District Council's subsequent ratification of this appeal . . . , four days after the expiration of the statutory 30 day appeal period, does not defeat the timeliness of the filed appeal."); *City of Tulsa v. Okla. State Pension & Ret. Bd.*, 674 P.2d 10, 13 (Okla. 1983) (reversing court of appeals order dismissing an appeal as unauthorized and untimely because the public entity did not ratify the notice of appeal the city attorney filed until the time for appeal had passed; even "[i]rregular and void acts may be ratified or confirmed at a subsequent meeting, provided it is a valid or legal meeting"). The Commission properly ratified the appeal; it should be allowed to proceed.

For these reasons, I respectfully dissent.

MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; AND INKA, LLC, PETITIONERS, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE, RESPONDENTS, AND PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; AND CHARITY FITZLAFF, ALL ON BEHALF OF THEMSELVES AND ALL SIMILARLY SITUATED INDIVIDUALS, REAL PARTIES IN INTEREST.

No. 71289

May 31, 2018 419 P.3d 148

Original petition for a writ of mandamus or other extraordinary relief challenging a district court order concerning the interpretation of Nevada Constitution Article 15, Section 16.

Petition granted.

Clark Hill PLLC and *Nicholas M. Wieczorek, Deanna L. Forbush*, and *Jeremy J. Thompson*, Las Vegas, for Petitioners.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, Jordan J. Butler*, and *Don Springmeyer*, Las Vegas, for Real Parties in Interest.

Jackson Lewis P.C. and *Elayna J. Youchah* and *Phillip C. Thompson*, Las Vegas, for Amici Curiae Claim Jumper Acquisition Co., LLC; Landry's Inc.; Landry's Seafood House—Nevada, Inc.; Landry's Seafood House—Arlington, Inc.; Bubba Gump Shrimp Co. Restaurants, Inc.; Morton's of Chicago/Flamingo Road Corp.; and Bertolini's of Las Vegas, Inc.

Littler Mendelson and *Rick D. Roskelley, Kathryn B. Blakey, Roger L. Grandgenett, II*, and *Montgomery Y. Paek*, Las Vegas, for

Amici Curiae Briad Restaurant Group, LLC; Wendy's of Las Vegas, Inc.; Cedar Enterprises, Inc.; and Terrible Herbst, Inc.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

The Minimum Wage Amendment (MWA) to the Nevada Constitution allows an employer who provides health benefits to pay a minimum wage of one dollar per hour less than an employer who does not provide health benefits. In this case, we are asked to clarify what health benefits an employer must provide to qualify for this privilege. We answer that the MWA requires an employer who pays one dollar per hour less in wages to provide a benefit in the form of health insurance at least equivalent to the one dollar per hour in wages that the employee would otherwise receive. Because the district court applied the substantive requirements of NRS Chapters 608, 689A, and 689B, rather than the standard set forth in this opinion, we grant petitioners' request for extraordinary relief.

I.

A.

The MWA is the result of a voter initiative called "The Raise the Minimum Wage for Working Nevadans Act." Posed as a statewide ballot question in 2004 and 2006, the measure declared that "[n]o full-time worker should live in poverty in our state" and that "[r]aising the minimum wage is the best way to fight poverty." Secretary of State, Statewide Ballot Questions, Question No. 6, p. 35 (2006), http://nvsos.gov/sos/home/showdocument?id=206. It stated that "[l]iving expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families" and that a higher minimum wage would help "make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line." *Id.* After the measure passed in both 2004 and 2006, it became Article 15, Section 16 of the Nevada Constitution. In relevant part, the MWA reads:

> Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's

> dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living.

Nev. Const. art. 15, § 16(A).

When the MWA went into effect in 2006, the minimum wage was $5.15 per hour if an employer provided health benefits, and $6.15 if an employer did not provide health benefits. *See* Nev. Const. art. 15, § 16(A). The MWA requires that those wages be adjusted according to standards articulated in the text of the MWA itself. *See id.* Currently, as adjusted and annually announced by the Office of the Labor Commissioner, the upper-tier minimum wage is $8.25 per hour, and the lower-tier minimum wage is $7.25. *See* Press Release, State of Nevada Department of Business and Industry, *Nevada's minimum wage and daily overtime rates will not increase in 2017* (March 30, 2017), http://labor.nv.gov/uploadedFiles/labornvgov/content/Wages/2017%20Minimum%20Wage%20Press%20Release.pdf. To pay an employee the lower-tier minimum wage, the employer must "provide[ ] health benefits" to the employee. Nev. Const. art. 15, § 16. To provide health benefits means to make health insurance available to an employee and his or her dependents at a total cost to the employee for premiums not more than 10 percent of the employee's gross taxable income. *Id.*

B.

Real parties in interest include four named plaintiffs who sued on behalf of themselves and other similarly situated employees (collectively "employees"), alleging that their employers paid them the lower-tier minimum wage without providing sufficient health benefits under the MWA. Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (collectively "MDC") are the plaintiffs' employers and the defendants in the suit in district court.[1] The employees moved for summary judgment, arguing that the health insurance offered by MDC did not qualify MDC to pay the lower-tier minimum wage because it did not comply with Nevada statutes placing substantive requirements on health insurance.

The district court granted the employees' motion, determining that an employer only provides health benefits sufficient to pay the

[1]MDC and the employees previously came before us seeking to clarify what it means to *provide* health benefits, and we held that an employer may pay the lower-tier minimum wage if the employer offers or makes qualifying health insurance available, even if the employee does not enroll in a plan. *See MDC Rests., LLC v. Eighth Judicial Dist. Court ("MDC I")*, 132 Nev. 774, 779-80, 383 P.3d 262, 266-67 (2016).

MWA's lower-tier minimum wage if the employer offers health insurance that complies with NRS Chapters 608, 689A, and 689B. NRS Chapter 608 places substantive requirements on employer-provided health insurance and requires an employer who offers health benefits to provide insurance that complies with NRS Chapters 689A and 689B.[2] NRS Chapter 689A regulates "individual health insurance" and Chapter 689B regulates "group and blanket health insurance." Both chapters mandate when certain benefits must be covered, including coverage for expenses such as hospice care, prescription drugs, cancer treatment, the management and treatment of diabetes, severe mental illness, and alcohol or drug abuse. The district court reasoned that because the "limited benefit plans" offered by MDC did not satisfy the statutory requirements of NRS Chapters 608, 689A, and 689B, the plans were not "health insurance" under the MWA sufficient to qualify MDC to pay the lower-tier minimum wage.

MDC now requests a writ of mandamus directing the district court to vacate its order granting partial summary judgment and either (1) refer the employees to the Labor Commissioner for an initial consideration of their wage complaints; or (2) direct the district court to evaluate the plans offered by MDC under NAC 608.102 instead of NRS Chapters 608, 689A, and 689B.

II.

Whether to grant extraordinary relief is solely within this court's discretion. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Generally, mandamus will issue to compel performance of a judicial act that the law requires as a duty resulting from office, *see* NRS 34.160, when "there is not a plain, speedy and adequate remedy in the ordinary course of law," NRS 34.170. Where, as here, the petitioners instead seek clarification of a legal issue of first impression, mandamus can nonetheless be appropriate when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008). However, "such relief must be issued sparingly and thoughtfully due to its disruptive nature" in litigation. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 824, 407 P.3d 702, 709 (2017). Such a petition for a writ of advisory mandamus should be granted only "when the issue presented is novel, of great public importance,

[2]*See* NRS 608.1555 ("Any employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS . . . ."); *see also, e.g.*, NRS 608.156(1) ("If an employer provides health benefits for his or her employees, the employer shall provide benefits for the expenses for the treatment of abuse of alcohol and drugs.").

and likely to recur." *Id.* at 708 (quoting *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994)).

While we generally deny such petitions, articulating the standard for when an employer who offers health benefits can pay the lower-tier minimum wage is an issue of statewide importance that needs clarification. In fact, the Legislature recently passed legislation attempting to answer this exact question, but it was vetoed by the Governor. *See* Letter from Governor Sandoval to Secretary of State Cegavske, *RE: Assembly Bill 175 of the 79th Legislative Session* (June 9, 2017) [hereinafter *Veto of A.B. 175*], http://gov.nv.gov/uploadedFiles/govnvgov/Content/News_and_Media/Press/2017_Images_and_Files/AB175_VETO.pdf.[3] And our state's district courts, as well as the federal district court, have been grappling with the issue presented in this petition as well. *See, e.g.*, *Tyus v. Wendy's of Las Vegas, Inc.*, No.: 2:14–CV–0729–GMN–VCF, 2017 WL 4381680 (D. Nev. Sept. 28, 2017); *Hanks v. Briad Rest. Grp., LLC*, No.: 2:14–CV–00786–GMN–PAL, 2017 WL 4349227 (D. Nev. Sept. 29, 2017); *Abrams v. Peppermill Casinos, Inc.*, No. 3:16–CV–0454–MMD (VPC), 2017 WL 2485381 (D. Nev. June 8, 2017); *Tarvin v. Hof's Hut Rest., Inc.*, No. A-16-741541-C (Eighth Judicial District Court, filed August 11, 2016). Thus, because the petition presents legal issues of statewide importance requiring clarification, and our decision will promote judicial economy and administration by assisting other jurists, parties, and lawyers, we exercise our discretion to consider the merits of this petition.

III.

MDC argues that the Labor Commissioner should have primary jurisdiction to resolve whether the plans in this case qualify as health insurance under NAC 608.102. As discussed *infra*, NAC 608.102 purports to set forth the requirements that a health insurance plan must meet to qualify an employer who offers the plan to pay the MWA's lower-tier minimum wage. MDC argues that the text of the MWA leaves a definitional gap when it comes to "health insurance" and the Labor Commissioner, having issued NAC 608.102 to fill

[3]The Governor's veto emphasized that this court already clarified the issue presented in A.B. 175, and that "[i]mposing a rigid, statutory definition on constitutionally required 'health benefits' not only conflicts with the flexible approach called for in the Nevada Constitution, but it also risks upsetting the [MWA's] careful, incentive-based balance that Nevada's voters approved in 2006." *Veto of A.B. 175*, *supra*, at 2. The Governor also expressed concern that the bill would require health insurance that would exceed the cost of paying an additional one dollar per hour in wages and create an incentive for employers to stop offering health insurance altogether. *Id.* In addition to these concerns, the veto warned of potential negative consequences for Nevada's workers and small businesses, such as receiving less hours at work, decreasing the number of available jobs, and resulting in a higher cost of providing health insurance. *Id.* at 1-2.

that gap, should be the first to give input as to whether a specific plan meets those qualifications.

"[T]he doctrine of primary jurisdiction occasionally requires courts to refrain from exercising jurisdiction, so that technical issues can first be considered by a governmental body." *Richardson Constr., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 66, 156 P.3d 21, 24 (2007). Whether to withhold determination of an issue and give primary jurisdiction to an agency—the Labor Commissioner in this instance—is within the discretion of the district court. *Nev. Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 962-63, 102 P.3d 578, 587-88 (2004). In determining whether to grant an agency primary jurisdiction, a court is guided by: "(1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities." II Richard J. Pierce, Jr., *Administrative Law Treatise* § 14.1, at 1162 (5th ed. 2010); *see also Richardson Constr.*, 123 Nev. at 66, 156 P.3d at 24 ("Two policies underlie this doctrine: (1) a desire for uniform regulation, and (2) the need for a tribunal with specialized knowledge to make initial assessments of certain issues.").

We reject MDC's argument that the Labor Commissioner should make the initial determination of what health insurance an employer must offer to qualify to pay employees the lower-tier minimum wage. While primary jurisdiction may apply "whenever enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body," *Nev. Power*, 120 Nev. at 962, 102 P.3d at 587-88 (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956)), at issue in this case is the meaning of a provision in the Nevada Constitution. This case requires interpretation of the MWA, which is a responsibility that we cannot abdicate to an agency. *See* Pierce, *supra*, at 1172 ("No court would refer a pure issue of constitutional law to an agency for initial resolution."); *see also Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (recognizing that the Supreme Court is the "ultimate interpreter of the Constitution").

Further, the question before the court is a legal one, and not one that requires the special expertise of an agency to explain technical factors necessary for the resolution of the issue. *Cf., e.g.*, *Nev. Power*, 120 Nev. at 962-63, 102 P.3d at 578-88 (considering whether an agency should have primary jurisdiction to determine "the appropriate transformer loss factor" and "appl[y] its expertise to determine the percentage of electricity used by the transformers in the conversion process"). Rather, the MWA has been in effect for

over ten years, and the Labor Commissioner has already carefully and thoughtfully provided input on this legal issue by enacting NAC 608.102. In fact, the Legislature also recently tried its hand at defining the substantive requirements of a health insurance plan such that an employer would qualify to pay the lower-tier minimum wage. *See* A.B. 175, 79th Leg. (Nev. 2017). However, the Governor vetoed the bill citing, in part, our recent decision in *Western Cab Co. v. Eighth Judicial District Court*, 133 Nev. 65, 390 P.3d 662 (2017), as having answered the question, and, in other part, rejecting the imposition of a "rigid, statutory definition on constitutionally required 'health benefits.'" *Veto of A.B. 175*, *supra*, at 2. It strikes us as inappropriate to defer a question of constitutional interpretation to an agency on the heels of the head of the state's executive branch nullifying legislative action that would have answered the same question—especially when the Governor's veto was, in part, based on the recognition that it is this court's responsibility to interpret the MWA.

Finally, while the Labor Commissioner is tasked with enforcing the labor laws of this state, the plain language of the MWA grants employees a private cause of action to enforce their right to a minimum wage. *See* Nev. Const. art. 15, § 16(B) ("An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section . . . ."). Thus, the agency's resolution of this issue is not necessary for uniform enforcement of a regulation, because the MWA creates a private cause of action for employees against an employer for violations of the MWA. On top of all of these considerations, we also note that granting primary jurisdiction to the Labor Commissioner at this stage in the litigation, when the employers raised primary jurisdiction for the first time nearly two years after the complaint was filed, would unduly delay the resolution of this issue before the court. *See* Pierce, *supra*, at 1162 (recognizing that courts may consider whether any factors favoring allocation of initial decision-making responsibility to an agency would be outweighed by undue delay in resolving the issue). Accordingly, we decline to cede primary jurisdiction to the Labor Commissioner.

IV.

MDC argues that the district court incorrectly applied the requirements of NRS Chapters 608, 689A, and 689B—statutory provisions mandating substantive requirements for health insurance—to the MWA. We agree with MDC that these statutory provisions do not set the constitutional standard for the quality of health insurance that allows an employer to pay the lower-tier minimum wage.

A.

In *Western Cab*, which was decided after the district court's grant of partial summary judgment in this case, the court looked to NAC 608.102, rather than NRS Chapters 608, 689A, or 689B, for examples of "health insurance." 133 Nev. at 70-71, 390 P.3d at 669-70 (analyzing whether the MWA is preempted by ERISA). In relevant part, NAC 608.102 requires an employer who pays the lower-tier minimum wage to offer health insurance that "[c]overs those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been borne directly by the employee."

As a result, both parties look to clarify the meaning of "those categories of health care expenses that are generally deductible" in NAC 608.102. MDC argues that a plan that provides coverage for *any* expenses that might be deductible on a federal income tax return qualifies as "health insurance" and therefore allows an employer to pay the lower-tier minimum wage. The employees retort that an equally reasonable interpretation of NAC 608.102 is that a plan must cover *all* benefits that could be deductible on federal income tax returns, but they actually assert that employers must provide comprehensive or major medical insurance policies to employees to pay the lower-tier wage. Both arguments fail to articulate a constitutional standard for the MWA, however, because the definition of the term "health insurance" in the MWA is not wed to a statutory-type analysis of the NAC or to the provisions of the Internal Revenue Code. Rather, those regulatory schemes are primarily reference points and useful illustrations of the types of benefits and coverages that insurance must cover to qualify as *health* insurance.

At issue in this case, however, is not the types of benefits provided and whether they are *health* or some other category of benefits, for which a reference to NAC 608.102, NRS 681A.030, 26 U.S.C. 213(d)(1)(A), or even *Black's Law Dictionary* may be helpful.[4]

[4]For instance, NAC 608.102 references 26 U.S.C. § 213, which allows a person to deduct expenses for "medical care" from that person's federal income tax obligation. Deductible expenses incurred for "medical care" include, in part, payments for "the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." 26 U.S.C. § 213(d)(1)(A). Similarly, "health insurance" is also defined elsewhere in the law. For example, NRS 681A.030 defines "health insurance" as "insurance of human beings against bodily injury, disablement or death by accident or accidental means, or the expense thereof, or against disablement or expense resulting from sickness, and every insurance appertaining thereto, together with provisions operating to safeguard contracts of health insurance against lapse in the event of strike or layoff due to labor disputes." *Black's Law Dictionary* also provides a definition for "health insurance," calling it "[a] contract or agreement whereby an insurer is obligated to pay or allow a benefit of pecuniary value

Rather, the issue presented by the parties is whether there is some minimum quality or substance of health insurance that an employer must provide for the employer to pay the lower-tier minimum wage under the MWA. This question was not argued in *Western Cab*, and it is evident from the parties' arguments that NAC 608.102 is an unworkable standard for making such a determination because there are numerous items that can be included in an insurance plan that insures against expenses relating to bodily injury and sickness.

To provide just *any* one of those benefits, as MDC urges, would allow an employer to qualify for the lower-tier minimum wage with the provision of even the most meager health insurance plan, such as one dental cleaning per year. This would leave employees with a lower wage, and no real benefit in return—a result that would leave the upper tier of the MWA without significance. On the other hand, to require provision of *all* conceivable health coverage benefits, as the employees suggest, would require an employer to provide health benefits at a cost much greater than the one dollar per hour of wages saved under the lower tier. This interpretation would disincentivize employers from providing health insurance in lieu of paying an extra dollar per hour in wages, which would decrease the significance of the lower tier of the MWA. Thus, to give effect to the entirety of the MWA's two-tiered approach, qualifying health benefits must lie somewhere in between these two extremes, such that both tiers of the MWA have purpose. Our task is to find a guiding principle in the text, history, and purpose of the MWA and articulate a workable standard to assess whether a health insurance plan is sufficient to qualify an employer to pay the lower-tier minimum wage.

B.

Questions of constitutional interpretation are reviewed de novo. *MDC I*, 132 Nev. at 779, 383 P.3d at 265. "The goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.'" *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (5th ed. 2013)). Where the meaning of a constitutional provision "is clear on its face, we will not go beyond that language in determining the voters' intent or to create an ambiguity when none exists." *Miller v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008) (footnote omitted). However, where a provision is ambiguous or susceptible to reasonable but inconsistent

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with respect to the bodily injury, disablement, sickness, death by accident or accidental means of a human being, or because of any expense relating thereto, or because of any expense incurred in prevention of sickness, and includes every risk pertaining to any of the enumerated risks." *Black's Law Dictionary* (6th ed. 1998).

interpretations, "we may look to the provision's history, public policy, and reason to determine what the voters intended." *Id.* We look to those sources to give the constitutional provision the meaning that an "intelligent, careful voter" would ascribe to it. 16 Am. Jur. 2d *Constitutional Law* § 75, at 435 (2009).

When voters passed the MWA they sought to provide higher wages to employees, or in the alternative, health insurance in order to "fight poverty" and "ensure that 'workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.'" *MDC I*, 132 Nev. at 780, 383 P.3d at 266 (quoting Nevada Ballot Questions 2006, Nevada Secretary of State, Question No. 6 § 2(6)). This purpose is reflected in the text of the MWA, which mandates that an employer pay employees $8.25 per hour, or in the alternative, $7.25 per hour plus offer health benefits. Nothing in the text or purpose of the MWA, however, suggests that the voters intended to create one tier that was inherently more or less valuable to employees than the other. Rather, the tiers are different means to the same end—the upper-tier minimum wage fights poverty by providing higher wages to employees, while the lower tier fights poverty in the form of a lower wage but the addition of health benefits.

Given that the MWA provides two tiers in furtherance of the same purpose, common sense dictates that an employer who pays the lower-tier minimum wage must offer health benefits that, at the very least, fill the one-dollar gap in value between the $7.25 per hour lower-tier minimum wage and the $8.25 per hour upper-tier minimum wage. Therefore, "health benefits" must mean the equivalent of one extra dollar per hour in wages to the employee, but offered in the form of health insurance as opposed to dollar wages. *See Calop Bus. Sys., Inc. v. City of L.A.*, 984 F. Supp. 2d 981, 1003 (C.D. Cal. 2013) (noting that Los Angeles' similar two-tiered ordinance created "a minimum wage that certain employers must pay, and permits them either to pay it all in cash or through a combination of cash and benefits contributions").

We hesitate to ascribe any further substantive requirements to health benefits beyond this simple meaning found within the text and purpose of the MWA. *See* 16 Am. Jur. 2d *Constitutional Law* § 3, at 325 (2009) ("[C]onstitutions traditionally do not deal in details, but enunciate the general principles and general directions which are intended to apply to all new facts which may come into being and which may be brought within these general principles or directions."). It is unlikely in enacting the MWA that the voters considered and intended to incorporate the entirety of Nevada's statutory scheme regarding health insurance into the meaning of "health benefits." *See Dist. of Columbia v. Heller*, 554 U.S. 570, 576 (2008) ("In interpreting [the Constitution], we are guided by the principle that '[t]he Constitution was written to be understood by the voters;

its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'") (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (alterations in original)). Nor should we afford such a meaning to health benefits when it might relate or connect the MWA to an ERISA plan, such that ERISA preemption concerns would arise in the enforcement of the MWA. *See Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 278 P.3d 632, 639 (Wash. 2012) (presuming "that an initiative is constitutional, just as [a court] presumes the constitutionality of a statute duly enacted by the legislature"); *see also Calop Bus. Sys.*, 984 F. Supp. 2d at 1003 (where a two-tiered minimum wage law that did "not require that employers provide health benefits, dictate the level or type of health benefits an employer must provide, or state which health benefit plan an employer must choose" was not preempted by ERISA). Instead, the simplest and most straightforward meaning of "health benefits" is a benefit in the form of health insurance at least equivalent to an additional one dollar per hour in wages. This ensures that employees may receive an equal benefit under either tier of the MWA, in furtherance of the MWA's stated purpose of fighting poverty. *See Opinion of Justices to House of Representatives*, 425 N.E.2d 750, 752 (Mass. 1981) ("[W]e must, if possible, construe the amendment so as to accomplish a reasonable result and to achieve its dominating purpose.").

Accordingly, an employer is qualified to pay the lower-tier minimum wage to an employee if the employer offers a benefit to the employee in the form of health insurance of a value greater than or equal to the wage of an additional dollar per hour, and covers "the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer." Nev. Const. art. 15, § 16. An employer who pays the lower-tier minimum wage will have the burden of showing that it provided the employee with a benefit in the form of health insurance equal to a value of at least an additional dollar per hour in wages. If an employer cannot offer such insurance to an employee, the employer must pay the employee the upper-tier minimum wage.

IV.

We therefore grant petitioners' request for extraordinary relief and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order granting partial summary judgment and hold further proceedings in accordance with this opinion. In doing so, we clarify that an employer may pay the MWA's lower-tier minimum wage to an employee if the employer offers health insurance at a cost to the employer of the equivalent of at least an additional dollar per hour in wages, and at a cost to the employee of no more than 10 percent of the employee's gross taxable income

from the employer. However, because applying our holding to the health insurance offered in this case requires further development in the district court, we withhold judgment as to whether the employers in this case qualified to pay one dollar per hour less in wages to employees who were offered health insurance.

Douglas, C.J., and Cherry, Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.

ROBAIRE PREVOST, Appellant, *v.* STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, APPEALS OFFICER, an Agency of the State of Nevada; and CCMSI, Respondents.

No. 71472

May 31, 2018 418 P.3d 675

Appeal from a district court order dismissing a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Reversed and remanded.

Stiglich, J., with whom Hardesty, J., agreed, dissented.

Kemp & Kemp and *James P. Kemp*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City, for Respondent State of Nevada Department of Administration, Appeals Officer.

Lewis Brisbois Bisgaard & Smith, LLP, and *Daniel L. Schwartz*, Las Vegas, for Respondent CCMSI.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

This is an appeal from an order dismissing a petition for judicial review under NRS 233B.130(2). In particular, NRS 233B.130(2)(a) provides that a petition for judicial review must "[n]ame as respondents the agency and all parties of record to the administrative proceeding." In this appeal, we are asked to determine whether the failure to name a party of record in the caption of a petition for judicial review is jurisdictionally fatal under NRS 233B.130(2)(a) where the party is named in the body of the petition and is properly served with

the petition. We conclude that NRS 233B.130(2)(a) does not require dismissal on these facts, and we therefore reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

Appellant Robaire Prevost, a former corrections officer employed by the State of Nevada, Department of Corrections (NDOC), filed a workers' compensation claim, alleging that various medical conditions were caused by the stress of his job. Respondent Cannon Cochran Management Services, Inc. (CCMSI), as NDOC's third-party administrator, denied Prevost's workers' compensation claim. Prevost administratively appealed CCMSI's denial, and an appeals officer ultimately issued a decision and order affirming CCMSI's denial.[1]

In January 2016, Prevost timely filed a petition for judicial review of the appeals officer's decision with the district court. The caption of the petition for judicial review listed NDOC and the Department of Administration as respondents, but did not individually identify CCMSI. However, the appeals officer's order and decision, which identified CCMSI, was attached and incorporated into the body of the petition. Moreover, CCMSI and its counsel were served with the petition.

Nonetheless, in March 2016, CCMSI moved to dismiss the petition, alleging that the failure to name CCMSI in the caption rendered the petition jurisdictionally defective pursuant to NRS 233B.130(2)(a) and *Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012).[2] Prevost subsequently filed an opposition to CCMSI's motion to dismiss, as well as a motion to amend the caption of his petition for judicial review to add CCMSI. The district court summarily granted CCMSI's motion to dismiss, denied Prevost's motion to amend, and dismissed Prevost's petition for judicial review with prejudice. This appeal follows.

DISCUSSION

On appeal, Prevost argues that the district court erred in dismissing his petition for judicial review on the basis that it failed to comply with NRS 233B.130(2)(a). We agree.

NRS 233B.130(2)(a) provides that "[p]etitions for judicial review must . . . [n]ame as respondents the agency and all parties of record to the administrative proceeding." In *Otto*, this court concluded that

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[1]The appeals officer's order and decision refers to NDOC and CCMSI as one party, the "Employer."

[2]CCMSI also argued in district court that Prevost failed to serve the petition on the Attorney General and the administrative head of the Department of Administration pursuant to NRS 233B.130(2)(c). *See Heat & Frost Insulators and Allied Workers Local 16 v. Labor Comm'r*, 134 Nev. 1, 408 P.3d 156 (2018). We do not address this argument, as CCMSI and Prevost agree that the issue is not properly before this court.

"pursuant to NRS 233B.130(2)(a), it is mandatory to name all parties of record *in a petition for judicial review* of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement." 128 Nev. at 432-33, 282 P.3d at 725 (2012) (emphasis added). There, this court determined that petitioner Washoe County failed to comply with NRS 233B.130(2)(a) because Washoe County did not "name any [respondent] taxpayer individually *in the caption, in the body of the amended petition, or in an attachment*." *Id.* at 430, 282 P.3d at 724 (emphasis added). Thus, *Otto* implicitly recognizes that the failure to identify a party in the caption of a petition for judicial review is not, in and of itself, a fatal jurisdictional defect. *Id.*

Here, Prevost named CCMSI in the body of the petition through incorporation by reference of the administrative decision, which Prevost also attached as an exhibit to the petition. *See* NRCP 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading . . . . A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").[3] We conclude that this is sufficient to satisfy NRS 233B.130(2)(a), which requires that "the agency and all parties of record to the administrative proceeding" be named as respondents, but does not explicitly require that the parties be named in the *caption* of the petition. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1321, at 388-89 (3d ed. 2004) ("[T]he caption is not determinative as to the identity of the parties to the action.").

CONCLUSION

We conclude that the failure to name CCMSI in the caption of the petition for judicial review did not render the petition jurisdictionally defective where (1) the body of the petition named CCMSI through incorporation by reference of the attached administrative decision, NRCP 10(c); and (2) CCMSI and its attorney were timely served with the petition. Thus, we reverse the district court's order dismissing Prevost's petition for judicial review for lack of jurisdiction and remand for further proceedings consistent with this opinion.[4]

Douglas, C.J., and Cherry, Gibbons, and Pickering, JJ., concur.

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[3]We reject CCMSI's contention that the Nevada Rules of Civil Procedure (NRCP) do not apply to judicial review proceedings under Nevada's Administrative Procedure Act (APA). Pursuant to NRCP 81(a), the provisions of the NRCP govern proceedings under the APA to the extent that they are not in conflict with the provisions of the APA. CCMSI fails to show that the APA contains a rule that conflicts with NRCP 10. Accordingly, we conclude NRCP 10 is applicable to petitions for judicial review under the APA.

[4]Prevost also argues that (1) this court should modify its holding in *Otto* to permit a petitioner to amend the caption of a petition for judicial review under

STIGLICH, J., with whom HARDESTY, J., agrees, dissenting:

I disagree with the majority's conclusion that this case can be distinguished from *Washoe County v. Otto*, 128 Nev. 424, 282 P.3d 719 (2012). The majority quotes the unambiguous statement in *Otto* that "it is mandatory to name all parties of record in a petition for judicial review of an administrative decision, and a district court lacks jurisdiction to consider a petition that fails to comply with this requirement," 128 Nev. at 432-33, 282 P.3d at 725, but nonetheless reads that opinion to imply "that the failure to identify a party in the caption of a petition for judicial review is not, in and of itself, a fatal jurisdictional defect," Majority opinion *ante* at 328. The majority bolsters its conclusion by citing NRCP 10(c), but our prior interpretation of NRS 233B.130(2)(a) in *Otto* does not support simplifying statutory requirements for jurisdiction based upon a civil rule permitting the adoption of statements by reference.

Although I concur that a party may comply with NRS 233B.130(2)(a) by "nam[ing] as respondents the agency and all parties of record to the administrative proceeding" elsewhere than in the caption,[1] I disagree with the majority's conclusion that the statute is satisfied, sufficient to confer jurisdiction, when the relevant party is simply *mentioned* somewhere in the petition or attached documents and is thereby "incorporat[ed] by reference." The mere fact that the relevant name appears in documents attached to the petition does not indicate that the named party is *named as a respondent*. *See* NRS 233B.130(2)(a). Here, CCMSI was not named in the caption, nor in the body of the petition, but the majority asserts that its status as respondent was "incorporated by reference" because Prevost referred to the administrative decision that mentioned CCMSI and attached it as an exhibit. Prevost's designation, or lack thereof, fell short of strict compliance with NRS 233B.130(2)(a), and the majority's approval thereof nullifies the import of the statute's jurisdictional requirement.

Because we required more of the petitioner in *Otto*, I respectfully dissent.

NRCP 15, (2) the provisions of NRS 233B.130(2) are not jurisdictional in a workers' compensation matter, (3) naming only the State of Nevada Department of Corrections in the caption was sufficient under agency principles, and (4) equitable principles should permit amendment under the facts of this case. Given our disposition, we need not reach these issues.

[1]This is based on the same language from *Otto* quoted by the majority regarding Washoe County's failure to name the respondent "in the caption, in the body of the amended petition, or in an attachment." Majority opinion *ante* at 328 (quoting 128 Nev. at 430, 282 P.3d at 724).

DAVID HARRISON DEGRAW, Petitioner, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE LINDA MARQUIS, District Judge, Respondents, and MISTY JO DEGRAW, Real Party in Interest.

No. 72528

May 31, 2018 419 P.3d 136

Original petition for writ of mandamus or prohibition challenging a district court order finding NRS 1.310 unconstitutional.

Petition denied.

Nevada Family Law Group and *Keith F. Pickard*, Henderson, for Petitioner.

Ghandi Deeter Blackham and *Brian E. Blackham* and *Nedda Ghandi*, Las Vegas, for Real Party in Interest.

Legislative Counsel Bureau Legal Division and *Brenda Erdoes*, Legislative Counsel, and *Kevin C. Powers*, Chief Litigation Counsel, Carson City, for Amicus Curiae Legislative Counsel Bureau.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In the underlying dispute, petitioner David Degraw moved the district court for the continuance of a custody hearing pursuant to Nevada's legislative continuance statute, NRS 1.310, because his attorney was a member of the Nevada State Assembly, and the 2017 legislative session was due to begin. NRS 1.310(1) provides:

> If a party to any action or proceeding in any court or before any administrative body is a member of the Legislature of the State of Nevada, or is President of the Senate, that fact is sufficient cause for the adjournment or continuance of the action or proceeding, including, without limitation, any discovery or other pretrial or posttrial matter involved in the action or proceeding, for the duration of any legislative session.

Real party in interest Misty Degraw opposed David's request for a continuance, arguing that NRS 1.310 was unconstitutional because it violated the separation of powers doctrine. Misty requested an evidentiary hearing, contending that there was an emergency and she was at risk of irreparable harm because David was withholding the children from her. The district court granted David's motion for

a continuance, but also ordered an evidentiary hearing for a date during the legislative session. The district court further concluded that NRS 1.310 was unconstitutional under the separation of powers doctrine.

While the parties ask us to decide the constitutionality of NRS 1.310, we decline to do so as the custody issues between the parties have been resolved, and therefore, we conclude that this case is moot. Additionally, we conclude that the interpretation of NRS 1.310 does not fall within the exception to the mootness doctrine for cases that are capable of repetition yet evading review. Accordingly, we deny the writ petition.

FACTS AND PROCEDURAL HISTORY

In November 2016, Misty filed a complaint for divorce against David. The district court set a case management conference and mediation for January 2017, and Misty filed a motion requesting an order for temporary custody, child support, and attorney fees. Misty alleged she and David orally agreed to a custody agreement when she moved out of the marital residence and that David was not upholding his end of the agreement because he was wrongfully withholding the children from her. Misty further argued that David's "cruel and divisive conduct [wa]s taking a toll on the children." David filed a motion to continue the hearing for temporary custody and support orders pursuant to NRS 1.310, requesting that the district court stay further litigation until after the 2017 legislative session concluded. Misty opposed the motion to continue, arguing that NRS 1.310 was unconstitutional because it violated the separation of powers doctrine under the Nevada Constitution and it infringed upon her fundamental right to parent.

The district court found:

> NRS 1.310 [is] unconstitutional as written as it violates the separation of powers doctrine of the Nevada Constitution by allowing the legislature to commandeer the inherent power of the judiciary to govern its own procedures, removing all discretion from the Court. There are instances in which the postponement of an action would result in irreparable harm or defeat an existing right, and emergency relief is warranted. In those instances, the Court must be able to be allowed to exercise discretion.

The district court granted David's request to stay litigation pending the legislative session, but the court ordered a brief evidentiary hearing on the merits of Misty's opposition to David's motion to continue, which the court scheduled for a date during the legislative session. David filed this writ petition arguing that the statute is constitutional as applied and that the district court erred by requiring an evidentiary hearing in violation of NRS 1.310 because Misty failed

to demonstrate "a prima facie showing of an emergency." This court stayed the evidentiary hearing and lifted the stay following the legislative session. Since the filing of the writ petition, the parties resolved their case.

DISCUSSION

David urges this court to look to the policy of NRS 1.310 and interpret the statute as being mandatory except in certain situations, such as emergencies or where a substantial right may be impaired, as some other states have interpreted similar statutes. Misty contends that the plain language of the statute renders it facially unconstitutional. Amicus curiae Legislative Counsel Bureau (LCB) urges this court to give NRS 1.310 a "reasonable construction to the fullest extent necessary to save it from any constitutional problems." Thus, LCB argues that we should interpret NRS 1.310 to be mandatory unless the party opposing the continuance can satisfy the "heavy burden to prove that as a direct result of emergency or extraordinary circumstances, a substantial existing right will be defeated or abridged by the legislative continuance and the party will thereby suffer substantial and immediate irreparable harm."

Though the parties agree that the child custody dispute in the underlying proceeding has been resolved, both parties argue that we should decide the constitutionality of NRS 1.310 because this case falls into the exception to mootness for cases that are capable of repetition yet evading review. We disagree.

"Mandamus is an extraordinary remedy, and the decision as to whether a petition will be entertained lies within the discretion of this court." *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). This court's duty is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions." *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). "Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events." *Id*. at 58, 624 P.2d at 11. Even where a case is moot, we may consider it if it involves "a matter of widespread importance capable of repetition, yet evading review." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013). To satisfy the exception to the mootness doctrine, David must show that "(1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Id*. at 334-35, 302 P.3d at 1113.

The parties appear to agree that all three elements are met. We agree that the time period to challenge the denial of a continuance may be limited, and we also agree that this case involves an important matter. However, in this case, we are not prepared to determine that it is likely that a similar issue will arise in the future

for two reasons. First, although David argues that several attorney-legislators will participate in the 2019 legislative session, this assertion is speculative at this juncture, as it is unknown how many attorneys will be elected and whether those attorneys will be involved in matters that would require court appearances. Second, David and LCB concede that interpreting NRS 1.310 as requiring a mandatory continuance without exception would render the statute unconstitutional. Therefore, they argue that we should employ the canon of constitutional avoidance to give NRS 1.310 a constitutional interpretation by adding an exception to NRS 1.310 for emergencies or situations implicating a fundamental right where such an exception does not currently exist. However, "[u]nder the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems. But a court relying on that canon still must *interpret* the statute, not rewrite it." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). The interpretation LCB requests would require this court to rewrite NRS 1.310 to include exceptions allowing judicial discretion for emergencies or situations implicating a fundamental right. This approach reaches far beyond interpreting NRS 1.310, and though we agree that this case involves an important matter, we decline to engage in policy making to rewrite the statute. *See Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 154, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").[1]

[1]David and LCB rely on several out-of-state cases that they suggest we follow to interpret NRS 1.310 as being mandatory in most instances but allowing judicial discretion where the opposing party demonstrates that the continuance will infringe upon a fundamental right. However, we note that those cases involved legislative continuance statutes with different language or language allowing judicial discretion. *See, e.g.*, *Nabholz Constr. Corp. v. Patterson*, 317 S.W.2d 9, 11 (Ark. 1958) ("The statute provides that when any attorney in a pending case is a member of the legislature all proceedings shall be stayed for not less than 15 days preceding the convening of the General Assembly and for thirty (30) days after its adjournment, unless otherwise requested by any interested member of said General Assembly." (internal quotation marks omitted)); *Johnson v. Theodoron*, 155 N.E. 481, 483 (Ill. 1927) (analyzing a legislative continuance statute that stated, "it shall be a sufficient cause for a continuance if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney, solicitor or counsel of such party, is a member of either house of the General Assembly, and in actual attendance on the sessions of the same, and that the attendance of such party, attorney, solicitor or counsel, in court, is necessary to a fair and proper trial of such suit" (internal quotation marks omitted)); *Kyger v. Koerper*, 207 S.W.2d 46, 48 (Mo. 1946) (Hyde, J., concurring) (addressing a legislative continuance statute that states that a continuance shall be granted if it appears to the court that the party or attorney is a member of the house or assembly and attendance of the party or attorney "is necessary to a fair and proper trial" (internal quotation

In addition, the record before us is not sufficiently developed for this court to assess the existence or severity of any alleged emergency. Further, interpreting the statute in the requested manner when it is unclear whether this issue is likely to reoccur in the future would render any opinion advisory at best. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 823, 407 P.3d 702, 708-09 (2017) ("Advisory mandamus on a legal issue not properly raised and resolved in district court does not promote sound judicial economy and administration, because the issue comes to us with neither a complete record nor full development of the supposed novel and important legal issue to be resolved."). Accordingly, we conclude that writ relief is not warranted, and we deny the petition as moot.

Douglas, C.J., and Cherry, Gibbons, Pickering, Parraguirre, and Stiglich, JJ., concur.

RENELYN BAUTISTA, Appellant, *v.*
JAMES PICONE, Respondent.

No. 72713

May 31, 2018 419 P.3d 157

Appeal from district court orders denying appellant's motion to modify custody and appointing a special master/parenting coordinator. Eighth Judicial District Court, Family Court Division, Clark County; Mathew Harter, Judge.

Reversed and remanded.

Black & LoBello and *John D. Jones*, Las Vegas, for Appellant.

Benjamin B. Childs, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Douglas, C.J.:

Appellant Renelyn Bautista and respondent James Picone agreed to share joint physical custody of their minor child. In the months

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marks omitted)); *Williams v. Bordon's, Inc.*, 262 S.E.2d 881, 883 (S.C. 1980) (discussing a legislative continuance statute that allows continuances unless the litigation involves an emergency and irreparable damage).

[1]The Honorable Lidia S. Stiglich, Justice, voluntarily recused herself from participation in the decision of this matter.

following the parents' agreement, Bautista filed three motions with the district court to modify the parents' custody arrangement, which were denied. The district court appointed a parenting coordinator to help mediate and resolve any disputes concerning the minor child and permitted the parenting coordinator to make substantive changes to the parents' custody arrangement. Bautista then filed another motion with the district court seeking to modify custody based on allegations that Picone was dating a minor. Without conducting an evidentiary hearing, the district court denied Bautista's request. In this opinion, we conclude that granting the parenting coordinator authority to make substantive changes to the parents' custody arrangement is an improper delegation of the district court's judicial authority. We further hold that the district court abused its discretion by denying Bautista's latest motion to change physical custody without conducting an evidentiary hearing after she established adequate cause.

FACTS AND PROCEDURAL HISTORY

Bautista and Picone share joint physical custody of their minor child pursuant to a stipulated order. Three months after the district court entered the stipulated order, Bautista filed a motion to modify physical custody. The court denied Bautista's motion and stated that given the history of the case, if Bautista filed a similar motion within the next six months, the court would appoint a parenting coordinator.

Subsequently, Bautista reported to the Special Victims Unit at the Henderson Police Department that Picone sexually abused their minor child. As a result, the parties filed competing motions regarding child custody. The district court conducted a hearing regarding the sexual abuse allegation and interviewed the investigating officer. At the conclusion of the hearing, the district court stated that based on the preponderance of the evidence and the history of the case, the parties' custody schedule would continue.

Two months after the hearing, Bautista filed another motion to modify child custody by one hour so that the minor child could attend Sunday school. The district court denied Bautista's request and appointed a parenting coordinator. Bautista filed a motion requesting a different and specific parenting coordinator, which the district court granted.

Bautista then filed a motion seeking to change custody based on allegations that Picone was dating a 15-year-old girl. The district court denied Bautista's request without conducting an evidentiary hearing. The district court also entered an order appointing a different parenting coordinator because the previous coordinator withdrew from the case. The district court granted the parenting coordinator the authority to make temporary decisions resolving minor disputes between the parents, including substantive and nonsubstan-

tive changes to the parents' custody plan, until the court entered an order modifying the coordinator's decision. Bautista now appeals the latest order denying custody modification and the latest order appointing a parenting coordinator.

DISCUSSION

Standard of review

Decisions regarding child custody rest in the district court's sound discretion, and this court will not disturb the decision absent a clear abuse of that discretion. *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). An abuse of discretion occurs when a district court's decision is not supported by substantial evidence or is clearly erroneous. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (providing that a district court's factual findings regarding child custody are reviewed for an abuse of discretion).

The district court abused its discretion by delegating its judicial authority to the parenting coordinator

Bautista argues that the district court improperly delegated its decision-making authority by allowing the parenting coordinator to make substantive changes to the parents' custody plan.[2] We agree.

Parenting coordinators are a relatively novel concept in Nevada. This court addressed the appointment of a parenting coordinator in *Harrison v. Harrison*, 132 Nev. 564, 376 P.3d 173 (2016). In *Harrison*, we approved of the appointment of a parenting coordinator, listing several factors: (1) the parents' custody dispute was highly contentious and multiple custody pleadings were filed in district court, (2) the parents consented to the appointment of a coordinator, (3) "the parenting coordinator's authority was limited to resolving nonsubstantive issues" between the parents, and (4) the district court maintained the final decision-making authority. *Id.* at 572-73, 376 P.3d at 178-79. Parenting coordinators act as "neutral third-party intermediaries who facilitate resolution of conflicts related to custody and visitation between divorced or separated parents." *Id.* at 571, 376 P.3d at 177. Parenting coordinators are beneficial in contentious cases, as "access to a parenting coordinator offers dispute resolution

[2]At the outset, Bautista asserts that her due process rights were violated because she never agreed to the appointment of a parenting coordinator. However, this is Bautista's first objection to the appointment of a parenting coordinator even though the district court appointed two in the past, including one that Bautista requested. *See Harrison v. Harrison*, 132 Nev. 564, 573, 376 P.3d 173, 179 (2016) (providing "due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right" (internal quotation marks omitted)). The specific order appointing a parenting coordinator that Bautista challenges was entered after the previous parenting coordinator withdrew from the case. Accordingly, Bautista's assertion is unsubstantiated.

sooner than [parents] would be able to appear before a judge." *Id.* at 572, 376 P.3d at 178. "Thus, parenting coordinators can be described as providing a hybrid of mediation and arbitration services." *Id.* at 571, 376 P.3d at 177.

The district court does not improperly delegate its decision-making authority by simply appointing a parenting coordinator. *Id.* at 572, 376 P.3d at 178. However, the district court has the ultimate decision-making power regarding custody determinations, and that power cannot be delegated to a parenting coordinator under any circumstance. *See Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962) (providing that "[t]he constitutional power of decision vested in a trial court in child custody cases can be exercised only by the duly constituted judge, and that power may not be delegated to a master or other subordinate official of the court"). Thus, a parenting coordinator's decision-making authority must be limited to nonsubstantive issues, such as scheduling and travel issues, and it cannot extend to modifying the underlying custody arrangement. *See Harrison*, 132 Nev. at 572, 376 P.3d at 179.

Here, the district court granted the parenting coordinator temporary decision-making authority to resolve minor disputes between Bautista and Picone, which included both substantive and nonsubstantive changes to their parenting plan. The district court's order defined a substantive change "as a modification to the parenting plan that (a) significantly changes the timeshare of the child with either parent; or (b) modifies the timeshare such that it amounts to a change in the designation of primary physical custody or a shared physical custodial arrangement." Because the parenting coordinator's authority was not limited in scope to nonsubstantive issues, we conclude that the district court improperly delegated its decision-making authority.

The district court erred by failing to conduct an evidentiary hearing

Bautista argues that the district court abused its discretion in denying her motion to change physical custody without conducting an evidentiary hearing because she established adequate cause.[3] Picone argues that Bautista failed to establish adequate cause to warrant an evidentiary hearing. We agree with Bautista.

"A district court must hold an evidentiary hearing on a request to modify custodial orders if the moving party demonstrates adequate cause." *Arcella v. Arcella*, 133 Nev. 868, 871, 407 P.3d 341, 345 (2017) (internal quotation marks omitted). "Adequate cause

[3]Bautista also seeks to disqualify the district court judge for bias, stating that the judge's bias is evidenced by his denial of Bautista's motions to modify custody. NRS 1.235(1) provides that a party seeking to disqualify a judge for bias "must file an affidavit specifying the facts upon which the disqualification is sought." Bautista acknowledges that she failed to perfect her request to disqualify the judge and, as a result, we conclude that disqualification is unwarranted.

arises where the moving party presents a prima facie case for modification." *Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d 123, 125 (1993) (internal quotation marks omitted). To establish a prima facie case, the movant must show that "(1) the facts alleged in the affidavits are relevant to the grounds for modification; and (2) the evidence is not merely cumulative or impeaching." *Id*.

Here, we conclude that Bautista met her burden to show adequate cause. Bautista presented exhibits of Facebook messages and emails between Picone and a 15-year-old girl. In those messages, Picone acknowledged the girl's age and he discussed having a sexual relationship with her. Bautista also presented a third-party affidavit stating that Picone intentionally ran his car into another car that the minor child was riding in. Based on the foregoing, we conclude that the district court abused its discretion by denying Bautista's motion to change physical custody without conducting an evidentiary hearing.

CONCLUSION

Accordingly, because the district court abused its discretion by granting the parenting coordinator authority to make substantive changes to the parenting plan and denying Bautista's motion to change physical custody without conducting an evidentiary hearing after adequate cause was established, we reverse the district court's orders and remand for proceedings consistent with this opinion.

Cherry, Gibbons, Pickering, Hardesty, and Parraguirre, JJ., concur.

ROBERT GUERRINA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71444

June 7, 2018 419 P.3d 705

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a deadly weapon, kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, and coercion. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed in part, vacated in part, reversed in part, and remanded.

Sandra L. Stewart, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Krista D. Barrie*, Chief Deputy District

Attorney, and *Charles W. Thoman*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Cherry, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Stiglich, J.:

In this appeal, we first determine whether a criminal defendant's request to represent himself was properly denied as "untimely" when the request was made 24 days prior to the scheduled trial date. We conclude that, under *Lyons v. State*,[1] such a request may be denied as untimely if granting it will delay trial. We further conclude that *Lyons* is consistent with United States Supreme Court precedent and decline to overrule it. We therefore affirm the district court's denial of Robert Guerrina's request to represent himself.

Next, we consider whether the State produced sufficient evidence to sustain convictions for robbery and kidnapping when both convictions stem from Guerrina's actions over the course of a single incident. As we held in *Mendoza v. State*, the dual convictions will be sustained if the perpetrator's movement or restraint of the victim "stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion." 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). We expressly overrule prior opinions inconsistent with *Mendoza*, and we affirm Guerrina's dual convictions of robbery and kidnapping.

Finally, we consider whether the State produced sufficient evidence to support charges that the defendant used or possessed a "deadly weapon" during the underlying acts. Because there was insufficient evidence that Guerrina's "weapon" satisfied an applicable definition of deadly weapon, we vacate and reverse his deadly weapon sentencing enhancements.

FACTS AND PROCEDURAL HISTORY

Ana Cuevas worked at FastBucks, a payday loan store in Henderson, Nevada. Each morning, she retrieved money from the store and deposited it in the bank before the store opened at 10 a.m. On most mornings, that money consisted of the business's proceeds from the previous day only, but on Mondays it included proceeds from both Friday and Saturday.

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[1]106 Nev. 438, 796 P.2d 210 (1990), *abrogated in part on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001).

One Monday morning, as Cuevas was walking toward the store, a man wearing a hat and sunglasses approached her. He carried a plastic bag and an object that Cuevas believed to be a knife. The man ordered Cuevas to unlock the FastBucks door and accompany him inside.

Once inside, the man locked the door, stood with his back to it, and ordered Cuevas to "get the money." As Cuevas went to a back room to retrieve the store's money, the man removed a spray can from his bag and sprayed a surveillance camera above the door. After Cuevas handed him the money, the man demanded she give him her personal wallet and cellphone. Cuevas complied. The man then ordered Cuevas to disconnect a FastBucks telephone in the room and throw it onto the floor. Cuevas again complied. The man removed a container from his bag and poured its liquid contents onto the floor in front of the door. Finally, he exited the store and locked the door behind him using Cuevas's key. Once locked, the door could not be opened from the inside without a key—which Cuevas no longer possessed.

After the man departed, Cuevas reconnected the FastBucks telephone and called the police. Upon entering the building, police identified the liquid near the door as "chlorine or bleach, something nondangerous." Cuevas told a detective that the perpetrator was Robert Guerrina, a former FastBucks employee whom she had previously seen several times at work events. The detective showed her a photograph of Guerrina from DMV records. Cuevas confirmed that he was the perpetrator.

The detective subsequently learned that Guerrina had been staying at a Motel 6 in Las Vegas. The detective spoke with the Motel 6 manager and viewed surveillance video of the motel on the day of the robbery. The detective testified that the video showed Guerrina entering the Motel 6 at some time "after the incident" and then departing that same day. He further testified that Guerrina did not return to the Motel 6, despite having paid in advance for the following day. He explained that he did not make a copy of the security tape because "it didn't establish the probable cause of [his] case," and it would not have provided Guerrina with an alibi defense because "there wasn't a conflict with the time." The tape was subsequently destroyed.

At Guerrina's arraignment, the district court appointed a public defender to represent him. Ten weeks later, Guerrina moved to dismiss the public defender, claiming various inadequacies in representation. The district court granted Guerrina's motion and appointed Edward Hughes to replace the public defender. Eight months later—and 24 days before trial—Guerrina moved to dismiss Hughes and represent himself. In a hearing on that motion, Guerrina stated that

he would require a continuance if he represented himself because he would need additional time to prepare for trial. The district court denied Guerrina's request as untimely.

After a four-day trial, the jury convicted Guerrina of burglary while in possession of a deadly weapon, first-degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, and coercion.

DISCUSSION

Guerrina's Sixth Amendment right to self-representation was not violated

Guerrina argues that the district court violated his Sixth Amendment right to self-representation when it denied his request to represent himself. We review the district court's order denying Guerrina's request for an abuse of discretion. *See Lyons v. State*, 106 Nev. 438, 441, 796 P.2d 210, 211 (1990), *abrogated in part on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001).

"A criminal defendant has the right to self-representation under the Sixth Amendment of the United States Constitution and the Nevada Constitution." *Vanisi*, 117 Nev. at 337, 22 P.3d at 1169 (citing *Faretta v. California*, 422 U.S. 806, 818-19 (1975)). But that right is not absolute. In Nevada, "[a] court may . . . deny a request for self-representation if the request is untimely, equivocal, or made solely for purposes of delay or if the defendant is disruptive." *Id.* at 338, 22 P.3d at 1170.

In *Lyons v. State*, this court created a two-part test to determine whether a request for self-representation (a *Faretta* request) is untimely. 106 Nev. at 445-46, 796 P.2d at 214. If the request can be granted "without need for a continuance, the request should be deemed timely." *Id*. at 446, 796 P.2d at 214. But if granting the request would require a continuance, the district court may deny the request as untimely if there is no "reasonable cause to justify [the] late request." *Id*.

Guerrina argues that the *Lyons* timeliness test violates *Faretta v. California*, the Supreme Court case establishing a criminal defendant's Sixth Amendment right to self-representation. 422 U.S. at 817-19. In that case, a defendant made a request for self-representation "weeks before trial."[2] 422 U.S. at 835. The trial court found that the defendant lacked the ability to adequately defend himself, so it denied his request. *Id.* at 808-10. The Supreme Court vacated and remanded, holding that the Sixth Amendment includes

[2]The *Faretta* opinion does not reveal *how many* "weeks before trial" the request was made.

a "right of self-representation," and the trial court violated that right when it denied the defendant's request. *Id*. at 821, 836. But *Faretta* did not address the issues of timeliness and delay.[3] Rather, a subsequent Supreme Court opinion implicitly approved courts' practices of denying *Faretta* requests as untimely. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161-62 (2000) ("The defendant must voluntarily and intelligently elect to conduct his own defense, and most courts require him to do so in a timely manner." (internal quotation marks and citation omitted)). In short, *Faretta* held that a defendant's request to represent himself, submitted an unspecified number of "weeks before trial," could not be denied merely because the district court found his legal acumen to be lacking. 422 U.S. 835-36. It "nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case." *People v. Lynch*, 237 P.3d 416, 439 (Cal. 2010), *abrogated in part on other grounds by People v. McKinnon*, 259 P.3d 1186, 1212 (Cal. 2011).

We conclude that the *Lyons* timeliness rule is consistent with Supreme Court precedent. In affording district courts discretion to deny unjustifiably late *Faretta* requests that will cause delay, *Lyons* furthers the State's interest "in avoiding disruptions and delays" while protecting defendants' Sixth Amendment right to self-representation. *See Williams v. State*, 655 P.2d 273, 276 (Wyo. 1982).

In this case, Guerrina insisted that he would require a continuance if his *Faretta* request was granted, so, under *Lyons*, the district court had discretion to deny Guerrina's request as untimely unless Guerrina presented "reasonable cause to justify [his] late request." 106 Nev. at 446, 796 P.2d at 214. Guerrina presented no such "reasonable cause." He pointed to no event that triggered his loss of faith in counsel 8 months after counsel's appointment and 24 days before trial. Indeed, Guerrina admitted that he did not question Hughes' lawyering abilities, and Hughes was Guerrina's second appointed counsel due to Guerrina's dismissal of his first lawyer. In sum, because granting Guerrina's request would have required a continuance and Guerrina provided no "reasonable cause to justify [his] late request," the district court did not abuse its discretion when it denied his request. *See Lyons*, 106 Nev. at 446, 796 P.2d at 214. Accordingly, we affirm the district court's order denying Guerrina's *Faretta* request as untimely.

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[3]We are not persuaded by Guerrina's reliance on *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005), in which the Ninth Circuit interpreted *Faretta* to mean that requests to self-represent made "weeks before trial" are timely. This court is not bound by the Ninth Circuit's interpretation of Supreme Court opinions. *See generally* Boyd Mangrum, *Freeing State Courts to Disregard Lower Federal Court Constitutional Holdings*, 25 Sw. L.J. 478, 481 (1971) (citing examples where federal appellate courts recognized that decisions of lower federal courts are not binding precedent for state courts).

The evidence was sufficient to support convictions of robbery and kidnapping

Guerrina next argues that the evidence was insufficient to sustain his dual convictions for robbery and kidnapping. He contends that he cannot be convicted of both crimes because all acts were in furtherance of the robbery and any movement of Cuevas did not create a greater risk of harm than was necessary to complete the robbery and escape.

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). On appeal, "the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation marks omitted).

As relevant here, first-degree kidnapping occurs where a person "holds or detains" another person "for the purpose of committing . . . robbery upon or from the person." NRS 200.310(1). "Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury . . . ." NRS 200.380(1). In *Mendoza v. State*, this court addressed the propriety of the State pursuing robbery and kidnapping charges stemming from a single incident:

> [T]o sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

122 Nev. 267, 275, 130 P.3d 176, 181 (2006). "Whether the movement of the victim is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact in all but the clearest cases." *Curtis D. v. State*, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982).

Here, Guerrina accosted Cuevas outside of FastBucks, a public place, and forced her to accompany him into the secluded store, where he later demanded her personal wallet and cellphone. Viewing the evidence in the light most favorable to the State, moving Cuevas "from a public place into a private one . . . substantially increased the risk of harm" to her. *Gonzales v. State*, 131 Nev. 481, 498, 354 P.3d 654, 665 (Ct. App. 2015). Guerrina could have simply taken Cuevas's key, cellphone, and wallet outside of the store, and a

reasonable jury could conclude that forcing her to accompany him inside "substantially exceeded the movement necessary to complete the robbery." *Stewart v. State*, 133 Nev. 142, 145, 393 P.3d 685, 688 (2017). Moreover, a rational trier of fact could have concluded that pouring liquid around the door and then locking Cuevas within the store constituted "restraint substantially in excess of that necessary to [the robbery's] completion." *Mendoza*, 122 Nev. at 275, 130 P.3d at 181. In sum, "[t]his is not one of the 'clearest of cases' in which the jury's verdict must be deemed unreasonable."[4] *Stewart*, 133 Nev. at 145, 393 P.3d at 688 (internal quotation marks omitted). Therefore, we affirm Guerrina's convictions of both robbery and kidnapping.

The evidence was insufficient to support a finding that Guerrina used or possessed a deadly weapon

Guerrina argues that there was insufficient evidence for a rational juror to have found that he used or possessed a deadly weapon as he committed these crimes. Viewing the evidence "in the light most favorable to the prosecution," *Milton*, 111 Nev. at 1491, 908 P.2d at 686-87 (internal quotation marks omitted), we agree.

To support the charges that Guerrina committed robbery and kidnapping with the use of a deadly weapon, "the State must prove that the weapon . . . is a 'deadly weapon' as defined in NRS 193.165(6)." *Berry v. State*, 125 Nev. 265, 271, 212 P.3d 1085, 1089 (2009), *abrogated in part on other grounds by State v. Castaneda*, 126 Nev. 478, 482 n.1, 245 P.3d 550, 553 n.1 (2010). "A knife is not necessarily a deadly weapon under NRS 193.165." *Domingues v. State*, 112 Nev. 683, 693 n.1, 917 P.2d 1364, 1371 n.1 (1996).[5]

By contrast, it remains unsettled how "deadly weapon" is defined within the context of burglary while in possession of a deadly weapon. Unlike Guerrina's robbery and kidnapping sentences, which were enhanced by NRS 193.165, his burglary sentence was enhanced by

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[4]Guerrina cites two cases for the proposition that his movement of the victim was merely incidental to the robbery: *Jefferson v. State*, 95 Nev. 577, 580, 599 P.2d 1043, 1044 (1979), and *Hampton v. Sheriff*, 95 Nev. 213, 214, 591 P.2d 1146, 1146-47 (1979). However, those 1979 cases predate *Mendoza*, wherein this court revised Nevada's rule concerning convictions for both robbery and kidnapping arising out of the same course of conduct. 122 Nev. at 269, 274, 130 P.3d at 177, 180. To the extent that *Mendoza* did not expressly overrule those cases, we do so now.

[5]*Domingues* was decided based on a statute and caselaw in effect prior to a 1995 amendment that broadened NRS 193.165's definition of deadly weapon. *See* 1995 Nev. Stat., ch. 455, § 1, at 1431. Given, however, that the current version of NRS 193.165 explicitly includes *some* knives as deadly weapons, *see* NRS 193.165(6)(c); NRS 202.265(1)(b), the principle of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—leads us to conclude that the statement in *Domingues* remains true: not all knives are deadly weapons.

NRS 205.060(4) (extending the punishment for burglary from 1-10 years of imprisonment to 2-15 years when a burglar possesses a deadly weapon). While we have held that NRS 193.165(6)'s definitions of deadly weapon are "instructive for determining whether a weapon is a 'deadly weapon' for purposes of NRS 205.060(4)," *Funderburk v. State*, 125 Nev. 260, 261, 212 P.3d 337, 337 (2009), we have not definitively incorporated all of NRS 193.165(6)'s definitions into NRS 205.060(4). However, as we explain below, because the record is devoid of *any* evidence that Guerrina's "weapon" was deadly, we need not presently elaborate on this issue.

In its jury instructions, the district court defined "deadly weapon" as follows:

> A "deadly weapon" is any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

Those definitions comport with the definitions set forth in NRS 193.165(6)(a) and NRS 193.165(6)(b). Thus, although NRS 193.165(6)(c) is arguably more apt for the facts of this case,[6] our review is limited to whether there was sufficient evidence for a rational jury to have concluded either (a) that Guerrina's weapon was designed to cause "substantial bodily harm or death," or (b) under the circumstances in which Guerrina used, attempted to use, or threatened to use it, the weapon was "readily capable of causing substantial bodily harm or death."

Turning to the facts of this case, the only evidence relating to Guerrina's weapon was Cuevas's testimony. Cuevas admitted that she never saw the blade of a knife but assumed that the object in Guerrina's hand was a folded knife. That object had a white handle that protruded "[m]aybe 3 inches, 2 inches" from Guerrina's hand. When asked how she knew that the object was a folding knife, Cuevas answered, "I'm familiar with what they look like." When pressed on cross-examination, Cuevas admitted that she could not tell the difference between a folding knife, a corkscrew, and a folding comb "when they're in the closed position." The object she saw was in the closed position, and while she believed it to be knife, she admitted that she could not be sure.

Although Cuevas reasserted on redirect that there was "no doubt in [her] mind" that Guerrina was holding a knife, her testimony re-

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[6]*See* NRS 193.165(6)(c) (defining "deadly weapon" as any "weapon specifically described in . . . NRS 202.265"); NRS 202.265(1)(b) (listing a "dirk, dagger, or switchblade knife"); NRS 202.265(5)(d) (defining "switchblade knife").

veals significant uncertainty as to the nature of the object within Guerrina's hand. Cuevas's confidence that the object was a knife is belied by the facts that she never saw a blade and that she admittedly could not distinguish a corkscrew from a knife from a comb when the object is in the closed position. Indeed, the only thing she actually saw was an object she described as a white handle. Regardless of what that object actually was, there was no evidence that it was designed to be deadly or that Guerrina used or threatened to use it in a deadly manner. Thus, the record contains insufficient evidence to support charges that Guerrina used or possessed a deadly weapon. *See Berry*, 125 Nev. at 271, 212 P.3d at 1089 (requiring the State to prove the weapon "is a 'deadly weapon' as defined in NRS 193.165(6)").

Accordingly, we order stricken the "with use of a deadly weapon" language from Guerrina's robbery and kidnapping convictions and vacate the enhanced sentences based thereon. *See Bias v. State*, 105 Nev. 869, 873, 784 P.2d 963, 965 (1989) (vacating a jury's finding that a defendant's toy gun constituted a deadly weapon and the related enhanced sentences). That is, we affirm Guerrina's 3-8 and 5-15 year sentences for robbery and kidnapping, respectively, but vacate his 3-8 and 2-5 year additional sentences that the district court imposed pursuant to the deadly weapon enhancement, NRS 193.165. Similarly, we order stricken "while in possession of a deadly weapon" from Guerrina's burglary conviction. However, because we cannot determine what portion, if any, of Guerrina's 2-7 year burglary sentence was due to his alleged possession of a deadly weapon, we reverse Guerrina's burglary sentence and remand to the district court for resentencing of Guerrina's burglary conviction. *Compare* NRS 205.060(2) (1-10 years imprisonment for baseline burglary), *with* NRS 205.060(4) (2-15 years' imprisonment for burglary while in possession of a deadly weapon).

Guerrina's remaining claims are without merit

Guerrina presents two additional claims. First, he argues that the State failed to prove any act of coercion. As relevant here, felony coercion consists of the use or immediate threat of violence or injury against a person or property, with "the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing." NRS 207.190(1), (2)(a). Whether the threat was "immediate" depends on the "viewpoint of a reasonable person facing the same threat." *Santana v. State*, 122 Nev. 1458, 1459, 148 P.3d 741, 742 (2006).

In this case, Guerrina committed coercion when he ordered Cuevas to disconnect the FastBucks telephone. He issued that order while standing with his back against the FastBucks door, which he had locked after forcing Cuevas to accompany him inside the otherwise empty store. Before ordering her to disconnect the phone, he

had sprayed the store's surveillance camera and robbed Cuevas of her wallet and cellphone, as well as the FastBucks money. Under such circumstances, a reasonable jury could have concluded that, from "the viewpoint of a reasonable person," Guerrina's order was accompanied by an immediate—albeit unspoken— "threat of physical force." *Id.* at 1462, 148 P.3d at 744. And, of course, Cuevas had a right to abstain from disconnecting the phone. Thus, viewing the evidence "in the light most favorable to the prosecution," *Milton*, 111 Nev. at 1491, 908 P.2d at 686-87 (internal quotation marks omitted), a rational juror could have found beyond a reasonable doubt that Guerrina committed felony coercion.

Second, Guerrina argues that the district court should have dismissed his indictment due to police misconduct. In particular, he argues that the police's decision not to obtain the Motel 6 surveillance tape constituted a failure to gather exculpatory evidence. We review the district court's denial of Guerrina's motion to dismiss for an abuse of discretion. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008).

To succeed on this claim, Guerrina must demonstrate that the surveillance tape was "material" and that the police's failure to gather it is "attributable to negligence, gross negligence, or bad faith." *Daniels v. State*, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998). "Evidence is material when there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." *Jackson v. State*, 128 Nev. 598, 613, 291 P.3d 1274, 1284 (2012).

Guerrina argues that the videotape was material because it could have provided him an alibi defense *if* it showed him at the Motel 6 at the time of the robbery or *if* it showed him wearing clothes different from those worn by the FastBucks robber. He points to no evidence to contradict the detective's testimony that the timing of Guerrina's appearance in the Motel 6 videotape did not conflict with the timing of the FastBucks robbery. His arguments *assume* rather than *demonstrate* that the videotape evidence was material. *See Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001) (rejecting a defendant's argument that evidence "would have been favorable to his case" as "mere speculation" where he offered no evidence to support his assertions). Thus, Guerrina has failed to show that the Motel 6 videotape was material to his defense, so his claim fails the first prong of *Daniels*. 114 Nev. at 267-68, 956 P.2d at 115. Accordingly, the district court did not abuse its discretion by denying Guerrina's motion to dismiss the charges against him.

CONCLUSION

We affirm *Lyons v. State*, which affords a district court discretion to reject a *Faretta* request as untimely if granting the request would require a continuance and the defendant shows no reasonable cause

to justify the lateness of his request. The district court did not abuse its discretion in denying Guerrina's *Faretta* request, which he inexplicably submitted 24 days prior to trial along with a request for a continuance.

We also affirm the *Mendoza v. State* test to determine when evidence is sufficient to simultaneously convict a defendant of robbery and kidnapping from a single course of events. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found that Guerrina's actions involved restraint substantially in excess of that necessary to effectuate the robbery and substantially increased the risk of harm to the victim. We therefore affirm his dual convictions.

Lastly, we reiterate that to sustain "deadly weapon" charges, the State must produce evidence that a perpetrator's weapon satisfied an applicable definition of "deadly weapon." Because there was insufficient evidence to support this finding, we vacate and reverse Guerrina's deadly weapon sentencing enhancements pursuant to NRS 193.165 and remand to the district court to resentence him for burglary under NRS 205.060(2).

Cherry and Parraguirre, JJ., concur.