We further conclude that the failure to give the instruction affected Sanchez-Dominguez's substantial rights. *See* NRS 178.602; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Although the evidence unquestionably shows that Sanchez-Dominguez killed the victim, it is a close question regarding whether that killing occurred in the perpetration of the earlier burglary. Further, as there was evidence that Sanchez-Dominguez was extremely intoxicated, the evidence supporting the premeditation theory of liability was not so convincing that the failure to give the instruction did not have a prejudicial impact on the verdict.

Accordingly, we would reverse the judgment of conviction and remand for a new trial.

THE HONORABLE STEVEN E. JONES, PETITIONER, *v.* NEVADA COMMISSION ON JUDICIAL DISCIPLINE, RESPONDENT.

No. 61902

February 27, 2014 318 P.3d 1078

Original petition for a writ of mandamus seeking relief in a judicial discipline proceeding.

Family court judge against whom disciplinary proceedings had been initiated filed petition for writ of mandamus, seeking dismissal of the proceedings against him, and asserting that proposed charges resulted from a defective complaint and deficient investigation. The supreme court, CHERRY, J., held that: (1) judge failed to demonstrate that alleged procedural violations by Commission on Judicial Discipline during investigatory phase of disciplinary proceedings actually prejudiced judge, and thus, the supreme court would decline to consider merits of judge's petition for writ of mandamus on ground that petition was premature; (2) due process rights generally do not attach during the investigatory phase of judicial discipline proceedings; and (3) the supreme court would deny judge's motion to seal case record of proceedings before the court challenging propriety of disciplinary proceedings against him.

Petition denied.

Jimmerson Hansen, P.C., and *James J. Jimmerson* and *James M. Jimmerson*, Las Vegas, for Petitioner.

David F. Sarnowski, Executive Director, and *Brian R. Hutchins*, Acting Executive Director, Nevada Commission on Judicial Discipline, Carson City, for Respondent.

1. COURTS.
   The supreme court has original jurisdiction to grant extraordinary writ relief. Const. art. 6, § 4.
2. COURTS.
   The supreme court is empowered to provide extraordinary writ relief with regard to proceedings of the Commission on Judicial Discipline. Const. art. 6, § 4.
3. MANDAMUS.
   Whether to consider a petition for extraordinary writ relief is within the supreme court's sole discretion.
4. 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.
5. COURTS.
   Family court judge who sought dismissal of disciplinary proceedings initiated against him by Commission on Judicial Discipline, asserting that charges against him resulted from a defective complaint and deficient investigation, had no adequate legal remedy, as relevant to his petition for writ of mandamus to compel prehearing dismissal of charges, since judge's right of appeal was only available from order of censure, removal, retirement, or other discipline entered after formal disciplinary hearing; however, in seeking relief in form of writ of mandamus, judge would bear the burden to demonstrate that the supreme court's extraordinary, prehearing intervention was warranted under circumstances of his case. NRAP 3D(c)(2).
6. CONSTITUTIONAL LAW; COURTS; MANDAMUS.
   Family court judge who sought dismissal of disciplinary proceedings initiated against him by Commission on Judicial Discipline, asserting that charges against him resulted from a defective complaint and deficient investigation in violation of his due process rights, failed to demonstrate actual prejudice resulting from Commission's alleged procedural deficiencies that occurred prior to judge's formal disciplinary hearing, and thus, the supreme court would decline to consider merits of judge's petition for writ of mandamus seeking dismissal of disciplinary charges against him, on the ground that petition was premature; judge's due process rights were not implicated in investigatory stage of disciplinary proceedings, but rather would be implicated in adjudicatory phase of proceedings, which had not yet occurred, and, absent showing of actual prejudice, judge's procedural challenges to Commission's actions during investigatory phase of proceedings against him were not ripe for review. U.S. CONST. amend. 14.
7. CONSTITUTIONAL LAW.
   When a judicial office is at stake, due process mandates a fair trial before a fair tribunal, requiring, at least, notice of the charges and an opportunity to be heard. Const. art. 1, § 8(5); U.S. CONST. amend. 14.
8. CONSTITUTIONAL LAW; JUDGES.
   In judicial disciplinary proceedings, which consist of an investigatory and an adjudicatory phase, the judge's legal rights are determined in the adjudicatory phase in which formal statement of charges against the judge is filed, and in which the judge has the opportunity to defend against the charges at a formal hearing that is open to the public; accordingly, a judge's due process rights will generally not attach during the investigatory phase of disciplinary proceedings, before a formal statement of charges is filed. U.S. CONST. amend. 14; NRS 1.4673, 1.4683, 1.4687.
9. CONSTITUTIONAL LAW; JUDGES.
   Due process rights generally do not attach during the investigatory phase of judicial discipline proceedings; such a rule allows the investiga-

tion to proceed unimpeded until the Commission on Judicial Discipline has determined whether formal charges should be brought. U.S. CONST. amend. 14; NRS 1.4663 (2008).

10. JUDGES.
Absent due process concerns, relief from any procedural violations occurring during the investigatory stage of judicial discipline proceedings may be obtained only by a showing of actual prejudice. U.S. CONST. amend. 14; NRS 1.4663 (2008).

11. JUDGES.
In judicial disciplinary proceedings, judges generally have no right to avoid charges based on new evidence discovered during the course of a legitimate investigation. NRS 1.4663 (2008).

12. RECORDS.
The supreme court would deny family court judge's motion to seal case record of proceedings before the court, in which judge sought writ of mandamus to compel dismissal of disciplinary proceedings initiated against him by Commission on Judicial Discipline, even though investigatory phase of judicial disciplinary proceedings before the Commission were confidential; since judge availed himself of traditionally public forum of the supreme court by filing petition for writ of mandamus, policy favoring public access to judicial records and documents prevailed over policy favoring confidentiality in initial judicial discipline proceedings before the Commission. NRS 1.090.

13. RECORDS.
Presumption favoring public access to judicial records and documents is only overcome when the party requesting the sealing of a record or document demonstrates that the public right of access is outweighed by a significant competing interest.

14. JUDGES.
When a judge, by filing a petition for extraordinary writ relief, avails himself of the traditionally public forum of the supreme court and seeks to have all proceedings against him by the Commission on Judicial Discipline dismissed, the public policies to keep government open and the public informed prevail over the state public policy favoring confidentiality in initial judicial discipline proceedings; the public has a right to know of such an extraordinary dispute in governmental affairs.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:[1]

Petitioner, the Honorable Steven E. Jones, is a Nevada family court judge against whom respondent, the Nevada Commission on Judicial Discipline, is currently conducting disciplinary proceedings. Judge Jones filed this original petition for a writ of mandamus seeking to halt and dismiss the disciplinary proceedings against him

[1]The disciplinary proceeding that is the subject of this writ proceeding is separate and distinct from the proceeding that culminated in the Commission's February 3, 2014, Findings of Fact, Conclusions of Law and Imposition of Discipline, *available at* http://judicial.state.nv.us/Jones%20-%20Findings%20Conclusions%20Imposition%201206-218.pdf.

because, he asserts, the Commission initiated the investigation based on a defective complaint, assigned an unfair or biased investigator who investigated issues outside of those indicated in the complaint, and is exercising its jurisdiction outside of the permissible time limits. Ultimately, we deny writ relief because most of these issues are not yet ripe for review. Nevertheless, in this opinion, we clarify that the investigatory stage of judicial discipline proceedings provides fewer due process protections than the adjudicatory stage. We also take this opportunity to address the reasoning behind our denial of Judge Jones' motion to seal these proceedings from public access.

FACTS

The Commission exercises original jurisdiction over the discipline of judges, which includes censure, removal, and involuntary retirement, among other forms of discipline provided for by statute. Nev. Const. art. 6, § 21(1) and (5); NRS 1.440 (exclusive jurisdiction); *see, e.g.*, NRS 1.4677 (forms of discipline). Before 2010, NRS 1.4655(1) provided that the Commission could investigate a judge's conduct after receiving a written, sworn complaint or any other type of information that reasonably indicated that a judge may have committed misconduct or may be incapacitated.[2] 2009 Nev. Stat., ch. 312, § 21, at 1339-40. If the complaint contained allegations that, if proven, would warrant discipline, the Commission would assign an investigator to inquire into the allegations' merits. NRS 1.4663(1). When the investigation resulted in insufficient "reason to proceed," the complaint would be dismissed. NRS 1.4667. If the results showed sufficient reason to proceed, in that there existed a likelihood that the evidence would clearly and convincingly establish grounds for discipline, the Commission would require the judge to respond to the complaint. NRS 1.4667; NRS 1.467. The Commission would then reconsider the matter in light of the judge's response and either dismiss the complaint or direct a prosecuting attorney to file a formal statement of charges, in prelude to a formal, public hearing on the charges, NRS 1.467, at which the Commission would ultimately determine whether and how to impose discipline. NRS 1.4673.

In August 2006, after reviewing police investigative reports and newspaper articles concerning Judge Jones' alleged involvement in two particular incidents of domestic battery on June 20 and 22,

[2]The judicial discipline provisions were substantially revised in 2009; however, the basic procedure remains the same. *See* 2009 Nev. Stat., ch. 312, §§ 1-36, at 1336-50; *id.* § 35, at 1350. As the complaint at issue here was filed in 2006, this opinion refers to the provisions in effect at that time, unless otherwise stated.

2006, and a resulting temporary protective order (TPO) violation, the Commission, through its executive director, issued a verified statement of complaint against Judge Jones, alleging that he may have violated Canons 1, 2, and 4 of the Nevada Code of Judicial Conduct. *See* Procedural Rules of the Nevada Commission on Judicial Discipline (PRJDC) 10(2). In addition to the alleged domestic battery and TPO violation, the complaint detailed possible instances of interference with the resulting police investigation, misuse of court personnel to render personal services, and exploitation of the judicial position through involvement in a private corporation. The Commission assigned The Advantage Group to investigate the complaint.

Judge Jones was first alerted to the existence of an investigation in November 2010, when he was interviewed by The Advantage Group. He received a copy of the complaint in July 2012, along with a notice of proposed charges. In a letter attached to the complaint, the Commission explained that the complaint's main allegations had been dropped due to lack of clear and convincing evidence. Nevertheless, the Commission's letter continued, over the course of the investigation several other concerns developed, to which the Commission believed a response was warranted. In particular, the attached proposed charging document alleged that Judge Jones had, continually since approximately 1996 or 1997, violated the Nevada Code of Judicial Conduct by persuading various individuals to invest large sums of money in unsound financial schemes, some involving undisclosed ex-felons. The proposed charging document also alleged that Judge Jones had engaged in and encouraged court employees to engage in other business dealings with convicted ex-felons, asked his bailiff to personally loan an ex-felon money on multiple occasions, and attempted to convince his bailiff that Judge Jones was entitled to a portion of his bailiff's disability retirement payout. Further, the proposed charging document alleged that Judge Jones was involved in an intimate relationship with an extern and later allowed her to appear in his courtroom without disclosing their prior relationship or recusing himself. Finally, the proposed charging document alleged that Judge Jones misappropriated marijuana evidence from an ongoing case. Outside of the first alleged unsound investment schemes, the asserted activities took place between 2002 and 2008.

Judge Jones, asserting that the investigation upon which the proposed charges are based resulted from a defective complaint, was conducted by a biased party in an untimely manner, and included an improper scope, now seeks this court's extraordinary intervention. The Commission has filed an answer, arguing that the matter is not now ripe for our consideration, and Judge Jones has filed a reply.

DISCUSSION

[Headnotes 1-3]

This court has original jurisdiction to grant extraordinary writ relief, *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); Nev. Const. art. 6, § 4, and "we are empowered to provide extraordinary relief with regard to Commission proceedings." *Mosley v. Nev. Comm'n on Judicial Discipline*, 117 Nev. 371, 377, 22 P.3d 655, 658 (2001). Whether to consider a petition for extraordinary relief, however, is within our sole discretion. *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

[Headnotes 4, 5]

Here, Judge Jones seeks a writ of mandamus directing the Commission to take specific actions in accord with procedural aspects of the judicial discipline statutes concerning investigations and, ultimately, to dismiss the 2006 complaint filed against him. "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); *see* NRS 34.160. Writ relief is generally available only where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see Halverson v. Sec'y of State*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008). To the extent that Judge Jones is seeking prehearing relief, no adequate legal remedy exists, as an appeal is available only from an order of censure, removal, retirement, or other discipline entered after the formal hearing. NRAP 3D(c)(2); PRJDC 34(1). As the petitioner, however, it is Judge Jones' burden to demonstrate that this court's extraordinary, prehearing intervention is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Judge Jones has not met that burden here.

Merits of the writ petition

[Headnote 6]

In challenging the Commission's actions, Judge Jones argues that the Commission violated procedural statutes and rules during the disciplinary investigation when it (1) proceeded with the investigation despite a complaint built on hearsay and unreliable evidence, (2) assigned a biased investigator and failed to restrict the investigator to charges relating to the complaint, and (3) extended the investigation beyond the time frames set forth in NRS 1.4655 and NRS 1.4681. Judge Jones asserts that he has been prejudiced by the Commission's improper actions and inactions because he now faces allegations different from those originally presented

in the 2006 complaint and he has lost virtually all opportunity to mount a defense, especially in regard to the new allegations stemming from alleged conduct beginning many years ago. Judge Jones also claims that the Commission arbitrarily and capriciously applied statutory and rule-based procedural safeguards during the investigatory phase of the judicial discipline proceeding and robbed him of his due process rights to notice and an opportunity to be heard, thus impinging upon a protected interest in his judicial office.

[Headnote 7]

This court has recognized that "commissioned judges in this state have a protected interest in their judicial offices under the Fourteenth Amendment [of the United States Constitution]." *Mosley v. Nev. Comm'n on Judicial Discipline*, 117 Nev. 371, 378, 22 P.3d 655, 659 (2001). The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Nev. Const. art. 1, § 8(5) ("No person shall be deprived of life, liberty, or property, without due process of law."). Thus, when a judicial office is at stake, due process mandates "a fair trial before a fair tribunal," *Ivey v. Eighth Judicial Dist. Court*, 129 Nev. 154, 159, 299 P.3d 354, 357 (2013), requiring, at least, notice of the charges and an opportunity to be heard. *See Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007).

We have recognized in another context, however, that due process rights generally are not implicated during purely investigatory proceedings. *Hernandez v. Bennett-Haron*, 128 Nev. 580, 588-89, 287 P.3d 305, 310-11 (2012) (citing *Hannah v. Larche*, 363 U.S. 420, 442 (1960)). In *Hernandez*, highway patrol officers challenged the constitutionality of county code provisions establishing coroner's inquests into officer-related deaths, arguing in part that the provisions violated due process guarantees. *Id.* at 586, 287 P.3d at 308. In determining whether due process guarantees were impacted, we considered the constitutional interest at issue, the type of proceeding involved, and the proceeding's potential impact on due process protections. *Id.* After analyzing several United States Supreme Court cases on the subject, which culminated in the conclusion that merely investigatory proceedings do not adjudicate legal rights and thus do not implicate due process protections, *id.* at 590-91, 287 P.3d at 313, we concluded that coroner's inquests were merely investigatory and thus did not trigger due process rights. *Id.* at 591, 287 P.3d at 314.

[Headnote 8]

The same result is warranted here. In Nevada, as elsewhere, judicial discipline proceedings are divided into two distinct phases: investigatory and adjudicatory. *See* NRS 1.4663 (governing in-

vestigations of alleged misconduct to determine whether to issue a formal statement of charges); NRS 1.4673 (governing hearings on formal statements of charges, after which disciplinary actions may be imposed). *See, e.g.*, *In re Flanagan*, 690 A.2d 865, 871-72 (Conn. 1997); *In re Henson*, 913 So. 2d 579, 589 n.3 (Fla. 2005); *In re Chrzanowski*, 636 N.W.2d 758, 769 (Mich. 2001). During the investigatory proceedings, which are confidential, the Commission reviews the complaint, appoints an investigator and considers the investigator's report, and weighs the judge's response to any probable cause determination; at each step, the Commission is required to determine whether there exists sufficient cause to proceed to the next stage or whether the complaint should be dismissed. Once a formal statement of charges against the judge is filed, the adjudicatory proceedings must be made open to the public, and the judge has every opportunity afforded under the law to defend, including notice of the charges and a formal hearing. NRS 1.4683(1); NRS 1.4687. It is during this phase that the judge's legal rights are adjudicated, not before. Accordingly, due process rights will generally not attach before a formal statement of charges is filed.

Other jurisdictions, distinguishing between the availability of due process protections during an investigation and those that attach when adjudication begins, have likewise determined that due process protections do not attach until a judicial discipline proceeding has been initiated. *See In re Petition to Inspect Grand Jury Materials*, 576 F. Supp. 1275, 1284 (S.D. Fla. 1983); *Ryan v. Comm'n on Judicial Performance*, 754 P.2d 724, 729 (Cal. 1988) (stating that while "a judge certainly has the right to conduct a proper defense in disciplinary actions[,] . . . the right attaches [only] once formal proceedings are instituted," not during the preliminary investigation); *Flanagan*, 690 A.2d at 875 (citing other cases holding the same). In rejecting the appellant's claimed due process right to pre-probable-cause notice of the charges, the Connecticut Supreme Court in *In re Flanagan* stated that "[a] judge is only entitled to reasonable notice of the charges upon which he may be disciplined after the review council has determined what those charges are." 690 A.2d at 875-76. "'Simply stated, a judge does not have the [constitutional] right to defend against a proceeding that has not yet been brought.'" *Id.* at 875 (alteration in original) (quoting *Ryan*, 754 P.2d at 747).

[Headnotes 9, 10]

We agree that due process rights generally do not attach during the investigatory phase of judicial discipline proceedings, as this will allow the investigation to proceed unimpeded until the Commission has determined whether formal charges should be brought. Allowing for unobstructed investigation furthers the Commission's goal of protecting the integrity of the judiciary and safeguarding

public confidence in the judicial branch but does not unduly burden the judge's right and ability to defend. *See* NRS 1.462 (explaining that the purpose of judicial discipline is "to preserve an independent and honorable judiciary"); *Flanagan*, 690 A.2d at 875 ("Two interests must be accommodated in judicial disciplinary proceedings: (1) the review council must have broad authority to investigate the conduct of our judges in order to maintain public confidence in the judiciary; and (2) our judges must be afforded adequate process before discipline is imposed to ensure that discipline is not imposed on the basis of unfounded charges of misconduct."). Accordingly, due process typically will not be implicated during the investigatory stage, and Judge Jones' claimed procedural violations regarding the prehearing complaint, investigation, and time limits must be viewed in this context. As the California Supreme Court has recognized, absent due process concerns, relief from any procedural violations occurring during the investigatory stage may be obtained only by a showing of actual prejudice. *Ryan*, 754 P.2d at 729.

[Headnote 11]

The requisite showing of actual prejudice is not present in this case. Both at the time the complaint was filed in 2006 and today, there is no absolute prohibition against initiating an investigation based on hearsay and inadmissible evidence included in the complaint. NRS 1.4655(1) (Commission can proceed on "[i]nformation from any source and in any format, from which the Commission may reasonably infer that the justice or judge may have committed misconduct or be incapacitated"); *see* Nev. Const. art. 6, § 21(9) (providing that "[a]ny matter relating to the fitness of a justice or judge may be brought to the attention of the Commission by any person or on the motion of the Commission"); NRS 1.4263 (as amended in 2009) (defining, currently, "complaint" as "information in any form and from any source that alleges or implies judicial misconduct or incapacity"). The important consideration is whether the alleged misconduct is capable of proof. NRS 1.4663(1) (requiring that the "complaint contain[ ] allegations which, if true, would establish grounds for discipline"); *see* NRS 1.4657 and NRS 1.4663 (as amended in 2009) (both requiring the Commission to determine that the "complaint alleges objectively verifiable evidence from which a reasonable inference could be drawn that a judge committed misconduct or is incapacitated" before initiating an investigation). Further, although Judge Jones may now face different allegations from those asserted in 2006, judges generally have no right to avoid charges based on new evidence discovered during the course of a legitimate investigation. *Flanagan*, 690 A.2d at 875-76 (explaining that there exists no right during the investigatory stage to notice of the charges or to limit the investigation and charges to only those set forth in the complaint). Judge Jones has not asserted or shown

that the additional proposed charges were unfounded or rendered with improper motive, and there is no indication that the allegations were stated in a manner insufficient to allow Judge Jones to respond. Although Judge Jones argues that he is unable to defend against the proposed charges because the evidence has become unavailable and for other reasons, he has not so demonstrated with specific facts, and regardless, those inherently factual issues are not properly before us in the first instance. *See generally Millspaugh v. Millspaugh*, 96 Nev. 446, 448-49, 611 P.2d 201, 202 (1980) (stating that knowledge of the running of the statute of limitations is "a question of fact to be determined by the jury or trial court after a full hearing where . . . the facts are susceptible to opposing inferences" (internal quotation omitted)); *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that this court is ill-suited to resolve factual issues). Based on Judge Jones' failure to demonstrate that writ relief is warranted, we decline to address Judge Jones' procedural challenges to the Commission's actions at this time. Essentially, this writ petition is premature. The timing concerns and any other alleged prejudicial procedural violations may be raised during any formal hearing on the charges and, if aggrieved by the final decision, to this court on appeal.

Sealing of court records and documents

[Headnote 12]

In arguing that this court's extraordinary intervention was warranted at this stage in the proceedings, Judge Jones validly pointed out that, to some extent, once formal charges are filed and the matter made public, damage to his reputation cannot be undone. For this reason, Judge Jones also moved to seal the court record in this case under Rule for Sealing and Redacting Court Records (SRCR) 3. In so doing, he asserted that the public's interest in open access to the courts should yield to the compelling interests underpinning confidentiality before the Commission, including but not limited to, meritless complaints, attracting and retaining high-quality judicial personnel, preventing belligerent litigants from harassing judges, and encouraging judges with valid complaints against them to retire rather than risk a public hearing.

[Headnote 13]

SRCR 3 provides procedures for sealing court records or documents in civil cases. It states that when a motion is made to seal, the information to be sealed remains confidential for a reasonable period until the court determines whether appropriate grounds exist for sealing the records. *See* SRCR 3. Courts may only seal their records or documents when the sealing is "justified by identified compelling

privacy or safety interests that outweigh the public interest in access to the court record." SRCR 3(4).[3] This presumption favoring public access to judicial records and documents is only overcome when the party requesting the sealing of a record or document demonstrates that "the public right of access is outweighed by a significant competing interest." *Howard v. State*, 128 Nev. 736, 744, 291 P.3d 137, 142 (2012) (discussing SRCR 3).

[Headnote 14]

In an attempt to meet this burden, Judge Jones relied on the catchall provision that justifies sealing or redaction when a party identifies another "compelling circumstance." SRCR 3(4)(h). But we have already concluded that the statute recognizing the state's interest in the confidentiality of judicial disciplinary proceedings by or before the Commission does not apply to proceedings before this court.[4] *Matter of Halverson*, 123 Nev. 493, 507, 169 P.3d 1161, 1171 (2007) ("[ARJD 5, requiring confidentiality until the filing of a formal statement of charges] did not apply to proceedings in this court, particularly in light of NRS 1.090's mandate that, with only limited exceptions, all courts of justice be open to the public . . . ."); *Attorney Gen. v. Steffen*, 112 Nev. 369, 373-74, 915 P.2d 245, 248 (1996). Thus, "when a judge avails himself of the traditionally public forum of this court and seeks to have all proceedings against him by the Commission . . . dismissed," the "public policies to keep government open and the public informed" prevail over "the state public policy favoring confidentiality in initial judicial discipline proceedings." *Steffen*, 112 Nev. at 373-74, 915 P.2d at 248. The public has a "right and need . . . to know of such an extraordinary dispute in governmental affairs." *Id.* at 374, 915 P.2d at 248. In addition, the threat of "secret judicial proceedings" would undermine "public confidence in this court and the judiciary," while "[o]penness promotes public understanding, confidence, and acceptance of judicial processes and results." *Id.* at 374, 915 P.2d at 248-49. Accordingly, the motion to seal was denied, and the proceedings before this court have been made publicly available.

---

[3]Identified compelling interests include statutory authorization by state or federal law; furthering a district court or justice court protective order or order striking material from the record; protecting public health and safety; protecting personal, medical, or tax information; protecting the confidentiality of settlement agreements; and protecting intellectual property or trade secrets. SRCR 3(4)(a)-(g).

[4]Administrative and Procedural Rule for the Nevada Commission on Judicial Discipline (ARJD) 5 was repealed and superseded by NRS 1.4683. We held in *Halverson* that the provisions of NRS 1.4683 are "nearly identical" to the prior rules governing confidentiality of proceedings before the Commission, and "*Steffen* remains the controlling authority with respect to appeals from confidential Commission rulings." *Halverson*, 123 Nev. at 508, 169 P.3d at 1171.

CONCLUSION

As discussed above, at this investigatory stage in the judicial discipline proceedings below, Judge Jones has not demonstrated actual prejudice stemming from any procedural or substantive violations sufficient to warrant writ relief at this time, although he may be able to establish such harm in the future. Because of the premature nature of this writ petition, we conclude that our extraordinary intervention is not warranted. After this case has developed factually, a future appeal from any final order of discipline will allow for meaningful review. Accordingly, we deny this petition for extraordinary writ relief.

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

CITY OF RENO, APPELLANT, *v.* THE HONORABLE KENNETH HOWARD; RENO MUNICIPAL COURT; AND CHERYL LEE, RESPONDENTS.

No. 62313

February 27, 2014 318 P.3d 1063

Appeal from a district court order denying a petition for a writ of mandamus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

City sought petition for writ of mandamus to compel the municipal court to admit declaration of phlebotomist who had collected defendant's blood for evidentiary testing after defendant's arrest for misdemeanor driving under the influence (DUI), which the municipal court had excluded on Confrontation Clause grounds. The district court denied petition. City appealed. The supreme court, PARRAGUIRRE, J., held that: (1) the supreme court had jurisdiction over the appeal, and (2) statute providing that a defendant charged with DUI waives the right to confront maker of declaration who collected defendant's blood for evidentiary testing unless defendant can show a substantial and bona fide dispute regarding facts in the declaration violated the Confrontation Clause, overruling *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203 (2005).

Affirmed.

Christopher P. Hazlett-Stevens, Deputy City Attorney, Reno, for City of Reno.

Larry K. Dunn & Associates and *Larry K. Dunn* and *Karena K. Dunn*, Reno, for Cheryl Lee.

Jonathan D. Shipman, Deputy City Attorney, Reno, for the Honorable Kenneth Howard and Reno Municipal Court.

1. MANDAMUS.
   The supreme court reviews a district court's decision to deny a petition for a writ of mandamus for an abuse of discretion.
2. CRIMINAL LAW.
   The supreme court reviews the constitutionality of a statute de novo.
3. MANDAMUS.
   The supreme court had jurisdiction over City's appeal of the district court's denial of mandamus petition pursuant to which City sought to compel the municipal court to admit declaration of phlebotomist who collected defendant's blood for evidentiary testing after his arrest for misdemeanor driving under the influence, though proceedings in the municipal court were still pending, as the mandamus petition was the only issue before the district court, such that the district court's denial of petition was a "final judgment" pursuant to appellate procedure rule providing that an appeal may be taken from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered. NRS 2.090(2), 50.315(6); NRAP 3A(b)(1).
4. CRIMINAL LAW.
   Documents created solely for an evidentiary purpose and in aid of a police investigation are testimonial hearsay for Confrontation Clause purposes. U.S. CONST. amend. 6.
5. CRIMINAL LAW.
   Statute providing that defendant charged with driving under the influence waives his right to confront maker of declaration who collected defendant's blood for evidentiary testing unless defendant can show a substantial and bona fide dispute regarding facts in the declaration violates the Confrontation Clause, as unlike a "simple" notice-and-demand statute that merely requires defendant's timely objection, the statute requires defendant to establish a substantial and bona fide dispute regarding the facts in the declaration in order to exercise his confrontation rights, overruling *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203 (2005). U.S. CONST. amend. 6; NRS 50.315(6).
6. COURTS.
   The supreme court is loath to depart from the doctrine of stare decisis and will overrule precedent only if there are compelling reasons to do so.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In Nevada, the declaration of a person who collects a criminal defendant's blood for evidentiary testing may be admitted at trial. NRS 50.315(4). A defendant in a misdemeanor driving under the influence trial waives the right to confront the maker of such a declaration unless the defendant can show a substantial and bona fide dispute regarding the facts in the declaration. NRS 50.315(6). In this appeal, we discuss the Confrontation Clause implications of

NRS 50.315(6). We conclude that, in light of the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the statute's substantial-and-bona-fide-dispute requirement impermissibly burdens the right to confront the declarant. Accordingly, we overrule our prior decision in *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203 (2005), and affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

Appellant City of Reno (City) charged respondent Cheryl Lee with misdemeanor driving under the influence in Reno Municipal Court. At Lee's bench trial, the City sought to introduce into evidence the declaration of Shirley Van Cleave, a phlebotomist who collected Lee's blood for evidentiary testing after Lee's arrest. Lee objected to the admission of the declaration on Confrontation Clause grounds, and the municipal court sustained the objection and excluded the declaration. The City petitioned the district court for a writ of mandamus to compel the municipal court to admit the declaration into evidence. The district court denied the petition, explaining that admission of the declaration over Lee's objection would have violated Lee's rights under the Confrontation Clause. The City now appeals.

DISCUSSION

[Headnotes 1, 2]

On appeal, the City argues that the district court abused its discretion by denying its petition for writ of mandamus, reasoning that the district court erroneously concluded that NRS 50.315(6)'s waiver provisions violate the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. This court reviews a district court's decision to deny a writ petition for an abuse of discretion and reviews the constitutionality of a statute de novo. *Walsh*, 121 Nev. at 902, 124 P.3d at 205.

This court has jurisdiction to hear this appeal

[Headnote 3]

Lee initially argues that we lack jurisdiction over this appeal because the proceedings in the municipal court remain pending. This court "has jurisdiction to review upon appeal . . . an order granting or refusing to grant . . . mandamus." NRS 2.090(2). Further, "[a]n appeal may be taken from . . . [a] final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." NRAP 3A(b)(1). Where a petition for writ of mandamus is the only issue before a district court, we have held that the district court's order denying the petition "is a final judgment within the

meaning of NRAP 3A(b)(1)." *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665, 856 P.2d 244, 246 (1993). Because the City's petition was the only issue before the district court, we conclude that we have jurisdiction to hear this appeal.

The declaration is testimonial

[Headnote 4]

The Confrontation Clause provides that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The U.S. Supreme Court has held that the Confrontation Clause prohibits the admission of testimonial hearsay against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Documents "created solely for an 'evidentiary purpose' " and "in aid of a police investigation" are testimonial hearsay, *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011) (quoting *Melendez-Diaz*, 557 U.S. at 311), and we have held that declarations made and offered pursuant to NRS 50.315(4) are testimonial hearsay. *Walsh*, 121 Nev. at 906, 124 P.3d at 207-08.

NRS 50.315(4) allows a declaration made under penalty of perjury by a person who collects blood from a subject for evidentiary testing to be admitted in evidence to prove the declarant's occupation, the identity of the subject, and that the declarant kept the sample in his custody until delivering it to another identified person.

The parties do not dispute that Van Cleave's declaration was made and offered pursuant to NRS 50.315(4) and thus is testimonial hearsay. Because the record does not suggest that Van Cleave was unavailable or that Lee had a prior opportunity to cross-examine Van Cleave, Lee's right to confront Van Cleave requires exclusion of the declaration unless Lee validly waived her right to confrontation. *See Melendez-Diaz*, 557 U.S. at 327; *Crawford*, 541 U.S. at 53-54.

NRS 50.315(6) impermissibly burdens confrontation rights

[Headnotes 5, 6]

The City argues that Lee validly waived her right to confront Van Cleave by failing to show a substantial and bona fide dispute regarding the declaration as required by NRS 50.315(6). In response, Lee argues that NRS 50.315(6) impermissibly burdens the rights provided by the Confrontation Clause. Although we previously addressed this issue in *Walsh*, 121 Nev. at 906-07, 124 P.3d at 208, Lee argues that the U.S. Supreme Court's decision in *Melendez-Diaz* compels us to overrule *Walsh*. "[W]e are loath to

depart from the doctrine of stare decisis" and will overrule precedent only if there are compelling reasons to do so. *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013).

A criminal defendant may waive her confrontation rights by failing "to comply with statutory procedures" for making an objection based on the Confrontation Clause. *Walsh*, 121 Nev. at 906, 124 P.3d at 208; *see also Melendez-Diaz*, 557 U.S. at 327 ("The defendant *always* has the burden of raising his Confrontation Clause objection."). Under existing Nevada law, a defendant waives the right to confront an NRS 50.315(4) declarant, such as Van Cleave, by failing to comply with NRS 50.315(6), which provides in relevant part:

> If, at or before the time of trial, the defendant establishes that:
>
> (a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and
>
> (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,
>
> the court may order the prosecution to produce the witness.

In *Walsh*, we explained that under NRS 50.315(6), failure "to argue that a substantial and bona fide dispute exists regarding the affidavit or declaration of the phlebotomist who drew the defendant's blood . . . acts as a waiver of the defendant's confrontation rights" as to the phlebotomist. 121 Nev. at 906, 124 P.3d at 208. We further explained that "[t]he essence of *Crawford* is the need for cross-examination," and absent a substantial and bona fide dispute regarding the declaration or credibility of the declarant, "cross-examination is meaningless." *Id.* at 907, 124 P.3d at 208.

The City argues that this reasoning is unaffected and indeed was approved by the U.S. Supreme Court's decision in *Melendez-Diaz*.[1] In *Melendez-Diaz*, the Court struck down a Massachusetts statute that allowed reports of forensic analysis to be admitted into evidence without requiring the prosecution to call the analysts as witnesses but allowing defendants to subpoena the analysts. 557 U.S. at 308-09, 329. The Court rejected the argument that this statute adequately protected the right to confrontation, explaining that the statute "shifts the consequences of adverse-witness no-shows from the State to the accused." *Id.* at 324. The Court further explained that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* However, the Court approved of

[1]While the Court appears to have approved of *Walsh*'s holding that NRS 50.315(4) declarations are testimonial, *see Melendez-Diaz*, 557 U.S. at 325-26 & n.11 (citing *Walsh*, 121 Nev. at 904-06, 124 P.3d at 207-08), it explicitly refused to address the validity of all but the simplest notice-and-demand statutes. *Id.* at 327 n.12.

notice-and-demand statutes "[i]n their simplest form" that require a defendant's timely objection to the admission of testimonial hearsay without live testimony by the declarant. *Id.* at 326. The Court explained that such provisions are "procedural rules governing objections" that the "[s]tates are free to adopt." *Id.* at 327.

The City argues that NRS 50.315(6) is such a procedural rule, whereas Lee argues that the statute impermissibly imposes on defendants the burden of establishing a substantial and bona fide dispute. Although we upheld the constitutionality of NRS 50.315(6) against a Confrontation Clause challenge in *Walsh*, we decided *Walsh* prior to the U.S. Supreme Court's discussion of notice-and-demand statutes in *Melendez-Diaz*. We now address this issue again in light of the U.S. Supreme Court's decision in *Melendez-Diaz*.

The Supreme Court of Kansas has addressed its notice-and-demand statute in light of *Melendez-Diaz*. *State v. Laturner*, 218 P.3d 23 (Kan. 2009). Under the Kansas statute, a defendant has 14 days to object to admission of a certificate of a person who collected blood for analysis and to state "the grounds for the objection." Kan. Stat. Ann. § 22-3437(a)(3). If the grounds for the objection do not show "that the conclusions of the certificate . . . will be contested at trial," the court must admit the certificate into evidence. *Id.*

In *Laturner*, the Kansas Supreme Court applied *Melendez-Diaz* to the Kansas statute and found "some overlap" between its statute and simple notice-and-demand statutes, but also found that the Kansas statute "impose[d] additional requirements," most notably that a defendant must show that he would actually contest the conclusions of the certificate at trial. 218 P.3d at 30. The court explained that an objection based solely on the Confrontation Clause could not satisfy this requirement, so a trial court would be bound to admit the evidence over a Confrontation Clause objection. *Id.* Because of this additional requirement, the Kansas court concluded that the statute was not a simple notice-and-demand statute like those approved in *Melendez-Diaz*. *Id.* at 32. The Kansas court further reasoned that this additional burden was too difficult for a defendant to overcome without an opportunity to cross-examine the signer of the certificate. *Id.* at 37.

Like the Kansas statute addressed in *Laturner*, NRS 50.315(6) imposes additional requirements on defendants who wish to confront those who have prepared declarations to be used against them at trial. While the Kansas statute required a defendant to show that he would actually contest the conclusions of the certificate at trial, NRS 50.315(6) requires a defendant to show a substantial and bona fide dispute regarding the facts contained in the declaration. These requirements are substantially similar, and we conclude that the reasoning of the *Laturner* court is convincing.

We further conclude that *Melendez-Diaz* prohibits burdening confrontation rights beyond requiring a defendant's timely objection to

proffered evidence. Accordingly, we now hold that NRS 50.315(6) impermissibly burdens confrontation rights because, unlike a "simple" notice-and-demand statute that merely requires a defendant's timely objection, NRS 50.315(6) requires a defendant to establish a substantial and bona fide dispute regarding the facts in the declaration in order to exercise his confrontation rights. A defendant who cannot make this showing will suffer a forced waiver of his confrontation rights despite a timely attempt to invoke them. Because such an additional burden is impermissible according to the U.S. Supreme Court's decision in *Melendez-Diaz*, we conclude that NRS 50.315(6) violates the Confrontation Clause.

Principles of stare decisis require a compelling reason to overrule prior caselaw. *Armenta-Carpio*, 129 Nev. at 535, 306 P.3d at 398. We conclude that the additional guidance provided by the U.S. Supreme Court in *Melendez-Diaz* provides such a compelling reason for overruling our prior decision in *Walsh*. Therefore, we now overrule our holding in *Walsh* that NRS 50.315(6) adequately protects the rights provided by the Confrontation Clause.

The nature of the declaration does not alter confrontation rights

The City further argues that *Melendez-Diaz* and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), are inapplicable because those cases dealt with reports of forensic analysis, whereas the declaration in this case relates only to the collection of blood. In *Melendez-Diaz*, the reports admitted in evidence indicated that the substance seized from the defendant contained cocaine, 557 U.S. at 308, and in *Bullcoming*, the report admitted in evidence indicated that the defendant's blood contained a particular amount of alcohol. 564 U.S. at 655. Thus, in each case, the reports contained conclusory facts that spoke directly to the defendant's guilt or innocence. *See id.*; *Melendez-Diaz*, 557 U.S. at 308. The City argues that this case is distinguishable on two grounds: (1) Van Cleave's task of collecting blood was relatively simple, and (2) the facts supported by Van Cleave's declaration are merely foundational. We conclude that neither distinction is significant.

First, the City seeks to distinguish Van Cleave's declaration from the reports in *Melendez-Diaz* and *Bullcoming* based on the simplicity of collecting a blood sample. The City essentially argues that because the task was simple, the declaration is reliable and confrontation is unnecessary. However, the Confrontation Clause "'commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'" *Melendez-Diaz*, 557 U.S. at 317 (quoting *Crawford*, 541 U.S. at 61). Therefore, simplicity and reliability are not relevant

to the Confrontation Clause analysis, and the fact that collecting blood may be a simple task has no effect on a defendant's right to confront the witnesses against him. *See id.*

Second, the City seeks to distinguish this case from *Melendez-Diaz* and *Bullcoming* based on the foundational purpose of Van Cleave's declaration. NRS 484C.250(1)(a)(1) provides that evidence of the results of a blood test are inadmissible in a prosecution for driving under the influence unless the person who collected the blood sample is qualified to do so. A phlebotomist is a qualified person. NRS 484C.250(1)(a)(1). The City argues that Van Cleave's declaration was offered only to show that she was a phlebotomist as required by NRS 484C.250(1)(a)(1), and this merely foundational purpose renders cross-examination meaningless.

As discussed above, Van Cleave's declaration is testimonial hearsay, and the Confrontation Clause therefore applies. *Walsh*, 121 Nev. at 906, 124 P.3d at 208. The U.S. Supreme Court has explained that there are only "two classes of witnesses—those against the defendant and those in his favor . . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Melendez-Diaz*, 557 U.S. at 313-14. Here, Van Cleave is clearly a witness "against" Lee because the City sought to use Van Cleave's declaration to prove its case. The City's distinction between foundational facts and conclusory or accusatory ones would create and place Van Cleave into a "third category of witnesses" prohibited by *Melendez-Diaz*. *Id.* at 314.

We note, however, that *Melendez-Diaz* does not require the testimony of every person with any connection to physical evidence. *Id.* at 311 n.1 ("[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."). The City argues that Van Cleave is merely a person with some connection to Lee's blood sample and thus is not required to testify.

In support of this argument, the City cites *Commonwealth v. Shaffer*, 40 A.3d 1250 (Pa. Super. Ct. 2012). In *Shaffer*, "no report authored by the phlebotomist" was offered as evidence, so no testimonial statement was at issue. *Id.* at 1252. In contrast, Van Cleave's testimonial declaration was offered as evidence in this case. Therefore, *Shaffer* is unpersuasive. The fact that Van Cleave's declaration was offered only to lay the foundation for other evidence has no effect on its testimonial nature, and therefore has no effect on the rights provided by the Confrontation Clause.

Accordingly, the relative simplicity of collecting blood and the foundational purpose for which Van Cleave's declaration was of-

fered as evidence have no effect on the rights provided by the Confrontation Clause.[2]

CONCLUSION

We conclude that the U.S. Supreme Court's decision in *Melendez-Diaz* requires us to overrule our prior decision in *Walsh*, where we held that NRS 50.315(6) adequately protected the rights provided by the Confrontation Clause. Therefore, we now hold that the requirement of NRS 50.315(6)—that a defendant must establish a substantial and bona fide dispute regarding the facts in a declaration made and offered as evidence pursuant to NRS 50.315(4)—impermissibly burdens the right to confrontation. Further, the relative simplicity of collecting blood and the foundational purpose for which the declaration was offered do not affect this conclusion. Therefore, we conclude that the district court did not err when it determined that admission of Van Cleave's declaration into evidence over Lee's objection would have violated Lee's right to confrontation, and the district court did not abuse its discretion by denying the City's petition for a writ of mandamus.

Accordingly, we affirm the order of the district court.

GIBBONS, C.J., and PICKERING, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

LAS VEGAS SANDS CORP., A NEVADA CORPORATION; AND SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND STEVEN C. JACOBS, REAL PARTY IN INTEREST.

No. 62489

February 27, 2014 319 P.3d 618

Original petition for a writ of prohibition or mandamus challenging a district court order compelling disclosure of purportedly privileged documents.

Defendant in action for breach of employment contract petitioned for writ of mandamus to halt production of purportedly privileged documents relied upon by witness in sanctions proceeding sua

[2]We note that NRS 50.330 and SCR Part IX-A(B), governing appearances by audiovisual transmission equipment, set forth circumstances and procedures to present certain testimony through the use of simultaneous audiovisual transmission equipment.

sponte ordered by the district court. The supreme court, GIBBONS, C.J., held that: (1) as a matter of first impression, statute governing production of writings used to refresh a witness's memory requires disclosure of any document used to refresh a witness's recollection before or while testifying, regardless of privilege; and (2) the district court abused its discretion by mandating production of purportedly privileged documents relied upon by witness at sanctions hearing after its issuance of sanctions order.

Petition granted.

Morris Law Group and *Steve L. Morris* and *Rosa Solis-Rainey*, Las Vegas; *Kemp, Jones & Coulthard, LLP*, and *J. Randall Jones* and *Mark M. Jones*, Las Vegas; *Holland & Hart LLP* and *J. Stephen Peek* and *Robert J. Cassity*, Las Vegas, for Petitioners.

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli*, and *Debra L. Spinelli*, Las Vegas, for Real Party in Interest.

1. PROHIBITION.
   When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act.
2. PRETRIAL PROCEDURE; PROHIBITION.
   Even though discovery matters typically are addressed to the district court's sound discretion and unreviewable by writ petition, the supreme court may intervene in discovery matters on a petition for writ of prohibition when: (1) the trial court issues blanket discovery orders without regard to relevance, or (2) a discovery order requires disclosure of privileged information.
3. PROHIBITION.
   The supreme court would exercise its discretion to consider petition for writ of prohibition, seeking to halt production of purportedly privileged documents relied upon by petitioner's witness in sanctions proceeding in civil action, where information with respect to which privilege was asserted would, if improperly disclosed, irretrievably lose its confidential and privileged quality and petitioner would have no effective remedy, even by later appeal.
4. APPEAL AND ERROR; PROHIBITION.
   Statutory interpretation and application is a question of law subject to de novo review, even when arising in a writ proceeding.
5. STATUTES.
   When a statute's language is plain and its meaning clear, the courts will generally apply that plain language; but when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and a court must resolve that ambiguity by looking to legislative history and construing the statute in a manner that conforms to reason and public policy.
6. STATUTES; WITNESSES.
   Nevada statute governing production and introduction of writings used to refresh a witness's memory was ambiguous where it referred to "a writing," and thus, legislative history could be used to ascertain legislative intent as to whether otherwise applicable evidentiary privileges applied to writings relied upon by witness to refresh his or her memory. NRS 50.125(1).

7. WITNESSES.
   Statute governing production and introduction of writings used to refresh a witness's memory does not afford a district court discretion to halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying. NRS 50.125.
8. WITNESSES.
   Nevada statute governing production and introduction of writings used to refresh a witness's memory requires disclosure of any document used to refresh a witness's recollection before or while testifying, regardless of privilege. NRS 50.125.
9. WITNESSES.
   The district court abused its discretion by mandating production of purportedly privileged documents relied upon by witness at sanctions hearing to refresh his recollection, after its issuance of sanctions order; sole purpose of rule requiring disclosure was to permit impeachment of witness's testimony, and opposing party did not request production during hearing. NRS 50.125.

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, C.J.:

In this opinion, we consider whether a witness's review of purportedly privileged documents prior to testifying constitutes a waiver of any privilege under NRS 50.125, such that the adverse party may demand production, be allowed to inspect the documents, cross-examine the witness on the contents, and admit the evidence for purposes of impeachment. We conclude that it does. However, under the specific facts of this case, where the adverse party failed to demand production, inspection, cross-examination, and admission of the documents at or near the hearing in question and instead waited until well after the district court had entered its order, the demand was untimely under NRS 50.125(1). Accordingly, we grant petitioners' request for a writ of prohibition to halt the production of the purportedly privileged documents.

FACTS AND PROCEDURAL HISTORY

Real party in interest Steven Jacobs filed an action against petitioners Las Vegas Sands Corp. and Sands China Ltd. and nonparty Sheldon Adelson, the chief executive officer of Las Vegas Sands (collectively, Sands), arising out of Jacobs's termination as president and chief executive officer of Sands's Macau operations. Jacobs alleged that Sands breached his employment contract by refusing to award him promised stock options, among other things. When

[1]THE HONORABLE KRISTINA PICKERING and THE HONORABLE RON PARRAGUIRRE, Justices, voluntarily recused themselves from participation in the decision of this matter.

the district court denied Sands China's motion to dismiss for lack of personal jurisdiction, Sands filed a petition for a writ of mandamus with this court, challenging the district court's finding of personal jurisdiction. We granted the petition for a writ of mandamus due to defects in the district court's order and directed the district court to revisit the issue of personal jurisdiction, hold an evidentiary hearing, and issue its findings on personal jurisdiction. *See Sands China Ltd. v. Eighth Judicial Dist. Court*, Docket No. 58294 (Order Granting Petition for Writ of Mandamus, August 26, 2011).

As a result of Sands's conduct in the ensuing jurisdictional discovery process, the district court sua sponte ordered an evidentiary hearing to consider sanctions. At the hearing, the district court considered (1) whether Sands violated EDCR 7.60(b) by causing the district court and Jacobs to waste time and resources on the applicability of Macau's Personal Data Protection Act (MPDPA), and (2) whether Sands breached its duty of candor to the court.[2]

During the three-day sanctions hearing, Jacobs cross-examined former Las Vegas Sands attorney Justin Jones on the theory that Jones and another attorney had printed copies of e-mails from Jacobs but did not retain the copies so that they could later claim they technically did not possess the documents, as the documents would have been in the United States in violation of Macau law. Jacobs noted that Jones's testimony had been fairly precise, and asked if Jones had reviewed his billing records before arriving at court that day. Following a work product objection, Jones responded affirmatively, explaining that he had done so to refresh his recollection as to certain dates, and that reviewing those records had in fact refreshed his recollection as to relevant dates. After another work product objection, Jones revealed that he had also reviewed e-mails that refreshed his memory as to the timing of events.

Jacobs argued at the hearing that Nevada law requires a party to disclose any documents used to refresh a witness's recollection, and thus, the billing records and e-mails Jones used were openly discoverable. When Sands objected to the identification and examination of the e-mails based on the work product doctrine and the attorney-client privilege, the district court suggested that Jacobs file a motion requesting that the documents be produced. The district court indicated that it would hold argument and rule on the discov-

---

[2]The MPDPA prohibits the transfer of personal data out of Macau, but testimony revealed that Sands had transported "ghost images" of important hard drives from Macau into the United States and that other data links were available between Macau and Las Vegas. Despite the fact that the information was already in the United States, Sands delayed discovery by asserting that it was having trouble obtaining authorization from Macau to transfer the data out of the country; it was forced to fly to Macau to view the data; and as a result, it could not comply with its disclosure obligations. When the district court found out that the information had been in the United States all along, it ordered a sanctions hearing.

ery issue at a later date. Two days later, and without deciding the discovery issue, the district court filed its order imposing sanctions on Sands.

Jacobs filed his motion to compel production of the documents Jones used to refresh his recollection two months later. In this motion, Jacobs alleged that Jones had waived the work product doctrine and the attorney-client privilege when he refreshed his recollection with the purportedly privileged documents. Sands opposed the motion, arguing that NRS 50.125(1), which generally requires disclosure of a writing used to refresh a witness's memory, does not require automatic disclosure of privileged documents, and that the district court must employ a balancing test to determine whether disclosure is in the interests of justice. Alternatively, Sands argued that the rights of production, inspection, cross-examination, and admission provided for in NRS 50.125(1) must be exercised at the hearing at which the witness testifies based on the documents. The district court heard arguments in chambers and entered an order compelling Sands to produce the documents. At Sands's request, the district court stayed enforcement of its order pending the resolution of these writ proceedings.

DISCUSSION

[Headnotes 1-3]

When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act. *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). Thus, even though discovery matters typically are addressed to the district court's sound discretion and unreviewable by writ petition, this court has intervened in discovery matters when (1) the trial court issues blanket discovery orders without regard to relevance, or (2) a discovery order requires disclosure of privileged information. *Id.* at 228 & n.6, 276 P.3d at 249 & n.6 (explaining that discovery excesses are more appropriately remedied by writ of prohibition than mandamus); *Valley Health Sys., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 679 (2011); *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977). This case presents a situation where, if improperly disclosed, "the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by later appeal." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995). Thus, we choose to exercise our discretion to consider this writ petition because the district court order at issue compels disclosure of purportedly privileged information. *See Valley Health*, 127 Nev. at 171, 252 P.3d at 679; *see also Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 635, 639-40, 289 P.3d 201, 204 (2012) ("[W]rit relief may

be available when it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective.").

Standard of review

[Headnotes 4, 5]

Here, the parties dispute the district court's interpretation and application of NRS 50.125. Statutory interpretation and application is a question of law subject to our de novo review, even when arising in a writ proceeding. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). "Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). But when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to legislative history and "construing the statute in a manner that conforms to reason and public policy." *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

When invoked at a hearing, NRS 50.125 requires disclosure of any document used to refresh the witness's recollection before or while testifying, regardless of privilege

To resolve this appeal, we must determine whether the Nevada Legislature intended all writings, including privileged documents, to be produced for impeachment purposes when a witness uses the document to refresh his or her recollection prior to testifying. NRS 50.125(1) provides for the production and introduction of writings used to refresh a witness's memory:

> If a witness uses a writing to refresh his or her memory, either before or while testifying, an adverse party is entitled:
>
> (a) To have it produced at the hearing;
>
> (b) To inspect it;
>
> (c) To cross-examine the witness thereon; and
>
> (d) To introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility.

The intersection of NRS 50.125 and Nevada privilege law is an issue of first impression in Nevada.[3]

---

[3]We note that this court addressed the interaction between NRS 50.125 and privileged communications in *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004). In *Means*, a former client demanded work product from his former attorney, not the more common scenario where counsel representing an adverse party demands disclosure. *Id.* at 1009-10, 103 P.3d at 30-31. Under the circumstances presented there, we concluded that disclosure of the documents in question was warranted. *Id.* at 1010, 103 P.3d at 31. We take this opportunity to clarify that

Sands argues that NRS 47.020 and NRCP 26(b)(3) guarantee that the work product doctrine and the attorney-client privilege apply at all stages of all proceedings except where they are "relaxed by a statute or procedural rule applicable to the specific situation." NRS 47.020(1)(a). To that end, Sands argues that NRS 50.125 does not "relax" any privilege because it does not specifically mandate the forfeiture of privileged documents when a witness uses those documents to refresh his or her memory before testifying. Alternatively, Sands argues that NRS 50.125 only provides that an adverse party is entitled to a document *at the hearing*, and therefore, it cannot be used as a tool for obtaining discovery after the relevant hearing has concluded. Jacobs responds that NRS 50.125 makes no exception for privileged documents and therefore applies to both privileged and nonprivileged documents. Additionally, Jacobs argues that NRS 50.125 lacks the discretionary prong that its federal counterpart, Federal Rule of Evidence (FRE) 612, contains.[4] Thus, Jacobs asserts that any document used to refresh a witness's recollection before or during testimony must be disclosed.

[Headnote 6]

Looking at the language of NRS 50.125, we conclude that the language "a writing" is ambiguous because the phrase could be interpreted to mean any writing, privileged or unprivileged. "[A] writing" could also be interpreted under NRS 47.020 to exempt privileged documents because under NRS 47.020, a privilege applies "at all stages of all proceedings" except where it is "relaxed by statute or procedural rule applicable to the specific situation." NRS 47.020(1). Therefore, we consider the statute's legislative history.

NRS 50.125 differs significantly from FRE 612

The Nevada Legislature has not amended NRS 50.125 since its passage in 1971. At that time, the language of the statute was chosen

---

Means involved a unique factual situation where a former client attempted to obtain his former counsel's notes for the purposes of an ineffective assistance of counsel claim. Our narrow holding was consistent with our reliance on *Spivey v. Zant*, 683 F.2d 881 (5th Cir. 1982), a case holding that a former client is entitled to all portions of his former attorney's file and that the work product protection only applies when an adversary seeks materials. *Id.* at 885. Therefore, we conclude that *Means* is inapplicable to the case at hand.

[4]Similar to NRS 50.125, FRE 612(b) provides that when a witness uses a writing to refresh his or her memory, "an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony." But FRE 612(a) differentiates between instances when a witness uses a writing to refresh memory while testifying as opposed to before testifying. In situations when a witness uses a writing to refresh his or her memory prior to testifying, it is within the district court's discretion to decide whether justice requires the writing to be produced. FRE 612(a)(2).

based on a draft version of FRE 612. Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg. (Nev., February 10, 1971). During the United States Congress's consideration of the draft rules, however, it amended FRE 612(a) to make production of writings used by a witness to refresh recollection *before* testifying subject to the discretion of the court "in the interests of justice, as is the case under existing federal law." H.R. Rep. No. 93-650, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7086. Congress implemented this change because it did not want to require wholesale production of documents used before testifying, as doing so "could result in fishing expeditions." *Id.* NRS 50.125 does not contain this discretionary prong.

The legislative history of NRS 50.125 does not shed light on whether the Nevada Legislature intended to require automatic disclosure despite a document's privileged status. But the legislators who worked on Nevada's evidence code noted that they wanted the code to promote "the search for truth," that "as much evidence as can come out, should come out," and therefore, they attempted to limit exceptions. Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg. (Nev., February 10, 1971).

Sands argues that the difference in the text between FRE 612 and NRS 50.125 is slight and does not affect the outcome of the case and that Nevada courts should have discretion on a case-by-case basis to balance the adverse party's need for the writing against the important public interests in protecting privileged documents. Jacobs responds that unlike FRE 612, NRS 50.125 draws no distinction between documents used prior to and while testifying, and contains no provision for the exercise of discretion. Further, Jacobs argues that even under federal cases that apply the discretionary prong, the weight of authority mandates disclosure of the privileged documents.

[Headnote 7]

We conclude that the differences between NRS 50.125 and FRE 612 are significant. Whereas FRE 612 permits the district court's exercise of discretion to preclude disclosure of privileged documents used to refresh a witness's recollection before testifying, no such discretionary language exists in NRS 50.125. Without such language in NRS 50.125, Nevada district courts lack discretion to halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying. In the 40 years since the passage of FRE 612, the Nevada Legislature has had the option to bring NRS 50.125 in line with the federal rule by adding a discretionary prong, but has not. Thus, we conclude that NRS 50.125 mandates that documents relied on before and during testimony to refresh recollection be treated the same. We therefore decline to read a discretionary element into NRS 50.125 where the Legislature has provided none.

Additionally, allowing privilege to prevail at this stage of a witness's testimony would place an unfair disadvantage on the adverse party. Sands's interpretation of NRS 50.125 would encourage witnesses to use privileged writings to refresh recollection in an attempt to shield the witness from any meaningful cross-examination on his or her testimony.[5] Such an interpretation of NRS 50.125 would inhibit the cross-examining party from investigating discrepancies between the writing and the witness's testimony, and as such, would serve to inhibit "the search for truth."

[Headnote 8]

The Nevada Legislature enacted NRS 50.125 to allow an adverse party to inspect and use the document to test a witness's credibility at the hearing. Thus, we conclude that where a witness refreshes his or her recollection with privileged documents, the witness takes the risk that an adversary will demand to inspect the documents. Therefore, when invoked at a hearing, we conclude that NRS 50.125 requires disclosure of any document used to refresh the witness's recollection before or while testifying, regardless of privilege. *See Wardleigh*, 111 Nev. at 354-55, 891 P.2d at 1186 (indicating that the "attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit" (internal quotations omitted)). However, as explained below, Jacobs did not properly invoke NRS 50.125 at the sanctions hearing, rendering the issue of Jones's credibility a moot point.

We note that Jones's reliance on the purportedly privileged documents for the purposes of refreshing his recollection would have only required disclosure of the documents to opposing counsel upon appropriate request under NRS 50.125, and would not constitute any further waiver of the work product doctrine or the attorney-client privilege that would have made the documents discoverable at a later point. *See Marshall v. U.S. Postal Serv.*, 88 F.R.D. 348, 351 (D.D.C. 1980) ("[U]se of a document for recollection purposes requires only the disclosure of the document to opposing counsel, and [the] disclosure does not, in and of itself, constitute any further waiver of the attorney-client privilege.").

---

[5]We have previously observed that "the attorney-client privilege was intended as a shield, not a sword." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 354, 891 P.2d 1180, 1186 (1995) (internal quotation marks omitted). It would be unfair to allow a witness to rely on a privileged document to refresh his or her recollection, and then disallow the cross-examiner to know the extent to which that document influenced or contradicts the witness's testimony. *See James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 146 (D. Del. 1982) ("The instant request constitutes neither a fishing expedition into plaintiff's files nor an invasion of counsel's 'zone of privacy.' Plaintiff's counsel made a decision to educate their witnesses by supplying them with the [privileged documents], and the Raytheon defendants are entitled to know the content of that education.").

The district court abused its discretion when it ordered the production of purportedly privileged documents because the request was untimely and Jones's credibility was no longer at issue

Sands argues that NRS 50.125 was designed to ensure that an adverse party has a full and fair opportunity to test the witness's credibility when the witness's testimony is based on recollection that was refreshed by examining particular writings. Sands points out that when the district court entered its order compelling production of the documents in question, there was no longer any need or opportunity to test Jones's credibility because the hearing was already over and the district court had issued its sanctions order. Jacobs argues that the fact that the district court made its decision post-hearing does not impair Sands's production requirements.

NRS 50.125(1) plainly states that the adverse party is entitled to have a document used to refresh the witness's recollection produced at the hearing, to allow inspection and cross-examination based on the document, and to permit the adverse party to introduce the document into evidence "for the purpose of affecting the witness's credibility." As the United States Court of Appeals for the Third Circuit has noted, "[FRE] 612 is a rule of evidence, and not a rule of discovery. Its sole purpose is evidentiary in function 'to promote the search of credibility and memory.'" *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985) (quoting FRE 612 advisory committee note); *see also Derderian v. Polaroid Corp.*, 121 F.R.D. 13, 17 (D. Mass. 1988) (indicating that FRE 612 "is a rule of *evidence*, not a rule of *discovery*"); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 683 (D. Kan. 1986) (same).[6] Although Jacobs argues that Sands's misconduct is ongoing, we are convinced that permitting such an untimely motion would encourage the types of "fishing expeditions" that both the Nevada Legislature and Congress sought to avoid with NRS 50.125 and FRE 612. The sole purpose of NRS 50.125 is to test the witness's credibility *at the hearing*, and the statute clearly states that the production must occur at the hearing.

[Headnote 9]

Here, the district court order compelling production of the purportedly privileged documents effectively turns NRS 50.125 into a discovery tool that has no relation to testing any witness's credibility. The district court read NRS 50.125 too broadly when it ordered the production of the billing entries and e-mails two months after Jones left the stand and after it issued its sanctions order. This

[6]We note that despite the differences between FRE 612 and NRS 50.125, the two provisions serve the same fundamental purpose. Thus, we find this authority persuasive inasmuch as it relates to the proper purpose of NRS 50.125.

is evident in the district court order's language, which states that "[p]ursuant to NRS 50.125, once a document is used by a witness to refresh his recollection, then that document is subject to discovery." This reading of NRS 50.125 ignores the "at the hearing" language and turns the statute into a general rule of discovery, not a rule of evidence. *See Derderian*, 121 F.R.D. at 17. As a result, we conclude that the district court abused its discretion by mandating the production of the purportedly privileged documents after it had issued its sanctions order. *See Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (explaining that a district court abuses its discretion if its decision "exceeds the bounds of law or reason").

Under these facts, when the district court indicated that it wanted briefing and would defer ruling on the issue, Jacobs should have noted that NRS 50.125 required the district court to rule on his request at the hearing. Alternatively, Jacobs should have submitted his motion immediately following the hearing to ensure that Jones could be put back on the stand and cross-examined regarding the contents of the purportedly privileged documents before the district court issued its ruling.

However, because the district court already issued its ruling on the sanctions issue, the issue of Jones's credibility became a moot point and there was no evidentiary reason to produce the documents. Thus, this is precisely the scenario in which "writ relief . . . is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective." *Aspen Fin. Servs., Inc.*, 128 Nev. at 639-40, 289 P.3d at 204.

CONCLUSION

We conclude that upon a timely request, NRS 50.125 mandates production of documents used by a witness to refresh his or her recollection prior to testifying, regardless of privilege. However, considering these facts, Jacobs's request for production of the documents was not timely because the district court had already issued its ruling on the underlying sanctions issue. We therefore grant Sands's petition and direct the clerk of this court to issue a writ of prohibition ordering the district court to halt the production of the purportedly privileged documents.[7]

HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

---

[7]In light of this disposition, we need not address the parties's other arguments, and Sands's alternative request for a writ of mandamus is denied.

HARRAH'S OPERATING COMPANY, INC., APPELLANT, *v.* THE STATE OF NEVADA DEPARTMENT OF TAXATION, RESPONDENT.

No. 61521

March 20, 2014 321 P.3d 850

Appeal from a district court order denying a petition for judicial review in a tax matter. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Taxpayer sought review of decision of the Nevada Tax Commission denying refund on use tax paid on four aircraft purchased out of state and used to transport taxpayer's executives and customers to and from its establishments worldwide. The district court denied petition for judicial review. Taxpayer appealed. The supreme court, CHERRY, J., held that: (1) aircraft purchased by taxpayer in Arkansas were not "first used" in interstate commerce outside Nevada so as to preclude imposition of use tax, (2) aircraft purchased in Oregon and first flown outside of Nevada were presumed to not be subject to use tax, and (3) stipulated facts did not rebut the statutory presumption that aircraft purchased in Oregon and first used outside of Nevada were not subject to Nevada use tax.

Affirmed in part, reversed in part, and remanded.

John S. Bartlett, Carson City, for Appellant.

Catherine Cortez Masto, Attorney General, and *David J. Pope*, Senior Deputy Attorney General, Carson City, for Respondent.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court reviews de novo the legal conclusions of an administrative agency.
2. ADMINISTRATIVE LAW AND PROCEDURE.
   Questions of law, including the administrative construction of statutes, are subject to independent appellate review.
3. ADMINISTRATIVE LAW AND PROCEDURE.
   Although the supreme court normally defers to an agency's conclusions of law that are closely related to its view of the facts, in cases involving the construction of a statute, independent review is necessary.
4. TAXATION.
   Tax statutes are to be construed in favor of the taxpayer.
5. TAXATION.
   Aircraft purchased by taxpayer in Arkansas were not "first used" in interstate commerce outside Nevada so as to preclude imposition of use tax under statute creating a presumption of nontaxability for property purchased outside the state that was first used in interstate or foreign commerce outside the state, where the first flights of the aircraft terminated in Las Vegas. NRS 372.250, 372.258(1)(a).

6. TAXATION.
   Taxpayer's first use in interstate commerce of the aircraft purchased in Oregon occurred wholly outside of Nevada, and the aircraft were continuously used in interstate commerce; and thus, the aircraft were presumed to have not been purchased for storage or use in Nevada and were not subject to Nevada use tax, where one was flown to Arkansas and the other to California on their first flights, and it was stipulated that the aircraft were continuously so used in accordance with their initial uses. NRS 372.250, 372.258(1)(a), (b).
7. STATUTES.
   When possible, the supreme court construes statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.
8. TAXATION.
   For use tax purposes, the "use" of an aircraft is commonly associated with the flight of an aircraft. NRS 372.258.
9. TAXATION.
   The supreme court will not extend a tax statute by implication.
10. TAXATION.
    Stipulated facts did not rebut the statutory presumption that aircraft purchased in Oregon and first used outside of Nevada were not subject to Nevada use tax; although the aircraft flight logs showed many flights to and from Las Vegas, taxpayer's use of the aircraft in Nevada was use in interstate commerce since a flight departing from Nevada nearly always terminated in a flight arriving in another state or country. NRS 372.185, 372.258.
11. TAXATION.
    Remand to the administrative law judge (ALJ) regarding rebuttal of presumption that use tax did not apply to aircraft purchased outside of state was not appropriate, where the parties stipulated to all of the relevant facts, giving the supreme court the power to examine the record itself and make the necessary inferences.
12. TAXATION.
    Sales and use tax statute only imposes a use tax on goods purchased for storage, use, or consumption in Nevada, not those purchased for use in interstate commerce. NRS 372.185.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

In this case, we consider the application of Nevada's use tax to four aircraft purchased out of state and used to transport Harrah's executives and customers to and from its establishments worldwide. In particular, under NRS 372.258, goods purchased outside of Nevada are presumed *not* to be purchased for use in Nevada, and thus not taxable under Nevada's use tax statute, if (1) the first use of the goods occurs outside Nevada and (2) the goods are continuously used in interstate commerce for 12 months. In this case, we construe the first use requirement to apply to an aircraft's first flight that both originates and terminates outside of Nevada. Additionally, the parties stipulated to the fact that the aircraft at issue were continu-

ously used in interstate commerce. Because two of Harrah's aircraft engaged the presumption of NRS 372.258 and the record does not rebut the presumption, we conclude that the Department of Taxation erred in its interpretation of NRS Chapter 372 and those aircraft are not subject to Nevada's use tax.

FACTS AND PROCEDURAL HISTORY

The parties stipulated to the following relevant facts. Appellant Harrah's Operating Company, Inc., is a Delaware corporation registered to do business in Nevada. Harrah's purchased four aircraft for the purpose of transporting Harrah's employees and guests to and from its establishments worldwide. Two of the aircraft, N88HE and N168CE, were purchased and delivered to Harrah's in Little Rock, Arkansas. According to their flight logs, those two planes flew to Las Vegas on their first flight. The other two aircraft, N89HE and N89CE, were purchased and delivered to Harrah's in Portland, Oregon, and their first flights thereafter went to Arkansas and California, respectively. The flight logs reveal that passengers were aboard each plane on its first flight and that the planes carried passengers on the majority of all flights. Each of the aircraft consistently flew to and from Nevada while in service. The parties stipulated that the planes have been continuously used ever since in the manner of their initial uses, *i.e.*, in interstate commerce.

Harrah's paid Nevada use tax on each of the aircraft and then requested refunds for the taxes paid, claiming that the aircraft were not purchased for use in Nevada within the meaning of NRS Chapter 372. No sales or use taxes were paid to any other state. Respondent Nevada Department of Taxation denied the refund requests.

After the Department denied Harrah's refund claims, the matter was referred to the Department's administrative law judge (ALJ). The ALJ affirmed the Department's refund denials. Harrah's appealed to the Nevada Tax Commission, which upheld the ALJ's decision. Harrah's then filed a petition for judicial review, which was denied by the district court. Harrah's appealed.

DISCUSSION

The dispositive issue in this case is whether, by purchasing the aircraft out of state and later bringing them to Nevada, Harrah's became subject to the use tax imposed by NRS 372.185.[1] Harrah's

[1]NRS Chapter 374 contains identical provisions relating to use taxes levied to support local schools. *See* NRS 374.190; NRS 374.263. Reference herein to NRS Chapter 372 applies equally to the analogous provision in NRS Chapter 374.

argues that, because its aircraft purchases fell under a statutory presumption that they were not taxable and because the Department failed to overcome that presumption, taxes were wrongfully imposed and upheld as a matter of law.

[Headnotes 1-4]

Like the district court, we review de novo the legal conclusions of an administrative agency. *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011). "Questions of law, including the administrative construction of statutes, are subject to independent appellate review." *Nev. Tax Comm'n v. Nev. Cement Co.*, 117 Nev. 960, 964, 36 P.3d 418, 420 (2001). Although we normally defer to "an agency's conclusions of law [that] are closely related to its view of the facts," *Fathers & Sons & A Daughter Too v. Transp. Servs. Auth. of Nev.*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008), "[b]ecause this case concerns the construction of a statute, . . . independent review is necessary." *Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 207, 955 P.2d 188, 190 (1998). In addition, tax statutes are to be construed in favor of the taxpayer. *State, Dep't of Taxation v. Visual Commc'ns, Inc.*, 108 Nev. 721, 725, 836 P.2d 1245, 1247 (1992).

Nevada use tax and the NRS 372.258 presumption

The Nevada use tax is complementary to the sales tax imposed on retail purchases made in this state. *State, Dep't of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 280, 871 P.2d 331, 334 (1994). The use tax can be imposed here if Harrah's planes, although delivered out of state and therefore not subject to Nevada's sales tax, were purchased for storage, use, or consumption, and were actually stored, used, or consumed in Nevada. *See id.*; NRS 372.185; *cf. Great Am. Airways v. Nev. State Tax Comm'n*, 101 Nev. 422, 428, 705 P.2d 654, 658 (1985) (upholding constitutionality of Nevada's use tax imposed on the purchase of an airplane used in interstate commerce but kept in Reno).

The Legislature has provided several rebuttable presumptions to assist the fact-finder in determining whether property was purchased for use in Nevada. The presumption at issue in this case is NRS 372.258. NRS 372.258(1) states that property delivered outside of this state for use in interstate commerce is presumed *not* purchased for storage, use, or consumption in this state if certain requirements are met:

> It is presumed that tangible personal property delivered outside this State to a purchaser was not purchased from a retailer for storage, use or other consumption in this State if the property:
>
> (a) Was first used in interstate or foreign commerce outside this State; and

> (b) Is used continuously in interstate or foreign commerce, but not exclusively in this State, for at least 12 months after the date that the property was first used pursuant to paragraph (a).

The ALJ found that Harrah's failed to meet the "first used" and "used continuously" requirements of NRS 372.258(1)(a) and (b).

First use

In order for the presumption in NRS 372.258 to apply, the purchased property must be "first used in interstate or foreign commerce outside this State." NRS 372.258(1)(a). The statute does not define "used," although courts generally define the term broadly for tax purposes. *See USAir, Inc. v. Ind. Dep't of State Revenue*, 623 N.E.2d 466, 469 (Ind. T.C. 1993). The statute does, however, define "[i]nterstate . . . commerce." NRS 372.258(2)(a). "Interstate . . . commerce" requires the transportation of passengers or property between two or more states and is defined as

> the transportation of passengers or property between:
> (1) A point in one state and a point in:
> (I) Another state;
> (II) A possession or territory of the United States; or
> (III) A foreign country; or
> (2) Points in the same state when such transportation consists of one or more segments of transportation that immediately follow movement of the property into the state from a point beyond its borders or immediately precede movement of the property from within the state to a point outside its borders.

Id.

[Headnotes 5, 6]

Here, the ALJ decided that the presumption applied only if Harrah's first interstate commerce use of each aircraft occurred completely outside Nevada, including both the origin and destination of each aircraft's first flight. Furthermore, the ALJ apparently concluded that the first use meant first day of use, because he ruled that one of the planes purchased in Portland, N89CE, which did not fly to Nevada on its first flight but did so later that same day, did not meet the first-use-outside-of-Nevada requirement.

[Headnote 7]

"[W]hen possible, we construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). The presumption's definition of interstate commerce already

contemplates the crossing of state lines. *See* NRS 372.258(2)(a)(1). Yet the presumption states "first used in interstate or foreign commerce *outside* this State." NRS 372.258(1)(a) (emphasis added). Using the statute's definition of interstate commerce, the "first used" provision requires the crossing of state lines *outside* of Nevada. The Legislature's addition of the word "outside" adds a requirement of exclusivity, meaning that the first use in interstate commerce must occur entirely outside the State of Nevada. Because the statute's definition of interstate commerce in subsection 2 allows one point to be within the state, the word "outside" in the subsection 1 requirement becomes surplusage if we do not read it to mean entirely outside Nevada.

[Headnotes 8, 9]

We limit, however, the definition of "first used" to the first flight and thereby repudiate the ALJ's temporal requirement. The "use[ ]" of an aircraft is commonly associated with the flight of an aircraft. *Cf. Irwin Indus. Tool Co. v. Ill. Dep't of Revenue*, 938 N.E.2d 459, 467 (Ill. 2010) (interpreting *Director of Revenue v. Superior Aircraft Leasing Co*., 734 S.W.2d 504 (Mo. 1987), to stand for the proposition that an aircraft's flights are more significant to the "purpose, function, and use" of aircraft, as relevant to use tax statutes, than the time that an aircraft spends on the ground). Nowhere in the statute does it state that the flights or "use[ ]" must be considered on a daily basis, with flights within a single day considered as mere *segments* of a larger *use*. " 'We will not extend a tax statute by implication,' " *Visual Commc'ns, Inc.*, 108 Nev. at 725, 836 P.2d at 1247 (quoting *Cashman Photo Concessions & Labs, Inc. v. Nev. Gaming Comm'n*, 91 Nev. 424, 428, 538 P.2d 158, 160 (1975)), and here we will not impose a temporal requirement not contained within the statute.

Having thusly interpreted the statute, we conclude that the aircraft purchased in Little Rock, N88HE and N168CE, were not "first used" in interstate commerce outside Nevada because their first flights terminated in Las Vegas. Accordingly, the presumption of nontaxability does not apply to those two planes. Because property purchased out of state and then brought into Nevada is generally presumed to have been purchased for use in this state, NRS 372.250, and the stipulated facts do not demonstrate otherwise, Harrah's refund of the use taxes paid on the purchases of these planes was properly denied.

Conversely, Harrah's first use in interstate commerce of the aircraft purchased in Portland, N89HE and N89CE, occurred wholly outside the State of Nevada, because one was flown to Little Rock and the other to California. Therefore, the ALJ erred in deciding that N89HE and N89CE were not "first used" in interstate commerce outside Nevada under NRS 372.258(1)(a).

Continuous use

Having found that the planes purchased in Portland, N89HE and N89CE, were first used in interstate commerce outside of Nevada, we now consider whether their use in interstate commerce was "continuous[ ]" for one year, as required by NRS 372.258(1)(b) to trigger the presumption of nontaxability. Our consideration is made easy by the parties' stipulation that the aircraft have been "continuously so used" in accordance with their initial uses. Thus, having already determined that the first use of both N89HE and N89CE was in interstate commerce, we also conclude that, in accordance with the parties' stipulation, the aircraft have been continuously so used ever since. This continuous use satisfies NRS 372.258(1)(b).

Rebutting the NRS 372.258 presumption of nontaxability

[Headnote 10]

Because the aircraft purchased in Portland, N89HE and N89CE, were first used in interstate commerce outside of Nevada and were used continuously in interstate commerce for over 12 months thereafter, we hold that the ALJ erred by not applying the presumption in NRS 372.258. We must now consider whether the Department has successfully rebutted the presumption by presenting other evidence.

[Headnote 11]

We first note that remand to the ALJ is not appropriate here because the parties stipulated to all of the relevant facts, giving this court the power to examine the record itself and make the necessary inferences. *See Sparks Nugget, Inc. v. State, Dep't of Taxation*, 124 Nev. 159, 163, 179 P.3d 570, 573 (2008) ("Because the parties have stipulated to the operative facts . . . the only issue before us involves the interpretation and application of Nevada [law]."). "We are impressed that in our review, we are as well situated as was the district court to make this determination . . . ." *Commercial Warehouse Co. v. Hyder Bros., Inc.*, 411 P.2d 978, 983 (N.M. 1966) (on second rehearing).

[Headnote 12]

The stipulated facts do not rebut the presumption that Harrah's aircraft were not purchased for use in Nevada. Only the flight logs cast any doubt on the presumed fact, because they show many flights to and from Las Vegas. However, NRS 372.185 does not say that the tax is applied in relation to the amount of time spent in Nevada. *Cf. Great Am. Airways v. Nev. State Tax Comm'n*, 101 Nev. 422, 427, 705 P.2d 654, 657 (1985) (rejecting appellant's "argument that Nevada should apportion its use tax based upon the amount of miles flown in Nevada or hours spent in Nevada"). Rather, the dis-

tinction created by the statutory scheme is between goods purchased "for . . . use" in Nevada, NRS 372.185(1), and those purchased for use in interstate commerce, even if such use might occur in Nevada, *see* NRS 372.258(2). We are not concerned here with the soundness of this distinction—we merely apply it.[2]

Harrah's use of the aircraft in Nevada was use in interstate commerce—a flight departing from Nevada nearly always terminated in a flight arriving in another state or country. In addition, the statute contemplates that some interstate commerce can occur wholly within the state. *See* NRS 372.258(2)(a)(2). Therefore, we determine that the stipulated facts do not rebut the presumption in NRS 372.258.

We conclude that the district court erred in affirming the ALJ's interpretation of NRS 372.258. The Department must refund the use taxes remitted for aircraft N89HE and N89CE. We accordingly affirm in part, reverse in part, and remand for further proceedings with respect to the requested refund.

HARDESTY and PARRAGUIRRE, JJ., concur.

---

[2]We are aware that, as a result of our interpretation, Harrah's will not have paid any sales or use tax on two of their aircraft. Nevertheless, this court must apply the statutes as written. "[D]espite the fundamental changes in federal Commerce Clause jurisprudence," *Word of Life Christian Ctr. v. West*, 936 So. 2d 1226, 1241 (La. 2006), NRS 372.185 only imposes a use tax on goods purchased for storage, use, or consumption in Nevada, not those purchased for use in interstate commerce. Any expansion of Nevada's use tax must come from the Legislature, not this court.