellant Michael Damon Rippo's second postconviction petition for a writ of habeas corpus, which challenged his conviction for two first-degree murders and related felony offenses and his death sentences. The petition was both untimely and successive. Our opinion focused primarily on Rippo's argument that he had shown good cause and prejudice to excuse the procedural bars to his petition based on the alleged ineffective assistance of his first postconviction counsel. We reiterated the holdings from this court's decisions in *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247 (1997), and *McKague v. Warden*, 112 Nev. 159, 912 P.2d 255 (1996), that

[1]After this appeal was briefed, argued, and submitted for decision, attorney Steven Wolfson was appointed Clark County District Attorney. Mr. Wolfson was one of the attorneys who represented appellant Michael Damon Rippo at trial. He has not appeared as the district attorney in this appeal.

[2]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

where a petitioner is entitled to the appointment of postconviction counsel pursuant to a statutory mandate, the ineffective assistance of that counsel may provide good cause for filing a second petition but that the ineffective-assistance claim must not itself be procedurally barred, *see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). We then addressed two issues related to whether an ineffective-assistance-of-postconviction-counsel claim, asserted as good cause to excuse other defaulted claims, has been raised in a timely fashion: (1) when does a postconviction-counsel claim reasonably become available, and (2) what is a reasonable time thereafter in which the claim must be asserted. As to the first question, we held that the factual basis for a claim of ineffective assistance of postconviction counsel is not reasonably available until the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred. As to the second question, we held that a petition asserting ineffective assistance of postconviction counsel to excuse the procedural default of other claims has been filed within a reasonable time after the postconviction-counsel claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. Our prior opinion also took the opportunity to explain the test for evaluating claims of ineffective assistance of postconviction counsel, adopting the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Applying those holdings, we concluded that although Rippo filed his petition within a reasonable time after the postconviction-counsel claims became available, those claims lacked merit and therefore he had not demonstrated good cause for an untimely petition or good cause and prejudice for a second petition. We also rejected his other allegations of good cause and prejudice. Accordingly, we determined that the district court properly denied the petition as procedurally barred and therefore affirmed.

Rippo petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari, vacated our prior opinion, and remanded for further proceedings. *Rippo v. Baker (Rippo IV)*, 137 S. Ct. 905 (2017). The Supreme Court's decision touched on only one of the many issues discussed in our prior opinion: Rippo's judicial bias claim. As to that issue, the Supreme Court determined that we applied the wrong legal standard by focusing on whether Rippo's allegations demonstrated actual bias rather than asking "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.* at 906-07. The Court then vacated our prior judgment and remanded "for further proceedings not inconsistent with this opinion." *Id.*

Upon reconsideration of the judicial-bias claim, we conclude that an evidentiary hearing is required. Rippo has offered some evidence in support of the judicial-bias claim that is substantially different than what was available to his trial and appellate counsel and this court on direct appeal, such that the law-of-the-case doctrine may not bar further litigation of this claim. And, considering the inquiry required by the Supreme Court, the judicial-bias claim may have merit if the new allegations are true. Rippo also made sufficient allegations that prior postconviction counsel provided ineffective assistance by not investigating and reasserting the judicial-bias claim, which would if true provide good cause to excuse the procedural defaults relevant to the judicial-bias claim. We therefore conclude that an evidentiary hearing is required with respect to these issues related to the judicial-bias claim. Accordingly, we reverse the district court's order as to the first claim in the postconviction petition and remand for an evidentiary hearing consistent with this opinion. Because the Supreme Court's decision did not affect the other holdings in our prior opinion, we reproduce most of our prior opinion and once again affirm the remainder of the district court's order.

FACTS AND PROCEDURAL HISTORY

The bodies of Denise Lizzi and Lauri Jacobson were found in Jacobson's apartment on February 20, 1992. Rippo and his girlfriend, Diana Hunt, were charged in the robbery and murder of Lizzi and Jacobson.[3] Hunt agreed to plead guilty to robbery and testify against Rippo. According to Hunt's testimony, Rippo hatched a plan to rob Lizzi that included Hunt subduing Jacobson by hitting her with a beer bottle. In carrying out the plan, Rippo used a stun gun to subdue both women, bound and gagged them, and strangled them;[4] wiped down the apartment with a rag and removed Lizzi's boots and pants because he had bled on her pants; and took Lizzi's car and credit cards, later using the credit cards to make several purchases. Approximately one week later, Rippo confronted Hunt, who suggested that they turn themselves in to the police. Rippo refused, telling Hunt that he had returned to Jacobson's apartment, cut the women's throats, and jumped up and down on them. Other witnesses provided testimony linking Rippo to property taken from the women. And several witnesses testified to incriminating statements made by Rippo. The medical examiner testified that Lizzi's injuries were consistent with manual and ligature strangulation and that Jacobson died

[3]The facts are set forth in greater detail in our opinion on direct appeal from the judgment of conviction. *Rippo v. State (Rippo I)*, 113 Nev. 1239, 1244-47, 946 P.2d 1017, 1021-23 (1997).

[4]Hunt testified that when she accused Rippo of choking the women, he told her that he had temporarily cut off their air supply and that he and Hunt needed to leave before the women regained consciousness.

from asphyxiation due to manual strangulation. But the medical examiner also testified that neither body revealed stun gun marks. A jury found Rippo guilty of two counts of first-degree murder and one count each of robbery and unauthorized use of a credit card.

At the penalty hearing, the State alleged six aggravating circumstances: that the murders were committed (1) by a person who was under a sentence of imprisonment; (2) by a person who was previously convicted of a felony involving the use or threat of violence to the person of another; (3) during the commission of a burglary; (4) during the commission of a kidnapping; (5) during the commission of a robbery; and (6) that the murders involved torture, depravity of mind, or the mutilation of the victims. In support of the first two aggravating circumstances, the State presented evidence that Rippo had a prior conviction for sexual assault and was on parole at the time of the murders. The remaining aggravating circumstances were supported by the guilt-phase evidence. In addition to the evidence supporting the aggravating circumstances, the State presented evidence that Rippo had a prior conviction for burglary and had confessed to committing numerous burglaries. The State also presented evidence about Rippo's conduct while in prison, that on one occasion he had been found with weapons in his cell, and on another occasion he threatened to kill a female prison guard. Finally, the State called five members of Jacobson's and Lizzi's families who provided victim-impact testimony.

The defense presented three witnesses in mitigation: (1) a prison worker testified that Rippo had not presented any problems while incarcerated; (2) Rippo's stepfather, Robert Duncan, testified regarding Rippo's friendly behavior when living with him while on parole and asked the jury to spare Rippo's life; and (3) Rippo's sister testified that their former stepfather, James Anzini, emotionally abused Rippo and had stolen his paychecks and gambled them away, and she urged the jury to show mercy. The defense also presented a letter from Rippo's mother, who was unable to testify in person because of medical issues. She described Rippo's upbringing and personality as a child (inquisitive, tender, and loving). She explained that Anzini made his living by gambling and that as a result, the family environment was not stable. She further described Rippo's relationship with Anzini in his teen years; the circumstances leading to Rippo's juvenile adjudication and commitment; the impact on the family environment and Rippo when Anzini was diagnosed with terminal cancer, eventually leading up to the sexual assault committed by Rippo in 1981; and Rippo's efforts to improve himself while incarcerated. At the conclusion of the penalty hearing, Rippo made a statement in allocution.

The jury found all six aggravating circumstances, concluded that the mitigating circumstances did not outweigh the aggravating cir-

cumstances, and imposed a sentence of death for each murder. This court affirmed the convictions and sentences on direct appeal. *Rippo I*, 113 Nev. at 1265, 946 P.2d at 1033. The remittitur issued on November 3, 1998.

Rippo filed a timely postconviction petition for a writ of habeas corpus in the district court on December 4, 1998, which was supplemented twice (on August 8, 2002, and February 10, 2004). As required by NRS 34.820, Rippo was represented by court-appointed counsel in the postconviction proceeding. Following an evidentiary hearing, the district court denied the petition. *See Rippo v. State (Rippo II)*, 122 Nev. 1086, 1091, 146 P.3d 279, 282 (2006). On appeal, this court struck three of the six aggravating circumstances pursuant to *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004)—the circumstances alleging that the murders occurred during the commission of a burglary, a kidnapping, and a robbery—but affirmed the denial of Rippo's petition after concluding in a 4-3 decision that the jury's consideration of the invalid aggravating circumstances was harmless beyond a reasonable doubt. *Rippo II*, 122 Nev. at 1094, 1098, 146 P.3d at 284, 287. The remittitur issued on January 16, 2007.

Rippo filed a second postconviction petition for a writ of habeas corpus on January 15, 2008, with the assistance of the Federal Public Defender's Office. The 193-page petition asserted 22 grounds for relief, some of which had been raised in prior proceedings and others that were new.[5] The State moved to dismiss the petition as procedurally barred, and Rippo sought leave to conduct discovery. After hearing argument on the petition and motions, the district court granted the State's motion to dismiss and denied Rippo's motion for discovery as moot. This appeal followed.

DISCUSSION

The petition at issue raised claims for relief based on trial error, prosecutorial misconduct and failure to disclose evidence, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and ineffective assistance of postconviction counsel. Rippo acknowledged that the petition was not filed within the time period provided by NRS 34.726(1) and that most of the grounds in the petition were either waived, successive, or an abuse of the writ and therefore subject to various procedural defaults under NRS 34.810. He provided several explanations for his failure to file the petition within the time provided by NRS 34.726(1) and for failing to raise the new claims in prior proceedings or raising the claims again. The district court dismissed the petition as procedurally defaulted, specifically mentioning NRS 34.726 and NRS 34.810(2). In reviewing

[5]The petition was accompanied by approximately 17 volumes of exhibits.

the district court's application of the procedural default rules, we will give deference to its factual findings but "will review the court's application of the law to those facts de novo." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

Ineffective assistance of postconviction counsel as cause and prejudice to excuse a procedural default

This opinion focuses on Rippo's allegations that counsel appointed to represent him in his first postconviction proceeding provided ineffective assistance (postconviction-counsel claim). We have recognized a right to effective assistance of postconviction counsel only where the appointment of postconviction counsel is statutorily mandated. *See Crump v. Warden*, 113 Nev. 293, 303 & n.5, 934 P.2d 247, 253 & n.5 (1997); *McKague v. Warden*, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). Under Nevada law, the appointment of postconviction counsel is statutorily mandated in one circumstance: where the "petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence." NRS 34.820(1)(a). That is the case here—Rippo has been sentenced to death and his prior petition was the first one challenging the validity of his conviction and sentence. Rippo therefore was entitled to effective assistance of that counsel.

Rippo's allegations regarding postconviction counsel arise in two contexts. First, Rippo asserted a postconviction-counsel claim as a free-standing claim for relief from his judgment of conviction and sentence (claim 20(A), (B)).[6] Second, Rippo asserted that postconviction counsel's ineffective assistance established "cause and prejudice" to excuse the procedural default of the other claims in his petition. In both contexts, we must address the allegations about postconviction counsel's performance within the prism of the three procedural bars that are implicated by the petition and the district court's decision: the second-or-successive-petition bar set forth in NRS 34.810(2), the waiver bar set forth in NRS 34.810(1)(b), and the time bar set forth in NRS 34.726(1).[7]

---

[6]The free-standing claim raises another issue that has not been adequately addressed by the parties and therefore is not addressed in this opinion: whether a free-standing claim of ineffective assistance of postconviction counsel is cognizable in a postconviction petition for a writ of habeas corpus given that there is no constitutional right to postconviction counsel. *See* NRS 34.724(1) ("Any person convicted of a crime and under sentence of death or imprisonment who *claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State* . . . may . . . file a postconviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence . . . ." (emphasis added)).

[7]Rippo's petition was subject to a fourth procedural bar, laches under NRS 34.800, because it was filed more than five years after our decision on direct appeal from the judgment of conviction. *See* NRS 34.800(2). Although the State pleaded laches below as required by NRS 34.800(2), we decline to address it because the district court did not mention laches in its order and the State has not

Successive petitions and abuse of the writ

We start with the statutory provision that limits second or successive habeas petitions that challenge a judgment of conviction or sentence. Under NRS 34.810(2), such a petition must be dismissed in either of two circumstances: (1) if "it fails to allege new or different grounds for relief and . . . the prior determination was on the merits" or (2) "if new and different grounds are alleged" and the court finds that the petitioner's failure "to assert those grounds in a prior petition constituted an abuse of the writ." To avoid dismissal under this provision, the petitioner must plead and prove specific facts that demonstrate both "[g]ood cause for the petitioner's failure to present the claim or for presenting the claim again" and "[a]ctual prejudice to the petitioner." NRS 34.810(3). Here, the prior petition was resolved on the merits and all of the grounds in the second petition had been raised in the prior petition or were new and different grounds for relief. The second petition therefore was subject to dismissal under NRS 34.810(2) absent a showing of cause and prejudice under NRS 34.810(3).

Failure to raise claims in prior proceedings

A petition also may be subject to dismissal under NRS 34.810(1)(b) if it raises any grounds that could have been raised in a prior proceeding (whether at trial, on appeal, or in a prior postconviction proceeding). Like the procedural default for second and successive petitions under NRS 34.810(2), this procedural default may be excused by a showing of "cause for the failure to present the grounds and actual prejudice," NRS 34.810(1)(b), and the petitioner has "the burden of pleading and proving specific facts that demonstrate" cause and actual prejudice, NRS 34.810(3). Most of the grounds raised in Rippo's petition could have been raised in a prior proceeding, including those based on alleged errors that occurred at trial (claims 1, 2, 6-14), which could have been raised on direct appeal; ineffective assistance of trial and appellate counsel (claims 3-8, 10-12, 14, 16-19), which could have been raised in the prior postconviction habeas petition; errors on appellate review (claim 15), which could have been raised in a petition for rehearing; and errors or irregularities in the prior postconviction proceeding (claim 20(C)-(G)), which could have been raised in the prior postconviction appeal. Those grounds therefore are subject to dismissal under NRS 34.810(1)(b).[8]

---

asserted it as an alternative basis on which to affirm the district court's decision aside from a summary statement on the final page of its brief that claim 21 is "subject to laches."

[8]The free-standing postconviction-counsel claim (claim 20(A), (B)) could not have been raised in a prior proceeding; that ground therefore is not subject to NRS 34.810(1)(b) to the extent that it is cognizable, *see supra* n.6. *See Riker*, 121 Nev. at 235, 112 P.3d at 1077.

Procedural default of cause-and-prejudice claim

To demonstrate the cause required to excuse the procedural default of claims under NRS 34.810(1)(b) and (2), the petitioner must show that "an impediment external to the defense" prevented the petitioner from presenting the claims previously or warrants presenting them again. *Clem v. State*, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). In an effort to make the required showing, Rippo relies primarily on allegations that his first postconviction counsel provided ineffective assistance.

This court has addressed ineffective assistance of postconviction counsel as cause to excuse a procedural default under NRS 34.810(1)(b) in *Crump*. In that case, we held that where a petitioner has the statutory right to assistance of postconviction counsel, a meritorious claim that postconviction counsel provided ineffective assistance may establish cause under NRS 34.810(1)(b) for the failure to present claims for relief in a prior postconviction petition for a writ of habeas corpus.[9] 113 Nev. 293, 304-05, 934 P.2d 247, 254 (1997). But we have also recognized that an ineffective-assistance-of-counsel claim cannot be asserted as cause to excuse the procedural default of another claim for relief if the ineffective-assistance claim is itself defaulted. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *accord Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000) (holding that ineffective-assistance claim asserted in federal habeas petition as cause for procedural default of another claim may itself be subject to procedural default that can be excused only by satisfying cause-and-prejudice standard with respect to ineffective-assistance claim). That is the case here: Rippo's ineffective-assistance-of-postconviction-counsel claim is itself subject to procedural default under NRS 34.726(1).[10] *Riker*, 121 Nev. at 235, 112 P.3d at 1077; *see also Pellegrini*, 117 Nev. at 869-70, 34 P.3d at 526 (rejecting argument that NRS 34.726 does not apply to second or successive petitions).

---

[9]We have held that good cause cannot be shown based on a postconviction-counsel claim where there is no constitutional or statutory right to counsel. *McKague*, 112 Nev. at 164-65, 912 P.2d at 258; *see also Brown v. McDaniel*, 130 Nev. 565, 567, 331 P.3d 867, 869 (2014) (holding that decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), does not address state procedural default rules and refusing to recognize ineffective assistance of postconviction counsel as good cause where petitioner did not have statutory or constitutional right to postconviction counsel).

[10]This procedural default was not addressed in *Crump* because Crump filed his petition in 1989, before NRS 34.726 had been adopted. *See* 1991 Nev. Stat., ch. 44, § 5, at 75-76 (adopting NRS 34.726); *id.* § 33, at 92 (providing that amendments did not apply to postconviction proceedings commenced before January 1, 1993).

Availability of postconviction-counsel claim and time within which it must be raised

Under NRS 34.726(1), a habeas petition challenging a judgment of conviction or sentence must be filed within one year after entry of the judgment of conviction, or if a timely appeal is taken from the judgment of conviction, within one year after this court issues its remittitur on direct appeal from the judgment of conviction. *Dickerson v. State*, 114 Nev. 1084, 1087-88, 967 P.2d 1132, 1133-34 (1998) (construing NRS 34.726(1) to allow one year from remittitur on direct appeal only if direct appeal was timely). Rippo's petition was not filed within that time period. To excuse the delay in filing the petition, Rippo had to demonstrate good cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*

The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem*, 119 Nev. at 621, 81 P.3d at 525; *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem*, 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Rippo argues that there was such an impediment. Specifically, he asserts that the delay in filing the petition was due to ineffective assistance of postconviction counsel and that his postconviction-counsel claim was not available at the time of the procedural default under NRS 34.726(1). We agree.

The availability of a postconviction-counsel claim is related to the showing that a petitioner must make to prove the claim. To make out a claim that postconviction counsel provided ineffective assistance, a petitioner must demonstrate that counsel's performance was deficient and that the deficient performance resulted in prejudice. *See* discussion *infra* pp. 422-25. Although a petitioner knows during the course of the postconviction proceedings that postconviction counsel omitted claims or presented claims in a certain way, he cannot state a claim of ineffective assistance of postconviction counsel until he has suffered prejudice. The basis for the claim thus depends on the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred. *Paz v. State*, 852 P.2d 1355, 1358 (Idaho 1993) (Bistline, J., dissenting); *cf. K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 369-70, 811 P.2d 1305, 1306 (1991) (explaining that statute of limitations for attorney malpractice action does not begin to run until claimant sustains damages and "that damages for

attorney malpractice are premature and speculative until the conclusion of the underlying lawsuit in which the professional negligence allegedly occurred"). In this case, as with most capital cases, the postconviction proceedings did not conclude within the time period provided in NRS 34.726(1). Therefore, the claim that postconviction counsel provided ineffective assistance in litigating the prior petition was not reasonably available to Rippo at the time of the procedural default under NRS 34.726(1).

The fact that the claim was not reasonably available within the one-year period does not end the inquiry because a petitioner does not have an indefinite period of time to raise a postconviction-counsel claim. As we have recognized, "[t]he necessity for a workable [criminal justice] system dictates that there must exist a time when a criminal conviction is final." *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984) (explaining consideration behind decision to restrict postconviction petition for writ of habeas corpus before enactment of specific statutory time limitations on such petitions). Consistent with that need for finality, we have held that when a petition raises a claim that was not available at the time of a procedural default under NRS 34.726(1), it must be filed within "a reasonable time" after the basis for the claim becomes available. *Hathaway*, 119 Nev. at 254-55, 71 P.3d at 507-08 (discussing delay in filing petition alleging appeal-deprivation claim where petitioner believed that attorney had filed appeal and did not learn of attorney's failure to file appeal before procedural default under NRS 34.726(1)). To determine whether Rippo's petition was filed within a reasonable time, we must answer two questions: (1) when does a claim that postconviction counsel provided ineffective assistance become available, and (2) what is a reasonable time thereafter for filing a petition that raises the claim.

The answer to the first question is related to the basis for a postconviction-counsel claim. We reasoned above that a necessary basis for a claim of ineffective assistance of postconviction counsel depends on the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred. Consistent with that determination, we conclude that the postconviction-counsel claim becomes available at the conclusion of those proceedings. Although there is no mandatory appeal in the postconviction context and it is not clear that there is a statutory right to counsel to pursue an appeal from an order denying a postconviction habeas petition even when there was such a right to counsel in the district court,[11]

[11]The Supreme Court has indicated that there is no constitutional right to assistance of counsel on appeal from an "initial-review collateral proceeding." *Coleman v. Thompson*, 501 U.S. 722, 755 (1991); *see also Martinez v. Ryan*, 566 U.S. 1, 16 (2012) ("The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for

we conclude that as a practical matter, if a timely appeal is taken, the postconviction proceeding concludes when this court issues its remittitur on appeal. Otherwise, there is the potential for piecemeal litigation that would further clog the criminal justice system. If no timely appeal is filed, the postconviction proceeding concludes when the district court enters its judgment resolving the petition. In this case, the prior postconviction proceeding concluded when this court issued its remittitur in the postconviction appeal on January 16, 2007. Rippo's postconviction-counsel claim therefore became available on that date.

The next question is whether Rippo's petition was filed within a reasonable time after the postconviction-counsel claim became available. Rippo asserts that a reasonable time for filing a petition that raises a postconviction-counsel claim would be within one year after the claim becomes available, similar to the time limit set forth in NRS 34.726(1). The State, on the other hand, suggests that a delay of even less than one year may be unreasonable depending on the circumstances, thus proposing more of a claim-by-claim approach. Both positions hold some appeal. Rippo's position provides a bright-line rule while providing sufficient time to investigate additional claims that may not appear from the record. The State's position acknowledges that most omitted claims will appear in the record and that a year is not required for all claims that may have been unavailable at the time of a default under NRS 34.726(1). We are reluctant, however, to take the State's approach because it would only add to the already endless litigation over the application of the procedural default rules, rules that are supposed to discourage the perpetual filing of habeas petitions, *see Pellegrini*, 117 Nev. at 875, 34 P.3d at 529. One needs only look to the California experience in applying its requirement that a habeas petition be filed without "substantial delay" to understand our reticence to use an imprecise standard in this arena. *See generally In re Gallego*, 959 P.2d 290 (Cal. 1998); *In re Robbins*, 959 P.2d 311 (Cal. 1998); *In re Clark*, 855 P.2d 729 (Cal. 1993); *see also Carey v. Saffold*, 536 U.S. 214, 223 (2002) (discussing California's timeliness standard in context of applying federal tolling provision and observing that "[t]he fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application . . . comes too late").

To provide clearer boundaries, we look to NRS 34.726 for guidance. With NRS 34.726(1), the Legislature has determined that one year provides sufficient time within which to raise claims that trial and appellate counsel provided ineffective assistance. The same can

---

discretionary review in a State's appellate courts."). And NRS 34.820(1)(a) does not clearly indicate whether the mandatory appointment of counsel pursuant to that statute carries over to an appeal.

be said with respect to raising a postconviction-counsel claim. Using a similar one-year boundary for what is a reasonable time within which to file a petition raising a postconviction-counsel claim that was not factually or legally available at the time of a procedural default under NRS 34.726 also provides some fairness and predictability. *Cf. Pellegrini*, 117 Nev. at 874-75, 34 P.3d at 529 (concluding that for purposes of determining timeliness of successive petitions filed by petitioners whose convictions were final before effective date of NRS 34.726, "it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions"). We therefore conclude that a claim of ineffective assistance of postconviction counsel has been raised within a reasonable time after it became available so long as the postconviction petition is filed within one year after entry of the district court's order disposing of the prior postconviction petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur. Because Rippo filed his petition within one year after we issued our remittitur on appeal from the order denying the prior petition, the second petition was filed within a reasonable time after the postconviction-counsel claim became available. Rippo thus met the first component of the good-cause showing required under NRS 34.726(1).

Undue prejudice to excuse untimely petition based on ineffective assistance of postconviction counsel and standard for evaluating postconviction counsel's effectiveness

The second component of the good-cause showing under NRS 34.726(1) requires the petitioner to demonstrate "[t]hat dismissal of the petition as untimely will unduly prejudice [him]." A showing of undue prejudice necessarily implicates the merits of the postconviction-counsel claim, otherwise this requirement would add nothing to the first component of the good-cause showing required under NRS 34.726(1) and the petitioner would be able to overcome the procedural default under that statute without establishing the merits of the postconviction-counsel claim.

To determine whether the postconviction-counsel claim has any merit, we must address the standard for evaluating postconviction counsel's performance. We have held that the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to evaluate the effectiveness of trial counsel, *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984), and appellate counsel, *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996). Similarly, we have indicated that *Strickland* should be used to evaluate the effectiveness of postconviction counsel where there is a statutory right to that counsel. *Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 254 (1997) ("[W]e must remand this matter to the district court

for an evidentiary hearing to determine whether [first postconviction counsel's] omissions constitute ineffective assistance of counsel as set forth in Strickland."). But unlike the rights to effective assistance of trial and appellate counsel, which are guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, *Evitts v. Lucey*, 469 U.S. 387, 392, 396-97 (1985), there is no recognized constitutional right to effective assistance of postconviction counsel,[12] *McKague v. Warden*, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996) (concluding that neither the United States nor Nevada Constitution provides for a right to counsel in postconviction proceedings). Given that distinction, we are not obligated to apply *Strickland* to evaluate postconviction counsel's effectiveness. *See People v. Perkins*, 856 N.E.2d 1178, 1183 (Ill. App. Ct. 2006) (observing that with statutory right to postconviction counsel, "*Strickland* is not automatically applicable to claims of less-than-reasonable assistance of postconviction counsel"). However, because *Strickland* provides a well-established standard that has been developed through caselaw and can be easily applied in the postconviction-counsel context, *see Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (describing *Strickland* as "a fair, workable and, as it turns out, durable standard"), we take this opportunity to explicitly adopt the *Strickland* standard to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of that counsel.[13]

Strickland has two prongs. The petitioner must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Both showings must be made before counsel can be deemed to have provided ineffective assistance, *id.* at 687, but a court need not address the prongs in a particular order or even consider both

[12]In the absence of a Supreme Court decision recognizing a constitutional right, we reiterate that the limited right to effective assistance of postconviction counsel addressed in this opinion arises out of the statutory mandate to appoint counsel under NRS 34.820(1)(a), and we disavow any prior decisions suggesting that the right has a constitutional basis, *see, e.g.*, *Pellegrini*, 117 Nev. at 887-88 n.125, 34 P.3d at 537 n.125 (describing *McKague* as "holding that there is no constitutional right to effective assistance of counsel except where state law entitles one to the appointment of counsel"); *Crump*, 113 Nev. at 304-05, 934 P.2d at 254.

[13]Not all states guarantee postconviction petitioners a statutory right to the effective assistance of counsel, but in states that do, use of the *Strickland* standard is not uncommon. *See, e.g.*, *In re Clark*, 855 P.2d 729, 748-49 (Cal. 1993); *Silva v. People*, 156 P.3d 1164, 1168-69 (Colo. 2007); *Stovall v. State*, 800 A.2d 31, 38 (Md. Ct. Spec. App. 2002); *Johnson v. State*, 681 N.W.2d 769, 776-77 (N.D. 2004); *Commonwealth v. Priovolos*, 715 A.2d 420, 422 (Pa. 1998). The Supreme Court has also indicated that *Strickland* applies when a state prisoner seeks federal habeas relief and asserts the ineffective assistance of state habeas counsel as cause to excuse the procedural default of a trial-counsel claim. *Martinez*, 566 U.S. at 14.

prongs if the petitioner makes an insufficient showing on one, *id.* at 697; *see also McNelton v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). And when a petitioner presents a claim of ineffective assistance of postconviction counsel on the basis that postconviction counsel failed to prove the ineffectiveness of his trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys. *State v. Jim*, 747 N.W.2d 410, 418 (Neb. 2008) (stating that layered claim of ineffective assistance requires evaluation at each level of counsel); *see also Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (observing that prejudice showing required for ineffective assistance of postconviction counsel based on failure to raise ineffective-assistance-of-trial-counsel claim "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective"), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015).

The showing required to satisfy the prejudice prong—a reasonable probability that the result of the proceeding would have been different—varies depending on the context, including the proceeding in which the allegedly deficient performance occurred and the nature of the deficient performance.[14] *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) ("[T]he concept of prejudice [under *Strickland*] is defined in different ways depending on the context in which it appears."). In the context of postconviction counsel, we conclude that the prejudice prong requires a showing that counsel's deficient performance prevented the petitioner from establishing "that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State," NRS 34.724(1). As one state court has explained, the question is more than whether "the first post-conviction relief proceeding should have gone differently":

> [T]he ultimate issue is the fairness of the defendant's conviction and sentence. It is not enough for the defendant to prove that the first post-conviction relief proceeding should have gone differently. The defendant must also prove that the flaw in the prior post-conviction relief proceeding prevented the defendant from establishing a demonstrable and prejudicial flaw in the original trial court proceedings.

[14]For examples of how the prejudice inquiry varies, see *Missouri v. Frye*, 566 U.S. 134, 147-48 (2012) (prejudice arising from deficient performance based on failure to communicate plea offer to defendant), *Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012) (prejudice arising from deficient performance in advising defendant to reject favorable plea offer), *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice arising from deficient performance that led defendant to accept plea offer rather than proceed to trial), *Strickland*, 466 U.S. at 694 (prejudice arising from deficient performance of counsel during trial), and *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114 (prejudice arising from deficient performance on appeal from judgment of conviction).

Grinols v. State, 10 P.3d 600, 620 (Alaska Ct. App. 2000), *aff'd*, 74 P.3d 889 (Alaska 2003); *see also Jackson v. Weber*, 637 N.W.2d 19, 23 (S.D. 2001) ("[I]neffective assistance of counsel at a prior habeas proceeding is not alone enough for relief in a later habeas action. Any new effort must eventually be directed to error in the original trial . . . .").[15] Thus, the Supreme Court's observation that "[s]urmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), is particularly apt when it comes to postconviction counsel's assistance. If a petitioner surmounts that high bar and proves that postconviction counsel provided ineffective assistance, then the postconviction-counsel claim is sufficient to meet the undue-prejudice component of the good-cause showing required to excuse a procedural default under NRS 34.726(1).

Actual prejudice to excuse procedural default under NRS 34.810 based on ineffective assistance of postconviction counsel

Similarly, a postconviction-counsel claim is sufficient to establish cause to excuse the procedural default of another claim under NRS 34.810(1)(b) or NRS 34.810(2) if the petitioner proves both prongs of the ineffective-assistance test. *See Lynch v. Ficco*, 438 F.3d 35, 49 (1st Cir. 2006) ("In theory, *Strickland* attacks (including its own prejudice prong) go to the separate 'cause' as opposed to the 'prejudice' standards for overcoming default."); *see also Clabourne*, 745 F.3d at 377 (explaining that to establish "cause" to allow federal habeas review of trial-counsel claim that was defaulted in state court based on allegation of ineffective assistance of postconviction counsel, petitioner "must establish that his counsel in the state post-conviction proceeding was ineffective" by establishing both prongs of the *Strickland* test). But to excuse the procedural default of another claim under NRS 34.810, the petitioner also must demonstrate actual prejudice. NRS 34.810(1)(b), (3).

If a petitioner who seeks to excuse a procedural default based on ineffective assistance of counsel makes the showing of prejudice required by *Strickland*, he also has met the actual prejudice showing required to excuse the procedural default.[16] *See, e.g.*, *Jo-*

[15]The statutes in South Dakota have been amended since *Jackson* was decided to preclude relief based on the ineffectiveness of postconviction counsel. S.D. Codified Laws § 21-27-4 ("The ineffectiveness or incompetence of counsel, whether retained or appointed, during any collateral post-conviction proceeding is not grounds for relief under this chapter.").

[16]Other courts have suggested that actual prejudice requires a greater showing than that required for the prejudice prong of an ineffective-assistance claim, *see, e.g.*, *United States v. Dale*, 140 F.3d 1054, 1056 n.3 (D.C. Cir. 1998); *see Armstrong v. Kemna*, 590 F.3d 592, 606 (8th Cir. 2010) (citing inconsistent decisions on the issue by different Eighth Circuit panels), but we are not persuaded that there is a useful distinction to be made.

seph v. Coyle, 469 F.3d 441, 462-63 (6th Cir. 2006) (explaining that because the Supreme Court has held in *Strickler v. Greene*, 527 U.S. 263 (1999), that the materiality prong of a *Brady*[17] violation parallels the prejudice showing required to excuse a procedural default, the prejudice prong of the ineffective-assistance test, which is similar to the *Brady* materiality prong, also parallels the prejudice showing required to excuse a procedural default); *Lynch*, 438 F.3d at 49-50 (same); *Mincey v. Head*, 206 F.3d 1106, 1147 n.86 (11th Cir. 2000) (same); *accord State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (following *Strickler* and equating *Brady* materiality with the prejudice required to excuse a procedural default under NRS 34.810).[18]

With this foundation in mind, we turn to Rippo's claims and whether he has met both prongs of the ineffective-assistance test with respect to postconviction counsel and therefore has demonstrated cause and prejudice to excuse the applicable procedural bars based on the ineffective assistance of postconviction counsel.[19] Applying the two-prong test set forth above, we conclude that, with the exception of the first claim in his petition, Rippo failed to show that postconviction counsel was ineffective, and that he was not entitled to an evidentiary hearing on the allegations related to postconviction counsel because they either lack merit or were not supported by sufficient factual allegations, *see Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (stating that postconviction petitioner is entitled to evidentiary hearing when he asserts specific factual allegations that, if true, would entitle him to relief). We therefore conclude that although Rippo raised his postconviction-counsel claims within a reasonable time after they became available, he failed to demonstrate undue prejudice to excuse the procedural default under NRS 34.726(1) or cause and actual prejudice to excuse the procedural defaults under NRS 34.810, except as to the first claim in his

[17]*Brady v. Maryland*, 373 U.S. 83 (1963).

[18]This court previously observed in *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 949-50 (1994), that the two prejudice showings are "separate and distinct" but also suggested that when "both prejudice requirements happen to address the same concern," then the same showing will satisfy them. To the extent that these observations in *Lozada* are inconsistent with this decision, we disavow them.

[19]Rippo's opening brief focuses primarily on the substantive merits of the grounds asserted in the petition, with limited attention paid to the threshold cause-and-prejudice inquiry based on the allegedly ineffective assistance provided by prior postconviction counsel. While the assertions of ineffective assistance of postconviction counsel in Rippo's briefs are not as detailed or focused as we would prefer, they also are not the kind of "*pro forma*, perfunctory" assertions of ineffective assistance that we discouraged in *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001).

petition. As to the first claim, the district court should have conducted an evidentiary hearing.[20]

Judicial bias (claim 1)

In claim 1 of his petition, Rippo alleged that his convictions and death sentences are invalid because the trial judge was biased and that trial and appellate counsel were ineffective because they failed to adequately challenge the trial judge's alleged bias. He argues on appeal that the district court erred in applying the law-of-the-case doctrine and the procedural default under NRS 34.810(2) to this claim.

The judicial-bias claim is based on allegations that the trial judge (1) was the subject of a federal investigation at the time of trial, (2) knew that the Clark County District Attorney's Office and/or the Las Vegas Metropolitan Police Department (Metro) were involved in the investigation but failed to disclose that fact, and (3) was acquainted with a trial witness (Denny Mason)[21] but failed to disclose that fact because it would have incriminated the judge in the federal investigation.

This claim was raised on direct appeal and rejected by this court. *Rippo v. State (Rippo I)*, 113 Nev. 1239, 1248-50, 946 P.2d 1017, 1023-24 (1997). Normally, the law-of-the-case doctrine would preclude further litigation of this issue. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Rippo argues, however, that the doctrine should not apply because the facts are substantially new or different than they were on direct appeal and because our prior decision was based on false representations by the State and the trial judge. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (observing that federal courts recognize exception to the doctrine when "subsequent proceedings produce substantially new or different evidence").

There is nothing substantially new or different about the allegation that the trial judge should have disqualified himself because he was under federal investigation. This court held on direct appeal that "[a] federal investigation of a judge does not by itself create an appearance of impropriety sufficient to warrant disqualification." *Rippo I*, 113 Nev. at 1248, 946 P.2d at 1023. The inquiry required by the Supreme Court on remand—whether, considering all of the

[20]To the extent that Rippo relies on arguments other than ineffective assistance of postconviction counsel to establish cause and prejudice as to any particular defaulted ground for habeas relief, those arguments are addressed in the discussion of each defaulted claim.

[21]Mason was Denise Lizzi's boyfriend, and his name was on a credit card that Hunt found in Rippo's wallet after the murders.

circumstances alleged, "the risk of bias was too high to be constitutionally tolerable," *Rippo IV*, 137 S. Ct. at 907—does not alter that decision. As such, the law-of-the-case doctrine bars relitigation of the judicial-bias claim based solely on the federal investigation.[22]

In contrast, the other allegations of judicial bias were rejected on direct appeal because there was no evidence offered to support them. *Rippo I*, 113 Nev. at 1248, 946 P.2d at 1023 (observing that there was no evidence "that the State was . . . involved in the federal investigation . . . of [the trial judge]"); *id.* at 1249, 946 P.2d at 1024 (stating that "no evidence exists, beyond the allegations set forth by the defense, that [the trial judge] knew either Denny Mason or his alleged business partner"). Rippo now points to evidence that the State and the trial judge lied about or withheld information about the State's involvement in the federal investigation. That evidence indicates that, as part of a federal sting operation, a deputy district attorney with the Clark County District Attorney's Office brought a fictitious criminal case before the trial judge to see if the trial judge would accept a bribe from the defendant. Rippo further alleges that the trial judge learned about the sting operation and the deputy district attorney's involvement approximately two months before Rippo's trial started. Rippo also points to evidence that the trial judge provided favors to a business associate of Denny Mason and to Mason himself. The State has not refuted Rippo's factual allegations or the new evidence, instead relying solely on the law of the case. Because Rippo has pointed to substantially new or different evidence, we conclude that the law-of-the-case doctrine does not bar relitigation of the judicial-bias claim based on that evidence.

But to reach the merits of the judicial-bias claim, Rippo also has to demonstrate good cause and actual prejudice to excuse his failure to reassert the judicial-bias claim in his first postconviction habeas petition. To that end, he asserts that prior postconviction counsel provided ineffective assistance in failing to further investigate the facts surrounding the judicial-bias claim and failing to repackage the judicial-bias claim as a trial- or appellate-counsel claim or to reassert it as a standalone claim.

We are not convinced that prior postconviction counsel was ineffective in omitting a trial- or appellate-counsel claim for two reasons. First, both trial and appellate counsel raised the judicial-bias issue, so any ineffective-assistance claim would have been belied

[22]We agree with the Ninth Circuit's observation that when a judge has been *indicted* on criminal charges "a reasonable person with knowledge of all the facts pertaining to the nature of the indictment would question the ability of a judge facing prosecution to remain impartial as the presiding jurist in a criminal proceeding." *United States v. Jaramillo*, 745 F.2d 1245, 1246, 1248 (9th Cir. 1984). Here, the trial judge was indicted *after* Rippo was tried and convicted, and he was suspended from the bench shortly after the indictment.

by the record. Second, after evaluating trial and appellate counsel's performance based on "counsel's perspective at the time," *Strickland*, 466 U.S. at 689, it is not clear that trial and appellate counsel were deficient given the representations made on the record by the prosecution and the trial judge and the lack of any information available at that time to refute those representations. In that respect, we note that the new information provided by Rippo is based on documents filed in connection with and testimony at the trial judge's federal trials in 1997 and 1998, *after* Rippo's trial. That evidence clearly was not available to trial counsel, making it difficult to fault trial counsel for failing to discover and present it. Even if some of the documents were filed in the federal case while the direct appeal was pending, appellate counsel could not have expanded the record before this court to include evidence that was not part of the trial record, *see Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476-77, 635 P.2d 276, 277-78 (1981), making it similarly difficult to fault appellate counsel's performance. It thus appears that both trial and appellate counsel did the best they could under the circumstances.

In contrast, it appears that the new information could have been discovered and used by prior postconviction counsel to reassert the judicial-bias claim in the first petition. We acknowledge that in most circumstances where an issue was raised at trial, in a motion for new trial, and on appeal, all to no avail, postconviction counsel's failure to reassert the issue will be perfectly reasonable considering the law-of-the-case doctrine. *See generally In re Reno*, 283 P.3d 1181, 1210 (Cal. 2012) (observing that the mere omission of a claim that has been further developed by new counsel "'does not raise a presumption that prior habeas corpus counsel was incompetent'" (quoting *In re Clark*, 855 P.2d 729, 749 (Cal. 1993))). But the circumstances here are not that cut and dry. As this court's decision on direct appeal made clear, at least some of the allegations supporting the judicial-bias claim were rejected because trial and appellate counsel had no evidence to support them and had been told by the trial judge and the prosecution, on the record, that there was nothing to see here. Postconviction counsel may have been in a different position. In particular, it appears that the district attorney's involvement in the federal sting operation was well known, at the very least within the legal community in Clark County, at the time that the first postconviction petition was filed and litigated. In these unusual circumstances, there is a fair argument that reasonably competent postconviction counsel would have investigated the issue further to determine whether there was evidence to support the prior allegations and perhaps overcome the law-of-the-case doctrine. Without an evidentiary hearing, we cannot be sure. Nor can we determine whether prior postconviction counsel looked into the

matter and made an objectively reasonable decision not to reassert the judicial-bias claim.

Turning to the prejudice prong of the postconviction-counsel claim, we must consider the underlying merit of the judicial-bias claim. This is where the Supreme Court's directive on review of our prior decision becomes relevant. On the merits of the judicial-bias claim, the inquiry is "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo IV*, 137 S. Ct. at 907. The answer to the question may be yes, if Rippo's allegations that the trial judge knew about the State's involvement in the federal sting operation but failed to disclose it or falsely denied that he had any connection to Mason or his business partner to avoid implicating himself in the federal bribery investigation are true. Because the substantive claim therefore may have merit based on the new information, we conclude that discovery and an evidentiary hearing is needed to determine whether the allegations supporting the judicial-bias claim are true and, if so, whether prior postconviction counsel provided ineffective assistance by failing to investigate and re-assert the judicial-bias claim.

Prosecutorial misconduct (claims 2 and 9)

Rippo raised numerous allegations of prosecutorial misconduct that appear in claims 2 and 9 in his second habeas petition. Those allegations are that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) (claim 2); the State failed to correct false testimony by its witnesses (claim 2); the State failed to disclose and misrepresented its involvement in the federal investigation of the trial judge (claim 2); the prosecutors made improper arguments to the jury (claim 2); and the State intimidated a defense witness (claim 9).[23] These claims were primarily raised as trial error, but claim 2 also included summary allegations that trial and appellate counsel were ineffective to the extent that they did not litigate or failed to fully litigate or uncover the misconduct alleged in that claim. The district court determined that both claims 2 and 9 were procedurally defaulted under NRS 34.810(2) and that claim 2 was also defaulted under NRS 34.810(1)(b). The court also observed that several of the misconduct allegations were subject to the law-of-the-case doctrine. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

[23]Included in his allegations of prosecutorial misconduct, Rippo claims that the State violated a discovery order (claim 2) as evidenced by a series of nondisclosures concerning the existence of a jailhouse informant, a forensic report, exculpatory statements a witness made to the prosecutor, and the State's release of "twelve inches of document discovery on the day of calendar call." Absent from Rippo's claim, however, is any allegation of prejudice even assuming his contentions are true. Accordingly, he has not demonstrated that postconviction counsel was ineffective in this regard.

Brady allegations

We first address the arguments in claim 2 that are based on *Brady* violations. "*Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)). To establish a *Brady* violation, the defendant must show (1) that the State withheld evidence, (2) which is favorable to the accused because it is exculpatory or impeaching, and (3) that prejudice resulted because the evidence was material, i.e., that there is a reasonable possibility of a different result had there been disclosure. *Id.* at 599-600, 81 P.3d at 8. When a *Brady* claim is raised in an untimely or successive petition, the cause-and-prejudice showing can be met based on the second and third prongs required to establish a *Brady* violation. *Id.* at 599, 81 P.3d at 8. The *Brady* allegations here involve claims that the State withheld evidence that could have been used to impeach several of the State's witnesses: Thomas Sims, Thomas Christos, and Michael Beaudoin.[24]

The *Brady* allegations related to Sims and Christos focus on whether the State withheld evidence of cooperation agreements whereby these witnesses received favorable treatment in exchange for testifying. A promise made by the prosecution to a key witness in exchange for the witness's testimony constitutes impeachment evidence that must be disclosed under *Brady*. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). As the district court observed, Sims and Christos were thoroughly "cross-examined [during trial] regarding continuances, quashed bench warrants, and future benefits" with respect to other criminal charges. Both witnesses denied being promised, expecting, or receiving any benefits in exchange for their testimony. A prosecutor also testified that Sims was not promised anything in exchange for his testimony, and the jury was aware that Sims' pending felony case had been continued repeatedly over the course of several years, the extent to which the delay in that proceeding may have benefited him, and the prosecutor's reasons for agreeing to the continuances.[25] Rippo's allegations are based on

[24]The petition below made summary allegations (claim 2, ¶¶ 13, 14) that the State failed to disclose exculpatory or impeachment evidence related to Donald Hill (aka William Burkett) and David Levine, but it included no specific allegations regarding the *Brady* violation related to Hill and made a summary allegation that Levine "expected to receive a favorable parole recommendation in exchange for his testimony." In his appellate briefs, Rippo argues that both witnesses testified falsely. The allegation as to Hill appears to involve a post-trial recantation, while the allegation as to Levine appears to involve a *Giglio* claim—that the prosecution knowingly used false testimony. *See Giglio v. United States*, 405 U.S. 150 (1972). Those arguments are addressed *infra*.

[25]Rippo suggests that postconviction counsel was ineffective for failing to raise a trial-counsel claim based on trial counsel's failure to have the prosecutor's testimony read into the record to impeach Sims. The record, however, shows that the prosecutor testified before the jury at trial.

records related to the disposition of various criminal cases involving Sims and Christos before and after they testified. But those favorable dispositions are a matter of public record that was not and could not be withheld by the State. They also do not suffice to establish either explicit or tacit agreements between the State and these witnesses in exchange for their testimony. *See Bell v. Bell*, 512 F.3d 223, 233-34 (6th Cir. 2008) (concluding that handling of witness's case does not prove existence of an agreement between prosecution and witness); *Middleton v. Roper*, 455 F.3d 838, 854 (8th Cir. 2006) (concluding that speculation based on sequence of events in which witnesses obtained favorable dispositions of criminal charges after testifying against defendant was not sufficient to demonstrate that prosecution withheld evidence of deal offered to witnesses in exchange for their testimony); *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony. . . . [T]he fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony."). Rippo therefore has not made sufficient factual allegations as to Sims and Christos to support a finding that the State violated *Brady*. Nor are the speculative allegations offered 12 years after trial based on public information that has long been available sufficient to warrant an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). For these reasons, the *Brady* claim as to these witnesses is not sufficient itself to establish cause and prejudice.[26] The deficiencies in Rippo's *Brady* claim as to these witnesses also undermine his effort to rely on the alleged ineffective assistance of postconviction counsel as cause to excuse his failure to raise the *Brady* claim in the first petition.

The *Brady* allegation involving Beaudoin is similar to those involving Sims and Christos, but where Rippo failed to allege any additional facts sufficient to establish a *Brady* violation related to those witnesses, Rippo has offered additional specific allegations with respect to Beaudoin. With his petition, Rippo submitted a declaration dated May 18, 2008, in which Beaudoin indicates that he was arrested on felony drug charges after he began cooperating with the prosecution in this case and that he contacted one of the attorneys prosecuting Rippo "at some point before [he] was scheduled to

[26]As a separate but related subclaim, Rippo argues that the State violated *Brady* by allowing Sims and Christos to testify falsely that they received no promises of leniency or favorable treatment in exchange for their testimony. This argument fails, however, as Rippo has not alleged sufficient facts to support the allegation that Sims and Christos testified falsely.

testify" and asked for help since he was helping the prosecution by testifying against Rippo.[27] According to the declaration, as a result of that call, the district attorney's office dropped one of the charges and reduced the other from a felony to a gross misdemeanor, and Beaudoin avoided going to prison on the charges. The declaration indicates that if "anyone had bothered to ask [him] about these matters, [he] would have provided them with all of the information that is contained in [the] declaration."[28] The latter representation seems questionable since Beaudoin was asked about inducements at trial and testified that there had been none. It is entirely possible that his trial testimony was truthful because the declaration does not indicate that the prosecutor made any explicit or tacit promises to Beaudoin before he testified. As discussed with respect to the *Brady* claim involving Sims and Christos, absent such a promise by the prosecution, there was no *Brady* violation. Regardless, we also are not convinced that the information in the Beaudoin declaration is material as required to establish a *Brady* violation.

Beaudoin had already testified before the grand jury and his trial testimony was consistent with that prior testimony, thus undermining the impeachment value of the information in the postconviction declaration, and Beaudoin was not such a key witness for the prosecution that additional impeachment of him beyond that presented at trial (his criminal record) would lead to a reasonable possibility of a different outcome at trial. *Cf. Harris v. Lafler*, 553 F.3d 1028, 1033-34 (6th Cir. 2009) (concluding that there was reasonable probability of different outcome at trial had prosecution disclosed promises of leniency or favorable treatment in exchange for witness's testimony where witness provided only eyewitness account of shooting and identified defendant as the shooter, providing only evidence that directly linked defendant to the shooting). Thus, even accepting the representations in the declaration as true and assuming that there was a promise of favorable treatment in exchange for Beaudoin's testimony shortly before he testified at trial, the failure to disclose that promise does not undermine our confidence in the jury's verdict. *See Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (explaining that materiality prong of *Brady* involves whether the violation undermines confidence in the verdict). For these reasons, we conclude that this *Brady* claim lacks merit and cannot itself establish cause and prejudice and that Rippo has not demonstrated that postconviction counsel was ineffective in failing to raise this *Brady* claim.

---

[27]The State does not acknowledge or address the declaration in its appellate brief, but we are not convinced that an evidentiary hearing is warranted on this claim based solely on that omission.

[28]Beaudoin also states in the declaration that he believes that Rippo "is responsible for the crime" but does not "believe that he should receive the death penalty because it's not going to bring Denise back."

False testimony

Rippo also alleges prosecutorial misconduct related to three jailhouse informants: David Levine, James Ison, and Donald Hill (aka William Burkett). These witnesses testified about admissions that Rippo made to them while he was incarcerated pending trial in this case. Each informant testified that he had known Rippo before the murders and that Rippo admitted his involvement in the murders. Based on handwritten declarations provided by Levine, Ison, and Hill in connection with the second postconviction petition, Rippo asserts that these witnesses gave false testimony. We first address the allegations involving Levine and Ison and then turn to those involving Hill.

Rippo alleges that prosecutors or police officers provided Levine and Ison with information about the case that they then related at trial as information obtained from Rippo, making their testimony appear more credible. Rippo asserts that Levine and Ison could have been impeached with this information had it been disclosed to the defense. Although couched in terms of the State's alleged failure to disclose material exculpatory and impeachment information, Rippo's claim speaks more to the prosecution knowingly presenting false or misleading testimony. *See Giglio v. United States*, 405 U.S. 150, 153 (1972); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) (requiring prosecutor to correct testimony if he learns of its falsity after the testimony has been presented). Where the prosecution knowingly presents false or misleading testimony or fails to correct false testimony after learning of its falsity, a new trial is required if "the false testimony used by the State in securing the conviction . . . may have had an effect on the outcome of the trial." *Napue*, 360 U.S. at 272. The claim is procedurally barred under both NRS 34.726 and NRS 34.810. Rippo appears to press two arguments on appeal to excuse the procedural bars.

First, he relies on the alleged withholding of evidence by the State. *Cf. State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (explaining that withholding of favorable evidence may establish cause for raising *Brady* claim in an untimely and/or successive petition). This argument is insufficient because any falsity in Levine's and Ison's testimony about Rippo's admissions would have been known to Rippo at the time that the witnesses testified. *Cf. West v. Johnson*, 92 F.3d 1385, 1398-99 (5th Cir. 1996) (rejecting *Brady* claim that prosecution withheld evidence suggesting that defendant fabricated his confession because defendant "knew whether or not he had taken the necklace"); *United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990) (concluding that there was no improper suppression of evidence under *Brady* where evidence at issue involved defendant's whereabouts, which were within defendant's knowledge).

Second, Rippo relies on the alleged ineffective assistance of post-conviction counsel to excuse the procedural bars to consideration of the claim as to Levine and Ison. The district court apparently rejected this argument on the prejudice prong of the ineffective-assistance claim, concluding that the declarations offered by Rippo do not undermine confidence in the verdict because Levine and Ison have not recanted their testimony that Rippo admitted his involvement in the murders. We agree with the district court's reading of the declarations provided by Levine and Ison.

Although the information in the declarations could have been used to impeach these witnesses had the defense been aware of it, we are not convinced that there is a reasonable likelihood that the allegedly false portions of Levine's or Ison's testimony could have affected the jury's verdict (*Giglio*/*Napue* standard) or that there is a reasonable possibility of a different outcome had the information been disclosed (*Brady* standard). Both witnesses were impeached regarding discrepancies between their statements to police and their trial testimony. Their credibility was enhanced more by their long-term acquaintance with Rippo than by the details that their declarations bring into question. In light of those circumstances and the fact that neither witness has recanted his testimony that Rippo confessed to his involvement in the murders, we agree with the district court's assessment that Rippo cannot demonstrate prejudice based on post-conviction counsel's failure to raise claims related to Levine's and Ison's testimony.[29] Accordingly, the postconviction-counsel claim lacks merit and therefore is not cause to excuse the procedural default of this claim.

Rippo's allegations as to Hill are of a different nature in that they appear to involve a partial recantation rather than the prosecution withholding evidence or knowingly presenting false testimony. Hill's postconviction declaration states that, contrary to his testimony at trial, Rippo never suggested that he wanted to have Hunt killed and that as far as Hill knew at the time, Hunt was not going to testify against Rippo.[30] The declaration does not suggest that the prosecution knew or had reason to know that this part of Hill's testimony was false, and although this claim is included in a section of Rippo's appellate brief that is focused on prosecutorial misconduct,

[29]We recognize that some of the details brought into question by the declarations arguably corroborated Hunt's testimony and therefore lent credibility to her account of the murders, but we are not convinced that any of those corroborating elements in themselves were of such significance that undermining them would also undermine our confidence in the jury's verdict.

[30]The declaration also states that Hill's girlfriend was not incarcerated at the women's prison in Carson City with Hunt during the relevant time period. Hill testified similarly at trial: when asked at trial whether his fiancée was still at the women's prison, he responded that she was not.

Rippo does not argue that the prosecution was aware that Hill testified falsely or suppressed evidence that could have been used to impeach Hill.[31] Nor does the declaration call into question Hill's trial testimony that Rippo admitted that he strangled the victims and put their bodies in a closet. Given these deficiencies, we cannot conclude that the district court erred in determining that Rippo had not demonstrated good cause and prejudice to excuse the procedural default of this claim.

Prosecutorial misconduct in closing argument

Rippo also asserts that the prosecutors committed misconduct during guilt- and penalty-phase argument. We first address the claims that had been raised before on direct appeal and then turn to the new claims.

The allegations of prosecutorial misconduct that were raised and rejected on direct appeal, *Rippo v. State (Rippo I)*, 113 Nev. 1239, 1253-55 & n.5, 946 P.2d 1017, 1026-28 & n.5 (1997), are subject to the law-of-the-case doctrine, which precludes further litigation of those claims. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Given that further litigation of those claims would have been barred by the law-of-the-case doctrine, we are not convinced that postconviction counsel's failure to raise them again fell outside the wide range of professionally competent assistance. Nor are we convinced by Rippo's suggestion that he has good cause to raise these claims again because they must be considered cumulatively. In particular, the assertion of "cumulative error" as cause to raise these claims anew ignores our prior determination that there was no error with respect to the claims that previously were rejected on appeal on their merits. Rippo does not explain how argument by a prosecutor that has been found not to be error can now be aggregated to comprise a new claim that falls outside the law-of-the-case doctrine. *See In re Reno*, 283 P.3d 1181, 1223-24 (Cal. 2012) (rejecting "cumulative error" explanation for capital petitioner to raise a claim again that was rejected on its merits in a prior appeal and explaining that such a claim "cannot logically be used to support a cumulative error claim because [the appellate court has] already found there was no error to cumulate").

One prosecutorial-misconduct claim that was raised on appeal (the characterization of Rippo as "evil" during penalty-phase argument) would not have been subject to the law-of-the-case doctrine because it was not preserved, and therefore this court chose not to

[31]Rippo's appellate brief suggests that Hill revealed his status as a "career criminal informant" for the first time on cross-examination at trial. But in the trial testimony cited in the brief, Hill, who had been incarcerated for all but nine months between 1982 and 1996, testified that he had acted as an informant in two cases, including this one. The citation therefore does not appear to support the characterization of Hill as a "career criminal informant."

consider it on the merits. 113 Nev. at 1260, 946 P.2d at 1030. But that claim and the other new claims of prosecutorial misconduct are procedurally barred under NRS 34.726 and NRS 34.810 because they were untimely and could have been raised before. Rippo generally asserts that postconviction counsel was ineffective for omitting trial- or appellate-counsel claims based on these alleged instances of prosecutorial misconduct. We conclude, however, that Rippo has not demonstrated any misconduct (i.e., error) as to the challenged comments by the prosecutor; therefore he has not met either prong of the omitted trial-counsel claim or the performance prong as to the omitted appellate counsel. The postconviction-counsel claim therefore lacks merit and is not sufficient cause to excuse the procedural default of these trial-error and ineffective-assistance claims regarding prosecutorial misconduct in argument at the guilt and penalty phases. And in the absence of any error, those claims also could not be cumulated with the instances of prosecutorial misconduct that were found to have merit on direct appeal (the reference to evidence not presented at trial and the comment on Rippo's failure to call a witness) but were determined to be harmless both individually and cumulatively, *see Rippo I*, 113 Nev. at 1253-55 & n.5, 946 P.2d at 1026-28 & n.5. On that basis, Rippo also cannot rely on "cumulative error" as cause to raise the new claims of prosecutorial misconduct. *See Reno*, 283 P.3d at 1223-24.

Witness intimidation

The allegation of improper witness intimidation (claim 9) was rejected by this court on direct appeal. *Rippo I*, 113 Nev. at 1251, 946 P.2d at 1025. Given that further litigation of the issue is precluded by the law-of-the-case doctrine, *see Hall*, 91 Nev. at 315, 535 P.2d at 798, we are not convinced that postconviction counsel's failure to re-raise this issue fell outside of the wide range of professionally competent assistance. We also reject the idea that the need to consider claims of prosecutorial misconduct cumulatively provides cause to raise this claim again where it was rejected previously on the merits. *See Reno*, 283 P.3d at 1223-24.

Failure to investigate and present mitigating evidence (claim 3)

Rippo argues that the district court erred in procedurally defaulting his claim that trial counsel were ineffective for failing to investigate and present mitigating evidence and submit a special verdict form listing possible mitigating circumstances. To excuse the procedural default, Rippo asserts that postconviction counsel was ineffective for failing to raise the trial-counsel claim. We conclude that this claim is not sufficient to excuse the procedural default because Rippo fails to meet either prong of the *Strickland* test to support a viable trial-counsel claim and therefore cannot demonstrate that postconviction counsel was ineffective in failing to raise it.

Rippo claims that postconviction counsel should have asserted an ineffective-assistance claim based on trial counsel's failure to present evidence that he suffered from a neuropsychological impairment. As support, he relies on a neuropsychological evaluation conducted 12 years after trial, which concluded that he had "mild neurocognitive dysfunction" and Attention Deficit Hyperactivity Disorder and Obsessive-Compulsive Disorder. But the reasonableness of counsel's performance is evaluated "from counsel's perspective at the time," without "the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). At the time of trial in this case, counsel had access to multiple psychological evaluations of Rippo from years before trial and just before trial, none of which revealed any psychoses, neuropsychological impairments, or major affective disorders. Considering the evaluations available to trial counsel, we cannot fault postconviction counsel for not asserting that trial counsel's failure to seek additional evaluations fell outside "the wide range of reasonable professional assistance." *Id.*

Rippo further claims that postconviction counsel should have asserted an ineffective-assistance claim based on trial counsel's failure to present testimony from a violence risk assessment expert and an institutionalization expert to establish that he would function well in a structured prison setting. Trial counsel did present some lay testimony to this effect from a prison vocational instructor who had interacted with Rippo. We are not convinced that trial counsel's failure to present an expert to provide similar testimony was unreasonable. Nor does the failure to present such testimony undermine our confidence in the outcome of the penalty hearing, *see id.* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."), particularly since any expert opinion would have been challenged on cross-examination with evidence that Rippo was found with weapons in his cell and had exposed himself to and threatened to kill a prison guard, the same as the witness who did testify at the penalty hearing. For these reasons, the ineffective-assistance-of-trial-counsel claim lacks merit, and we cannot fault postconviction counsel for failing to assert it.[32]

[32]Rippo also claims that postconviction counsel should have challenged trial counsel's failure to prepare a social history and provide it to a mental health expert for evaluation. As support, he provided a lengthy social history and an evaluation from psychologist Dr. Jonathan Mack, who opined that Rippo experienced "significant psychosocial trauma in the home of his mother and step-father, and possibly earlier in the home of his biological father and mother," which "caused a free floating anxiety" leading to obsessive-compulsive and drug-addictive tendencies, and that Rippo had a suppressed variant of post-traumatic stress disorder that was difficult to diagnosis perhaps due to "conscious and unconscious repression of family-of-origin trauma." This new mitigation evidence lacks sufficient persuasiveness to have altered the outcome of the penalty hearing had it been presented to the jury. We therefore are not convinced that postconviction counsel was ineffective in omitting this trial-counsel claim.

Rippo also claims that postconviction counsel should have asserted an ineffective-assistance claim based on trial counsel's failure to present evidence that Rippo was sexually and physically abused by his stepfather James Anzini. At the penalty phase, trial counsel presented one witness who testified about Rippo's childhood and upbringing, his sister Stacie. She described Rippo as the "family clown" and a "great brother" who was protective of and encouraging to his sisters. She also testified about their childhood, explaining that life with Anzini was difficult. He was a compulsive gambler and often took Rippo's allowance and paychecks to support his gambling habit. He frequently pushed Rippo around and told him that he would never amount to anything, and he degraded women in front of Rippo. So trial counsel did present some evidence at the penalty phase on the topic of Rippo's childhood and upbringing. Rippo argues, however, that the presentation fell short due to trial counsel's failure to adequately investigate and interview his family members and that reasonably competent counsel would have uncovered evidence of sexual and physical abuse.

To support his claim, Rippo filed several declarations by various family members, including his sister Stacie; his father; his former stepmother; and Anzini's ex-wife, sister, brother-in-law, former sister-in-law, and sons (Rippo's stepbrothers). In her declaration, Stacie recalls that Anzini was abusive in that he was demeaning toward women; played games that frightened her, her sister, and Rippo; and was extremely aggressive when he played board games with the children, calling Rippo a "sissy" when he lost to his sisters. She states that Anzini enjoyed scaring and taunting the children and that their mother and Anzini had violent arguments. She describes Anzini as physically abusive to the children but that she was unaware of "what, if anything [Anzini] did to [Rippo] that may have had any sexual overtones." In the other declarations, Anzini is described as physically and verbally abusive. Most of the declarants never saw instances of physical abuse involving Rippo, but they suspected that Anzini had physically abused Rippo based on his general character for such abuse or because they saw bruises on Rippo or his sisters that they felt were not sufficiently explained. Many of the declarants also suggested that Rippo had been a happy, good boy and that being raised by Anzini must have changed him. None of the declarations suggest that Anzini sexually abused Rippo.

We first address the performance prong on the omitted trial-counsel claim as it informs whether postconviction counsel's omission of that claim was ineffective. When it comes to preparing for the penalty phase of a capital case, trial counsel generally has a duty to conduct "a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). But *Strickland* does not require the same investigation in every case. *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011). "[A] particular decision not

to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. The test "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011).

Here, Stacie's declaration indicates that trial counsel met with her and other unidentified members of Rippo's family before the penalty hearing to find out if any of them were willing to testify during the penalty hearing and Stacie agreed to do so. She suggests that her testimony would have been more detailed about the abuse perpetrated by Anzini if trial counsel had better prepared her. But at the penalty hearing, trial counsel asked Stacie broad questions about how Anzini was around the house and how he was toward Rippo, and in response she never suggested significant physical abuse even though it is clear that she knew Rippo's upbringing was important when she observed at the end of her testimony that "a lot of your upbringing directs your life." Even assuming that trial counsel spent a limited amount of time with Stacie before she testified, we are not convinced that counsel's acts or omissions in this respect were outside the wide range of professionally competent assistance.

We are not as confident addressing the performance prong with respect to the more general allegation that trial counsel failed to interview and present the testimony of other family members. Stacie's declaration does not identify the other family members who were present for the meeting with counsel before the penalty hearing, but the family members who provided declarations for the postconviction petition indicate that they were never contacted by trial counsel. Absent an evidentiary hearing, it is difficult to determine whether trial counsel considered contacting other family members or had any reason to believe such an investigation would be fruitful. In this respect, Stacie's testimony at the penalty phase and the letter that counsel read into the record from Rippo's mother suggest that no one led trial counsel to believe there was more significant physical abuse or any sexual abuse and therefore counsel's investigation and presentation may have been within the wide range of professionally competent assistance in this respect. In the same vein, Rippo has not specifically alleged that he informed trial counsel about the abuse or identified any family members who could testify to the abuse. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."); *see also Waldrop v. Thigpen*, 857 F. Supp. 872, 915 (N.D. Ala. 1994) ("The attorney's duty under the Sixth Amendment is to conduct a *reason-*

able investigation, not such an exhaustive investigation that all conceivable mitigating evidence is necessarily uncovered."). Although we believe that Rippo has not overcome the presumption that trial counsel's performance was within the wide range of professionally competent assistance, we also address the prejudice prong below.

Considering all of the information in the declarations, we are not convinced that "there is a reasonable probability that at least one juror would have struck a different balance" between life and death. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). In addition to Stacie's testimony and the letter from Rippo's mother, the defense presented testimony about Rippo's good behavior in prison and for a period of time while he was on parole and living with his mother and stepfather, Robert Duncan. The testimony at the penalty hearing and the postconviction declarations describe Rippo as a likeable and kind person who was skilled and intelligent. Rippo also made a statement in allocution and expressed remorse for the victims' deaths. Although some of the declarations include descriptions of instances where Anzini emotionally and verbally abused Rippo, aside from Stacie's declaration, the postconviction declarations detail little in the way of specific instances of physical abuse involving Rippo; many of the declarants indicate that they suspected such abuse but had not witnessed it or were told by someone else that Anzini was abusive toward everyone in the house. Against this mitigating evidence, the State proved three valid aggravating circumstances: (1) that Rippo had a prior violent felony conviction for sexual assault, (2) that he was under a sentence of imprisonment at the time of the murders, and (3) that the murders involved torture. *See Rippo v. State (Rippo II)*, 122 Nev. 1086, 1093, 1098, 146 P.3d 279, 284, 287 (2006) (holding that three aggravating circumstances were invalid under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), but that the jury's consideration of those aggravating circumstances was harmless beyond a reasonable doubt). We have characterized the mitigating evidence presented at trial in this case as "not particularly compelling," *Rippo II*, 122 Nev. at 1094, 146 P.3d at 284, and the additional mitigating evidence does not add anything compelling enough for us to conclude that there is a reasonable probability that at least one juror would have struck a different balance—either in weighing the aggravating and mitigating circumstances or choosing between life and death. *See Cullen*, 563 U.S. at 189 (explaining that *Strickland*'s reasonable probability standard "requires a 'substantial,' not just 'conceivable,' likelihood of a different result" (quoting *Harrington*, 562 U.S. at 112)). On the latter point of the ultimate choice between life and death, it is significant that Rippo took two lives. Having determined that the omitted trial-counsel claim lacks merit, Rippo has not demonstrated cause to excuse the procedural default of that claim based on ineffective assistance of postconviction counsel.

Finally, Rippo claims that trial counsel should have argued specific mitigating circumstances and requested a special verdict form listing specific mitigating circumstances. Postconviction counsel raised this trial-counsel claim in the first petition. At the evidentiary hearing on that petition, trial counsel testified that they chose not to create a list of specific mitigating circumstances—other than the statutory mitigating circumstances—because they wanted the jury "to think of absolutely anything as a mitigating factor." We cannot fault postconviction counsel for not pursuing this claim further on appeal given that the testimony establishes that it was a strategic decision and there is no reasonable probability that this court would have granted some form of relief based on this claim. *See Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances."), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072 n.6, 13 P.3d 420, 432 n.6 (2000).

Disclosure of records (claim 8)

Rippo argues that the district court erred in dismissing his claim related to the trial court's decision to quash a subpoena for records that were in the possession of the Department of Parole and Probation. He argues that the trial court infringed on his constitutional right to present a defense and confront the witnesses against him, that trial counsel failed to "adequately litigate the disclosure of the records," and that appellate counsel should have raised the issue on direct appeal. To excuse the procedural default of these claims under NRS 34.726(1) and NRS 34.810, Rippo asserts that prior postconviction counsel was ineffective for failing to raise them. We conclude that the postconviction-counsel claim lacks merit and therefore the trial-error and ineffective-assistance claims are defaulted.

The postconviction-counsel claim lacks merit as to the allegation of trial error because the alleged error was invited. When the trial court held a hearing on the State's motion to quash the subpoena, trial counsel represented that he and the prosecution had "worked something out informally" and he did not have an objection to the court granting the motion to quash. Under the circumstances, Rippo cannot complain that the trial court erred when his counsel participated in and invited the alleged error in granting the motion to quash. *See Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal."). There similarly is no basis for concluding that postconviction counsel was deficient for not presenting a trial-error claim that was both procedurally defaulted (under NRS 34.810(1)(b) because it could have been raised on appeal)

and without merit. Accordingly, the postconviction-counsel claim is not sufficient to excuse the procedural default of the trial-error claim.

The postconviction-counsel claim also lacks merit as cause and prejudice with respect to the defaulted allegations of ineffective assistance of trial and appellate counsel. The appellate-counsel claim fails on the prejudice prong of *Strickland* because there is no reasonable probability that this omitted issue would have had success on appeal, *see Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-14 (1996) (explaining *Strickland* prejudice in context of appellate-counsel claim), given trial counsel's representation that the issue had been resolved informally and that there was no objection to granting the motion to quash, *see Carter*, 121 Nev. at 769, 121 P.3d at 599 ("A party who participates in an alleged error is estopped from raising any objection on appeal."). The trial-counsel claim fails on both prongs. As to the deficiency prong, the record indicates that trial counsel had come to a resolution on the issue with the prosecution and Rippo has not made any factual allegations to the contrary. As to the prejudice prong, Rippo has not substantiated his claim that the records would have given rise to expert testimony; even now, over a decade after trial, Rippo has not identified an expert willing to offer testimony about his future dangerousness and amenability to a structured living environment based on the records. He therefore has not established a reasonable probability of a different outcome at trial had counsel challenged the motion to quash the subpoena. Because the appellate- and trial-counsel claims fail, so does the postconviction-counsel claim as cause and prejudice to excuse the procedural default of the appellate- and trial-counsel claims.

Rippo also argues that the district court erred in dismissing his claim that the trial court erred by preventing him from cross-examining Diana Hunt with the results of a pretrial psychiatric evaluation. To excuse the procedural default of this alleged trial error under NRS 34.726(1) and NRS 34.810, Rippo asserts that prior postconviction counsel was ineffective based on his failure to assert trial- and appellate-counsel claims related to this alleged trial error. We conclude that the postconviction-counsel claim lacks merit.

First, because Rippo has not identified a discovery motion or other request for the evaluation that was denied by the trial court, he has not demonstrated a viable issue that reasonably competent appellate counsel could have raised. Second, because Rippo fails to allege that trial counsel knew about the evaluation or explain what additional investigation trial counsel should have conducted that would have uncovered the evaluation, assuming that counsel was not aware of it, he has not demonstrated that trial counsel's con-

duct did not fall within the range of reasonable professional assistance. It further appears that there was no viable prejudice argument to support a trial-counsel claim as trial counsel thoroughly cross-examined Hunt and challenged her credibility, and Hunt admitted her criminal history, involvement in the charged crimes, and agreement to testify against Rippo to avoid murder charges. Given the lack of any substantial basis on which to challenge trial or appellate counsel's performance, the postconviction-counsel claim lacks merit and cannot be sufficient cause to excuse the procedural default of the trial-error claim.[33]

Actual innocence

Where, as here, a petitioner cannot demonstrate cause and prejudice, the district court may nevertheless excuse a procedural bar if the petitioner demonstrates that failing to consider the merits of any constitutional claims would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Typically, a fundamental miscarriage of justice in this context requires "a colorable showing" of actual innocence. *Id.* And we have allowed such gateway claims of actual innocence with respect to a capital petitioner's death eligibility. *Id.* Rippo contends that he is ineligible for the death penalty because the three aggravating circumstances supporting his death sentence are invalid.[34]

Rippo argues that insufficient evidence supports the torture aggravating circumstance, a claim we rejected on direct appeal. *See Rippo v. State (Rippo I)*, 113 Nev. 1239, 1263-64, 946 P.2d 1017, 1032-33 (1997). He acknowledges our prior review but argues that we never determined whether the evidence showed that he "in-

[33]Rippo also challenges the district court's denial of the following claims related to (1) inadequate voir dire of potential jurors (claim 4), (2) admission of prior bad act evidence (claim 5), (3) guilt phase jury instructions (claims 6, 7, 11, and 19), (4) admission of victim-impact evidence (claim 12), (5) penalty phase jury instructions (claims 16 and 17), and (6) admission of gruesome photographs (claim 18). We conclude that Rippo failed to overcome the applicable procedural bars and/or the law-of-the-case doctrine and therefore the district court properly denied these claims. We further reject Rippo's claim that cumulative error requires reversal of the judgment of conviction. Any deficiencies in postconviction counsel's representation, considered individually or cumulatively, *see McConnell*, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17, did not prejudice him. Finally, we reject Rippo's claim that the lethal injection protocol is unconstitutional, as this claim is not cognizable in a postconviction petition for a writ of habeas corpus. *See id.* at 248-49, 212 P.3d at 311.

[34]Rippo challenged two of the aggravating circumstances in claims 13 and 14 in his petition. Those claims were subject to the same procedural bars discussed in this opinion. The claims are addressed here only to the extent that they are the basis for Rippo's assertion of actual innocence as a gateway to consideration of his procedurally defaulted claims.

flict[ed] pain beyond the killing itself." *Hernandez v. State*, 124 Nev. 978, 984, 194 P.3d 1235, 1239 (2008), *overruled on other grounds by Armenta-Carpio v. State*, 129 Nev. 531, 532, 306 P.3d 395, 396 (2013). His claim is patently without merit based on this court's observation regarding the evidence of torture inflicted on the victims, which comports with the requirement identified by Rippo. *Rippo I*, 113 Nev. at 1264, 946 P.2d at 1033 ("There seems to be little doubt that when Rippo was shocking these victims with a stun gun, he was doing so for the purpose of causing them pain and terror and for no other purpose. Rippo was not shocking these women with a stun gun for the purpose of killing them but, rather, it would appear, with a purely 'sadistic purpose.'").

Rippo complains that the other two aggravating circumstances are invalid for two reasons. First, he argues that the prior conviction related to both aggravating circumstances was the product of an invalid guilty plea. Based on our review of the record, we disagree that his guilty plea was involuntarily or unknowingly entered. Second, relying on *Roper v. Simmons*, 543 U.S. 551 (2005), Rippo argues that the prior conviction could not be used as an aggravating circumstance for death-penalty eligibility because he was only 16 years old at the time of the prior offense. We reject this argument because *Roper* only addresses whether a defendant can be sentenced to death for a capital offense committed before age 18; it does not address whether a conviction for an offense that was committed before the defendant was 18 can be used to make the defendant death-eligible on another offense committed after the defendant turned 18. Here, the murders were committed a week before Rippo's 27th birthday. The aggravating circumstances are valid, and Rippo has not demonstrated that he is ineligible for the death penalty.[35]

Having determined that Rippo is entitled to an evidentiary hearing as to the first claim in his petition but that his other claims lack merit, we affirm in part, reverse in part, and remand to the district court for further proceedings consistent with this opinion.

Douglas, C.J., and Gibbons and Parraguirre, JJ., concur.

Pickering, J., concurring in part and dissenting in part:

I would remand not just for discovery and an evidentiary hearing but also briefing and argument on the mandate rule as it applies to Rippo's judicial bias claim. It may be, as my colleagues hold, that Rippo cannot prevail without establishing ineffective as-

[35]Rippo argues that postconviction counsel was ineffective for not challenging the aggravating circumstances as invalid. We conclude that his claim lacks merit and therefore the district court did not err by denying this claim.

sistance of first post-conviction counsel. But that is not clear from the Supreme Court's opinion reversing our prior decision rejecting Rippo's judicial bias claim. *Rippo v. Baker*, 137 S. Ct. 905 (2017). Another, also supportable reading of the Supreme Court's *Rippo* opinion is that, because a judge's unconstitutional failure to recuse violates due process and constitutes structural error, *see Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016), and because our now vacated decision resolved Rippo's appeal partly based on law-of-the-case, *see Rippo v. State*, 132 Nev. 95, 117-18, 368 P.3d 729, 744 (2016), *vacated sub nom. Rippo v. Baker*, *supra*, Rippo may be entitled to a new trial if he can show the State defeated Rippo's original judicial bias claim by falsely denying its involvement in the investigation of the judge. *See Foster v. Chatman*, 136 S. Ct. 1737, 1742-43 (2016) (reversing state supreme court order denying habeas corpus relief to a death-penalty defendant based on post-conviction evidence demonstrating the State defeated the defendant's original *Batson* challenge by misrepresenting the true bases for its peremptory challenges); *cf. also Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) (summarily reversing state court decision denying post-conviction relief and noting that, "[t]he alternative to granting review, after all, is forcing Wearry to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed"). We compound the problem by opining—in advance of discovery and an evidentiary hearing—on what trial and appeal counsel knew or should have known, and when, about the facts underlying the judicial bias claim. *Cf. Echavarria v. Filson*, 896 F.3d 1118, 1130 (9th Cir. 2018) (affirming district court's grant of federal habeas relief based on implied judicial bias claim) (discussing *Rippo*).

The mandate rule requires us to adhere to what the Supreme Court decided expressly or by necessary implication. *See* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4478.3 (2d ed. 2002). Error by a subordinate court in interpreting the mandate may lead to further proceedings, including reversal. *See id.*, at 734-36 nn.4-5 (collecting cases). Because the proper interpretation of the Supreme Court's mandate in *Rippo* is not clear, I would not reissue our vacated opinion and limit the scope of the proceedings on remand to the district court, particularly not without input from the parties. If we are wrong in our interpretation of the mandate, additional delay and yet further proceedings, including additional discovery and even reversal, may result.

To avoid these risks, I would remand to the district court for discovery, an evidentiary hearing, and briefing and argument on Rip-

po's judicial bias claims, consistent with the Supreme Court's mandate in *Rippo*. I therefore concur in part and dissent in part.

CHERRY, J., concurring in part and dissenting in part:

I concur in the majority's decision that when postconviction counsel is appointed pursuant to NRS 34.820, a challenge to that counsel's representation becomes available upon the conclusion of the first postconviction proceeding. I further agree with the majority's adoption of the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate claims of ineffective assistance of postconviction counsel. However, I disagree with the majority's decision that a petition raising a claim of ineffective assistance of first postconviction counsel is filed within a reasonable time if it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal is taken from the district court's order, within one year after our issuance of remittitur. I would hold that the reasonableness of any delay should be assessed on a case-by-case basis considering the totality of the circumstances, which may justify a delay of more than one year.

Turning to Rippo's claims, I agree with Justice Pickering as to the judicial-bias claim. But, unlike my colleagues, I also believe that Rippo showed that he is entitled to an evidentiary hearing on his claims that postconviction counsel was ineffective for not raising a claim of prosecutorial misconduct and an ineffective-assistance claim based on trial counsel's failure to present additional mitigation evidence. Therefore, I would reverse and remand this matter to the district court for an evidentiary hearing on these two claims as well.

Rippo complains that postconviction counsel was ineffective in failing to investigate and present evidence that the State knowingly presented perjured testimony at trial. Two of the State's witnesses, David Levine and James Ison, have provided declarations stating that the police provided details about the murders that Rippo had not disclosed to them. The majority acknowledges that the statements in the declarations could have been used to impeach Levine and Ison but concludes that this was not enough to make a difference. In my view, an evidentiary hearing is necessary before that determination can be made. While Levine and Ison did not recant their testimony that Rippo admitted his involvement in the murders, their statements certainly impeached aspects of their testimony and, perhaps more importantly, raise serious concerns about prosecutorial misconduct. *See People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956) ("It is of no consequence that the falsehood bore upon the witness'[s] credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case,

the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."). The implications of the matters raised in the declarations deserve closer examination that an evidentiary hearing will provide.

Rippo also contends that postconviction counsel was ineffective for not challenging trial counsel's failure to present mitigating evidence of the abuse he suffered at the hands of his stepfather, James Anzini, and his neuropsychological impairment. The new evidence paints a picture of emotional and physical abuse to which the jury was not privy. Anzini played games with Rippo and his siblings for the sole purpose of belittling and harassing them. Anzini scared the children by pretending that he was going to drive the car they were riding in over a cliff. He hit Rippo and his siblings with books and bamboo sticks. Anzini treated Rippo worse than any of his children or stepchildren. On one occasion, after Rippo suffered a beating from a neighbor boy, Anzini ordered him to "go back and finish the job." Rippo returned to fight the boy and was badly hurt. In another incident, Anzini flew into a rage when Rippo accidently broke an inexpensive household item. Anzini punished Rippo for minor infractions by confining him to his room for hours without access to a bathroom and then beating him when he wet his pants. While the family was living in Moab, Utah, Anzini punished Rippo by making him stand outside when the temperature was over 100 degrees. Rippo's mother, Carole Anzini, also contributed to his troubled childhood. She was neglectful in her care of him, and when he was seven years old, she took Rippo and his siblings from their home in New York without permission from the children's father, Domiano Campanelli. Campanelli knew nothing about his children's whereabouts until ten years later. The new mitigation evidence strongly suggests that Campanelli was a kind and caring father who loved his children very much. Because of Carole's actions, Rippo was robbed of a loving relationship with his father for a decade.

In addition, Rippo provided an evaluation from psychologist Jonathan Mack. Dr. Mack concluded that Rippo suffers from Attention Deficit Hyperactivity Disorder, which, along with his unstable upbringing, contributed to his early drug use. Further, Rippo sustained significant psychosocial trauma during his childhood, which caused "a chronic free floating anxiety which led to the development of his obsessive-compulsive and drug addictive tendencies" as a means of controlling his anxiety. Dr. Mack observed that Rippo's overall neurological and psychological assessment reveals that he has significant problems with attention, impulse control, and short-term memory that could have been identified by competent neurological testing prior to trial.

The mitigation evidence presented at trial did little in the way of providing the jury any insight into Rippo's character, background, and conduct. Had the new mitigation evidence been presented, it could have provided that insight and swayed the jury to choose imprisonment rather than death. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) ("Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned *moral* response to the defendant's background, character, and crime." (citations and internal quotation marks omitted)), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Douglas v. Woodford*, 316 F.3d 1079, 1090 (9th Cir. 2003) ("Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" (quoting *Boyde v. California*, 494 U.S. 370, 382 (1990))); Jesse Chang, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Cases*, 35 Law & Soc. Inquiry 39, 46 (2010) ("The purpose of mitigating evidence is to provide the jury with a basis for sentencing the individual defendant to life imprisonment rather than to death . . . . The challenge facing defense counsel is to present mitigating evidence that explains the defendant's commission of the crime. This requires providing the jury with an empathy provoking way of understanding the defendant and his conduct."). While the majority casually dismisses this new mitigation evidence, concluding that it would not have made a difference, Rippo has produced sufficient support entitling him to an evidentiary hearing to prove his allegations that postconviction counsel provided ineffective assistance by failing to investigate and challenge trial counsel's performance in the presentation of mitigating circumstances. Should he be successful, he may secure a new penalty hearing. Justice demands that he receive that opportunity.

CORY DEALVONE HUBBARD, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 66185

August 2, 2018 422 P.3d 1260

Appeal from a judgment of conviction pursuant to a jury verdict of conspiracy to commit robbery, burglary, seven counts of robbery with use of a deadly weapon, assault, and discharge of a firearm within a structure. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Reversed and remanded.

Hardesty, J., with whom Pickering, J., agreed, dissented in part.

Law Office of Patricia M. Erickson and *Patricia M. Erickson*, Las Vegas; *Brent D. Percival*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens* and *Krista D. Barrie*, Chief Deputy District Attorneys, and *Charles W. Thoman*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cherry, J.:

Appellant was convicted after a jury trial of conspiracy to commit robbery, burglary, seven counts of robbery with use of a deadly weapon, assault, and discharge of a firearm within a structure. The district court admitted evidence at trial concerning appellant's prior residential burglary conviction to prove intent and absence of mistake under NRS 48.045(2). In this appeal, we decide whether the defense must place intent or absence of mistake at issue before prior act evidence may be admitted.

We conclude that the defense need not place intent or absence of mistake at issue before the State may seek admission of prior act evidence if the evidence is relevant to prove an element of the offense such as intent for the specific intent crime of burglary. Regardless, the evidence may still be inadmissible if it is not relevant or its probative value is substantially outweighed by the risk of unfair prejudice. Where, as here, the evidence left little doubt as to the assailants' intent to commit a felony at the time of entering the home, and appellant's defense was not based on a claimed lack of intent or on mistake, but rather on a claim that he was not present and had no involvement in the crime, the evidence of his prior resi-

dential burglary conviction had little relevance or probative value as to his intent or absence of mistake when compared to the danger of unfair prejudice resulting from its propensity inference. Therefore, the district court manifestly abused its discretion in admitting evidence of the prior conviction, and because the error was not harmless, we reverse the judgment of conviction and remand for further proceedings.

BACKGROUND

On the evening of August 22, 2013, several people were present at a residence located at 657 Shirehampton Drive in Las Vegas, including David Powers, Darny Van, Matthew Van, Thavin Van, Trinity Van, Asia Van, Kenneth Flenory ("KJ"), and Anthony Roberts. When the doorbell rang at about 8:45 p.m., Darny answered the door and a man asked for someone by the name of "Darnell," and then two other men along with the first barged their way into the house. The men were alleged to be appellant Cory Dealvone Hubbard, Willie Carter, and Stelman Joseph. One of the men pointed a gun at Darny's face, took an iPhone and iPad from Asia's hands, and pointed the gun at Thavin and Trinity. One of the men also pointed a gun at Matthew, but Matthew escaped out a back door. When KJ ran for the front door, one of the assailants, alleged to be Hubbard, pursued and tackled him, and took his cell phone. David, who was in a bedroom upstairs, grabbed a gun and ran toward the staircase as the assailant alleged to be Hubbard was coming up with a gun in his hand, and David fired two or three times, hitting the assailant in the left shoulder. One of the other two assailants shot at David, and all three assailants fled the residence.

At about 9 p.m. the same night, Hubbard entered a Short Line Express Market located about four miles from the residence. He had blood on his shirt and he had been shot in his left shoulder. In his statement to the police, Hubbard indicated that he was randomly shot while walking down the street. The surveillance videos from the market did not show any vehicles dropping off a person that matched Hubbard's description. Except for KJ, none of the victims could positively identify Hubbard as one of the assailants based on a photo lineup. KJ was certain to an eight on a scale of one to ten that Hubbard was one of the assailants.

Hubbard was indicted, along with Carter and Joseph, on several charges stemming from the armed robbery of the residence and several of its occupants. The indictment charged Hubbard, in relevant part, with burglary while in possession of a firearm when he did willfully, unlawfully, and feloniously enter the residence "while in possession of one or more firearms, with intent to commit a Larceny and/or any felony, and/or Robbery."

The State filed a pretrial motion in limine to admit evidence of Hubbard's prior conviction for a residential burglary that occurred

in the state of Washington on July 27, 2012, attaching the judgment of conviction and a police report. The State argued the evidence was admissible under NRS 48.045(2) to prove motive, intent, identity, and absence of mistake and to rebut a claim that Hubbard was an innocent victim of an unrelated, random drive-by shooting. Although the majority of the State's analysis focused on identity, the State did argue as to intent specifically that the prior conviction was relevant to prove that, at the time Hubbard entered the residence, he intended to steal items inside. The State also argued that the 2012 burglary conviction made it more likely that Hubbard was participating in a burglary when he was shot as opposed to being the victim of a random shooting. Hubbard did not file a written opposition, but he did object at the hearing based on significant differences between the two cases (the earlier one was a generic residential burglary and did not involve guns or holding anyone at gunpoint) and the danger of undue prejudice. At the hearing, the district court orally granted the motion to prove absence of mistake, motive, and intent because Hubbard claimed he was not involved in the robbery, but the court indicated it would continue to oversee how the evidence was presented in order to minimize the potential for undue prejudice. The district court did not enter a written order as to its ruling.

At trial, all but one of the victims in the residence testified, as did Carter, who pleaded guilty to robbery with a deadly weapon and attempted murder but denied that Hubbard was involved in the crime. Testimony from a crime scene analyst and a forensic scientist indicated that none of Hubbard's DNA or fingerprints were found in the residence.

The victim of the 2012 burglary, Kimberly Davis, also testified during the State's case-in-chief. Before this testimony, the district court gave the jury a limiting instruction that the evidence may not be considered to prove that Hubbard "is a person of bad character or to prove he has a disposition to commit crimes" but may be considered "only for the limited purpose of proving the defendant's intent and/or motive to commit the crimes alleged or the absence of mistake or accident." Thereafter, Davis testified that she was home alone in the house she shared with her parents when the doorbell rang and she observed a Hispanic male standing on her front porch and a white car on the street. He repeatedly rang the doorbell, but she did not answer, and the man left. She saw the car return, heard the doorbell ring again, and then heard footsteps in the gravel outside her window. Davis locked herself in the bathroom, she heard people come into the house and male voices in the bedroom, and someone attempted to force open the bathroom door without success. After the intruders left, Davis discovered jewelry and other items missing from the home. Davis never actually saw any individuals in her home.

Hubbard was the only witness to testify in his defense. He testified that he was shot during an unrelated drug deal that had been arranged by Joseph. Hubbard testified that he drove to a parking lot near the Short Line Express Market and a person with the drugs entered the vehicle, and while Hubbard was inspecting the merchandise, another person came to the driver side window and shot him in the left shoulder. Hubbard ran away and ended up at the market. Hubbard testified that he had never been inside the residence where the robbery occurred, he did not know any of the victims present on that evening, and he denied any involvement in the robbery. On cross-examination, Hubbard admitted that he had been convicted of the 2012 burglary and had sustained three other felony convictions.

During closing argument, the State referenced the 2012 burglary conviction and stated that it could not be considered to prove Hubbard has a disposition to commit crimes but could be used to prove his intent as to the burglary and to prove that Hubbard was not shot mistakenly or accidentally while walking down the street. Hubbard was convicted of the burglary, as well as conspiracy to commit robbery, seven counts of robbery with use of a deadly weapon, assault, and discharge of a firearm within a structure. Hubbard was adjudicated a habitual criminal and sentenced to serve 10 concurrent life sentences without the possibility of parole, and credit for time served on the assault conviction.

Hubbard appealed from the judgment of conviction, and we transferred the case to the court of appeals. *See* NRAP 17(b). The court of appeals concluded that the district court manifestly abused its discretion in admitting testimony of the 2012 burglary because it was not relevant for any of the State's proffered nonpropensity uses and the marginal probative value of the evidence was substantially outweighed by the danger of unfair prejudice. In particular, the court concluded that Hubbard's defense that he was not present and was shot at random did not place at issue his intent or raise any question about his mistake as to any material fact of the crimes charged. The court of appeals further concluded that the evidence against Hubbard was not overwhelming and the error in admitting the evidence was not harmless, and the court reversed the judgment of conviction and remanded the matter to the district court for further proceedings.[1] We granted the State's petition for review under NRAP 40B and directed supplemental briefing on the limited issue of whether the district court abused its discretion in admitting the prior bad act evidence because the defense did not put intent or absence of mistake at issue.

[1]The court of appeals also concluded that three of the robbery convictions were not supported by sufficient evidence, but we did not grant review as to that portion of the decision.

DISCUSSION

I. *Admission of the 2012 burglary conviction*

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character and show the person acted in conformity therewith, but may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). "A presumption of inadmissibility attaches to all prior bad act evidence." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (quoting *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)). To overcome the presumption of inadmissibility, the prosecution must demonstrate that: "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond v. Stat*e, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). The decision of whether to admit or exclude such evidence is within the district court's discretion and will not be overturned absent a manifest abuse of that discretion. *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

"Identification of an at-issue, nonpropensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis." *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (citing *United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012)). Because the issue on which we accepted review and directed supplemental briefing in this case pertains to intent and absence of mistake, we discuss each in turn.

A. *Intent*

Hubbard contends that every crime has an element of intent, and for that reason, unless intent is raised "in substance" or is "at issue" during trial, bad act evidence is inadmissible to prove it. Thus, Hubbard argues that since he denied being present at the residence that evening and asserted that he had been shot during an unrelated incident, he implicitly or practically conceded that he acted with intent if the jury found he committed the acts inside the residence, and thus, because intent was not at issue, evidence of the 2012 burglary was irrelevant. The State argues that intent is automatically at issue in specific intent crimes and it is not necessary for the defense to contest intent before the prosecution may address it.

Our prior caselaw does not clearly address the admissibility of prior act evidence to prove intent for a specific intent crime, particularly where the defendant denies involvement in the crime. In *Wallin v. State*, this court held that prior bad act evidence was admissible where the defense placed intent at issue, but the case involved a

prosecution for battery, a general intent crime. 93 Nev. 10, 11, 558 P.2d 1143, 1143-44 (1977); *see* NRS 200.481 (defining battery). Additionally, in *Ford v. State*, this court upheld the district court's decision to admit the defendant's five prior acts of burglary to prove the defendant's intent and/or absence of mistake when he broke into the victim's residence. 122 Nev. 796, 806, 138 P.3d 500, 506-07 (2006). It is not clear from the *Ford* opinion, however, whether the defense theory at trial was that the defendant was not present and did not commit the crime, *id.* at 800, 138 P.3d at 503 ("Throughout the interview, Ford was handcuffed to a table and maintained that he was not in the neighborhood where [the victim] was murdered that day."), or whether the defense theory was mistake/lack of intent, *id.* at 799, 138 P.3d at 502 ("When [the victim] asked Ford why he was breaking into the house, Ford professed that he was only trying to use the restroom.").

The prosecution has the burden to prove all elements of the charged offenses, and prior bad act evidence may be probative of an essential element of the criminal offense. *See Estelle v. McGuire*, 502 U.S. 62, 69 (1991). Moreover, "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Id.* Some federal circuit courts hold that when a defendant is charged with a specific intent crime, intent is an issue in the case regardless of whether the defendant had made it an issue, thereby permitting other acts evidence to prove intent. *See, e.g.*, *United States v. Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994) (holding that when the crime charged requires specific intent as an element, the prosecution may use other acts evidence "to prove that the defendant acted with the specific intent notwithstanding any defense the defendant might raise"). Other courts hold that when the defendant claims not to have engaged in the acts at all, evidence of prior bad acts may be inadmissible to prove intent. *See, e.g.*, *United States v. Jemal*, 26 F.3d 1267, 1273 (3d Cir. 1994) ("[W]here a defendant has claimed that he did not distribute drugs at all rather than claiming that he distributed a substance that turned out to be drugs without knowledge that the substance was drugs, the Second Circuit has precluded the admission of prior crime evidence."); *People v. Clark*, 35 N.E.3d 1060, 1067-68 (Ill. App. Ct. 2015) (holding evidence that the defendant had stolen a bicycle previously was inadmissible to show intent because intent was not a contested issue where the eyewitness evidence left no doubt that the perpetrator intended to steal the bicycle and the defendant did not claim a lack of intent to steal (such as negligence or recklessness in taking the bicycle) but that he was not the perpetrator at all).

We are persuaded by an alternative approach taken in *United States v. Gomez*, in which the United States Court of Appeals for

the Seventh Circuit held that although intent is at issue in specific intent crimes, the rule is not one of automatic admission. 763 F.3d 845, 858-59 (7th Cir. 2014). In *Gomez*, the court explained that for general intent crimes, the defendant's intent can be inferred from the act itself, so intent is not necessarily at issue and "other-act evidence is not admissible to show intent *unless* the defendant puts intent 'at issue' beyond a general denial of guilt." *Id.* at 858 ("[U]nless the government has reason to believe that the defense will raise intent as an issue, evidence of other acts directed toward this issue should not be used in the government's case-in-chief and should not be admitted until the defendant raises the issue." (quoting *United States v. Shackleford*, 738 F.2d 776, 781 (7th Cir. 1984), *overruled on other grounds by Huddleston v. United States*, 485 U.S. 681 (1988))). But for specific intent crimes, intent is automatically at issue as a material element to be proven by the government, and evidence of other acts may be admissible to prove intent. *Gomez*, 763 F.3d at 858. The court cautioned that the rule is not one of automatic admission; other-act evidence offered to prove intent "can still be completely irrelevant to that issue, or relevant only in an impermissible way." *Id*. at 859 (internal quotation marks omitted). In other words, the other-act evidence "must be relevant without relying on a propensity inference, and its probative value must not be substantially outweighed by the risk of unfair prejudice." *Id.* Furthermore, the degree to which the issue is actually contested may affect the probative value of the other-act evidence. *Id.*

Here, the State charged Hubbard with burglary while in possession of a firearm when he willfully, unlawfully, and feloniously entered the residence while possessing a firearm with the intent to commit a larceny, felony, and/or robbery. The prosecution had the burden of proving a specific intent upon entering the residence. *See* NRS 205.060(1); *Stowe v. State*, 109 Nev. 743, 745, 857 P.2d 15, 17 (1993) (discussing the specific intent required for burglary). Under the facts of this case, however, we conclude that evidence of the 2012 burglary had little relevance to the issue of intent. *See* NRS 48.015 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence").

The evidence showed that three unknown men barged into the house at night and ordered the occupants about, property was taken by the men at gunpoint, shots were fired, and the three men fled the residence. This evidence left little doubt that at the time the perpetrators entered the residence, they intended to commit a robbery, larceny, or other felony therein. *See* Clifford S. Fishman & Anne T. McKenna, 3 *Jones on Evidence* § 17:64 (7th ed. 2016). This is because "[w]hen a person's conduct leaves no real doubts as to the actor's intent, it is difficult to see much need or justification for similar

acts on that issue. When a man walks into a store, draws a gun, and orders the store clerk to empty the cash register into a sack, surely a jury needs no additional evidence as to the man's intent. . . . [T]he only real issue is not, why did the actor do what he or she did, but is the defendant in fact the person in question." *Id*. The evidence did not suggest that the perpetrator alleged to be Hubbard entered the residence for an innocent reason and then formed the intent to commit robbery or another felony after entry. Moreover, Hubbard denied participation in the act or being present at the scene in his statements to the police and his testimony at trial. Under these facts, evidence of Hubbard's 2012 burglary had little relevance to establishing Hubbard's intent at the time he entered the residence, and the minimal probative value was substantially outweighed by the risk of unfair prejudice.

B. *Absence of mistake*

Hubbard contends that mistake is not an element of the offense and can only be at issue when the defendant raises it as a defense, such as admitting to the act but claiming a genuine mistake in the belief that the act was legal. Here, for example, mistake would have been at issue had Hubbard's defense been that he entered the home believing that he was attending a party or that he mistakenly went to the wrong home for dinner with friends. The State asserts that NRS 48.045 permits prior act evidence to prove absence of mistake or accident, and it is not necessary that the absence of mistake or accident occur on the part of the defendant. The State argues that absence of mistake was relevant because Hubbard claimed he was not present and was shot during an unrelated incident.

For the absence of mistake or accident exception under NRS 48.045(2), we have stated that it applies when "the evidence tends to show the defendant's knowledge of a fact material to the specific crime charged," such as knowledge of the controlled nature of a substance when such knowledge is an element of the charged offense. *Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980); *cf. Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991) (observing that evidence that the child had previously been injured was probative on the question of the actor's intent because it showed the child's death resulted from an intentional act by someone and not from an accident regardless of whether the defendant raised the defense of accidental death at trial). Prior act evidence can also be used to rebut a defense of mistake or accident. *See Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013) (observing that proof of prior injuries or abuse may tend to disprove accidental injury, a common defense to a child abuse charge).

Thus, the absence of mistake or accident exception may be relevant to proving either the mens rea (the defendant concedes per-

forming the act but claims to have done so mistakenly or with innocent intent) or the actus rea (the defendant concedes harm or loss but argues it resulted from an accident and not of his agency). *See* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 422 (2006). Absence of mistake or accident is grounded in the law of probabilities. "Innocent persons sometimes accidentally become enmeshed in suspicious circumstances, but it is objectively unlikely that will happen over and over again by random chance." *Id.* at 423.

In this case, evidence of the 2012 burglary would be relevant to proving that Hubbard entered the home with a felonious intent rather than by mistake, under some misapprehension, or as an innocent victim of the circumstances surrounding the robbery. But the State did not make that argument for admission of the evidence under this exception, and instead asserted that the evidence was relevant to prove Hubbard was the perpetrator who was shot during the robbery and did not receive the wound during some unrelated accident.[2] Used in this way, the State is essentially trying to prove that Hubbard was correctly identified as the perpetrator. *See United States v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996) (concluding that absence of mistake "on behalf of the government" in identifying the perpetrator is not a legitimate basis to admit other acts evidence). Thus, as with intent, the prior act had little relevance on the issue of absence of mistake or accident by Hubbard where he claims he was not present.

Given the lack of relevance that the 2012 burglary has to either intent or lack of mistake, it becomes clear that the evidence was instead being used for an impermissible propensity purpose, i.e., if Hubbard committed a burglary before, he must have done so in this case. Thus, the low probative value was substantially outweighed by the unfair prejudice, and we conclude that the district court's admission of Davis' testimony regarding the 2012 burglary for purposes of proving intent or absence of mistake was a manifest abuse of discretion.

---

[2]To support its argument, the State cites *United States v. Woods*, 484 F.2d 127, 135 (4th Cir. 1973) (allowing evidence that nine other infants in the accused's custody had experienced 20 cyanotic episodes over a 25-year period to rebut a claim that the child victim's suffocation was accidental based on the remoteness of the possibility that so many infants would die without wrongdoing and to prove the identity of the accused as the wrongdoer), and *People v. Spector*, 128 Cal. Rptr. 3d 31, 62 (Ct. App. 2011) (holding that evidence of the defendant's prior armed assaults against women were admissible to prove the victim's death was neither an accident nor a suicide). These cases are not dispositive of this issue because they involve a mistake or accident as to the accused's criminal intent or the criminal act.

II. *Harmless error*

Because we conclude that the district court's decision to admit evidence of the prior conviction was a manifest abuse of discretion, any error in admitting the evidence under NRS 48.045(2) is subject to harmless error review. *Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005). An error is harmless and not reversible if it did not have a substantial and injurious effect or influence in determining the jury's verdict. *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013). The State argues that any error in admitting evidence of the prior conviction was harmless because the State could have used the prior conviction to impeach Hubbard on cross-examination and because the evidence of guilt was overwhelming. We reject both arguments.

First, when the State questioned Hubbard on cross-examination, he admitted to the 2012 Washington burglary conviction, as well as three other felony convictions. This evidence of the prior felony convictions was admissible for impeachment purposes only. NRS 50.095(1) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible . . . ."). Impeachment evidence cannot be used as substantive evidence of guilt or to show propensity. *See Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1106 (1990) (holding that prior convictions could only be considered on the issue of the defendant's credibility and not substantive proof of his guilt); 81 Am. Jur. 2d Witnesses § 864 ("While it is improper to use prior convictions as substantive evidence of guilt or a defendant's propensity to commit crimes, it is permissible to use them to attack the defendant's truthfulness and credibility in his or her testimony."). In contrast, Davis' testimony regarding the 2012 burglary was admitted for a substantive purpose, to prove intent and absence of mistake under NRS 48.045, and the district court so instructed the jury. *See generally Yates v. State*, 95 Nev. 446, 449 n.2, 596 P.2d 239, 241 n.2 (1979) (discussing the difference between felony convictions used for impeachment under NRS 50.095 and prior bad acts relevant to some purpose other than character under NRS 48.045).

Additionally, the quality of the impeachment evidence was different and less prejudicial than Davis' live testimony about her experience concerning the prior burglary. *See Tomarchio v. State*, 99 Nev. 572, 578, 665 P.2d 804, 808 (1983) (noting that "[t]he usual and proper manner of establishing a prior conviction is to ask the witness if he had been theretofore convicted of a felony, and if he denies the conviction, to produce a copy of the judgment of conviction"); *cf. Jones v. State*, 101 Nev. 573, 578, 707 P.2d 1128, 1132 (1985) (observing that details of prior crimes have a greater impact on a jury than a bare record conviction). Most importantly, if the district court had excluded Davis' testimony regarding the 2012 burglary,

Hubbard might have chosen not to testify. *See Robinson v. State*, 35 So. 3d 501, 507 (Miss. 2010) (holding that erroneous admission of prior bad act evidence was not harmless where the defendant was forced to take the stand to explain the evidence, which implicated the defendant's constitutional right to refrain from testifying).

In concluding that any error in admitting the prior bad act evidence was harmless, the dissent does not address these consequential effects and what impact they may have had in determining the jury's verdict. Davis' testimony cannot be said to be harmless where it provided powerful details about the nature of an unrelated burglary in another state for which Hubbard was convicted, and given the fact that Hubbard testified in his own defense. In that regard, the dissent ignores that the introduction of evidence concerning the nature of a prior conviction similar to the substantive charges in the pending case carries a singular risk of substantial unfair prejudice that can jeopardize the defendant's right to a fair trial. *See Old Chief v. United States*, 519 U.S. 172, 180-81, 185 (1997) (explaining that such propensity evidence "generally carries a risk of unfair prejudice to the defendant" in that it may "lure a juror into a sequence of bad character reasoning" including that the prior act "rais[ed] the odds that he did the later bad act now charged"). As recognized in *Old Chief*, "'[a]lthough "propensity evidence" is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.'" *Id.* at 181 (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)). Thus, we cannot conclude that the use of impeachment evidence rendered harmless the erroneous admission of Davis' testimony.

Second, the evidence of guilt was not overwhelming. In concluding otherwise, the dissent focuses only on the significance of certain circumstantial evidence without addressing weaknesses in the State's case, including other evidence supporting Hubbard's defense, and whether it can be said with assurance that, without stripping the erroneously admitted prior bad act evidence from the whole, the jury's verdict was not substantially influenced by the error. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."); *see Fields v. State*, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009) (observing that the standard set forth in *Kotteakos* applies in reviewing nonconstitutional error, under which a conviction must be reversed unless the court is convinced that the defendant suffered no prejudice as a result of the error). On this record, we are not convinced that the prior bad act evidence did not influence the jury's assessment of evidence

favorable to Hubbard's defense. None of the victims could identify Hubbard at trial or in a photo lineup, aside from KJ who was only 80 percent certain on the photo lineup. Carter pleaded guilty and testified that he did not know Hubbard and he did not identify Hubbard as being present at the residence during the robbery. None of Hubbard's DNA or fingerprints were found in the residence. Moreover, even though the market was four miles from the residence and Hubbard appeared there only ten minutes after the robbery, none of the market surveillance cameras recorded a vehicle dropping him off. Hubbard explained that he had called Joseph because they were friends, that Joseph had arranged the drug deal but he never showed up, and that Hubbard was not initially forthcoming with the police about his injury because of his previous negative experiences with the police. We, therefore, cannot say with any confidence that the error in admitting evidence of the prior burglary conviction was harmless. *See Rosky*, 121 Nev. at 198, 111 P.3d at 699.

For the reasons set forth above, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

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

Hardesty, J., with whom Pickering, J., agrees, concurring in part and dissenting in part:

I agree with the majority's adoption of the reasoning in *United States v. Gomez*, that intent is automatically at issue for specific intent crimes because it is an element of the offense and relevant evidence of other acts may be admissible to prove intent without the defendant placing intent "at issue." 763 F.3d 845, 858-59 (7th Cir. 2014). However, I do not agree that the district judge manifestly abused his discretion by admitting evidence of the 2012 burglary on the issue of Hubbard's intent to commit the burglary in 2013 as charged. *See Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008) (stating that "[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference" (alteration in original) (internal quotation marks omitted)); *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005) (explaining that reversal for admission of prior bad acts is warranted only upon "a showing that the decision is manifestly incorrect").

But, even if the district court erred in admitting the bad acts evidence here, the error was harmless. An error is harmless and not reversible if it did not have "a substantial and injurious effect or influence in determining the jury's verdict." *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (internal quotation marks omitted). Contrary to the majority's analysis, I view the circumstan-

tial evidence of Hubbard's guilt as overwhelming. *See Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (stating that circumstantial evidence alone can uphold a conviction).

Hubbard admitted that he drove to Las Vegas in a red Chevy Impala. An hour before the robbery, the surveillance photos from the Rhodes Ranch gated community show Hubbard arriving at the Rhodes Ranch gate at 7:53 p.m. in a red Chevy Impala. Hubbard called Joseph at his number while at the Rhodes Ranch gate at 7:54 p.m. and again at 7:58 p.m. Joseph resided within the Rhodes Ranch community.

At 8:43 p.m., the victim's neighbor's surveillance video showed a dark colored SUV, later identified as belonging to Joseph, pulling up and three men barging into the front door of the victim's house. The victims testified that the men robbed them at gunpoint. KJ identified Hubbard to an 80-percent certainty as one of the assailants. Other family members identified one of the men as the darker, thicker, broader, and heavier black male, which matched Hubbard's description. That man ran up the stairs after entering the residence. David, who was upstairs, fired his gun at the man when he reached the top of the stairs and hit him in the left shoulder. After the shots were fired, the three men began to flee the residence. David was able to identify Joseph as one of the perpetrators. At the end of the neighbor's video, Hubbard and Joseph are shown running back to the SUV and driving away. It then shows a flash where Carter shot into the house and ran away on foot.

David called 911 at 8:51 p.m. to report the robbery. Five minutes later, at 8:56 p.m., Joseph called 911, from the number 702-236-4175, to report that his friend had been shot and was at the Chevron Station at Durango and Windmill. Also at 8:56 p.m., the cell phone pings from that number showed that Joseph was traveling northbound on Durango near Windmill where the Short Line Express was located.

Shortly after, Hubbard stumbled into the Short Line Express at 8096 South Durango, which is approximately 4 miles and 7 minutes from 657 Shirehampton Drive—the victim's address. Hubbard had a gunshot wound in the left shoulder. At 8:58 p.m., the cashier at Short Line Express called 911 to report Hubbard's gunshot wound. Hubbard refused to tell the 911 operator, the paramedics, the police officers, and the detectives how he was shot. The surveillance video at Rhodes Ranch showed an SUV matching the description of the vehicle used in the robbery entering Rhodes Ranch on 8:59 p.m.

Hubbard was arrested the night of the crime. Upon being booked at the Clark County Detention Center, Hubbard called Joseph at 702-236-4175, which is the same number that Joseph used to make the 911 call. Hubbard attempted to call Joseph a total of seven times at that number while Hubbard was in jail. He also called three of the same numbers that appeared on Joseph's phone records.

In resolving an appeal from a criminal conviction, we must view the evidence in the light most favorable to the prosecution. *See Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). The circumstantial evidence connecting Hubbard to the robbery was overwhelming. Because "the result would have been the same if the trial court had not admitted the [bad act] evidence," I would affirm. *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (internal quotation marks omitted).

NEVADA RECYCLING AND SALVAGE, LTD., a Nevada Limited Liability Company; and AMCB, LLC, a Nevada Limited Liability Company, dba RUBBISH RUNNERS, Appellants, *v.* RENO DISPOSAL COMPANY, INC., a Nevada Corporation, dba WASTE MANAGEMENT; REFUSE, INC., a Nevada Corporation; and WASTE MANAGEMENT OF NEVADA, INC., a Nevada Corporation, Respondents.

No. 71467

August 2, 2018 423 P.3d 605

Appeal from a district court order granting summary judgment in an unfair trade practice dispute. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Affirmed.

Winter Street Law Group and *Stephanie R. Rice, Delmar L. Hardy*, and *Richard A. Salvatore*, Reno, for Appellants.

Simons Law PC and *Mark G. Simons*, Reno, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Douglas, C.J.:

This case arises out of an alleged violation of the Nevada Unfair Trade Practice Act (UTPA). Appellants claim that respondents conspired with a third party to obtain exclusive franchise agreements with the City of Reno for the collection of waste and recyclable materials. According to appellants, this conspiracy precluded them from receiving a franchise agreement with the City of Reno. The question presented in this appeal is whether appellants have been injured in their business and therefore have standing to assert their claim under the UTPA.

We conclude that appellants lack standing to bring an antitrust claim because they were unable to show that they suffered any injuries (i.e., damages).[1] Accordingly, we affirm the district court's order granting summary judgment in favor of respondents.

FACTS AND PROCEDURAL HISTORY

Appellants Nevada Recycling and Salvage, Ltd. (Nevada Recycling) and AMCB, LLC, d/b/a Rubbish Runners (Rubbish Runners), brought this suit in district court under the Nevada Unfair Trade Practice Act for injunctive relief and treble damages. Nevada Recycling operates a facility that accepts, processes, recycles, and disposes of waste and recyclable materials. Rubbish Runners collects, hauls, and disposes of waste and recyclables for commercial accounts within the City of Reno. The gist of the complaint is that respondents Reno Disposal Company, Inc. (Reno Disposal), Refuse, Inc. (Refuse), and Waste Management of Nevada, Inc. (Waste Management), who are also collectors, haulers, and disposers of waste and recyclables for commercial accounts within the City of Reno, entered into a conspiracy with nonparty Castaway Trash Hauling (Castaway) for the explicit purpose of monopolizing the waste and recyclables market in the City of Reno.

The City of Reno was looking to implement a single-stream recycling service. Reno Disposal proposed that the City of Reno create exclusive service areas whereby waste haulers would have an exclusive privilege to collect and dispose of waste and recyclable materials within their assigned area. The City of Reno agreed, and it was determined that Reno Disposal and Castaway would each receive exclusive commercial franchise agreements, servicing all of Reno.

Proposed ordinances representing the franchise agreements were drafted and the Reno City Council conducted three public hearings in which the terms and conditions of the ordinances were discussed. At the first reading of the ordinances, Rubbish Runners spoke in opposition to the proposed ordinance, concerned that the ordinances would put it out of business. In addressing Rubbish Runners' concerns, carve-outs and exemptions were included in the ordinances that allowed Rubbish Runners to keep its existing customers upon verification of its customers' contracts. Under the proposed ordinances, Rubbish Runners would not be allowed to expand to new customers and it was not allowed to haul certain types of materials. The ordinances were subsequently approved.

Thereafter, Waste Management purchased Castaway and acquired all of Castaway's rights and duties held under the ordinance. Pursuant to authority granted under the ordinance, Waste Management then assigned its rights and duties held under the ordinance to Reno

[1]As this issue is dispositive, we do not reach the additional issues raised in appellants' appeal.

Disposal. As a result, Reno Disposal had exclusive rights to collect waste and recyclables in the City of Reno subject to the exemptions made for Rubbish Runners under the ordinance.

Before the district court, appellants argued that respondents conspired with Castaway to create an illegal monopoly for Reno Disposal. Reno Disposal and Refuse moved for summary judgment, and Waste Management filed a joinder to the motions for summary judgment. The district court granted summary judgment in favor of respondents, concluding that the *Noerr-Pennington* doctrine applied because respondents' conduct involved political and not business conduct. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). In addition, the district court concluded that, in terms of damages, appellants lacked standing to assert an UTPA claim because they were not qualified to service a franchise zone, they never sought to be considered for a franchise zone, and the City of Reno determined that they were not qualified waste haulers. This appeal followed.

DISCUSSION

"Antitrust standing is a question of law reviewed de novo." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999). Likewise, a district court's order granting summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id*. When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id*. General allegations and conclusory statements do not create genuine issues of fact. *Id*. at 731, 121 P.3d at 1030-31.

Appellants argue that the district court erred in concluding that they lack antitrust standing. We disagree.

The UTPA, codified in NRS Chapter 598A, provides, in relevant part:

> Any person injured or damaged directly or indirectly in his or her business or property by reason of a violation of the provision of this chapter may institute a civil action and shall recover treble damages . . . .

NRS 598A.210(2). The UTPA "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes." NRS 598A.050; *see also Boulware v. Nev., Dep't of Human Res.*, 960 F.2d 793, 800 (9th Cir. 1992) ("[The UTPA] also adopts by reference the case law applicable to the federal antitrust laws.").

While we have not yet addressed standing under the UTPA, the United States Supreme Court has addressed standing under the fed-

eral antitrust counterpart, the Clayton Act. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 521 (1983). The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). The Supreme Court rejected a broad interpretation of the statute, as "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." *Associated Gen. Contractors of Cal.*, 459 U.S. at 529. Instead, antitrust standing requires courts to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535. "[I]t [is] virtually impossible to announce a black-letter rule that will dictate the result in every case," *id.* at 536, thus, certain factors are used to determine antitrust standing:

> (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
>
> (2) the directness of the injury;
>
> (3) the speculative measure of the harm;
>
> (4) the risk of duplicative recovery; and
>
> (5) the complexity in apportioning damages.

Am. Ad Mgmt., 190 F.3d at 1054.

"Generally [n]o single factor is decisive." *Id.* at 1055 (alteration in original) (internal quotation marks omitted). Thus, "a court need not find in favor of the plaintiff on each factor." *Id.* Instead, the factors should be weighed and balanced, but the courts "give great weight to the nature of the plaintiff's alleged injury." *Id.* "In fact, the Supreme Court has noted that [a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under [the Clayton Act]." *Id.* (second alteration added) (internal quotation marks omitted).

Appellants' purported injury is that respondents' alleged anticompetitive conspiracy excluded appellants from receiving a franchise agreement with the City of Reno for the collection of waste and recyclable material. The supposed harm here is that appellants lost customers as a result. Appellants claim, "ascertaining the amount of Appellants' damages is complicated by the fact that different rates were charged to Appellants' customers over time prior to losing them."

Here, appellants' alleged harm is insufficient to demonstrate antitrust standing. The UTPA was intended to preserve competition for the benefit of consumers. *See* NRS 598A.030; *see also GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 758 (2d Cir. 1972) ("[T]he plain-

tiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he or she was engaged."). Nevada Recycling does not collect waste and recyclable materials, and therefore, it is not a competitor as to the franchise agreements. Nevada Recycling has not provided any evidence supporting its contention that the ordinances harmed its business. Even if it did, Nevada Recycling, as a noncompetitor, could not show how any alleged injury is the type the antitrust laws were intended to forestall.

Rubbish Runners, on the other hand, is a competitor, as its services include the collection of waste and recyclable materials. However, Rubbish Runners has not provided any evidence supporting its contention that it lost customers due to the franchise agreements. Pursuant to the franchise agreements, Rubbish Runners was allowed to keep its existing customers upon verification of the customers' contracts. Thus, any loss in customers was a direct result of Rubbish Runners' failure to do so.

Based on the foregoing, we conclude that appellants did not make any showing that they suffered any injuries (i.e., damages) from respondents' alleged conspiracy, and thus, they lack antitrust standing. Accordingly, we affirm the district court's order granting summary judgment in favor of respondents.

Cherry, Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.