Law of the case belongs to the family of preclusion doctrines including, collateral estoppel, res judicata, and stare decisis. Under the law of the case doctrine, when an issue is decided in a particular case, the parties of that case cannot relitigate the same issue in any subsequent proceeding. For example, consider Lenny, a defendant in a criminal case who is convicted of murder and decides to appeal an evidentiary ruling of the trial judge. Once the appellate court decides that particular issue on appeal, Lenny cannot relitigate that same issue in a petition for post-conviction relief in the trial court below, or in any further proceeding in the appellate court. The decision of the first appeal becomes the "law of the case" precluding further consideration of that issue. The purpose of the doctrine is to ensure efficient resolution of issues. Once a court decides a legal issue, it is generally "inefficient" to reconsider that issue. "Simplicity is achieved by narrowing the scope of review" of issues presented to courts in subsequent proceedings.

Jurisdictions vary on how strictly they apply the doctrine. Some jurisdictions absolutely refuse to consider an issue once decided regardless of the reason. This Note refers to this view as the "no power theory," meaning the court has no power to reconsider the issue. Hence the nickname, "the right or wrong doctrine," signifying adherence to the prior ruling even though the court believes the ruling was wrongfully decided. In other jurisdictions, the doctrine is less strict, providing departures in certain circumstances. These jurisdictions reject the no power theory in favor of correcting a possible erroneous outcome.

* J.D. 2002, William S. Boyd School of Law, University of Nevada, Las Vegas.


4 Steinman, supra note 1, at 602.

5 Parks, supra note 3, at 127.


8 Parks, supra note 3, at 136.

9 Schopler, supra note 6, § 3(a).

10 Id. §§ 3(a), 6.
Depending on the particular view adopted, courts compare their interpretation of law of the case to a related preclusion doctrine. Some courts explain law of the case as res judicata; other courts explain law of the case as stare decisis. Law of the case is related to stare decisis because both entail conformity of law to prior decisions: law of the case applying to the immediate case between the parties, and stare decisis covering any future case as well. Another commonality between the two is the principle of departure, which permits courts to overrule erroneous decisions.

Res judicata on the other hand, is generally not subject to departure principles. Law of the case also differs from res judicata because it lacks the "necessary to the judgment" standard required by res judicata. Law of the case also differs from res judicata because it lacks the "necessary to the judgment" standard required by res judicata.

\[\text{footnote}{\text{11} \text{ Parks, supra note 3, at 130-31 (comparing law of the case with res judicata, collateral estoppel, and stare decisis) (for examples of cases dealing with these issues, see the endnotes on these pages). Res judicata holds that a party may only sue on a single claim once. Collateral estoppel prevents relitigation of issues litigated and decided in the first case. Finally, stare decisis, also known as the doctrine of precedent, requires that all future decisions follow a particular rule of law set forth by an appellate court. \text{Richard D. Freer & Wendy C. Purdue, Civil Procedure: Cases, Materials, and Questions 647-48 (2d ed. 1997). For an historical perspective concerning the family of preclusion doctrines, see Spencer Bower, The Doctrine of Res Judicata (1924).}}\]

\[\text{footnote}{\text{12} \text{ See Schopler, supra note 6, § 1(a) (discussing cases that mesh law of the case with the preclusion doctrines res judicata and stare decisis).}}\]

\[\text{footnote}{\text{13} \text{ Parks, supra note 3, at 131.}}\]

\[\text{footnote}{\text{14} \text{ Steinman, supra note 1, at 599 n.10; Greene v. Rothschild, 402 P.2d 356 (Wash. 1966). Under the doctrine of stare decisis, the court is not obligated to perpetrate its own errors. This doctrine means that the rule laid down in any particular case is applicable to another case involving identical or substantially similar facts. . . . We see no reason why this principle should not apply where the allegedly erroneous decision is one which was rendered on a prior appeal of the same case.}}\]


\[\text{footnote}{\text{16} \text{ Freer & Purdue, supra note 11, at 648-49; Schopler, supra note 6, § 3(a) ("There is a difference between the principle of the law of the case and the doctrine of res judicata: the former 'directs discretion,' the latter 'supersedes it and compels judgment'; in other words, the latter is 'a question of power,' the former one 'of submission.'") (citing S.R. Co. v. Clift, 260 U.S. 316, 319 (1922) to discuss the difference between res judicata and law of the case); Greene v. Rothschild, 402 P.2d 356 (Wash. 1966) (distinguishing res judicata, a "uniform rule," from law of the case, a "discretionary rule") (citing United States v. U.S. Smelting Refining & Mining Co., 339 U.S. 186 (1950)). The Ninth Circuit, in Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833-34 (9th Cir. 1982), provided that:}}\]

\[\text{[the law of the case principle is analogous to, but less absolute a bar than, res judicata. [citation omitted]. Although the law of the case rule does not bind a court as absolutely as res judicata, and should not be applied "woodenly" when doing so would be inconsistent with "considerations of substantial justice," . . . the discretion of a court to review earlier decisions should be exercised sparingly so as not to undermine the salutary policy of finality that underlies the rule.}}\]

\[\text{footnote}{\text{17} \text{ Steinman, supra note 1, at 598 n.8; Harris v. Harris, 591 P.2d 1147, 1148 n.1 (Nev. 1979) (describing the "essential to the judgment" element under collateral estoppel); Clark v. Clark, 389 P.2d 69, 71 (Nev. 1964) (stating that under collateral estoppel an issue must be "necessarily determined").}}\]
case may apply to any issue presented, deliberated, and decided while res judicata requires a decisive issue. For this reason, res judicata is more narrowly applied.

The preclusion doctrine to which courts relate law of the case is significant to litigants. An example illustrates this significance. Consider Lenny, the convicted murderer who appealed his conviction. The appellate court decided against his claim of error on the evidentiary ruling in the trial court. Suppose on that issue, the court decided that hearsay is admissible if the hearsay is a victim's written statement about the defendant. Suppose, however, the same court heard that issue again only a year later, in a different case, and held to the contrary—a victim's written statement about the defendant is hearsay and inadmissible. Meanwhile, after hearing the outcome of this case, Lenny filed a second appeal again raising the issue of the victim's written statement. Facing these contradictory opinions, the court must decide how to treat Lenny's second appeal.

Whether law of the case operates like stare decisis or res judicata is vital in this hypothetical. If law of the case operates like stare decisis, the court may recognize the erroneous conclusion and reconsider Lenny's issue. On the other hand, if the law of the case operates like res judicata, the court would simply estop Lenny from raising the issue.

This note argues that law of the case in Nevada should operate more like stare decisis than the other preclusion doctrines and allow for instances of departure from prior rulings. Currently this is not so. In Nevada, "[t]he law of the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Moreover, the Nevada Supreme Court claims it has no power to revisit prior issues already decided. Hence, even if the prior ruling is erroneous, no longer sound, or might work a manifest injustice, the court refuses to reconsider the issue. In Nevada, law of the case is treated like res judicata. Law of the case, however, should be treated like stare decisis; the court should have the discretionary power to overrule.

If Nevada's version of law of the case is applied to Lenny's situation, he loses miserably. Even if the Nevada Supreme Court openly admitted that its prior decision was wrong, it could not entertain the issue on Lenny's second appeal since it claims to have no power to do so. Also unfortunate is the fact that the court's intervening ruling, which changed precedent under the second appeal, will not be applied to Lenny's case for the same reason. Both of these results are unfair to Lenny.

Part One of this Note tracks law of the case as it developed in Nevada and discusses why the court adopted the no power theory. The history of law of the case in Nevada illustrates the inconsistencies prevalent in the doctrine. Part

18 Compare Clark, 389 P.2d at 71, with State v. Loveless, 150 P.2d 1015, 1017-18 (Nev. 1944).
19 Id.
21 Loveless, 150 P.2d at 1017 (quoting Walker v. State, 455 P.2d 34, 38 (Nev. 1969)).
22 The litigant's only recourse lies in a petition for rehearing, which, for all intents and purposes, is meaningless in the above hypothetical. See id. at 1017; Nev. R. App. P. 40.
23 Cartan v. David, 4 P. 61, 65 (Nev. 1884).
Two summarizes the main elements of Nevada law of the case doctrine, then offers a critique of the Nevada approach, which highlights some of these inconsistencies and provides an alternative approach.

I. LAW OF THE CASE IN NEVADA: THE FOUNDATIONAL CASES

Interestingly, in early Nevada law, the Nevada Supreme Court had the opportunity to treat law of the case like stare decisis. Instead, the court chose to adopt the no power theory.

A. Linn v. Minor

The 1869 case, *Linn v. Minor*,24 was one of the first cases to discuss stare decisis in Nevada. In this case, the court was called upon to consider (1) whether a particular act of the Nevada legislature was repugnant to an act of Congress, and (2) if not, whether the court should overrule cases that say the Nevada act is repugnant to the act of Congress. On the first issue, the court found that the Nevada act was not repugnant to the Congressional act. It therefore, with some reservation, overruled prior cases that said otherwise. "[A] decision once made upon due deliberation ought not to be disturbed by the same Court, except upon the most cogent reasons and upon undoubted manifestation of error."26 The court discussed the need for the finality of the issue, yet argued that finality and stability of the law should sometimes capitulate to progress in the law.27 "[E]ven this backwardness to interfere with previous adjudications does not require us to shut our eyes upon all improvements in the science of the law, or require us to be stationary while all around us is in progress."28 Ripe before the court was the struggle between finality of decision and correctness of decision. The court did not employ a rule that unduly restricted its review of these competing principles, but rather, the court preferred treating these cases on an *ad hoc* basis.29 "Circumstances of each particular case . . . whether it may only be doubtful or clearly against principle, whether sustained by some authority or opposed to all: these are all matters to be judged of whenever the Court is called on to depart from a prior determination."30

The court's foregoing admonition necessarily includes law of the case. The court, however, did not heed the admonition. Instead, it chose to restrict its power to revisit an issue already decided.

A few years later, in *Winston*,31 the petitioner sought relief from his conviction of gaming on the Lord's Day. The petitioner argued that a law passed in 1869 repealed an 1861 law that empowered criminal prosecution for gaming

24 4 Nev. 462 (1869).
25 *Id.* at 463.
26 *Id.* at 465-66.
27 *Id.*
28 *Id.* at 466.
29 *Id.* at 466-67.
30 *Id.* (emphasis added).
31 9 Nev. 71 (1873).
on the Lord’s Day. The court held that the petitioner’s writ for habeas corpus was not the same as a writ of error. The justice of the peace, by expressed provisions, had jurisdictional authority to determine whether the 1869 law repealed the 1861 law. Having found that it did not, the appropriate remedy for petitioner was a writ of error to the district court, not a re-determination of the issue already decided by a competent magistrate with jurisdictional power. “The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this Court would be.” The court held that a habeas corpus petition to the Nevada Supreme Court is tantamount to asking the court to rehear that legal issue. Law of the case precluded revisititation because the court “ha[d] no power to say whether it is right or wrong.”

By restricting its power to revisit issues, the court threw a blanket of approval over past decisions whether rightly or wrongly decided. The “right or wrong” view of law of the case is a public policy notion rooted in principles of finality and efficiency. As such, law of the case in Nevada drifted from its brother stare decisis and followed its cousin res judicata. In State v. Consolidated Virginia Mining Co., the appellant argued that the doctrine better resembles res judicata than stare decisis because it is not triggered by strength or correctness of argument, but by applicability of estoppel principles to bar successive issues. Two years later, in Cartan v. David, the Nevada Supreme Court deemed law of the case – “res judicata between the . . . parties.”

B. Wright v. Carson Water Co.

Before 1895, the court failed to articulate with any depth, its reasons and policies for adopting a stricter construction than called for in Linn v. Minor. This all changed with the seminal cases – Wright v. Carson Water Co. I and Wright v. Carson Water Co. II. In the original case of Wright v. Carson Water Co. [hereinafter Wright I], Wright brought an action in the Nevada courts to enforce a promissory note allegedly executed by the president and secretary of Carson Water Co. The trial court, in a bench trial, awarded

32 Id.
33 Id. at 75.
34 Id. at 76.
35 Id. at 78.
36 Id. at 76.
37 Id. at 75.
38 Parks, supra note 3, at 136-37.
39 Id. at 131 n.36; Allen D. Vestal, Law of the Case: Single-Suit Preclusion, 12 UTAH L. Rev. 1, 2 (1967) (referring to law of the case as twin brother of stare decisis).
40 16 Nev. 432 (Nev. 1882).
41 Id. at 432.
42 4 P. 61 (Nev. 1884).
43 Id. at 65.
44 39 P. 872 (Nev. 1895) [hereinafter Wright I].
45 42 P. 196 (Nev. 1895) [hereinafter Wright II].
46 Wright I, 39 P. at 873.
Wright judgment on the note. The district court granted a new trial and Wright’s estate (Wright was by then deceased) appealed. The Nevada Supreme Court affirmed the ruling of the district court. In the second trial, this time by jury, Carson Water Co. moved to exclude the note from evidence. The trial court excluded the note and Wright’s estate appealed the judgment.

Wright argued that since a witness did not testify in the second trial they should be allowed to reargue the issue of the note’s validity. The court found that the issue was “properly presented, argued, and contested on the former hearing.” Furthermore, the decision “went to the essence of the case.” After establishing that the doctrine is applicable to a distinct set of facts adjudicated between distinct parties, the court addressed the binding nature of the prior decision on all future decisions:

[T]he law of the case [is] not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart. The supreme court has no power to review its own judgments in the same case, except upon petition for rehearing, in accordance for the rules established for the purpose. Such are the decisions of more than two hundred cases, decided in more than thirty states of the Union, besides a great number of the federal courts, including the Supreme Court of the United States.

Important to note from this excerpt is that the court reaffirmed its no power stance regarding revisitation of issues. It adopted this construction from the majority view at the time, as outlined in a book by Herman entitled, Estoppel and Res Judicata. This book indicates that some two hundred cases favored the no power theory.

The Nevada Supreme Courts’ fixation on this construction will be shown in later cases throughout the twentieth century until today. This occurred despite the fact that many of the jurisdictions Nevada relied upon in Wright I abandoned the no power theory.

47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id. at 873-74.
56 See Ex parte Winston, 9 Nev. 71 (1873).
57 Wright I, 39 P. at 874 (citing HERMAN ON ESTOPPEL AND RES JUDICATA).
58 Id.
60 For example, the federal circuits and the U.S. Supreme Court abandoned this view. United States v. Paquette, 201 F.3d 40 (1st Cir. 2000); Counsel of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999); United States v. Aramony, 166 F.3d 655 (4th Cir. 1998); Gates v. Shell Offshore, Inc., 881 F.2d 215 (5th Cir. 1989); Holloway v. Brush, 220 F.3d 767 (6th Cir. 2000); Creek v. Vill. of Westhaven, 144 F.3d 441 (7th Cir. 1998); Little
In the sequel, Wright v. Carson Water Co. [hereinafter Wright II], Wright’s estate filed a petition for rehearing to the Nevada Supreme Court arguing that the second appeal disclosed a different set of facts from the set of facts disclosed on the first appeal. The court evidently found the basis for its decision concerning the note, which it skimmed over in Wright I, and went into depth on the ratification process to form an implied contract absent express authorization of corporate board members. The court held that law of the case precluded revisitation of the issue because the new alleged facts, immaterial at best, related to decisive issues presented in the first appeal.

In his dissent, Chief Justice Bigelow criticized the majority’s decision concerning law of the case on two points. First, he asserted that law of the case only binds decisive issues presented before the court, not dicta. On the first appeal, the decisive factor was review of the district court’s grant of a new trial. Conversely, the decisive factor presented in the second appeal was the court’s ruling on an evidentiary matter. He, therefore, found the decision on the first appeal was “uncalled-for expressions of opinion” not binding in the second appeal. Second, he stated that whether the corporation’s conduct amounted to an implied contract was a question of fact for the jury to decide. “It is upon questions of law, and not upon questions of fact, that the decision of the court becomes law of the case.” Evidence surrounding the validity of the note should not be precluded by law of the case, when appellants are arguing mutated facts.

II. Development of the Doctrine in the Twentieth Century

Not much has changed in the years following the Wright cases. The court has worked on fine-tuning the doctrine. The heated discussion about applying the doctrine lingered and although the court started making exceptions, it left the rule essentially intact.


Note that the court is revisiting its decision in Wright I because of the nature of the petition. This is not a subsequent appeal to the Nevada Supreme Court, but a petition for rehearing. In Wright I, the court allowed revisitation of issues upon a petition for rehearing. 39 P. at 874.

Wright II, 42 P. 196, 197-98 (Nev. 1895).
Id. at 200 (Bigelow, C.J., dissenting).
Id. at 200-01.
Id.
Id. at 200.
Id. at 201.
Id.
Id.
A. Law of the Case & Dictum

One important mid-century case discussed the posture of law of the case on issues of dicta. In State v. Loveless, the jury convicted the defendant of murder. The defense appealed the judgment, and the Nevada Supreme Court reversed sua sponte rather than by points brought on appeal. The court refuted, in all respects, the points raised by the defense. The jury again convicted the defendant on the identical charge, and again the defense appealed. This time, in conjunction with oral argument, the state moved to strike points made by the defense on the first appeal. The defense responded by arguing that issues rejected in the first opinion were merely dictum, as the court ultimately raised the decisive issue, and should be heard again. In response to the defense’s claim, the court defined obiter dictum as “an opinion expressed by a Judge on a point not necessarily arising in a case.” Such issues relate to “some point not discussed at bar.” Distinguished are those types of issues for which actual questions were raised in the former appeal which “the court deliberately considered and decided.” Since issues were briefed, argued, deliberated upon, and decided in the first appeal, they were not obiter dictum and therefore amenable to law of the case. This was true despite the fact that reversal occurred on different grounds. The issues decided on the first appeal were necessary “to establish the law of the case on all points involved, and for the guidance of the lower court.”

Necessarily then, some dictum binds a subsequent appeal. True, obiter dictum will not carry authority to the next appeal, and hence is not part of law of the case. However, judicial dictum will. While obiter dictum relates to collateral matters not raised on appeal, judicial dictum relates to questions raised and decided on appeal albeit having no bearing on the outcome of the case. Logically, issues decided by an appellate court must transmit to the lower court as mandatory authority for guidance purposes. If so, then the same issues ought to bind any subsequent appeal.

71 150 P.2d 1015 (Nev. 1944).
72 Id. at 1016.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Chief Justice Bigelow argued similarly. See supra notes 64-70 and accompanying text.
79 150 P.2d at 1018.
80 Id.
81 Id.
82 Id.
83 Id.
84 See Lanigir v. Arden, 450 P.2d 148 (Nev. 1969) (holding that the issue raised on the second appeal is not precluded because it was only indirectly mentioned in the first appeal, and the issue was not “specified” as error); Sherman Gardens Co. v. Longley, 491 P.2d 48 (Nev. 1971) (holding that the trial court cannot imply from the previous opinion “law of the case” unless the issue was presented, considered, and deliberately decided).
85 This is probably the most valuable component of the doctrine. If a district or trial court on remand were able to sidestep the higher courts instructions, chaos would ensue. This occurrence, interestingly, is not infrequent. See, e.g., LoBue v. State, 554 P.2d 258 (Nev.
Stare decisis differs from law of the case because it arguably implicates neither type of dictum. In other words, only decisive issues would fall under stare decisis analysis. Law of the case, on the other hand, abounds under judicial dictum and the decisive issue in the case. Therefore, law of the case tends to be broader in application. Loveless, however, changed this distinction:

We are aware that it has been held that judicial dictum is not of equal binding force as an authority, as the point on which the decision of the case turned. But we think this is a rule too rigid to be recognized as the law of this jurisdiction . . . . "So it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in the fullest extent."86

Because the court put judicial dictum and the decisive issue of the case on the same level, there is no real fundamental difference between stare decisis and law of the case. Hence, cases establishing the law of the case doctrine should have followed the principles outlined in Linn v. Minor. If the court is to be consistent, there is no reason why the case at bar deserves stricter treatment regarding principles of departure than future cases with similar issues. Law of the case should not apply in erroneous decisions.

B. The Family Feud Continued

The debate regarding the integrity of law of the case continued in Hotel Riviera, Inc. v. Short,87 wherein the majority held to its nineteenth century roots.88 Upon reversal of summary judgment for defendants on a particular theory of law, the trial continued on remand and a jury awarded compensatory and punitive damages for plaintiff.89 Defendants appealed.90 The court found that the facts remained substantially the same from the summary judgment ruling to the end of the trial.91

On appeal, defendants claimed, inter alia, that the rule of law adopted from the appeal of the summary judgment was erroneous and should be overruled.92 Plaintiff responded stating, "the prior ruling was not so ‘clearly and palpably erroneous’ and the alleged error was not ‘so unjust’ as to justify this court to reverse the ruling in that decision.”93 The plaintiff largely based his argument on stare decisis principles from the cases cited in the opinion.94 The plaintiff’s counsel improvidently equated Nevada law pertaining to stare decisis with law of the case, conceding that the court may have power to overrule a prior decision in the same case.95 Fortunately, for the plaintiff, the court better

---

86 150 P.2d at 1019 (quoting in part 1 Bouvier’s Law Dictionary 83 (3d ed.)).
87 396 P.2d 855 (Nev. 1964).
88 Id.
89 Id. at 856.
90 Id.
91 Id. at 856.
92 Id. at 859.
93 Id. at 861.
94 Id.
95 Id.
understood the Nevada doctrine and held in his favor.\textsuperscript{96} Distinguishing law of the case from stare decisis, the court commented, "[t]his weight falls even more heavily in the present case, for our ruling in the previous case became the law of this case."\textsuperscript{97} Apparently, the court loosely interpreted the strict construction of \textit{Wright I}, as it seemed to describe the difference between stare decisis and law of the case as only a matter of degree.

The dissent, written by Justice Thompson, criticized the majority’s use of law of the case. Justice Thompson argued that the doctrine “should never be invoked to require the perpetuation of error.”\textsuperscript{98} He continued, “[a] court need not be ashamed to acknowledge its mistake and correct it before damage results. Though embarrassing, it is the only honorable course.”\textsuperscript{99} The argument was of course, nothing new. Peculiar to Justice Thompson’s approach, however, was that for the first time since \textit{Wright I}, an often-cited publication supported the argument. This publication, written by E.H. Schopler, was an annotation entitled, \textit{Erroneous Decision As Law of the Case On Subsequent Appellate Review}.\textsuperscript{100} This annotation contained the divergent views regarding law of the case, and especially important, the numerous jurisdictions’ departure from the no power theory.\textsuperscript{101} If the court in 1895 adopted the no power theory because of federal and sister court recognition, the Nevada Supreme Court should not continue with the antiquated no power theory in light of a majority shift to a less rigid standard.

\begin{itemize}
\item \textsuperscript{96} \textit{Id.} at 861-62.
\item \textsuperscript{97} \textit{Id.} at 866.
\item \textsuperscript{98} \textit{Id.} (Thompson, J., dissenting).
\item \textsuperscript{99} \textit{Id.} at 866 (Thompson, J., dissenting).
\item \textsuperscript{100} See supra note 6.
\item \textsuperscript{101} The Annotation explains the divergent views in some detail. The following excerpt portrays the Nevada interpretation.
\end{itemize}

On the one hand are cases which hold the doctrine of the law of the case applicable, irrespective of whether the decision on the former appeal is right or wrong, and apply this rule even in situations in which the court, upon the later appeal, specifically finds or strongly intimates that the decision on the former appeal was erroneous. Cases of this kind express the view that the doctrine of the law of the case is inflexible, that an appellate court, having lost its jurisdiction over the case and its former decision constituting a final adjudication, has no power to revise its own decision on a former appeal, that this decision is “res judicata,” and that the only remedy available to correct the error is a petition for rehearing seasonably made after the decision on the former appeal.

\textit{Id.} § 3(a).

The argument on the other side is that law of the case is more of a principle of adherence than a principle of estoppel. Notice from the following excerpt how law of the case better resembles stare decisis than res judicata.

[The doctrine of the law of the case as applied to appellate courts is not an inexorable or absolute command, and not inflexible; that the doctrine is founded upon expediency, and not upon the principle of estoppel by former adjudication, and is subject to exceptions. Under this view the doctrine of the law of the case, as applied to appellate courts on successive appeals, is a mere rule of practice, but not a limitation on the courts’ power. It is, however, recognized that an appellate court’s power to depart from its own ruling on a former appeal may be invoked not as a matter of right, but of grace and discretion, and should be exercised only sparingly or rarely, and for cogent reasons, after careful consideration of the situation involved in individual cases, or, more specifically, in a clear case under extraordinary or exceptional circumstances, in the interest of justice.]

\textit{Id.}
C. A More Detailed Argument Or Different Facts?

An appellant losing on the first appeal may try to refine the issue or somehow bolster the argument for another try at the court. This occurred in *Hall v. State*,,102 where the defendant in a murder case cleverly raised the issue of lack of competence to enter a guilty plea a second time. In the first appeal, the court found the defendant competent to enter a plea.103 In the second appeal, the defense failed to apprise the court of the previous hearing as required by Nevada Revised Statute 177.335.104 On appeal from his denial of petition for post-conviction relief, the defense fine-tuned the competence argument.105 Having discovered the first appeal, the court barred the issue, and held that “the doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.”106

This case may appear trivial, but it introduced an important element in Nevada law of the case. The defendant did not add facts or evidence or argue different issues on the second appeal; instead, defendant placed more emphasis on an issue already argued in the first appeal. “The law of the case is the law of the case on all subsequent appeals in which the facts are substantially the same.”107

This leaves the question of whether *new facts* are barred under law of the case. The Nevada Supreme Court examined this issue in *Paine v. State*,108 in which Paine was convicted of murder in two robbery operations. Paine killed a cab driver and wounded another.109 The court decided on the first appeal that Paine committed murder at random and without apparent motive, which the court found an aggravating circumstance for capital punishment purposes.110 On the second appeal, Paine argued that “new evidence” adduced at the second penalty hearing indicated that the murders were necessary to accomplish the robberies.111 Hence, no aggravating circumstances should carry.112 The court found that the new evidence fell under law of the case principles because the new evidence “[was] not substantially different from that which was introduced at the first penalty hearing.”113 Accordingly, the court found that it “need not reconsider” the issue.114

---

103 Id. at 798.
104 Id. at 798 & n.1. Nev. Rev. Stat. 177.335 (1991) repealed by Acts 1991, ch. 44, § 31, p. 92 (at the time stating in pertinent part, “The petition must identify any previous state or federal court proceedings taken by the petitioner to secure relief from his conviction or sentence”).
105 *Hall*, 535 P.2d at 798.
106 Id. at 799.
107 Id. at 798 (quoting Walker v. State, 455 P.2d 34 (Nev. 1969)).
109 Id. at 1026-27.
110 Id. at 1026.
111 Id. at 1028.
112 Id. at 1028-29.
113 Id. at 1029.
114 Id. As pertaining to “new evidence,” law of the case does not control. Usually newly discovered evidence is only allowed under Nevada Rule of Civil Procedure 60 on motion at the trial judge’s discretion. New facts argued on appeal are generally not allowed because
D. Inconsistencies in the Doctrine

The *Paine* court's consideration of the substantially similar facts element is not the only principle derived from the case. It also presents a clear break from prior rulings on the law of the case doctrine and, therefore, provides a segue into some of the inconsistencies the Nevada Supreme Court introduced into the doctrine. After ruling on the "new evidence" issue, the court elected to revisit prior issues of the case because of the gravity of Paine's sentence.\(^{115}\) The court, notwithstanding its reservations about weakening the doctrine, decided to revisit an issue even though it supposedly had no power to do so.\(^{116}\) In so doing, the court departed from its long-standing no power theory.

In its later cases, the court engaged in efforts almost simultaneously to (1) uphold the integrity of the no power doctrine and (2) ignore departures from the doctrine. In addition, the court struggled with law of the case, a judicially created doctrine, and legislatively enacted procedural bars. Interestingly, the legislative procedural bars provide exceptions for departure while law of the case does not.\(^{117}\) In a very convoluted case, the court provided examples of these phenomena.

1. *Lozada v. State*

In *Lozada v. State*,\(^{118}\) a jury convicted Lozada of four controlled substance violations.\(^{119}\) Lozada failed to perfect an appeal.\(^{120}\) Subsequently, Lozada filed a petition for post-conviction relief in the state district court, arguing that his counsel was ineffective for failing to inform him of the right to appeal.\(^{121}\) The district court denied Lozada's petition and the Nevada Supreme Court dismissed his subsequent appeal.\(^{122}\) Lozada then filed a petition for writ of habeas corpus in the federal district court.\(^{123}\) After his petition failed in the Ninth Circuit, the U.S. Supreme Court granted certiorari and remanded to the Ninth Circuit because two circuits recognized a presumption of prejudice in Lozada's case.\(^{124}\) The Ninth Circuit agreed with the U.S. Supreme Court that prejudice is presumed when a petitioner establishes that counsel's failure to file a notice

---


\(^{115}\) *Paine*, 877 P.2d at 1029.

\(^{116}\) Id. at 1028-29.

\(^{117}\) *NEV. REV. STAT.* 34.810(2) (1985) provides: "a second or successive petition must be dismissed if . . . the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Id.* § 34.810(3) requires petitioners to establish good cause for rearguing issues that have been rejected on their merits in a previous petition. *NEV. REV. STAT.* 34.726(1) (1991) requires good cause for failing to file a petition within one year of the final resolution of the direct appeal, or conviction if no appeal was taken.

\(^{118}\) 871 P.2d 944 (Nev. 1994).

\(^{119}\) *Id.* at 945.

\(^{120}\) *Id.*

\(^{121}\) *Id.*

\(^{122}\) *Id.*

\(^{123}\) *Id.*

\(^{124}\) *Id.*
of appeal was without the petitioner’s consent. The Ninth Circuit remanded to the federal district court for a determination of whether Lozada’s trial counsel failed to pursue an appeal without Lozada’s consent. Lozada filed a notice of appeal in the Nevada Supreme Court pursuant to the instructions of the federal district court. The court found that it lacked jurisdiction on Lozada’s direct appeal because the notice of appeal was filed well after the thirty-day appeal period prescribed by Nevada Rule of Appellate Procedure 4(b) (despite the Ninth Circuit’s offer to allow a delayed appeal). However, the court decided to change its ruling on the appeal of the petition for post-conviction based on the U.S. Supreme Court’s decision. The court noted, however, that the appellant must first overcome certain procedural bars to be able to file a petition for writ of habeas corpus (post-conviction) in the district court. Each required a showing of good cause for the successive or belated issues. The court stated that Lozada met the good cause requirement:

Because Lozada filed a timely petition for post-conviction relief, his claim of ineffective assistance of counsel was properly presented to the district court. If that claim had merit, the denial of relief by the district court, and the subsequent denial of relief by this court, would constitute an impediment external to the defense that would excuse appellant’s default in presenting the same claim in a successive petition. Therefore, we must determine whether appellant presented a viable claim for relief in his petition for post-conviction relief.

Law of the case doctrine is not mentioned at all in the court’s opinion. If the court had applied its construction of the law of the case doctrine, Lozada would not have been able to file a petition for writ of habeas corpus (post-conviction) in the district court. The first decision made on the appeal of the petition for post-conviction relief must stand according to the Nevada law of the case doctrine. It is entirely inconsistent in law to provide a detour around legislative procedural bars for good cause while the court leaves its judicially created procedural bar without exception. Only by not considering one could the court reconcile the two. The Lozada court may have chosen the favorable statutory procedural bars over the judicial doctrine because of the former’s flexibility. In this way, the court could hold tight to its rigid construction for the doctrine law of the case, but limit its scope to cases it deemed proper.

Limits in the doctrine’s applicability came not only from arbitrary decisions like Lozada, but also from restrictions on who may invoke the doctrine. In Winston, the court held that as long as a court has absolute jurisdiction

125 Id.
126 Id.
127 Id. at 945-46.
128 Id. at 946.
129 Id. at 946; see Nev. Rev. Stat. 34.810(2), 34.810(3), and 34.726.
130 Lozada, 871 P.2d at 946.
131 Id. at 946.
132 Id. passim.
133 Cf. Mazzan v. Whitley, 921 P.2d 920 (Nev. 1996) (equating law of the case with the statutory procedural bars allowing both an exception for a showing of “good cause”).
134 See Wright I, 39 P. 872, 875-74 (introducing the no power theory).
135 9 Nev. 71 (1873).
over an issue, its decision is the law of the case from which even a higher court cannot deviate. This did not mean that the higher courts had no jurisdiction for appellate review. But *Winston* stood for the proposition that higher courts’ review was restricted to certain appellate functions.\(^{136}\) At that time, Nevada law of the case had not fully developed and the issue of its applicability lingered. Did law of the case apply to horizontal and vertical appellate court treatment, binding the subsequent appellate court and the trial court below? Or could law of the case bind horizontal trial courts as well?\(^{137}\) Would the court cling to its ruling in *Winston*, where a trial court binds an appellate court? The language employed in *Wright I*, provided clues on this issue. The court stated that the “ruling of an appellate court” is a “final adjudication.”\(^{138}\) Did that statement overrule *Winston*?

2. *McKague v. Whitley*

The scope of law of the case remained an issue until *McKague v. Whitley*.\(^{139}\) In that case, a jury convicted McKague of murder and he was sentenced to death.\(^{140}\) McKague appealed and the court affirmed the conviction.\(^{141}\) He then filed a petition for post-conviction relief in the district court arguing ineffective assistance of counsel.\(^{142}\) The district court denied the petition and McKague’s counsel failed to perfect an appeal of the denied petition.\(^{143}\) Thereafter, the court dismissed McKague’s untimely appeal.\(^ {144}\) McKague filed another post-conviction petition for a writ of habeas corpus.\(^ {145}\) The district court dismissed the petition with prejudice invoking law of the case doctrine.\(^ {146}\) On appeal from that decision, the court held that the doctrine is

\(^{136}\) *Id.* at 75.

\(^{137}\) For an elaborate article on the application of law of the case in various court settings see Vestal, *supra* note 39. In his article, Professor Vestal first discussed an appellate court binding an inferior court. *Id.* at 5. In such cases, the higher court’s mandate carries the strictest requirement of observance. *Id.* The lower court generally has no power to deviate from the instructions given. *Id.* In this situation, problems generally do not arise other than deciphering the instructions to be followed or an inconsistent mandate. *Id.* at 6-10. Next, he covered an appellate court binding itself. *Id.* at 10. As discussed previously, there are two prevailing views: one favoring the no power theory and the other interpreting law of the case as a flexible rule of adherence. Next, he discussed a trial court binding a trial court. *Id.* at 10-11. Some courts treat horizontal authority at the lower level as binding. *Id.* at 15. However, most courts view the first trial court’s decision non-binding to a subsequent trial court on the same issues. *Id.* A number of variables shape this view: “(1) whether there has been an intervening, inconsistent or controlling decision; (2) whether the same or different judge is involved; (3) whether rehearing en banc is authorized.” *Id.* at 15. Finally, he discussed the anomalous inferior court binding an appellate court. *Id.* at 20. These situations involve lack of objection in the lower court or improper appellate review of the issues. In other words, the lower court has general jurisdiction and the remedy sought by appellant is not an appellant remedy. *See* *Ex parte* *Winston*, 9 Nev. 71 (1893) discussed in text.

\(^{138}\) *Wright I*, 39 P. 872, 874 (Nev. 1895).

\(^{139}\) 912 P.2d 255 (Nev. 1996).

\(^{140}\) *Id.* at 255.

\(^{141}\) *Id.*

\(^{142}\) *Id.*

\(^{143}\) *Id.*

\(^{144}\) *Id.*

\(^{145}\) *Id.*

\(^{146}\) *Id.*
Inapplicable to horizontal trial court decisions "because only appellate court decisions may constitute the law of the case."\textsuperscript{147} However, the court stressed that trial court decisions are still given weight because statutory procedural bars are applicable in such cases.\textsuperscript{148}

The result achieved in \textit{McKague} is inconsistent with \textit{Lozada}. Why did the court stress overcoming the statutory procedural bars in \textit{Lozada}'s case without considering the equally weighted judicial procedural bar of law of the case? Unlike \textit{McKague}, \textit{Lozada} involved an appellate court decision. Some explanations are possible. Either law of the case was purposefully omitted from inquiry in \textit{Lozada} in the interests of efficiency or the court did not think to consider employing the doctrine to the facts of the case. However, a third more remote explanation is possible. Perhaps the court was attempting to steer away from its rigid construction to a more liberal view of law of the case. Consider the following cases.

3. \textit{Murray v. State}

In \textit{Murray v. State},\textsuperscript{149} a jury convicted Murray on two counts of attempted robbery with the use of a deadly weapon.\textsuperscript{150} Murray then filed a direct appeal, which the court dismissed.\textsuperscript{151} Murray filed a post-conviction petition for a writ of habeas in the district court challenging the sentence.\textsuperscript{152} The district court found merit in Murray's claim and "remanded" to its fellow district court to re-sentence Murray.\textsuperscript{153} The court of remand refused to alter the sentence and Murray appealed.\textsuperscript{154} On appeal, the state argued that Murray's claim was barred under law of the case because it involved a decided issue -- the validity of Murray's sentence.\textsuperscript{155} The court held on the earlier appeal that Murray's sentence was "within the statutory limits,"\textsuperscript{156} but refused to apply law of the case for two reasons. First, the issue apparently was not entirely the same as argued on the second appeal.\textsuperscript{157} Second, and more interesting, a case decided

\textsuperscript{147} Id. at 259 (emphasis added).
\textsuperscript{148} Id. at 259-60.
\textsuperscript{149} 803 P.2d 225 (Nev. 1990).
\textsuperscript{150} Id. at 226.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. This decision pre-dated \textit{McKrague}. Perhaps the district court did not feel law of the case bound it to the decision of its fellow court. The law proved inconclusive as yet on this issue. If law of the case did weigh against the court, on "remand" several factors are relevant according to Professor Vestal: "the distaste judges have for repeated work which has already been done; the general respect that one judge has for another; [and] the desire for stability in the law." Vestal, supra note 39, at 16-17. In this case, however, the first district court has no power to remand to a fellow district court so law of the case is inapplicable. Murray v. State, 803 P.2d 225, 226 (Nev. 1990). In a dissenting opinion in a case written by Justice Springer, a district judge reconsidered and overruled a prior district judge's decision. Masonry & Title Contractors Ass'n of S. Nev. v. Jolley, Urga, & Wirth, Ltd., 941 P.2d 486 (Nev. 1997) (Springer, J., dissenting). The judge refused to adhere to law of the case because, according to the judge, the decision was clearly erroneous. \textit{Id.} at 492. Ironically, the judge was clearly erroneous in his interpretation of Nevada law of the case!\textsuperscript{155} Murray, 803 P.2d at 226.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
between Murray's first appeal and his second appeal offered clarity or, in the court's words, "explained the law." Arguably then, a decision of law fixed between two appeals in a case, not appertaining to the case or its proceedings, might offer clarifying or explanatory rules that govern the second appeal. This rationale sounds too much like the law of the case as a principle of adherence as opposed to the no power theory of Nevada law of the case. A shift was occurring. Applying this rationale to the hypothetical illustrated in the Introduction, Lenny might argue on a second appeal that "explanatory law" changed the result on the hearsay issue and, therefore, the court should reconsider the issue. This result might defeat a practical efficiency interest, but it favors the right decision.

4. Mazzan v. Whitley

In Mazzan v. Whitley, the court continued to find exception to law of the case. In 1979, Mazzan was convicted of murder and sentenced to death. Several petitions and appeals followed this conviction. The court noted it had already decided a few of Mazzan's assertions in previous proceedings. The court then introduced the normal statutory bars like the ones used in Lozada and other cases, namely Nevada Revised Statute 34.810(2) and (3). These statutes require a showing of good cause. Mixed in with these statutes, the court injected law of the case doctrine as an additional procedural element Mazzan must overcome. Not present in the discussion, however, are any distinguishing factors from these statutory bars and law of the case. It appeared from the reading that Mazzan overcame all his procedural hurdles by a showing of "good cause."

E. Summary of Nevada Points on Law of the Case

From the foregoing analysis of the history of law of the case, several points about the Nevada doctrine are apparent. A list of these points will facilitate the following section entitled Criticism and An Alternative Route.

---

158 Id. at 227.
159 Indeed, if two cases are positioned on the same point of law but with inconsistent results and without significantly varied facts, it would seem quite logical that "neither is the law of the case." Greene v. Rothschild, 402 P.2d 356 (Wash. 1966) (citing Gage v. Downey, 29 P. 635 (Cal. 1892)); In re Estate of Walker, 181 P. 792 (Cal. 1919) (emphasis in original).
160 Cf. Barrett v. Thomas, 809 F.2d 1151 (5th Cir. 1987); Counsel of Alternative Political Parties v. Hooks, 179 F.3d 64 (3d Cir. 1999).
162 Id. at 920.
163 Id. at 920-21.
164 Id. at 922.
165 Id.
166 Id.
167 Id. Note the similarity produced in this case and Lozada. However, the Lozada court failed to implicate law of the case while Mazzan did.
168 Id. passim.
169 Id. at 922.
1) Nevada courts associated law of the case with res judicata under principles of estoppel as opposed to stare decisis under principles of correct application of rules.  

2) Nevada courts adopted the no power theory of law of the case, meaning, once the court rules it cannot depart from that prior rule except upon a motion for rehearing.  

3) The scope of law of the case in Nevada is limited to only appellate decisions.  

4) Law of the case applies to any issue on appeal properly raised, deliberated, and decided.  

5) Nevada law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings.  

6) Law of the case applies to all issues where the facts are substantially the same.  

III. CRITICISM AND AN ALTERNATIVE ROUTE  

This section of the note will compare the law of the case doctrine in Nevada with the current federal framework. As the court adopted the "no power theory" from outside cases back in 1895, it is appropriate now to contrast the Nevada view with current cases. In Wright I, the court stated that it looked to the opinions of its sister courts, federal courts, and the U.S. Supreme Court. A complete analysis calls for comparison of the Nevada interpretation with those jurisdictions from which Nevada adopted its interpretation. However, for sake of brevity and to facilitate concentration on current doctrine, this note will limit comparison to the current federal framework.  

One might argue the significance of equating law of the case to res judicata or stare decisis. These doctrines indeed share similar characteristics and are sometimes confused with one another. Generally speaking, however, courts that adopt the no power theory associate law of the case to res judicata, a strict preclusion doctrine blind to any hindsight. On the other hand, other

170 Cartan v. David, 4 P. 61 (Nev. 1884); Wright I, 39 P. 872 (Nev. 1895).  
171 Wright I, 39 P. 872; State v. Loveless, 150 P.2d 1015 (Nev. 1944).  
173 Loveless, 150 P.2d 1015.  
176 In Swanson v. Swanson, 5 P.3d 973 (Idaho 2000), the court equated law of the case to stare decisis. The court, speaking of law of the case noted, "[l]ike stare decisis it protects against relitigation of settled issues." Id. at 977. This equation is disingenuous to principles of stare decisis since a court may decide the issue mistakenly on the first appeal. Such a case is not settled. Idaho is one of the few states like Nevada that adhere to the no power theory. The court should have related its interpretation of law of the case to res judicata.  
177 See supra note 16; see also United States v. ITT Rayonier, 627 F.2d 996, 1004 (9th Cir. 1980) ("The doctrine of res judicata does not depend on whether the prior judgment was free of error. If it did, judgments would lack finality, the very rationale of the rule of res judicata.") (citing Milliken v. Meyer, 311 U.S. 457 (1940)); Thompson v. Sawyer, 678 F.2d 257, 270 (D.C. Cir. 1982) ("[T]he doctrine of the law of the case, unlike res judicata but like stare decisis, does not preclude reconsideration of erroneous decisions.").
courts view law of the case as a rule of adherence, like stare decisis, allowing departure under certain circumstances.\(^{178}\)

In the classic case, \textit{Linn v. Minor}, the court left the following instruction: “\textit{whenever a court is called upon to depart from a prior determination}” it must take into account “all improvements in the science of the law.”\(^ {179}\) However, only a few years later the court failed to follow that instruction and instead followed a path set by other jurisdictions.\(^{180}\) The court in \textit{Wright I} and other decisions characterized law of the case as kin to res judicata.\(^{181}\)

Law of the case ought to operate more like stare decisis. It cannot act like res judicata since the doctrine is not limited to decisive issues. Law of the case extends to a multitude of issues presented, deliberated, and decided in one case.\(^ {182}\) To mandate strict preclusionary effect to all these issues is an uncomfortable prospect. A court might be prone to lackadaisically dismiss a collateral issue with little forethought if it is not the determinative issue. This does not mean that all judicial dictum of the Nevada Supreme Court is flagrantly cursory. But, given the court’s extremely pressing burden, overlooking a few collateral issues is not an implausible occurrence.\(^ {183}\)

The \textit{Loveless} court cautioned that a decision is only authority if “there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in the fullest extent.”\(^ {184}\) Does that mean that only carefully considered judicial dictum is binding under law of the case? Is the issue of “careful consideration” a presumption, an irrebuttable presumption? If law of the case extends to a multitude of issues, a power of departure is warranted. Law of the case ought to operate like stare decisis. Its overreaching effect should demand flexibility. In this way, law of the case and stare decisis share the same aim, to ensure a consistent body of law. For example, the hypothetical in the Introduction would allow Lenny to reargue the issue of hearsay before the court. This result is sound since the litigant in the intervening case received beneficial treatment on the issue.

In addition to this noted exception to law of the case, the case law is replete with categorical exceptions including allowing departure when a past decision is erroneous or would work a manifest injustice.\(^ {185}\) These cases fully

\(^{178}\) Schopler, \textit{supra} note 6, § 3(a) and cases cited therein; \textit{see also}, Steinman, \textit{supra} note 1, at 598-99 nn.8-10.

\(^{179}\) \textit{4 Nev.} 462, 466-67 (1868).

\(^{180}\) \textit{State v. Loveless}, 150 P.2d 1015, 1018 (Nev. 1944).

\(^{181}\) \textit{Id.} at 1017-18; \textit{Wright I}, 39 P. 872 (Nev. 1895).

\(^{182}\) \textit{Loveless}, 150 P.2d at 1019.

\(^{183}\) There is no doubt that Nevada is one of the fastest growing states in America. Consequently, litigation in Nevada is on the rise. In a matter of just five years, cases appealed to the Nevada Supreme Court increased dramatically. Susan Wilson, \textit{Proper Person Litigation In The Nevada Supreme Court}, 6 \textit{Nev. Law.} 24 (1998). A growing state provides an additional reason to abandon the no power theory. Within a matter of time, Nevada may augment its court system with intermediate appellate courts. Complications may ensue regarding applicability of the law of the case doctrine. \textit{See} Greene v. Rothschild, 402 P.2d 356 (Wash. 1966) (citing Note, \textit{Law of the Case}, 5 \textit{Stan. L. Rev.} 751 (1953)).

\(^{184}\) \textit{Loveless}, 150 P.2d at 1019.

\(^{185}\) Steinman, \textit{supra} note 1, at 599; Schopler, \textit{supra} note 6, § 6 and cases cited therein.
elaborate why efficiency must capitulate to accuracy.\textsuperscript{186} A quick review of such decisions extols the reasons behind the rule.

Most if not all federal jurisdictions hold to the view that law of the case is not an "inexorable command.\textsuperscript{187} Perhaps one of the most respected and foundational cases espousing this view is \textit{White v. Murtha}.\textsuperscript{188} There, the court faced the question of whether it should adhere to a former decision. In reviewing the case law pertaining to law of the case, it summarized the competing principles as follows:

The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof. While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.\textsuperscript{189}

This interpretation of the doctrine is found in many recent federal court opinions.\textsuperscript{190} The Second Circuit takes an even more relaxed approach to the doctrine.\textsuperscript{191} In \textit{Rezzonico v. H & R Block, Inc.},\textsuperscript{192} the court explained that law of the case is a discretionary doctrine and not a mandatory one. The doctrine applies, according to the court, absent "cogent or compelling" reasons.\textsuperscript{193} This is by far the most liberal approach to law of the case as it vests the court with room for reason; however, the majority of circuits limit departure to the categories established in \textit{Murtha}.\textsuperscript{194}

This interpretation is a far cry from Nevada’s strict construction. Nevada saw fit long ago to adopt the current interpretation; it is now years behind the

\textsuperscript{186} Schopler, \textit{supra} note 6, § 6 and cases cited therein.
\textsuperscript{187} See, e.g., Craft \textit{v. United States}, 233 F.3d 358, 363 (6th Cir. 2000); Greene \textit{v. Safeway Stores, Inc.}, 210 F.3d 1237, 1241 (10th Cir. 2000).
\textsuperscript{188} 377 F.2d 428, 431 (5th Cir. 1967).
\textsuperscript{189} Id. at 431-32.
\textsuperscript{191} Steinman, \textit{supra} note 1, at 614-15.
\textsuperscript{192} 182 F.3d 144 (2d Cir. 1999).
\textsuperscript{193} Id. at 149.
\textsuperscript{194} See cases cited in \textit{supra} note 185.
existing view in the federal system. Nevada should adopt the Murtha view. Adoption of the categorical exceptions presented in Murtha would require Nevada to overturn the no power theory, but such a sacrifice is justified. In fact, adopting the Murtha categorical exceptions to law of the case will harmonize the law of the case doctrine with Murray, Mazzan, and Lozada.

The first categorical exception in Murtha is that law of the case does not apply if controlling authority has since made contrary decisions.195 If a decision on a first appeal is altered, clarified, or changed by intervening law,196 and the second appellate decision factors in the intervening law, harmony is struck producing a general consistency in the law. Applying this principle to Murray, the court could have changed its decision on the second appeal with Odoms v. State,197 an intervening decision, regardless of whether law of the case precluded the issue. Here, the Murtha exception applies. The court decided that the issue presented on the second appeal differed from the first justifying a departure from the doctrine.198 But had the issue been the same, under the Murtha exception, the court could follow the Odoms decision. Conversely, under the no power theory, the court could not account for the intervening Odoms decision if the issue presented in the first appeal is substantially similar to the second appeal. Therefore, to ensure consistency in the Nevada case law, Nevada courts should overrule the no power theory in favor of the Murtha exception.

The second Murtha categorical exception to law of the case provides for departure from the doctrine if adherence would result in an erroneous decision or work a manifest injustice.199 This principle echoes the underlying theory of overruling the wrong decision in stare decisis. The Nevada Supreme Court decisions of Lozada and Mazzan apply these principles in direct violation of Nevada’s law of the case interpretation. In Lozada, the court did not mention law of the case, yet changed a prior decision because it reached the incorrect result.200 In Mazzan, the court mentioned law of the case, yet applied the doctrine because plaintiff failed to show “good cause” for disregarding the doctrine. In both cases, the Nevada legislature drafted procedural bars, and in so doing, created an exception upon a showing of “good cause.”201 If the Nevada Supreme Court will adopt the Murtha exceptions, harmony would not only result in the case law, but also between the Nevada Supreme Court and the Nevada Legislature. Good cause would allow the court to depart from an erroneous ruling. The court must overrule the no power theory. Otherwise, a continual friction between the legislature and the court will prevail.

195 377 F.2d at 431-32 (5th Cir. 1967).
196 See, e.g., Barrett v. Thomas, 809 F.2d 1151 (5th Cir. 1987); see also Hooks, 179 F.3d 64.
199 377 F.2d at 431-42.
200 871 P.2d at 944.
201 See supra note 117.
IV. CONCLUSION

Nevada should restructure law of the case to account for recent developments in the doctrine. The old theory is outdated. The Nevada Supreme Court adopted the "no power theory" of law of the case as a result of existing case law prevalent at the time from various jurisdictions, including the federal circuits. Since then the entire federal system changed its scheme to discount the no power theory. Categorical exceptions employed by the federal courts provide a practical solution to the unforgiving result of the no power theory. If a decision on the first appeal is changed, altered, or clarified by an intervening decision, or if the first decision on the case is clearly wrong or works a manifest injustice, law of the case should not hold to perpetuate error. Therefore, the Nevada Supreme Court should apply the Murtha categorical exceptions. In doing so, the court will provide not only a workable standard, but also ensure the integrity of the law of the case remains well within defined limits.