suffer physical pain or mental suffering"). Based on the evidence presented, a rational juror could reasonably conclude that Newson exposed the children to physical danger by discharging a firearm several times in a vehicle with the children present and, in the infant's case, seated immediately adjacent to the victim. Accordingly, the evidence overwhelmingly supports this verdict.[4]

III.

A district court must instruct the jury on voluntary manslaughter when requested by the defense so long as it is supported by some evidence, even if that evidence is circumstantial. We conclude the district court erred by declining to instruct the jury on voluntary manslaughter here, where Newson's statement to the victim's friend, viewed in light of the other evidence adduced at trial, suggests the shooting occurred in a heat of passion after Newson was provoked, and the error was not harmless. We therefore reverse the judgment of conviction as to the murder charge, affirm the judgment of conviction as to the remaining charges, and remand for a new trial on the murder charge.

Hardesty and Stiglich, JJ., concur.

MARCUS A. REIF, an Incompetent Person By and Through His Conservator CINDY REIF, Appellant, *v.* ARIES CONSULTANTS, INC., a Nevada Corporation, Respondent.

No. 76121

October 10, 2019 449 P.3d 1253

Appeal from a district court order granting a motion to dismiss for failure to comply with NRS 11.258(1). Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Reversed and remanded.

[Rehearing denied October 31, 2019]

Glen Lerner Injury Attorneys and *Randolph L. Westbrook, III*, and *Glen J. Lerner*, Las Vegas, for Appellant.

Gordon Rees Scully Mansukhani, LLP, and *Robert E. Schumacher, Craig J. Mariam*, and *Brian K. Walters*, Las Vegas, for Respondent.

---

[4]We disagree with Newson's argument that cumulative error warrants reversal. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *see also Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (addressing the test for cumulative error).

Before the Supreme Court, HARDESTY, STIGLICH and SILVER, JJ.

OPINION

By the Court, HARDESTY, J.:

For actions involving nonresidential construction malpractice, NRS 11.258 requires the plaintiff's attorney to file an affidavit and an expert report "concurrently with the service of the first pleading." The district court dismissed appellant Marcus Reif's complaint because he filed it, though he did not serve it, without an affidavit and expert report. In doing so, the district court relied on a statement in *Otak Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011), that "a pleading *filed* under NRS 11.258 without the required affidavit and expert report is void ab initio." (Emphasis added.) We now clarify that, based on the plain text of the statute, an initial pleading filed under NRS 11.258(1) is void ab initio only where it is *served* without a concurrent filing of the required attorney affidavit and expert report. Accordingly, we reverse the district court's order granting the motion to dismiss and remand to the district court for further consideration.

FACTS AND PROCEDURAL HISTORY

Reif sustained serious injuries as a result of an alleged parking garage structural failure when his vehicle traveled through the wall and fell five stories. He filed a complaint against respondent Aries Consultants, Inc., the company that had inspected the wall, asserting negligence, negligence per se, and negligent performance of an undertaking. Reif did not file the attorney affidavit and expert report required by NRS 11.258(1) with his complaint. The next day, Reif filed another complaint, entitled "Amended Complaint," identical to the initial complaint but with the addition of the affidavit and expert report. Reif then served the amended pleading, without having served the initial complaint.

Aries moved to dismiss the complaint, arguing that the complaint violated the single-cause-of-action rule because Reif maintained an identical cause of action in a separate court,[1] and that the complaint failed to comply with NRS 11.258 because the attorney who signed the affidavit was not licensed in Nevada or admitted pro hac vice in this action. Reif disputed both of these claims.

The district court granted the motion to dismiss on different grounds. Without reaching the merits of the arguments presented,

[1]The complaint currently before us followed a complaint filed in the same district court, which was assigned to a different judge.

the district court, relying on *Otak*, concluded that Reif violated NRS 11.258 for failing to *file* an attorney affidavit and expert report concurrently with the filing of the initial complaint.

DISCUSSION

We review questions of statutory interpretation de novo. *Constr. Indus. Workers' Comp. Grp. v. Chalue*, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003). When a statute is clear and unambiguous, this court will "give effect to the plain and ordinary meaning of the words." *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

NRS 11.258(1) and (3) provide that, for actions involving nonresidential construction against design professionals, "the attorney for the complainant shall file an affidavit [with the attached expert report] with the court concurrently with the service of the first pleading in the action." If the requirements of NRS 11.258 are not met, NRS 11.259(1) mandates that the district court "shall dismiss" the action. The parties concede that Aries is a design professional and that NRS 11.258 applies. The issue before us, therefore, is whether the district court erred in finding that Reif failed to comply with NRS 11.258's affidavit and expert report requirements.

In dismissing the complaint, the district court relied on our decision in *Otak*, in which we considered whether NRS 11.259(1) compels dismissal when the initial pleading in an action alleging nonresidential construction malpractice was served without filing the attorney affidavit and expert report as required under NRS 11.258(1). 127 Nev. at 595, 260 P.3d at 409. We concluded that a complaint served before the filing of the statutorily required attorney affidavit and expert report was void ab initio and could not be amended. *Id*. However, in one sentence—the part of the decision relied upon by the district court—we incorrectly stated that "a pleading *filed* under NRS 11.258 without the required affidavit and expert report is void ab initio and of no legal effect." *Id.* at 599, 260 P.3d at 412 (emphasis added). As is clear from the plain language of the statute, the pleading must be *served* under NRS 11.258 to trigger the required concurrent filing of the affidavit and expert report.

In relying on the incorrect language in *Otak*, the district court found that Reif's failure to file an attorney affidavit and report concurrently with the *filing* of the initial complaint violated NRS 11.258. This, however, conflicts with the plain language of the statute. We, therefore, take this opportunity to correct *Otak* and clarify that a pleading is void ab initio under NRS 11.258(1) only where the pleading is *served* without a concurrent filing of the required attorney affidavit and expert report, not where the pleading is merely *filed*. Because Reif's initial pleading was never served, it should not have been dismissed under NRS 11.259.

Accordingly, we reverse the district court's order granting the motion to dismiss and remand for further proceedings consistent with this opinion.[2]

Stiglich and Silver, JJ., concur.

JAMES McNAMEE, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE DOUGLAS SMITH, District Judge, Respondents, and GIANN BIANCHI; and DARA DELPRIORE, Real Parties in Interest.

No. 76904

October 17, 2019 450 P.3d 906

Original petition for writ of mandamus challenging an order denying a motion to dismiss based on the failure to timely substitute the representative of a deceased party under NRCP 25.

Petition granted in part.

Pyatt Silvestri and *Jeffrey J. Orr*, Las Vegas; *Solomon Dwiggins & Freer, Ltd.*, and *Alexander G. LeVeque* and *Tess E. Johnson*, Las Vegas, for Petitioner.

Campbell & Williams and *J. Colby Williams* and *Philip R. Erwin*, Las Vegas; *Glen Lerner Injury Attorneys* and *Corey M. Eschweiler*, Las Vegas; *Weinberg Wheeler Hudgins Gunn & Dial* and *Lee Roberts*, Las Vegas, for Real Parties in Interest.

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

---

[2]Because the district court granted the motion to dismiss based on an incorrect statement in *Otak*, it did not reach the merits of the arguments presented by the parties. We decline to entertain the parties' arguments for the first time on appeal and instead instruct the district court to address them on remand. These arguments include whether the "first pleading" language in NRS 11.258 required Reif to serve the initial pleading before filing and serving the amended pleading; whether the lawsuits initiated in the district court below and another department violate the single-cause-of-action rule; whether the attorney affidavit complied with NRS 11.258—particularly, whether the "attorney for the complainant" language of the statute requires either that the attorney affidavit be completed by the same attorney that meets the requirements of NRS 11.258(1) or that said attorney either be licensed to practice law in Nevada or admitted pro hac vice; and whether a clerk of court may correct a technical error with a court's e-filing system, and the necessity of an equitable remedy to correct the same, *see* NEFCR 15.

OPINION

By the Court, Silver, J.:

The procedure for substituting a successor or representative in place of a deceased party to a civil action is governed by NRCP 25(a)(1). Under that rule, the filing and service of a suggestion of death triggers a deadline to file a motion to substitute a successor or representative in place of the deceased party. Once the deadline is triggered, the court must dismiss the action if a motion to substitute is not filed before the deadline expires.

In this original proceeding, we reconsider *Barto v. Weishaar*, 101 Nev. 27, 692 P.2d 498 (1985), and its conclusion that a suggestion of death emanating from the deceased party must identify the deceased party's successor or representative in order to trigger the deadline in NRCP 25(a)(1) to file a motion to substitute. Although we acknowledge the importance of precedent, we are convinced that *Barto* expanded NRCP 25(a)(1) beyond its plain language. Therefore, we overrule *Barto* and hold that a suggestion of death that is properly served triggers the deadline for filing a motion to substitute regardless of which party files it and whether it identifies the deceased party's successor or representative.[1]

Here, counsel for petitioner James McNamee filed and served a suggestion of death after McNamee died. Under the controlling authority at that time, the suggestion of death did not trigger the deadline for filing a motion to substitute because it did not identify McNamee's successor or representative. The district court therefore was not required by law to dismiss the action as to McNamee. Accordingly, we deny the petition to the extent it challenges the district court's order denying the motion to dismiss based on NRCP 25(a)(1). But we conclude the district court arbitrarily or capriciously exercised its discretion when it denied McNamee's motion to substitute based solely on the court's preference that someone other than the special administrator appointed by the probate court be appointed as administrator of McNamee's estate. Thus, we grant relief in part.

FACTS AND PROCEDURAL HISTORY

James McNamee rear-ended another vehicle at a red light. Giann Bianchi was driving the other vehicle, and Dara Delpriore[2] was in

---

[1]This opinion has been circulated among all justices of this court, any two of whom, under IOP 13(b), may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of overruling *Barto* were not cast.

[2]Hereinafter, we refer to Bianchi and Delpriore collectively as "Bianchi."

the front passenger seat; both suffered injuries as a result of the collision. Bianchi sued McNamee for damages caused by the collision, alleging negligence and negligence per se.

During the pending litigation, McNamee died. McNamee's attorney filed and served Bianchi with a suggestion of death on September 20, 2017. The suggestion of death did not name a successor or representative. On the same day, McNamee's attorney filed a petition for special letters in the probate court, naming Susan Clokey, an employee of the law firm representing McNamee, as petitioner. The probate court granted the petition and appointed Clokey as special administrator for the limited purpose of defending Bianchi's negligence suit and distributing any insurance policy proceeds therein.

McNamee's attorney then filed a motion to substitute the special administrator for McNamee as the party defendant in the negligence suit on December 14, 2017, just shy of 90 days after he filed the suggestion of death. The district court orally denied the motion and directed the parties to submit three names for the court to consider as administrators for McNamee's estate. The district court subsequently entered a written order denying the motion to substitute Clokey and naming Fred Waid as general administrator of McNamee's estate. McNamee's attorney then moved to dismiss the personal injury case, asserting that his motion to substitute had been denied and no other motion to substitute had been filed within the 90-day deadline under NRCP 25(a)(1).[3] The district court denied McNamee's motion to dismiss and granted his related motion to amend its prior order, appointing Fred Waid as special and general administrator of McNamee's estate and substituting Waid in that capacity as the defendant in place of McNamee. This petition for a writ of mandamus followed.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether a writ of mandamus will be issued is within the appellate court's sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, this court does not entertain mandamus petitions challenging orders denying motions to dismiss. *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358,

[3]The Nevada Rules of Civil Procedure were amended on March 1, 2019. *In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). The amended NRCP 25(a)(1) imposes a 180-day deadline. Because the events in this case occurred before the rule's amendment, we reference the prior version of NRCP 25(a)(1) and its 90-day deadline.

362, 662 P.2d 1338, 1340 (1983). However, we allow "very few exceptions where considerations of sound judicial economy and administration militate[ ] in favor of granting such petitions." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). And writ relief may be warranted if the record reflects clear legal error or manifest abuse of discretion by the district court, or when an important issue of law requires clarification. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819-20, 407 P.3d 702, 706-07 (2017). We elect to review McNamee's petition to clarify NRCP 25(a)(1)'s requirements and correct the district court's manifest abuse of discretion in denying McNamee's motion to substitute.

McNamee argues that the district court should have dismissed the underlying action because his motion to substitute was denied and no other motion was filed within NRCP 25(a)(1)'s 90-day deadline. Bianchi responds that the district court properly denied McNamee's motion to dismiss because the suggestion of death did not identify McNamee's successor or representative, failing to trigger the 90-day deadline under *Barto v. Weishaar*, 101 Nev. 27, 692 P.2d 498 (1985). McNamee urges this court to reconsider *Barto*, arguing that the case is based on bad law and bad policy. Although we agree with Bianchi that the suggestion of death in this case did not trigger the 90-day deadline based on *Barto*, which was controlling at the time, we take this opportunity to clarify that NRCP 25(a)(1) does not require that a suggestion of death emanating from the deceased party must include the name of the deceased party's successor or representative to trigger the 90-day deadline.

"Because the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure," we apply the rule as written when the plain meaning of the rule's language is unambiguous. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141-42 (2015) (internal quotation marks omitted). NRCP 25(a)(1) states:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

NRCP 25(a)(1)'s plain, unambiguous language does not require that the suggestion of death identify the deceased party's successor or representative to trigger the 90-day deadline. However, in *Barto*, we concluded the opposite based on *Rende v. Kay*, 415 F.2d 983 (D.C.

Cir. 1969), a federal case interpreting FRCP 25(a)(1), the Nevada rule's federal counterpart.

In *Rende*, the federal court stated that because the federal rule allowed a party, successor, or representative to file the suggestion of death, the advisory committee "plainly contemplated" that a suggestion of death filed by the deceased party's counsel would identify a successor or representative. 415 F.2d at 985. We disagree because neither the federal rule, nor the advisory committee notes, mention such a requirement. Moreover, Nevada's rule and corresponding drafter's note do not mention such a requirement either.

The *Rende* court also expressed concern that not requiring the deceased defendant's counsel to identify that party's successor or representative in a suggestion of death "would open the door to a tactical maneuver to place upon the plaintiff the burden of locating the representative of the estate within 90 days." 415 F.2d at 986. Although we echoed that concern in *Barto*, 101 Nev. at 29, 692 P.2d at 499, we now recognize that such a tactical maneuver is not an issue because a party may request more time to file the motion to substitute under NRCP 6(b). *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662-64, 188 P.3d 1136, 1142-43 (2008). Although courts disagree on this topic, some have reached the same conclusion as we do here. *See, e.g.*, *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467, 470 (2d Cir. 1998) (concluding "[FRCP 25(a)(1)] does not require that the statement identify the successor or legal representative," and that FRCP 6(b) eliminates the potential tactical maneuver anticipated by the *Rende* court); *In re MGM Mirage Sec. Litig.*, 282 F.R.D. 600, 602-03 (D. Nev. 2012) (acknowledging split of authority); *Ray v. Koester*, 215 F.R.D. 533, 534-35 (W.D. Tex. 2003) (agreeing with the Second Circuit's decision in *Unicorn Tales*); *Stoddard v. Smith*, 27 P.3d 546, 548-49 (Utah 2001) (noting that Utah's Rule 25(a)(1)'s plain language does not limit who may file a suggestion of death, declining to follow *Rende*, and observing that the tactical maneuver discussed in *Rende* would violate an attorney's ethical obligations).

While we acknowledge the importance of stare decisis, we cannot ignore that *Barto* broadened the scope of NRCP 25(a)(1) by expanding its reach beyond its precise words. *Cf. Egan v. Chambers*, 129 Nev. 239, 299 P.3d 364 (2013) (overruling prior decision that interpreted a statute to reach beyond its plain language). Accordingly, we overrule *Barto* to the extent that it concludes that a suggestion of death emanating from the deceased party must identify the deceased party's successor or representative to trigger the 90-day deadline for filing a motion to substitute. We hold that once the suggestion of death is filed on the record and served upon the appropriate parties, the deadline in NRCP 25(a)(1) for filing a motion to substitute is triggered, regardless of whether the deceased party's successor or representative has been identified in the suggestion of death.

McNamee, however, cannot rely on our new construction of the rule to assert that the suggestion of death filed by his counsel triggered the 90-day period. *See Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. 784, 791 n.5, 383 P.3d 246, 251 n.5 (2016) (observing that factors in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether a court's holding applies retroactively, "still apply . . . when 'a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct'" (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991))). Applying our prior decisions that controlled at the time, the suggestion of death filed by McNamee's counsel did not trigger the 90-day deadline. NRCP 25(a)(1) therefore did not require the district court to dismiss the action against McNamee. Accordingly, we deny the petition to the extent that it seeks a writ directing the district court to dismiss the action against McNamee.

The only remaining issue involves the district court's decision to deny McNamee's motion to substitute the special administrator appointed by the probate court and instead appoint and substitute a different representative for McNamee's estate. The district court has discretion in ruling on a motion to substitute. NRCP 25(a)(1) ("[T]he court *may* order substitution of the proper parties." (emphasis added)); *see also Lummis v. Eighth Judicial Dist. Court*, 94 Nev. 114, 116, 576 P.2d 272, 273 (1978) (indicating that district court's decision on motion to substitute under NRCP 25(a) is discretionary). A district court's exercise of discretion may be controlled through a writ of mandamus only if there was a manifest abuse or arbitrary or capricious exercise of that discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981), such as a decision based on "prejudice or preference rather than on reason," *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011) (internal quotation marks omitted).

The district court denied McNamee's motion to substitute because it was "bothered" that McNamee's counsel sought to substitute his law firm's employee, whom the probate court had appointed as a special administrator, as the party defendant. The district court further explained that it did not think the choice was "improper" but that it "just felt it would be better to have a third party come in." The district court thus denied the motion to substitute based on preference alone. We conclude this was an arbitrary or capricious exercise of the district court's discretion.[4] Accordingly, we grant the petition in part and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its orders entered on March 27,

[4]In light of our decision, we decline to consider McNamee's arguments concerning the district court's authority to create a general administration.

2018, and May 14, 2018, to the extent they substituted Fred Waid as special and general administrator for the deceased defendant's estate and to reconsider the motion to substitute in light of this opinion.

Hardesty and Stiglich, JJ., concur.

THE STATE OF NEVADA BOARD OF PAROLE COMMISSIONERS, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE CONNIE J. STEINHEIMER, District Judge, Respondents, and MARLIN THOMPSON, Real Party in Interest.

No. 76024

October 24, 2019 451 P.3d 73

Original petition for a writ of mandamus challenging a district court order denying a petition filed by the Nevada Board of Parole Commissioners pursuant to NRS 176.033(2).

Petition granted.

Aaron D. Ford, Attorney General, and *Kathleen M. Brady*, Deputy Attorney General, Carson City, for Petitioner.

Aaron D. Ford, Attorney General, *Theresa Haar*, Senior Deputy Attorney General, and *Tiffany E. Breinig*, Deputy Attorney General, Carson City, for Respondents.

Marlin Thompson, Yerington, in Pro Se.

Christopher Hicks, District Attorney, and *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, and *Marilee Cate*, Deputy District Attorney, Washoe County, for Amicus Curiae Washoe County District Attorney.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

The Nevada Board of Parole Commissioners currently has authority under NRS 176.033(2) to ask the district court to modify a parolee's sentence after the parolee has served a specified amount of

time on parole.[1] If the district court determines there is good cause after hearing the Parole Board's recommendation, the court may reduce the parolee's sentence to not less than the minimum provided by the applicable penal statute. The primary question presented by this original proceeding is this: What is the minimum term or limit for purposes of NRS 176.033(2) when the applicable penal statute only provided for a life sentence either with or without the possibility of parole? We conclude that in that circumstance, the parole eligibility term prescribed by the penal statute sets the limit for reducing the life sentence under NRS 176.033(2). Because the district court relied on a misunderstanding of the law in denying the Parole Board's petition under NRS 176.033(2), we grant the Parole Board's petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

In 1979, Marlin Thompson was sentenced to a term of 15 years for attempted murder, to run consecutive with a term of life with the possibility of parole for the crime of first-degree murder. Thompson was granted parole on the life sentence in January 1990 and on the attempted-murder sentence in 1992. He was released from prison in July 1992 and has remained on parole since that time.

On September 11, 2017, pursuant to NRS 176.033(2), the Parole Board filed a petition for modification of Thompson's sentence. The Washoe County District Attorney's Office opposed the petition, arguing that the minimum term for first-degree murder prescribed by NRS 200.030 at the time of Thompson's offense was a life term because the statute only permitted life sentences and therefore the court could not reduce Thompson's maximum term. The district court agreed with the District Attorney's Office and denied the Parole Board's petition. Subsequently, the Parole Board filed a notice of appeal from the district court's order, as well as a petition for a writ of mandamus challenging the district court's decision. Having dismissed the appeal for lack of jurisdiction, *Bd. of Parole Comm'rs v. State*, Docket No. 75799 (Order Dismissing Appeal, October 12, 2018), we now consider whether to entertain the mandamus petition.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second*

[1]In passing A.B. 236, 80th Leg. (Nev. 2019), the Legislature recently amended the statute to remove the Parole Board's authority in this respect, effective July 1, 2020. 2019 Nev. Stat., ch. 633, §§ 10.5, 137, at 4381-82, 4488. Given the effective date, that amendment does not apply here.

Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Whether a mandamus petition will be considered is within our sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see also Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014). Before deciding whether to exercise that discretion, we consider respondents'[2] argument that we should deny the petition because the Parole Board lacks standing to request a writ of mandamus.

The Parole Board has standing

Respondents argue that the Parole Board lacks standing to pursue this writ petition because it does not have a beneficial interest in the relief sought. We disagree.

"To establish standing in a mandamus proceeding, the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief." *Heller v. Nev. State Leg.*, 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004). A beneficial interest is "a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." *Id.* at 461, 93 P.3d at 749 (quoting *Lindelli v. Town of San Anselmo*, 4 Cal. Rptr. 3d 453, 461 (Ct. App. 2003)). In other words, if a petitioner will gain no direct benefit from the writ's issuance and suffer no direct detriment from its denial, then the petition should be denied. *Id.*

Here, the Parole Board has a beneficial interest. NRS 176.033(2) specifically authorizes the Parole Board to petition the district court to modify a parolee's sentence and thereby reduce the time that the parolee will be supervised. The Parole Board therefore has an interest in how that provision is interpreted and whether its request under the statute is granted or denied. Because the Parole Board has demonstrated a beneficial interest, we decline to dismiss the petition for lack of standing. Accordingly, we must decide whether mandamus is available as a remedy and whether to exercise our discretion in this matter.

The Parole Board has no other adequate remedy and has presented a question of law that warrants this court's consideration

As a general rule, mandamus is not available when the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Although the right to appeal "is gen-

[2]We note that both petitioner and respondents are represented by attorneys in the office of the Nevada Attorney General. At oral argument, they represented that proper screening mechanisms were implemented and any conflicts of interest were waived by their respective clients.

erally an adequate legal remedy that precludes writ relief," *Pan*, 120 Nev. at 224, 88 P.3d at 841, the Parole Board had no right to appeal from the district court's order in this matter, as indicated in our order dismissing the Parole Board's appeal for lack of jurisdiction. *Bd. of Parole Comm'rs v. State*, Docket No. 75799 (Order Dismissing Appeal, October 12, 2018). Respondents, however, suggest that another remedy is available—an application to the State Board of Pardons Commissioners. The Pardons Board has authority to commute Thompson's sentence such that he would no longer be subject to supervision as a parolee, achieving the result that the Parole Board sought in filing its petition under NRS 176.033(2). But the Pardons Board cannot answer the legal question presented in this matter, as that is a matter for the courts. *Compare* Nev. Const. art. 5, § 14 (providing that the Pardons Board may grant a request to have a fine or forfeiture remitted, a punishment commuted, a pardon granted with certain exceptions), *with* Nev. Const. art. 6, § 1 (providing that "judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace" and municipal courts established by the Legislature), *and N. Lake Tahoe Fire Prot. Dist. v. Washoe Cty. Bd. of Cty. Comm'rs*, 129 Nev. 682, 687, 310 P.3d 583, 587 (2013) (describing "judicial power" as the authority to hear and determine justiciable controversies and to declare what the law is or has been). But more significantly, an application to the Pardons Board seeks an act of extraordinary grace. We therefore are not convinced that an application to the Pardons Board provides a "remedy in the ordinary course of law" as contemplated by NRS 34.170. Because the Parole Board does not have a plain, speedy, and adequate legal remedy, mandamus is available as a remedy.

Even though mandamus is available as a remedy, the decision whether to entertain the Parole Board's petition on the merits remains a matter within this court's discretion. *See State, Dep't of Transp. v. Thompson*, 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983) (explaining that "a petitioner is never 'entitled' to a writ of mandamus" because "it is purely discretionary"). We elect to exercise that discretion here because the petition presents a pure question of law that is of statewide significance. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (explaining that this court's discretion "to entertain a petition for a writ of mandamus when important public interests are involved will not be exercised unless legal, rather than factual, issues are presented" (citation omitted)).

The version of NRS 176.033(2) in effect when the Parole Board filed its petition applies in this case

Before we can interpret the language in NRS 176.033(2) to answer the legal question presented, we must determine which version

of the statute applies. The parties express some disagreement on that matter, with respondents suggesting that the version of the statute in effect at the time of Thompson's offense in 1978 applies, and the Parole Board pointing to the 1987 version of the statute in effect before it was amended in 1995. Because the Parole Board petitioned for modification in 2017, the parties also addressed whether the 1995 amendments apply. Based on the following analysis, however, we agree with the Parole Board.

When it was adopted in 1975, the provision that later became NRS 176.033(2) authorized the Parole Board to file a petition asking the district court to modify a sentence "at any time after a parolee has served one-half of the period of his parole" by "reducing the term of imprisonment" to no "less than any minimum term prescribed by the applicable penal statute." 1975 Nev. Stat., ch. 435, § 1, at 653 (codified as NRS 176.033(3)). At the time, the provision seemingly excluded individuals who had been released on parole from a life sentence, given the difficulty in calculating "one-half" of a lifetime period of parole. *See* Hearing on A.B. 560 Before the Senate Comm. on Judiciary, 64th Leg., at 11-13 (Nev. May 6, 1987) (testimony of representative from Department of Parole and Probation). With that situation in mind, the Legislature amended the statute in 1987 to include parolees who had been paroled from a life sentence and served 10 consecutive years on parole. 1987 Nev. Stat., ch. 174, § 1, at 396. At that point, including technical amendments passed in 1977, the statute provided:

> At any time after a prisoner has been released on parole and has served one-half of the period of his parole, or 10 consecutive years on parole in the case of a prisoner sentenced to life imprisonment, the state board of parole commissioners, upon the recommendation of the department of parole and probation, may petition the court of original jurisdiction requesting a modification of sentence. The board shall give notice of the petition and hearing thereon to the attorney general or district attorney who had jurisdiction in the original proceedings. Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence by reducing the term of imprisonment but shall not make the term less than the minimum limit prescribed by the applicable penal statute.

1987 Nev. Stat., ch. 174, § 1, at 396. When the Legislature overhauled the approach to sentencing in 1995, it made conforming amendments to the final sentence in NRS 176.033(2) to refer to the "maximum" and "minimum" terms of imprisonment: "Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence by reducing the *maximum* term of imprisonment but shall not make the

term less than the minimum **[**limit**]** *term* prescribed by the applicable penal statute." 1995 Nev. Stat., ch. 443, § 205, at 1248 (repealed language shown in brackets and new language shown in italics).

If the 1975 version of the statute applies here, Thompson's life sentence could not be modified regardless of whether the applicable penal statute provided for a minimum less than life. That is because, as indicated above, the statute originally applied only to parolees who had served "one-half" of their period of parole, a condition that could not be met by a parolee facing a lifetime period of parole. It was not until the 1987 amendment that NRS 176.033(2) addressed the circumstances in which the Parole Board could petition to modify the sentence of a parolee facing a lifetime period of parole—after the parolee had served 10 consecutive years on parole.

The Legislature did not expressly tie the 1987 amendments' effective date to the date of a parolee's offense, and the statute's plain language indicates the 1987 amendments were not so limited. Since the provision's adoption in 1975, its plain language has focused on the amount of time served on parole as the event that triggers the Parole Board's authority to file a petition. That did not change with the 1987 amendments. The triggering event thus has nothing to do with the date the offense was committed; instead, it is focused on events occurring long after the offense. And the statute has always provided that the Parole Board may petition the court "[a]t any time after" the triggering event. 1975 Nev. Stat., ch. 435, § 1, at 653 (codified as NRS 176.033(3)). As a whole, this language indicates the Legislature intended to afford the Parole Board discretion to seek a sentence modification for any parolee who had served the requisite time on parole, regardless of when the offense was committed.[3]

The Legislature's intent with respect to the effective date of the 1995 amendments to NRS 176.033(2) is less clear. In particular, the 1995 legislation included two effective-date provisions for the section that amended NRS 176.033(2), one stating the amendments did not apply to offenses committed before July 1, 1995, and the other stating that the amendments became effective on July 1, 1995. 1995 Nev. Stat., ch. 443, §§ 393, 394, at 1340 (referring to section 205, which amended subsections 1 and 2 of NRS 176.033). It appears the Legislature was trying to ensure that the comprehensive amendments to sentencing provisions included in the 1995 legislation did not apply to offenses committed before the legislation's effective date. That would be consistent with the general rule that "the proper penalty is the penalty in effect at the time of the commission of the offense." *Pullin*, 124 Nev. at 567, 188 P.3d at 1081. Because the 1995 amendments to NRS 176.033(2) were solely to conform its

[3]We conclude that the general rule regarding retroactivity of ameliorative sentencing amendments, *see generally State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 188 P.3d 1079 (2008), does not apply here because NRS 176.033(2) has nothing to do with the original sentencing determination.

language to the new sentencing scheme adopted at the same time and that sentencing scheme did not apply to offenses committed before July 1, 1995, we conclude that the 1995 amendments to NRS 176.033(2) do not apply here. Having concluded the 1987 version of the statute applies, we turn to the legal question presented: whether the district court could reduce Thompson's sentence to less than life.

Life sentences may be modified pursuant to NRS 176.033(2) (1987) to a sentence not less than the minimum parole eligibility prescribed by the applicable penal statute

"Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). "[W]hen 'the language of a statute is plain and unambiguous, and its meaning clear and unmistakable,'" this court must give effect to that plain meaning as an expression of legislative intent without searching for "'meaning beyond the statute itself.'" *Dykema v. Del Webb Cmtys., Inc.*, 132 Nev. 823, 826, 385 P.3d 977, 979 (2016) (quoting *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007)). But when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, this court may look to interpretive aids such as legislative history and "the context and the spirit of the law or the causes which induced the [L]egislature to enact it." *Id.* (alteration in original) (quoting *Torres v. Nev. Direct Ins. Co.*, 131 Nev. 531, 535, 353 P.3d 1203, 1206-07 (2015)).

Respondents argue that Thompson's sentence cannot be reduced because the applicable sentencing statute did not provide a minimum sentence, only a maximum limit of life. Under that interpretation, a life sentence could not be modified under NRS 176.033(2) in a case like this where no sentence less than life, either with or without parole, was available. However, such interpretation would render the 1987 amendments largely nugatory, as the Parole Board could file a petition to modify a life sentence, but the district court would not be able to grant it. Thus, we respectfully disagree with respondents' conclusion.

Here, the language of the statute is ambiguous as to the meaning of "minimum limit" in this context. Consequently, we look to the legislative history and purpose behind NRS 176.033(2) to assist in determining the Legislature's intent. The purpose of the amendment to the statute proposed by the Department of Parole and Probation in 1987 was to clarify whether it had to supervise a parolee serving a life sentence for the rest of his life without exception. That legislative history demonstrates that, by passing the 1987 amendment, the Legislature intended to allow the Parole Board to seek a modification of a parolee's life sentence under NRS 176.033(2). It necessarily follows that the Legislature intended to allow the district court

to reduce a parolee's life sentence. In light of the legislative history, we conclude that when the penal statute provides for a life sentence with the possibility of parole and specifies a period of time that must be served before parole eligibility, the district court has authority under NRS 176.033(2) to reduce the life sentence to not less than the period specified for parole eligibility. The Parole Board would be able to petition for such a reduction only after the parolee has served 10 consecutive years on parole. In this case, these requirements have been met, and the district court has the authority to reduce Thompson's life sentence in accordance with NRS 176.033(2). Because the district court misapplied the law, we grant the petition. *See State v. Eighth Judicial District Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (defining manifest abuse of discretion warranting mandamus relief). Accordingly, we direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order and reconsider the Parole Board's petition consistent with this opinion.

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

DEANDRE GATHRITE, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE DOUGLAS W. HERNDON, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 77529

November 7, 2019 451 P.3d 891

Original petition for a writ of mandamus or prohibition challenging a district court order denying a pretrial petition for a writ of habeas corpus and a motion to dismiss an indictment with prejudice.

Petition granted in part and denied in part.

[Rehearing denied December 20, 2019]

[En banc reconsideration denied January 24, 2020]

Lobo Law PLLC and *Adrian M. Lobo*, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

Sarah K. Hawkins, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Before the Supreme Court, HARDESTY, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

NRS 172.135(2) provides that only "legal evidence" may be presented to the grand jury. The primary question raised in this original proceeding is whether evidence that has been suppressed in justice court proceedings on a felony complaint is "legal evidence" that may be presented to the grand jury in support of an indictment. We conclude that such evidence is not "legal evidence" for purposes of NRS 172.135(2) and therefore cannot be presented to a grand jury so long as the justice court's suppression ruling has not been overturned before the evidence is presented to the grand jury. Here, because the justice court suppressed statements and evidence about the gun and because the State did not challenge the justice court's suppression ruling before going to the grand jury and did not present any other legal evidence to support the indictment, we conclude that the district court erroneously denied the defendant's pretrial petition for a writ of habeas corpus. We therefore grant the petition for a writ of mandamus in part.

PROCEDURAL HISTORY

Stemming from petitioner Deandre Gathrite's alleged involvement in a deadly shooting, the State filed a criminal complaint in the justice court charging Gathrite with murder with use of a deadly weapon and possession of a firearm by a prohibited person. Before the preliminary hearing, Gathrite moved to suppress his statements to the police and the gun discovered as a result of his statements, alleging that the police had violated *Miranda v. Arizona*, 384 U.S. 436 (1966), and his Fifth Amendment privilege against self-incrimination. The justice court granted the motion and ordered the statements and the gun suppressed. The State did not ask the justice court to reconsider its decision or appeal the justice court's decision to the district court. Instead, the State voluntarily dismissed the criminal complaint without prejudice and went to the grand jury solely on a charge of possession of a firearm by a prohibited person, presenting the evidence that the justice court had suppressed. The grand jury indicted Gathrite on one count of possession of a firearm by a prohibited person.

Gathrite filed a pretrial petition for a writ of habeas corpus, challenging the legal sufficiency of the evidence supporting the indictment. Gathrite primarily contended that the State erroneously presented evidence to the grand jury that had been suppressed in the justice court proceedings and did not present the grand jury with

the suppression ruling.[1] In deciding the petition, the district court reviewed the justice court's suppression ruling. After conducting an evidentiary hearing and determining that the evidence was not obtained in violation of Gathrite's constitutional rights, the district court denied the petition. Gathrite now asks this court to intervene and issue a writ of mandamus.[2]

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires as a duty arising from an office, trust, or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion. NRS 34.160; *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011); *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Issuance of an extraordinary writ is purely discretionary. *State, Office of the Attorney Gen. v. Justice Court of Las Vegas Twp.*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017). Although we ordinarily will not exercise that discretion to "review pretrial challenges to the sufficiency of an indictment," we have made exceptions when presented with a purely legal question. *Ostman v. Eighth Judicial Dist. Court*, 107 Nev. 563, 565, 816 P.2d 458, 459-60 (1991). This is such a case. We therefore elect to consider the petition for a writ of mandamus on its merits.

Gathrite argues that insufficient legal evidence was presented to the grand jury because the State only presented evidence that had been suppressed by the justice court in earlier proceedings on a criminal complaint for the same felony offense. The Legislature has directed that "the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." NRS 172.135(2). In this respect, our Legislature has provided greater evidentiary constraints in grand jury proceedings than are provided in the federal system. *See Costello v. United States*, 350 U.S. 359, 362 (1956) ("[N]either the Fifth Amendment

[1]Gathrite also filed a motion to dismiss the indictment with prejudice because, among other things, the State engaged in prosecutorial misconduct by presenting the suppressed evidence to the grand jury. We have considered Gathrite's argument that the district court was required to dismiss the indictment with prejudice based on the presentation of the suppressed evidence to the grand jury and conclude that the circumstances do not warrant that relief. *See Sheriff v. Keeney*, 106 Nev. 213, 217, 791 P.2d 55, 57 (1990) (describing reasons to dismiss with prejudice, including the elimination of prejudice and to curb prosecutorial excesses).

[2]Gathrite alternatively asks us to issue a writ of prohibition. We decline to entertain the petition to that extent because the district court had jurisdiction to consider the pretrial habeas petition and motion to dismiss. *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) ("A writ of prohibition . . . will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration.").

nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."). As we have not yet explored the meaning of "legal evidence" as used in NRS 172.135(2), we do so now.

The meaning of "legal evidence" in NRS 172.135(2) is a matter of statutory interpretation, which we review de novo even in the context of an original proceeding. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). "[W]hen 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).

At the time NRS 172.135 was enacted, *Black's Law Dictionary* defined "legal" as "required or permitted by law; not forbidden or discountenanced by law; good and effectual in law" or "[p]roper or sufficient to be recognized by law; cognizable in the courts." *Legal*, *Black's Law Dictionary* (4th ed. 1951). *Black's Law* further defined "legal evidence" as "all admissible evidence," *Legal Evidence*, *id*., and "admissible evidence" as evidence that "is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced," *Admissible*, *id.* Putting these definitions together, we conclude that "legal evidence" as used in NRS 172.135(2) means evidence that is admissible under the law. *Accord Mott v. Superior Court*, 38 Cal. Rptr. 247, 248 (Ct. App. 1964) (explaining that under a California statute that provided "none but legal evidence" may be presented to a grand jury, "a grand jury may receive only the same type of evidence which a court of law may entertain, i.e. legally competent evidence"); *see also* Sara S. Beale et al., Grand Jury Law and Practice § 4:21 (2d ed. 2018) ("Although there are generally no cases interpreting these provisions [that use the term 'legal evidence' in describing the evidence that a grand jury may consider], the general intent appears to be to require legally admissible evidence."). That understanding of "legal evidence" also finds support in the rest of NRS 172.135(2), which excludes "hearsay or secondary evidence" from a grand jury proceeding.[3] *See* Beale, *supra*, § 4:21 ("This inference [that 'legal evidence' means legally admissible evidence] is strongest in the case of the statutes that specifically prohibit the admission of hearsay or secondary evidence."). Evidence that has been suppressed because it was obtained in violation of a defendant's constitutional rights therefore is not "legal evidence" for purposes of NRS 172.135(2) because such evidence is not admissible. *See Rosky v. State*, 121 Nev. 184, 191, 111 P.3d

[3]The Legislature has provided that in certain circumstances affidavits may be used in lieu of live testimony, NRS 172.135(1), and that some types of hearsay evidence that would not be admissible in a court of law may be legally presented to the grand jury, NRS 172.135(2).

690, 695 (2005) (recognizing that statements obtained in violation of the privilege against self-incrimination, made without the *Miranda* warning, are inadmissible at trial); *Osburn v. State*, 118 Nev. 323, 325 n.1, 44 P.3d 523, 525 n.1 (2002) (recognizing that evidence obtained as a consequence of lawless official acts is excluded as fruit of the poisonous tree); *see also* NRS 48.025(1)(b) ("All relevant evidence is admissible, except . . . [a]s limited by the Constitution of the United States or of the State of Nevada . . . .").

The State argues that it was not bound by the justice court's suppression ruling when it went to the grand jury and therefore the evidence suppressed by the justice court could be presented to the grand jury without violating NRS 172.135(2). As support for that position, the State relies on *Sheriff v. Harrington*, 108 Nev. 869, 840 P.2d 588 (1992). We conclude that reliance is misplaced.

In *Harrington*, the justice court dismissed a felony DUI count, determining that a prior DUI conviction was constitutionally infirm and therefore could not be used to enhance the charged offense to a felony. *Id*. at 870, 840 P.2d at 588. The State subsequently obtained a grand jury indictment for felony DUI, relying upon the same prior DUI conviction that the justice court had determined was constitutionally infirm. *Id*. at 871, 840 P.2d at 588. Harrington challenged the indictment in a pretrial petition for a writ of habeas corpus, arguing that the *decision* of the justice court was exculpatory evidence that the State was required to present to the grand jury under NRS 172.145(2).[4] *Id*. at 871, 840 P.2d at 588-89. The district court agreed and dismissed the case. *Id*. at 871, 840 P.2d at 589. On appeal, this court reversed, reasoning that the justice court's decision was not evidence. *Id*. Rather, the justice court's decision was a legal opinion about an issue relevant to sentencing. *Id*. Likewise, a judge's suppression ruling is not evidence, and thus, *Harrington* closes the door on Gathrite's argument that the State had to present the justice court's *suppression ruling* to the grand jury. But the *Harrington* court did not consider whether *evidence* suppressed by the justice court is legal evidence for purposes of NRS 172.135(2)—that statute is not mentioned at all in *Harrington*. Consequently, *Harrington* does not support the State's argument relating to NRS 172.135(2).

The State also argues more broadly that the justice court's suppression ruling is not binding outside the proceedings in that court. The argument holds some appeal. After all, when the justice court binds a defendant over for trial in district court, it is not uncommon for the prosecution and defense to relitigate any suppression rulings the justice court may have made before or during the preliminary hearing. This court has never questioned the district court's author-

[4]NRS 172.145(2) states, "If the district attorney is aware of any evidence which will explain away the charge, the district attorney shall submit it to the grand jury."

ity to decide those issues anew after a bind over, and we are not inclined to do so now. Despite the argument's appeal in that respect, it has little bearing on the question here: Is evidence that has been suppressed by the justice court before or during a preliminary hearing "legal evidence" that can be presented to the grand jury consistent with NRS 172.135(2)? Our statutory scheme suggests it is not.

The Nevada Legislature has authorized justice courts to suppress illegally obtained evidence before or during a preliminary hearing, *Grace v. Eighth Judicial Dist. Court*, 132 Nev. 511, 513-14, 375 P.3d 1017, 1018 (2016), and allowed the State to challenge the justice court's suppression ruling through an expedited appeal to the district court,[5] NRS 189.120; *see also Grace*, 132 Nev. at 518, 375 P.3d at 1021 (concluding that "NRS 189.120 plainly allows the State to appeal a justice court's suppression order, made during a preliminary hearing, to the district court"). At the same time, the Legislature has allowed the State to proceed to a grand jury where it previously dismissed a criminal complaint voluntarily, *see* NRS 178.562(1) (providing that voluntary dismissal of a complaint under NRS 174.085 does not bar another prosecution for the same offense), and where the justice court has discharged a defendant on a criminal complaint after a preliminary hearing, NRS 178.562(2) (providing that "discharge of a person accused upon preliminary examination . . . does not bar the finding of an indictment"). When the State does so, it starts a new case before the grand jury. *Warren v. Eighth Judicial Dist. Court*, 134 Nev. 649, 652, 427 P.3d 1033, 1036 (2018).

But the new proceeding before the grand jury must comply with the evidentiary constraints the Legislature has provided, such as the requirement in NRS 172.135(2) that the grand jury receive "none but legal evidence." Although the Legislature has provided some exceptions to those evidentiary constraints, *e.g.*, NRS 172.135(2)(a)-(b) (allowing the grand jury to consider certain hearsay evidence in limited circumstances), it has not made an exception for evidence suppressed by the justice court before or during a preliminary hearing on a complaint. Similarly, the Legislature has not expressly limited the legal effect of the justice court's suppression ruling when the State starts a new case in the grand jury. It easily could have done so. *Cf.* Cal. Penal Code § 1538.5(j) (West 2011) (providing that a suppression ruling is not binding in subsequent probable cause proceedings, with certain exceptions, when the defendant is not held to answer at the preliminary hearing). Nor can we imply an exception or limit on the effect of the justice court's suppression ruling from the text of the statutes allowing the State to

[5]Here, the State also could have asked the justice court to reconsider its decision. *See, e.g.*, JCRLV 11.

proceed to a grand jury after a voluntary dismissal of a complaint or discharge of a defendant upon a preliminary hearing.[6] We are particularly reticent to imply an exception when the Legislature has expressed its desire to provide greater protection to Nevada citizens by imposing evidentiary constraints in grand jury proceedings.

Considering the balance struck by the Legislature in providing an expedited appeal of a justice court's suppression ruling and limiting the evidence that a grand jury can receive, we hold that when a judge suppresses evidence before or during a preliminary hearing and the State has not successfully challenged the suppression ruling, NRS 172.135(2) precludes the State from presenting the suppressed evidence to the grand jury.[7] Because the State did not present the grand jury with anything but the suppressed evidence, the district court manifestly abused its discretion in denying the pretrial habeas petition.[8] *See Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. 424, 436, 305 P.3d 887, 896 (2013) (recognizing that an indictment is fatally deficient where insufficient evidence is presented to support the probable cause determination); *Robertson v. State*, 84 Nev. 559, 561-62, 445 P.2d 352, 353 (1968) (recognizing that an indictment will be sustained even if inadmissible evidence was presented to the grand jury so long as "there [was] the slightest sufficient legal evidence" presented); *see also State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (explaining that a lower court's clearly erroneous interpretation or application of the law is a manifest abuse of discretion). Accordingly, we grant the petition in part and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Gathrite's pretrial petition for a writ of habeas corpus and enter an order consistent with this opinion. We deny the petition in all other respects.

Hardesty and Silver, JJ., concur.

---

[6]In contrast, NRS 178.562(2) limits the effect of the justice court's decision to discharge a defendant upon a preliminary hearing by explicitly providing that it "does not bar the finding of an indictment."

[7]Not every evidentiary determination made by a judge before or during a preliminary hearing is a "suppression ruling." A suppression ruling is one that excludes evidence because it was illegally obtained, generally in violation of the Fourth, Fifth, or Sixth Amendments to the United States Constitution. *See State v. Shade*, 110 Nev. 57, 62-63, 867 P.2d 393, 396 (1994) (discussing definition of "motion to suppress").

[8]In light of our decision, we decline to consider the merits of the justice court's suppression ruling.

WILLIAM LESTER WITTER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 73444

November 14, 2019 452 P.3d 406

Appeal from a third amended judgment of conviction. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

Rene L. Valladares, Federal Public Defender, and *David Anthony, Stacy M. Newman*, and *Tiffany L. Nocon*, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

When a district court determines that restitution is appropriate in a criminal case, Nevada law requires that the court set forth the specific amount of restitution in the judgment of conviction. Thus, this court has held that the district court errs if it states in the judgment of conviction that restitution will be imposed in an amount to be determined sometime in the future. And going a step further, this court has held that a judgment of conviction with that kind of language is not a final judgment for purposes of an appeal to this court or for purposes of triggering the one-year deadline for filing a postconviction habeas petition. We are asked to determine whether those prior decisions allow appellant William Lester Witter to raise direct appeal issues related to his 1995 capital trial in this appeal from an amended judgment of conviction entered in 2017. They do not, for two reasons. First, the judgment of conviction in this case arose from a jury verdict that was appealable under NRS 177.015(3) regardless of any error with respect to restitution in the subsequently entered judgment of conviction. Second, and more importantly, Witter treated the 1995 judgment of conviction as final for more than two decades, litigating a direct appeal and various postconviction proceedings in state and federal court. He does not get to change course now. Although the amended judgment of conviction

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

is appealable, the appeal is limited in scope to issues stemming from the amendment. Because Witter does not present any such issues, we affirm.

PROCEDURAL HISTORY

Witter was tried before a jury; found guilty of first-degree murder with use of a deadly weapon, attempted murder with use of a deadly weapon, attempted sexual assault with use of a deadly weapon, and burglary; and sentenced to death in 1995. The district court entered a judgment of conviction setting forth the adjudication and sentence for the murder count on August 4, 1995, and amended the judgment of conviction on August 11, 1995, and September 26, 1995, to add the adjudication and sentences for the nonhomicide counts. The amended judgments further required Witter to pay restitution "in the amount of $2,790.00, with an additional amount to be determined." Witter filed a notice of appeal from the judgment of conviction, and this court affirmed the judgment of conviction and sentence on appeal. *Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996), *abrogated in part by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). Witter then litigated a timely postconviction petition for a writ of habeas corpus on the merits and two untimely and successive postconviction petitions for a writ of habeas corpus. *Witter v. State*, Docket No. 36927 (Order of Affirmance, August 10, 2001); *Witter v. State*, Docket No. 50447 (Order of Affirmance, October 20, 2009); *Witter v. State*, Docket No. 52964 (Order of Affirmance, November 17, 2010). Witter never challenged the indeterminate portion of the restitution provision or the finality of the judgment of conviction in any of the prior proceedings. Witter has also sought relief from his conviction in the federal courts.

Witter pointed to the indeterminate portion of the restitution provision in the judgment of conviction for the first time in a postconviction petition for a writ of habeas corpus filed in state court in 2017. In particular, he asserted that his conviction was not final because the judgment of conviction contained an indeterminate restitution provision and therefore the procedural bars could not be applied to his petition. The district court agreed that the conviction was not final but nonetheless denied the petition.[2] The district court also amended the judgment of conviction to delete the indeterminate part of the restitution provision. Witter filed this appeal from the third amended judgment of conviction.

DISCUSSION

Witter argues that because of the indeterminate restitution provision in the 1995 judgment, his conviction was not final until entry

[2]Witter's appeal from that decision is pending in Docket No. 73431.

of the third amended judgment of conviction in 2017. Consequently, Witter argues, the direct appeal decided in 1996 and the subsequent postconviction proceedings were null and void for lack of jurisdiction and therefore he should be allowed to raise any issues stemming from the 1995 trial without regard to the law of the case. The State argues that we lack jurisdiction over this appeal. Both parties are wrong.

NRS 176.105(1)(c) states that a judgment of conviction must include the amount and terms of any restitution. NRS 176.033(1)(c) likewise requires the district court to set forth the "amount of restitution for each victim of the offense." Despite these statutory requirements, some district courts have entered judgments of conviction that imposed restitution in an uncertain amount to be determined in the future. That clearly constitutes error, as this court first explained in *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993). *Accord Roe v. State*, 112 Nev. 733, 736, 917 P.2d 959, 960-61 (1996); *Smith v. State*, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996).

Botts and its progeny, however, did not address what effect, if any, an indeterminate restitution provision has on the finality of a judgment of conviction. *See Slaatte v. State*, 129 Nev. 219, 221, 298 P.3d 1170, 1171 (2013) ("None of our prior decisions addressed whether the judgment was final given its failure to comply with NRS 176.105(1)."). That question is significant in at least two respects: the defendant's right to appeal from a "final judgment" under NRS 177.015(3) and the starting point for the one-year period under NRS 34.726 to file a postconviction habeas petition. This court considered the question of finality when a judgment of conviction includes an indeterminate restitution provision in *Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012). There, this court held that a judgment of conviction that imposed restitution in an uncertain amount was not final and therefore did not start the clock on the one-year period under NRS 34.726 for filing a postconviction habeas petition. 128 Nev. at 263, 285 P.3d at 1055. A year later in *Slaatte v. State*, this court similarly held that it lacked jurisdiction over an appeal from a judgment that imposed restitution in an indeterminate amount because the judgment was not final. 129 Nev. at 221, 298 P.3d at 1171.

The State urges us to reconsider whether a judgment that includes an indeterminate restitution provision is final. Focusing on this case, the State argues that restitution was "insignificant and utterly inconsequential to the parties." And more generally, the State argues that federal courts have suggested that the failure to include restitution in a judgment is not a jurisdictional bar to filing an appeal. *See, e.g.*, *Dolan v. United States*, 560 U.S. 605, 617-18 (2010); *United States v. Gilbert*, 807 F.3d 1197, 1199-1200 (9th Cir. 2015); *United States v. Muzio*, 757 F.3d 1243, 1246-47 (11th Cir. 2014). Although we acknowledge that federal courts have interpreted federal statutes

differently than we have interpreted the relevant Nevada statutes, the State has not offered any compelling reasons to overrule our prior decisions. *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("[U]nder the doctrine of *stare decisis*, [this court] will not overturn [precedent] absent compelling reasons for so doing." (quoting *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008))). And we remain convinced that given our statutory scheme, the specific amount of restitution is a weighty matter that must be included in the judgment of conviction when the sentencing court determines that restitution is warranted. *See Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999) (recognizing that "[r]estitution under NRS 176.033(1)(c) is a sentencing determination," and while the defendant is not entitled to a full hearing, a defendant is entitled to challenge restitution at sentencing). In particular, the amount of restitution is not an inconsequential matter when a judgment imposing restitution "constitutes a lien in like manner as a judgment for money rendered in a civil action," NRS 176.275(1), which may be "enforced as any other judgment for money rendered in a civil action," NRS 176.275(2)(a), and "[d]oes not expire until the judgment is satisfied," NRS 176.275(2)(b). Although we adhere to our prior decisions, they are distinguishable in two respects and therefore not controlling in the circumstances presented by this case.

Our decision in *Slaatte* focused on the provision in NRS 177.015(3) that allows a defendant to appeal from a "final judgment." But NRS 177.015(3) also allows a defendant to appeal from a "verdict." That part of the jurisdiction statute was not at issue in *Slaatte* because the conviction in that case resulted from a guilty plea.[3] *See Slaatte*, 129 Nev. at 220, 298 P.3d at 1170. In contrast, the conviction in this case arose from a jury verdict. Because Witter could appeal from the verdict, the finality of the subsequently entered judgment of conviction would not have been determinative of this court's jurisdiction under NRS 177.015(3), unlike in *Slaatte*.[4]

More importantly, our prior cases do not stand for the proposition that a defendant can treat a judgment of conviction with an indeterminate restitution provision as final by litigating a direct appeal and postconviction habeas petitions only to later change course and argue that the judgment was never final. The defendants in the two cases addressing finality, *Whitehead* and *Slaatte*, raised the error regarding the indeterminate restitution provision during the first proceeding in which they challenged the validity of their judgments

[3]The defendant in *Whitehead* had also pleaded guilty. *See Whitehead*, 128 Nev. at 261, 285 P.3d at 1054.

[4]Contrary to Witter's argument, *Slaatte* does not implicate this court's subject matter jurisdiction. Nev. Const. art. 6, § 4 (providing that the Nevada Supreme Court has appellate jurisdiction "in all criminal cases in which the offense charged is within the original jurisdiction of the district courts").

of conviction—on direct appeal (*Slaatte*, 129 Nev. at 220, 298 P.3d at 1170), and in a first postconviction habeas petition where no direct appeal had been filed (*Whitehead*, 128 Nev. at 261, 285 P.3d at 1054). Like those defendants, Witter had the benefit of *Botts*, which had been decided before his trial and conviction. Witter, however, litigated a direct appeal and state and federal postconviction proceedings without raising any issues about the indeterminate restitution provision.

This distinction implicates finality, a compelling consideration for courts when reviewing a challenge to the validity of a conviction. *Trujillo v. State*, 129 Nev. 706, 717, 310 P.3d 594, 601 (2013) (recognizing that this court has "long emphasized the importance of the finality of judgments"). A challenge to a conviction made years after the conviction is a burden on the parties and the courts because "[m]emories of the crime may diminish and become attenuated," and the record may not be sufficiently preserved. *Groesbeck v. Warden*, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984). Thus, the concern expressed in *Whitehead* that piecemeal litigation could result from restitution being imposed in an indeterminate amount, 128 Nev. at 263, 285 P.3d at 1055, must be counterbalanced against the interest in the finality of a conviction. This court has long precluded a litigant from arguing that a judgment was not final or that this court lacked jurisdiction in a prior appeal when the party treated the judgment as final. *See, e.g.*, *Renfro v. Forman*, 99 Nev. 70, 71-72, 657 P.2d 1151, 1151-52 (1983) (holding that a party is estopped from asserting that the judgment was not final after treating the judgment as final); *Gamble v. Silver Peak Mines*, 35 Nev. 319, 323-26, 133 P. 936, 937-38 (1913) (determining that when a party has treated a judgment as final, that party may not later argue that this court lacked jurisdiction over the appeal because the judgment was not final); *Costello v. Scott*, 30 Nev. 43, 88, 94 P. 222, 223 (1908) ("Even if there was room for argument as to whether the judgment rendered in this case was a final judgment, appellants by treating it as such, and appealing therefrom, are estopped to deny the finality of the decree."). From 1995 to 2017, Witter treated the judgment of conviction as a final judgment. He therefore is estopped from now arguing that the judgment was not final and that the subsequent proceedings were null and void for lack of jurisdiction.[5]

Finally, we reject the State's argument that this court lacks jurisdiction over this appeal. An amended judgment of conviction is substantively appealable under NRS 177.015(3). *See Jackson v. State*, 133 Nev. 880, 881-82, 410 P.3d 1004, 1006 (Ct. App. 2017). The

[5]We conclude that Witter's argument that the State invited the error by requesting an amendment to the judgment of conviction to eliminate the indeterminate restitution provision is without merit. Further, in light of our decision, we decline to address whether *Whitehead* and *Slaatte* apply retroactively.

scope of the appeal is limited, however, to issues arising from the amendment. *Id.*; *see also Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (recognizing that an amendment to a judgment of conviction may provide good cause to present claims challenging the amendment in an untimely postconviction petition for a writ of habeas corpus). Here, Witter only raises issues arising from the 1995 trial. Because those issues are not properly before us in this appeal, we have not considered them and express no opinion as to their merit. And because Witter has not demonstrated any error with respect to the amendment to his judgment of conviction, we affirm the third amended judgment of conviction.

Gibbons, C.J., and Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.