DELBERT ROY DOUGLAS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 59084

May 1, 2014 327 P.3d 492

Appeal from judgment of conviction for sexual assault and incest. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The supreme court, PICKERING, J., held that incest condemns sex between close relatives without regard to whether the intercourse was consensual.

Affirmed.

Philip J. Kohn, Public Defender, and *P. David Westbrook*, Deputy Public Defender, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Respondent.

1. INCEST.
   Incest condemns sex between close relatives without regard to whether the intercourse was consensual. NRS 201.180.
2. INCEST.
   The phrase "persons who commit" sanctions punishment for those persons who voluntarily carry the incestuous act into execution, and prevents the prosecution of those who do not, as that phrase is used in statute providing that persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void who intermarry with each other or who commit fornication or adultery with each other shall be punished for a category A felony by imprisonment in the state prison; this requirement shields rape victims and certain minors from prosecution for incest, but it does not demand mutual consent.
3. INCEST.
   Term "fornication," as used in incest statute, does not signify consensual sexual intercourse. NRS 201.180.
4. CRIMINAL LAW.
   Term "fornication" is defined as voluntary sexual intercourse with an unmarried woman or voluntary sexual intercourse between two unmarried persons.
5. STATUTES.
   Textually permissible interpretation of statute that furthers, rather than obstructs, the statute's purpose should be favored.
6. STATUTES.
   Courts should not add things to what a statutory text states or reasonably implies.
7. CRIMINAL LAW.
   Rule of lenity requires that the supreme court liberally interpret an ambiguous criminal law in favor of the accused, but the principle applies

only after the supreme court has used every interpretive tool at its disposal and a reasonable doubt persists.

8. Criminal Law; Incest.

While the jury instructions—to which defendant did not properly object—did not make mutual consent an element of incest or define "fornication" in terms of "consent," this was not error, plain or otherwise, since the crime of incest did not require mutual consent. NRS 201.180.

9. Double Jeopardy.

Sexual assault and incest each contain an element not contained in the other, and thus, defendant's convictions for both incest and sexual assault did not violate double jeopardy; incest requires familial relationship, while sexual assault does not. U.S. Const. amend. 5; NRS 200.366, 201.180.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

Delbert Roy Douglas fathered two children with his daughter, whom he forced to have sex with him when she was 12 and, again, after she turned 18. He was charged with and convicted of sexual assault and incest for both rapes. On appeal, Douglas challenges his incest convictions. He argues that incest requires mutual consent while sexual assault is, by definition, nonconsensual, making the two crimes mutually exclusive. We hold, as the majority of courts have held, that incest condemns sex between close relatives without regard to whether the intercourse was consensual.

I.

A.

[Headnote 1]

Our review is de novo, *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011), and begins with the text of Nevada's incest statute:

> Persons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void who intermarry with each other or who commit fornication or adultery with each other shall be punished for a category A felony by imprisonment in the state prison . . . .

NRS 201.180.

Obviously, NRS 201.180 omits any express mutual consent requirement. But Douglas parses the statute as punishing "[*p*]*ersons* being within the degree of consanguinity within which marriages are declared by law to be incestuous and void . . . who *commit fornication . . . with each other*" and infers a mutual consent requirement from its key terms: *persons*, *commit*, *for-*

nication, and *with each other*. "Unlike sexual assault," Douglas argues, "incest is not a crime perpetrated by *one* person against another; it is the joint operation of two or more prohibited *persons* who, *together*, 'commit fornication.' " And "fornication," Douglas continues, means " 'consensual sexual intercourse between two persons not married to each other.' " *Id.* at 8 & n.2 (quoting *Merriam-Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary/fornication (last visited, July 20, 2012)).

Nevada's prohibition on incest dates back to 1861. 1861 Laws of the Territory of Nevada, ch. 28, § 129, at 83. Though the penalty has changed over time, *see* 1979 Nev. Stat., ch. 655, § 43, at 1429; 1995 Nev. Stat., ch. 443, § 83, at 1198; 2005 Nev. Stat., ch. 507, § 31, at 2877, the words used to describe incest's elements have not varied.[1] In general, "[w]ords must be given the meaning they had when the text was adopted." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012). So, we look to references from the late 19th century to glean the meaning of NRS 201.180.

To Douglas, the phrase "with each other" unambiguously requires mutual consent. But 19th century scholarly references primarily defined *with* as in the "presence" or "company of." Rev. James Stormonth, *Dictionary of the English Language* 733 (1877); *see also* William Dwight Whitney, *The Century Dictionary* 6952 (1895) (defining *with* as "in company with"). Thus, "with each other" requires only that the charged party commit the act of incest in the company of the person with whom he or she intermarries or fornicates. The phrase is indeed unambiguous,[2] but it does not demand the consent of both parties to support a conviction.

[Headnote 2]

Douglas also argues that the phrase "persons . . . who commit" requires mutual consent. We disagree. *Commit* is defined as "to do or effect," Stormonth, *supra*, at 99, or "to perpetrate." Whitney, *supra*, at 1131. Thus, the phrase "persons . . . who commit" sanctions punishment for those persons who voluntarily carry the incestuous act

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[1]Section 129 of the 1861 Laws of the Territory of Nevada criminalized incest in terms identical to NRS 201.180, except for the reference to the territorial as opposed to the state prison and the omission of five commas: "Persons being within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, shall, on conviction, be punished by imprisonment in the territorial prison . . . ." 1861 Laws of the Territory of Nevada, ch. 28, § 129, at 83.

[2]*See* 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:7, at 304 (7th ed. 2007) (explaining that a court's reliance on a dictionary to interpret language does not render that language ambiguous).

into execution, and prevents the prosecution of those who do not. This requirement shields rape victims and certain minors from prosecution for incest, but it does not demand mutual consent.

[Headnote 3]

Nor do we agree that *fornication* signifies consensual sexual intercourse. Stormonth defines *fornication* as sexual intercourse "between unmarried persons." Stormonth, *supra*, at 215. Whitney similarly defines it as "illicit sexual intercourse on the part of an unmarried person with a person of the opposite sex, whether married or unmarried." Whitney, *supra*, at 2340. These early definitions focus on marital status of the participants, not consent.

Though helpful, historical dictionaries are not "perfect repositories." Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1445, 1447 (1994). Douglas supports his reading of NRS 201.180 with *Merriam-Webster's Online Dictionary*, *supra*, which defines *fornication* as "consensual sexual intercourse." But other modern dictionaries do not include "consensual" in their definitions of fornication. *See, e.g.*, *Webster's Seventh New Collegiate Dictionary* 329 (1969). And Douglas's reference to the online dictionary provides no prefatory material, or information as to editor, year of publication, or depth, making it impossible to weigh his definition's relative credibility.

[Headnote 4]

A more reliable modern resource is *Black's Law Dictionary*. *See Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. 424, 432, 305 P.3d 887, 893 (2013). The definition of *fornication* offered by *Black's* is "voluntary sexual intercourse with an unmarried woman" or "[v]oluntary sexual intercourse between two unmarried persons." *Black's Law Dictionary* 679 (8th ed. 2009). These definitions mirror those provided by Stormonth and Whitney, except for *Black's* inclusion of the word *voluntary*. *See* Stormonth, *supra*, at 215; Whitney, *supra*, at 2340.

One definition of *voluntary* is "not impelled." *Black's Law Dictionary* 1605 (8th ed. 2009). Under that definition, *fornication* suggests mutual consent. But *voluntary* may also mean "by . . . intention." *Id.* Under this definition, a conviction for incestuous fornication requires an intentional act by the accused, like all crimes in Nevada. NRS 193.190 ("In every crime or public offense there must exist a union, or joint operation of act and intention . . . ."). But it would not demand mutual consent.

B.

The majority of courts that have considered statutes like NRS 201.180 have refused to infer a mutual consent requirement. Most states passed statutes criminalizing incest by the late 1800s. Joel

Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* § 728, at 442 (2d ed. 1883). Although "[t]hese statutes [were] not precisely the same in all states," they were "substantially so." William Lawrence Clark & William Lawrence Marshall, *A Treatise on the Law of Crimes* § 460, at 704 (2d ed. 1905). For the most part, these statutes were worded like NRS 201.180: They "punish[ed] any persons who, being within the degrees of consanguinity . . . within which marriages are declared to be incestuous and void, intermarry or commit adultery or fornication with each other." *Id.* By 1905, "in most states," it was the settled law that "the consent of both parties is not a necessary element of the offense" of incest. *Id.* at 705; Recent Case, *Incest—Elements of Offense—Relation of Parties*, 22 Yale L.J. 625 (1913) ("According to the weight of authority assent of both parties is not necessary to constitute the crime of incest."); L. S. Tellier, Annotation, *Consent as element of incest*, 36 A.L.R.2d 1299 (1954) ("While [incest] statutes generally forbid persons within specified degrees of consanguinity or affinity to have sexual intercourse 'with each other' or 'together,' in most jurisdictions the courts do not regard the words 'with each other' or 'together,' as requiring a mutual consent to the wrongful act in order that incest may be committed, the purpose of the statutes being to deter the commission of fornication or adultery with one within the prohibited degrees of relationship, and to punish the accused regardless of whether or not the other party consented to the act or whether or not force was used to overcome the other's resistance.").

Nevada appears to have copied its incest statute from California. *Compare* 1861 Laws of the Territory of Nevada, ch. 28, § 129, at 83, *reprinted supra* note 1, *with* 1850 Cal. Stat. 244 ("Persons being within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, shall, on conviction, be punished by imprisonment in the State Prison . . . ."); *see also* 5 Nev. Compiled Laws § 10140 (1929) (citing Cal. Penal Code § 285, where 1850 Cal. Stat. 244 was eventually codified, as a resource for Nevada's incest statute). In *People v. Stratton*, 75 P. 166, 167 (1904), *superseded by statute on other grounds as stated in People v. Tobias*, 21 P.3d 758, 766 (Cal. 2001), the California Supreme Court considered and rejected the text-based mutual-consent arguments Douglas reprises here. In its view, such "reasoning does not commend itself" because it makes "mutuality of agreement and joint consent . . . the essence of the crime" in an improper judicial revision of the "express declaration of the [statutory] law." *Id.* Adding a mutual consent requirement to the statute disserves its purpose:

> The gravamen of the crime of incest, as of rape, is the unlawful carnal knowledge. In rape it is unlawful because accomplished

> by unlawful means. In incest it is unlawful, without regard to the means, because of consanguinity or affinity. Where both the circumstances of force and consanguinity are present, the object of the statute being to prohibit by punishment such sexual intercourse, it is not less incest because the element of rape is added, and it is not less rape because perpetrated upon a relative. In this, as in every offense, the guilt of the defendant is measured by his knowledge and intent, and not by the knowledge and intent of any other person.

Id., *quoted with approval in State v. Hittson*, 254 P.2d 1063, 1065 (N.M. 1953); *see also* Tellier, *supra*, 36 A.L.R.2d at 1296 (reproducing *Hittson* as the lead case for the annotation).

Douglas suggests that the wording of Nevada's incest statute is unique and distinguishes the cases holding incest does not require mutual consent. But this is not accurate. Early cases abound, construing incest statutes indistinguishable from Nevada's and rejecting the idea that incest requires mutual consent.

In *People v. Barnes*, 9 P. 532 (1886), for example, the Supreme Court of the Territory of Idaho considered Idaho's incest statute—a statute identical to Nevada's. C*ompare id.* at 532 (reprinting 1875 Revised Laws of the Territory of Idaho, ch. 10, § 129, at 353), *with* 1861 Laws of the Territory of Nevada, ch. 28, § 129, at 83, *reprinted supra* note 1. In *Barnes*, the defendant tendered the same arguments about "fornication" and "with each other" requiring mutual consent that Douglas does. *Barnes*, 9 P. at 534. Quoting contemporary authorities, the Idaho Territorial Court noted that one defines "fornication" as " 'the unlawful knowledge by an unmarried person of another,' " which "does not imply that carnal knowledge must necessarily be mutual," while the other "defines it to be 'the voluntary sexual intercourse of one person with another.' " *Id.* These definitions establish that the defendant must act volitionally but not that the intercourse must occur consensually. As the *Barnes* court rhetorically asks: "There must be a voluntary consent of the will on the part of the one, but may not the other party to the act be the victim of force or fraud, or a child so young that the law regards her incapable of giving consent?" *Id.* The *Barnes* court's conclusion that incest does not require mutual consent was not simply policy-based but text-based as well:

> The terms used in the statute are, "Persons being within the degrees of consanguinity," etc., "who shall commit fornication with each other." Evidently the term "fornication" is used in the ordinary common-law meaning. *We have been unable to find any definition of that term in the common-law authorities which necessarily implies a consenting mind in both parties to the act.* It is maintained that the words "with each other," used in the statute, imply that the offense is committed only when

> both participants therein do so with a willing mind. . . . We are unable to adopt this construction. We are rather of the opinion that . . . neither the language of the statute, nor the true definition of the terms employed, imply that a mutuality of consent is necessary to constitute the crime of incest.

Id. at 534-35 (emphasis added).

Addressing statutes with the same wording as NRS 201.180 and coming to the same conclusion as *Stratton* and *Barnes* are: *McCaskill v. State*, 45 So. 843, 844-45 (Fla. 1908) ("The fact that the defendant, who had carnal intercourse with his daughter, used some force to overcome the resistance actually made by her, does not render the act the less incestuous."); *David v. People*, 68 N.E. 540, 542 (Ill. 1903) ("the consent of the female is not necessary to constitute the crime of incest by the male"); *Keeton v. State*, 549 So. 2d 960, 961 (Miss. 1989) ("If this Court has not before adopted, we here adopt the majority position that consent is not a necessary element of incest."); *Hittson*, 254 P.2d at 1065 ("[T]he purpose of the [incest] statute is to prevent sexual intercourse between close relatives, and the free act of the one being tried, with knowledge of the relationship, is all that is required. It is immaterial that the same testimony would have sustained a conviction for rape."); *Signs v. State*, 250 P. 938, 940 (Okla. Crim. App. 1926) ("incest is proved, although the female was incapable of and did not give her consent or voluntarily participate in the act of intercourse"); *State v. Nugent*, 56 P. 25, 26 (Wash. 1899) ("If it be true that both parties must be guilty or neither can be, then it must follow that if the female is under the age of consent, or an imbecile, the crime cannot be incest. We cannot subscribe to such a doctrine. It is illogical, and in disregard of the fundamental principle that each must answer for the consequences of his own act, and his own guilt does not depend upon the conduct or mental condition of another.").

DeGroat v. People, 39 Mich. 124 (1878), on which Douglas relies, and *State v. Jarvis*, 26 P. 302 (Or. 1891), are the exceptions to the rule established by the cases just cited. They address statutes similar to NRS 201.180 and deem mutual consent an element of incest. But no court outside Michigan or Oregon has cited either decision approvingly since the end of the 19th century, while many have considered and rejected their holdings. *See Stratton*, 75 P. at 167 (*DeGroat* and *Jarvis* are products of "judicial construction" not proper statutory interpretation); *David*, 68 N.E. at 542-43 (rejecting *DeGroat* and *Jarvis*); *State v. Freddy*, 41 So. 436, 437-38 (La. 1906) (construing a differently worded statute but rejecting the rule in *DeGroat* and *Jarvis*; "the aim of the [incest] statute is to prevent the unnatural sexual intercourse, and this intercourse exists none the less if accomplished against the will of one of the parties, and the act is none the less incest because it happens also to be rape"); *Hittson*,

254 P.2d at 1064-65 (rejecting *DeGroat* and *Jarvis*); *Signs*, 250 P. at 940 (citing *DeGroat* and *Jarvis* as exceptions to the better-reasoned general rule); *State v. Winslow*, 85 P. 433, 435 (Utah 1906) (construing a differently worded statute but rejecting *DeGroat* and *Jarvis*; "the great weight of authority is to the effect that when the incestuous fornication is shown to have been committed by the defendant with full knowledge of the relationship between himself and the other participant, though he used force in the accomplishment of his object, he may, nevertheless, be convicted of the crime of incest"); *Nugent*, 56 P. at 26 (rejecting *DeGroat* and *Jarvis* as "illogical").

Two courts that started down the *DeGroat* and *Jarvis* path, *State v. Thomas*, 4 N.W. 908, 910 (Iowa 1880); *Noble v. State*, 22 Ohio St. 541, 545 (1872), considered statutes worded differently from NRS 201.180, and, more to the point, did not stay the course. *Thomas* was a 3-2 decision from which, to the extent it supported the mutual consent rule contended for here, the Iowa Supreme Court soon retreated. *See State v. Hurd*, 70 N.W. 613, 615 (Iowa 1897) ("'A person may be convicted of incest though he accomplish his purpose by such force as to render him also guilty of rape.'" (quoting headnote 1 to *Smith v. State*, 19 So. 306, 306 (Ala. 1896))); *see also State v. Chambers*, 53 N.W. 1090, 1092 (Iowa 1893) ("Guilt may exist and is none the less enormous, because the act was without the consent of the female. To hold otherwise is to say that the crime of incest cannot be committed with one who, from infancy or other cause, is incapable of consenting to the act."). And *Noble*'s passing reference to incest being "committed by two willing parties," 22 Ohio St. at 545, was later dismissed as dictum in *State v. Robinson*, 93 N.E. 623, 624 (Ohio 1910) ("The question whether consent is an essential ingredient of the crime [of incest] was not presented in the case of *Noble v. State.*"). *See also id*. ("[I]n the great majority of states it is held that the consent of both parties is not essential, and that a defendant may be convicted of incest though he use such force as makes it rape. We think the better reason is with the majority.").[3]

C.

"It would seem a strange rule of law, that a man indicted for incest might escape conviction and secure an acquittal, by satisfying

[3]The decision in *People v. Harriden*, 1 Parker's Criminal Reports 344 (N.Y. 1852), has likewise failed the test of time. As noted in *People v. Wilson*, 135 N.Y.S.2d 893 (Nassau Cnty. Ct. 1952), *Harriden* was effectively overruled by *People v. Gibson*, 93 N.E.2d 827, 828 (N.Y. 1950), permitting *Wilson* to uphold a verdict of guilt as to both rape and incest for the same sexual assault. *Id.* at 897. So, too, with *State v. Shear*, 8 N.W. 287 (Wis. 1881): To the extent *Shear* could be read for the proposition that incest and rape were mutually inconsistent, it was abrogated by *Porath v. State*, 63 N.W. 1061, 1064 (Wis. 1895), which held that in a case "founded on a single transaction, a count for incest may be joined with one for rape."

the jury that he overcame the woman by force and violence." *Straub v. State*, 27 Ohio C.C. 50, 55 (Ohio Ct. App. 1904). Yet, this is the rule Douglas champions and *DeGroat* and *Jarvis* endorse. Such a rule is supported neither by the text of NRS 201.180 nor the majority of cases to have interpreted comparable texts. And adopting the rule in *DeGroat* and *Jarvis* would thwart the evident purpose of the prohibition against incest—protecting families and the welfare of children, and preventing genetic mutations. Leigh B. Bienen, *Defining Incest*, 92 Nw. U.L. Rev. 1501, 1536 (1998) ("The goals incorporated within traditional incest statutes include: the orderly regulation of marriage, the prevention of biologically harmful inbreeding . . . and the setting out of punishment for sexual behavior perceived as deviant or exploitative."). Most incest convictions involve sexual contact between an adult and a minor whose legal and psychological capacity to consent is, at best, debatable. *See People v. Facey*, 499 N.Y.S. 2d 517, 520 (App. Div. 1986). Making consent an element of incest leaves NRS 201.180 unusable in the context in which its application seems most apt.

[Headnotes 5, 6]

"A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner, *supra*, at 63. If the Legislature wanted to make mutual consent an element of incest, it would have been easy to do but it did not; courts should not add things to what a statutory text states or reasonably implies. *Id.* at 93. Absent clear textual instruction otherwise, we decline to presume that a legislature acting in this environment would sanction lack of consent as a defense to incest, particularly when the defense would primarily serve those accused of assaulting the children whose accessibility, due to family ties, is greatest. *See Facey*, 499 N.Y.S. at 520.

D.

[Headnote 7]

The rule of lenity requires that we liberally interpret an ambiguous criminal law in favor of the accused. *Lucero*, 127 Nev. at 99, 249 P.3d at 1230. But the principle applies only after this court has used every interpretive tool at its disposal and "a reasonable doubt persists." *Moskal v. United States*, 498 U.S. 103, 108 (1990). And given the analysis above, this court is not left with reasonable doubt as to the meaning of NRS 201.180.

II.

[Headnote 8]

Our reading of NRS 201.180 disables Douglas's remaining arguments. While the jury instructions—to which Douglas did not properly object—did not make mutual consent an element of incest or

define "fornication" in terms of "consent," this was not error, plain or otherwise, since the crime of incest does not require mutual consent. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[Headnote 9]

Douglas's double jeopardy challenge also fails. Sexual assault and incest each "contains an element not contained in the other." *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). Incest requires familial relationship, NRS 201.180, while sexual assault does not. NRS 200.366. And sexual assault makes nonconsent of the other party a clear condition for conviction, NRS 200.366(1), while incest does not. Also, the text of neither statute suggests that a conviction under one precludes a conviction under the other. Thus, Douglas's convictions for both incest and sexual assault did not violate double jeopardy.

We affirm.

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

RICKY D. ANDERSON, APPELLANT, *v.* THE STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; CYNTHIA A. JONES, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION; AND KATIE JOHNSON, IN HER CAPACITY AS CHAIRPERSON OF THE EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW, RESPONDENTS.

No. 59152

May 15, 2014 324 P.3d 362

Appeal from a district court order denying a petition for judicial review in an unemployment benefits matter. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Claimant petitioned for judicial review of denial by Employment Security Division of application for unemployment benefits based on his inability to obtain employment following medical release to return to work after work-related back injury. The district court denied petition, and claimant appealed. The supreme court, PICKERING, J., held that: (1) whether claimant's return to work for period of two years following work-related disability leave restored his eligibility to elect alternative base period for calculating unemployment compensation was question of law subject to de novo review; (2) three-year limitations period governing application for unemployment benefits for following "period of disability" referred to period during which claimant was off work and receiving particular type of workers' compensation disability benefit, not claimant's

injury; and (3) three-year limitations period governing claim for unemployment compensation after initial period of disability began started anew for claimant who returned to work for period of two years after final payment of total temporary disability benefits for work-related back injury was paid, and who reinjured his back and was subsequently unable to obtain employment following release back to work.

Reversed and remanded.

Nevada Legal Services and *David A. Olshan* and *Heather Anderson-Fintak*, Las Vegas, for Appellant.

J. Thomas Susich, Senior Legal Counsel, Employment Security Division, Sparks, for Respondents.

1. Unemployment Compensation.
   Whether claimant's return to work for period of two years following work-related disability leave restored his eligibility to elect alternative base period for calculating unemployment compensation was question of statutory interpretation, and thus, was question of law subject to de novo review. NRS 612.344.
2. Unemployment Compensation.
   The supreme court defers to the Employment Security Division's findings of fact with respect to a claim for unemployment benefits, but the supreme court's review is de novo as to questions of law.
3. Unemployment Compensation.
   The unemployment statutes should be liberally construed in order to advance the protective purposes of Nevada's unemployment compensation system of providing temporary assistance and economic security to individuals who become involuntarily unemployed. NRS 612.010 *et seq.*
4. Unemployment Compensation.
   Provision of unemployment compensation statute involving claimant who had been receiving workers' compensation benefits and was then unable to obtain employment upon release to work, which allowed claimant to elect alternative base period for calculating benefit if claim was filed within three years after initial period of disability began and not later than fourth calendar week of unemployment after last disability payment, "period of disability" referred to period during which claimant was off work and receiving particular type of disability benefit, not claimant's injury. NRS 612.344(2).
5. Unemployment Compensation.
   Three-year limitations period governing claim for unemployment compensation after initial period of disability began started anew for claimant who returned to work for period of two years after final payment of total temporary disability benefits for work-related back injury was paid, and who reinjured his back and was subsequently unable to obtain employment following release back to work, and thus, two-year period during which claimant was working prior to reinjury qualified as base period for purposes of calculating unemployment benefit. NRS 612.344(2).
6. Unemployment Compensation; Workers' Compensation.
   Unemployment compensation is designed to soften the economic burdens of those who find themselves unemployed through no fault of their

> own by helping them to maintain purchasing power and to limit the social and economic consequences of unemployment, whereas workers' compensation, on the other hand, is designed to aid persons while they are unable to work due to a physical disability; one is not a substitute for the other. NRS 612.010 *et seq.*

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

NRS 612.344 allows an individual who cannot find work after a period of temporary disability the option of using his work history for the 15 months preceding his disability leave to determine his unemployment compensation instead of, as is the norm, the 15 months preceding his application for unemployment compensation. To qualify for this option, the application must be filed "within 3 years after the initial period of disability begins and not later than the fourth calendar week of unemployment after . . . [t]he end of the period of temporary total disability or temporary partial disability [or the] date the person ceases to receive money for rehabilitative services, whichever occurs later." NRS 612.344(2). On this appeal, we consider what the phrase "within 3 years after the initial period of disability begins" means for the worker with a recurring or degenerative condition. We hold that it refers to the first in the series of potentially available benefits enumerated in NRS 612.344(2)—temporary total disability, temporary partial disability, and/or vocational rehabilitation—for each episode of compensated disability leave. Thus, the alternative-calculation option in NRS 612.344 renews when a temporarily disabled worker recovers and returns to work long enough to reestablish himself in the unemployment compensation system.

I.

A.

Unemployment compensation depends on wages and work history during a claimant's "base period." NRS 612.340; NRS 612.375. In general, "base period" is defined as "the first 4 of the last 5 completed calendar quarters [*i.e.*, 15 months] immediately preceding the first day of a person's benefit year," NRS 612.025, which begins the "first day of the week . . . a valid claim is filed" and continues for the succeeding 52 weeks. NRS 612.030. To qualify for unemployment compensation in any given week, the claimant must have earned wages "within his or her base period" and be "unemployed" but "able to [and] available for work." NRS 612.375(1). A person is

not "unemployed" who is receiving temporary disability or similar benefits as workers' compensation or for vocational rehabilitation:

> No person shall be deemed to be unemployed in any week in which the person:
>
> . . .
>
> (b) Receives benefits for a temporary total disability or a temporary partial disability pursuant to chapters 616A to 616D, inclusive, or 617 of NRS; or
>
> (c) Receives money for rehabilitative services pursuant to chapters 616A to 616D, inclusive, or 617 of NRS.

NRS 612.185(3); *see also* NRS 612.190(3)(a)(2) ("Wages" does not include an employing unit's payments for "[s]ickness or accident disability.").

These statutes coordinate the workers' compensation and unemployment compensation systems so as to avoid duplication of wage-loss benefits. *Cf.* 9 Lex K. Larson, *Larson's Workers' Compensation Law* §§ 157.01-157.02 (2013) (arguing that "all wage loss devices should be part of an overall system" and lamenting "the jerry-built character of American social legislation [that] has resulted at many points in failure to anticipate and provide for appropriate coordination"). But they create an "inequity in the law" for the "person with a recognized attachment to the labor force who is injured on the job and receives workman's compensation . . . and is then released to return to work and [finds] no work is available [yet] is disqualified" from unemployment compensation by his lack of base-period wages. Hearing on S.B. 3 Before the Assembly Comm. on Labor & Mgmt., 66th Leg. (Nev., March 14, 1991) (testimony of Stan Jones, then Director of the Nevada Employment Security Department).

NRS 612.344 addresses this inequity. It creates an alternative base period for the person who was not "unemployed" because receiving workers' compensation or other benefits enumerated in NRS 612.185(3). Such a person "may elect" to have his unemployment compensation determined with reference to his wages for the 15 months preceding his disability leave instead of the 15 months before applying for unemployment compensation.

> A person who has received:
>
> (a) Benefits for a temporary total disability or a temporary partial disability pursuant to chapters 616A to 616D, inclusive, or 617 of NRS;
>
> (b) Money for rehabilitative services pursuant to chapters 616A to 616D, inclusive, or 617 of NRS; or
>
> (c) Compensation pursuant to any similar federal law,
>
> may elect a base period consisting of the first 4 of the last 5 completed calendar quarters immediately preceding the first day of the calendar week in which the disability began.

NRS 612.344(1). The alternative-calculation option does not extend to periods of sustained disability lasting longer than 3 years:

> An elected base period may be established only if the person files a claim for benefits within 3 years after the initial period of disability begins and not later than the fourth calendar week of unemployment after:
>
> (a) The end of the period of temporary total disability or temporary partial disability; or
>
> (b) The date the person ceases to receive money for rehabilitative services,
>
> whichever occurs later.

NRS 612.344(2).

We must decide how, if at all, NRS 612.344 applies to a recurring or degenerative medical condition. The Employment Security Division (ESD) reads NRS 612.344 as limited to the 3 years following the original, disabling injury. So, if a worker injures his knee, receives temporary total disability benefits for 2 years, is rehabilitated, returns to work for 20 years, then reinjures his knee and is off work on temporary disability for 15 months, and cannot find work when he is medically cleared to return, he may not receive unemployment compensation despite his 20-year work history. We reject this interpretation as unreasonable and hold instead that the NRS 612.344 option renews when an injured worker rejoins the work force and works long enough to establish a fresh base period.

B.

In 2004, appellant Ricky Anderson injured his C-5 and C-6 vertebrae at work. The injury was debilitating, and Anderson received workers' compensation benefits for temporary total disability. Following surgery, Anderson returned to work as a construction company foreman. He held this job for more than two years, from March 2006 until October 2008. Anderson's back problems recurred, and he again received temporary total disability benefits, from November 2008 until June 2010. After more surgery, Anderson was medically released to return to work. But Anderson could not find a job, so he filed for unemployment compensation.

The ESD denied Anderson's claim. It determined that he did not qualify for unemployment compensation, calculated conventionally, because he had not earned wages in the first four of the last five calendar quarters preceding his application. And since Anderson received disability benefits for his back injury starting in July 2004, it held that he could not use NRS 612.344's alternative-calculation option, as the statute's three-year window closed in 2007.

Anderson went through a series of administrative appeals, then petitioned for judicial review, to no avail. This appeal followed.

II.

A.

[Headnotes 1, 2]

We defer to the ESD's findings of fact but our review is de novo as to questions of law. *Clark Cnty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006). The ESD argues that the issue in this case is factual—did Anderson's 2004 injury to his C-5 and C-6 vertebrae underlie his temporary total disability in 2004-2006 and 2008-2010? But Anderson accepts (and so do we) the ESD's finding that his 2004 injury led to both disability leaves. Anderson's point is that by working full-time from 2006 to 2008, he restored his eligibility to elect the optional base period under NRS 612.344. This is a legal question calling for statutory interpretation, not fact-finding, making our review de novo.

B.

To the ESD, NRS 612.344 has an obvious plain meaning: If the same original injury leads to two extended periods of temporary disability, the NRS 612.344(1) option only applies to the first. The ESD culls this meaning from NRS 612.344(2)'s use of the word "initial" in providing, "An elected base period may be established only if the person files a claim for benefits within 3 years after the *initial* period of disability begins . . . ." (Emphasis added.) "If the Legislature meant that one could elect an alternative base period within three years after any work stoppage resulting from an earlier injury," the ESD argues, "it would have stated that. Instead, the Legislature specifically limits eligibility for election of the alternative base period to three (3) years from the date that the INITIAL disability begins." (Capitalization ESD's.) The ESD maintains that we must read "initial" out of the statute for Anderson to win.

But the ESD reads "period of" out of the statute. It has "initial" modifying "disability," then equates "disability" with "injury." This explains the ESD's position that the dispute here is factual: Anderson's "initial" injury occurred in 2004, so according to the ESD, his optional NRS 612.344 election expired 3 years later for anything causally connected to that "initial" injury. But if two distinct on-the-job injuries had befallen Anderson—say a skull fracture from a fall, then two years later, third-degree burns from a warehouse fire—and they led to the same disability leave/work history that his back injury did, apparently the ESD would permit him to use NRS 612.344 because the "disabil-it[ies]"—read injuries—are distinct.

[Headnote 3]

The logic of the ESD's position is hard to follow. If its goal is to sustain its denial of benefits to Anderson, it would be better off to

accept that "initial" modifies "period of disability" and then treat the NRS 612.344 option as a one-time opportunity. This would mean that a worker has only 3 years after his first or "initial" period of disability to use NRS 612.344; after that, the option would expire, regardless of what disabilities followed or how long he worked between them. But consistent with the rule that our "unemployment statutes should be liberally construed in order to advance the protective purposes of Nevada's unemployment compensation system of providing temporary assistance and economic security to individuals who become involuntarily unemployed," *State, Dep't of Emp't, Training & Rehab. v. Reliable Health Care Servs. of S. Nev., Inc.*, 115 Nev. 253, 257, 983 P.2d 414, 417 (1999), the ESD does not go that far. It argues only that NRS 612.344 is off-limits where, as in Anderson's case, the same original injury leads to multiple periods of disability leave.

C.

"[P]eriod of disability" is not defined in Chapter 612 or elsewhere in the NRS. However, it is used in Nevada's workers' compensation statutes, NRS Chapter 616C, to distinguish between "temporary total disability" and "temporary partial disability," on the one hand, and "permanent partial disability," on the other hand. NRS 616C.405 (stating that a person may not receive permanent partial disability compensation "during [a] period of temporary total disability" and that a person may not receive a permanent partial disability award "during [a] period of temporary partial disability"); *see* NRS 616C.400 (equating duration of incapacity to "period"); NRS 616C.475(1) & (3) (explaining how benefits "for the period of temporary total disability" are calculated and what their start date is when "a claim for [a] period of temporary total disability is allowed"); NRS 616C.475(7) (requiring a physician's or chiropractor's certification of disability to "[i]nclude the period of disability"); NRS 616C.500(1) (stating the formula for calculating temporary partial disability benefits and providing that they may only last "for a period not to exceed 24 months during the period of disability"). *Cf. DiPasquale v. Bd. of Review*, 669 A.2d 275, 278 (N.J. Super. Ct. App. Div. 1996) (it is appropriate to construe the workers' compensation and unemployment compensation statutes harmoniously since they are "inter-related statutes designed to effect an 'employee welfare plan for alleviation of wage loss' " (quoting *Seatrain Lines, Inc. v. Medina*, 188 A.2d 169, 172 (N.J. 1963))).

[Headnote 4]

NRS 612.344 uses "period of disability" much as NRS Chapter 616C uses the phrase. Thus, NRS 612.344(1) describes the con-

text for its base-period option as a worker's receipt of benefits for "a temporary total disability or a temporary partial disability," "[m]oney for rehabilitative services," or "[c]ompensation pursuant to any similar federal law." After requiring the unemployment benefits claim to be filed "within 3 years after the initial period of disability begins," NRS 612.344(2) then specifies that, to qualify, the claim must also be filed "*not later than* the fourth calendar week of unemployment after: (a) The end of the *period of temporary total disability or temporary partial disability*; or (b) The date the person ceases to receive money for rehabilitative services, *whichever occurs later*." (Emphasis added.) Thus, "period of disability" refers to the duration of a type of disability benefit, not injury. The statute's use of "whichever occurs later" confirms that NRS 612.344(2) is addressing a series of potential "period of disability" types, with "initial" modifying the first in the sequence. While this does not answer whether a worker can have more than one "initial period of disability" over the course of his career, it makes untenable the ESD's position that he may, so long as his periods of disability result from discrete injuries.

D.

[Headnote 5]

Accepting that "period of disability" refers not to injury but to time off work receiving a particular type of disability benefit, the question remains whether NRS 612.344(2) permits or prohibits a worker from having more than one "initial period of disability" over the course of his career. On this point, the statute's text can reasonably be read either way. "Initial" may mean first or original, in which event the worker would have only one initial period of disability, or it may mean the first in a series, in which the worker could have more than one such initial period. Because the statute is ambiguous, we may consult its legislative history for clues to its meaning. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); *see also Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 118, 123, 319 P.3d 618, 620 (2014) (in interpreting a statute whose text is unclear, the court favors the interpretation that leads to a reasonable result).

The Legislature added NRS 612.344 to NRS Chapter 612 in 1991. Originally, NRS 612.344 only applied to benefits for temporary total disability or their federal counterpart. The statute referred to "*the* period of disability" twice in one sentence, but it did not mention "*initial* period of disability" at all:

> A person who has received compensation for a temporary total disability pursuant to chapter 616 or 617 of NRS or any similar

> federal law may elect a base period consisting of the first 4 of the last 5 completed calendar quarters immediately preceding the first day of the calendar week in which the disability began. *An elected base period may be established only if the person files a claim for benefits not later than the fourth calendar week of unemployment after the end of the period of disability and files the claim within 3 years after the period of disability begins.*

1991 Nev. Stat., ch. 60, § 1, at 120 (emphasis added). This text concerned the length of time the worker received temporary disability benefits before applying for unemployment compensation. If his temporary total disability period lasted longer than 3 years, then he could not use NRS 612.344 to resurrect a 3+ year old work history as a basis for unemployment compensation. But nothing suggested that, if the worker recovered and returned to work, he could not thereafter use NRS 612.344, assuming he established an adequate work history, his new temporary total disability period lasted less than 3 years, and he timely applied for unemployment compensation.

NRS 612.344 was amended to its current, ambiguous form in 1993. The changes to the 1991 version of NRS 612.344 are shown in italics (additions) and bolded brackets (deletions) below:

> 1. A person who has received **[**compensation**]** *:*
>
> *(a) Benefits* for a temporary total disability *or a temporary partial disability* pursuant to chapter 616 or 617 of NRS **[**or**]** *;*
>
> *(b) Money for rehabilitative services pursuant to chapter 616 or 617 of NRS; or*
>
> *(c) Compensation pursuant to* any similar federal law *,*
>
> may elect a base period consisting of the first 4 of the last 5 completed calendar quarters immediately preceding the first day of the calendar week in which **[**the**]** *his* disability began.
>
> *2.* An elected base period may be established only if the person files a claim for benefits *within 3 years after the initial period of disability begins and* not later than the fourth calendar week of unemployment after **[**the**]** *:*
>
> *(a) The* end of the period of *temporary total* disability **[**and files the claim within 3 years after the period of disability begins.**]** *or temporary partial disability; or*
>
> *(b) The date he ceases to receive money for rehabilitative services,*
>
> *whichever occurs later.*

1993 Nev. Stat., ch. 248, § 3, at 536.

The object of the 1993 amendments to NRS 612.344 was to *expand* it to reach temporary partial disability and rehabilitative services in addition to temporary total disability, not to *restrict* its use to the 3-year period following a worker's first disabling injury. The ESD expressly said this was the reason for the amendments in the prepared testimony it presented to the 1993 Nevada Legislature:

> [The object is to] provide the potential for a second base period for a person on rehabilitation or temporary partial disability [by] allow[ing] them to use wages earned immediately prior to the disabling injury to establish an unemployment insurance claim. . . .
>
> *The* [*ESD*] *supports passage of this bill because it provides equity for injured workers who are receiving assistance from SIIS* [*workers' compensation*] *in the form of rehabilitation services or temporary partial disability benefits, but do not have the option of an alternate base period that is presently available to individuals on temporary total disability*.
>
> In summary, this bill makes available to an injured individual an alternate base period to establish benefits if it is to the claimant's advantage. This is beneficial to the injured worker.

Hearing on A.B. 436, Before the Assembly Comm. on Labor & Mgmt., 67th Leg. (Nev., April 23, 1993) (emphasis added) (testimony of ESD Assistant Chief of Benefits, Ross Whitacre).

The 1993 Legislature amended both NRS 612.185, *reprinted supra* § I.A, and NRS 612.344(2), at the same time and as part of the same bill. The 1993 amendments to NRS 612.185 further confirm our understanding of the purpose of the 1993 amendments to NRS 612.344(2). In its pre-1993 form, NRS 612.185(3) said only that a worker was not "unemployed" for unemployment compensation purposes if he was receiving "benefits for a temporary total disability." 1985 Nev. Stat., ch. 263, § 1, at 802. The 1993 amendment to NRS 612.185 expanded the definition of not "unemployed" to reach the worker receiving benefits for either temporary total or temporary partial disability or money for rehabilitative services. 1993 Nev. Stat., ch. 248, § 1, at 533. This expansion of the ranks of the not-"unemployed" to include those on temporary partial disability or those receiving money for rehabilitative services required, in fairness, a correlative expansion of the NRS 612.344(2) option, so it would be available to the new categories of workers being added to the definition of not-"unemployed" in NRS 612.185. But nothing in these amendments suggests a purpose of limiting the alternative-calculation option NRS 612.344(2) affords to the first injury a worker may sustain over the course of his career.

E.

[Headnote 6]

Public policy and common sense also support our reading of NRS 612.344(2). Unemployment compensation is designed "to soften the economic burdens of those who find themselves unemployed through no fault of their own by helping them to maintain purchasing power and to limit the social and economic consequences of unemployment." *Kempf v. Mich. Bell Tel. Co.*, 358 N.W.2d 378, 382 (Mich. Ct. App. 1984). Workers' compensation, by contrast, is "designed to aid persons while they are unable to work due to a physical disability. *One is not a substitute for the other*." *Id.* (emphasis added). As the Colorado Court of Appeals noted in construing its analog to NRS 612.344(2), "the statutory scheme has as its purpose to harmonize the payment of benefits which an injured worker may be entitled to receive under each act." *Fluke v. Indus. Claim Appeals Office*, 799 P.2d 468, 470 (Colo. Ct. App. 1990).

We recognize that "the legislature is the parent of unemployment benefits" and that "[t]hese benefits are not inherent rights of Nevada citizens." *Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 26, 769 P.2d 66, 68 (1989). It makes sense to establish a limit on how far back in time a claimant may reach to establish an alternate base period, since the more remote the period is, the greater the record-keeping and other administrative challenges. But it is difficult to fathom why a worker with a medical condition that recurs should be treated differently from one who is accident-prone and suffers multiple distinct injuries, especially since the law, presumably, encourages individuals to return to gainful employment if they are able. As the ESD conceded at oral argument, it is not in the business of evaluating the etiology of medical disorders. Its concern is the proximity of the base period to the application for unemployment compensation. So long as a disabled claimant's work history establishes an alternate base period without having to go back more than 3 years to start the period, NRS 612.344 applies.

For these reasons, we reverse and remand for further proceedings consistent with this opinion.

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

CHARLES DORNBACH; AND JAKE HUBER, PETITIONERS, *v.* THE TENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CHURCHILL; AND THE HONORABLE THOMAS L. STOCKARD, DISTRICT JUDGE, RESPONDENTS, AND FRANCIS A. ELLINGWOOD, TRUSTEE OF THE FRANCIS A. ELLINGWOOD TRUST; PAUL THOMAS BRUNELLE AND SUSAN GAYLENE BRUNELLE, TRUSTEES OF THE BRUNELLE FAMILY TRUST; EDELTRAUT RUPPEL, SUCCESSOR TRUSTEE OF THE RUPPEL FAMILY TRUST; STUART V. DAWSON, TRUSTEE OF THE STUART V. DAWSON REVOCABLE TRUST; JURGE SCHLICKER; MICHAEL J. SOUTHARD, SUCCESSOR TRUSTEE OF THE JEAN PIERRE IRISSARY 2005 RESTATEMENT OF THE 1993 REVOCABLE TRUST; AND JOSEPH LOUDEN AND LINDA LOUDEN, HUSBAND AND WIFE, REAL PARTIES IN INTEREST.

No. 62771

May 15, 2014 324 P.3d 369

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss a complaint under NRCP 16.1(e).

Plaintiff brought action against defendants, seeking a deficiency judgment. The district court denied defendants' motion to dismiss case without prejudice for plaintiff's failure to hold an early case conference and file case conference report within set deadlines. Defendants petitioned for writ of mandamus. The supreme court, PARRAGUIRRE, J., held that: (1) petition for writ of mandamus was appropriate avenue for review; (2) deadlines to hold early case conference and file conference report began when defendant appeared, not when defendant answered complaint; (3) plaintiff's failure to comply with deadlines did not warrant dismissal without prejudice; and (4) compelling and extraordinary circumstances justified extension of deadlines.

Petition denied.

Robison, Belaustegui, Sharp & Low and *Mark G. Simons*, Reno, for Petitioners.

Jeffrey K. Rahbeck, Zephyr Cove, for Real Parties in Interest.

1. MANDAMUS; PRETRIAL PROCEDURE.

Petition for writ of mandamus was appropriate avenue through which to seek review of the district court's denial of defendant's motion to dismiss without prejudice due to plaintiff's failure to hold early case conference and file conference report without set deadlines; because rule requiring such conference and report was relevant in nearly all civil cases, its construc-

tion and application involved important legal issues in need of clarification, consideration of the petition promoted judicial economy and administration because questions concerning the early case conference necessarily arose early in the proceedings, affected the remainder of the case, and could not be adequately addressed on appeal after a case has proceeded through the full extent of litigation. NRCP 16.1(e).

2. Mandamus.
   The supreme court has discretion to consider a petition for a writ of mandamus.
3. 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.
4. Mandamus.
   A writ of mandamus is not available when an adequate and speedy legal remedy exists.
5. Mandamus.
   The supreme court generally declines to consider writ of mandamus petitions that challenge interlocutory district court orders denying motions to dismiss because an appeal from a final judgment is an adequate legal remedy.
6. Mandamus.
   The supreme court may consider petitions for writ of mandamus challenging interlocutory orders if an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.
7. Pretrial Procedure.
   Deadlines for a plaintiff to hold an early case conference and file case conference report began to run upon a defendant's appearance, not the filing of an answer; "appearance" and "answer" had different, well-settled definitions, such that the time periods set forth in rule governing conference and report unambiguously began to run when a defendant appeared, regardless of whether that appearance was by motion or answer. NRCP 16.1(e).
8. Pretrial Procedure.
   A plaintiff is required to hold an early case conference, where the parties must confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement. NRCP 16.1(b)(1).
9. Appeal and Error.
   A district court's interpretation of court rules is reviewed de novo.
10. Courts.
    The rules of statutory interpretation apply to the rules of civil procedure.
11. Courts.
    Unambiguous language in a rule of civil procedure is given its ordinary meaning unless it is clear that this meaning was not intended.
12. Pretrial Procedure.
    Plaintiff's failure to comply with deadlines to hold early case conference and file conference report did not warrant dismissal of action without prejudice, where defendant's motion to dismiss remained pending for several months due to the district court's own delays, while this motion was pending, defendant did not file an answer to the complaint, and, although plaintiff had a duty to hold the early case conference and file the case conference report even without defendant having answered the complaint, doing so may have been fruitless. NRCP 16.1(e).

13. Pretrial Procedure.
When exercising its discretion in determining whether to dismiss a complaint without prejudice due to a plaintiff's failure to hold an early case conference and file the conference report within the set deadlines, a district court should consider factors such as the length of the delay, whether the defendant caused the delay, whether the delay has otherwise impeded the timely prosecution of the case, general considerations of case management, or whether the plaintiff has provided good cause for the delay. NRCP 16.1(e).

14. Pretrial Procedure.
Compelling and extraordinary circumstances justified extension of deadlines to hold early case conference and file conference report; delays were caused by death of county's only sitting district judge, which resulted in defendant's motion to dismiss pending for approximately 11 months, and it was entirely reasonable for plaintiff to want a ruling on the motion to dismiss prior to holding the conference to maximize the utility of the conference. NRCP 16.1(e).

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

NRCP 16.1(b) directs plaintiffs in civil cases to meet and confer with defendants concerning how to best manage the litigation and discovery. Thereafter, a report on the case conference must be filed. NRCP 16.1(c). When a plaintiff fails to meet the deadlines for complying with these provisions, a district court may dismiss the complaint without prejudice under NRCP 16.1(e).

In this original writ proceeding, we discuss the extent to which a district court has discretion to deny an NRCP 16.1(e) motion to dismiss and to order the parties to meet and confer beyond the rule's deadlines. We conclude that a district court may consider its own internal delays when deciding an NRCP 16.1(e) motion to dismiss, and that, here, the district court properly exercised its discretion by extending the deadlines of NRCP 16.1 after finding that compelling and extraordinary circumstances warranted the extension. Accordingly, we deny the petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

On December 6, 2011, real party in interest Francis A. Ellingwood, as trustee for the Francis A. Ellingwood Trust, and other plaintiffs (collectively, Ellingwood) filed a complaint for a deficiency judgment against petitioners Charles Dornbach and Jake Huber (collectively, Dornbach) in the Churchill County district court. On February 27, 2012, Dornbach filed a motion to dismiss for failure to state a claim pursuant to NRCP 12(b)(5). Due to the death of Churchill County's only sitting district judge and related delays

in the district court, the hearing on the NRCP 12(b)(5) motion did not occur until January 7, 2013, and the motion was eventually denied. While the motion remained pending, Dornbach did not file an answer to Ellingwood's complaint.

On December 6, 2012, 284 days after Dornbach filed the NRCP 12(b)(5) motion, Dornbach filed a motion to dismiss the case without prejudice due to Ellingwood's failure to comply with NRCP 16.1(e), which allows a district court to dismiss a case if the plaintiff fails to hold an early case conference and file the case conference report within set deadlines. The district court implicitly recognized that Ellingwood failed to comply with the rule but denied Dornbach's motion, explaining that the death of the district judge and the significant resulting delays constituted compelling and extraordinary circumstances that justified extending the NRCP 16.1 deadlines. Dornbach then sought a writ of mandamus from this court to compel the district court to dismiss the case.

DISCUSSION

In this petition, Dornbach argues that the district court improperly denied the NRCP 16.1 motion to dismiss and ordered the parties to meet and confer after the NRCP 16.1 deadlines expired.

Whether to consider the petition for a writ of mandamus

[Headnotes 1-6]

We have discretion to consider a petition for a writ of mandamus. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 558-59 (2008). "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." *Id.* at 197, 179 P.3d at 558. A writ is not available, however, "when an adequate and speedy legal remedy exists." *Id.* Generally, we "decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss" because an appeal from a final judgment is an adequate legal remedy. *Id.* Nevertheless, we may consider such petitions if "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id.* at 197, 179 P.3d at 559.

Because NRCP 16.1 is relevant in nearly all civil cases, its construction and application involve important legal issues in need of clarification. *See id.* at 198, 179 P.3d at 559. Moreover, although we ultimately determine that writ relief is not warranted, our consideration of this petition promotes judicial economy and administration because questions concerning the early case conference necessarily arise early in the proceedings, affect the remainder of the case, and cannot be adequately addressed on appeal after a case has proceeded

through the full extent of litigation. Therefore, we will consider the petition.

The meaning of "appearance" in NRCP 16.1(e)

[Headnotes 7-11]

NRCP 16.1(b)(1) requires a plaintiff to hold an early case conference, where the parties must "confer and consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement." NRCP 16.1(c) requires the parties to file a report regarding the conference with the district court. In order "to promote the prosecution of litigation within adequate timelines," *Arnold v. Kip*, 123 Nev. 410, 415, 168 P.3d 1050, 1053 (2007), deadlines are given for both the early case conference and the report. NRCP 16.1(b)(1) provides that the early case conference must be held within 30 days after the defendant files an answer to the complaint, and this deadline may be extended no later than 180 days from when the defendant's appearance is served, unless compelling and extraordinary circumstances justify an extension. The case conference report must be filed within 30 days after the conference. NRCP 16.1(c). NRCP 16.1(e) provides, in relevant part, that the district court may dismiss a case if these deadlines, with any extensions, are not followed:

> (1) If the conference . . . is not held within 180 days after an *appearance* by a defendant, the case *may* be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice, unless there are compelling and extraordinary circumstances for a continuance beyond this period.
>
> (2) If the plaintiff does not file a case conference report within 240 days after an *appearance* by a defendant, the case *may* be dismissed as to that defendant upon motion or on the court's own initiative, without prejudice.

(Emphases added.)

While Dornbach and Ellingwood agree that NRCP 16.1(e)'s deadlines began running when Dornbach made his first "appearance" in district court, they disagree as to when this appearance occurred. Dornbach argues that he first appeared by filing the NRCP 12(b)(5) motion to dismiss and that NRCP 16.1(e)'s deadlines ran from this date. Ellingwood argues that a defendant does not appear for purposes of NRCP 16.1(e) until filing an answer to the complaint. According to Ellingwood, because Dornbach had not yet answered Ellingwood's complaint when Dornbach filed the NRCP 16.1(e) motion to dismiss, the rule's deadlines had not expired, and the district court therefore properly denied Dornbach's motion.

Ellingwood points to NRCP 16.1(b)(1)'s requirement that the early case conference be held "within 30 days after filing of an *answer* by the first answering defendant." (Emphasis added.) Because

NRCP 16.1(b)(1) uses the word "answer" while NRCP 16.1(e) uses the word "appearance," Ellingwood argues that the rule is ambiguous and this court should interpret "appearance" in NRCP 16.1(e) as being synonymous with "answer." We find this argument unpersuasive.

"A district court's interpretation of court rules is reviewed de novo." *Moon v. McDonald, Carano & Wilson, L.L.P.*, 126 Nev. 510, 512, 245 P.3d 1138, 1139 (2010). "[T]he rules of statutory interpretation apply to Nevada's Rules of Civil Procedure." *Webb ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). Unambiguous language in a rule "is given 'its ordinary meaning unless it is clear that this meaning was not intended.' " *State, Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 386, 254 P.3d 601, 603 (2011) (quoting *State, Dep't of Taxation v. DaimlerChrysler Servs. N. Am., L.L.C.*, 121 Nev. 541, 543, 119 P.3d 135, 136 (2005)).

An "appearance" is "[a] coming into court as a party or interested person, . . . esp[ecially] a defendant's act of taking part in a lawsuit . . . by an answer, demurrer, *or motion*." *Black's Law Dictionary* 113 (9th ed. 2009) (emphasis added). In contrast, an "answer" is "[a] defendant's first pleading that addresses the merits of the case." *Id.* at 107. Because "appearance" and "answer" have different, well-settled definitions, we conclude that the time periods set forth in NRCP 16.1(e) unambiguously begin to run when a defendant appears, regardless of whether that appearance is by motion or answer.

It is undisputed that Dornbach filed the NRCP 12(b)(5) motion more than 240 days before filing the NRCP 16.1(e) motion. Filing the NRCP 12(b)(5) motion constituted Dornbach's appearance, and because the NRCP 16.1(e) time periods begin to run when a defendant appears, the NRCP 16.1(e) deadlines expired before Dornbach filed the NRCP 16.1(e) motion to dismiss.

The district court did not arbitrarily or capriciously exercise its discretion by denying Dornbach's motion to dismiss

[Headnote 12]

NRCP 16.1(e)(1) and (2) provide that a "case *may* be dismissed" if a plaintiff fails to comply with the rule's deadlines. (Emphasis added.) Based on this permissive language, this court has repeatedly recognized a district court's discretion to dismiss a case under NRCP 16.1(e). For example, in *Arnold v. Kip*, we upheld a district court's order of dismissal, explaining that "[t]he decision to dismiss an action without prejudice for a plaintiff's failure to comply with the timing requirements of NRCP 16.1(e)(2) remains *within the district court's discretion*." 123 Nev. at 415, 168 P.3d at 1053 (emphasis added). In evaluating an NRCP 16.1(e)(2) dismissal in

Moon v. McDonald, Carano & Wilson, L.L.P., we again noted that "the district court exercised its *discretion* to dismiss [the plaintiffs'] case." 126 Nev. at 514, 245 P.3d at 1140 (emphasis added).

[Headnote 13]

Nevertheless, Dornbach argues that the district court's reasoning was arbitrary and capricious because a district court's internal delays are not among the relevant factors for deciding an NRCP 16.1(e) motion to dismiss. When exercising its discretion under NRCP 16.1(e), a district court should consider factors such as "the length of the delay, whether the defendant . . . caused the delay, whether the delay has otherwise impeded the timely prosecution of the case, general considerations of case management . . . , or whether the plaintiff has provided good cause for the delay." *Arnold*, 123 Nev. at 415-16, 168 P.3d at 1053. This list of factors is "nonexhaustive," *id.*, and we have recognized, "as a proper guide to the exercise of discretion, the basic underlying policy to have each case decided upon its merits." *Hotel Last Frontier Corp. v. Frontier Props., Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963). Further, although the NRCP 16.1(e) deadlines unambiguously begin to run upon a defendant's appearance, we have stated that it may be "fruitless" to hold a case conference before a defendant has filed an answer to the complaint simply for the purpose of complying with NRCP 16.1. *Dougan v. Gustaveson*, 108 Nev. 517, 522, 835 P.2d 795, 799 (1992), *abrogated on other grounds by Arnold*, 123 Nev. at 415, 168 P.3d at 1053.

Here, Dornbach's NRCP 12(b)(5) motion to dismiss remained pending for several months due to the district court's own delays, and while this motion was pending, Dornbach did not file an answer to the complaint. Although Ellingwood had a duty to hold the early case conference and file the case conference report even without Dornbach having answered the complaint, doing so may have been fruitless. *See Dougan*, 108 Nev. at 522, 835 P.2d at 799. In addition, the district court's internal delays are relevant to "general considerations of case management." *See Arnold*, 123 Nev. at 416, 168 P.3d at 1053. Therefore, we conclude that the district court's consideration of its internal delays and their effects on the progression of the case was not improper, and thus, the district court did not arbitrarily or capriciously exercise its discretion by denying Dornbach's motion to dismiss.

The district court did not arbitrarily or capriciously exercise its discretion by ordering the parties to comply with NRCP 16.1 after the deadlines expired

[Headnote 14]

Dornbach also argues that the district court improperly ordered the parties to comply with NRCP 16.1 after the deadlines expired.

NRCP 16.1(b)(1) provides in relevant part: "Absent compelling and extraordinary circumstances, neither the court nor the parties may extend the time [for holding the conference] to a day more than 180 days after an appearance is served by the defendant in question."

We have recognized "the inherent power of the judiciary to economically and fairly manage litigation." *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004). Adherence to deadlines promotes the efficient prosecution of cases, *Arnold*, 123 Nev. at 415, 168 P.3d at 1053, but so does allowing district courts to manage the cases before them. *See Borger*, 120 Nev. at 1029, 102 P.3d at 606.

Here, the district court explicitly found that the death of the district judge and the resulting delays were extraordinary circumstances that justified an extension of the deadline for the conference. But Dornbach argues that the district court's own delays could not justify an extension because they did not impact Ellingwood's ability to hold the conference.

Even though NRCP 16.1(b)(1) generally precludes a district court from extending the deadline for the NRCP 16.1 conference, a district court also has inherent authority to manage a case, including the authority to order parties to meet and confer. *See Borger*, 120 Nev. at 1029, 102 P.3d at 606. Moreover, a district court has the express authority to extend the deadline for the conference where warranted by compelling and extraordinary circumstances. NRCP 16.1(b)(1). NRCP 16.1(b)(1) does not explicitly state that these compelling and extraordinary circumstances cannot arise from within the district court itself, and we decline to determine that the rule implicitly creates such a limitation. *See Webb*, 125 Nev. at 618, 218 P.3d at 1244 (stating that "the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure"). Therefore, a district court's consideration of its own internal delays may, in certain circumstances, be relevant to determining whether compelling and extraordinary circumstances justify an extension under NRCP 16.1(b)(1).

In this case, we conclude that the district court did not arbitrarily or capriciously exercise its discretion by finding that the judge's death and the substantial resulting delays constituted compelling and extraordinary circumstances. Indeed, the record shows that Dornbach's NRCP 12(b)(5) motion to dismiss was pending for approximately 11 months because of these delays. It was entirely reasonable for Ellingwood to want a ruling on this motion prior to holding the conference in order to maximize the conference's utility. *Cf.* NRCP 16.1(b)(1) (requiring the parties to "consider the nature and basis of their claims and defenses" at the early case conference); *Dougan*, 108 Nev. at 522, 835 P.2d at 799 (recognizing that, in certain circumstances, it may be "fruitless" to hold a case conference simply for the purpose of complying with NRCP 16.1's deadlines). As a

result, we conclude that the district court did not act arbitrarily or capriciously by extending the deadline for the NRCP 16.1 conference beyond 180 days.

CONCLUSION

The deadlines set forth in NRCP 16.1(e) clearly begin to run upon a defendant's appearance, not the filing of an answer, and therefore these deadlines expired before Dornbach filed a motion to dismiss Ellingwood's complaint pursuant to NRCP 16.1(e). But the district court explicitly found that compelling and extraordinary circumstances excused Ellingwood's delay and justified an extension of time to complete the conference and the report. As a result, we cannot conclude that the rule requires dismissal here, or that the district court acted arbitrarily and capriciously by denying Dornbach's motion to dismiss and ordering the parties to meet and confer. Accordingly, we deny the petition for a writ of mandamus.

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

SHAFIQ AHMED AFZALI, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54019

May 29, 2014 326 P.3d 1

Appeal from a judgment of conviction, pursuant to a jury verdict, of 11 counts of lewdness with a child, 15 counts of sexual assault of a child under 14 years of age, 2 counts of first-degree kidnapping, 1 count of second-degree kidnapping, 3 counts of battery with intent to commit a crime, 3 counts of using a minor in the production of pornography, and 22 counts of possession of child pornography. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

The supreme court, HARDESTY, J., held that defendant was entitled to information relating to racial composition of three grand juries that indicted him and of 100-person venires from which grand juries were selected, in whatever form and by whatever means, so that the defendant could assess whether grand juries were selected from fair cross-section of community.

Remanded.

[Rehearing denied September 22, 2016]

Philip J. Kohn, Public Defender, and *Sharon G. Dickinson*, Deputy Public Defender, Clark County, for Appellant.

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

1. GRAND JURY.
   A person has the right to have the grand jury selected from a fair cross-section of the community.
2. COURTS.
   The Nevada Supreme Court is bound by United States Supreme Court precedent.
3. GRAND JURY.
   Defendant was entitled to information relating to racial composition of three grand juries that indicted him on multiple sex offenses and of 100-person venires from which grand juries were selected, in whatever form and by whatever means, so that the defendant could assess whether grand juries were selected from fair cross-section of community. U.S. CONST. amend. 14.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Appellant Shafiq Ahmed Afzali asserts that the district court violated his constitutional rights by obstructing his ability to challenge the racial composition of the three grand juries that indicted him.[1] Prior to his trial, Afzali requested information that would identify the racial composition of the three separate grand juries that indicted him, and the 100-person venires from which the grand jurors were selected. The district court denied him the requested information.

Afzali argues that he had the right to challenge the grand jury selection process under either the Equal Protection or the Due Process Clauses of the United States Constitution, but that he was unable to determine whether he had a viable challenge to the racial composition of the three grand juries that indicted him because the court failed to provide the information requested.

We conclude that Afzali has a right to the information he requested. Without this information, Afzali's ability to show a potential violation of his constitutional right to a grand jury drawn from a fair cross-section of the community is limited. Therefore, we conclude that a limited remand is necessary for the district court to conduct further proceedings consistent with this opinion.

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[1]Afzali raises a number of additional issues on appeal. However, because we determine that a limited remand is necessary, we do not address those issues at this time.

FACTS AND PROCEDURAL HISTORY

In July 2007, Afzali was charged by indictment with 17 felony counts regarding crimes of a sexual nature against 3 children. He was then charged by a superseding indictment with 42 felony counts regarding crimes of a sexual nature based on his acts against the 3 child victims and the 25 images of child pornography he possessed. He was later charged by a final second superseding indictment with 63 felony counts regarding crimes of a sexual nature.

In October 2007, Afzali filed a motion requesting information on the selection process for the grand jury, the racial composition of the three grand juries that indicted him, and the racial composition of the entire 100-person venires from which those grand jurors were chosen. He stated that his request was being made to evaluate whether he had grounds to bring an equal protection or due process challenge to the make-up of the three grand juries or the grand jury selection process.

The district court held two hearings on the motion. During the first hearing, Afzali's counsel stated that she was concerned about the grand jury selection process and the ethnic background of the grand jury. The district court explained that it had no such information, but would inquire of the then-sitting chief judge about the procedure for obtaining the information Afzali was requesting. During the second hearing, the district court provided Afzali with information on the grand jury selection process; however, it explained that race information did not exist. It also explained that the records of all potential grand jurors were shredded, except for the records of those 50 potential grand jurors selected by the judges from the 100-person pool.[2]

In November 2007, the Eighth Judicial District Court Administration (Eighth District) filed a motion to quash a subpoena duces tecum served on the jury commissioner by Afzali's counsel. The subpoena sought the names and contact information for the 100-person venires for each of the three grand juries that indicted Afzali. The next month the district court conducted hearings on the Eighth District's motion to quash. Ultimately, the district court concluded that the Eighth District handled the information Afzali was requesting, not the jury commissioner; the personal information of the 50 potential grand jurors was destroyed but their contact information

[2]Under NRS 6.110, the selection of the grand jury begins when the clerk of the court solicits 500 qualified persons at random and mails a questionnaire to those selected. The names of the first 100 persons who return the completed questionnaire to the clerk are submitted to the district court judges for that judicial district. NRS 6.110(1). The district court judges then select one name from the list until 50 persons have been selected, at which time the clerk issues a venire. NRS 6.110(2). Finally, the presiding district court judge selects 17 persons at random from the 50-person group to serve as the grand jury. NRS 6.110(3).

was preserved; and Afzali was "entitled to it." The district court granted the motion to quash as to the jury commissioner but denied it as to the Eighth District because only the latter had access to the information requested.

In January 2008, the district court conducted a hearing on the disclosure of the grand jury contact information. Afzali's counsel asserted that, if given the contact information for the 50 potential grand jurors, she would conduct an independent investigation on the racial composition of that group. The State objected, arguing that the disclosure would violate the secrecy of the grand jury. In a compromise, the district court asked Afzali's counsel to draft a questionnaire to be given to the 50 potential jurors. The district judge stated that he would then provide that questionnaire to the jury commissioner and the chief judge, who supervises the grand jury.

In March 2008, then-Chief Judge Hardcastle entered an order denying Afzali's request for the grand jury contact information. In denying Afzali's request, Judge Hardcastle reviewed Afzali's questionnaire and determined that "the proper procedure and notice to all interested parties to challenge the methods used to select the grand jury has not been followed." In June 2008, Afzali requested a hearing on Judge Hardcastle's order, arguing that he had followed the district court's direction in requesting the grand jury contact information. The district court did not grant the request, but admitted, "I don't know we know the procedure."

Afzali's trial took place in March 2009, and the jury ultimately found Afzali guilty as to counts 4-39, 42-54, and 56-63. The jury was hung as to counts 1-3, and found Afzali not guilty as to counts 40, 41, and 55. The district court entered its judgment of conviction in June 2009. This appeal followed.[3]

DISCUSSION

Afzali contends that without access to information about the racial composition of the three grand jury pools that indicted him, he has no way to know whether he has grounds to bring a challenge to the grand jury selection process under the Equal Protection Clause or the Due Process Clause. We agree.

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[3]In November 2007, during the time Afzali was attempting to obtain the information on the grand jury, he also filed a petition for writ of habeas corpus. He argued that the district court's grand jury selection process violated his constitutional and statutory rights because the destruction of records concerning proposed grand jurors prevented him from obtaining the evidence necessary to support any challenge to the racial composition of the grand jury. The State filed a return, arguing that it was not part of the grand jury selection process and it thus could not address that process. In December 2008, prior to the filing of this appeal, the district court denied the petition.

[Headnote 1]

The United States Supreme Court has held that "the criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded." *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986). Furthermore, a person has the right to have the grand jury selected from a fair cross-section of the community. *Adler v. State*, 95 Nev. 339, 347, 594 P.2d 725, 731 (1979) ("[I]t is settled that a grand jury must be drawn from a cross-section of the community, and there must be no systematic and purposeful exclusion of an identifiable class of persons.").

A federal statute was enacted in order to squarely address a defendant's right to obtain the information necessary to mount challenges to the composition of the grand jury in federal court. *See* 28 U.S.C. § 1867(f) (2006) (allowing parties who are preparing a motion to challenge the grand jury composition to have access to "[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process"). In analyzing this statute, the United States Supreme Court stated that its purpose was to ensure grand juries were selected at random from a fair cross-section and noted that "without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge." *Test v. United States*, 420 U.S. 28, 30 (1975).

[Headnotes 2, 3]

Certainly, Nevada is not bound by this federal statute, and it does not have a state statute providing the right to inspect grand jury records. Nevertheless, this court is bound by Supreme Court precedent, and in *Adler*, we recognized that a defendant has a constitutional right to a grand jury drawn from a fair cross-section of the community. 95 Nev. at 347, 594 P.2d at 731. As the Supreme Court of Missouri noted when considering this same issue, "[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980). Thus, we hold that Afzali is entitled to information relating to the racial composition of the grand jury so that he may assess whether he has a viable constitutional challenge.

Based on our holding, we conclude that a limited remand is necessary in order for the district court to make available to Afzali the information he requested. On remand, the district court should first determine whether information is available on the racial composition of the three grand juries that indicted Afzali and on the 100-person venires from which those jurors were chosen, in what-

ever form and by whatever means.[4] We recognize that during the prior district court hearings surrounding Afzali's request, there was some confusion as to what information was actually retained by the district court regarding the grand jury pools involved in Afzali's indictments. The record demonstrates that at least the contact information for the 50 proposed grand jurors was available. Once the district court obtains the information, it should be provided to Afzali so that he can determine whether he has grounds for a fair cross-section challenge. If he determines that there is a viable challenge, he should make the challenge in the district court so that the court can resolve the matter and enter appropriate findings of facts and conclusions of law. This court can then review that decision, if challenged. If the district court is unable to provide the requested information after exploring all possible avenues, then the district court should enter appropriate findings and certify them to this court. This court will then determine whether the failure to provide this information requires reversal of the judgment of conviction. The district court shall have 90 days to conduct the necessary proceedings required as a result of the limited remand of this matter.

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

STEPHANIE BRASS, AS PERSONAL REPRESENTATIVE FOR RONNIE DANELLE BRASS, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 56146

May 29, 2014 325 P.3d 1256

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit kidnapping and murder, first-degree kidnapping, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Defendant died while appeal was pending and personal representative of his estate was appointed. Personal representative filed motion to abate judgment of conviction due to defendant's death. The supreme court, DOUGLAS, J., held that: (1) as matter of first impression, direct appeal from convictions would continue upon substitution of defendant's mother as personal representative of

[4]For example, contact information may be available through payroll records pertaining to grand jurors who served, *see* NRS 6.150 (grand juror fees), or from the transcripts of the grand jury proceedings. Thus, if the racial composition of those jurors is not otherwise known, the district court may need to contact the grand jurors in order to obtain the necessary information.

his estate, who would prosecute his appeal; and (2) dismissal of prospective juror after defendant raised *Batson* challenge, before defendant was allowed to respond to State's proffered race-neutral reason for exercise of peremptory challenge or to show pretext, was structural error.

Reversed.

David M. Schieck, Special Public Defender, and *JoNell Thomas* and *Michael W. Hyte*, Deputy Special Public Defenders, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *David L. Stanton* and *Nancy A. Becker*, Deputy District Attorneys, Clark County, for Respondent.

1. Criminal Law.
   Defendant's direct appeal from convictions for kidnapping, murder, and other crimes would continue upon substitution of defendant's mother as personal representative of his estate, following defendant's death while appeal was pending.
2. Jury.
   The district court's dismissal of prospective juror after defendant raised *Batson* challenge, before defendant was allowed to respond to State's proffered race-neutral reason for exercise of peremptory challenge or to show pretext, was functional equivalent of racially discriminatory peremptory challenge amounting to structural error warranting reversal of convictions for murder, kidnapping, and related offenses. U.S. Const. amend. 14.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this opinion, we consider whether a judgment of conviction must be vacated and the prosecution abated when a criminal defendant dies while his or her appeal from the judgment is pending. We hold that although a deceased appellant is not entitled to have his or her judgment of conviction vacated and the prosecution abated, a personal representative may be substituted as the appellant and continue the appeal when justice so requires. In this appeal, we reverse the judgment of conviction based on an error during jury selection.

FACTS

The State charged Ronnie Brass and his brother, Jermaine Brass, as codefendants with burglary, grand larceny, conspiracy to commit kidnapping, first-degree kidnapping, conspiracy to commit murder,

and murder with the use of a deadly weapon. Jermaine and Ronnie jointly filed a motion to sever their trials. The district court denied the motion, and the two were tried together.

During voir dire, defense counsel argued that the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986), because it exercised a peremptory challenge to exclude prospective juror no. 173 not based on lack of qualifications, but based on the prospective juror's race. Prior to holding a hearing on Jermaine and Ronnie's *Batson* challenge, the district court excused a number of prospective jurors, including prospective juror no. 173. Subsequently, the district court conducted the *Batson* hearing and—after concluding that the State had race-neutral reasons for its peremptory challenge—denied the defense's *Batson* challenge.

At the conclusion of the trial, the jury found Jermaine guilty on all six counts and found Ronnie guilty on four counts, excluding burglary and grand larceny. The brothers filed separate appeals.

In Jermaine's appeal, this court reversed his conviction and remanded the matter for a new trial based on our conclusion that the district court committed reversible error during the jury selection phase of Jermaine and Ronnie's trial. *See Brass v. State*, 128 Nev. 748, 291 P.3d 145 (2012). Specifically, we held that "[Jermaine and Ronnie] were not afforded an adequate opportunity to respond to the State's proffer of race-neutral reasons [for its peremptory challenge of juror no. 173] or to show pretext because the district court permanently excused juror no. 173 before holding a *Batson* hearing," and that such dismissal of juror no. 173 "had the same effect as a racially discriminatory peremptory challenge because even if [Jermaine and Ronnie] were able to prove purposeful discrimination, they would be left with limited recourse." *Id.* at 754, 291 P.3d at 149. We concluded that reversal of Jermaine's conviction was warranted because the "discriminatory jury selection constitute[d] structural error that was intrinsically harmful to the framework of the trial." *Id.*

On appeal, Ronnie raises the same *Batson* issue. However, after the parties completed briefing in this matter, Ronnie died while in prison. The district court appointed his mother, Stephanie Brass, as his personal representative, and she substituted in as a party to this appeal under NRAP 43. Upon substitution, Stephanie filed a motion to abate Ronnie's judgment of conviction due to his death. Stephanie's motion presents a novel issue in Nevada: Should a judgment of conviction be vacated and the criminal prosecution abated when a defendant dies while his or her appeal from the judgment of conviction is pending?

DISCUSSION

There are three general approaches when a criminal defendant dies while his or her appeal from a judgment of conviction is pend-

ing: (1) abate the judgment *ab initio*, (2) allow the appeal to be prosecuted, or (3) dismiss the appeal and let the conviction stand. Tim A. Thomas, Annotation, *Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction—Modern Cases*, 80 A.L.R. 4th 189 (1990). We will discuss each approach in turn.

Abatement ab initio

Abatement *ab initio* is the abatement of all proceedings in a prosecution from its inception. *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983). This requires an appeal to be dismissed and the case remanded to the district court with instructions to vacate the judgment and dismiss the indictment or information. *Id.* Courts that apply the abatement *ab initio* doctrine believe that when death deprives a defendant of the right to an appellate decision, justice prohibits that defendant from standing convicted without a court resolving his or her appeal on its merits. *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977). Many state courts employ this approach. *See State v. Griffin*, 592 P.2d 372, 372-73 (Ariz. 1979); Thomas, *supra*, 80 A.L.R. 4th at 191.

Allow the appeal to continue

Some jurisdictions have determined that a defendant who dies while pursuing an appeal from a judgment of conviction is not entitled to have the criminal proceedings abated *ab initio*; they instead resolve the appeal on its merits. *See, e.g.*, *State v. Makaila*, 897 P.2d 967, 969 (Haw. 1995) (citing cases that follow this approach). These courts have rationalized that " 'it is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and decided by the appellate process.' " *State v. McDonald*, 424 N.W.2d 411, 414-15 (Wis. 1988) (quoting *Commonwealth v. Walker*, 288 A.2d 741, 742 n.* (Pa. 1972)). Some courts allow the appeal to continue only if a personal representative is substituted for the deceased appellant, *Makaila*, 897 P.2d at 972; *State v. McGettrick*, 509 N.E.2d 378, 382 (Ohio 1987); however, other courts decline to impose this requirement. *See State v. Jones*, 551 P.2d 801, 803-04 (Kan. 1976); *see also McDonald*, 424 N.W.2d at 415.

Dismiss the appeal and let the conviction stand

Courts that have dismissed the appeal and let the conviction stand have done so on mootness grounds or out of public policy considerations. *See State v. Trantolo*, 549 A.2d 1074, 1074 (Conn. 1988) (finding that where an appeal would not affect the interests of a

decedent's estate, it was moot); *Perry v. State*, 575 A.2d 1154, 1156 (Del. 1990) (finding that there was no real party in interest because a cause of action based upon a penal statute did not survive death, thus the appeal was moot); *State v. Korsen*, 111 P.3d 130, 135 (Idaho 2005) (holding that the provisions of a judgment of conviction related to custody or incarceration are abated upon the death of the defendant during the pendency of a direct appeal, but provisions of the judgment of conviction pertaining to payment of court costs, fees, and restitution remain intact because those provisions were meant to compensate the victim); *Whitehouse v. State*, 364 N.E.2d 1015, 1016 (Ind. 1977) (finding that the right to appeal was personal and exclusive to the defendant and that any civil interests of third parties may be separately litigated).

The appeal shall continue

The abatement *ab initio* and outright dismissal approaches are extreme and have substantial shortcomings. Vacating the judgment and abating the prosecution from its inception undermines the adjudicative process and strips away any solace the victim or the victim's family may have received from the appellant's conviction. Outright dismissal could prevent a defendant's family from potentially clearing a loved one's name. And both approaches would preclude this court from correcting a deprivation of an individual's constitutional rights. Although the appellant is deceased, rectifying a constitutional error nevertheless benefits society because it decreases the chances that another person would fall victim to the same error.

[Headnote 1]

We now adopt the position articulated in *Makaila* and allow a deceased criminal defendant's direct appeal to continue upon proper substitution of a personal representative pursuant to NRAP 43 when justice so requires.[1] This approach allows all parties to present arguments, and then, the court can make an informed decision regarding the validity of the deceased appellant's conviction. Further, a challenge to the regularity of Nevada's criminal process presents a live controversy regardless of the appellant's status because, as stated in *Commonwealth v. Walker*, 288 A.2d 741 (Pa. 1972), society has an interest in the constitutionality of the criminal process. Therefore, we deny Stephanie's motion for abatement *ab initio* but conclude that, as Ronnie's properly substituted personal representative, she is entitled to continue his appeal.

[1]*Cf. State v. Salazar*, 945 P.2d 996, 1003-04 (N.M. 1997) (noting that appellate courts may consider "the best interests of [a] decedent's estate, [any] remaining parties, or society" in determining whether an appeal may continue after an appellant's death).

[2]Stephanie raises several other issues on appeal. But, in light of our determination regarding the *Batson* challenge, we need not address these additional issues.

[3]A remand for further proceedings is unnecessary because Ronnie cannot be retried.

Ronnie's appeal

[Headnote 2]

Stephanie asserts that the district court erred in denying Ronnie's *Batson* challenge.[2] In Jermaine's appeal, we concluded that a reversal of his judgment of conviction was warranted because the district court's mishandling of Jermaine and Ronnie's *Batson* challenge was intrinsically harmful to the trial's framework. *Brass*, 128 Nev. at 754, 291 P.3d at 149. Ronnie suffered the same harm as Jermaine and is entitled to the same relief. We recognize that the jury found sufficient evidence to convict Ronnie of the conspiracy, kidnapping, and murder charges.

However, the jury was not properly constituted, and its decision does not override the constitutional error Ronnie suffered. Accordingly, we reverse the judgment of conviction.[3]

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

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[2]Stephanie raises several other issues on appeal. But, in light of our determination regarding the *Batson* challenge, we need not address these additional issues.

[3]A remand for further proceedings is unnecessary because Ronnie cannot be retried.