WELLS FARGO BANK, N.A., APPELLANT, *v.* DEWEY S. O'BRIEN; AND RENEE D. O'BRIEN, RESPONDENTS.

No. 61650

October 3, 2013 310 P.3d 581

Appeal from a district court order granting a petition for judicial review of a foreclosure mediation, awarding sanctions, and remanding the matter to the Foreclosure Mediation Program for further mediation. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Mortgagors petitioned for judicial review of foreclosure mediation based on assertion that mortgagee had breached agreement reached in mediation to stay foreclosure pending resolution of application for loan modification. The district court granted petition and ordered mortgagee to participate in and pay for further mediation. Mortgagee appealed. The supreme court, CHERRY, J., held that order granting petition for review and requiring mortgagee to participate and pay for further mediation was not final and appealable.

Dismissed.

HARDESTY, J., dissented.

Tiffany & Bosco, P.A., and *Gregory L. Wilde* and *Kevin S. Soderstrom*, Las Vegas, for Appellant.

Mark L. Mausert, Reno, for Respondents.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   In the administrative context, a district court order remanding a matter to an administrative agency is not an appealable order, unless the order constitutes a final judgment on the merits and remands merely for collateral tasks. NRAP 3A(b)(1).
2. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   The district court's order granting mortgagors' petition for judicial review based on claim that mortgagee had violated parties' agreement at foreclosure mediation hearing to stay foreclosure pending resolution of application for loan modification, and which directed mortgagee to participate in and pay for further mediation, was not final, appealable order, where second mediation would address merits of foreclosure case. NRS 107.086; NRAP 3A(b)(1).

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

This appeal raises a threshold jurisdictional question: is a district court order granting a petition for judicial review of a foreclosure

mediation and remanding the matter for additional mediation final and appealable, or is it not final and, thus, not appealable? To preserve and promote the interests of judicial economy and efficiency, we conclude that an order remanding for further mediation generally is not final and appealable, and we thus dismiss this appeal.

PROCEDURAL HISTORY

At an NRS 107.086 foreclosure mediation, respondent homeowners Dewey S. O'Brien and Renee D. O'Brien and representatives of appellant lender Wells Fargo Bank, N.A., agreed that foreclosure proceedings would be halted for three months while the O'Briens were being considered for a loan modification. Several months later, the O'Briens petitioned the district court for judicial review, asserting that Wells Fargo breached the parties' agreement. The district court found that Wells Fargo had violated the agreement and granted the O'Briens' petition for judicial review, awarding them sanctions and attorney fees. Significant to our jurisdictional analysis, the district court also directed Wells Fargo to participate in and pay for ''further mediation.'' Wells Fargo appealed.

We ordered Wells Fargo to show cause why this appeal should not be dismissed for lack of jurisdiction, asking it to address whether, given the remand for additional mediation, the order was final and appealable. Both Wells Fargo and the O'Briens timely responded, arguing, respectively, that the order resolved all of the issues before the district court and thus was final and appealable, and that the order did not resolve the ultimate question regarding the status of the O'Briens' home and consequently was not final and appealable.

DISCUSSION

[Headnotes 1, 2]

To promote judicial economy and efficiency by avoiding piecemeal appellate review, appellate jurisdictional rules have long required finality of decision before this court undertakes its review. NRAP 3A(b)(1); *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000); *see Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5, 106 P.3d 134, 136-37 (2005) (''The general rule requiring finality . . . is not merely technical, but is a crucial part of an efficient justice system. . . . [F]or the appellate court, it prevents an increased caseload and permits the court to review the matter with the benefit of a complete record.''); *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 733 (1994) (recognizing that the finality rule ''seeks to . . . promot[e] judicial economy by avoiding the specter of piecemeal appellate review''). Thus, in the administrative context, a district court order remand-

ing a matter to an administrative agency is not an appealable order, unless the order constitutes a final judgment on the merits and remands merely for collateral tasks, such as calculating benefits found due. *Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 1489, 929 P.2d 936, 937 (1996); *see State Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1024-25, 862 P.2d 423, 424-25 (1993); *Clark Cnty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 657-58, 730 P.2d 443, 446 (1986); *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000).

The same reasoning applies to orders arising from, and remanding for further mediation to, the Foreclosure Mediation Program. Here, the district court considered the matter under Foreclosure Mediation Rule 21 and remanded for the parties to attend mediation again. The second mediation will readdress the merits of the foreclosure matter, and, if appropriate, any party will then be able to petition for judicial review of that mediation. Consequently, we conclude that the appealed order was not the final resolution of this matter. Because it is not final, the order is not appealable. NRAP 3A(b)(1). As recognized by the federal court of appeals in *Pueblo of Sandia*, deferring appellate review until the completion of significant ongoing proceedings not only avoids the possibility of considering two appeals but ''also leaves open the possibility that no appeal will be taken in the event the proceedings on remand satisfy all parties.'' 231 F.3d at 880. Accordingly, we conclude that we lack jurisdiction, and we dismiss this appeal.

PICKERING, C.J., and GIBBONS, PARRAGUIRRE, DOUGLAS, and SAITTA, JJ., concur.

HARDESTY, J., dissenting:

As acknowledged by the majority, an order that resolves, on their merits, all of the substantive issues before the court is final and appealable, even though it also remands the matter for further proceedings collateral to the issues before the court. *See Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 1488-89, 929 P.2d 936, 937 (1996); *State Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1024-25, 862 P.2d 423, 424-25 (1993) (indicating that the district court's consideration of the merits of a petition for judicial review can render its order final, even if the court also remands that matter). That is exactly what happened here.

During foreclosure mediation, the O'Briens and Wells Fargo reached an agreement to forestall foreclosure for three months upon certain terms. Several months later, after being notified that their house was once again in foreclosure status, the O'Briens filed a petition for judicial review, seeking enforcement of their agreement with Wells Fargo and sanctions. The district court concluded that Wells Fargo had breached the parties' agreement and

awarded sanctions, as requested. Instead of enforcing the agreement, which at that point had ostensibly expired, the district court remanded for additional mediation, giving the parties an opportunity to reach a new or extended agreement, but not necessarily to resolve issues directly related to the first one. This finally resolved all of the issues before the court. *Cf.* 2 Am. Jur. 2d *Administrative Law* §§ 574 and 575 (2004) (recognizing that remands typically are to allow the decision-maker to reconsider the original matter in light of additional evidence or a corrected standard, or for additional factual findings). And because the remand was essentially for a new mediation, if an appeal is not allowed immediately, Wells Fargo may be denied an opportunity to challenge the district court's decision at a later date. Moreover, this court's decision to decline jurisdiction over appeals from these types of remand orders invites the possibility of endless back-and-forth between the Foreclosure Mediation Program and the district court, without any direct and nondiscretionary avenue for review of the district court's decisions by this court. Thus, I would hold that the district court's order finally resolved the merits of the petition for judicial review, rendering the district court's order appealable as a final judgment, NRAP 3A(b)(1); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000), and proceed to consider the merits of this appeal. For these reasons, I dissent.

NORTH LAKE TAHOE FIRE PROTECTION DISTRICT, APPELLANT, *v.* WASHOE COUNTY BOARD OF COUNTY COMMISSIONERS; AND TAMMI DAVIS, WASHOE COUNTY TREASURER, RESPONDENTS.

No. 60395

October 3, 2013 310 P.3d 583

Appeal from a district court order denying a petition for a writ of mandamus seeking payment under NRS Chapter 474. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Following decision of Board of County Commissioners and Treasurer to provide refunds to previously overtaxed property owners and to fund such refunds in part by withholding property tax distributions made to Fire District that had previously benefited from overtaxation, Fire District petitioned for writ of mandamus compelling County Commissioners and Treasurer to cease withholding portion of property tax distribution normally credited to Fire District. The district court denied relief. Fire District appealed. The supreme court, CHERRY, J., held that: (1) statute requiring property taxes collected on behalf of Fire District to be

credited to Fire District's funds did not preclude County Commissioners and Treasurer from withholding property tax distribution from Fire District; and (2) County Commissioners and Treasurer had discretion to withhold tax distribution from Fire District, and therefore political question doctrine precluded the supreme court from hearing Fire District's petition.

Affirmed.

Reese Kintz, LLC, and *Devon T. Reese, D. Geno Menchetti*, and *Ryan W. Herrick*, Incline Village, for Appellant.

Richard A. Gammick, District Attorney, and *David C. Creekman*, Chief Deputy District Attorney, Washoe County, for Respondents.

1. CONSTITUTIONAL LAW.
   The political question doctrine stems from the separation of powers essential to the American system of government.
2. CONSTITUTIONAL LAW.
   The separation of powers doctrine exists to prevent one branch of government from encroaching on the powers of another branch. U.S. CONST. art. 1, § 1 *et seq.*; art. 2, § 2 *et seq.*; art. 3, § 1 *et seq*.
3. CONSTITUTIONAL LAW.
   The Nevada Constitution specifically delineates the power belonging to each branch of government in the state; the Legislature enacts laws, the executive branch is tasked with carrying out and enforcing those laws, and judicial power is the authority to hear and determine justiciable controversies. Const. art. 4, § 1 *et seq.*; art. 5, § 7.
4. COURTS.
   In general, the judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.
5. CONSTITUTIONAL LAW.
   Under the political question doctrine, which provides for a narrow exception limiting justiciability of cases before the judiciary, controversies are precluded from judicial review when they revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.
6. CONSTITUTIONAL LAW.
   Features that characterize a case as being nonjusticiable under the political question doctrine include a textually demonstrable constitutional commitment of the issue to a coordinate political department, a lack of judicially discoverable and manageable standards for resolving it, the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
7. PRETRIAL PROCEDURE.
   A determination that any one of the *Baker v. Carr*, 369 U.S. 186, 217 (1962), factors for determining whether a case is nonjusticiable under the political question doctrine has been met necessitates dismissal.

8. CONSTITUTIONAL LAW.
   Once the Legislature has made policy and value choices by enacting statutory law, that law's construction and application is the job of the judiciary.
9. MANDAMUS.
   A writ of mandamus may be available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station.
10. TAXATION.
    Statute requiring property taxes collected on behalf of Fire District to be credited to Fire District's funds did not preclude County Commissioners and Treasurer from withholding property tax distribution from Fire District to refund previously overtaxed property owners, where Fire District had previously benefited from overtaxation of property owners. NRS 474.200.
11. CONSTITUTIONAL LAW.
    For purposes of the political question doctrine, in their power to budget, spend, and levy and collect property taxes, county commissioners perform various functions of executive dimension. NRS 244.150, 244.195, 244.200, 244.1505.
12. CONSTITUTIONAL LAW.
    For purposes of the political question doctrine, the executive power includes the general power to, among other things, administer appropriated funds, so long as doing so does not conflict with legislative purpose.
13. CONSTITUTIONAL LAW; TAXATION.
    County Commissioners and Treasurer had discretion to refund overtaxed property owners by withholding property tax distribution from Fire District, and therefore political question doctrine precluded the supreme court from hearing Fire District's petition for writ of mandamus challenging such decision, where there was no statute or rule, aside from statute that allowed for withholding of distribution credit from county taxing units for purpose of issuing tax refunds necessitated by overpayments, that governed how County Commissioners must handle tax refund liability. NRS 354.240.
14. CONSTITUTIONAL LAW; COURTS.
    Courts exist solely to declare and enforce the law, and are without authority as to matters of mere governmental policy.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

This case arises out of actions taken by respondents Washoe County Board of County Commissioners and Washoe County Treasurer Tammi Davis to provide refunds to Incline Village and Crystal Bay property owners who paid excessive property taxes as a result of improper appraisals. To cover the cost of the refunds plus interest, respondents withheld amounts from property tax distributions made to the various county taxing units that had previ-

ously benefited from the excessive property taxes, essentially offsetting the refunded amounts against the distributions. Those taxing units from which distribution amounts were withheld include appellant North Lake Tahoe Fire Protection District (FPD), which petitioned the district court for a writ of mandamus compelling respondents to cease withholding portions of the distributions.

The district court denied relief, and on appeal, we are asked to consider the propriety of these withholdings under our current statutory scheme. We must also consider whether judicial interference in this matter is precluded by the political question doctrine. To assist with this latter assessment, we take this opportunity to adopt the factors set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962). In applying these factors, we conclude that because respondents were within their authority to withhold distributions, and because the manner in which they did so was discretionary, the political question doctrine precludes judicial review. We thus conclude that the district court properly denied writ relief.

FACTS AND PROCEDURAL HISTORY

FPD provides all emergency and nonemergency fire services, along with emergency medical services, to the Incline Village/Crystal Bay area. It was formed under NRS Chapter 474 (County Fire Protection Districts) and is funded pursuant to the requirements set forth in NRS 474.190. Like other taxing units, including Washoe County, the Washoe County School District, the State of Nevada, the Incline Village General Improvement District, and the supplemental city/county relief tax account, FPD obtains funding from property tax distributions. Slightly more than half of FPD's budget is made up of its bimonthly distributions of the real property taxes.

Pursuant to our decision in *Berrum v. Otto*, 127 Nev. 372, 381, 255 P.3d 1269, 1274-75 (2011), in which we held that the Washoe County Treasurer had a duty under NRS 360.2935 to refund, with interest, unconstitutionally imposed and collected property taxes in Incline Village and Crystal Bay, the County Commissioners considered various ways in which the refund and interest payment could be funded. The County Commissioners ultimately decided to pay for the refund and interest by reducing future property tax distributions proportionately among the various taxing units. Thus, in August 2011, the County Commissioners directed Treasurer Davis to make the refunds and interest payments and to withhold corresponding proportionate amounts from the county taxing units' property tax distributions over the next 18 months. Doing so reduced FPD's property tax distribution significantly.

Consequently, FPD filed a petition for a writ of mandamus with the district court, seeking to prevent respondents from con-

tinuing to withhold any portion of FPD's tax revenues. After a hearing, the district court determined that writ relief was not appropriate. The district court determined that, to address FPD's concerns, it would have to interject itself into the internal political decisions of another branch of government, which it could not do. The court further pointed out that a writ may not be used to prescribe the manner in which political officers should exercise discretion unless the officers' actions are arbitrary and capricious, which was not the case here. Thus, the district court denied the application for writ relief. FPD subsequently appealed.

On appeal, FPD argues that the writ of mandamus exists to allow a court to compel compliance with a statutory mandate such as that contained in NRS 474.200. NRS 34.160. FPD points out that NRS 474.200 is not discretionary—it requires respondents to collect and then distribute a portion of the real property taxes to FPD. FPD thus argues that the district court erred in refusing to issue a writ of mandamus to compel the County Commissioners and Treasurer to distribute the full amount due based on the current year's property tax base. FPD further contends that the district court's reliance on separation-of-powers-based justiciability requirements was misplaced, as issuing a writ would not intrude on respondents' decision-making authority. In so arguing, FPD challenges the withholding of monetary distributions to fund the tax refunds. Respondents, on the other hand, assert that the issue presented here is completely nonjusticiable and, thus, the district court properly denied FPD's requested writ relief.

DISCUSSION

[Headnotes 1, 2]

The political question doctrine stems from the separation of powers essential to the American system of government. Nevada's separation of powers doctrine, contained in Article 3, Section 1 of the Nevada Constitution, provides that ''no persons charged with the exercise of powers properly belonging to [another branch] shall exercise any functions, appertaining to either of the others.'' This doctrine exists for one very important reason—''to prevent one branch of government from encroaching on the powers of another branch.'' *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103 (2009). Recently, we stated that ''[t]his separation is fundamentally necessary because '[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator: Were it joined to the executive power the judge might behave with all the violence of an oppressor.' '' *Berkson v. LePome*, 126 Nev. 492, 498-99, 245 P.3d 560, 565 (2010) (second alteration in original) (quoting *Galloway v. Truesdell*, 83 Nev. 13, 19, 422

P.2d 237, 242 (1967)). ''The division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people.'' *Galloway*, 83 Nev. at 18, 422 P.2d at 241.

[Headnote 3]

The Nevada Constitution specifically delineates the power belonging to each branch of government in this state. *Berkson*, 126 Nev. at 498, 245 P.3d at 564. The Legislature enacts laws, and in turn, the executive branch is tasked with ''carrying out and enforcing th[ose] laws.'' *Galloway*, 83 Nev. at 20, 422 P.2d at 242 (''The executive power extends to the carrying out and enforcing the laws enacted by the Legislature.''); 16 C.J.S. *Constitutional Law* § 354 (2005) (''The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature''); *see* Nev. Const. art. 4 (providing the Legislature with the ability to enact laws); Nev. Const. art. 5, § 7 (''[The Governor] shall see that the laws are faithfully executed.''). On the other hand, '' ' ''Judicial Power'' is the *authority* to hear and determine justiciable controversies,' '' *State v. Second Judicial Dist. Court*, 116 Nev. 953, 962, 11 P.3d 1209, 1214 (2000) (quoting *Galloway*, 83 Nev. at 20, 422 P.2d at 242), '' '[t]o declare what the law *is*[,] *or has been*.' '' *Berkson*, 126 Nev. at 499, 245 P.3d at 565 (first alteration in original) (quoting 1 Thomas M. Cooley, *Constitutional Limitations* 191 (8th ed. 1927)).

[Headnotes 4, 5]

''In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.' '' *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. ___, ___, 132 S. Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). The political question doctrine, however, provides for a narrow exception limiting justiciability. *See Zivotofsky*, 566 U.S. at ___, 132 S. Ct. at 1427; *Pershing Cnty. v. Sixth Judicial Dist. Court*, 43 Nev. 78, 89, 183 P. 314, 315 (1919). Under the political question doctrine, controversies are precluded from judicial review when they ''revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.'' 16A Am. Jur. 2d *Constitutional Law* § 268 (2013); *see generally Hardy*, 125 Nev. at 296, 212 P.3d at 1106; *Caine v. Robbins*, 61 Nev. 416, 424, 131 P.2d 516, 519 (1942); *Pershing Cnty.*, 43 Nev. at 89, 183 P. at 315.

[Headnotes 6, 7]

More specifically, the United States Supreme Court has identified certain features that characterize a case as being nonjusticiable under the political question doctrine:

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

United States v. Munoz-Flores, 495 U.S. 385, 389-90 (1990) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). A determination that any one of these factors has been met necessitates dismissal based on the political question doctrine. *See id.* To clarify and expand our limited jurisprudence in this area, we take this opportunity to adopt the *Baker* factors to assist in our review of the justiciability of controversies that potentially involve political questions. With these factors in mind, we examine FPD's arguments concerning NRS 474.200 and the County Commissioner's and Treasurer's withholding decisions.

NRS 474.200

[Headnotes 8, 9]

FPD argues that the political question doctrine does not apply here because NRS 474.200 contains a clear funding mandate, and mandamus is available to compel governmental compliance with a clear statutory mandate. As noted, once the Legislature has made policy and value choices by enacting statutory law, that law's construction and application is the job of the judiciary. Moreover, a writ of mandamus may indeed be available ''to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station.'' *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. Thus, if a clear statutory directive found in NRS 474.200 were being violated, the political question doctrine would not prevent court review. But we do not read NRS 474.200 to require a full distribution to FPD of all taxes received regardless of previous overpayments.

[Headnote 10]

NRS 474.200 provides, in relevant part, that

> 1. At the time of making the levy of county taxes for that year, the boards of county commissioners shall levy the tax established pursuant to NRS 474.190 upon all property, both

> real and personal, subject to taxation within the boundaries of the district. . . .
>
> 2. When levied, the tax must be entered upon the assessment rolls and collected in the same manner as state and county taxes. . . .
>
> 3. *When the tax is collected, it must be placed in the treasury of the county in which the greater portion of the county fire protection district is located, to the credit of the district*.

(Emphasis added.) Thus, pursuant to this statute, the taxes collected on behalf of a fire district must be credited to the fire district's funds. NRS 474.200(3). Plainly, funding FPD through its portion of the collected taxes is not discretionary. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012) (explaining that in our de novo review of a statute, we will not look beyond the plain language when it is clear on its face). However, this statute does not contemplate or provide guidance when a refund is due of overpaid, unconstitutionally collected taxes. And while not directly on point, NRS 354.240 allows for the withholding of distribution credit from county taxing units for the purpose of issuing tax refunds necessitated by overpayments. Under NRS 354.220-.250, an applicant may request a refund from the County Commissioners or the Treasurer where ''the applicant for refund has a just cause for making the application and the granting of the refund would be equitable.'' NRS 354.220(4). Once NRS 354.220 has been implicated, ''[t]he county may withhold amounts refunded from its subsequent apportionments of revenues from property tax to the other taxing units in the county.'' NRS 354.240(2). Accordingly, we conclude that nothing in NRS 474.200 precludes the withholding method followed by the County Commissioners and Treasurer here.

Nevertheless, FPD further contends that *Golconda Fire Protection District v. County of Humboldt*, 112 Nev. 770, 774, 918 P.2d 710, 712 (1996), is instructive, because in that case, we determined that taxes collected for fire districts must be deposited into a county treasury and used only for fire protection purposes. *Golconda* dealt with the assertion that Humboldt County wrongfully credited the interest earned on taxes that it collected for the fire protection district to the county's general fund. 112 Nev. at 771, 918 P.2d at 710. The district court determined that Humboldt County's actions were discretionary and thus immune from challenge. *Id*. We determined that because ''NRS 355.170 did not confer authority to Humboldt County with respect to the apportionment of [the fire protection district]'s tax proceeds and the interest earned thereon,'' and ''NRS 355.175 does not convey any author-

ity to counties for the investment of government funds,'' Humboldt County did not retain discretion over the interest due to the fire protection district. *Id*. at 773, 918 P.2d at 711-12. We determined that NRS 474.200 creates a constructive trust that places ''fiduciary duties on Humboldt County to administer the taxes collected on behalf of [the fire protection district].'' *Id*. at 774, 918 P.2d at 712. Accordingly, we reversed the dismissal order and remanded for an accounting of the tax funds. *Id*. at 775, 918 P.2d at 713.

Golconda is distinguishable from this case because it concerns unauthorized apportionment and improper use of interest *legitimately* owed to a fire protection district. While *Golconda* states that ''taxes collected by fire districts *must* be deposited into a county treasury and used *only* for fire protection purposes,'' it does not state that improperly collected taxes may not be recovered at a later time. *Id*. at 774, 918 P.2d at 712. Nor is there any argument here that the withholdings were improperly apportioned among the various taxing entities. Moreover, *Golconda* is consistent with the County Commissioners' decision to reclaim the unconstitutionally collected tax distributions. In stating that NRS 474.200 creates a constructive trust that places fiduciary duties on the County to ''administer'' the taxes collected on behalf of FPD, we acknowledged the County's need to manage the tax distributions. *Golconda*, 112 Nev. at 774, 918 P.2d at 712. Thus, the County Commissioners did not violate NRS 474.200 or act outside of their authority here.

The withholding decision

[Headnotes 11, 12]

County commissioners have the power to budget, spend, and levy and collect property taxes, NRS 244.150; NRS 244.1505; NRS 244.200-.255, and to ''do and perform all such other acts and things as may be lawful and strictly necessary to the full discharge of the powers and jurisdiction conferred on the board.'' NRS 244.195. In this, county commissioners perform various functions of executive dimension. *See Queen Anne's Conservation, Inc. v. Cnty. Comm'rs of Queen Anne's Cnty.*, 855 A.2d 325, 335 (Md. 2004); *Pa. State Ass'n of Jury Comm'rs v. Commonwealth*, 64 A.3d 611, 615 n.8 (Pa. 2013); *see also Ball v. Fitzpatrick*, 602 So. 2d 873, 878 (Miss. 1992) (citing numerous jurisdictions and explaining that ''official functions of local governments frequently overlap and local governments may perform executive, legislative, and judicial functions''). The executive power also includes the general power to, among other things, administer appropriated funds, so long as doing so does not conflict with legislative purpose. 16 C.J.S. *Constitutional Law* § 354 (2005). Particularly, as

noted in *Golconda*, while the amounts collected on FPD's behalf belong to FPD, it is the County's duty to administer those collected taxes. *Id.* at 774, 918 P.2d at 712.

[Headnotes 13, 14]

Here, under the basic powers set forth above and NRS 354.240, the County Commissioners had administrative authority to withhold distributions from the taxing entities and, within that authority, to decide the precise manner in which to furnish the tax refunds. NRS 474.200 does not govern or impact the refund process, and FPD has pointed to no other authority compelling a different manner of funding. The second *Baker* factor reasons that a court should relinquish a case for nonjusticiability if there is '' 'a lack of judicially discoverable and manageable standards for resolving' '' the issue. *Munoz-Flores*, 495 U.S. at 389 (quoting *Baker*, 369 U.S. at 217). And the third *Baker* factor limits justiciability if it is impossible to decide the issue '' 'without an initial policy determination of a kind clearly for nonjudicial discretion.' '' *Id.* (quoting *Baker*, 369 U.S. at 217). Aside from NRS 354.240, there appears to be no standard or rule for the courts to follow governing how the County Commissioners must handle tax refund liability. Thus, it is up to the County Commissioners to determine how to satisfy the refund and corresponding budgeting obligations, so long as their determination does not conflict with a legislative purpose. FPD points to no conflict, and we thus decline to interject ourselves into the administration of the tax distribution and refund process. *See Montano v. Cnty. Legislature of Suffolk*, 891 N.Y.S.2d 82, 89 (App. Div. 2009) (''In the absence of any allegation that constitutional rights have been violated, or that a governmental body's action contravenes an applicable statute, law or ordinance, a legislature's governance of its internal affairs . . . should not be subject to court oversight.'' (internal quotations omitted)). Once it is concluded that the County Commissioners had authority to withhold the disbursements in this case, the precise manner in which they do so must be decided based on policy and economics. '' 'Courts exist solely to declare and enforce the law, and are without authority as to matters of mere governmental policy.' '' *State ex rel. Meshel v. Keip*, 423 N.E.2d 60, 70-71 (Ohio 1981) (Brown, J., dissenting) (emphasis omitted) (quoting *Grogan v. DeSapio*, 83 A.2d 809, at 611-12 (N.J. Super. Ct. Law Div. 1951)); *see generally Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005) (''[T]he judicial department should neither inject itself nor be injected into the details of the executive department budget process.'').

In sum, if the court system undertook resolution of this case, it would supplant the County Commissioners' legislative and executive powers. The '' 'lack of judicially discoverable and manageable

standards' '' and '' 'the impossibility of deciding [this case] without an initial policy determination of a kind clearly for nonjudicial discretion' '' remove this case from our judicial purview. *Munoz-Flores*, 495 U.S. at 389 (quoting *Baker*, 369 U.S. at 217). Accordingly, the district court correctly concluded that FPD's petition presented a nonjusticiable political question.

CONCLUSION

We conclude that the County Commissioners' decision to withhold collected property taxes from FPD was within its authority in general, and that the precise manner in which it undertook that task is outside of our purview. Consequently, further judicial review is precluded by the political question doctrine.[1] The district court's order denying extraordinary writ relief is affirmed.

HARDESTY and PARRAGUIRRE, JJ., concur.

IN THE MATTER OF STEVEN DANIEL P., A MINOR CHILD.

THE STATE OF NEVADA, APPELLANT, *v.*
STEVEN DANIEL P., A MINOR CHILD, RESPONDENT.

No. 61068

October 3, 2013 309 P.3d 1041

Appeal from a district court juvenile division order dismissing a delinquency petition and referring the juvenile for informal supervision. Second Judicial District Court, Family Court Division, Washoe County; Frances Doherty, Judge.

State filed delinquency petition alleging that juvenile committed unlawful acts that would be felony and gross misdemeanor charges if committed by an adult. The district court dismissed petition and referred juvenile to probation office for informal supervision without district attorney's written approval. State appealed. The supreme court, HARDESTY, J., held that juvenile court was not permitted to dismiss delinquency petition without written approval of district attorney.

Reversed and remanded.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Lori L. Plater*, Deputy District Attorney, Washoe County, for Appellant.

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[1]In light of the resolution of this appeal, we decline to reach the parties' remaining contentions.

Jennifer L. Lunt, Alternate Public Defender, and *Krista D. Meier* and *Cynthia Lu*, Deputy Alternate Public Defenders, Washoe County, for Respondent.

1. INFANTS.
   The juvenile court lacked authority to dismiss delinquency petition against juvenile alleging unlawful acts that would have been a felony or gross misdemeanor if committed by an adult and refer juvenile to probation office for informal supervision without the written approval of the district attorney, where statute providing court with authority to dismiss a petition allowed such dismissal only if requirements of statute providing preconditions for a juvenile to be placed under informal supervision had been met, and one of preconditions was written approval of district attorney. NRS 62C.230(1)(a).
2. APPEAL AND ERROR.
   Statutory interpretation is a question of law subject to de novo review.
3. STATUTES.
   When construing a statute, the supreme court looks to the words in the statute to determine the plain meaning of the statute.
4. STATUTES.
   When interpreting a statute, the supreme court will not look beyond the express language unless it is clear that the plain meaning was not intended.
5. STATUTES.
   When interpreting a statute, the supreme court avoids statutory interpretation that renders language meaningless or superfluous.
6. STATUTES.
   If a statute's language is clear and unambiguous, the supreme court will enforce the statute as written.
7. STATUTES.
   The supreme court construes statutes to preserve harmony among them.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, HARDESTY, J.:

The State filed a delinquency petition alleging that respondent Steven P., a juvenile, committed unlawful acts that would be felony and gross misdemeanor charges if committed by an adult. Without the district attorney's written approval, the juvenile court dismissed the State's petition and referred Steven to the probation office for informal supervision. In this appeal, we are asked to determine whether the juvenile court has authority under NRS 62C.230(1)(a) to dismiss a delinquency petition and refer a juvenile for informal supervision pursuant to NRS 62C.200 without the written approval of the district attorney, and whether the juvenile court's discretion in overseeing a juvenile matter is limited by the

authority granted under the Nevada Revised Statutes. We conclude that NRS 62C.230(1)(a) grants the juvenile court authority to dismiss a petition and refer a juvenile for informal supervision only when the requirements of NRS 62C.200 have been met, including the requirement that the district attorney give written approval for placement of the juvenile under informal supervision where the acts alleged in the petition would be a felony or gross misdemeanor if committed by an adult. Further, we conclude that the juvenile court is limited by the provisions of NRS Title 5 when exercising its authority to carry out its duties in overseeing juvenile justice matters.

FACTS AND PROCEDURAL HISTORY

The State filed a delinquency petition on September 12, 2011, alleging that Steven P., a juvenile, committed burglary (a felony) and conspiracy to commit burglary (a gross misdemeanor). The parties negotiated a dismissal of the burglary allegation in exchange for Steven admitting the conspiracy allegation and agreeing to adjudication on that allegation.

On January 9, 2012, the juvenile court accepted the plea bargain and dismissed the burglary allegation. The probation officer assigned to Steven specifically recommended in a risk and needs assessment report that Steven be placed on formal probation. Based on this report, the State requested at the hearing that Steven be made ''a delinquent ward of the court'' and placed on probation. The court reserved ruling on the State's petition and on Steven's probationary status because of concerns with ordering formal probation.

Approximately one month after the dispositional hearing, no decision on the status of Steven's case had been made. The State filed a motion for adjudication, contending that pursuant to NRS 62D.310(1), a final disposition of the case was required within 60 days of the filing of the petition on September 12, 2011.[1] In its motion, the State reasserted its request that the juvenile court adjudicate Steven on the conspiracy allegation. Additionally, the State indicated that Steven ''could earn a deferred status and dismissal of the charge if he successfully complete[d] probation and ha[d] no further delinquent referrals.'' The State contended that pursuant to NRS 62C.200-.230, deferred adjudication required approval from the district attorney prior to the juvenile court allowing informal supervision.

The juvenile justice statutes provide for informal supervision. When a complaint alleges a juvenile is delinquent or in need of supervision, a probation officer conducts a preliminary inquiry and makes a recommendation whether a petition for delinquency

[1]Steven's counsel did not oppose the State's motion.

should be filed or whether the interests of the juvenile would be better served by placing the juvenile under informal supervision pursuant to NRS 62C.200. NRS 62C.100(1). If the probation officer recommends informal supervision following a complaint, NRS 62C.200(1)(b) provides that a juvenile may be informally supervised by a probation officer if ''[t]he district attorney gives written approval for placement of the child under informal supervision, [and] if any of the acts alleged . . . would have constituted a gross misdemeanor or felony if committed by an adult.'' If, however, a petition for delinquency is filed, ''the juvenile court may . . . refer the child to the probation officer for informal supervision pursuant to NRS 62C.200.'' NRS 62C.230(1)(a). Additionally, NRS 62C.230(1)(b) provides that a juvenile may be placed under supervision ''pursuant to a supervision and consent decree, without a formal adjudication of delinquency, if the juvenile court receives: (1) [t]he recommendation of the probation officer; (2) [t]he written approval of the district attorney; and (3) [t]he written consent and approval of the child and the parent or guardian of the child.''

Here, a petition had been filed. Thus, NRS 62C.230 addresses the availability of informal supervision. Without the district attorney's written approval, the juvenile court dismissed the State's petition and referred Steven for informal supervision. The juvenile court reasoned that NRS 62C.230(1)(a) did not require written approval from the district attorney. Based on this interpretation of the statute, the juvenile court determined that it could dismiss the State's petition and refer Steven for informal supervision. The State now appeals the juvenile court's order.

DISCUSSION

[Headnote 1]

The State argues that the juvenile court erroneously dismissed its delinquency petition and referred Steven to the juvenile probation office for informal supervision because the district attorney's written approval is required pursuant to NRS 62C.230(1)(a). The State further asserts that the juvenile court has limited authority under the Nevada Revised Statutes and, accordingly, its power to dismiss the State's delinquency petition is subject to statutory authorization. We agree with both of the State's contentions.

The juvenile court does not have authority under NRS 62C.230(1)(a) to dismiss a delinquency petition and refer a juvenile for informal supervision without the written approval of the district attorney

[Headnotes 2-7]

Whether the juvenile court has authority pursuant to NRS 62C.230(1)(a) to dismiss a delinquency petition and refer a juve-

nile for informal supervision without the district attorney's written approval is a matter of statutory interpretation. ''Statutory interpretation is a question of law subject to de novo review.'' *State v. Eric A.L. (In re Eric A.L.)*, 123 Nev. 26, 31, 153 P.3d 32, 35 (2007). ''When construing a statute, this court looks to the words in the statute to determine the plain meaning of the statute, and this court will not look beyond the express language unless it is clear that the plain meaning was not intended.'' *Hernandez v. Bennett-Haron*, 128 Nev. 580, 595, 287 P.3d 305, 315 (2012); *see also In re Eric A.L.*, 123 Nev. at 31, 153 P.3d at 35 (acknowledging that ''this court must attribute the plain meaning to an unambiguous statute''). ''This court 'avoid[s] statutory interpretation that renders language meaningless or superfluous,' and '[i]f the statute's language is clear and unambiguous, [this court will] enforce the statute as written.' '' *George J. v. State (In re George J.)*, 128 Nev. 345, 349, 279 P.3d 187, 190 (2012) (alterations in original) (quoting *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011)). Additionally, we construe ''statutes to preserve harmony among them.'' *Canarelli v. Eighth Judicial Dist. Court*, 127 Nev. 808, 814, 265 P.3d 673, 677 (2011).

NRS 62C.230(1)(a)

NRS 62C.230(1)(a) states that ''[i]f the district attorney files a petition with the juvenile court, the juvenile court may . . . [d]ismiss the petition without prejudice and refer the child to the probation officer for informal supervision *pursuant to NRS 62C.200*.'' (Emphasis added.) The State focuses on the language ''pursuant to NRS 62C.200'' and argues that it is restrictive—it requires the juvenile court to determine whether the requirements of NRS 62C.200 are met before dismissing the petition and referring the juvenile for informal supervision. Steven contends that NRS 62C.230(1)(a) provides only that the juvenile court ''may'' dismiss the district attorney's petition without prejudice ''and'' consider referring the juvenile for informal supervision as defined under NRS 62C.200. In his view, the reference to NRS 62C.200 serves only to define the informal supervision, not to restrict when the juvenile court may exercise its discretion under NRS 62C.230(1)(a) to dismiss a petition and refer a juvenile for informal supervision. To resolve this dispute, we must interpret the phrase ''pursuant to.''

According to *Black's Law Dictionary*, the term ''pursuant to'' means ''[i]n compliance with; in accordance with; under . . . [a]s authorized by; under . . . [i]n carrying out.'' 1356 (9th ed. 2009). Other jurisdictions have construed the term ''pursuant to'' to hold a restrictive effect. For instance, in *Stocker v. Sheehan*, the New York appellate court stated that ''[t]he term 'pursuant to' in the Connecticut statute limiting exclusive, continuing jurisdiction to de-

terminations made 'pursuant to' another referenced statute is a 'restrictive term[,]' meaning that the referenced statute must be the 'legal mechanism' under which the determination was made.'' 786 N.Y.S.2d 126, 131 (App. Div. 2004) (citation omitted). *See also John Allan Love Charitable Found. v. United States*, 540 F. Supp. 238, 244 (E.D. Mo. 1982) (discussing ''pursuant to'' language as used in trust documents and stating that ''the issue really is whether the trust instrument was the legal mechanism under which the payments were made''); *Knowles v. Holly*, 513 P.2d 18, 23 (Wash. 1973) (holding that the term ''pursuant to'' is a ''restrictive term'' (internal quotations omitted)).

Here, under the plain language of NRS 62C.230(1)(a), we conclude that the juvenile court may dismiss the State's petition and refer a juvenile for informal supervision *only* upon the juvenile court's determination that the requirements of NRS 62C.200 have been met. *See Stocker*, 786 N.Y.S.2d at 131.

NRS 62C.200

NRS 62C.200 includes preconditions for a juvenile to be placed under informal supervision of a probation officer. It states, in pertinent part, that,

> 1. When a complaint is made alleging that a child is delinquent or in need of supervision, the child may be placed under the informal supervision of a probation officer *if*:
>
> (a) The child voluntarily admits participation in the acts alleged in the complaint; *and*
>
> (b) The *district attorney gives written approval* for placement of the child under informal supervision, *if* any of the acts alleged in the complaint are unlawful acts that would have constituted a gross misdemeanor or felony if committed by an adult.

NRS 62C.200(1) (emphases added).

Based on the plain language of this statute, we conclude that written approval is required from the district attorney before the juvenile court can place a juvenile under informal supervision when the juvenile has allegedly committed an unlawful act that would be a gross misdemeanor or a felony if committed by an adult.

Steven contends that the statutory language of NRS 62C.200 does not specify who is required to seek written approval from the district attorney prior to referring a juvenile for informal supervision. Relying on NRS 62C.100(1),[2] he asserts that the juvenile

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[2]NRS 62C.100(1) states, in pertinent part, that

> [w]hen a complaint is made alleging that a child is delinquent or in need of supervision[,] . . . [t]he complaint must be referred to a probation officer . . . to determine whether the best interests of the child or of the

court construed NRS 62C.200 as requiring the probation officer—not the juvenile court—to obtain such written approval from the district attorney and therefore it does not limit the juvenile court's authority.

Although NRS 62C.100(1) includes the restrictive term ''*pursuant to NRS 62C.200*,'' it applies to a probation officer's determination upon a preliminary inquiry after a complaint is made alleging that a juvenile is delinquent. (Emphasis added.) Therefore, a *probation officer* is required to comply with NRS 62C.200 if the officer recommends placing a juvenile under informal supervision rather than filing a delinquency petition. *See* NRS 62C.100(1)(b). However, we determine that NRS 62C.100(1) is not relevant to the juvenile court's statutory obligation under NRS 62C.230(1)(a) to ensure that the requirements of NRS 62C.200 have been met (including that the district attorney gives written approval) before the juvenile court dismisses the State's petition and refers a juvenile for informal supervision. *See Canarelli*, 127 Nev. at 814, 265 P.3d at 677 (noting that this court construes ''statutes to preserve harmony among them''). To hold otherwise would render the restrictive language in NRS 62C.230(1)(a) meaningless. *See In re George J.*, 128 Nev. at 349, 279 P.3d at 190 (stating that this court '' 'avoid[s] statutory interpretation that renders language meaningless or superfluous' '' (alteration in original) (quoting *Hobbs*, 127 Nev. at 237, 251 P.3d at 179)).

Therefore, we conclude that the plain language of NRS 62C.230(1)(a) and NRS 62C.200(1) required the juvenile court to obtain the written approval of the district attorney before dismissing the State's delinquency petition and referring Steven for informal supervision because Steven had been charged with unlawful acts (conspiracy to commit burglary and burglary) that would be a gross misdemeanor or a felony if committed by an adult.[3]

NRS 62C.230(1)(b) does not eliminate the requirement of written approval from the district attorney

Steven argues that NRS 62C.230(1)(b) supports his contention that the juvenile court is not required to seek written approval from the district attorney prior to referring a juvenile for informal supervision under NRS 62C.230(1)(a) because unlike paragraph (a), which has the restrictive reference to NRS 62C.200, paragraph

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> public . . . [r]equire that a petition be filed[ ] or . . . [w]ould better be served by placing the child under informal supervision *pursuant to NRS 62C.200*.
>
> (Emphasis added.)

[3]Although the district attorney later dismissed the burglary allegation, the conspiracy-to-commit-burglary allegation remained at the time that the juvenile court entered its order.

(b) expressly states that the juvenile court is required to obtain the approval of the district attorney when ordering a ''supervision and consent decree.'' Steven basically posits that because paragraph (a) does not include the same language, the Legislature did not intend to require the district attorney's approval for the juvenile court to act under paragraph (a).[4] We cannot agree with this interpretation because it would require that we ignore the express language in paragraph (a) that incorporates NRS 62C.200.

The United States Supreme Court has held that '' '[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute.' '' *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (quoting 2 J.G. Sutherland & John Lewis, *Statutes and Statutory Construction* 787 (2d ed. 1904)); *see also State ex rel. Walsh v. Buckingham*, 58 Nev. 342, 349, 80 P.2d 910, 912 (1938) (''A statute by reference made a part of another law becomes incorporated in it and remains so as long as the former is in force.''). Because NRS 62C.230(1)(a) refers to, and thus incorporates the statutory language of, NRS 62C.200, compliance with the latter statute's provisions is necessary in order for the juvenile court to exercise its authority under NRS 62C.230(1)(a). *See In re George J.*, 128 Nev. at 349, 279 P.3d at 190 (''[T]his court 'will interpret a rule or statute in harmony with other rules and statutes' '' to avoid rendering any part of a statute meaningless (quoting *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006))). Conversely, NRS 62C.230(1)(b) includes in its statutory language the specific requirements for placement of a juvenile under a ''supervision and consent decree,'' and the juvenile court need not look to other statutory provisions in order to take action under that provision.

Thus, we reject Steven's argument that the statutory language of NRS 62C.230(1)(b) supports his contention that the juvenile court is not required to seek written approval from the district attorney before exercising its discretion under NRS 62C.230(1)(a) to dismiss a petition and refer a juvenile for informal supervision.

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[4]NRS 62C.230(1)(b) provides:

> [i]f the district attorney files a petition with the juvenile court, the juvenile court may:
>
> . . . .
>
> (b) Place the child under the supervision of the juvenile court pursuant to a supervision and consent decree, without a formal adjudication of delinquency, if the juvenile court receives:
>
> (1) The recommendation of the probation officer;
>
> (2) The written approval of the district attorney; and
>
> (3) The written consent and approval of the child and the parent or guardian of the child.

The juvenile court's authority is statutorily limited

Finally, the State contends that the juvenile court's discretionary power to dismiss a delinquency petition and refer a juvenile for informal supervision is limited to the authority granted under the Nevada Revised Statutes, and the juvenile court cannot usurp the legislative and executive power provided under the separation of powers doctrine. Steven argues that the juvenile court maintains broad judicial discretion in deciding the matters before it and is tasked with serving as an appropriate check on prosecutorial conduct under the separation of powers doctrine.

In *State v. Barren*, this court held that '' 'the juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it in the statute.' '' 128 Nev. 337, 341, 279 P.3d 182, 184 (2012) (quoting *Kell v. State*, 96 Nev. 791, 792-93, 618 P.2d 350, 351 (1980)); *see also State v. Bill*, 91 Nev. 275, 277, 534 P.2d 1264, 1265 (1975) (''The Juvenile Court Act's grant of exclusive and original jurisdiction is limited . . . .'').

Title 5 of the Nevada Revised Statutes encompasses Nevada's Juvenile Justice Code. NRS 62A.360(1) declares that the title should be construed liberally to ensure all juveniles receive appropriate care and guidance. And one of the purposes behind the title is to ''promote the establishment, supervision and implementation of preventative programs that are designed to prevent a child from becoming subject to the jurisdiction of the juvenile court.'' NRS 62A.360(2).

NRS 62B.010(4) states that ''a judge of the juvenile court has all the powers and duties set forth in this title,'' and under NRS 62B.300(2), the juvenile court must exercise its ''jurisdiction pursuant to the provisions of'' Title 5. Therefore, the juvenile court's discretion to dismiss the State's delinquency petition and refer Steven for informal supervision was expressly limited by statute as we discuss above, and we conclude that the juvenile court exceeded its statutory authority here.

For the reasons set forth above, we reverse the juvenile court's order and remand this matter for further proceedings consistent with this opinion.

PARRAGUIRRE and CHERRY, JJ., concur.

HEATHER SHARMAYN PALEY, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE FRANCES DOHERTY, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 61029

October 3, 2013 310 P.3d 590

Petition for a writ of mandamus challenging a juvenile court order holding petitioner in direct contempt of court.

Juvenile's mother petitioned for writ of mandamus seeking order directing vacatur of direct contempt order entered against her by the district court based on positive drug test immediately before her appearance in her daughter's juvenile court proceeding. While petition was pending, the district court vacated its contempt order. The supreme court, HARDESTY, J., held that mother was not in direct contempt of court for failing drug test.

Petition denied.

Jennifer Lunt, Alternate Public Defender, Washoe County, for Petitioner.

Catherine Cortez Masto, Attorney General, and *Daniel M. Roche*, Deputy Attorney General, Carson City, for Respondents.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Lori L. Plater*, Deputy District Attorney, Washoe County, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   A writ of mandamus generally will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170.
3. MANDAMUS.
   Mandamus is an extraordinary remedy, and it therefore is in the supreme court's discretion to determine whether a petition will be considered.
4. COURTS.
   The supreme court may exercise its discretion to consider a writ of mandamus where an important issue of law needs clarification and public policy is served by the supreme court's invocation of its original jurisdiction.

5. APPEAL AND ERROR.
   The supreme court generally will not exercise its discretion to consider a moot case because its duty is to resolve actual controversies by an enforceable judgment.
6. APPEAL AND ERROR.
   The supreme court will exercise its discretion to adjudicate a moot case when: (1) the contested issue is likely to arise again, and (2) the challenged action is too short in its duration to be fully litigated prior to its natural expiration.
7. CONTEMPT.
   A positive drug test result alone is not a sufficient basis to sustain a finding of direct contempt.
8. CONTEMPT.
   For purposes of determining whether contemptuous conduct occurred in the immediate view of the court, as required for holding a party in direct contempt, ''immediate view'' and ''presence of the court'' means in the ocular view of the court.
9. CONTEMPT.
   Absent evidence of conduct that actually disrupts the court proceeding, a positive out-of-court drug test is not a sufficient basis for holding a party in contempt of court because no contemptuous conduct occurs in the immediate view and presence of the judge. NRS 22.030(1).
10. CONTEMPT.
    Juvenile's mother was not in direct contempt of court for failing drug test prior to her appearance in her daughter's juvenile court proceeding because positive drug test alone was not enough to hold her in direct contempt, and mother was polite, coherent, and respectful at hearing. NRS 22.010.

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

OPINION

By the Court, HARDESTY, J.:

This is a petition for a writ of mandamus. Petitioner Heather Sharmayn Paley seeks an order directing the juvenile court to vacate its order holding her in direct contempt of court based on a positive drug test that was taken outside of court, immediately before her court appearance. The respondent district court judge vacated the contempt order while this original proceeding was pending, acknowledging that Paley's actions did not constitute direct contempt.[1] Respondents argue that this renders the petition moot. An exception to the mootness doctrine allows judicial review when the contested issue is likely to arise again but will evade review. We conclude that this exception to the mootness doctrine does not apply because it is clear that a positive drug test alone will not

[1]We originally denied this petition in an unpublished order filed on September 27, 2012. Paley subsequently moved for publication of our disposition as an opinion, and real party in interest the State of Nevada joined in the motion. *See* NRAP 36(f). Cause appearing, we grant the motion and publish this opinion in place of our prior unpublished order.

support a finding of direct contempt under NRS 22.010. Thus, the issue presented is not likely to recur.

FACTS

Paley tested positive for methamphetamines immediately prior to a hearing before the juvenile drug court.[2] The test was administered outside of the court and outside of the presence of the judge. Based on the positive drug test, the judge held Paley in direct contempt of court for being under the influence of methamphetamines and ordered her to be immediately remanded to the Washoe County Detention Facility for a period of 25 days. A video of the hearing reveals that Paley was polite, coherent, and respectful, and that she did not cause any disturbance in the presence of the court.

Paley moved to stay the contempt order and requested an order-to-show-cause hearing. At the hearing, Paley argued that she could not be held in direct contempt because she did not cause any disturbance in the immediate view and presence of the court or violate any court order. The juvenile court concluded that it would not change its ruling that Paley's positive drug test was a direct contempt of court. However, it did suspend the remainder of Paley's sentence after she had already served seven days. Paley then filed a writ petition with this court. Approximately one month after Paley filed the petition, the juvenile court vacated its order finding her in direct contempt.

DISCUSSION

[Headnotes 1-4]

''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see also* NRS 34.160. But the writ generally will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170. Because ''[n]o rule or statute authorizes an appeal from an order of contempt,'' we have held that ''contempt orders must be challenged by an original petition pursuant to NRS Chapter 34.'' *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000). Mandamus, however, is an extraordinary remedy, and it therefore is in this court's discretion to determine whether a petition will be considered. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453,

[2]The juvenile court obtained jurisdiction over Paley, who is not a minor, pursuant to NRS 62B.350 because Paley's daughter agreed to participate in juvenile drug court. NRS 62B.350 extends the juvenile court's jurisdiction to ''adults to the extent that such jurisdiction is incidental and necessary to its jurisdiction over children.''

455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). This court may exercise that discretion where '' 'an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.' '' *Mineral Cnty. v. State, Dep't of Conservation & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting *Bus. Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

[Headnotes 5, 6]

Because the juvenile court vacated the order of contempt, there is no longer an actual controversy for this court to adjudicate. As the parties acknowledge, this renders the petition moot. We generally will not exercise our discretion to consider a moot case because our duty is ''to resolve actual controversies by an enforceable judgment.'' *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). However, ''we will exercise our discretion to adjudicate a moot case when (1) the contested issue is likely to arise again, and (2) the challenged action is 'too short in its duration to be fully litigated prior to its natural expiration.' '' *Stephens Media, L.L.C. v. Eighth Judicial Dist. Court*, 125 Nev. 849, 858, 221 P.3d 1240, 1247 (2009) (quoting *Jason S. v. Valley Hosp. Med. Ctr. (In re Guardianship of L.S. & H.S.)*, 120 Nev. 157, 161, 87 P.3d 521, 524 (2004)).

[Headnotes 7, 8]

We conclude that Paley's petition does not fall under an exception to the mootness doctrine. This issue is not likely to arise again because it is abundantly clear that ''a positive drug test result alone is not a sufficient basis to sustain a finding of direct contempt.'' *In re J.H.*, 213 P.3d 545, 549 (Okla. 2008). While being under the influence may sometimes result in behavior that disrupts court proceedings, direct contempt requires that the contemptuous conduct actually occur in the ''immediate view and presence'' of the judge. NRS 22.030(1).[3] And ''when we say immediate view and

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[3]Pursuant to NRS 22.010 the following conduct constitutes contempt:

1. Disorderly, contemptuous or insolent behavior toward the judge while the judge is holding court, or engaged in judicial duties at chambers, or toward masters or arbitrators while sitting on a reference or arbitration, or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the court, or in its immediate vicinity, tending to interrupt the due course of the trial or other judicial proceeding.

3. Disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers.

4. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court or judge at chambers.

presence of the court we mean in the *ocular* view of the court.'' *Ex parte Hedden*, 29 Nev. 352, 374, 90 P. 737, 744 (1907) (emphasis added).

[Headnote 9]

Absent evidence of conduct that actually disrupts the court proceeding, a positive out-of-court drug test is not a sufficient basis for holding a party in contempt of court because no contemptuous conduct occurs in the ''immediate view and presence'' of the judge. *See* NRS 22.030(1); *see also Cameron v. State*, 650 A.2d 1376, 1381-82 (Md. Ct. Spec. App. 1994) (reversing a finding of direct contempt against a party who appeared drunk in court because ''[h]e was in no way disruptive of the proceedings'' and ''was not rebellious or insubordinate'' or ''willfully disobedient or openly disrespectful''); *In re J.H.*, 213 P.3d at 548-49 (reversing a finding of direct contempt against parties who tested positive for cocaine prior to appearing in court because the parties were not ''disorderly or insolent'' and did not ''disturb[ ] or willfully obstruct[ ] the judicial proceedings'').

[Headnote 10]

Here, the juvenile court held Paley in direct contempt because she tested positive for methamphetamines prior to the hearing. However, a positive drug test for methamphetamines prior to a court proceeding is not an act or omission that constitutes contempt under NRS 22.010. And the record reveals that Paley was polite, coherent, and respectful at the hearing and did not engage in any disorderly, insolent, boisterous, or violent conduct, nor did she commit a breach of peace. NRS 22.010(1)-(2).

The district court rectified its error when it vacated its contempt order. This rendered the proceeding moot, and no applicable exception to the mootness doctrine applies. Accordingly, we deny the petition as moot.[4]

PICKERING, C.J., and SAITTA, J., concur.

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6. Disobedience of the order or direction of the court made pending the trial of an action, in speaking to or in the presence of a juror concerning an action in which the juror has been impaneled to determine, or in any manner approaching or interfering with such juror with the intent to influence the verdict.

7. Abusing the process or proceedings of the court or falsely pretending to act under the authority of an order or process of the court.

[4]Paley further argues that she was unconstitutionally deprived of counsel and a due process hearing because the juvenile court's direct contempt order was criminal in nature. However, we do not address constitutional questions unless it is necessary to do so, *Cortes v. State*, 127 Nev. 505, 516, 260 P.3d 184, 192 (2011), and it is not necessary to reach this issue because we deny the petition as moot.

WALTER TRUJILLO, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 58937

October 10, 2013 310 P.3d 594

Appeal from an order of the district court denying a petition for a writ of *coram nobis*. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

More than a decade after his felony conviction and discharge from probation, defendant filed a motion for writ of error *coram nobis*, seeking relief from conviction based on his trial counsel's alleged failure to inform him of the immigration consequences of pleading guilty. The district court denied the petition. Defendant appealed. The supreme court, DOUGLAS, J., held that: (1) final judgment denying defendant's petition for writ of error *coram nobis* was appealable; (2) writ of error *coram nobis* was a remedy available to defendant who was no longer in custody, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955); and (3) ineffective assistance of counsel claim based on counsel's alleged failure to inform defendant of the immigration consequences of pleading guilty to a felony exceeded the scope of the common-law writ of error *coram nobis*.

Affirmed.

Michael H. Schwarz, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW.
   A federal petition for a writ of *coram nobis* cannot be filed by a person seeking to challenge a state conviction because it is a writ used by a court to correct its own errors, not errors of another jurisdiction.
2. CRIMINAL LAW.
   The writ of *coram nobis* is constitutionally authorized, and therefore not repugnant to or in conflict with the Constitution, if the writ is proper and necessary to the complete exercise of the jurisdiction of the district courts.
3. CRIMINAL LAW.
   Coram nobis is not repugnant to or in conflict with the Nevada Constitution, as an important component of the district court's jurisdiction over a criminal case is to correct mistakes of fact that would have prevented a conviction and for which there is or was no other available legal remedy; this is so even after the defendant has completed serving the sentence imposed and is no longer in custody on the conviction being challenged.

4. CRIMINAL LAW; HABEAS CORPUS.
   For a person who is not in custody, Nevada's post-conviction habeas corpus scheme does not apply and would not preclude a writ of *coram nobis*; conversely, if a person is in custody on the conviction being challenged, a writ of *coram nobis* is not available and habeas corpus must be sought as the exclusive remedy to challenge the conviction.
5. CRIMINAL LAW; HABEAS CORPUS.
   Distinction between persons who are under sentence of imprisonment, for which habeas relief is available remedy, and those who are not, for purposes of the writ of *coram nobis*, does not violate any constitutional or legal rights, as the writ of *coram nobis* is not proper and necessary to the jurisdiction of the district courts where another legal remedy, a post-conviction petition for a writ of habeas corpus, is available to challenge the conviction.
6. CRIMINAL LAW.
   State constitutional provision that grants district courts the power to issue writs that are proper and necessary to the complete exercise of their jurisdiction authorized common-law writ of error *coram nobis* for a person who is not in custody on the conviction being challenged, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955). Const. art. 6, § 6(1); NRS 1.030.
7. CRIMINAL LAW.
   The writ of error *coram nobis* is limited to the scope of the common-law writ and therefore may be used only to challenge errors of fact outside the record that could not have been raised earlier and that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955). NRS 1.030.
8. CRIMINAL LAW.
   A writ of *coram nobis* is the forum to correct only the most egregious factual errors that would have precluded entry of the judgment of conviction had the error been known to the court at the time, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955).
9. CRIMINAL LAW.
   A writ of *coram nobis* is not the forum to relitigate the guilt or innocence of the petitioner, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955).
10. CRIMINAL LAW.
    To warrant issuance of writ of error *coram nobis*, any error that was reasonably available to be raised while the petitioner was in custody is waived, and it is the petitioner's burden on the face of his petition to demonstrate that he could not have reasonably raised his claims during the time he was in custody, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955).
11. CRIMINAL LAW.
    The writ of error *coram nobis* should have been treated as a civil writ for appeal purposes, and thus, a final judgment denying defendant's petition for writ of *coram nobis* was appealable, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955). NRAP 3A(b)(1).
12. CRIMINAL LAW.
    The supreme court generally has appellate jurisdiction only where a statute or court rule provides for an appeal.

13. CRIMINAL LAW.

The remedy of petitioning for writ of error *coram nobis* was available to defendant who was no longer in custody on his felony conviction when he filed his petition for the writ, overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955). Const. art. 6, § 6(1); NRS 1.030.

14. CRIMINAL LAW.

Defendant's ineffective-assistance-of-counsel claim based on counsel's alleged failure to inform defendant of the immigration consequences of pleading guilty to a felony exceeded the scope of the common-law writ of error *coram nobis*; claimed error was on the record and was an error of law, not fact. Const. art. 6, § 6(1); NRS 1.030.

Before GIBBONS, DOUGLAS and SAITTA, JJ.

OPINION[1]

By the Court, DOUGLAS, J.:

Appellant Walter Trujillo was convicted of a felony in 1996 and was honorably discharged from probation the following year. More than a decade later, he filed a petition for a writ of *coram nobis* in district court seeking relief from the judgment of conviction because he was not informed by his trial counsel of the immigration consequences of his plea. At issue is whether the common-law writ of *coram nobis* may be used in Nevada. We hold that the common-law writ of *coram nobis* is available under Article 6, Section 6(1) of the Nevada Constitution, which grants district courts the power to issue writs that are proper and necessary to the complete exercise of their jurisdiction, and NRS 1.030, which continues the common law under some circumstances. But we further hold that, consistent with NRS 34.724(2)(b) and the exclusive remedy created by the Legislature for post-conviction challenges to a judgment of conviction, the writ may only be used by a person who is no longer in custody on the judgment of conviction being challenged. And to be consistent with NRS 1.030, we further hold that the writ is limited to the scope of the common-law writ and therefore may be used only to challenge errors of fact outside the record that could not have been raised earlier and that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered. Because the ineffective-assistance-of-counsel claim raised by Trujillo is not within that limited scope, we affirm the decision of the district court to deny the petition for a writ of *coram nobis*.

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[1]This opinion has been circulated among all justices of this court, any two of whom, under IOP 13(b) may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of overruling *Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955), were not cast.

FACTS AND PROCEDURAL HISTORY

On April 12, 1996, Trujillo, a citizen of Venezuela, was convicted of attempted burglary and sentenced to serve a term of 12 to 30 months in prison. The sentence was suspended, and a period of probation not to exceed 2 years was imposed. Trujillo did not appeal his conviction and never sought post-conviction relief from his conviction. He honorably discharged probation on December 31, 1997.

The conviction had immediate deportation consequences for Trujillo. Shortly after sentencing, he was taken into federal custody, and a federal judge ordered him deported to Venezuela. Trujillo successfully challenged the deportation order and was issued a green card and given permanent-resident status. He took no further action regarding citizenship until 2010.

Learning in 2010 that he could not become a United States citizen because of his 1996 conviction, Trujillo filed a petition for a writ of *coram nobis* attacking the validity of his conviction. In the petition, Trujillo claimed that his trial counsel was ineffective for failing to advise him of the immigration consequences of his conviction, contrary to *Padilla v. Kentucky*, 559 U.S. 356 (2010). Trujillo asserted that a petition for a writ of *coram nobis* was the only available remedy to challenge his 1996 conviction.

The State argued that the writ of *coram nobis* was abolished by NRS 34.724(2)(b), which provides that a post-conviction petition for a writ of habeas corpus is the exclusive remedy for challenging a judgment of conviction. Responding to that argument, Trujillo argued that the legislative history for NRS Chapter 34 does not indicate that a petition for a writ of *coram nobis* was one of the common-law remedies replaced by a habeas corpus petition under NRS 34.724(2)(b). Trujillo asserted that the provision was only intended to eliminate the post-conviction relief petition under NRS Chapter 177.[2]

The district court construed the petition for a writ of *coram nobis* to be a post-conviction petition for a writ of habeas corpus, determining that a common-law petition for a writ of *coram nobis* was not available because the writ was superseded by the exclusive-remedy language in NRS 34.724(2)(b) and because the claim raised by Trujillo was a legal claim that exceeded the scope of the common-law writ. Deciding that the petition was timely filed from the decision in *Padilla* and that *Padilla* applied retroactively, the district court nonetheless denied relief because Trujillo had not demonstrated that counsel's failure to inform him of the immigra-

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[2]The history of post-conviction relief in Nevada is set forth in detail in *Pellegrini v. State*, 117 Nev. 860, 870-73, 34 P.3d 519, 526-28 (2001).

tion consequences prejudiced him as he was an undocumented, illegal immigrant.

DISCUSSION

Preliminarily, we conclude that the district court incorrectly treated the petition as a post-conviction petition for a writ of habeas corpus because Trujillo was not in custody at the time he filed his petition. Nev. Const. art. 6, § 6(1); NRS 34.724(1); *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). As a result, the question this court is then tasked to answer is whether the writ of *coram nobis* exists in Nevada. To answer that question, we must address two interrelated issues: the sources of authority to recognize the writ and the scope of the writ. To set the stage, we briefly examine the history of the writ.

Historical overview of coram nobis

The writ of *coram nobis* is an ancient writ that developed in sixteenth century England. Judge Stanley H. Fuld, *The Writ of Error Coram nobis*, 117 N.Y.L.J. Nos. 130-132, at 2212, 2230, 2248 (1947); James MacPherson, Comment, *Coram nobis: ''The Wild Ass of the Law,''* 11 Loy. L. Rev. 100, 101 (1961-62); Richard B. Amandes, *Coram nobis—Panacea or Carcinoma*, 7 Hastings L.J. 48, 49 (1955-56). At the time, errors of law could be raised to Parliament and the Exchequer, but errors of fact were excluded from their review. Fuld, *supra*. The writ of *coram nobis* was devised as a means of reviewing errors of fact outside the record that affected the validity and regularity of the decision itself and would have precluded the judgment from being rendered had they been known. *Id*. The ancient writ, *quae coram nobis residant* (''let the record and proceedings remain before us''), was directed to the Court of the King's Bench and was issued in the King's name.[3] *Id*. The writ was sought before the same court that had entered the judgment and could only be used to address an error of fact not known to the court and not negligently concealed by the defendant. Amandes, *supra*, at 49. Some examples of the kinds of errors of fact that were reviewed through a writ of *coram nobis* include clerical errors, the infancy of the defendant and nonrepresentation by a guardian, the common-law disability of coverture (the married woman's disability to appear on her own in court), the death of a party before the verdict, the insanity of the defendant at the time of trial, a guilty plea procured by extrinsic fraud, and a valid de-

[3]Contrast the writ of *coram vobis* (''before you''), which was directed to the Court of Common Pleas. Fuld, *supra*. When the writ arrived in America it generally retained the name of *coram nobis*, the writ brought before the Court of the King's Bench.

fense that was not made because of fraud, duress, or excusable neglect. *See People v. Hyung Joon Kim*, 202 P.3d 436, 445-47 (Cal. 2009); *see also* Fuld, *supra*; Amandes, *supra*, at 49. The writ of *coram nobis* was rarely used, and by the time of Blackstone, it was considered to be obsolete. Fuld, *supra*.

In America, the writ developed slowly. It was acknowledged as early as 1834 when the United States Supreme Court recognized that its counterpart, the writ of *coram vobis*, might be available in state court to challenge an error of fact relating to a defendant's immunity from suit. *Davis v. Packard*, 33 U.S. (8 Pet.) 312, 324 (1834). Despite this early acknowledgment, over the next century, the writ of *coram nobis*, at least federally, remained a rather archaic vehicle for relief; it was acknowledged as a common-law writ but was not utilized by the courts. *See Bronson v. Schulten*, 104 U.S. 410, 416-17 (1881) (recognizing the availability of the writ at common law but questioning its modern availability and determining that the court did not have the power to set aside, vacate, and modify a final judgment after the end of the term during which the judgment was rendered); *United States v. Mayer*, 235 U.S. 55, 68-69 (1914) (recognizing the availability of *coram nobis* at common law, but expressing no opinion as to whether *coram nobis* existed because the errors complained of, prosecutorial misconduct and juror bias, would not have been the type of errors reviewable under the common law).

[Headnote 1]

This quiet period ended in 1954 when the United States Supreme Court reinvigorated the writ of *coram nobis* in the seminal case *United States v. Morgan*, 346 U.S. 502 (1954). Morgan sought to challenge a federal conviction that was being used to enhance a subsequent state conviction on the ground that he was denied the right to counsel in the federal proceeding. 346 U.S. at 503-04. The Supreme Court determined that a motion in the nature of *coram nobis* could be sought in a criminal case based on the all-writs language in 28 U.S.C § 1651. *Id*. at 505-11. 28 U.S.C. § 1651(a), then and now, provides that the federal courts ''may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'' Without any analysis as to how the writ of *coram nobis* was necessary and appropriate to the jurisdiction of the courts, the *Morgan* majority appeared to indicate that its usage was agreeable based on the writ's common-law history and its use in the various states and circuits. *Id*. at 507-10. While the Court acknowledged that at common law the writ was limited to errors of fact, the Court observed that the writ had been used more broadly in various states and lower courts. *Id*. at 507-08. The Court explained that, to achieve justice, a motion in the nature of *coram nobis* would be

available to correct errors of the most fundamental character under circumstances where no other remedy was available and sound reasons existed for failure to seek relief earlier. *Id*. at 511-12. In a breathtaking expansion of the common-law writ, the *Morgan* Court indicated that a motion in the nature of *coram nobis* was of the same general character as a motion under 28 U.S.C. § 2255—meaning it would be available to correct violations of the Constitution and laws of the United States. *Id*. at 505 n.4. This expanded version of *coram nobis* is followed today in the federal courts for persons challenging a federal conviction.[4] *See, e.g.*, *Chaidez v. United States*, 568 U.S. ___, 133 S. Ct. 1103 (2013); *United States v. Denedo*, 556 U.S. 904 (2009); *United States v. George*, 676 F.3d 249 (1st Cir. 2012); *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005), *abrogated on other grounds by Padilla*, 559 U.S. 356; *Klein v. United States*, 880 F.2d 250 (10th Cir. 1989).

Unlike the uniform recognition of *coram nobis* in the federal courts, *coram nobis* is a rarer creature in state courts. Only 12 states recognize *coram nobis*, and a slim majority of those states follow the common-law definition and limit the writ to claims of factual error.[5] The writ of *coram nobis* is not available in a majority of states because those states have enacted uniform post-conviction acts that provide a streamlined, single remedy for

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[4]A federal petition for a writ of *coram nobis* cannot be filed by a person seeking to challenge a state conviction because it is a writ used by a court to correct its own errors, not errors of another jurisdiction. *See Finkelstein v. Spitzer*, 455 F.3d 131, 133-34 (2d Cir. 2006); *Obado v. New Jersey*, 328 F.3d 716, 718 (3d Cir. 2003).

[5]Seven states strictly follow the common-law definition of the writ. *People v. Shipman*, 397 P.2d 993, 995 (Cal. 1965); *State v. Grisgraber*, 439 A.2d 377, 378-79 (Conn. 1981); *State v. Diaz*, 808 N.W.2d 891, 895-96 (Neb. 2012); *Gregory v. Class*, 584 N.W.2d 873, 877 (S.D. 1998); *State v. Sinclair*, 49 A.3d 152, 154-57 (Vt. 2012); *Neighbors v. Commonwealth*, 650 S.E.2d 514, 516-17 (Va. 2007); Va. Code Ann. § 8.01-677 (2007) (*coram vobis*); *Jessen v. State*, 290 N.W.2d 685, 687-88 (Wis. 1980).

The remaining five jurisdictions that recognize the writ fall somewhere on the continuum between the common-law approach and the federal approach. *Skok v. State*, 760 A.2d 647, 654-60 (Md. 2000) (following federal approach); Md. Rules § 15-1201–07 (West 2013); *Smith v. United States,* 20 A.3d 759, 763 (D.C. 2011) (following federal approach); *Grant v. State*, 365 S.W.3d 894, 896 (Ark. 2010) (allowing for four types of claims to be raised: ''insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal''); *People v. Bachert*, 509 N.E.2d 318, 319 (N.Y. 1987) (permitting *coram nobis* for claims of ineffective assistance of appellate counsel); Tenn. Code. Ann. § 40-26-105 (2012) (allowing newly-discovered-evidence claims to be raised in *coram nobis*). In West Virginia, the issue of *coram nobis* is still an open question, but if recognized, West Virginia appears to follow the common-law approach. *State ex rel. McCabe v. Seifert*, 640 S.E.2d 142, 147 n.9 (W. Va. 2006).

obtaining relief from a judgment of conviction, and that remedy is available to petitioners who are no longer in custody.[6]

Nevada has addressed *coram nobis* only once in any significant fashion in its criminal jurisprudence—*Bigness v. State*, 71 Nev. 309, 289 P.2d 1051 (1955).[7] In *Bigness*, a recidivist criminal filed a petition for a writ of *coram nobis* to challenge a 16-year-old Nevada conviction, which was being used to enhance a sentence in New York, on the ground that he had been deprived of the right to counsel. *Id*. at 310-11, 289 P.2d at 1051-52. In affirming the denial of the petition, this court observed that Nevada statutes did not provide for *coram nobis*, and that even if such a writ were recognized, the petition under consideration admittedly exceeded the scope of the common-law writ by raising a claim of error that was on the record and was an error of law, not fact. *Id*. at 311, 289 P.2d at 1052. The *Bigness* court rejected the argument that the writ must be recognized in order to provide a corrective judicial remedy because another such remedy (habeas corpus) was available during the petitioner's period of confinement on the Nevada conviction, and its present unavailability was due to his inattention to his rights. *Id*. at 312, 289 P.2d at 1052.

The writ is available in Nevada for persons who are not in custody on the conviction being challenged

While the *Bigness* court correctly observed that no specific Nevada statute addresses the writ of *coram nobis*, the *Bigness* decision ignored two important sources of authority that may sanction

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[6]*See, e.g.*, Ala. R. Crim. P. 32.1; Alaska Stat. § 12.72.010 (2012); Ariz. R. Crim. P. 32.1; Colo. Rev. Stat. § 18-1-410 (2012); Fla. R. Crim. P. 3.850; Haw. R. Penal P. 40(a)(1); Idaho Code Ann. § 19-4901 (Supp. 2013); Ind. R. Post-Conviction P. 1; Iowa Code § 822.2 (West 2003 & Supp. 2013); Me. Rev. Stat. Ann. tit. 15, § 2124 (2003 & Supp. 2012); Mass. R. Crim. P. 30; Mich. Ct. R. 6.502(C)(3); Minn. Stat. Ann. § 590.01 (West 2010); Miss. Code Ann. § 99-39-5 (2007 & Supp. 2012); Mont. Code Ann. § 46-21-101 (2011); N.J. R. Crim. P. 3.22-1 (2013); N.C. Gen. Stat. § 15A-1411 (2009); N.D. Cent. Code § 29-32.1-01 (2006); Ohio Rev. Code Ann. § 2953.21 (LexisNexis 2006); Okla. Stat. tit. 22, § 1080 (West 2003); Or. Rev. Stat. § 138.510 (2011); R.I. Gen. Laws § 10-9.1-1 (2012); S.C. Code Ann. § 17-27-20 (2003); Utah Code Ann. §§ 78B-9-102, -104 (LexisNexis 2012); Wash. R. App. P. 16.4(b).

[7]The only other reference to *coram nobis* in a Nevada criminal case occurred in *Warden v. Peters*, 83 Nev. 298, 429 P.2d 549 (1967). In *Peters*, the court briefly noted that *coram nobis* was available at common law to correct a mistake of fact discovered after the judgment and that some states allowed relief in the nature of *coram nobis* even after the writ had been abolished. *Id*. at 301, 429 P.2d at 551. The writ of *coram nobis* was not used in *Peters* or recognized as a currently available remedy.

The writ of *coram nobis* was abolished in 2005 in civil cases by NRCP 60(b). *See NC-DSH, Inc. v. Garner*, 125 Nev. 647, 650 n.1, 218 P.3d 853, 856 n.1 (2009).

use of the writ of *coram nobis* in Nevada: NRS 1.030, which recognizes the applicability of the common law, and the all-writs language in Article 6, Section 6 of the Nevada Constitution.

NRS 1.030 provides that the ''common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State.'' Thus, to apply the common law, two requirements must be satisfied under NRS 1.030: (1) that *coram nobis* be a common-law writ, and (2) that *coram nobis* not be repugnant to or in conflict with the Constitution and laws, both federal and state. The first requirement is rather easily met: *coram nobis* certainly was a common-law writ even though it became obsolete in England. The second requirement is more complicated and requires an examination of the United States and Nevada Constitutions and post-conviction laws of the United States and Nevada.

Nothing in the federal system prohibits the recognition of *coram nobis* in Nevada. The United States Constitution makes no mention of *coram nobis* and does not present any obstacle to recognizing *coram nobis* in Nevada. Nothing in federal law prevents a state from recognizing the writ of *coram nobis* in state proceedings. In fact, as discussed previously, when it comes to challenges to a federal conviction, *coram nobis* has been recognized under the all-writs language of 28 U.S.C. § 1651, which provides federal courts with the power to ''issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.'' Thus, neither the United States Constitution nor federal laws restrict us from recognizing *coram nobis*.

[Headnotes 2, 3]

Turning to Nevada law, whether the writ of *coram nobis* is repugnant to or in conflict with the Nevada Constitution actually leads to the second source of authority for recognizing the writ: Nevada Constitution Article 6, Section 6. Article 6, Section 6 of the Nevada Constitution contains Nevada's version of an all-writs clause:

> The District Courts . . . have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction.

The writ of *coram nobis* is constitutionally authorized, and therefore not repugnant to or in conflict with the constitution, if the writ is proper and necessary to the complete exercise of the jurisdiction of the district courts. When posed a similar question regarding *coram nobis* and the federal all-writs language set forth in 28

U.S.C. § 1651,[8] the United States Supreme Court determined that *coram nobis* was authorized by § 1651 for a person who was not in custody on the conviction being challenged because at common law *coram nobis* was a step in the criminal case. *United States v. Morgan*, 346 U.S. 502, 505 n.4 (1954). We reach a similar conclusion. In Nevada, original jurisdiction over a criminal case, except as provided by law, is vested in the district courts. Nev. Const. art. 6, § 6; NRS 171.010; *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137, 141 (1962). And we have previously recognized that the district courts have continuing jurisdiction to correct certain types of errors. *See Warden v. Peters*, 83 Nev. 298, 301, 429 P.2d 549, 551 (1967). We conclude that an important component of the district court's jurisdiction over a criminal case is to correct mistakes of fact that would have prevented a conviction and for which there is or was no other available legal remedy. This is so even after the defendant has completed serving the sentence imposed and is no longer in custody on the conviction being challenged. Thus, *coram nobis* is not repugnant to or in conflict with the Nevada Constitution.

[Headnotes 4, 5]

Whether the writ of *coram nobis* would be in conflict with Nevada law is a more complicated question. The State argues that the writ of *coram nobis* was abolished by the exclusive-remedy language set forth in NRS 34.724(2)(b), and thus, the writ would be in conflict with that Nevada statute. The issue, however, is not that clear-cut. NRS 34.724(2)(b) provides that a post-conviction petition for a writ of habeas corpus ''[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.'' But unlike the majority of other states that have similar provisions in their post-conviction relief statutes and therefore have refused to recognize the writ of *coram nobis*, *see supra* note 5 and accompanying text, the exclusive remedy adopted in NRS 34.724(2)(b) is not available to all persons who have sustained a conviction in Nevada. A prerequisite to the constitutional authority to grant habeas relief is the custodial status of the petitioner: the petitioner must be in actual custody or have suffered a criminal conviction and not completed the sentence imposed pursuant to the judgment of conviction. Nev. Const. art. 6, § 6(1). A post-conviction petition for a writ of habeas corpus is further limited to a person who is

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[8]Section 1651 provides that the federal courts ''may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.''

''under sentence of death or imprisonment.'' NRS 34.724(1). These two provisions thus require a habeas petitioner to be under a sentence of imprisonment for the conviction he challenges at the time the petition is filed. *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). For a person who is not in custody, Nevada's post-conviction habeas corpus scheme does not apply and would not preclude a writ of *coram nobis*.[9] Conversely, if a person is in custody on the conviction being challenged, a writ of *coram nobis* is not available and habeas corpus must be sought as the exclusive remedy to challenge the conviction.[10] This distinction between persons who are under sentence of imprisonment and those who are not for purposes of the writ of *coram nobis* does not violate any constitutional or legal rights as the writ of *coram nobis* is not proper and necessary to the jurisdiction of the district courts where another legal remedy, a post-conviction petition for a writ of habeas corpus, is available to challenge the conviction.

[Headnote 6]

Thus, we hold that Article 6, Section 6 of the Nevada Constitution and NRS 1.030 authorize the common-law writ of *coram nobis* for a person who is not in custody on the conviction being challenged. To the extent that our decision in *Bigness* suggested that the common-law writ did not exist in Nevada, we overrule that decision.

The writ of coram nobis is limited in scope

We turn then to the scope of the writ. As stated earlier, jurisdictions recognizing the writ have adopted different approaches to its scope. Two approaches may be said to be in the majority—the common-law approach and the federal approach adopted in *Morgan*. Given the sources of authority for recognizing the writ in Nevada, as discussed above, we conclude that the writ in Nevada has the same scope as the common-law writ. We decline to follow the *Morgan* Court and expand the writ beyond its common-law scope because we can find no authority, and none is offered by the parties, that would allow this court to create a new substantive

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[9]We recognize that the writ of *coram nobis* has been abolished in civil cases under NRCP 60. However, we conclude that NRCP 60 would not preclude the writ of *coram nobis* in a criminal case. When faced with a similar suggestion, the United States Supreme Court rejected the argument that language in FRCP 60 abolishing *coram nobis* in civil cases also ended the writ in criminal cases because the writ of *coram nobis* served as a step in a criminal case. *Morgan*, 346 U.S. at 505 n.4. We agree and conclude that NRCP 60 does not preclude use of the writ in criminal cases.

[10]There are limited exceptions that are not relevant here. *See generally* NRS 34.724(2)(a) (providing that habeas corpus is ''not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court or the remedy of direct review of the sentence or conviction'').

remedy out of whole cloth, appending only the name of *coram nobis* to this new creation. Such a remedy as created by the *Morgan* Court could only be created by our Legislature, and we leave it in its hands to fashion. At common law, the writ of *coram nobis* existed to correct errors of fact, and to the extent that it exists in Nevada, it exists as a common-law writ.

[Headnotes 7, 8]

Consistent with the common law, the writ of *coram nobis* may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being rendered. At common law, many of these errors of fact involved personal jurisdiction—errors regarding the status of the party which would prevent a judgment from being entered against the party. The common-law examples of coverture and infancy have been eliminated through the evolution of legal principles relating to women and children, but the competency of the defendant at the time of the plea or trial is an example that still has relevance today. *See* NRS 178.405(1) (requiring the suspension of proceedings when a doubt rises as to the competence of the defendant). Although we do not attempt to precisely define the realm of factual errors that may give rise to a writ of *coram nobis*, that realm is limited to errors involving facts that were not known to the court, were not withheld by the defendant, and would have prevented entry of the judgment. For example, a factual error does not include claims of newly discovered evidence because these types of claims would not have precluded the judgment from being entered in the first place. *See Hyung Joon Kim*, 202 P.3d at 453; *Commonwealth v. Morris*, 705 S.E.2d 503, 506 (Va.), *cert. denied*, 565 U.S. ___, 132 S. Ct. 115 (2011). And legal errors fall entirely outside the scope of the writ. *See, e.g.*, *Hyung Joon Kim*, 202 P.3d at 446; *State v. Diaz*, 808 N.W.2d 891, 896 (Neb. 2012). A writ of *coram nobis* is the forum to correct only the most egregious factual errors that would have precluded entry of the judgment of conviction had the error been known to the court at the time.

[Headnotes 9, 10]

A writ of *coram nobis* is not, however, the forum to relitigate the guilt or innocence of the petitioner. We have long emphasized the importance of the finality of judgments, and we are gravely concerned that recognizing this writ, even in the very limited form that we do today, will result in a proliferation of stale challenges to convictions long since final. *See Jackson v. State*, 115 Nev. 21, 23 n.2, 973 P.2d 241, 242 n.2 (1999); *Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). Given these concerns, we hold that any error that was reasonably available to be raised while the petitioner was in custody is waived, and it is the peti-

tioner's burden on the face of his petition to demonstrate that he could not have reasonably raised his claims during the time he was in custody.

[Headnotes 11, 12]

Having recognized that a writ of *coram nobis* may be filed in district court by a person who is no longer in custody to challenge a judgment of conviction based on errors of fact, we necessarily must determine whether the district court's order resolving such a petition is appealable.[11] Generally, this court has appellate jurisdiction only where a statute or court rule provides for an appeal. *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). As the State points out, there is no specific statute or court rule applicable to criminal cases that authorizes an appeal from an order resolving a petition for a writ of *coram nobis*. However, NRAP 3A(b)(1) provides that an appeal may be taken from a final judgment in a civil action. *Coram nobis*, much like habeas corpus, cannot be strictly characterized as civil or criminal for all purposes. *See Hill v. Warden*, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980). Thus, although the writ is a step in the criminal process, for purposes of determining the appealability of an order resolving a petition for a writ of *coram nobis*, we are guided by the approach in the federal courts to classify the writ proceeding as a civil action. FRAP 4(a)(1)(C), since 2002, provides that *coram nobis* is appealable as a civil judgment. Even before that provision was added to FRAP 4(a)(1), federal courts had determined that the writ should be treated as civil for appeal purposes. *See, e.g.*, *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989), *overruled on other grounds by Smith v. Barry*, 502 U.S. 244 (1992); *United States v. Johnson*, 237 F.3d 751, 754 (6th Cir. 2001); *United States v. Craig*, 907 F.2d 653, 655-57 (7th Cir. 1990), *amended at* 919 F.2d 57. Thus, we conclude that the writ of *coram nobis* should be treated as a civil writ for appeal purposes and a final judgment resolving a petition for a writ of *coram nobis* therefore is appealable pursuant to NRAP 3A(b)(1).

Application to Trujillo

[Headnotes 13, 14]

Having decided that a petition for a writ of *coram nobis* exists in limited circumstances, we must determine whether the district court abused its discretion in denying the petition. *See Hyung Joon Kim*, 202 P.3d at 448 (recognizing that ''a lower court's ruling on a petition for the writ is reviewed under the abuse of dis-

[11]At common law, the writ was filed in the court alleged to have made the error of fact preventing entry of the judgment of conviction. This necessarily means that the writ of *coram nobis* is not available in an original proceeding in this court.

cretion standard''); *Jessen*, 290 N.W.2d at 688 (recognizing that *coram nobis* is ''a discretionary writ''). Consistent with our decision today, the remedy of *coram nobis* was available to Trujillo because he was no longer in custody on the judgment being challenged when he filed his petition. We turn then to the merits of the petition.

In his petition, Trujillo claimed that he received ineffective assistance of counsel because his trial counsel failed to inform him about the immigration consequences of his conviction. This claim fell outside the scope of claims permissible in a petition for a writ of *coram nobis*. A claim of ineffective assistance of counsel involves legal error. *See Hyung Joon Kim*, 202 P.3d at 454; *Diaz*, 808 N.W.2d at 896; *Morris*, 705 S.E.2d at 507-08. While there is undeniably a factual underpinning to a claim of ineffective assistance of counsel, the ultimate issue is the legal question of whether the representation was constitutionally adequate: whether the performance of counsel fell below an objective standard of reasonableness and whether there was resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Because Trujillo's claim was not properly raised in a petition for a writ of *coram nobis*, we conclude that the district court did not abuse its discretion in denying the petition. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

CONCLUSION

In discussing the writ of *coram nobis*, the First Circuit Court of Appeals has indicated that the writ should be ''hen's-teeth rare.'' *United States v. George*, 676 F.3d 249, 254 (1st Cir. 2012). We echo that sentiment. *Coram nobis*, where recognized, is an extraordinary remedy; one necessary only to achieve justice. The common-law writ of *coram nobis* is available in Nevada only for petitioners who are no longer in custody on the judgment being challenged and only to address errors of fact outside the record that were not known to the court entering the judgment, could not have been raised earlier, and affect the validity and regularity of the decision itself in that they would have precluded the judgment from being rendered.

GIBBONS and SAITTA, JJ., concur.