not guideposts to much of anything useful in this case. But that will not always be true, and there likely will be cases in which thinking about the board's opinion as an example of legal reasoning, and thinking about it instead as an exercise in subject-matter expertise, may lead to very different views on whether we should give weight to what the board thought or did. To the extent that our role includes providing guidance to the public on how questions like this will be analyzed and resolved, we should be clear on precisely what we are saying or else we risk confusing the issue more than clarifying it, even on questions like this one where the potential confusion originates with the words used by the Nevada Supreme Court.

AIMEE HAIRR; AURORA ESPINOZA; ELIZABETH ROBBINS; LARA ALLEN; JEFFREY SMITH; AND TRINA SMITH, PETITIONERS, *v*. THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CARSON CITY; AND THE HONORABLE JAMES E. WILSON, DISTRICT JUDGE, RESPONDENTS, AND HELLEN QUAN LOPEZ, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, C.Q.; MICHELLE GORELOW, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, A.G. AND H.G.; ELECTRA SKRYZDLEWSKI, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, L.M.; JENNIFER CARR, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, W.C., A.C., AND E.C.; LINDA JOHNSON, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, K.J.; SARAH SOLOMON AND BRIAN SOLOMON, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, D.S. AND K.S.; AND DAN SCHWARTZ, NEVADA STATE TREASURER, IN HIS OFFICIAL CAPACITY, REAL PARTIES IN INTEREST.

No. 69580

March 10, 2016 368 P.3d 1198

Original petition for a writ of mandamus challenging a district court order denying a motion to intervene.

Parents of minor children who attended public schools brought action challenging constitutionality of senate bill that established program by which child who received instruction from entity other than public school could receive grant and provided for amount of grant to be deducted from total apportionment to school district. The district court denied motion to intervene on behalf of parents who sought to apply for grants. Parents who sought to apply for grants filed petition for writ of mandamus. The supreme court, HARDESTY, J., held that: (1) parents who sought to apply for grants were not

entitled to intervention of right, and (2) the district court did not abuse its discretion in denying motion for permissive intervention of parents who sought to apply for grants.

Petition denied.

[Rehearing denied May 10, 2016]

[En banc reconsideration denied June 24, 2016]

Kolesar & Leatham, Chtd., and *Matthew T. Dushoff* and *Lisa J. Zastrow*, Las Vegas, for Petitioners.

Adam Paul Laxalt, Attorney General, and *Lawrence J.C. VanDyke*, Solicitor General, *Joseph Tartakovsky*, Special Assistant Attorney General, and *Ketan D. Bhirud*, Chief Deputy Attorney General, Carson City, for Real Party in Interest Dan Schwartz, Nevada State Treasurer.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Don Springmeyer, Justin C. Jones*, and *Bradley S. Schrager*, Las Vegas; *Education Law Center* and *David G. Sciarra* and *Amanda Morgan*, Newark, New Jersey; *Munger, Tolles & Olson, LLP*, and *Tamerlin J. Godley, Thomas Paul Clancy*, and *Samuel T. Boyd*, Los Angeles, California, for Real Parties in Interest Hellen Quan Lopez, Michelle Gorelow, Electra Skryzdlewski, Jennifer Carr, Linda Johnson, Sarah Soloman, and Brian Soloman.

1. MANDAMUS.
   A mandamus petition is an appropriate method to seek review of a district court's order denying intervention when petitioners are not parties to the underlying action and cannot appeal the order. NRS 34.160.
2. MANDAMUS.
   Petitioners seeking a writ of mandamus have the burden of demonstrating that writ relief is warranted.
3. PARTIES.
   Parents who sought to apply for grants, under senate bill that established program by which child who received instruction from entity other than public school could receive grant and provided for amount of grant to be deducted from total apportionment to school district, failed to demonstrate that their interest in upholding constitutionality of bill would not be adequately represented by State, and thus, were not entitled to intervention of right, in action by parents of minor children who attended public schools challenging constitutionality of bill; parents who sought to apply for grants and State had same ultimate objective, State showed willingness to fully defend bill, and parents who sought to apply for grants failed to identify any arguments that differed from those of State. NRCP 24(a).
4. PARTIES.
   The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties, and when an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. NRCP 24(a).

5. Parties.
   The district court did not abuse its discretion in denying motion for permissive intervention of parents who sought to apply for grants, under senate bill that established program by which child who received instruction from entity other than public school could receive grant and provided for amount of grant to be deducted from total apportionment to school district, in action by parents of minor children who attended public schools challenging constitutionality of bill; the district court appropriately considered potential for delay and increased costs to parties, and the district court invited parents who sought to apply for grants to submit briefs on determinative issues as amici curiae, which was adequate alternative to permissive intervention. NRCP 24(b).
6. Appeal and Error.
   A district court's ruling on permissive intervention is subject to particularly deferential review.
7. Appeal and Error.
   On review of a district court's denial of a motion for permissive intervention, the question is not whether the factors that render permissive intervention appropriate were present, but rather whether the court committed a clear abuse of discretion in denying the motion. NRCP 24(b).
8. Amicus Curiae; Parties.
   Where no new questions are presented, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

Before Hardesty, Saitta and Pickering, JJ.

OPINION

By the Court, Hardesty, J.:

In this original petition for a writ of mandamus, we must determine whether the district court abused its discretion in denying petitioners' motion to intervene as defendants in the underlying action as a matter of right under NRCP 24(a), or alternatively, through permissive intervention under NRCP 24(b). We conclude, as the district court found, that petitioners' "interest is adequately represented" by real party in interest Dan Schwartz, Nevada Treasurer, in his official capacity (State). NRCP 24(a)(2). Petitioners and the State share the same goal of having the education grant program created by Senate Bill 302 declared constitutional. The State, in defending S.B. 302's validity, is presumed to be adequately representing the interests of citizens who support the bill, including petitioners. Petitioners failed to overcome the presumption when they could not show any conflict of interest with the State's position or cite an argument they would make that the State would not. As for the denial of permissive intervention, such decisions are given particular deference, including considerations of potential delay and increased costs in adding parties. Petitioners' failed to provide any supportable reasons why a writ should issue to reverse that discretionary decision. Moreover,

while the district court did not perceive any benefit to petitioners' intervention, it invited them to brief the determinative issue as amici curiae, which, under the circumstances, is an adequate alternative to permissive intervention. As we perceive no abuse of discretion in the district court's decision, we deny writ relief.

BACKGROUND

This petition arises out of a district court action in which several parents are challenging the constitutionality of S.B. 302 on their own behalf and on behalf of their minor children who attend Nevada public schools. Senate Bill 302

> establish[es] a program by which a child who receives instruction from a certain entity rather than from a public school may receive a grant of money in an amount equal to the statewide average basic support per-pupil [and] provid[es] for the amount of each grant to be deducted from the total apportionment to the school district.

2015 Nev. Stat., ch. 332, at 1824. Plaintiffs filed their suit against defendant Dan Schwartz, in his official capacity as the Treasurer of the State of Nevada.

Petitioners, who are parents seeking to apply for the grants, moved to intervene in district court as defendants, arguing that they satisfy the requirements for intervention of right under NRCP 24(a), or alternatively that they should be permitted to intervene under NRCP 24(b) to assist the court "in focusing on the effect of the challenged law on its real beneficiaries, parents and children." Plaintiffs opposed the motion, and the State did not. After the district court denied the motion, petitioners filed this petition for a writ of mandamus to compel the district court to grant their application to intervene.

DISCUSSION

[Headnotes 1, 2]

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Because petitioners are not parties to the underlying action and cannot appeal the district court's order denying intervention, a mandamus petition is an appropriate method to seek review of such an order. *Am. Home Assurance Co. v. Eighth Judicial Dist. Court*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Petitioners have the burden of demonstrating that writ relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); *see Am. Home Assurance*

Co., 122 Nev. at 1234, 147 P.3d at 1124 (recognizing the district court's considerable discretion in deciding a motion to intervene and declining to grant writ relief where petitioners failed to demonstrate a clear abuse of that discretion).

Intervention of right

[Headnote 3]

Petitioners first argue that the district court was required to grant their application for intervention of right because they met the rule's prerequisites for rightful intervention and the district court applied the wrong legal standard in determining that they did not. As the district court's discretionary judgment rested on the words of NRCP 24(a), we disagree that the rule mandates a different outcome.

NRCP 24(a) provides that

> [u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

We have previously held that an applicant for intervention of right must show "(1) that it has a sufficient interest in the litigation's subject matter, (2) that it could suffer an impairment of its ability to protect that interest if it does not intervene, (3) that its interest is not adequately represented by existing parties, and (4) that its application is timely." *Am. Home Assurance Co.*, 122 Nev. at 1238, 147 P.3d at 1126. "Determining whether an applicant has met these four requirements is within the district court's discretion." *Id.*

Here, the district court found that although petitioners arguably met requirements 1, 2, and 4 for intervention of right, they failed to satisfy requirement 3 by demonstrating that their interest in upholding the constitutionality of S.B. 302 would not be adequately represented by the State. The district court determined that where, as here, the original defendant in a suit is a state official represented by the state attorney general, the applicant seeking intervention must make a "very compelling showing" to overcome a presumption that the government will adequately represent the applicant's interests.

Petitioners contend that the district court applied the wrong standard in resolving their motion, as they were required to show only that the State's representation "may be" inadequate in order to overcome the presumption. According to petitioners, they met this minimal burden by arguing that the State has broader interests than they

do on a theoretical level and that they might, without actually identifying any, make different arguments than the State. In that regard, petitioners assert that in finding that petitioners had no independent legal interest in seeing the constitutionality of S.B. 302 upheld, the district court failed to recognize their "liberty interest in the educational upbringing of their children." Petitioners' understanding of their burden to overcome the presumption of the State's adequate representation does not accurately reflect the legal standard that applies when the State and the intervention applicant share the same goal in the litigation, and therefore these arguments do not provide a basis for writ relief.

[Headnote 4]

"The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties . . . . [and] when an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Although the Ninth Circuit explained that "[t]he burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests 'may be' inadequate," it also recognized that there is an "assumption of adequacy when the government is acting on behalf of a constituency it represents," and "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Id.* (quoting 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1909 (3d ed. 2007)); *see also Lundberg v. Koontz*, 82 Nev. 360, 362-63, 418 P.2d 808, 809 (1966) (denying a motion to intervene of right on the basis that the interests of the intervenor applicants were adequately represented by the State because the single issue raised was an issue of law on which the applicants and the State sought the same outcome).

Consistent with the Ninth Circuit's reasoning, we held in *American Home Assurance Co.* that although the applicant's burden to prove the inadequacy of representation "has been described as 'minimal,' when the [applicant's] interest or ultimate objective in the litigation is the same as the [existing party]'s interest or subsumed within [that existing party's] objective, the . . . representation should generally be adequate, unless the [applicant] demonstrates otherwise." 122 Nev. at 1241, 147 P.3d at 1128. We concluded that unless the applicant "can show that the [existing party] has a different objective, adverse to its interest," or can show that the existing party "may not adequately represent their shared interest, the [exist-

ing party's] representation is assumed to be adequate." *Id*. at 1242, 147 P.3d at 1129.

In this case, petitioners and the State have the same ultimate objective—a determination that S.B. 302 is constitutional—and petitioners did not identify any conflicting interest or point to any arguments that the State was refusing to make in support of the bill's constitutionality. To the contrary, the State has shown its willingness to fully defend the bill, including through appeal. As for petitioners' argument that the State's interest in upholding the bill is broader than the liberty interest petitioners identified in seeking intervention, the only issue in this case is the constitutionality of S.B. 302, and petitioners do not indicate how protecting their right to choose where to educate their children would result in their assertion of different defenses in support of the determinative issue. Although petitioners cite to school voucher litigation in other states to support their contention that the State's arguments may differ from their own, use of different legal arguments and strategies is not per se inadequate representation. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009). Regardless, petitioners failed to identify any such differing arguments in this case, although they presumably could have done so, and they likewise did not provide examples of how the defenses raised by the intervenor parents in the cases cited were different from the state's defenses in those cases. Instead, petitioners note that the intervenor-parents in those cases pursued different litigation strategies, which does not justify intervention of right. On this record, the district court had no reason to conclude that the State's representation would be inadequate.

Because petitioners have not shown that they have a different legal interest than the State in the outcome of the litigation or that their interests in defending the suit are adverse to the State's interests, the district court correctly determined that petitioners failed to make the required compelling showing to overcome the presumption that the State will adequately represent their interest. *Am. Home Assurance Co.*, 122 Nev. at 1234, 147 P.3d at 1124; *Arakaki*, 324 F.3d at 1086. Thus, petitioners have failed to meet their burden to demonstrate that a writ should issue to compel the district court to grant intervention of right.

Permissive intervention

[Headnote 5]

Petitioners next argue that the district court abused its discretion by denying their request for permissive intervention under NRCP 24(b), pointing to two alleged legal errors. First, petitioners argue that the district court did not adequately consider "whether the intervention will unduly delay or prejudice the adjudication of the rights

of the original parties" as is required by NRCP 24(b)(2). Second, petitioners contend that the district court's decision was based on an erroneous finding that petitioners did not comply with NRCP 24(c)'s requirement that a motion for intervention "be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

NRCP 24(b) provides that

> [u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The district court's concerns in denying permissive intervention centered on the potential for delay and increased costs, which it determined would come with no measurable benefit to the court's ability to determine the legal and factual issues in the case. The district court also found that petitioners failed to comply with NRCP 24(c)'s procedural requirements and instead filed numerous documents, including an opposition to plaintiffs' preliminary injunction motion, a filing in support of the State's motion to dismiss, and notices to substitute and associate counsel even though they were not parties and had no legal basis to do so. The district court therefore declined to exercise its discretion to grant permissive intervention.

[Headnotes 6, 7]

A district court's ruling on permissive intervention is subject to "particularly deferential" review. *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999). Permissive intervention "is wholly discretionary with the [district] court . . . and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1913 (3d ed. 2007). Thus, on review, the question "is not whether 'the factors which render permissive intervention appropriate under [Rule] 24(b) were present,' but is rather 'whether the trial court committed a clear abuse of discretion in denying the motion.'" *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 471 (5th Cir. 1984) (quoting *Korioth v. Briscoe*, 523 F.2d 1271, 1278 (5th Cir. 1975)).

The district court properly considered the potential for delay and increased costs to the parties, as required by NRCP 24(b)(2), and although petitioners argue that the district court merely mentioned generalized concerns in this regard, this is precisely the type of fact-

based judgment determination entitled to particular deference by a reviewing court. Thus, petitioners have not demonstrated that the district court clearly abused its discretion in denying permissive intervention on this score.

[Headnote 8]

Providing further reason to deny the writ petition as to permissive intervention, the district court invited petitioners to submit briefs on determinative issues as amici curiae. *See Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (recognizing that an appeals court may consider the fact that the intervention applicant has been granted amicus curiae status in the case in reviewing a challenge to an order denying permissive intervention). Under the circumstances, amicus participation is an adequate alternative to permissive intervention. *See McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012) ("Numerous cases support the proposition that allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention." (citing *Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002); *Mumford Cove Ass'n v. Town of Groton*, 786 F.2d 530, 535 (2d Cir. 1986); *Bush*, 740 F.2d at 359; and *Brewer v. Republic Steel Corp.*, 513 F.2d 1222, 1225 (6th Cir. 1975))). As one court has observed, "[w]here he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention." *Bush*, 740 F.2d at 359 (quotation omitted). Although there may be instances in which amicus curiae status would not be an adequate substitute for permissive intervention, petitioners have not shown or argued that this is such a case.

We therefore deny the petition for a writ of mandamus.

SAITTA and PICKERING, JJ., concur.

JENNY RISH, Appellant, *v.* WILLIAM JAY SIMAO and CHERYL ANN SIMAO, Individually and as Husband and Wife, Respondents.

No. 58504

JENNY RISH, Appellant, *v.* WILLIAM JAY SIMAO and CHERYL ANN SIMAO, Individually and as Husband and Wife, Respondents.

No. 59208

JENNY RISH, Appellant, *v.* WILLIAM JAY SIMAO and CHERYL ANN SIMAO, Individually and as Husband and Wife, Respondents.

No. 59423

March 17, 2016 368 P.3d 1203

Consolidated appeals from a district court judgment in a tort action and from post-judgment orders denying a new trial and awarding attorney fees. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Motorist filed suit against defendant driver for injuries sustained in rear-end collision. The district court struck driver's answer based on multiple violations of pretrial order barring evidence or argument on "low-impact" defense, which order was entered based on driver's failure to present opinion of biomechanical expert in support of defense, then held prove-up hearing following which it awarded motorist damages of $194,390.96 for past medical expenses, $1,378,209 for past pain, suffering, and loss of enjoyment of life, and $1,140,552 for future pain, suffering, and loss of enjoyment of life. Driver appealed. The supreme court, Hardesty, J., held that: (1) driver was not required to present expert testimony from certified biomechanical engineer to support low-impact defense to claim for personal injuries arising out of rear-end collision; (2) driver's proffered medical expert was qualified to testify as to whether rear-end collision could have caused motorist's injuries; (3) pretrial order lacked specificity, for purposes of determining whether violations of order by driver's attorney warranted case-ending sanction of striking driver's answer; (4) violations of order were not clear, for purposes of determining whether sanction was warranted; and (5) motorist was not prejudiced from violations.

Reversed, vacated, and remanded.

Lewis Roca Rothgerber Christie, LLP, and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.*, and *Stephen H. Rogers*, Las Vegas, for Appellant.

David T. Wall, Las Vegas; *Eglet Prince* and *Robert T. Eglet* and *Robert M. Adams*, Las Vegas, for Respondents.

1. Evidence.
   Defendant driver was not required to present expert testimony from certified biomechanical engineer to support low-impact defense to claim for personal injuries in action brought by motorist arising out of rear-end collision. NRS 50.275.
2. Appeal and Error.
   When the district court abuses its discretion in determining whether to admit or exclude evidence, the supreme court will overturn the district court's determination.
3. Trial.
   Once a plaintiff presents testimony regarding the nature of the impact in a vehicle collision case, the defense may present evidence to rebut the plaintiff's assertions.
4. Evidence.
   Expert testimony, biomechanical or otherwise, must have a sufficient foundation before it may be admitted into evidence.
5. Evidence.
   Driver's proffered medical expert was qualified to testify as to whether rear-end collision could have caused motorist's injuries, in motorist's action against driver, where expert examined motorist's medical records, images from magnetic resonance imaging (MRI), and photographs of damage to parties' vehicles. NRS 50.275.
6. Evidence.
   A medical doctor may offer an opinion regarding causation of injuries from automobile accident so long as there is a sufficient foundation for the conclusion.
7. Appeal and Error; Costs.
   The supreme court reviews the imposition of a sanction for the violation of court orders under a somewhat heightened standard of review: a party is required to follow court orders, even erroneous ones, until overturned or terminated, and even if the order is later overruled, a sanction predicated on violations of that order may remain in force.
8. Pretrial Procedure.
   Pretrial order barring defendant driver from presenting any evidence or argument on "low-impact" defense to motorist's claim for personal injuries arising out of rear-end collision lacked specificity, for purposes of determining whether violations of order by driver's attorney during trial warranted sanction of striking driver's answer; although order precluded driver from raising defense, it provided no further guidance except to specifically preclude driver's expert and other witnesses from testifying, arguing, or insinuating that collision was too insignificant to have caused motorist's injuries, defendant's attorney expressed his confusion about order on numerous occasions, the district court refused to clarify what it would and would not allow, and order was inconsistently applied throughout trial.
9. Pretrial Procedure.
   Violations by defendant driver's attorney of pretrial order barring driver from presenting any evidence or argument on "low-impact" defense to motorist's claim for personal injuries arising out of rear-end collision were not clear, as basis for sanction of striking driver's answer; there was nothing to indicate that two violations based on driver's expert's comments that accident was not significant and that motorist's injuries were based, in

part, on knowledge of accident, were prompted by driver's attorney, and other instances of alleged attorney misconduct arising out of questions as to whether witness knew what happened to motorist as result of accident and whether there was stop-and-go traffic before accident did not describe accident itself.

10. Pretrial Procedure.

Motorist was not prejudiced by defendant driver's purported violations of pretrial order barring any evidence or argument on "low-impact" defense to motorist's claim for injuries arising out of rear-end collision, so as to justify sanction of striking driver's answer, where the district court did not articulate why various admonitions and "irrebuttable presumption" instruction that accident was severe enough to cause motorist's injuries were inadequate to address alleged misconduct, irrebuttable presumption instruction was confusing in any case, and therefore would not have helped jury, and while there were two more alleged violations of order before the district court struck answer based on questions posed to motorist, the district court struck both questions, motorist never answered questions, and the district court did not explain how two alleged violations raised aggregate misconduct to level warranting case-ending sanction.

11. Pretrial Procedure.

In determining whether a party is prejudiced by violation of a pretrial order rising to the level of attorney misconduct, so as to warrant a case-ending sanction, the district court is required to find that a violation is so extreme that it cannot be eliminated through an objection and admonition.

Before Hardesty, Douglas and Cherry, JJ.

OPINION

By the Court, Hardesty, J.:

Respondents William Jay Simao and Cheryl Ann Simao (Simao) filed a motion in limine to preclude appellant Jenny Rish from presenting a low-impact defense in a personal injury case arising out of an automobile accident. Simao claimed our holding in *Hallmark v. Eldridge*, 124 Nev. 492, 500-02, 189 P.3d 646, 651-53 (2008), required the exclusion of low-impact evidence because Rish failed to retain a biomechanical expert to opine on the nature of the accident. In *Hallmark*, we held that a biomechanical engineer's testimony regarding whether the forces involved in a car accident could have caused the plaintiff's injury was without sufficient foundation to be admissible under NRS 50.275. 124 Nev. at 500-02, 189 P.3d at 651-53. Because *Hallmark* held that a biomechanical expert's testimony must have sufficient foundation to be admissible under NRS 50.275, not that a biomechanical expert's testimony must underlie all evidence of the alleged injury-causing accident, we conclude that the district court's order granting the motion in limine was in error as a matter of law.

Following eight alleged violations of the district court's pretrial order prohibiting a low-impact defense and violations of two ad-

ditional pretrial orders, the district court struck Rish's answer as a sanction. Because the case-ending sanction order failed to satisfy the requirements of *BMW v. Roth*, 127 Nev. 122, 126, 252 P.3d 649, 652 (2011), we reverse and remand this matter for a new trial.

FACTS AND PROCEDURAL HISTORY

Rish and William Simao were involved in a car accident in which Rish rear-ended William Simao in stop-and-go traffic. The damage to the vehicles was not extensive. While an ambulance was called, both Rish and William Simao refused medical treatment at the scene. William Simao later alleged that the accident injured his head and neck, causing him constant pain and requiring on-going medical treatment and procedures. Simao brought suit against Rish to recover damages for William's injuries and Cheryl's loss of consortium.

Before trial, Simao filed a motion in limine asking the district court to preclude Rish, her attorneys, her medical expert, Dr. David Fish, and her witnesses from testifying, arguing, or insinuating that the collision was too insignificant to have caused William Simao's injuries. Citing to *Hallmark*, 124 Nev. at 496-97, 189 P.3d at 649, *Choat v. McDorman*, 86 Nev. 332, 335, 468 P.2d 354, 356 (1970), and *Levine v. Remolif*, 80 Nev. 168, 171-72, 390 P.2d 718, 719-20 (1964), Simao asserted that any argument or evidence of a low-impact accident should be barred because Rish had not retained a biomechanical engineer who could first testify that the forces imparted by the collision were too insignificant to cause the injury. On this basis, Simao also argued that photographs of the vehicles and repair invoices should likewise be excluded as irrelevant because, without supporting expert testimony, there was no reliable correlation between the extent of damage and the extent of injury, citing *Hallmark*, NRS 50.275, and *Davis v. Maute*, 770 A.2d 36, 40 (Del. 2001).

Rish opposed the motion, arguing that physicians have always been permitted to consider the severity of the accident when formulating opinions and to opine on whether the force could have caused the injury. She further argued that none of the cases relied upon by Simao prohibit the defense from describing the accident as low impact, and that evidence of property damage was relevant, admissible, and not substantially prejudicial.

At the motion hearing, the district court found the extent of property damage to be relevant but nevertheless granted Simao's motion in its entirety because, "pursuant to the *Hallmark* case," Rish did not have "a witness who can lay the proper foundation" for Rish to advance a low-impact defense. Finding the result was required by *Hallmark*, the district court granted Simao's requests to prohibit Rish "from Raising a 'Minor' or 'Low Impact' Defense," and to prohibit Dr. Fish and other experts from "opin[ing] regarding biomechanics or the nature of the impact of the subject crash." The

court further prohibited photographs of the parties' cars and property damage invoices.

Before and during the trial, Rish's trial counsel sought clarification of the district court's order in limine, voicing concerns that the order prevented the defense from offering any testimony showing the nature of the accident. The district court, stating that its order was clear, declined to clarify the order. During the trial, the court sustained eight objections by Simao to Rish's questions and evidence as violating the low-impact defense pretrial order.

During opening statements, and without objection from Simao, Rish's trial counsel described the accident by saying that Rish "was stopped behind [William Simao], who moved a few feet in front of her . . . ; [Rish] applied her brakes, only just not quite hard enough; and the accident follow[ed]." Rish's trial counsel also stated that no one in the accident claimed loss of consciousness, everyone refused help from the paramedics, and Rish drove away from the scene. Rish's trial counsel then attempted to play a portion of Rish's videotaped deposition. Simao objected. The district court's order indicated that the objection was sustained on hearsay grounds and because it contained testimony concerning "the nature of the accident."

Rish's trial counsel cross-examined three of Simao's physician experts. During cross-examination of the first doctor, Rish's trial counsel asked if he "kn[ew] anything about what happened to Jenny Rish and her passengers in this accident." Simao objected on relevancy grounds and referenced the low-impact defense pretrial order. The district court sustained the objection without comment from Rish.

Rish's trial counsel asked the second doctor if he "kn[e]w anything about the folks in Jenny Rish's car." Simao objected on relevancy grounds. A bench conference was held where Rish's trial counsel asked if the irrelevancy of his question had been addressed in a previous order. Simao briefly referenced the low-impact defense pretrial order, and the district court sustained the objection.

Finally, Rish's trial counsel asked the third doctor: "[y]ou know [William Simao] wasn't transported by ambulance?" After the doctor replied in the affirmative, Rish asked: "You know that Jenny Rish . . . was lifted from the scene." Simao objected and asked that Rish's trial counsel be admonished for disregarding the low-impact defense pretrial order. The objection was sustained, and the jury was told to disregard the question. Simao later sought to make a record, outside the presence of the jury, as to Rish's trial counsel's violation. The district court indicated that it would consider a progressive sanction and suggested that Rish's trial counsel reread the order.

During Simao's cross-examination of Dr. Fish, Dr. Fish attempted to distinguish a case where he had causally related a patient's injury to her accident by stating, "Well, in this very significant accident, yes." Simao moved to strike most of the doctor's response, and the

court instructed the jury to disregard all but the word "yes." On redirect of Dr. Fish, Rish's trial counsel asked how he reached the opinion that the accident did not cause William Simao's injuries. Dr. Fish stated that it was "based on multiple factors. It's based on the actual—looking at the images of the MRI. . . . It's looking at the notes that were taken of the events that happened and it's knowing about the accident itself." Simao objected and moved to strike, and the district court told the jury to disregard Dr. Fish's last phrase. Another exchange followed outside the presence of the jury, and Simao asked the court to give a presumption instruction to the jury as a sanction. The court ultimately instructed the jury that "there is an irrebuttable presumption that the motor vehicle accident of April 15, 2005 was sufficient to cause the type of injuries sustained by the Plaintiff. Whether it proximately caused those injuries remains a question for the jury to determine."

Finally, during cross-examination of William Simao, Rish's trial counsel asked if the traffic was stop-and-go. Simao asked for a bench conference, and the district court precluded the question because it improperly suggested that the impact was minor. Rish's trial counsel then asked William Simao whether the paramedics had transported anyone from Rish's car. Simao objected, asked for a bench conference, and moved to strike Rish's answer. The district court granted the motion, entered a default judgment against Rish, and dismissed the jury.

Thereafter, the district court held a prove-up hearing, at which it limited each party to a short argument regarding damages and awarded William Simao $194,390.96 for past medical expenses; $1,378,209 for past pain, suffering, and loss of enjoyment of life; and $1,140,552 for future pain, suffering, and loss of enjoyment of life. It also awarded $681,286 to Cheryl Simao for loss of consortium and attorney fees in the amount of $1,078,125. In all, the awards against Rish totaled nearly $4.5 million.[1] This appeal followed.

DISCUSSION

On appeal, Rish primarily challenges the validity of the district court's final sanction of striking her answer and entering a default judgment against her. The threshold question is whether the pretrial order precluding the testimony and evidence of a low-impact de-

[1]Because we are reversing this matter for a new trial, we do not address the procedure used by the district court to determine damages pursuant to *Foster v. Dingwall*, 126 Nev. 56, 68, 227 P.3d 1042, 1050 (2010) ("[T]he nonoffending party[has an] obligation to present sufficient evidence to establish a prima facie case, which includes substantial evidence that the damages sought are consistent with the claims for which the nonoffending party seeks compensation.").

fense was erroneous as a matter of law. We hold that it was. We also hold that the district court erred by striking Rish's answer, and we reverse the district court's judgment and order a new trial.

The district court erred in extending Hallmark to preclude all argument of a low-impact defense

[Headnotes 1, 2]

Trial courts have broad discretion in determining whether to admit evidence and may exclude relevant evidence that is substantially more unfairly prejudicial than probative. NRS 48.035(1); *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). When the district court abuses its discretion in determining whether to admit or exclude evidence, this court will overturn the district court's determination. *Land Res. Dev. v. Kaiser Aetna*, 100 Nev. 29, 34, 676 P.2d 235, 238 (1984).

During the proceedings below, Simao argued that *Hallmark* precludes all testimony, evidence, argument, and insinuation of a low-impact defense unless the party offering it first provides a foundation for this defense through expert testimony from a qualified biomechanical engineer. The district court agreed and imputed the reasoning from *Hallmark* to bar any evidence of a minor or low-impact defense.

We held in *Hallmark* that the district court abused its discretion in allowing an expert witness, who was both a physician and mechanical engineer, to testify that an accident was too low impact to have caused the plaintiff's injuries. 124 Nev. at 502, 189 P.3d at 652. Although we determined that the witness was qualified to testify as an expert, we concluded that the expert did not have an adequate factual or scientific basis for his opinions regarding the nature of the accident after he acknowledged that he failed to review critical information when he formed his opinion. *Id.* at 497, 504, 189 P.3d at 649, 654. Rather, the expert's opinion was based more on supposition than science and did not qualify as admissible expert testimony under NRS 50.275 because biomechanics was not a recognized field of expertise, the testimony had not been and could not be tested, and the expert's theories and methods had not been subjected to peer review. *Id.* at 500-02, 189 P.3d at 651-53. While noting that biomechanical testimony was not necessarily precluded in every case, we determined that the expert's testimony in that case was without a sufficient foundation to be admitted. *Id.* at 504, 189 P.3d at 654. Thus, *Hallmark* focused specifically on the admissibility of expert testimony.

[Headnotes 3, 4]

Nothing in *Hallmark* mandates that supporting testimony from a certified biomechanical engineer or other expert must be offered

before a defendant will be allowed to present a low-impact defense.[2] Rather, *Hallmark* stands for the well-established proposition that expert testimony, biomechanical or otherwise, must have a sufficient foundation before it may be admitted into evidence. *Id*. at 503-04, 189 P.3d at 653-54; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993); *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir.); *Howard Entm't, Inc. v. Kudrow*, 146 Cal. Rptr. 3d 154, 170 (Ct. App. 2012). In the absence of a specific issue concerning the speed or the nature of the impact, mandating supporting expert testimony as a prerequisite to advancing a general low-impact defense would effectively and impermissibly deprive juries of hearing any testimony regarding the nature and circumstances of the accident and any resulting injuries unless an expert first describes the accident to the jury.[3] *See Banks v. Sunrise Hosp.*, 120 Nev. 822, 838, 102 P.3d 52, 63 (2004) (noting that it is for the jury to determine the credibility of and the weight to be given to testimony where evidence presented on a material point may be conflicting or facts could support differing inferences). Nothing in *Hallmark* mandates such a requirement, and we have previously determined that causation issues, including the circumstances and severity of an accident and whether it proximately caused the alleged injuries, are factual issues that are proper for a jury to weigh and determine. *See Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981) (holding that whether a collision proximately caused respondent's injuries were factual issues for the jury to resolve); *Fox v. Cusick*, 91 Nev. 218, 221, 533 P.2d 466, 468 (1975) (concluding that it is "for the jury to weigh the evidence and assess the credibility" of the witnesses); *Barreth v. Reno Bus Lines, Inc.*, 77 Nev. 196, 198, 360 P.2d 1037, 1038 (1961) (the jury decides questions of proximate cause). The district court therefore abused its discretion in prohibiting Rish from presenting or eliciting any evidence and testimony regarding the nature and circumstances of the accident, as well as the injuries suffered by Rish and her passengers. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) ("While

[2]In arguing below that a low-impact defense requires supporting testimony from a qualified biomechanical engineer, Simao also cited to *Choat v. McDorman*, 86 Nev. 332, 335, 468 P.2d 354, 356 (1970), and *Levine v. Remolif*, 80 Nev. 168, 171-72, 390 P.2d 718, 719-20 (1964). Neither of those cases creates such a rule. Rather, in both of those cases, we held that an expert may not testify to the specific speed of the vehicles at the time of a collision absent a sufficient foundation for that determination. *Choat*, 86 Nev. at 335, 468 P.2d at 356; *Levine*, 80 Nev. at 171-72, 390 P.2d at 719-20. Moreover, as neither case addressed whether medical doctors may opine on injury causation, they are inapplicable to the issue before this court.

[3]Generally, once a plaintiff presents testimony regarding the nature of the impact in a vehicle collision case, the defense may present evidence to rebut the plaintiff's assertions. *See Provence v. Cunningham*, 95 Nev. 4, 7-8, 588 P.2d 1020, 1021-22 (1979).

review for abuse of discretion is ordinarily deferential, deference is not owed to legal error."); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."), *superseded by rule on other grounds*, Fed. R. Civ. P. 11.

As to whether a medical doctor may relate the nature and severity of the impact to the injuries, we note that courts in other jurisdictions have allowed such testimony. *See, e.g.*, *Mattek v. White*, 695 So. 2d 942, 943 (Fla. Dist. Ct. App. 1997) (holding that defendant's expert in accident reconstruction and biomechanical engineering, who was not a medical doctor, was not qualified to opine on the extent of plaintiff's injury); *Santos v. Nicolos*, 879 N.Y.S.2d 701, 704 (Sup. Ct. 2009) (explaining that biomechanical engineer was not qualified to testify about the causal relationship between an accident and the injuries of the plaintiff *because he was not a medical doctor*); *Streight v. Conroy*, 566 P.2d 1198, 1200 (Or. 1977) (refusing to assign error where the trial court allowed expert medical witnesses to testify as to whether the impact could have caused plaintiff's wife's back problems after viewing photographs of the accident because the jury could review the evidence and "give such weight to the experts' testimony as they saw fit"); *Wilson v. Rivers*, 593 S.E.2d 603, 605 (S.C. 2004) (stating that medical doctor "was qualified to render an opinion on the forces created by an impact and on the general effects on the human body caused by such forces and, . . . an opinion regarding the cause of respondent's particular medical problems"); *John v. Im*, 559 S.E.2d 694, 697 (Va. 2002) ("[S]ince [the expert] was not a medical doctor, he was not qualified to state an expert medical opinion regarding the cause of [the] injury."). And in *Hallmark*, this court suggested that had the defense expert, who was also a medical doctor, physically examined the plaintiff or reviewed her medical history, the defense may have been able to lay a proper foundation to allow the expert to testify as to causation. 124 Nev. at 504, 189 P.3d at 654.

[Headnotes 5, 6]

Based on this analysis, we conclude that a medical doctor may offer an opinion regarding causation so long as there is a sufficient foundation for the conclusion. We do not intend by this opinion to suggest that low-impact collisions cannot result in serious injuries. Low-impact collisions can cause serious, as well as minor, injuries, but, as noted above, the nature of the impact is a factor for the trier of fact to consider in determining the causation of the injuries that form the basis of the claim. In this case, Dr. Fish examined William Simao's medical records, the MRI images, and photographs of the damage to the parties' vehicles, and therefore had a sufficient basis

to offer an opinion on whether the accident caused William Simao's injuries.[4]

The district court erred in striking the answer

[Headnote 7]

We now turn to the validity of the sanction, which we review under a somewhat heightened standard of review. *See Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010) ("[A] somewhat heightened standard of review applies where the sanction strikes the pleadings, resulting in dismissal with prejudice."). A party is required to follow court orders, even erroneous ones, until overturned or terminated. *Walker v. City of Birmingham*, 388 U.S. 307, 320-21 (1967) (holding that order violating civil rights should have nevertheless been followed until overturned); *see also Howat v. Kansas*, 258 U.S. 181, 190 (1922) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."). Even if the order is later overruled, a sanction predicated on violations of that order may remain in force. *See Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 351, 354 (5th Cir. 1997).

Here, the district court imposed a case-ending sanction by striking Rish's answer, entering a default, and conducting a prove-up hearing. Following argument on Simao's motion to strike Rish's answer, the district court entered a written order analyzing the factors in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990), and finding that Rish's trial counsel's conduct violated the low-impact defense pretrial order. The order concluded that counsel engaged in misconduct by violating the low-impact defense

[4]The district court also excluded from evidence all photographs of the vehicles and invoices for the repair work on the basis that such evidence was substantially prejudicial and that *Hallmark* required supporting testimony from a biomechanical engineer in order to be admissible. During arguments, Rish withdrew any objection to the district court's ruling, and therefore, we do not decide whether the district court erred in either applying *Hallmark* to bar the admission of the photographs and invoices. However, we note that other jurisdictions generally admit such evidence because, even in the absence of supporting expert testimony, there is a common-sense correlation between the nature of the impact and the severity of the injuries, and a plaintiff may overcome any prejudicial effect by offering contradicting testimony, cross-examining the witnesses, and utilizing other mechanisms to prove his or her case. *See Johnson v. McRee*, 152 P.2d 526, 527-28 (Cal. Ct. App. 1944); *Martin v. Miqueu*, 98 P.2d 816, 818 (Cal. Ct. App. 1940); *Hayes v. Sutton*, 190 A.2d 655, 656 (D.C. 1963); *Cancio v. White*, 697 N.E.2d 749, 756 (Ill. App. Ct. 1998); *Mason v. Lynch*, 878 A.2d 588, 601 (Md. 2005); *Brenman v. Demello*, 921 A.2d 1110, 1118 (N.J. 2007); *Gambrell v. Zengel*, 265 A.2d 823, 824-25 (N.J. Super. Ct. App. Div. 1970); *Accetta v. Provencal*, 962 A.2d 56, 61-62 (R.I. 2009); *Murray v. Mossman*, 329 P.2d 1089, 1091 (Wash. 1958).

pretrial order on eight occasions during trial: one incident involved a videotaped deposition that Rish's trial counsel attempted to play during opening statements, four incidents involved questions Rish's trial counsel posed to William Simao and his experts concerning what happened to Rish and her passengers following the accident, one incident involved Rish's trial counsel asking William Simao if there was stop-and-go traffic prior to the accident, and two incidents involved Dr. Fish's answers during cross-examination and redirect.[5]

In *BMW v. Roth*, 127 Nev. 122, 126, 252 P.3d 649, 652 (2011), we held "[f]or violation of an order in limine to constitute attorney misconduct requiring a new trial, the order must be specific, the violation must be clear, and unfair prejudice must be shown." Although the sanction requested in *BMW* differs from the sanction requested here, *BMW*'s analysis is applicable because it addresses the larger issue of attorney misconduct. *See also Foster*, 126 Nev. at 66, 227 P.3d at 1049 (discussing whether "the court's decision to strike de-

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[5]The district court's oral order imposing case-ending sanctions was "primarily" based on Rish's trial counsel's violations of the low-impact defense pretrial order, but its written order also makes reference to three additional violations of two separate pretrial orders. The parties did not raise, and we do not analyze, the question of whether these two additional pretrial orders and their corresponding violations violate *BMW*, 127 Nev. 122, 126, 252 P.3d 649, 652 (2011). Based on our disposition, we resolve them briefly here.

First, during opening statement, Rish's trial counsel referred to an unrelated motorcycle accident involving William Simao, which was barred by a pretrial order. Second, Rish's trial counsel stated during opening statement that doctors were going to testify and that some of them appear regularly in court, and later Rish's trial counsel asked Dr. McNulty on cross-examination whether he had testified around 100 times. Simao objected to this question, and the district court sustained the objection. These violations were allegedly barred by a pretrial order excluding any attempt to present an "'attorney driven' or a 'medical-buildup' case."

Neither of these alleged medical-build up violations appear to actually fall within the pretrial order. In fact, the opening statement and cross-examination question are relevant to credibility. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) ("[T]he exposure of a witness motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (internal quotation marks omitted)); *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) ("Expert witness testimony is, in some respects, akin to a business arrangement between the witness, the hiring attorney and the client. The trier of fact has the right to take business associations into account when determining the credibility of witnesses and the weight to give their testimony."). Additionally, they do not implicate "medical build-up." "Medical buildup" concerns a party "seek[ing] necessary but costly medical treatment, that they would otherwise forego" in order to generate a larger award. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. Rev. 805, 834 (2011); *see also* Bruce A. Hagen, Karen K. Koehler & Michael D. Freeman, 2 *Litigating Minor Impact Soft Tissue Cases* § 36:12 (2015) (explaining that a motion seeking to preclude a defendant from referring to a case as a "medical buildup" or "attorney-driven" case "seeks to preclude any evidence or statement implying that medical treatment was sought as a result of litigation—or at the suggestion of Plaintiff's attorneys").

fendants' pleadings and enter default was just, related to the claims at issue in the violated discovery order, and supported by a careful written analysis of the pertinent factors").

Specificity of the order

[Headnote 8]

The low-impact defense pretrial order "preclude[d] [Rish] from Raising a 'Minor' or 'Low Impact' Defense," but it gives no further guidance except to specifically preclude Dr. Fish and other witnesses from testifying, arguing, or insinuating that the collision was too insignificant to have caused William Simao's injuries. Rish's trial counsel expressed his confusion with the order on numerous occasions, but the district court refused to clarify what it would and would not allow.

A low-impact defense is defined as "describ[ing] [an] incident as 'low impact'" in order "to liken the incident to common, everyday experiences." Roxanne Barton Conlin & Gregory S. Cusimano, *Litigating Tort Cases* § 53:22 (2014). The district court appears to broadly construe the term low-impact defense to include the facts before, during, and after the accident.

However, Rish, without objection, was permitted to describe the accident in her opening statement, stating that "she was stopped behind [William Simao], who moved a few feet in front of her . . . ; [Rish] applied her brakes, only just not quite hard enough; and the accident follow[ed]." Thereafter, Simao objected to questions concerning the nature of the accident, including questions posed by Rish's trial counsel concerning traffic conditions and what Rish did following the accident. These objections were all sustained. This inconsistent application of the low-impact defense pretrial order leads to our conclusion that the order prohibiting the low-impact defense lacks specificity.

Clarity of the violation[6]

[Headnote 9]

Two of the violations of the low-impact defense pretrial order were statements made by Dr. Fish. Dr. Fish's implied comment that the accident was not significant was made during Simao's cross-examination, and his statement that William Simao's injuries were based, in part, on knowledge of the accident was made during redirect. Nothing in the record or the district court's order shows that Rish's trial counsel prompted or caused Dr. Fish to testify in violation of the low-impact defense pretrial order.

[6]We note that the district court never described how the alleged instances of misconduct violated the pretrial orders.

The other instances of attorney misconduct regard the same basic questions posed by Rish's trial counsel: whether the witness knew what happened to Rish as a result of the accident and whether there was stop-and-go traffic before the accident. While these instances might be construed to violate the low-impact defense pretrial order, none of them describe the accident itself. We conclude that there is no clear violation, let alone misconduct, of the low-impact defense pretrial order caused by these questions.

Unfair prejudice

[Headnotes 10, 11]

Even if we were to find clear misconduct, there was no unfair prejudice to Simao. The district court found that "no lesser sanction had been successful in precluding future violations." But, the district court's order fails to explain why. Under this prong, the district court is required to find that a violation is so extreme that it cannot be eliminated through an objection and admonition. *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008). The district court failed to meet this requirement because it did not articulate why the various admonitions and, ultimately, the irrebuttable presumption instruction were inadequate to address the alleged misconduct.

Even if an irrebuttable presumption instruction was justified, the instruction itself was confusing. The jury was first instructed that the accident in this case was sufficient to cause William Simao's injuries. However, the jury was then instructed that it was to determine whether the accident proximately caused William's injuries. But given the first part of the instruction, it is unclear how Rish could show or the jury would decide whether the accident caused William's injuries. Also, the district court did not explain the difference between causation and proximate causation, so the jury would not have been able to effectively understand or utilize the instruction. Further, regardless of its confusion, the instruction was more than sufficient to remedy any misconduct that occurred up to that point in the trial.

While it is true that two more alleged violations of the low-impact defense pretrial order occurred before the district court struck Rish's answer, the district court struck both questions posed by Rish's trial counsel and William Simao did not answer either. The district court did not explain how these two alleged violations raised the aggregate misconduct to a level warranting the ultimate case-ending sanction.

Because we conclude that any misconduct by Rish's trial counsel did not rise to the level requiring the case-ending sanctions imposed by the district court under *BMW*, 127 Nev. at 126, 252 P.3d at 652, we vacate the order striking Rish's answer.

Accordingly, for the reasons set forth above, we reverse the district court's judgment and post-judgment order denying a new trial,[7] and we remand this matter to the district court for a new trial consistent with this opinion.[8]

DOUGLAS and CHERRY, JJ., concur.

THE STATE OF NEVADA EMPLOYMENT SECURITY DIVISION; RENEE OLSON, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION; AND KATIE JOHNSON, IN HER CAPACITY AS CHAIRPERSON OF THE EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW, APPELLANTS, *v.* CALVIN STEVEN MURPHY, RESPONDENT.

No. 65681

March 31, 2016 371 P.3d 991

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

Claimant, who was fired by employer because of his unexcused absences caused by his incarceration, sought unemployment compensation benefits. The Board of Review determined that claimant committed disqualifying misconduct and was therefore not entitled to unemployment benefits, and claimant appealed. The district court reversed, and appeal was taken. The supreme court, HARDESTY, J., held that: (1) employee who is terminated as a result of missing work due to incarceration after being convicted of a crime is not eligible for unemployment benefits; (2) when the misconduct alleged is unemployment compensation's absenteeism caused by incarceration, claimant can only rebut the presumption by demonstrating the incarceration is not caused by criminal conduct, but rather by indigence or unsupported charges; and (3) although claimant stated that he could not afford bail, his absence from work was directly caused by his criminal conduct, and therefore, he was disqualified from receiving unemployment compensation benefits.

Reversed.

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[7]We decline to assign this case to a different judge because the district court's rulings do not suggest bias. *See Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006) ("[D]isqualification for personal bias requires an extreme showing of bias that would permit manipulation of the court and significantly impede the judicial process and the administration of justice." (internal quotation marks and alteration omitted)).

[8]In light of this opinion, the attorney fees order is also vacated.

J. Thomas Susich and *Neil A. Rombardo*, State of Nevada Employment Security Division, Carson City, for Appellants.

Nevada Legal Services, Inc., and *Ron Sung* and *I. Kristine Bergstrom*, Las Vegas, for Respondent.

1. Unemployment Compensation.
   Like the district court, the supreme court reviews an administrative unemployment compensation decision to ascertain whether the Board of Review acted arbitrarily or capriciously, thereby abusing its discretion.
2. Unemployment Compensation.
   In unemployment compensation case, Board of Review acts as an independent trier of fact, and its factual findings are conclusive when supported by substantial evidence.
3. Unemployment Compensation.
   Substantial evidence to support unemployment compensation decision is that which a reasonable mind could find adequate to support a conclusion.
4. Unemployment Compensation.
   Fact-based legal conclusions with regard to unemployment compensation issues are entitled to deference.
5. Unemployment Compensation.
   In unemployment compensation case, purely legal questions, including issues of statutory construction, are reviewed de novo.
6. Unemployment Compensation.
   Unemployment compensation is designed to ease the economic burden on those who are unemployed through no fault of their own.
7. Unemployment Compensation.
   Claimant is not disqualified from receiving unemployment benefits simply because he or she is terminated.
8. Unemployment Compensation.
   Disqualifying misconduct occurs when unemployment compensation claimant deliberately and unjustifiably violates or disregards his employer's reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer's interests or the employee's duties and obligations to his employer.
9. Statutes.
   When unambiguous, the supreme court gives effect to a statute's plain meaning.
10. Unemployment Compensation.
    "Misconduct," in unemployment compensation context, is defined as unlawful, dishonest, or improper behavior. NRS 612.385.
11. Unemployment Compensation.
    Employee who commits a crime has chosen to become unavailable for work, and thus, employee who is terminated as a result of missing work due to incarceration after being convicted of a crime is not eligible for unemployment benefits. NRS 612.385.
12. Unemployment Compensation.
    If an employee seeks benefits because of incarceration caused by an inability to afford bail or pay a fine, and the employee dutifully notifies the employer, there is no disqualifying misconduct; however, when an employee is convicted of a crime, it is the employee's criminal behavior that prevents him or her from returning to work, and the employee is disqualified from receiving unemployment benefits. NRS 612.385.

13. Unemployment Compensation.
Once a pattern of unauthorized absenteeism has been established, the burden shifts to the unemployment compensation claimant to rebut the presumption.

14. Unemployment Compensation.
When the misconduct alleged is unemployment compensation's absenteeism caused by incarceration, claimant can only rebut the presumption by demonstrating the incarceration is not caused by criminal conduct, but rather by indigence or unsupported charges. NRS 612.385.

15. Unemployment Compensation.
Although claimant stated that he could not afford bail, his absence from work was directly caused by his criminal conduct, in that he pleaded guilty to the charges against him, and therefore, he was disqualified from receiving unemployment compensation benefits. NRS 612.385.

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

In this appeal, we are asked to consider whether an employee who is terminated because he or she misses work due to incarceration has committed disqualifying misconduct pursuant to NRS 612.385 and is thus not entitled to unemployment benefits. Based on the plain language of the statute and narrowly construing *State, Employment Security Department v. Evans*, 111 Nev. 1118, 901 P.2d 156 (1995), we conclude that an employee who is terminated as a result of missing work due to incarceration, and who is subsequently convicted of a crime, is not eligible for unemployment benefits.

FACTS AND PROCEDURAL HISTORY

Respondent Calvin Murphy was employed by Greystone Park Apartments. He was arrested for possession of stolen property and could not afford his $40,000 bail. He eventually pleaded guilty and was incarcerated for approximately one year. Murphy was fired by Greystone because of his unexcused absences caused by his incarceration. Appellant Nevada Employment Security Division's (ESD) claims adjudicator, the appeals referee, and the ESD Board of Review all determined that Murphy committed disqualifying misconduct pursuant to NRS 612.385 and was therefore not entitled to unemployment benefits. Specifically, the appeals referee found that Murphy admitted to the criminal conduct that caused his incarceration, and the Board of Review adopted that finding.

Murphy petitioned the district court for judicial review, and the court reversed the ESD Board of Review's decision. The district court reasoned that the only misconduct connected with work was

Murphy's absenteeism, which was insufficient as a matter of law to deny benefits. We disagree and thus reverse.

DISCUSSION

Standard of review

[Headnotes 1-5]

Like the district court, we review an administrative unemployment compensation decision "to ascertain whether the Board acted arbitrarily or capriciously, thereby abusing its discretion." *Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1444, 148 P.3d 750, 754 (2006). "[T]he Board acts as an independent trier of fact," and its factual findings are conclusive when supported by substantial evidence. *Id.* (internal quotations omitted). "Substantial evidence is that which a reasonable mind could find adequate to support a conclusion." *Kolnik v. Nev. Emp't Sec. Dep't*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996). Additionally, "fact-based legal conclusions with regard to . . . unemployment compensation [issues] are entitled to deference." *Bundley*, 122 Nev. at 1445, 148 P.3d at 754. However, purely legal questions, including issues of statutory construction, are reviewed de novo. *Id*.; *see also Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009).

Murphy's absenteeism due to his incarceration was disqualifying misconduct

[Headnotes 6-8]

Unemployment compensation in Nevada is designed to ease the economic burden on those who are "unemployed through no fault of their own." *Anderson v. State, Emp't Sec. Div.*, 130 Nev. 294, 304, 324 P.3d 362, 368 (2014) (internal quotations omitted); *see also* A.B. 93, 38th Leg. (Nev. 1937) (Nevada's original bill enacting the unemployment insurance statute). A person is not disqualified from receiving unemployment benefits simply because he or she is terminated:

> Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards h[is] employer's reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to show a substantial disregard of the employer's interests or the employee's duties and obligations to [his] employer. As we have previously suggested, because disqualifying misconduct must involve an element of wrongfulness, an employee's termination, even if based on misconduct, does not necessarily require disqualification under the unemployment compensation law.

Bundley, 122 Nev. at 1445-46, 148 P.3d at 754-55 (internal footnotes and quotations omitted).

Three statutes can disqualify former employees from receiving unemployment benefits.[1] The pertinent statute here is NRS 612.385, and it provides that "[a] person is ineligible for benefits . . . if he or she was discharged . . . for misconduct connected with the person's work."

Here, Murphy's employment was terminated because he failed to show up at work due to his incarceration. We were presented with a similar issue in *Evans* and held that the terminated employee was eligible for unemployment benefits. 111 Nev. at 1119, 901 P.2d at 156. In so holding, we determined that because the employee's unavailability to "work was due to her pretrial incarceration which was predicated on her inability to obtain bail, not her criminal conduct," *id.*, the employee's absence was neither deliberate nor voluntary, and we noted that the employee had dutifully notified the employer of the situation. *Id.* at 1119, 901 P.2d at 156-57.

Murphy urges this court to read *Evans* broadly and create a bright-line rule that no disqualifying misconduct occurs when an employee cannot attend work due to incarceration and the employee dutifully notifies the employer. We decline to do so and conclude that *Evans* must be narrowed and clarified to align with NRS 612.385's plain language.[2]

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[1]Two of those statutes are not germane to this appeal: NRS 612.380 applies when an employee voluntarily leaves without good cause or to seek other employment, and NRS 612.383 applies when an employee is discharged for crimes committed in connection with employment.

[2]If we were to read *Evans* broadly, as Murphy proposes, Nevada may become the only state that widely grants incarcerated claimants unemployment benefits, regardless of fault or conviction. For example, New Jersey has determined that incarceration, regardless of fault, results in disqualification from benefits. *See Fennell v. Bd. of Review*, 688 A.2d 113, 116 (N.J. Super. Ct. App. Div. 1997) (finding that "[n]o matter how sympathetic the facts," a claimant who lost his job because of incarceration is disqualified from benefits under a voluntary leaving statute). Other states have decided that claimants are disqualified when at fault or culpable for their incarceration under either a misconduct or voluntary quitting statute. *See, e.g.*, *Weavers v. Daniels*, 613 S.W.2d 108, 110 (Ark. Ct. App. 1981) (finding that a failure to attend work due to fault-based incarceration is disqualifying misconduct); *Hillsborough Cty., Dep't of Emergency Med. Servs. v. Unemp't Appeals Comm'n*, 433 So. 2d 24, 25 (Fla. Dist. Ct. App. 1983) (same); *Carter v. Caldwell*, 261 S.E.2d 431, 432 (Ga. Ct. App. 1979) (same); *Grimble v. Brown*, 171 So. 2d 653, 656 (La. 1965) (same); *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. Ct. App. 1984) (same); *Stanton v. Mo. Div. of Emp't Sec.*, 799 S.W.2d 202, 205 (Mo. Ct. App. 1990) (same); *Weems v. Unemp't Comp. Bd. of Review*, 952 A.2d 697, 699 (Pa. Commw. Ct. 2008) (same); *see also Bivens v. Allen*, 628 So. 2d 765, 767 (Ala. Civ. App. 1993) (determining that a failure to attend work due to incarceration amounts to a voluntary leaving); *Sherman/Bertram, Inc. v. Cal. Dep't of Emp't*, 21 Cal. Rptr. 130, 133 (Dist. Ct. App. 1962) (same). In addition,

NRS 612.385's plain language

[Headnotes 9-11]

When unambiguous, this court gives effect to a statute's plain meaning. *Sonia F.*, 125 Nev. at 499, 215 P.3d at 707. Pursuant to NRS 612.385, a person who is discharged "for misconduct connected with the person's work" is ineligible for unemployment compensation. "Misconduct" is defined as "unlawful, dishonest, or improper behavior." *Misconduct*, *Black's Law Dictionary* (10th ed. 2014); *see also Bundley*, 122 Nev. at 1445-46, 148 P.3d at 754-55 (determining that misconduct requires deliberate or careless action in "disregard of the employer's interests" such that there is "an element of wrongfulness" (internal quotations omitted)). Clearly, an employee who has been incarcerated because of criminal conduct is being penalized for unlawful and improper behavior, and in committing that behavior, the employee has carelessly disregarded the employer's interest in having an available workforce. *See Bundley*, 122 Nev. at 1445-46, 148 P.3d at 754-55. "Connected" is defined as "[j]oined; united by junction . . . [or] by dependence or relation." *Connected*, *Black's Law Dictionary* (6th ed. 1990). The misconduct here is connected with work because an employee's unauthorized absence affects an employer's ability to efficiently operate its business. *See Bundley*, 122 Nev. at 1450, 148 P.3d at 757. In effect, the employee who commits a crime has chosen to become unavailable for work. Based on a plain reading of NRS 612.385, an employee who is terminated as a result of missing work due to incarceration after being convicted of a crime is not eligible for unemployment benefits.

[Headnote 12]

We believe that our holding in *Evans* can be construed to align with NRS 612.385's plain meaning. Though not entirely clear, based on the facts as stated in the majority opinion, it appears that Evans applied for unemployment benefits before being adjudicated on the crimes charged. *See* 111 Nev. at 1119, 901 P.2d at 156 ("Evans[']s failure to be available for work was due to her pretrial incarceration[,] which was predicated on her inability to obtain bail, not her criminal conduct."). Although the cases were not cited in *Evans*, it appears this court intended Nevada jurisprudence to align with other jurisdictions that recognize claimants' limited right to receive unemployment benefits when their incarceration was caused by indigence or criminal charges that were subsequently dropped. *See, e.g.*, *Kaylor v. Dep't of Human Res.*, 108 Cal. Rptr. 267, 268-69,

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Kentucky and Michigan have statutes that specifically disqualify persons at fault for their incarceration from receiving unemployment benefits. Ky. Rev. Stat. Ann. § 341.370(6) (LexisNexis 2011); Mich. Comp. Laws § 421.29(1)(f) (2013).

271 (Ct. App. 1973) (holding that a claimant jailed because of an inability to pay a traffic fine was not disqualified from unemployment benefits); *Holmes v. Review Bd. of Ind. Emp't Sec. Div.*, 451 N.E.2d 83, 88 (Ind. Ct. App. 1983) (holding that a claimant was not disqualified from unemployment benefits because of pretrial incarceration where charges were later dismissed). Admittedly, the *Evans* dissent calls the majority's application into question, *see* 111 Nev. at 1119-20, 901 P.2d at 157 (STEFFEN, C.J., and YOUNG, J., dissenting), but we believe the opinion's general proposition to be sound. Thus, we take this opportunity to clarify and narrow *Evans*' holding. If an employee seeks benefits because of incarceration caused by an inability to afford bail or pay a fine, and the employee dutifully notifies the employer, there is no disqualifying misconduct. However, when an employee is convicted of a crime, it is the employee's criminal behavior that prevents him or her from returning to work, and the employee is disqualified from receiving unemployment benefits.

The district court erred

[Headnotes 13, 14]

The district court misstated the law in its order. The district court proclaimed that employee absenteeism is insufficient as a matter of law to deny unemployment benefits. Implicitly, the district court concluded that absenteeism because of incarceration is not sufficiently connected with employment to implicate NRS 612.385. In *Bundley*, this court determined that employers have the initial burden of showing misconduct, but a clear pattern of unauthorized absences from work creates a presumption of disqualifying misconduct. 122 Nev. at 1450, 148 P.3d at 757. Once a pattern of unauthorized absenteeism has been established, the burden shifts to the employee to rebut the presumption. *Id*. When the misconduct alleged is an employee's absenteeism caused by incarceration, we conclude that the employee can only rebut the presumption by demonstrating the incarceration is not caused by criminal conduct, but rather by indigence or unsupported charges.

Murphy argues that he dutifully notified Greystone about missing work. The district court did not address the issue of dutiful notification in its order. However, the district court did not err by failing to do so. This argument is irrelevant in light of Murphy pleading guilty to the criminal charges. The dutiful notification requirement is only relevant when the employee is either not subsequently convicted on the criminal charges or demonstrates that indigence caused the incarceration.

[Headnote 15]

However, we conclude that the district court erred in overturning the ESD's decision. Although Murphy stated that he could not af-

ford bail, his absence from work was directly caused by his criminal conduct—he pleaded guilty to the charges against him. Therefore, he is disqualified from receiving benefits under NRS 612.385.

CONCLUSION

For the foregoing reasons, we conclude that the ESD's decision was not arbitrary or capricious and was supported by substantial evidence. Murphy pleaded guilty to the criminal charges against him and was incarcerated for a year. He was absent from work as a result of his criminal conduct. The ESD properly concluded that Murphy's situation was distinguishable from *Evans* on the basis of criminal conduct or an "element of wrongfulness." *Bundley*, 122 Nev. at 1446, 148 P.3d at 755. Accordingly, we conclude that the district court abused its discretion in granting Murphy's petition. We reverse the district court's order granting the petition for judicial review.

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

IN THE MATTER OF THE PARENTAL RIGHTS AS TO M.F., M.F., AND N.F., MINOR CHILDREN.

JESUS F., JR., APPELLANT, *v.* WASHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT.

No. 67063

March 31, 2016 371 P.3d 995

Appeal from a district court order terminating appellant's parental rights as to the minor children. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.

County Department of Social Services filed termination of parental rights petition. After bench trial, the district court terminated father's parental rights, and he appealed. The supreme court, GIBBONS, J., held that: (1) neither the United States Constitution nor the Nevada Constitution guarantees the right to a jury trial in a termination of parental rights proceeding, (2) the district court did not violate father's due process rights by denying his demand for a jury trial, and (3) substantial evidence supported the district court's findings that termination of father's parental rights was in children's best interests.

Affirmed.

Jennifer L. Lunt, Alternate Public Defender, and *Carl William Hart*, Alternate Deputy Public Defender, Washoe County, for Appellant.

Christopher J. Hicks, District Attorney, and *Jeffrey S. Martin*, Chief Deputy District Attorney, Washoe County, for Respondent.

1. Appeal and Error.
   Constitutional issues, such as one's right to a jury trial, present questions of law that are reviewed de novo. U.S. Const. amends. 6, 7.
2. Jury.
   Neither the United States Constitution nor the Nevada Constitution guarantees the right to a jury trial in a termination of parental rights proceeding. Const. art. 1, § 3.
3. Jury.
   Seventh Amendment protects the right to a jury trial in civil cases in certain circumstances, but that Amendment does not apply to the states. U.S. Const. amend. 7.
4. Constitutional Law.
   Because parents retain a vital interest in preventing the irretrievable destruction of their family life, due process requires states to provide parents with fundamentally fair procedures in parental termination proceedings. U.S. Const. amend. 14.
5. Constitutional Law.
   Because father did not risk a loss of personal liberty in the termination of parental rights proceeding, the supreme court would apply the due process balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to evaluate the private interests at stake against the government's interest and the risk that the procedures used would have led to an erroneous decision, and under *Eldridge*, father's interest in the companionship, care, custody, and management of his children would be weighed against the State's interest in the welfare of the children, conservation of judicial resources, and the need for an accurate and fair outcome. U.S. Const. amend. 14.
6. Constitutional Law; Infants.
   The district court did not violate father's due process rights by denying his demand for a jury trial in termination of parental rights action; jury was not a required component of accurate fact-finding, judge demonstrated familiarity with the rules of evidence and the legal standards of a termination action, father was given notice of the proceeding, was afforded competent counsel to represent his interests, and was afforded the opportunity to confront and cross-examine the witnesses against him, and father retained the right to appeal from an adverse decision. U.S. Const. amend. 14.
7. Infants.
   The supreme court closely scrutinizes whether the district court properly preserved or terminated parental rights but will not substitute its judgment for that of the district court and will uphold the lower court's decision if it is supported by substantial evidence.
8. Infants.
   Substantial evidence to support a district court's termination of parental rights decision is that which a reasonable person would accept as adequate to sustain a judgment.

9. INFANTS.
   Statute creates two presumptions for a child who has resided outside of the home for 14 of any consecutive 20 months, in that the district court must presume that the parent has made only token efforts to care for the child and the best interest of the child must be presumed to be served by the termination of parental rights, and to rebut these statutory presumptions, a parent must prove otherwise by a preponderance of evidence. NRS 128.109.
10. EVIDENCE.
    Preponderance of the evidence requires that the evidence lead the fact-finder to conclude that the existence of the contested fact is more probable than its nonexistence.
11. INFANTS.
    Substantial evidence supported the district court's findings that termination of father's parental rights was in children's best interests based on the statutory presumption of termination for children placed outside of their home for 14 of any 20 consecutive months, and father failed to rebut this presumption due to his failure to show that there was a reasonable prospect that he could provide for children's basic needs in a reasonable period of time. NRS 128.107(2), (3), 128.109(2).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we consider whether appellant is entitled to a jury trial in a termination of parental rights proceeding. We conclude that neither the United States Constitution nor the Nevada Constitution guarantees the right to trial by jury in a termination of parental rights proceeding. Additionally, we conclude that the district court relied on substantial evidence in terminating appellant Jesus F.'s parental rights. Accordingly, we affirm the district court order terminating Jesus F.'s parental rights as to his three minor children.

FACTS AND PROCEDURAL HISTORY

Respondent Washoe County Department of Social Services (WCDSS) removed Jesus F.'s six children from his home in January 2010 due to drug use, safety hazards, and inadequate supervision. All six children were placed in protective custody pursuant to NRS 432B.330 based on parental neglect and resided in various out-of-home placements over the next four years. By the time the three older children had reached the age of majority, WCDSS filed a petition to terminate Jesus F.'s parental rights as to the three minor children.

Jesus F. filed a demand for a jury trial with the district court. The district court issued an order denying Jesus F.'s jury trial demand, concluding that the right to a jury trial in a parental termination proceeding is not guaranteed by common law, statute, or the Nevada Constitution. Following a bench trial, the district court terminated

Jesus F.'s parental rights as to the three minor children. On appeal, Jesus F. argues that the district court erred in (1) denying Jesus F.'s demand for a jury trial in the termination of parental rights proceeding, (2) concluding that it was in the minor children's best interests to terminate Jesus F.'s parental rights pursuant to the statutory presumption contained in NRS 128.109(2), and (3) concluding that Jesus F.'s parental fault had been established pursuant to NRS 128.105(2).

DISCUSSION

The district court did not err in denying Jesus F.'s demand for a jury trial in the termination of parental rights proceeding

[Headnote 1]

"Constitutional issues, such as one's right to a jury trial, present questions of law that we review de novo." *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007).

[Headnote 2]

Upon de novo review, we conclude that neither the United States Constitution nor the Nevada Constitution guarantees the right to a jury trial in a termination of parental rights proceeding, as outlined below.

The United States Constitution does not guarantee the right to a jury trial in a termination of parental rights proceeding

[Headnotes 3, 4]

"Termination of parental rights is an exercise of awesome power." *In re Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000) (internal quotations omitted). The Seventh Amendment to the United States Constitution protects the right to a jury trial in civil cases in certain circumstances, but that Amendment does not apply to the states. *See Hawkins v. Bleakly*, 243 U.S. 210, 216 (1917); *see also Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). While the U.S. Supreme Court has held that the states may not terminate parental rights without due process of law because "the companionship, care, custody and management of [one's] children" is an important interest that "undeniably warrants protection," *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972), the Court has not addressed whether due process requires a jury trial for a termination of parental rights proceeding. However, because "parents retain a vital interest in preventing the irretrievable destruction of their family life," due process requires states to provide parents with fundamentally fair procedures in parental termination proceedings. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

To evaluate whether such a proceeding violates a parent's due process rights, the U.S. Supreme Court has applied the balancing

test outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which consists of the following factors: (1) the private interest affected by the proceeding, (2) the risk of error inherent in the state's procedure, and (3) the countervailing government interest. *Santosky*, 455 U.S. at 754. Elaborating on these factors, the Court has indicated that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *Id.* at 759 (internal quotations omitted). On the other hand, the state maintains a dual stake in the outcome—a *parens patriae* interest in promoting the child's welfare and an "administrative interest in reducing the cost and burden of termination proceedings." *Id.* at 766. Using the test, the Court has refused to guarantee the right to counsel in a termination proceeding because the parent does not risk a loss of personal liberty. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 25-26 (1981) ("[A]s a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.").

[Headnote 5]

While Jesus F. correctly argues that the parent-child relationship is a fundamental interest under *Lehr v. Robertson*, 463 U.S. 248, 258 (1983), he fails to demonstrate that this status automatically affords a parent the right to a jury trial in this type of action. Instead, because Jesus F. does not risk a loss of personal liberty in the termination proceeding, this court applies the due process balancing test outlined in *Eldridge* to evaluate the private interests at stake against the government's interest and the risk that the procedures used would have led to an erroneous decision. *See Lassiter*, 452 U.S. at 26-27 (stating that parents do not have a *per se* right to counsel in a termination of parental rights proceeding because parents do not risk the loss of personal liberty). Under *Eldridge*, Jesus F.'s interest in the companionship, care, custody, and management of his three minor children must be weighed against the state's interest in the welfare of the children, conservation of judicial resources, and the need for an accurate and fair outcome. Since both parties have compelling interests, the analysis turns on an evaluation of the risk that the procedures used would have resulted in an erroneous decision.

[Headnote 6]

We conclude that the district court's decision to hold a bench trial as opposed to a jury trial posed only a minimal risk of an erroneous decision for several reasons. First, a jury, while important, is not a required component of accurate fact-finding. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971) ("[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding."); *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) ("We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may

never be treated by a judge as he would be by a jury."); *see In re Weinstein*, 386 N.E.2d 593, 596 (Ill. App. Ct. 1979) (interpreting the U.S. Supreme Court's decision in *McKeiver* as follows: "implicit in the rationale of the holding is that a jury trial is not a fundamental concept of due process"). Here, the family court judge demonstrated familiarity with the rules of evidence, the legal standards of a termination action, and the Nevada Rules of Civil Procedure, and the court applied the heightened clear and convincing evidentiary standard of proof.

Second, Jesus F. was given notice of the proceeding, was afforded competent counsel to represent his interests, and was afforded the opportunity to confront and cross-examine the witnesses against him. *See McKeiver*, 403 U.S. at 543-45 (explaining that juveniles are not entitled to a jury trial in delinquency proceedings as long as other fact-finding procedures such as "notice, counsel, confrontation, cross-examination, and standard of proof" are in place to ensure accuracy and protect the juvenile's interests); *see also In re Parental Rights as to N.D.O.*, 121 Nev. 379, 383, 115 P.3d 223, 227 (2005) (providing that while "no absolute right to counsel in termination proceedings exists in Nevada," counsel may be appointed if a case-by-case analysis pursuant to NRS 128.100(2) requires it). Third, Jesus F. retained the right to appeal from an adverse decision. Therefore, we conclude that the district court did not violate Jesus F.'s due process rights pursuant to the U.S. Constitution by denying his demand for a jury trial.

The Nevada Constitution does not guarantee the right to a jury trial in a termination of parental rights proceeding

In Nevada, "[t]he right of trial by [j]ury shall be secured to all and remain inviolate forever; but a [j]ury trial may be waived by the parties in all civil cases in the manner to be prescribed by law . . . ." Nev. Const. art. 1, § 3. This court has determined that the phrase "shall . . . remain inviolate forever" indicates an intent to perpetuate the jury trial right as the framers understood it when Nevada's Constitution was adopted in 1864. *See Awada*, 123 Nev. at 621, 173 P.3d at 712 (concluding that Nevada's modern jury trial right does not require a district court to first proceed with legal issues because the jury trial right in 1864 did not impede a court's discretion to address the equitable issues prior to allowing a jury to address the action's legal issues); *see also Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 870-74, 124 P.3d 550, 553-56 (2005) (denying the right to a jury trial in small claims court because no such right existed at the time the Nevada Constitution was adopted); *Aftercare of Clark Cty. v. Justice Court of Las Vegas Twp.*, 120 Nev. 1, 6-7, 82 P.3d 931, 934 (2004) (explaining that Nevada guarantees the right to jury trial in justice court civil actions if small amounts are in controversy

because the practice originated in 1861, prior to the adoption of the Nevada Constitution).

Jesus F. argues that Article 1, Section 3 of the Nevada Constitution guarantees him the right to a jury trial. We disagree. Jesus F. correctly argues that since a termination of parental rights action is civil in nature, the matter falls under the purview of Article 1, Section 3 of the Nevada Constitution. However, no such action existed in 1864, and since termination of parental rights actions were created in 1975, the Legislature has not conferred the right to a jury trial in such proceedings, despite ample opportunity to do so. Therefore, under *Awada*, *Cheung*, and *Aftercare*, the Nevada Constitution does not guarantee a jury trial in a termination of parental rights proceeding.

Additionally, requiring jury trials in the district court's family division implicates many of the same policy concerns that the U.S. Supreme Court found persuasive in *McKeiver*, though that case addressed the juvenile court system. *See* 403 U.S. at 550 ("If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial."). Instituting such a delay would slow the pace of the high volume of cases before the family court each year, yielding a backlog where speedy reunification or permanent placement of the child is of great importance. The formality of a jury trial may also undermine the shared interest in maintaining the child's anonymity in a termination proceeding. Further, family courts in several judicial districts in Nevada are not equipped to accommodate jurors, and to make the administrative and structural changes necessary to accommodate them would be a time-consuming effort and one that is more appropriately relegated exclusively to the Legislature. Finally, as the U.S. Supreme Court stated in *Duncan* and reiterated in *McKeiver*, we remain unconvinced that a jury would necessarily render a decision more reliable than a family court judge. *See Duncan*, 391 U.S. at 158 ("We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be treated by a judge as he would be by a jury."); *see also McKeiver*, 403 U.S. at 547 ("The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function.").

Our conclusion is further strengthened by the national trend to deny jury trials in termination of parental rights proceedings.[1] *See*

[1]The five states in the minority that guarantee the right to a jury trial in termination proceedings do so pursuant to statute or express state constitutional provision—neither avenue is present in Nevada. Those five states are Oklahoma, Wyoming, Wisconsin, Texas, and Virginia. *See Matter of D.D.F.*, 801 P.2d 703, 705 (Okla. 1990) (explaining that the Oklahoma Constitution

Linda A. Szymanski, *Is a Jury Trial Even Available in a Termination of Parental Rights Case?*, Nat'l Ctr. for Juvenile Justice (NCJJ) Snapshot, (2011).[2] The majority of states specifically prohibit a jury trial in a termination of parental rights proceeding by precedent, statute, local court rule, or common practice. *See id.* The Supreme Court of Montana, for example, relied on principles akin to those in *Awada*, and concluded that there is no right to trial by jury in termination proceedings because no such right existed when the Montana Constitution was adopted in 1889, and the Montana Constitution guarantees only rights enjoyed when the Constitution was adopted. *In re M.H.*, 143 P.3d 103, 106 (Mont. 2006). A number of jurisdictions echo similar logic, denying the right to trial by jury in termination proceedings because no right to a jury trial existed for such proceedings at common law. *See, e.g.*, *Alyssa B. v. State, Dep't of Health & Soc. Servs.*, 123 P.3d 646, 648-49 (Alaska 2005); *In re Lambert*, 86 A.2d 411, 412-13 (D.C. 1952); *Porter v. Watkins*, 121 S.E.2d 120, 121-22 (Ga. 1961); *E.P. v. Marion Cty. Office of Family & Children*, 653 N.E.2d 1026, 1030-31 (Ind. Ct. App. 1995); *In Interest of Baby Boy Bryant*, 689 P.2d 1203, 1209 (Kan. Ct. App. 1984); *In re Shane T.*, 544 A.2d 1295, 1297 (Me. 1988); *Matter of Colon*, 377 N.W.2d 321, 328 (Mich. Ct. App. 1985); *State ex rel. Children, Youth & Families Dep't v. T.J.*, 934 P.2d 293, 297-98 (N.M. Ct. App. 1997); *Matter of Ferguson*, 274 S.E.2d 879, 880 (N.C. Ct. App. 1981); *State in Interest of T.B.*, 933 P.2d 397, 400 (Utah Ct. App. 1997).

The district court relied on substantial evidence in its decision to terminate Jesus F.'s parental rights

[Headnotes 7, 8]

This court closely scrutinizes whether the district court properly preserved or terminated parental rights, but will not substitute its

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expressly guarantees a jury trial in a termination of parental rights proceeding, but that a parent may waive the right); *Matter of GP*, 679 P.2d 976, 983 (Wyo. 1984) (concluding that a parent has a statutory right to a jury trial in a parental termination proceeding); *In re Keylen D.K.*, 828 N.W.2d 251, 258-60 (Wis. Ct. App. 2013) (concluding that although Wisconsin statutorily guarantees the right to jury trial in parental termination proceedings, the state distinguishes between a statutory jury trial right and the heightened procedural protections in criminal cases); *Gen. Motors Corp. v. Gayle*, 924 S.W.2d 222, 226 (Tex. Ct. App. 1996) (noting that a Texas statute confers the right to jury trial in civil cases when one party demands it and pays a jury fee); *Hough v. Mathews Dep't of Social Servs.*, No. 2405-13-1 2014, WL 4412583, at *1 n.1 (Va. Ct. App. Sept. 9, 2014) (explaining that a Virginia statute permits a juvenile or domestic relations issue to be heard by an "advisory jury," in the judge's discretion, upon motion by either party).

[2]*See* http://www.ncjj.org/pdf/Snapshots/2011/vol16_no3_Jury%20Trial%20In%20Termination%20of%20Parental%20Rights%20Case.pdf (last visited March 30, 2016).

judgment for that of the district court and will uphold the lower court's decision if it is supported by substantial evidence. *In re Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000). Substantial evidence is that which a reasonable person would accept as adequate to sustain a judgment. *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

The Nevada Legislature has adopted a statutory scheme to ensure that parental rights are not erroneously terminated and that every child's needs are protected. *In re Parental Rights as to C.C.A.*, 128 Nev. 166, 169, 273 P.3d 852, 854 (2012). To terminate parental rights, a petitioner must demonstrate by clear and convincing evidence that (1) at least one ground of parental fault exists, and (2) termination is in the child's best interest. NRS 128.105(1)-(2); *In re N.J.*, 116 Nev. at 800-01, 8 P.3d at 132-33; *In re C.C.A.*, 128 Nev. at 169, 273 P.3d at 854. While both factors must be established, "[t]he primary consideration in any proceeding to terminate parental rights must be whether the best interests of the child will be served by the termination." 2015 Nev. Stat., ch. 250, § 3, at 1184-85.[3]

[Headnotes 9, 10]

To guide a district court in determining a parent's conduct, NRS 128.109 creates the following two presumptions for a child who has resided outside of the home for 14 of any consecutive 20 months: (1) a court must presume that the parent has made only token efforts to care for the child, and (2) the best interest of the child must be presumed to be served by the termination of parental rights. NRS 128.109(1)(a), (2) (2013). To rebut these presumptions, a parent must prove otherwise by a preponderance of evidence. *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 472, 283 P.3d 842, 849 (2012). A preponderance of the evidence requires that the evidence lead the fact-finder to conclude that "the existence of the contested fact is more probable than its nonexistence." *See Brown v. State*, 107 Nev. 164, 166, 807 P.2d 1379, 1381 (1991) (quotation marks and citation omitted).

Jesus F. argues that the district court improperly (1) relied on the best interests presumption contained in NRS 128.109(2) because he had successfully rebutted the presumption, and (2) found parental fault under NRS 128.105 on Jesus F.'s part sufficient to satisfy a clear and convincing evidence standard. We disagree.

[Headnote 11]

First, substantial evidence supports the district court's findings that termination of Jesus F.'s parental rights was in the minor children's best interests based on the statutory presumption in NRS 128.109(2) and that Jesus F. failed to rebut the presumption due to

[3]While the statute has been amended, the amendments do not impact this case.

his failure to show that there was a reasonable prospect that he could provide for the minor children's basic needs in a reasonable period of time. *See In re J.D.N.*, 128 Nev. at 472, 283 P.3d at 849; *see also* NRS 128.107(2)-(3) (outlining the factors that a court shall consider in determining whether parental rights should be terminated). Second, substantial evidence supports the district court's findings as to five separate grounds of parental fault on Jesus F.'s behalf, and the court listed its reasoning with adequate specificity. Thus, we conclude that the district court's decision to terminate Jesus F.'s parental rights was supported by substantial evidence.

CONCLUSION

Having considered the parties' filings and the attached documents, we conclude that the district court properly denied Jesus F.'s demand for a jury trial in the termination of parental rights proceeding. Additionally, we conclude that substantial evidence supports the district court's decision to terminate Jesus F.'s parental rights. We therefore affirm the district court order terminating Jesus F.'s parental rights.

Parraguirre, C.J., and Hardesty, Douglas, Cherry, Saitta, and Pickering, JJ., concur.

JASON DUVAL McCARTY, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 58101

March 31, 2016 371 P.3d 1002

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon, one count of conspiracy to commit murder, two counts of conspiracy to commit kidnapping, three counts of first-degree kidnapping, two counts of robbery with the use of a deadly weapon, and one count each of conspiracy to commit burglary, burglary, battery with substantial bodily harm, robbery, and pandering. Appellant was sentenced to death for each murder. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The supreme court, Cherry, J., held that: (1) the defendant's Sixth Amendment right to counsel attached at hearing at which magistrate informed the defendant of his right to counsel, his right to remain silent, and his right to a preliminary hearing; (2) *Miranda v. Arizona*, 384 U.S. 436 (1966), warnings given to the defendant, after his Sixth Amendment right to counsel had attached, were sufficient to apprise him of the nature of his Sixth Amendment rights, and the

consequences of abandoning those rights; but (3) the district court committed clear error when it rejected the defendant's objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the State's use of a peremptory challenge to remove an African American from the venire, and (4) the State's contention that it struck prospective juror because she answered affirmatively to questionnaire's inquiry whether "anyone close to you has ever been charged with, arrested for, or convicted of any public offense" was insufficient to demonstrate that the State's challenge was not improperly motivated.

Reversed and remanded.

[Rehearing denied June 24, 2016]

PICKERING, J., with whom HARDESTY and GIBBONS, JJ., agreed, dissented in part.

Christopher R. Oram, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Marc P. DiGiacomo* and *Ryan J. MacDonald*, Deputy District Attorneys, Clark County, for Respondent.

1. CRIMINAL LAW.
   Defendant's Sixth Amendment right to counsel attached at hearing at which magistrate informed the defendant of his right to counsel, his right to remain silent, and his right to a preliminary hearing, and who had already determined the conditions for pretrial release, regardless of whether the State had filed formal charges against the defendant. U.S. CONST. amend. 6.
2. CRIMINAL LAW.
   The Sixth Amendment right to counsel is limited by its terms, and therefore, it does not attach until a prosecution is commenced. U.S. CONST. amend. 6.
3. CRIMINAL LAW.
   Miranda v. Arizona, 384 U.S. 436 (1966), warnings given to murder defendant were sufficient to apprise him of the nature of his Sixth Amendment rights and the consequences of abandoning those rights. U.S. CONST. amend. 6.
4. CRIMINAL LAW.
   Once a defendant's Sixth Amendment right to counsel has attached, the defendant is entitled to the presence of counsel during any critical stage of the postattachment proceedings; thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself. U.S. CONST. amend. 6.
5. CRIMINAL LAW.
   A defendant may waive the Sixth Amendment right to counsel, so long as relinquishment of the right is voluntary, knowing, and intelligent. U.S. CONST. amend. 6.
6. CRIMINAL LAW.
   A defendant may waive the Sixth Amendment right to counsel even if he is represented by counsel; the decision to waive need not itself be counseled. U.S. CONST. amend. 6.

7. Jury.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.

8. Jury.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), once the opponent of a peremptory challenge makes a prima facie case of racial discrimination, the burden of production shifts to the proponent of the strike to give a race-neutral explanation; if such an explanation is given, then the trial court must decide whether the opponent has proved purposeful racial discrimination; this final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

9. Criminal Law.

The district court's ruling on the issue of discriminatory intent in striking a prospective juror is reviewed for clear error.

10. Jury.

The defendant bears a heavy burden in demonstrating that the State's facially race-neutral explanation for striking a prospective juror is pretext for discrimination; in order to carry that burden, the defendant must offer some analysis of the relevant considerations which is sufficient to demonstrate that it is more likely than not that the State engaged in purposeful discrimination.

11. Jury.

Considerations that are relevant to a determination as to whether the State engaged in purposeful discrimination in striking a prospective juror include: (1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in the venire, (2) the disparate questioning by the prosecutors of struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the jury shuffle, and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

12. Jury.

An implausible or fantastic justification by the State for striking a prospective juror may, and probably will, be found to be pretext for intentional discrimination.

13. Jury.

In determining whether discriminatory purpose was a factor in striking a prospective juror, the district court must undertake a sensitive inquiry into any circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson v. Kentucky*, 476 U.S. 79 (1986), objection.

14. Jury.

A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority venire members were pretextual.

15. Jury.

The district court should sustain the *Batson v. Kentucky*, 476 U.S. 79 (1986), objection and deny the peremptory challenge if it is more likely than not that the challenge was improperly motivated.

16. Jury.

The district court committed clear error when it rejected murder defendant's objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the

State's use of a peremptory challenge to remove an African American from the venire; the district court admitted it was concerned about the State's independent investigation into the background of only one juror based on the fact that she had worked at an adult nightclub, but failed to undertake the sensitive inquiry into all relevant circumstances required by *Batson* before rendering its decision, and failed to discuss which facts or circumstances alleviated its concerns about the State's independent investigation and caused it to deny the defendant's *Batson* challenge.

17. JURY.

It is the district court that has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination, and the district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual.

18. JURY.

The State's contention that it struck prospective juror, an African American, because she answered affirmatively to questionnaire's inquiry whether "anyone close to you has ever been charged with, arrested for, or convicted of any public offense," was insufficient to demonstrate that the State's challenge was not improperly motivated; there was no evidence that prospective juror's brother was ever convicted of a violent crime, Caucasian juror who also answered affirmatively to the question was only asked one question about his answer during voir dire, while African-American juror was asked 18 questions about her answer.

19. JURY.

Disparate questioning by prosecutors of struck veniremembers and those veniremembers of another race or ethnicity is evidence of purposeful discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

Jason Duval McCarty was convicted of multiple felony counts related to the kidnapping and murder of Charlotte Combado and Victoria McGee. In two interviews with police after his initial appearance before a magistrate, McCarty denied killing the women or being present when they were killed, instead implicating Domonic Malone, but he admitted to helping to discard evidence. The district court denied a motion to suppress the statements made in those interviews, and McCarty challenges that decision on appeal. We conclude that McCarty's Sixth Amendment right to counsel attached at his initial appearance before a magistrate but that he waived his right to have counsel present at the subsequent interviews when he was informed of his rights consistent with *Miranda v. Arizona*, 384 U.S. 436 (1966), and chose to speak with police without counsel. Although McCarty is not entitled to relief on that issue, an error during jury selection requires that we reverse the judgment of con-

viction and remand for a new trial. In particular, after considering all the relevant circumstances, we conclude that the district court committed clear error when it rejected McCarty's objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), to the State's use of a peremptory challenge to remove an African American from the venire.

I.

McCarty was arrested on the evening of May 25, 2006. The supporting Declaration of Arrest identifies numerous charges, including two counts of murder with the use of a deadly weapon, three counts of kidnapping, three counts of conspiracy, and battery causing substantial bodily harm. According to the Henderson Township Justice Court's minutes, McCarty first appeared before a magistrate on May 30, 2006, five days after he was arrested. At that time, McCarty was denied bail on the murder charges and bail was set at $2 million on "all other charges." Eight days later, counsel was appointed to represent him when he appeared for arraignment. During the eight days between his initial appearance and his arraignment, McCarty was interrogated by the State on two occasions. He contends that the statements he made during the interrogations should have been suppressed because detectives deliberately elicited incriminating statements after his Sixth Amendment right to counsel attached. The State contends that McCarty's Sixth Amendment right to counsel did not attach until the district attorney filed "formal" charges on June 7, 2006, the same date that McCarty appeared for arraignment and was appointed counsel. Both McCarty and the State are mistaken.

A.

[Headnotes 1, 2]

We first address the State's misconception about when the Sixth Amendment right to counsel attaches. The Sixth Amendment provides that, "[i]n all prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. As the Supreme Court has explained, the Sixth Amendment right to counsel "is limited by its terms," and therefore, "'it does not attach until a prosecution is commenced.'" *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (quoting *McNeil v. Wisonsin*, 501 U.S. 171, 175 (1991)); *see also Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007) (stating that the "right to counsel is triggered at or after the time that judicial proceedings have been initiated" (quotation marks omitted)). Commencement of prosecution, for purposes of the attachment of the right to counsel, has been tied to "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery*, 554 U.S. at 198

(quotation marks omitted). One example of the initiation of judicial proceedings is particularly relevant in this case—an initial appearance before a magistrate.

Beginning as early as 1977, the Supreme Court has held "that the right to counsel attaches at the initial appearance before a judicial officer." *Id.* at 199 (citing *Brewer v. Williams*, 430 U.S. 387, 399 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986), *overruled on other grounds by Montejo v. Louisiana*, 556 U.S. 778, 797 (2009). An "initial appearance" has been characterized by the Court as a hearing at which a magistrate informs the defendant of the charge and various rights in further proceedings and determines the conditions for pretrial release. *Id.* Based on the Court's description of an initial appearance, the proceeding in this case in justice court on May 30, 2006, was an initial appearance: McCarty was in custody on a declaration of arrest that set forth specific charges and probable cause to support those charges, was brought before a magistrate who informed him of his right to counsel, his right to remain silent, and his right to a preliminary hearing and who had already determined the conditions for pretrial release (as part of a probable cause review on May 27). Contrary to the State's assertion, the fact that the district attorney had not yet filed "formal" charges is irrelevant. *Id*. at 194-95 (rejecting argument that attachment of the right to counsel "requires that a public prosecutor (as distinct from a police officer) be aware of [the] initial proceeding or involved in its conduct"); *id.* at 207 ("[U]nder the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate prosecution."); *id.* at 210 (observing that "an initial appearance following a charge signifies a sufficient commitment to prosecute regardless of a prosecutor's participation, indictment, information, or what the County calls a 'formal' complaint"). McCarty's Sixth Amendment right to counsel attached on May 30, 2006.

B.

[Headnotes 3, 4]

"Whether the right has been violated and whether [McCarty] suffered cognizable harm are separate questions from when the right attaches." *Rothgery*, 554 U.S. at 212 n.17; *see also id.* at 212 n.15 ("We do not here purport to set out the scope of an individual's postattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis."); *id.* at 213-14 (Alito, J., concurring) ("As I interpret our precedents, the term 'attachment' signifies nothing more than the beginning of the defendant's prose-

cution. It does not mark the beginning of a substantive entitlement to the assistance of counsel."). "Once attachment occurs," the defendant "is entitled to the presence of counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 212. "Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.*

[Headnotes 5, 6]

After the right to counsel attached in this case, eight days passed before counsel was appointed. During that time, McCarty was interviewed by police on two occasions (June 1 and June 6). The Supreme Court has held that postattachment interrogation by the State is a critical stage at which the defendant has a right to be represented by counsel. *Montejo*, 556 U.S. at 786 (citing *Massiah v. United States*, 377 U.S. 201, 204-05 (1964)). It is undisputed that McCarty did not have counsel present during the postattachment interrogations. Although it is arguable that the eight-day delay in the appointment of counsel was unreasonable, as the Supreme Court has "place[d] beyond doubt," the defendant may waive the Sixth Amendment right to counsel, "so long as relinquishment of the right is voluntary, knowing, and intelligent." *Id.* "The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." *Id.*

Here, the district court found, after a hearing on the motion to suppress, that McCarty "had been Mirandized." According to the Supreme Court, "when a defendant is read his *Miranda* rights (which includes the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick" because even though the *Miranda* rights have their foundation in the Fifth Amendment, a *Miranda* advisement is sufficient to apprise a defendant of the nature of his Sixth Amendment rights and the consequences of abandoning those rights. *Id.* at 786-87 (citing *Patterson v. Illinois*, 487 U.S. 285, 296 (1988)). Because McCarty has failed to demonstrate that his *Miranda* waiver was not voluntary, knowing, and intelligent, we cannot say that there was a Sixth Amendment violation that would have required the district court to grant the motion to suppress.

II.

[Headnote 7]

McCarty also contends that the State engaged in discriminatory jury selection when it exercised peremptory strikes to remove two African-American prospective jurors from the venire. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). Discriminatory jury

selection is particularly concerning in capital cases where each juror has the power to decide whether the defendant is deserving of the ultimate penalty, death.

A.

At the beginning of McCarty's trial, the district court held five days of voir dire, narrowing the venire to 36 prospective jurors after for-cause challenges. The State exercised ten peremptory challenges, using two of them to strike two of the three remaining African Americans in the venire. McCarty objected to those two peremptory challenges as discriminatory, focusing primarily on prospective juror number 36, a married 28-year-old African-American mother of two who was a full-time college student. In response to McCarty's objection, the State explained that based on prospective juror 36's responses to questions during voir dire, it conducted independent research into her background in an attempt to learn why her brother had been incarcerated. During the course of that investigation, the State conducted a Shared Computer Operations for Protection and Enforcement (SCOPE) background check and learned that she had a valid work card for an adult nightclub.[1] Referring to that information, the prosecution explained to the district court that, "with all due respect, it has nothing to do with the race, but the State of Nevada's not going to leave somebody who works at a strip club on their panel." McCarty argued that the State used prospective juror 36's work card as pretext for purposeful discrimination. When McCarty attempted to point out that prospective juror 36 had obtained the work card "over three years ago" and that she mentioned in her juror questionnaire that she had been a full-time college student for over a year, the district court interrupted defense counsel and told counsel, "[I]t sounds like your argument here is for the Supreme Court. I've made my decision. And I don't mean it in a flippant way . . . [a]nd I am concerned about this, but . . . I've ordered that they show you the SCOPE, and it'll be part of the record, and we can go from there." The court then continued with the peremptory challenges and swore in the jury.

McCarty contends that the district court erred by denying his *Batson* objection because the State's race-neutral explanations were pretext for racial discrimination. In its answering brief, the State fails to mention its strip-club explanation provided to the district court and instead focuses on prospective juror 36's brother, arguing that it struck this prospective juror because her brother was prosecuted by the State 13 years earlier and it did not want jurors who had family members who had been convicted of a violent crime to

[1]The investigation failed to uncover any information about the prospective juror's brother.

serve on the jury. Having considered all the circumstances surrounding McCarty's *Batson* objection, we conclude that the district court clearly erred.

B.

[Headnotes 8, 9]

An equal protection challenge to the exercise of a peremptory challenge is evaluated using the three-step analysis set forth by the United States Supreme Court in *Batson. Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004); *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (summarizing the three-step *Batson* analysis). First, "the opponent of the peremptory challenge must make out a prima facie case of discrimination." *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). Then, "the production burden . . . shifts to the proponent of the challenge to assert a neutral explanation for the challenge," *id*., that is "clear and reasonably specific," *Purkett*, 514 U.S. at 768 (internal quotation marks omitted). Finally, "the trial court must . . . decide whether the opponent of the challenge has proved purposeful discrimination." *Ford*, 122 Nev. at 403, 132 P.3d at 577. "This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (internal quotation marks omitted). We review the district court's ruling on the issue of discriminatory intent for clear error. *See Libby v. State*, 115 Nev. 45, 55, 975 P.2d 833, 839 (1999). In this case, we only address the third step of the *Batson* inquiry because the district court's decision at step one is moot, *see Hernandez v. New York*, 500 U.S. 352, 359 (1991), and McCarty does not argue that the State's explanations for striking the prospective jurors were facially discriminatory, *see Purkett*, 514 U.S. at 768 (explaining that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral" at step two (internal quotation marks omitted)).

[Headnotes 10-12]

As we recently discussed in our opinion in *Hawkins v. State*, the defendant bears a heavy burden in demonstrating that the State's facially race-neutral explanation is pretext for discrimination. 127 Nev. 575, 578-79, 256 P.3d 965, 967 (2011). In order to carry that burden, the defendant *must* offer some analysis of the relevant considerations which is sufficient to demonstrate that it is more likely than not that the State engaged in purposeful discrimination. Considerations that are relevant at the third step include, but are not limited to: (1) the similarity of answers to voir dire questions given by jurors who were struck by the prosecutor and answers by those jurors of another race or ethnicity who remained in the venire,

(2) the disparate questioning by the prosecutors of struck jurors and those jurors of another race or ethnicity who remained in the venire, (3) the prosecutors' use of the "jury shuffle," and (4) "evidence of historical discrimination against minorities in jury selection by the district attorney's office." *Id.* at 578, 256 P.3d at 967. "An implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination." *Ford*, 122 Nev. at 404, 132 P.3d at 578.

[Headnotes 13-15]

The district court also plays an important role during step three of the *Batson* inquiry and must "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" and "consider all relevant circumstances" before ruling on a *Batson* objection. *Batson*, 476 U.S. at 93, 96 (internal quotation marks omitted); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). "A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual." *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014). The district court should sustain the *Batson* objection and deny the peremptory challenge if it is "more likely than not that the challenge was improperly motivated." *Johnson v. California*, 545 U.S. 162, 170 (2005); *see also Williams v. Beard*, 637 F.3d 195, 215 (3d Cir. 2011).

C.

[Headnote 16]

We turn then to the inquiry that was conducted at step three in this case. Although McCarty challenges the district court's decision at step three with respect to both of the African-American prospective jurors who were struck by the State, we need only consider one of them here. *See Snyder*, 552 U.S. at 478 (explaining that clear error with respect to one juror is sufficient for reversal); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."). In its argument below, the State explained to the district court that it does not want employees of strip clubs to serve as jurors. After a lunch break, and 30 minutes into argument on McCarty's *Batson* objection, the State added that it was also concerned that prospective juror 36 might be upset because the State prosecuted her brother 13 years earlier or that her brother might have committed a violent crime.

We first address the race-neutral explanation initially offered by the State for striking prospective juror 36. The State claimed that it struck prospective juror 36 because "the State of Nevada's not going to leave somebody who works at a strip club on their panel." The State's explanation is troubling because the State admitted that

it only ran a SCOPE background check on one of the other 35 prospective jurors remaining in the venire. If, indeed, prospective juror 36's possession of a valid work card for an adult nightclub made the State uneasy, it should have also been worried about the other 34 prospective jurors on whom it did not conduct a SCOPE background check to determine whether they had obtained a valid work card within the last three years. This kind of disparate treatment supports our conclusion that it is more likely than not that the reasons given for striking prospective juror 36 were mere pretext for purposeful discrimination. *See Miller-El v. Dretke*, 545 U.S. 231, 244 (2004).

We acknowledge that this pretext argument was not well developed in the district court and McCarty takes a different tack on appeal. However, McCarty twice alluded to this observation below in the context of challenging the State's use of SCOPE background checks on jurors. He first complained that the defense cannot assess whether the State has articulated a race-neutral reason without equal access to the SCOPEs because the defense had no way of knowing if any of the other potential jurors had work cards. McCarty further argued that "[i]f two of those jurors have stripper cards, then we can show the Court that's not a racially neutral reason." Later, McCarty suggested a hypothetical where a prosecutor accesses an African-American juror's SCOPE in search of a race-neutral reason to strike the juror. He argued that "[i]f the prosecutor were to make a specific election to not examine any other SCOPEs, you have then a mechanism in place where a race-neutral reason can be proffered and the validity of the race-neutral reason can never be challenged." These arguments point to the concern we have in this case that the discovery of juror 36's work card was just a fortuitous excuse to remove this African-American juror. We cannot overlook such a clear instance of discriminatory intent. Considering the State's original reason for conducting the independent background investigation (prospective juror 36's brother's criminal history) and that investigation's failure to yield results, we conclude that the State's strip-club explanation is "'implausible.'" *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30 (quoting *Purkett*, 514 U.S. at 768).

[Headnote 17]

We are also troubled by the district court's handling of McCarty's concern about the accuracy of the work-card information on prospective juror 36's SCOPE. Her SCOPE indicated that she had obtained a work card to serve cocktails at an adult nightclub three years earlier. The juror listed her occupation as "full-time student" in her questionnaire, and she confirmed during voir dire that she was a full-time student studying health-care administration. When McCarty attempted to point out that it was unlikely that prospective juror 36 currently worked at an adult nightclub because she listed her occupation as "full-time student" in her questionnaire and had

obtained the work card three years earlier, the district court prevented him from continuing with his argument and told him "it sounds like your argument here is for the Supreme Court." The district court is mistaken. As we recently explained in *Conner*, 130 Nev. at 465, 327 P.3d at 509, it is the district court that "has a duty to assess whether the opponent of the strike has met its burden to prove purposeful discrimination" and the "district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual."

Here, the district court admitted it was "concerned" about the State's independent investigation into prospective juror 36's background, but it nevertheless disregarded McCarty's attempt to show that it was unlikely that prospective juror 36 currently worked at an adult nightclub. The district court failed to undertake the sensitive inquiry into all the relevant circumstances required by *Batson* and its progeny before rendering its decision. *See Batson*, 476 U.S. at 93, 96. Furthermore, the district court failed to discuss which facts or circumstances alleviated its concerns about the State's independent investigation and caused it to deny McCarty's *Batson* challenge. We have previously explained that "an adequate discussion of the district court's reasoning may be critical to our ability to assess the district court's resolution of any conflict in the evidence regarding pretext." *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30. The district court's failure to consider all of the relevant circumstances and make a record in this case undermines our confidence in its decision.

[Headnote 18]

The State asks this court to disregard its strip-club explanation and focus on its alternative explanation that it struck prospective juror 36 because her brother was prosecuted by the State 13 years earlier, and it did not want veniremembers who had family members who had been convicted of a violent crime to serve as jurors. But, there is no evidence that prospective juror 36's brother was ever convicted of a violent crime. Furthermore, when prospective juror 36 told the State that she had "very little" relationship with her brother and, based on the limited information she had about his prosecution, she believed the State treated him fairly, the prosecutor responded, "So obviously . . . you don't harbor any resentment against my office." The State also fails to mention that it did not offer its alternative explanation until after McCarty attacked its first race-neutral explanation as pretextual. *Cf. Miller-El*, 545 U.S. at 246 (finding it difficult to credit the State's alternative race-neutral explanation because of its pretextual timing).

[Headnote 19]

Nonetheless, we have considered the State's alternative explanation. Like prospective juror 36, three other prospective jurors who

were not struck by the State responded affirmatively to the questionnaire's inquiry whether "anyone close to you [has] ever been charged with, arrested for, or convicted of any public offense." We focus on prospective juror 76, a Caucasian, and the only other prospective juror on whom the State conducted a SCOPE background check. In response to this question, prospective juror 36 answered, "Brother, not exactly sure of the charges." Similarly, the Caucasian juror answered, "My real father, but I don't know of what exactly . . . ." The Caucasian juror was only asked one question about this answer during voir dire—"Without getting too in depth into the questions that you had that were asked related to your father, I'm assuming there is nothing related to your father that would affect your ability to be fair and impartial." In contrast, prospective juror 36 was asked 18 questions about her answer, 3 by the defense and 15 by the State. Sometime after this questioning, the State entered both jurors' names into the SCOPE database as part of its independent investigation. Neither background check turned up information about the prospective jurors' family members. The African-American juror was struck, and the Caucasian juror remained on the empaneled jury. We are not persuaded that the State was seriously concerned about whether a juror's family member had been prosecuted by the State and whether they had been convicted of a violent crime, when it asked the Caucasian prospective juror a single leading question about her father. Disparate questioning by prosecutors of struck veniremembers and those veniremembers of another race or ethnicity is evidence of purposeful discrimination.

Having considered all the relevant circumstances, we conclude that the district court clearly erred by allowing the State to exercise a peremptory challenge to dismiss prospective juror 36. Because this error is structural, *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008), we reverse the judgment of conviction and remand this matter to the district court for proceedings consistent with this opinion.

PARRAGUIRRE, C.J., and SAITTA, J., concur.

DOUGLAS, J., concurring:

I agree with the majority's conclusion that McCarty's Sixth Amendment right to counsel attached at his initial appearance before the magistrate and that he waived his right to counsel under the circumstances presented here. Further, I agree with the majority's decision to reverse the judgment of conviction and remand for a new trial based on *Batson* error. I write separately to highlight my concern over the district court's handling of McCarty's *Batson* objection.

Although the three-step *Batson* analysis is firmly rooted in our jurisprudence, we continue to see that analysis not being followed.

McCarty challenged the State's peremptory strike against juror 36 as discriminatory and the State proffered race-neutral reasons to support the strike. However, the district court ignored step three of the analysis, which required it to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'" to determine whether McCarty met his burden of proving discriminatory intent. *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *see Hernandez v. New York*, 500 U.S. 362, 363 (1991); *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014). That sensitive inquiry necessarily includes factual findings regarding discriminatory intent, *see Hernandez*, 500 U.S. at 364 (observing that the trial court's decision on the ultimate question of discriminatory intent represents a factual finding), and credibility determinations, not only concerning the prosecutor but the juror who is the subject of the *Batson* challenge, *see Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) ("[T]he trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."). The district court plays a crucial role in evaluating a *Batson* claim, as we rely on those determinations to effectively review whether there has been purposeful discrimination. *See Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004) ("An adequate discussion of the district court's reasoning may be critical to our ability to assess the district court's resolution of any conflict in the evidence regarding pretext."); *see also Snyder*, 552 U.S. at 477 (acknowledging the trial court's "pivotal role in evaluating *Batson* claims"); *Hernandez*, 500 U.S. at 365 (observing that the trial court's findings concerning discriminatory intent " 'largely will turn on evaluation of credibility'" and therefore those findings are accorded great deference on appeal (quoting *Batson*, 476 U.S. at 98 n.21)).

Here, the district court articulated no factual or credibility findings regarding the State's proffered race-neutral reasons for striking juror 36. The record only reflects a lengthy discussion of the SCOPE searches and the prosecutor's use of the SCOPE database, not a discussion or analysis of any race-neutral reason for striking this juror. We therefore cannot make those determinations. That duty fell exclusively on the district court. Nor did the district court satisfy its obligation to determine whether McCarty had met his burden of showing purposeful discrimination. Consequently, the district court has left us in the dark. I acknowledge, as the majority does, that the pretext argument was not well developed in the district court. Nevertheless, this case aptly illustrates why it is crucial that the district court undertake a thoughtful and proper analysis, not only to adequately assess the merits of a *Batson* challenge at the trial level,

but to allow this court to effectively evaluate a challenge on appeal. A deficient *Batson* analysis is particularly troubling in capital prosecutions. When a defendant faces the ultimate punishment—a sentence of death—it is imperative to follow the letter of the law. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that [the] qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability."). The letter of the law was not followed here. Therefore, I would reverse the judgment of conviction based on the district court's failure to adhere to analysis mandated under *Batson*.

PICKERING, J., with whom HARDESTY and GIBBONS, JJ., agree, concurring in part and dissenting in part:

The majority reverses McCarty's judgment of conviction based on its finding that the State engaged in purposeful racial discrimination, forbidden under *Batson v. Kentucky*, 476 U.S. 79 (1986), when it exercised a peremptory challenge against prospective juror 36, a 28-year-old, married, African-American woman. I cannot reconcile this finding with the record of proceedings in the district court, or controlling law. With the exception of part I of the opinion, in which I join, I therefore respectfully dissent.

Batson holds that the Equal Protection Clause of the Fourteenth Amendment forbids prosecutors from exercising peremptory challenges against prospective jurors based on their race. *Id.* at 89. Unlike for-cause challenges, which test a juror's objective impartiality, peremptory challenges "are often the subjects of instinct," *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (citing *Batson*, 476 U.S. at 106 (Marshall, J., concurring)), "based on subtle impressions and intangible factors," *Davis v. Ayala*, 576 U.S. ___, ___, 135 S. Ct. 2187, 2208 (2015), that are "inherently subjective." *Miller-El*, 545 U.S. at 266-67 (Breyer, J., concurring); *see also Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring) (plurality opinion) ("Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, 'as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'" (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892))). A case can be made for eliminating peremptory challenges altogether in criminal cases, *Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) (stating that the only way to "end the racial discrimination that peremptories inject into the jury-selection process [is to] eliminat[e] peremptory challenges entirely"); *Miller-El*, 545 U.S. at 266-67 (Breyer, J.,

concurring) (to similar effect), but this has not occurred. Instead, case law leaves it to the district courts to ferret out discrimination in the exercise of peremptory challenges, a process that "places great responsibility in the hands of the trial judge, who is in the best position to determine whether a peremptory challenge is based on an impermissible factor." *Davis*, 576 U.S. at ___, 135 S. Ct. at 2208.

A *Batson* objection triggers a three-step analysis in the district court: "[(1)] a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; [(2)] the prosecution must offer a race-neutral basis for striking the juror in question; and [(3)] the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008) (internal quotation marks and alterations omitted); *accord Hawkins v. State*, 127 Nev. 575, 578, 256 P.3d 965, 967 (2011). Steps two and three require the district judge to "evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." *Davis*, 576 U.S. at ___, 135 S. Ct. at 2201. Such " 'determinations of credibility and demeanor lie peculiarly within a trial judge's province,' " and " 'in the absence of exceptional circumstances, [a reviewing court will] defer to the trial court.' " *Id.* (quoting *Snyder*, 552 U.S. at 477); *see Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation."); *Watson v. State*, 130 Nev. 764, 775, 335 P.3d 157, 165-66 (2014) ("This court affords great deference to the district court's factual findings regarding whether the proponent of a strike has acted with discriminatory intent, *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008), and we will not reverse the district court's decision 'unless clearly erroneous.' " (quoting *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004))).

The majority acknowledges these rules but then does not follow them. Reversing the district court, it deems the race-neutral reasons the State gave for striking juror 36 pretextual and suggests that the district court gave the defense unfairly short shrift in adjudicating its *Batson* challenge. This holding attributes to the defense a claim of pretext it did not make and, I respectfully submit, misapprehends the record and how it evolved in district court.

Juror 36 divulged in her answers to the written jury questionnaire that her brother had been prosecuted by the Clark County District Attorney's Office—the same office prosecuting McCarty—and did time in prison as a result. She did not know the details, though the defense and the State both pressed her about them. At one point during the defense's questioning of her, for reasons not entirely clear, juror 36 started to cry. Neither side questioned her further, and both sides passed her for cause.

In preparing for its peremptory challenges, the State conducted a Shared Computer Operations for Protection and Enforcement or SCOPE search on juror 36 to try to find her maiden name and thereby identify her brother and the crime he was convicted of. Although the State learned juror 36's maiden name, the name was too common for the State to identify her brother or his crime. But the State's research turned up a work card authorizing juror 36 to work at a Las Vegas strip club called "Sin." Though juror 36 had obtained the work card three years earlier, and was attending college, the card was current and would not expire for two more years. The State struck juror 36 and, when challenged by the defense, relied on the facts just summarized.

The majority suggests that the defense challenged the State's strip-club explanation as pretextual and that, when challenged, the State scrambled to come up with another reason for excusing juror 36: her brother's criminal history. This is not accurate. The defendant was charged with murdering two women he had been pandering as prostitutes and using to help him deal drugs. Given these alleged facts, not wanting a woman who worked or had recently worked at a strip club on the jury provided a facially race-neutral reason for the peremptory challenge. *See Felkner v. Jackson*, 562 U.S. 594, 595 (2011) (the trial court did not act unreasonably in deeming the prosecutor's explanation about not "lik[ing] to keep social workers" on a jury to be "race-neutral"); *Hawkins*, 127 Nev. at 579, 256 P.3d at 967 (holding to similar effect as to peremptory challenge of a college professor). Indeed, the defense did not argue otherwise in district court and, at two points in the argument, came very close to conceding that, in this particular case, striking a woman with a work card for a Las Vegas strip club from the jury was understandable. The brother's unexplained criminal history factored into the discussion as the reason for conducting the SCOPE search on juror 36 (and juror 76, see below) and in that light is likewise understandable, not, as the majority suggests, a flimsy fallback.[1]

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[1]The transcript is consistent with the account in the text. When challenged to provide a race-neutral reason for striking juror 36, the State gave the following account of its reasons:

> In our questionnaire, she indicated that her brother had been convicted by a—of a felony by our office. When I questioned her about it, you know, it was, [w]ell, he had picked up warrants, but I'm really not sure what for. She indicated that—I asked her if it was about a crime that [inaudible] which [inaudible] jurors on here with anybody [inaudible] for the prosecutor of the crime. She couldn't answer that question.
>
> Afterwards, [defense counsel] was asking her questions and apparently she had an answer to a question on the last section related to something [inaudible]—her feelings concerning the issue that—that's relevant there, and she did not put it on the questionnaire but indicated to [defense counsel] that something happened to her and she didn't want to tell him about it, and he didn't press her any further.

The State revealed that it had run a SCOPE search on juror 36 in explaining its reasons for striking her. This prompted the defense to object to its lack of access to SCOPE and similar law enforcement databases. When the defense suggested that the State may have run a SCOPE search on juror 36 in the hopes of unearthing a plausible race-neutral reason for excusing her, the district court did not, as Justice Douglas's concurrence argues, fail to examine and resolve the purposeful discrimination claim. On the contrary, the district judge directly questioned the two prosecutors representing the State about the SCOPE searches they or anyone working for them had run. The State's lawyers represented to the court that they ran the searches on two jurors, juror 36 and one other, juror 76, a Caucasian woman whose questionnaire answers resembled those of juror 36. (Juror 76's father did time in prison, but she could not say for what; she, too, was married, and the State searched SCOPE for her maiden name; unlike juror 36, the search did not turn up anything.) The prosecutors further confirmed that they did not run SCOPE searches on any other members of the venire, including, specifically, the three other African Americans remaining after the jury was passed for cause. The district court then stated, on the record, that it was "accepting Counsel at his word that the two people he looked up were [jurors 36 and 76]," and, after entertaining additional argument, denied the defense's motion to strike the jury panel. The district court heard, considered, and resolved the purposeful discrimination claim the defense made; it was not obligated to do more. *Compare Conner v. State*, 130 Nev. 457, 464, 327 P.3d 503, 509 (2014), *cert. denied*, ___ U.S. ___, 135 S. Ct. 2351 (2015) ("[T]he defendant bears a heavy burden in demonstrating that the State's facially race-neutral explanation is pretext for discrimination."), *with Hawkins*, 127 Nev. at 579, 256 P.3d at 967 ("*Batson* does not impose 'an independent duty on the trial court to pore over the record and compare the characteristics of jurors, searching for evidence of pretext, absent any pretext argument or evidence presented by counsel.'" (quoting *Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir. 1999))).

The real focus of the defense's argument in the district court was on the inequity in the State having access to the SCOPE database when the defense did not. The voir dire and the appellate briefing in this case predated our decision in *Artiga-Morales v. State*, 130 Nev. 795, 335 P.3d 179 (2014) (4-3), in which a divided en banc

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> Based on that, you know, I really want to know what her brother did, so I did a little research into her background, found out—I could not identify who her brother was, but during the course of researching her background, I found that . . . she has a current valid hard work card for a strip club, Judge. And so with all due respect, it was nothing to do with the race, but the State of Nevada's not going to leave somebody who works at a strip club on their panel. So . . . .

court rejected a challenge to the State's use of criminal databases such as SCOPE in preparing for voir dire. And here, the defense did not file the written pretrial motion that the defense did in *Artiga-Morales*, asking the district court to compel the State to produce SCOPE search results on the venire—a deficiency that led the district court in this case to state that the defense "almost in effect waived" the argument by not filing a written motion. Nonetheless, the district court *granted* the defense's oral motion to compel the State to share with the defense the results of the two SCOPE searches it ran on jurors 36 and 76. After the prosecutors again confirmed that these were the only SCOPE searches they or anyone acting for them ran on the venire, the defense then made a record that for the State to challenge jurors with incarcerated family members unfairly prejudices people of color, which argument is reiterated on appeal. The district court rejected the defense's *Batson* challenge, and the jury was sworn. Although the majority suggests otherwise, the district court did not cut the defense argument off on any of these issues. On the contrary, the transcript of proceedings on the defense's *Batson* challenge runs almost 50 pages, with the district court excusing the jury and breaking early for lunch so the lawyers could undertake research over the noon hour, then reconvening outside the presence of the jury to argue the matter.

The opening and answering briefs on appeal recite the *Batson* standards but do little or no analysis of how they should apply to this record. It is only in the reply brief that the defense actually hints at the argument that striking juror 36 based on her strip club work card was pretextual, an argument the majority credits but the defense did not make in their opening brief or in district court. This is too little, too late. The burden is on the opponent of the strike to traverse the race-neutral reason(s) and demonstrate pretext. *E.g.*, *Kaczmarek*, 120 Nev. at 333, 91 P.3d at 29 ("Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."); *Hawkins*, 127 Nev. at 579, 256 P.3d at 967 (rejecting *Batson* challenge where, as here, the defense did not make in district court the pretext argument advanced on appeal).

The district court handled the *Batson* challenge with care. It allowed the lawyers to make a record outside the presence of the jury and gave them time to undertake research on the issues they raised. The district judge witnessed juror 36's demeanor and that of the prosecutors who exercised a peremptory strike against her. He found no purposeful discrimination by the State's attorneys. On this record, that factual finding was not "clearly erroneous" and does not properly serve as a basis to vacate the judgment on the jury's verdict and require a new trial in this case.

I dissent.