TRACEY W. VICKERS, Appellant, *v.* JAMES E. DZURENDA, Director, Nevada Department of Corrections; and HAROLD WICKHAM, Warden, Warm Springs Correctional Center, Respondents.

No. 72352-COA

November 21, 2018 433 P.3d 306

Pro se appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus.[1] First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed.

Tracey W. Vickers, Lovelock, in Pro Se.

Adam Paul Laxalt, Attorney General, and *Heather D. Procter*, Senior Deputy Attorney General, Carson City, for Respondents.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

Per Curiam:

In this opinion, we consider whether an offender who is willing and able to work but who has not been assigned a job by the Nevada Department of Corrections (NDOC) is entitled to labor credits pursuant to NRS 209.4465(2). We also consider whether the change in the ability to apply credits to minimum sentences brought about by the 2007 amendments to NRS 209.4465 violated the Equal Protection Clauses of the United States and Nevada Constitutions. For the reasons discussed below, we answer "no" to both questions.

FACTS

In February 2014, appellant Tracey W. Vickers struck his victim with a cane. He subsequently pleaded guilty to battery with the use of a deadly weapon, a category B felony. *See* NRS 200.481(2)(e)(1). He was sentenced to 48 to 120 months, which was suspended, and he was placed on probation for five years. Vickers' probation was revoked the following year. The district court imposed the original sentence and credited him with 134 days for time spent in presentence confinement, but it did not credit him with time spent on probation. Vickers admits he has not worked since he has been in NDOC's custody.

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

ANALYSIS

Labor credits

Vickers contends he is entitled to labor credits pursuant to NRS 209.4465(2) because he is ready and willing to work. He points out NDOC does not have enough jobs for all inmates who want to work. Vickers argues crediting offenders who want to work, but for whom NDOC does not have a job, furthers the legislative intent behind labor credits—promoting early release and incentivizing inmates to remain trouble-free. Accordingly, Vickers argues, he is entitled to 10 days per month labor credit for each month he is willing and able to work, regardless of whether he actually works. Vickers presents a question of statutory interpretation.

The meaning of a statute is a question of law and is thus reviewed de novo. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). A statute's plain meaning informs us of the Legislature's intent, and where the language is clear and unambiguous, we must give effect to the apparent intent. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011).

The plain meaning of NRS 209.4465(2) belies Vickers' arguments. NRS 209.4465(2) grants NDOC's Director the discretion to "allow not more than 10 days of credit each month for an offender whose *diligence in labor* and study merits such credits." (Emphasis added.) "Diligence" is "a persevering *application*." *Merriam-Webster's Collegiate Dictionary* 350 (11th ed. 2014) (emphasis added). Thus, to be diligent in labor one must actually apply oneself to the labor. The legislative intent is clear: Where an inmate has not engaged in any labor, he has not been diligent in labor, and accordingly, the Director has no discretion under NRS 209.4465(2) to award labor credits. The Department's administrative regulations are in accord with this intent. *See* NDOC AR 563.01(2)(A) (providing for verification to "ensure that inmates who are not assigned to work or study do not receive work credits"). Here, Vickers admits he has not worked. Therefore, he is not entitled to labor credits.

Equal protection

Vickers contends the failure to apply statutory good-time credits he earns pursuant to NRS 209.4465(1) to his parole eligibility violates his right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 4, Section 21 of the Nevada Constitution. Vickers asserts offenders convicted of the same category of felony receive disparate treatment under NRS 209.4465 based upon the date they committed their offenses.

At the heart of the Equal Protection Clauses is the idea that all people similarly situated are entitled to equal protection of the law. *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000); *see*

Armijo v. State, 111 Nev. 1303, 1304, 904 P.2d 1028, 1029 (1995) ("[T]he standard of the Equal Protection Clause of the Nevada Constitution [is] the same as the federal standard . . . ."). Thus, the threshold question is whether a statute treats similarly situated people disparately. *Rico v. Rodriguez*, 121 Nev. 695, 703, 120 P.3d 812, 817 (2005).

Between the adoption of NRS 209.4465 in 1997 and the effective date of its amendment in 2007, NRS 209.4465(7)(b) provided that credits earned pursuant to the statute "[a]ppl[ied] to eligibility for parole unless the offender was sentenced pursuant to a statute which specifie[d] a minimum sentence that must be served before a person becomes eligible for parole." 1997 Nev. Stat., ch. 641, § 4(7)(b), at 3175. The Nevada Supreme Court has considered whether, for offenders sentenced for crimes committed during this time period, "credits earned pursuant to NRS 209.4465 apply to eligibility for parole as provided in NRS 209.4465(7)(b) where the offender was sentenced pursuant to a statute that requires a minimum term of not less than a set number of years but does not mention parole eligibility." *Williams v. State*, 133 Nev. 594, 595, 402 P.3d 1260, 1261 (2017). It concluded they did. *Id.*

In 2007, NRS 209.4465 was amended to provide exceptions for how credits earned under the statute were to be applied. NRS 209.4465(8) was added, providing that offenders who had not committed felonies involving the use or threatened use of force, "[a] sexual offense that is punishable as a felony," certain violations of NRS Chapter 484C that are punishable as a felony, and category A or B felonies would have statutory credits applied to their parole eligibility. *See* 2007 Nev. Stat., ch. 525, § 5, at 3177. At the same time, NRS 209.4465(7) was amended to begin, "Except as otherwise provided in subsection 8." *Id.* The exclusions in NRS 209.4465(8) were thus clearly intended to abrogate any contrary language in NRS 209.4465(7). The amendments to NRS 209.4465 became effective on July 1, 2007. 2007 Nev. Stat., ch. 525, § 22, at 3196.

The version of NRS 209.4465 in effect at the time an offender committed his or her crime is the one that governs application of credits toward parole eligibility. *See Weaver v. Graham*, 450 U.S. 24, 31-33 (1981); *Goldsworthy v. Hannifin*, 86 Nev. 252, 255, 468 P.2d 350, 352 (1970); *cf. State v. Second Judicial Dist. Court* (*Pullin*), 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008) ("[T]he proper penalty is the penalty in effect at the time of the commission of the offense . . . ."). For crimes committed after July 17, 1997, but before July 1, 2007, whether credits apply to an offender's minimum sentence depends on the verbiage in the sentencing statute. For crimes committed on or after July 1, 2007, the applicability also depends on whether the offender's convictions fall within the offenses identified in NRS 209.4465(8)(a)-(d). Thus, NRS 209.4465 has the poten-

tial to apply disparately to offenders convicted of similar offenses based on the date the offenses were committed. For example, category B felonies typically require a minimum term of not less than a set number of years but do not mention parole eligibility. *See, e.g.*, NRS 193.130(2)(b) ("A category B felony is a felony for which the minimum term of imprisonment in the state prison that may be imposed is not less than 1 year and the maximum term of imprisonment that may be imposed is not more than 20 years . . . ."); NRS 200.481(2)(e)(1) (stating battery with the use of a deadly weapon is punishable as "a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years"). Thus, a person who committed battery with the use of a deadly weapon on June 30, 2007, could have statutory credits applied to his parole eligibility, while a person who committed the same crime on July 1, 2007, could not.

However, legislation that has the potential to treat offenders disparately does not necessarily run afoul of the Equal Protection Clauses. *See New Orleans v. Dukes*, 427 U.S. 297, 304 n.5 (1976) ("Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." (quotation marks omitted)). Indeed, we presume the challenged legislation is constitutional. *Allen v. State*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984).

Equal-protection analysis involves a two-part inquiry. This court first establishes what level of scrutiny the legislation receives, and then it examines the legislation under the appropriate level of scrutiny. *Gaines*, 116 Nev. at 371, 998 P.2d at 173. Legislation that leads to disparate treatment but that does not involve a suspect class or impinge upon a fundamental right is reviewed under the rational basis standard of review. *Id*. Under this standard, this court will uphold the legislation so long as "the challenged classification is rationally related to a legitimate governmental interest." *Id.*

The application of statutory credits is subject only to rational basis review, *see McGinnis v. Royster*, 410 U.S. 263, 270 (1973), because "inmates are not a suspect class," *Peck v. Zipf*, 133 Nev. 890, 898, 407 P.3d 775, 782 (2017), and as "there is no fundamental constitutional right to parole," *Glauner v. Miller*, 184 F.3d 1053, 1054 (9th Cir. 1999), there can be no fundamental constitutional right to receive credit to accelerate a parole eligibility date, *see Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). Thus, disparate treatment under NRS 209.4465 will violate the Equal Protection Clauses only if the legislation "is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Allen, 100 Nev. at 136, 676 P.2d at 796 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

When it comes to sentencing, it seems virtually axiomatic that offenders may be punished differently for the same crime committed on different dates. As one court aptly observed, "Legislation must, of necessity, take effect on some specific date," and thus may "creat[e] two classes of offenders distinguishable by only the date of offense, conviction, plea, or sentencing." *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 504 (6th Cir. 2007). And the United States Court of Appeals for the Ninth Circuit specifically held that "[t]here is no denial of equal protection in having persons sentenced under one system for crimes committed before [a specific date] and another class of prisoners sentenced under a different system." *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th Cir. 1991) (quoting *Foster v. Wash. State Bd. of Prison Terms & Paroles*, 878 F.2d 1233, 1235 (9th Cir. 1989)); *see also Leigh v. United States*, 586 F.2d 121, 123 (9th Cir. 1978) (denying an equal-protection claim challenging different laws that were in effect depending on when a defendant's case went to trial). Other courts have reached a similar conclusion. *See, e.g.*, *Doe*, 490 F.3d at 504-05; *Huggins v. Isenbarger*, 798 F.2d 203, 206-07 (7th Cir. 1986); *Frazier v. Manson*, 703 F.2d 30, 36 (2d Cir. 1983); *State v. Nguyen*, 912 P.2d 1380, 1382-83 (Ariz. Ct. App. 1996); *Robinson v. State*, 584 A.2d 1203, 1206 (Del. 1990); *Bergee v. S.D. Bd. of Pardons & Paroles*, 608 N.W.2d 636, 644 (S.D. 2000). Discrepancies in the time offenders must serve, even where the offenders committed similar crimes, is inescapable whenever a legislature increases or reduces sentences. *United States v. Speed*, 656 F.3d 714, 720 (7th Cir. 2011).

The 2007 amendments to NRS 209.4465 refined the parole-eligibility calculation. *See Williams*, 133 Nev. at 599 n.6, 402 P.3d at 1264 n.6 (noting the 2007 change "set additional limitations on the application of credits to eligibility for parole"). And establishing the time an offender must spend in prison is a rational governmental purpose, *cf. McQueary*, 924 F.2d at 834 ("Improvement in sentencing is [a] rational governmental purpose." (quotation marks omitted)). The 2007 amendments to NRS 209.4465 were thus rationally related to a legitimate governmental interest. Accordingly, any disparate treatment resulting from the date a crime was committed does not deny offenders equal protection of the law under the United States and Nevada Constitutions.

CONCLUSION

The plain language of NRS 209.4465(2) requiring "diligence in labor" means an offender must actually work to earn labor credits. And the disparate application of statutory credits to parole eligibility based on when an offender committed an offense is rationally relat-

ed to a legitimate governmental interest and thus does not offend the Equal Protection Clauses of the United States and Nevada Constitutions. For these reasons, we conclude the district court did not err in dismissing Vickers' petition, and we affirm.[2]

CARA O'KEEFE, AN INDIVIDUAL, APPELLANT, *v.* THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES, RESPONDENT.

No. 68460

December 6, 2018 431 P.3d 350

Appeal from a district court order granting a petition for judicial review in an employment matter. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed.

[Rehearing denied March 6, 2019]

Hejmanowski & McCrea LLC and *Malani L. Kotchka*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, *Jordan T. Smith*, Assistant Solicitor General, *Cameron P. Vandenberg*, Chief Deputy Attorney General, and *Dominika J. Batten* and *Brandon R. Price*, Deputy Attorneys General, Carson City, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This case concerns a decision by the Department of Motor Vehicles to terminate a classified employee's employment and a hearing officer's decision to reinstate the employee. At issue is whether the hearing officer applied the correct standard of review. To resolve that issue, we must interpret NRS 284.385(1)(a), which sets forth grounds for an agency to dismiss or demote a classified employ-

[2]Vickers also claims he was entitled to credit for time served on probation. We conclude the district court did not err by denying this claim. *See* 2009 Nev. Stat., ch. 447, § 5, at 2513-14; NRS 176A.635(1); *Webster v. State*, 109 Nev. 1084, 1085, 864 P.2d 294, 295 (1993).

We have also considered Vickers' claim that he was entitled to the appointment of postconviction counsel. We conclude the district court did not abuse its discretion in declining to appoint counsel. *See* NRS 34.750(1) (the appointment of counsel is discretionary); *Renteria-Novoa v. State*, 133 Nev. 75, 75, 391 P.3d 760, 760-61 (2017).

ee, together with NRS 284.390, which directs a hearing officer to review the agency's disciplinary decision. We hold: Whether the employee violated a law or regulation is reviewed de novo, but the agency's decision to terminate the employee is entitled to deference. Because the hearing officer applied the wrong standard of review, we affirm the district court's order granting the petition for review.

FACTS AND PROCEDURAL HISTORY

The employee's policy violations and termination

From 2006 until 2012, appellant Cara O'Keefe worked as a revenue officer at the Department of Motor Vehicles (DMV), where her job involved the licensing and registration of trucks. Her performance evaluations were positive, and she had never received discipline for violating any DMV rules or regulations. In December 2012, O'Keefe transferred to a different state position within the Nevada Division of Insurance (DOI). That transfer was considered a promotion, and so, under NRS 284.300, O'Keefe had the option to return to her position at the DMV if she failed her probationary period at the DOI.

Shortly after O'Keefe's transfer, two of her former DMV colleagues notified the DMV administrator for management services that they had overheard O'Keefe making unauthorized calls to the Carson City Sheriff's Office. On those calls, O'Keefe stated that she was helping a customer with a driver's license issue related to a DUI, but in reality, O'Keefe had no customer at her desk, and her job duties never involved DUI issues. Because O'Keefe had already left her position at the DMV, the DMV administrator declined to investigate the allegations.

O'Keefe failed her probationary period at the DOI and opted to return to the DMV. In light of O'Keefe's imminent return, the DMV administrator opened a formal investigation into O'Keefe's prior conduct while employed by the DMV. That investigation revealed that, in addition to the two unauthorized calls she made to the sheriff's office, O'Keefe accessed confidential DMV databases on at least ten occasions for nonwork purposes. O'Keefe admitted to all of the allegations, explaining that she accessed the information to help a friend "fill out some paperwork" related to the friend's DUI violation. O'Keefe further admitted that she had read and signed a memorandum from the DMV director warning employees that "querying DMV records for a purpose other than DMV business is strictly forbidden." That memorandum contained only one sentence that was underlined: "The first offense can result in termination."

In a predisciplinary hearing memorandum, the DMV administrator noted that "misuse of information technology is a terminable offense for a first time violation" and recommended that the DMV terminate O'Keefe's employment. The DMV director agreed, con-

cluding that "it is in the best interest of the State of Nevada to terminate [O'Keefe's] employment."

The hearing officer's decision

O'Keefe requested a hearing under NRS 284.390 to challenge the DMV's decision to terminate her employment. After considering the evidence, the hearing officer vacated the DMV's decision, noting the hearing officer's duty "to ascertain if there is substantial evidence of legal cause, and to ensure that the employer did not act arbitrarily or capriciously, thus abusing its discretion." The decision cited NRS 284.385, *Dredge v. State, Department of Prisons*, 105 Nev. 39, 769 P.2d 56 (1989), and *Knapp v. State, Department of Prisons*, 111 Nev. 420, 892 P.2d 575 (1995), for the proposition that the hearing officer must "make an independent determination as to whether there is sufficient evidence showing that the discipline would serve the good of the public service."

The hearing officer found that O'Keefe violated three Nevada Administrative Code (NAC) regulations[1] and four provisions of the DMV Prohibitions and Penalties.[2] With regard to the most serious offense—DMV Prohibition G(1), "Misuse of Information Technology"—the hearing officer found that while a first-time violation "can result in termination," "the level of discipline for this offense is discretionary." The hearing officer found that O'Keefe's conduct "was not a 'serious violation of law or regulation' to merit termination prior to imposition of less severe disciplinary measures" (citing NRS 284.383(1)), and the evidence "does not establish that termination will serve the good of the public service." The hearing officer based these determinations on (1) "the nature of the offense," which the hearing officer did not consider grave; (2) O'Keefe's "seven years of state service without prior discipline"; and (3) "the DMV's failure to promptly investigate this matter and take immediate corrective action." Thus, the hearing officer reversed the DMV's decision to terminate O'Keefe and recommended the lesser discipline of a 30-day suspension.

Judicial review

The DMV petitioned for judicial review. The district court noted the hearing officer's finding that O'Keefe had violated DMV Prohi-

[1]NAC 284.650(1) ("Activity which is incompatible with an employee's conditions of employment"); NAC 284.650(6) ("Insubordination or willful disobedience"); NAC 284.650(18) ("Misrepresentation of official capacity or authority").

[2]The four DMV Prohibitions and Penalties provisions were: B(23) ("Disregard and/or Deliberate Failure to Comply with or Enforce . . . Regulations and Policies"), C(4) ("Conducting Personal Business During Work Hours"), G(1) ("Misuse of Information Technology"), and H(7) ("Acting in an Official Capacity Without Authorization").

bition G(1), which, according to the DMV's regulations, warranted termination even if it was the employee's first offense. The district court reasoned that "[a] hearing officer does not have authority to second-guess the DMV's Prohibitions and Penalties offense classification," so if the DMV "proves an offense for which the Prohibitions and Penalties provide a minimum discipline of termination, just cause for termination is established and termination is reasonable as a matter of law." On those grounds, the district court granted the petition and set aside the hearing officer's decision.

O'Keefe appealed. The court of appeals affirmed by order, holding that the "DMV's Prohibitions and Penalties mandated dismissal for O'Keefe's actions," so the "hearing officer's ruling to the contrary was arbitrary and based on an error of law." *O'Keefe v. State, Dep't of Motor Vehicles*, Docket No. 68460-COA (Order of Affirmance, January 30, 2017). O'Keefe petitioned for review under NRAP 40B, which we granted.

DISCUSSION

"When a [hearing officer's] decision . . . is challenged, the function of this court is identical to that of the district court. It is to review the evidence presented to the [hearing officer] and ascertain whether [the hearing officer] acted arbitrarily or capriciously, thus abusing [his or her] discretion." *Gandy v. State, Div. of Investigation*, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980) (discussing review of an administrative body's decision); *see also Knapp*, 111 Nev. at 423, 892 P.2d at 577 (indicating that a hearing officer's decision is treated the same as an "agency determination"). Under the arbitrary-and-capricious standard, this court defers to the hearing officer's "conclusions of law [that] are closely related to [the hearing officer]'s view of the facts" but decides "pure legal questions" de novo. *Knapp*, 111 Nev. at 423, 892 P.2d at 577 (internal quotation marks omitted).

Statutory background

Nevada's state personnel system is highly regulated. *See generally* NRS Chapter 284; NAC Chapter 284. The Personnel Commission must adopt an employee discipline system wherein, "except in cases of serious violations of law or regulations, less severe measures are applied" before more severe disciplinary actions such as termination. NRS 284.383(1). Permanent classified state employees receive the additional protection that the appointing authority[3] must "con-

[3]"Appointing authority" means any official granted the "legal authority to make appointments to positions in the state service." NAC 284.022. The relevant appointing authority in this case is the DMV or, more specifically, the DMV director, who made the final determination to terminate O'Keefe.

sider[ ] that the good of the public service will be served" by terminating the employee. NRS 284.385(1)(a).[4] Classified employees also have the right to challenge their termination before a "hearing officer of the [Personnel] Commission." NRS 284.390(1).[5]

In this case, the parties agree that O'Keefe was a classified employee who violated multiple NAC 284.650 regulations and four DMV Prohibitions and Penalties, including DMV Prohibition G(1). The issue we address is whether the hearing officer acted arbitrarily and capriciously in overruling the DMV's conclusions that (1) O'Keefe's conduct constituted a "serious violation[ ] of law or regulation[ ]," NRS 284.383(1), and (2) terminating O'Keefe's employment would serve "the good of the public service," NRS 284.385(1)(a).

The hearing officer acted arbitrarily and capriciously in holding that O'Keefe's conduct did not constitute a serious violation of law or regulation

The hearing officer held that O'Keefe's conduct was not a "serious violation of law or regulation" so as to warrant immediate termination without imposing progressive discipline as required by NRS 284.383(1). That conclusion of law was erroneous. The DMV expressly delineated Prohibition G(1) as an offense that warrants termination for a first violation. By doing so, the agency expressed its view that the offense involves a "serious violation[ ]" for purposes of NRS 284.383(1). *See also* NAC 284.646(1) (authorizing dismissal if "[t]he agency with which the employee is employed has adopted any rules or policies which authorize the dismissal of an employee for such a cause"). As the district court aptly noted, the hearing officer basically "second-guess[ed]" the DMV's assessment as to the seriousness of the violation of its own regulations, thus defeating the purpose of requiring the Personnel Commission to approve agencies' regulations in the first place.[6] Therefore, in holding that O'Keefe's conduct was not a "serious violation of law or regulation," the hearing officer disregarded the DMV's Prohibitions and Penalties and, in so doing, acted arbitrarily and capriciously.

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[4]NRS 284.385 has been amended twice, in 2015 and 2017, since the foregoing events took place, but the language of subsection 1 remains the same as the version in effect when the hearing officer issued the decision at issue here. *Compare* 2011 Nev. Stat., ch. 272, § 2, at 1495, *with* NRS 284.385.

[5]NRS 284.390 was amended in 2017. *See* 2017 Nev. Stat., ch. 581, § 3, at 4181-82. For the purposes of this appeal, the amendment was merely cosmetic, as the relevant statutory language remained the same. *See* 2011 Nev. Stat., ch. 479, § 64, at 2954.

[6]The DMV Prohibitions and Penalties were previously approved by the Personnel Commission—the same commission that grants the hearing officer the authority to review agency disciplinary decisions. NRS 284.383.

The hearing officer applied an erroneous legal standard when it determined that O'Keefe's termination was not for the good of the public service

Upon concluding that an employee committed a "serious violation[ ] of law or regulation," NRS 284.383(1), a hearing officer must still decide whether the employee's termination was "without just cause as provided in NRS 284.385," NRS 284.390(7).[7] NRS 284.385(1)(a) provides that an appointing authority may "[d]ismiss or demote any permanent classified employee when the appointing authority considers that the good of the public service will be served thereby." The issue is whether the hearing officer determines "the good of the public service" de novo or instead defers to the agency's determination.

The hearing officer stated that her duty was to "make an independent determination as to whether there is sufficient evidence showing that the discipline would serve the good of the public service." That statement is ambiguous as to what standard the hearing officer applied: "[M]ake an independent determination" implies de novo review, but "whether there is sufficient evidence" suggests a deferential standard. However, the hearing officer's analysis of what she considered to be the "good of the public service" reveals that she in fact reviewed that issue de novo.

O'Keefe argues that the hearing officer correctly applied de novo review to determine whether "the good of the public service will be served" by terminating her employment. She relies on NAC 284.798, which provides that "[t]he hearing officer shall make no assumptions of innocence or guilt but shall be guided in his or her decision by the weight of the evidence as it appears to him or her at the hearing," and further cites *Knapp*, wherein this court stated, "Generally, a hearing officer does not defer to the appointing authority's decision." 111 Nev. at 424, 892 P.2d at 577 (noting "[a] hearing officer's task is to determine whether there is evidence showing that a dismissal would serve the good of the public service").

There are several problems with the de novo standard that O'Keefe advocates. First, it ignores the deferential language used in the relevant statutes. For example, NRS 284.390(1) directs the hearing officer to determine the "reasonableness" of the agency's disciplinary decision, and NRS 284.390(7) provides that the hearing officer reviews decisions to terminate for "just cause." Terms such as "reasonableness" and "just cause" indicate a high level of deference. *See, e.g.*, *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 249, 327 P.3d 487, 490 (2014) (equating "reasonableness" review to the "substantial evidence standard of review"); *Sw. Gas Corp. v. Vargas*, 111

[7]At the time of the hearing officer's decision, this language was codified at subsection 6 of NRS 284.390. Although it was later moved to subsection 7, the language has remained unchanged. *See* 2017 Nev. Stat., ch. 581, § 3, at 4181-82.

Nev. 1064, 1078, 901 P.2d 693, 701-02 (1995) ("[A] discharge for 'just' or 'good' cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true."). Second, a de novo standard does not account for the nature of the "good of the public service" inquiry or the perspective from which that inquiry is conducted. In particular, NRS 284.385(1)(a) authorizes dismissal so long as "the appointing authority considers that the good of the public service will be served thereby." That language is meaningfully different from authorizing dismissal when the public service will *in fact* be served thereby. That is, the statute implicitly recognizes that "the good of the public service" is a subjective concept, and the relevant perspective is that of the appointing authority, who is in a better position than the hearing officer to evaluate what is best for the "public service." *See Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 931-32, 314 P.3d 949, 951 (2013) ("These provisions grant the hearing officer the power to review for reasonableness, . . . they do not make hearing officers appointing authorities or provide them with explicit power to prescribe the amount of discipline imposed.").

Like the provisions in NRS Chapter 284, the administrative code does not authorize de novo review of whether "the good of the public service will be served" by terminating a classified employee. In directing the hearing officer to "make no assumptions of innocence or guilt," NAC 284.798 indicates that the hearing officer reviews de novo whether the employee *in fact* committed the charged violation. It says nothing about the hearing officer's review of the reasonableness of or just cause for dismissing the employee based on the violation. In sum, the statutory and regulatory framework support a deferential standard when the hearing officer reviews an agency's determination that an employee's termination is in the good of the public service.

The confusion over the appropriate standard of review stems from a trio of cases decided between 1989 and 1995, all of which involved disciplinary decisions by the Nevada Department of Prisons (NDOP): *Knapp*, 111 Nev. 420, 892 P.2d 575; *State, Department of Prisons v. Jackson*, 111 Nev. 770, 895 P.2d 1296 (1995); and *Dredge*, 105 Nev. 39, 769 P.2d 56. In *Dredge*, the earliest of those cases, this court explained that "[i]t was the task of the hearing officer to determine *whether NDOP's decision to terminate Dredge was based upon evidence that would enable NDOP to conclude that the good of the public service would be served* by Dredge's dismissal." 105 Nev. at 42, 769 P.2d at 58 (emphases added). That explanation implied deference to the agency and properly recognized the subjective concept of "the good of the public service" as well as the relevant perspective of the agency. The court then referenced NAC 284.650(3), addressing discipline for employees in institu-

tions administering a security program, to support its statement that "[*m*]*oreover*, the critical need to maintain a high level of security within the prison system entitles the appointing authority's decision to deference by the hearing officer whenever security concerns are implicated in an employee's termination." 105 Nev. at 42, 769 P.2d at 58 (emphasis added).

Our subsequent cases interpreted the above language from *Dredge* to mean that "[g]enerally, a hearing officer does not defer to the appointing authority's decision," *except* when "security concerns are implicated in an employee's termination." *Knapp*, 111 Nev. at 424, 892 P.2d at 577-78 (internal quotation marks omitted); *see also Jackson*, 111 Nev. at 773, 895 P.2d at 1298 ("Generally, we would defer to the hearing officer, were it not for *Dredge*, which requires deference to the appointing authority in cases of breaches of security."). But *Dredge* implied deference to an agency's decision that termination was for the "good of the public service" and then merely emphasized the importance of deference in situations where "security concerns are implicated" by referencing a specific provision in the NAC. 105 Nev. at 42, 769 P.2d at 58. It did not create a broad rule that deference is generally not owed unless there are security concerns. And neither *Knapp* nor *Jackson* parsed out, as we do today, the difference between the standard of review as to whether the employee committed the charged violation, *see* NAC 284.798 (indicating a de novo standard of review applies as to whether a violation occurred), and the standard of review as to whether the agency's termination decision was reasonable and with just cause, *see* NRS 284.390(1), (7) (recognizing a deferential standard of review as to the agency's disciplinary action). Therefore, we overrule those parts of *Knapp* and *Jackson*, and their progeny, which suggest that the hearing officer decides de novo whether the employee's termination serves the "good of the public service."

When a classified employee requests a hearing to challenge an agency's decision to terminate her as a first-time disciplinary measure, the hearing officer "determine[s] the reasonableness" of the agency's decision by conducting a three-step review process. NRS 284.390(1). First, the hearing officer reviews de novo whether the employee in fact committed the alleged violation. *See* NAC 284.798. Second, the hearing officer determines whether that violation is a "serious violation[ ] of law or regulations" such that the "severe measure[ ]" of termination is available as a first-time disciplinary action. NRS 284.383(1). If the agency's published regulations prescribe termination as an appropriate level of discipline for a first-time offense, then that violation is necessarily "serious" as a matter of law. NRS 284.383(1); NAC 284.646(1). Third and last, the hearing officer applies a deferential standard of review to the agency's determination that termination will serve "the good of the public service." NRS 284.385(1)(a). The inquiry is not what the

hearing officer believes to be the good of the public service, but whether it was reasonable for the agency to "consider[ ] that the good of the public service w[ould] be served" by termination. *Id.* Although that inquiry affords deference to the agency's decision, it "does not automatically mandate adherence to [the agency's] decision" as "[d]eferential review is not no review, and deference need not be abject." *McDonald v. Western-Southern Life Ins. Co.*, 347 F.3d 161, 172 (6th Cir. 2003) (internal quotation marks omitted); *see also Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986) (recognizing that a deferential standard of review is "not [a] rubber stamp [of] the action of the agency; rather, [the reviewing entity] must satisfy itself that the agency has articulated a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

Here, the hearing officer correctly applied de novo review to find that O'Keefe repeatedly violated DMV Prohibition G(1). But the hearing officer acted arbitrarily or capriciously in concluding that O'Keefe's violations were not "serious violation[s] of law or regulation[s]," because the DMV's regulations categorize a violation of Prohibition G(1) as a first-time terminable offense.

The hearing officer again acted arbitrarily or capriciously in reviewing de novo the DMV's determination that termination served the "good of the public service." NRS 284.385(1)(a). Substantial evidence reveals that the DMV's decision was reasonable. First, the delay between O'Keefe's violations and the DMV's investigation into her conduct was reasonable in light of O'Keefe's promotion out of the DMV because the DMV had no authority over her as an employee and therefore no cause to investigate her conduct. Second, while O'Keefe was a long-term state employee with no record of previous violations, termination of such an employee may still be appropriate if the employee commits an offense that warrants termination for a first-time violation. And although DMV employees may not have been terminated for similar conduct before 2011, the evidence shows that after 2011, DMV employees signed the DMV director's memorandum indicating that they understood that violations of Prohibition G(1) could result in termination and four other employees had been terminated for violating that provision. In sum, the evidence does not show that the agency acted unreasonably when it determined that termination served "the good of the public service." Thus, we affirm the district court's decision to vacate the hearing officer's decision.

CONCLUSION

The district court correctly held that the hearing officer applied the wrong standard of review to the DMV's disciplinary decision to terminate O'Keefe's employment. A hearing officer reviews de novo

whether a classified employee committed the alleged violation, but the hearing officer applies a deferential standard of review to the agency's decision to terminate. The hearing officer did not apply that deferential standard here. Accordingly, we affirm the district court's order granting the DMV's petition for judicial review and setting aside the hearing officer's decision.

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

Pickering, J., concurring:

I concur in the majority's decision to reverse the hearing officer's reinstatement of O'Keefe's employment, but I would not create a new three-step test or overrule the precedent set in *Dredge*, *Knapp*, and *Jackson*. A hearing officer's job is "to determine the reasonableness" of the state employee's dismissal, NRS 284.390(1), and to reinstate the employee if the dismissal was "without just cause," NRS 284.390(7). The "hearing officer does not defer to the appointing authority's decision," but instead takes a "new and impartial view of the evidence." *Knapp v. State Dep't of Prisons*, 111 Nev. 420, 424, 892 P.2d 575, 577, 578 (1995) (quoting *Dredge v. State Dep't of Prisons*, 105 Nev. 39, 48, 769 P.2d 56, 62 (1989) (Springer, J., dissenting)). We then review the hearing officer's decision as a final agency action under NRS 233B.135. NRS 284.390(9). The party seeking reversal bears the burden to show that the hearing officer's decision was invalid for one of the reasons in NRS 233B.135(3). I would reverse the hearing officer because the decision to reinstate O'Keefe's employment was contrary to NRS 284.383(1) and NAC 284.646(1), *see* NRS 233B.135(3)(a), and "[a]ffected by other error of law," NRS 233B.135(3)(d).

The hearing officer was incorrect, as a matter of law, when she determined that O'Keefe's offenses required progressive discipline because they were not serious violations of law or regulations. NRS 284.383(1) directs the Personnel Commission to "adopt by regulation a system for administering disciplinary measures against a state employee in which, except in cases of serious violations of law or regulations, less severe measures are applied at first, after which more severe measures are applied only if less severe measures have failed to correct the employee's deficiencies." Among the progressive-discipline regulations the Personnel Commission adopted to fulfill this statutory mandate is NAC 284.646(1), which provides: "An appointing authority may dismiss an employee for any cause set forth in NAC 284.650 if: (a) The agency with which the employee is employed has adopted any rules or policies which authorize the dismissal of an employee for such a cause; or (b) The seriousness of the offense or condition warrants such dismissal." What this regulation says is that an agency may terminate an em-

ployee for an offense without engaging progressive discipline in two instances: (1) when it has rules and policies in place that state termination will result from that offense; or (2) when the offense otherwise constitutes a "serious violation[ ] of law or regulations."

The DMV's Prohibition G(1) is a policy approved by the Personnel Commission that authorizes the DMV to bypass progressive discipline and dismiss an employee who makes unauthorized use of DMV data. O'Keefe violated Prohibition G(1) on at least ten occasions between July and November of 2012. As a matter of law, O'Keefe's termination for those offenses is reasonable. *See* NAC 284.646(1)(a).

Though O'Keefe argued that the DMV did not enforce Prohibition G(1), pointing to an incident from before 2011, the substantial evidence does not support that O'Keefe was treated dissimilarly from other employees. Where an employer selectively enforces a termination policy, firing some but merely suspending or reprimanding others who commit the same offense, it becomes a question of fact whether just cause supports termination. *See* Restatement of Employment Law § 2.04 cmt. e, illus. 5 (Am. Law Inst. 2015) (noting that an employer's tolerance "of comparable conduct by other employees is relevant to whether there is cause to terminate [the targeted employee's] employment and raises an issue for the trier of fact"). But the DMV terminated all four other employees (or allowed them to resign) who violated Prohibition G(1) after signing the director's memo in 2011, which reminded employees about the Prohibition and that termination could follow from unauthorized data retrievals. Where an employer consistently enforces a policy approved by the Personnel Commission that requires termination, termination without progressive discipline is reasonable as a matter of law.

The analysis should end there. This appeal does not implicate the rule in *Knapp* because in *Knapp*, all parties, including the appointing agency, conceded that the offenses the employee committed did not warrant termination. 111 Nev. at 425, 892 P.2d at 578. In its rush to overrule *Knapp*, the majority misses the key point: A hearing officer decides questions of fact and mixed questions of fact and law that may include, but often go beyond, whether the employee committed the offense charged. For example, had O'Keefe presented substantial evidence that, after the director's 2011 memo, the DMV selectively enforced Prohibition G(1), whether just cause existed for her termination would have presented a mixed question of fact and law for the hearing officer to take evidence on and decide. *See* Restatement of Employment Law, *supra*, § 2.04 cmt. e, illus. 5. Under NRS 284.390(9), a hearing officer's decision is reviewed under NRS Chapter 233B. And, under NRS 233B.135(3), the reviewing court must defer to the hearing officer's decision on questions of fact

and mixed questions of fact and law. *Knapp*, 111 Nev. at 423, 892 P.2d at 577 (recognizing that the district court gives deference to "an agency's conclusions of law [that] are closely related to the agency's view of the facts") (internal quotation omitted). Our review in that instance is deferential, not to the appointing agency but to the hearing officer. NRS Chapter 233B mandates this deference to the hearing officer, as our prior case law recognizes. *Id*. at 423-25, 892 P.2d at 577-78; *Dredge*, 105 Nev. at 43, 769 P.2d at 58-59.

By reaching out to decide an issue not presented by this appeal, the majority departs from clear statutory mandate and, in dictum, unnecessarily overrules existing precedent, adding confusion to this area of the law. I would resolve this case as the district court did and hold that the hearing officer committed an error of law in second-guessing the DMV Prohibition G(1)'s policy decision as to the seriousness of a DMV employee's unauthorized computer access. I therefore concur in the decision to reverse the hearing officer but only because of the legal error the hearing officer committed when she decided that O'Keefe's offenses were not sufficiently serious violations of law or regulations to justify termination. I do not ascribe to the majority's new three-step process for review of an employer's disciplinary actions, and would not turn away from our prior cases outlining a hearing officer's duties to provide an independent, fair, and impartial review of disciplinary actions against state employees.

NORTH LAKE TAHOE FIRE PROTECTION DISTRICT; AND PUBLIC AGENCY COMPENSATION TRUST, APPELLANTS, *v*. THE BOARD OF ADMINISTRATION OF THE SUBSEQUENT INJURY ACCOUNT FOR THE ASSOCIATIONS OF SELF-INSURED PUBLIC OR PRIVATE EMPLOYERS; AND ADMINISTRATOR OF THE STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY, DIVISION OF INDUSTRIAL RELATIONS, RESPONDENTS.

No. 70592

December 6, 2018 431 P.3d 39

Appeal from a district court order denying a petition for judicial review in an administrative law matter. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Reversed and remanded.

Thorndal Armstrong Delk Balkenbush & Eisinger and *Robert F. Balkenbush* and *Kevin A. Pick*, Reno, for Appellants.

The Law Offices of Charles R. Zeh, Esq., and *Charles R. Zeh*, Reno, for Respondent Board of Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers.

Donald C. Smith and *Jennifer J. Leonescu*, Henderson, for Respondent Department of Business and Industry, Division of Industrial Relations.

Before the Supreme Court, En Banc.

OPINION

By the Court, Douglas, C.J.:

Under NRS 616B.578, an employer may qualify for reimbursement on a workers' compensation claim if the employer proves by written record that it retained its employee after acquiring knowledge of the employee's permanent physical impairment and before a subsequent injury occurs. In this appeal, we examine the statutory definition of a "permanent physical impairment," which generally defines a permanent physical impairment as "any permanent condition . . . of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment," but also states that "a condition is not a 'permanent physical impairment' unless it would support a rating of permanent impairment of 6 percent or more of the whole person." NRS 616B.578(3). We conclude that requiring an employer to prove that it had knowledge of a preexisting permanent physical impairment that would support a rating of at least 6% whole person impairment is a reasonable interpretation of NRS 616B.578. However, we further conclude that this statute cannot be reasonably interpreted to require knowledge of a specific medical diagnosis in order for an employer to successfully seek reimbursement. In the present case, it is unclear whether the employer knew of any permanent condition that hinders the employee's employment, and whether it could be fairly and reasonably inferred from the written record that the employer knew of the employee's preexisting permanent physical impairment, which supported a rating of at least 6% whole person impairment. Therefore, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

In 1981, appellant North Lake Tahoe Fire Protection District (the District) hired a man as a paramedic and firefighter (the employee). For approximately 20 years, the employee worked without a

documented injury. Between 2002 to 2007, however, the employee injured his back on numerous occasions while on duty and sought treatment following his injuries. Doctors diagnosed the employee with various back conditions, such as herniated nucleus pulposus (HNP), radiculopathy, back sprain, and lumbar disc abnormalities.

In November 2007, the employee then suffered a subsequent back injury while on duty, and following this subsequent injury, doctors specifically diagnosed the employee with spondylolisthesis.[1] A few years later, the employee underwent back surgery for the spondylolisthesis, and a year after his surgery, the employee retired.

Shortly after the employee retired, Dr. David Berg conducted a permanent partial disability (PPD) evaluation on the employee in response to the employee's November 2007 back injury and rated the employee with a 21% whole person impairment (WPI) with no apportionment for any preexisting condition. Next, at the request of the third-party administrator of the underlying workers' compensation claim, Dr. Jay Betz reviewed the employee's medical records and Dr. Berg's PPD evaluation. Dr. Betz disagreed with Dr. Berg's conclusion regarding no apportionment and instead found that the employee's spondylolisthesis was a preexisting impairment with a 7-9% WPI. Dr. Betz further found that at least half of the 21% WPI should be apportioned to the employee's preexisting conditions, and thus, 11% WPI should be apportioned to the November 2007 injury (10.5% rounded up). After receiving Dr. Betz's report, Dr. Berg agreed with Dr. Betz by apportioning one-half of the WPI to preexisting conditions. Thereafter, the employee saw Dr. G. Kim Bigley for a second PPD evaluation. Dr. Bigley found that the employee did not have spondylolisthesis prior to his November 2007 back injury, and thus, found that apportionment was inappropriate.

The insurer, appellant Public Agency Compensation Trust (PACT), paid the employee an 11% PPD award after apportionment. PACT then sought reimbursement under NRS 616B.578 from the Nevada Department of Business and Industry, Division of Industrial Relations (DIR). Respondent Administrator of DIR recommended denying PACT's claim for failure to show compliance with NRS 616B.578. PACT timely requested a hearing before respondent Board of Administration of the Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers (the Board) to challenge the Administrator's recommendation of denial.

Following a hearing, the Board issued its decision. The Board concluded, in pertinent part, that NRS 616B.578 required appellants

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[1]Spondylolisthesis "is the '[f]orward movement of the body of one of the lower lumber vertebrae on the vertebra below it, or upon the sacrum.'" *Lederer v. Viking Freight, Inc.*, 89 P.3d 1199, 1200 n.2 (Or. Ct. App. 2004) (alteration in original) (quoting *Stedman's Medical Dictionary* 1678 (27th ed. 2000)).

to prove, by written record, that the District had knowledge of a preexisting permanent physical impairment amounting to a rating of at least 6% WPI. The Board also concluded that appellants were required to show that the District knew *specifically* of the employee's spondylolisthesis condition prior to the subsequent injury. Moreover, the Board found that the employee's preexisting conditions documented prior to his subsequent injury—including his HNP, radiculopathy, back sprain, and lumbar disc abnormalities—were not the same as spondylolisthesis and did not rise to the level of a permanent physical impairment as required by NRS 616B.578(3), and thus, appellants failed to satisfy NRS 616B.578. Based on the foregoing, the Board denied appellants' application for reimbursement. Appellants petitioned the district court for judicial review of the Board's decision. The district court affirmed the Board's decision and denied appellants' petition.

DISCUSSION

Standard of review

This court's role in reviewing an administrative agency's decision is identical to that of the district court, and we do not give any deference to the district court's order denying a petition for judicial review. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). "Although statutory construction is generally a question of law reviewed de novo, this court defers to an agency's interpretation of its governing statutes and regulations if the interpretation is within the language of the statute." *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (internal quotation marks omitted); *see also Collins Disc. Liquors & Vending v. State*, 106 Nev. 766, 768, 802 P.2d 4, 5 (1990) ("[C]ourts should not substitute their own construction of a statutory provision for a reasonable interpretation made by an agency.").

Moreover, this court reviews an administrative agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion." *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013) (internal quotation marks omitted). Substantial evidence may be shown inferentially if certain evidence is absent. *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005). "If the [administrative] agency's decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002).

Whether the Board erred in denying appellants reimbursement

Appellants argue that the Board committed clear legal error when considering whether appellants were entitled to reimbursement. In particular, appellants contend that the Board erred in interpreting the definition of "permanent physical impairment" by requiring proof that appellants had specific knowledge of spondylolisthesis prior to the employee's subsequent injury. Instead of requiring proof that an employer had knowledge of a specific medical diagnosis, appellants contend that an employer's general knowledge of a permanent, preexisting impairment that could pose a hindrance to employment or reemployment satisfies the plain meaning of, and public policy behind, NRS 616B.578. Conversely, respondents argue that appellants erroneously disregard the 6% rule under the plain meaning of NRS 616B.578(3). While we agree with appellants that they were not required to show that they knew the employee suffered specifically from spondylolisthesis prior to his subsequent injury in order to satisfy NRS 616B.578, we also agree with respondents that NRS 616B.578(3) requires a condition to amount to at least 6% WPI to be considered a permanent physical impairment.

The Board's interpretation of NRS 616B.578 was reasonable in part

Nevada's Subsequent Injury Account for the Associations of Self-Insured Public or Private Employers (the Account) is a workers' compensation program that was created to encourage self-insured employer members of associations to hire and retain workers with preexisting disabling conditions. Crystal M. McGee, Legislative Counsel Bureau Research Division, *Background Paper 01-1: A Study of Subsequent Injury Funds* 1 (2000). In furtherance of this purpose, NRS 616B.578(1) allows for reimbursement of workers' compensation paid by an employer where an employee sustains an injury in the course of his or her employment that is "substantially greater [due to] the combined effects of the preexisting impairment and the subsequent injury than that which would have resulted from the subsequent injury alone." NRS 616B.578(1). However, certain conditions must be met. *Cf. Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 152, 274 P.3d 759, 760 (2012) (analyzing NRS 616B.587, which has provisions identical to NRS 616B.578, but applies to private carriers instead of associations of self-insured public or private employers). To qualify for reimbursement, the associations of self-insured public or private employers must establish by written record "either that the employer (1) had knowledge of the permanent physical impairment at the time the employee was hired or (2) retained its employee after it acquired knowledge of the permanent physical impairment." *Id.* at 154, 274 P.3d at 761. In the second scenario, "an employer must acquire knowledge of an em-

ployee's permanent physical impairment before the subsequent injury occurs to qualify for reimbursement." *Id.* at 154-55, 274 P.3d at 762. In interpreting NRS 616B.578(4), this court must look to NRS 616B.578(3), which defines "permanent physical impairment" as:

> [A]ny permanent condition, whether congenital or caused by injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee is unemployed. For purposes of this section, a condition is not a "permanent physical impairment" unless it would support a rating of permanent impairment of 6 percent or more of the whole person . . . .

Here, the Board interpreted NRS 616B.578 as "requir[ing] an applicant to prove by its contemporaneous written record that it had knowledge of a preexisting permanent physical impairment . . . [that] would support a rating of 6% [WPI] or more." In giving effect to the plain meaning of the statute's relevant subsections, we conclude that the Board's statutory interpretation of NRS 616B.578 was reasonable. Appellants' reliance solely on the first sentence of NRS 616B.578(3) inappropriately renders the second sentence of the statute requiring at least 6% WPI nugatory. *See S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) ("When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." (internal quotation marks omitted)).

However, the Board also concluded that appellants failed to satisfy NRS 616B.578(4) because "there is no proof by written record that applicant knew of spondylolisthesis, until after the subsequent industrial injury occurred." Thus, the Board concluded that appellants were required to show that the District knew of the employee's specific medical condition prior to his subsequent injury. That interpretation of the statute is not reasonable because NRS 616B.578(3) plainly requires a showing of "*any* permanent condition" that hinders employment. (Emphasis added.)

Moreover, in Alaska, a "permanent physical impairment" is similarly defined in comparison to the first sentence in NRS 616B.578(3). *See* Alaska Stat. § 23.30.205(f) (2016). However, instead of defining a permanent physical impairment based on "a rating of permanent impairment of 6 percent or more of the whole person," NRS 616B.578(3), Alaska's statute prescribes that a condition may not be considered a "permanent physical impairment" unless the condition is one of 27 conditions statutorily listed or the condition "would support a rating of disability of 200 weeks or more if evaluated according to standards applied in compensation claims." Alaska Stat. § 23.30.205(f). Considering the similarity between the language of Alaska's relevant statute and NRS 616B.578(3), we are persuaded

by the Supreme Court of Alaska's interpretation of the written record requirement.

The Supreme Court of Alaska has stated that "the written record does not need to contain the exact medical terminology describing the condition" in order to qualify for reimbursement. *VECO Alaska, Inc. v. State, Dep't of Labor, Div. of Workers' Comp., Second Injury Fund* (*VECO*), 189 P.3d 983, 989 (Alaska 2008). Rather, the employer satisfies the written record requirement by showing that the employee's preexisting condition "could reasonably be due to one of the conditions [recognized by statute], even if the employer cannot precisely identify the specific medical condition." *Id.* "[T]he statutory standard is the employer's knowledge [of the employee's condition], not the knowledge of either the employee or his physicians." *Id.* at 991. In other words, "[a]n employer is entitled to reimbursement from the Second Injury Fund if it produces a written record from which its prior knowledge of the employee's qualifying disability can fairly and reasonably be inferred." *Id.* at 988 (internal quotation marks omitted).

We are persuaded by the reasoning in *VECO*, and thus, we conclude that appellants were not required to show that the employer knew of the exact medical terminology for the employee's permanent physical impairment, specifically, spondylolisthesis, prior to the subsequent injury. This interpretation of NRS 616B.578 supports the public policy behind the Account, which encourages employers to knowingly hire or retain employees who suffer from a permanent physical impairment. However, the employee's preexisting permanent physical impairment, which is recognized by statute, must be fairly and reasonably inferred from the written record. In Nevada, the impairment must amount to a minimum of 6% WPI. NRS 616B.578(3). Here, Dr. Betz and Dr. Berg apportioned 10.5% WPI to preexisting conditions, and Dr. Betz further specified that spondylolisthesis was the preexisting condition with 7-9% WPI. This mathematically leaves the employee's other conditions, such as HNP, radiculopathy, back sprain, and lumbar disc abnormalities, with a maximum of 4% WPI. Consequently, because none of his other conditions could meet the 6% WPI requirement of the employer's written record, spondylolisthesis was the employee's only permanent physical impairment recognizable under the statute.[2] Although appellants were not required to show that the employer knew of the employee's spondylolisthesis specifically, knowledge of a qualifying permanent impairment had to be fairly and reasonably inferred from the written record. After review of the record, we find that it is unclear whether the employer actually knew of any per-

[2]For this reason, we conclude that the Board's finding that the employee's other preexisting conditions documented prior to the subsequent injury did not rise to the level of a permanent physical impairment as required by NRS 616B.578(3) is supported by substantial evidence.

manent condition that hinders employment, and it is further unclear whether it could be fairly and reasonably inferred from the written record that the employer knew of the employee's spondylolisthesis. Therefore, due to lack of clarity concerning the employer's specific knowledge, and in light of *VECO*, we reverse the district court's decision and remand this matter for the district court to further remand to the Board for proceedings consistent with this opinion as to knowledge of the employee's hindering condition constituting a preexisting permanent impairment.

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

THE STATE OF NEVADA, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE LYNNE K. SIMONS, District Judge, Respondents, and FRANCISCO MERINO OJEDA, Real Party in Interest.

No. 72456

December 6, 2018 431 P.3d 47

Original petition for a writ of prohibition or mandamus challenging a district court order requiring the State to disclose veniremember information to defense counsel before trial.

Petition denied.

Pickering, J., dissented.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Jennifer P. Noble* and *Joseph R. Plater*, Appellate Deputy District Attorneys, Washoe County, for Petitioner.

John L. Arrascada, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

In *Artiga-Morales v. State*, this court held that it was not reversible error for a district court to deny a defendant's motion to compel the disclosure of veniremember background information developed by the prosecution. 130 Nev. 795, 798-99, 335 P.3d 179, 181 (2014).

This petition raises a related issue: whether a district court acted without authority in *granting* a motion to compel the disclosure of prosecution-gathered criminal histories of veniremembers. We hold that the district court has authority to order the State to share criminal history information obtained from databases to which the defense did not have access. We therefore deny the State's petition.

FACTS AND PROCEDURAL HISTORY

Francisco Ojeda awaits trial for murder in the Second Judicial District Court. In a pretrial motion, he sought an order compelling the State to disclose the criminal histories of veniremembers before jury selection. Ojeda alleged—and the State did not dispute—that courts in the Second Judicial District release a list of veniremembers to both parties several days before jury selection commences. Ojeda further alleged—and again the State did not dispute—that the State using government databases then accesses criminal histories for those veniremembers that are not available to defendants. Ojeda contended that the resulting disparity in information would put him at a disadvantage during jury selection. The State disputed this point, claiming that Ojeda would not be disadvantaged because he could obtain equivalent information either from commercial databases or through voir dire.

The district court granted Ojeda's motion. In particular, the district court ordered the State to "disclose the criminal histories the State gathers, if any, for potential venire members" to the district court on the Friday before trial, so that the court could then provide that information to Ojeda. The district court grounded its authority to order disclosure in NRS 179A.100(7)(j) (2015),[1] which requires "[r]ecords of criminal history [to] be disseminated by an agency of criminal justice" to persons authorized by "court order." The district court further explained that "it believes in the fundamental right to fair play," and that "[a]llowing only the State to use the criminal histories of potential jurors creates a disparity."

The State filed the instant petition for a writ of prohibition or mandamus, arguing that the district court did not have the authority to compel the disclosure of the veniremembers' criminal history records.

DISCUSSION

We exercise our discretion to consider the State's petition

The decision to consider a writ of prohibition or mandamus lies within the sole discretion of this court. *Smith v. Eighth Judicial*

[1]NRS 179A.100 has been amended since the district court issued its order on February 12, 2016. The language which formerly appeared at section (7)(j) has been moved to section (4)(j) in the current version of the statute, but the relevant language itself has not changed. We apply the version of the statute in effect at the time of the district court's decision. 2015 Nev. Stat., ch. 546, § 3, at 3861-63.

Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). As an extraordinary remedy, writ relief is generally available only when no "adequate and speedy" legal remedy exists. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). However, this court has exercised its discretion to intervene to resolve "a question of first impression that arises with some frequency," in "the interests of sound judicial economy and administration." *Id.* at 39-40, 175 P.3d at 908. A writ of prohibition is the proper remedy to restrain a district judge from acting "without or in excess of its jurisdiction." *Smith*, 107 Nev. at 677, 818 P.2d at 851. Mandamus is the proper remedy "to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011).

Here, the State has no remedy in law. Whether Ojeda is acquitted or convicted, the State will not have the right to appeal. NRS 177.015(3). Moreover, as both parties agree, the departments in the Second Judicial District Court have adopted differing approaches to the issue of when to order disclosure of veniremember criminal histories. Considering the State's petition is therefore in "the interests of sound judicial economy and administration," *Cote H.*, 124 Nev. at 40, 175 P.3d at 908, we exercise our discretion to consider the State's petition.

A district court has the authority to compel the State to disclose veniremember criminal histories

The State argues that "the district court had no statutory, constitutional, or other authoritative basis to order the State to divulge its work product regarding the jury venire." We disagree.

The State is correct that the United States Constitution does not require the State to disclose veniremember criminal histories—we held as much in *Artiga-Morales*, 130 Nev. at 798-99, 335 P.3d at 181. In that case, Humberto Artiga-Morales challenged his conviction on the basis that the district court had denied his pretrial motion for the prosecutor to disclose veniremember "information gathered by means unavailable to the defense." *Id*. at 796, 335 P.3d at 180. After considering Artiga-Morales' statutory and constitutional arguments, we concluded that he "established neither a constitutional nor statutory basis for us to reverse his conviction based on the district court's denial of his motion to compel disclosure of prosecution-gathered juror background information." *Id.* at 798-99, 335 P.3d at 181. In declining to reverse Artiga-Morales' conviction, however, we did not address the threshold issue presented here: whether the district court had the authority to *grant* a motion to compel disclosure of veniremember criminal histories.

District courts enjoy broad discretion in the realm of discovery disputes. *See Means v. State*, 120 Nev. 1001, 1007, 103 P.3d 25, 29 (2004). As the district court noted, NRS 179A.100(7)(j) (2015) al-

lowed courts to order "an agency of criminal justice" to disseminate "[r]ecords of criminal history." That statutory basis, combined with the district court's discretionary authority to control discovery, leads us to conclude that the district court did not act "without or in excess of its jurisdiction" when it ordered disclosure. *Smith*, 107 Nev. at 677, 818 P.2d at 851. Therefore, a writ of prohibition will not lie.

The district court did not act arbitrarily or capriciously in requiring the State to share veniremember criminal history information

Having concluded that the district court had authority to order disclosure of the State's records, we must now determine whether the court exercised that authority in an "arbitrary or capricious" manner. *See Armstrong*, 127 Nev. at 931-32, 267 P.3d at 779-80. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law . . . ." *Id.* at 931-32, 267 P.3d at 780 (citation and internal quotation marks omitted).

The district court's order contains a single factual finding: "[a]llowing only the State to use the criminal histories of potential jurors creates a disparity." The parties' stipulations support this finding. That is, the State concedes that it prepares for voir dire by acquiring veniremember information using at least one government database that is unavailable to defendants. Such unilateral access to a resource the State finds useful for jury selection indeed creates a disparity between the two sides. *See People v. Murtishaw*, 631 P.2d 446, 465 (Cal. 1981) ("[P]rosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel."), *superseded by statute on other grounds as stated in People v. Boyd*, 700 P.2d 782, 790 (Cal. 1985).

The remaining question is whether this disparity can be corrected. As the State correctly notes, our judicial system does not *require* parity of information between prosecution and defense. *See generally Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (acknowledging that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense"). And while the State attempts to categorize the veniremember information as its work product, this argument was not made before the district court and is therefore inappropriately presented to this court. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017). However, even if we consider the State's work product argument, we do not believe the raw information from the criminal history databases contains "the mental processes of the attorney." *Floyd v. State*, 118 Nev. 156, 167, 42 P.3d 249, 257 (2002) (internal quotation marks omitted), *abrogated on other grounds by Grey v. State*, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008); *see also Losavio v. Mayber*, 496 P.2d 1032, 1034 (Colo. 1972) (holding that veniremember criminal histories

are not "in any conceivable way work product" (internal quotation marks omitted)). Rather, in accessing these databases, the prosecution is merely capitalizing on its relationship with government entities that systematically acquire detailed information on individuals who enter the criminal justice system. As the quantity and quality of that information continue to increase, unilateral State access will increasingly disadvantage defendants. *See Artiga-Morales*, 130 Nev. at 800-01, 335 P.3d at 182 (CHERRY, J., dissenting); *see also Tagala v. State*, 812 P.2d 604, 613 (Alaska Ct. App. 1991) ("If the state is entitled to examine criminal records of jurors for jury selection, it is fair for the defense to have access to the same information."); *Murtishaw*, 631 P.2d at 465 ("Such a pattern of inequality reflects on the fairness of the criminal process."). Thus, we agree with Ojeda, the district court, and a growing number of other states[2] that unilateral access to government databases provides the State with an unfair advantage which demands our attention.

As the State concedes in its petition, this court has the inherent authority to make procedural rules that remedy systematic unfairness in the way that judicial proceedings are conducted. *Halverson v. Hardcastle*, 123 Nev. 245, 261-62, 163 P.3d 428, 440 (2007) (recognizing this court's "inherent authority" to make rules necessary "to prevent injustice and to preserve the integrity of the judicial process"). Pursuant to that authority, we hold as follows: Upon motion by the defense, the district court must order the State to disclose any veniremember criminal history information it acquires from a government database that is unavailable to the defense.[3] This holding does not *require* the State to access such databases; if the State refrains from doing so, then there is no disparity of information and nothing to share. Nor does this holding require the State to disclose *all* veniremember information it possesses—only criminal history information derived from databases unavailable to the defense.[4]

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[2]*Tagala*, 812 P.2d at 613; *Murtishaw*, 631 P.2d at 465; *Losavio*, 496 P.2d at 1035; *State v. Bessenecker*, 404 N.W.2d 134, 138-39 (Iowa 1987); *Commonwealth v. Cousin*, 873 N.E.2d 742, 750 (Mass. 2007); *State v. Goodale*, 740 A.2d 1026, 1030-31 (N.H. 1999).

[3]By limiting this holding to the criminal histories of the veniremembers, we do not share our dissenting colleague's concern that other information might be disclosed, such as addresses and medical information. Additionally, disclosure is subject to other protections imposed by the law, for example the prohibition against the posting or displaying of another's social security number. *See* NRS 205.4605(1).

[4]We recognize that the majority in *Artiga-Morales* declined to create a rule, in part because of that case's "limited record and arguments" on this issue. 130 Nev. at 799, 335 P.3d at 182. In this case, by contrast, the parties' briefings and arguments focused *exclusively* on this issue. Moreover, the procedural posture of *Artiga-Morales*—that is, a direct appeal from a judgment of conviction—made it unnecessary for this court to consider the present issue at length, since Artiga-Morales could not show that the refusal to disclose veniremember

We return, finally, to the district court's order, which required the State to "disclose the criminal histories the State gathers, if any, for potential venire members." At first glance, this order may require the State to share veniremember criminal history information acquired from *any* source. However, read in context with the whole of the district court's order, particularly its reference to NRS 179A.100(7)(j) (2015) for the authority to order the disclosure, we believe the district court properly limited the mandated disclosure to criminal history information derived from a database unavailable to the defense. Because the district court's decision was not based on preference or prejudice nor was it contrary to established rules of law, and the district court did not act arbitrarily or capriciously, we deny the State's petition.

CONCLUSION

We hold that, upon motion by the defense, the district court must order the State to disclose any veniremember criminal history information it acquires from a government database that is unavailable to the defense. Because the district court had the authority to order the disclosure and because the order was not an arbitrary or capricious exercise or manifest abuse of discretion, we deny the State's petition.

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

Pickering, J., dissenting:

The majority announces the following new criminal procedure rule: "Upon motion by the defense, the district court *must* order the State to disclose *any* veniremember criminal history information it acquires from a government database that is unavailable to the defense." (emphasis added). This broad mandatory disclosure rule has no basis in the United States or Nevada Constitutions, the Nevada statutes governing discovery in criminal cases, or any formally adopted court rule. As support, the majority invokes our "inherent authority" and district court "discretion." But these are not sound bases for the court to promulgate a procedural rule of statewide application in the context of deciding an individual case. The rule the majority promulgates infringes the legitimate privacy interests of citizen jurors and potentially conflicts with state and federal laws governing access to and use and dissemination of information compiled in confidential databases. Even assuming the court's inherent authority reaches as far as the majority perceives, it would be wiser

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information resulted in prejudice. *Id*. at 797-98, 335 P.3d at 180-81. In the present mandamus petition, by contrast, the issue is squarely raised and ripe for our resolution.

to proceed by formal rule-making, after notice and hearing, with input from all affected. For these reasons, I respectfully dissent.

A variant of the question presented in this case came before the court four years ago in *Artiga-Morales v. State*, 130 Nev. 795, 335 P.3d 179 (2014). As *Artiga-Morales* recognized, established law holds that a defendant in a criminal case does not have a constitutional right to the prosecution's juror-background research. *Id*. at 796-97, 335 P.3d at 180. Nor do Nevada's criminal discovery statutes require disclosure of prosecution-developed juror-background information. *See* NRS 174.233 through NRS 174.295.[1] Because no constitutional provision, statute, or court rule mandates disclosure of such information, *Artiga-Morales* held—as most courts confronted with the question have held—that the district court did not err when it declined to order the prosecution to share its juror-background research with the defense. *Id.* at 798-99, 335 P.3d at 181-82.[2]

The defendant in *Artiga-Morales*, like Ojeda here, pressed us to create a fairness-based mandatory disclosure rule. Declining to do so, we acknowledged the disparity that exists "between the prosecution, which has ready access to criminal history and other government databases on prospective jurors, and the defense, which does not" and so must rely on investigators, public record searches, and live questioning of the venire for its juror-background information. *Id.* at 797, 335 P.3d at 180. But while court-mandated disclosure might correct the prosecution/defense disparity, it would also impact other stakeholders, including potential jurors whose privacy interests deserve consideration and respect, and the government entities that create and maintain the databases, which compile more

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[1]To the extent Nevada's criminal discovery statutes address production of the prosecution's juror-background research, they do not license but appear to prohibit its disclosure. *Compare* NRS 174.235(2) ("The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of: (a) An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case. (b) A statement, report, book, paper, [or] document . . . that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state"), *with* NRS 179A.100 (protecting criminal database information and placing limits on its dissemination); NRS 179A.800, Art. IV (similar).

[2]Cases finding no reversible error in a district court denying a motion to compel prosecution-assembled juror-background information include: *United States v. Falange*, 426 F.2d 930, 932-33 (2d Cir. 1970); *Doster v. State*, 72 So. 3d 50, 79-80 (Ala. Crim. App. 2010); *Charbonneau v. State*, 904 A.2d 295, 319 (Del. 2006); *Monahan v. State*, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974); *Coleman v. State*, 804 S.E.2d 24, 30 (Ga. 2017); *People v. Franklin*, 552 N.E.2d 743, 751 (Ill. 1990); *State v. Jackson*, 450 So. 2d 621, 628-29 (La. 1984); *Couser v. State*, 374 A.2d 399, 403 (Md. Ct. Spec. App. 1977); *State v. Hernandez*, 393 N.W.2d 28, 29-30 (Minn. Ct. App. 1986); *State v. White*, 909 S.W.2d 391, 393-94 (Mo. Ct. App. 1995); *State v. Kandies*, 467 S.E.2d 67, 76-77 (N.C. 1996); *Linebarger v. State*, 469 S.W.2d 165, 167 (Tex. Crim. App. 1971); *Salmon v. Commonwealth*, 529 S.E.2d 815, 817-19 (Va. Ct. App. 2000).

than arrest and conviction data. Without the input available in a formal rule-making or legislative setting, we deemed it inappropriate to create, by judicial decision, the broad disclosure rule for which Artiga-Morales advocated. *See id.* at 799, 335 P.3d at 181-82 ("[i]f policy considerations dictate that defendants should be allowed to see [prosecution-developed juror background research], then a court rule should be proposed, considered and adopted" through the court's formal rule-making process, with public debate and input on "the scope of the disparity, the impact on juror privacy interests, the need to protect work product, practicality, and fundamental fairness") (quoting *People v. McIntosh*, 252 N.W.2d 779, 782 (Mich. 1977)).

We should adhere to our holding in *Artiga-Morales*. In Nevada, completed juror questionnaires are open to the public and the press. *See Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 861-62, 221 P.3d 1240, 1249-50 (2009). Presumably, the database print-outs the prosecution now must provide the defense will likewise be publicly available—and shared by defense counsel with the defendant. A prospective juror in a criminal case can fairly expect to reveal, orally or in response to a written juror questionnaire, her arrest and conviction history, since these bear on her qualifications to serve and bias for or against the State. *See* Lance Salyers, *Invaluable Tool vs. Unfair Use of Private Information: Examining Prosecutors' Use of Jurors' Criminal History Records in Voir Dire*, 56 Wash. & Lee L. Rev. 1079, 1109-17 (1999). But government databases collect information that goes well beyond arrests and convictions, *see* Criminal Justice Information Services, National Crime Information Center, https://www.fbi.gov/services/cjis/ncic (last visited 10/15/2018) (detailing 21 files NCIC maintains, including 14 person files and 7 property files), and can include, depending on the database and the search run, home addresses, birth dates, social security numbers, distinctive markings such as tattoos, suspected gang affiliation, weapons possession, suspected terrorist activity, and special risks to police and medical response teams posed by residents with documented mental illness or high-risk communicable diseases like AIDS. For a general discussion of juror privacy interests in this context, see *In re Essex County Prosecutor's Office*, 46 A.3d 616, 624-29 (N.J. Super. 2012).

Additionally, the government databases available to the prosecution carry statutory restrictions against access and dissemination. *See* National Crime Prevention and Privacy Compact, codified at NRS 179A.800, Art. IV(3) ("Any record obtained under this Compact may be used only for the official purposes for which the record was requested. Each Compact officer shall establish procedures, consistent with this Compact and with rules, procedures, and standards established by the Council under Article VI, which procedures shall protect the accuracy and privacy of the records . . . ."));

NRS 179A.075 (creating the Central Repository for Nevada Records of Criminal History); NRS 179A.100 (restricting access to Criminal Repository records and providing, in subparagraph 2(b), that "a record of criminal history or the absence of such a record may be . . . [f]urnished by one agency to another to administer the system of criminal justice, including the furnishing of information by a police department to a district attorney"). These restrictions were not addressed in the briefing or considered by the court, beyond the majority's passing suggestion that NRS 179A.100(7)(j) (2015) supports court-mandated disclosure. But this statute merely allows a court, when a basis therefor is shown, to order disclosure of otherwise confidential data; it does not sanction automatic disclosure to rectify a perceived imbalance between the prosecution and the defense in jury selection.

Other jurisdictions have grappled with the prosecution's ability to obtain information about prospective jurors from restricted government databases. The responses vary and range from a categorical rejection of the proposition that "personal information about prospective jurors is . . . subject to disclosure by the State," *State v. Ward*, 555 S.E.2d 251, 264 (N.C. 2001), to a court-imposed rule forbidding the prosecution from accessing database information about prospective jurors without advance court approval and then sharing it with the defense, *see State v. Bessenecker*, 404 N.W.2d 134, 139 (Iowa 1987), to a rule permitting the prosecutor to use such information without disclosing it but providing that, "[i]f the prosecutor is aware that potential jurors are not being truthful about their prior record, the prosecutor has an ethical obligation to disclose such information," *State v. Hernandez*, 393 N.W.2d 28, 30 (Minn. Ct. App. 1986), to a state statute providing that, "Notwithstanding any law or court rule to the contrary, the dissemination to the defendant or defense attorney in a criminal case of criminal history record information pertaining to any juror in such case is prohibited" except "as may be necessary to investigate misconduct by any juror." Del. Code Ann. tit. 11, § 8513(g) (2015); *see Charbonneau v. State*, 904 A.2d 295, 319 (Del. 2006) (upholding § 8513(g) against constitutional challenge and rejecting argument that, as a matter of due process, if the defendant "cannot have access, then neither should the State"); *see also* Jeffrey F. Ghent, Annotation, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors*, 86 A.L.R. 3d 571 (1978 & Supp. 2018). The majority asserts that a "growing number" of jurisdictions mandate disclosure of prosecution-developed juror-background information but the handful of cases cited do not support the claim. The majority's principal case, *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981), *superseded by statute on other grounds as stated in People v. Boyd*,

700 P.2d 782, 790 (Cal. 1985), is no longer good law. *See* 5 Witkin, *Cal. Crim. Law*, § 55 (4th ed. 2012) ("The *Murtishaw* holding predates the adoption of the criminal discovery statutes, which limit discovery to that provided for by statute or mandated by the U.S. Constitution . . . .") (citing Cal. Penal Code § 1054(e) (West 1990)). And the few courts that have required disclosure by judicial decision have done so based on unique court rules providing for expansive criminal discovery, *see Tagala v. State*, 812 P.2d 604, 612 (Alaska Ct. App. 1991) (construing Alaska Crim. Rule 16(b)(3)), or state constitutional law, *see State v. Goodale*, 740 A.2d 1026, 1030-31 (N.H. 1999).

The majority invokes "inherent authority" for its mandatory disclosure rule. Robust though the doctrine is in Nevada, inherent authority "is not infinite . . . and it must be exercised within the confines of valid existing law." *Halverson v. Hardcastle*, 123 Nev. 245, 263, 163 P.3d 428, 441 (2007) (footnote omitted). "Generally, a court's inherent authority is limited to acts that are reasonably necessary for the judiciary's proper operation [*and*] *should be exercised only when established methods fail or in an emergency situation*." *Id.* (footnote omitted) (emphasis added). The court has available to it the formal rule-making process endorsed in *Artiga-Morales*. *Cf. State v. Second Judicial Dist. Court*, 116 Nev. 953, 11 P.3d 1209 (2000) (holding the court had inherent authority to promulgate SCR 250 through formal rule-making process to regulate criminal procedure in death penalty cases, despite that the Legislature shares this power and has passed complementary statutes). Given the complexity of the issue, the variety of responses from courts elsewhere, and the competing juror-privacy and governmental database-security concerns, there appears no justification for invoking inherent authority to fashion in an opinion denying extraordinary writ relief in an individual case a rule better crafted through public notice and hearing process. While I can envision an individual case in which, on a sufficient showing of specific need, a district court could order production by the State of juror-background information, that showing was not made, or attempted to be made, here.

I would grant the writ, not deny it, and therefore respectfully dissent.

JUAN JOSE RODRIGUEZ, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 73154

December 6, 2018 431 P.3d 45

Appeal from a judgment of conviction, pursuant to a guilty plea, of battery resulting in substantial bodily harm committed against an older person. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Affirmed.

John L. Arrascada, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cherry, J.:

In this appeal, we consider whether the district court impermissibly imposed double sentencing enhancements for the same primary offense when it sentenced Juan Jose Rodriguez to a maximum of 60 months' imprisonment for the crime of battery resulting in substantial bodily harm under NRS 200.481(2)(b) and an additional 120 months' maximum imprisonment under NRS 193.167 for committing that crime against an older person. We conclude that NRS 200.481(2)(b) is not an enhancement statute. Accordingly, the addition of an older-person enhancement to Rodriguez's sentence under the primary offense statute, NRS 200.481(2)(b), did not violate Nevada law prohibiting multiple sentencing enhancements for the same primary offense. Therefore, we affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Sixty-eight-year-old Henry Sosnowski observed Rodriguez defacing property with graffiti and confronted him. Rodriguez struck Sosnowski, causing him to fall and suffer permanent brain damage. Rodriguez was arrested and charged with battery resulting in substantial bodily harm committed against an older person. Rodriguez

pleaded guilty to the offense. The district court sentenced him to 18 to 60 months for the primary offense and a consecutive term of 48 to 120 months for the older-person enhancement, resulting in an aggregate term of 66 to 180 months.

DISCUSSION

Rodriguez argues that the district court erroneously imposed two sentencing enhancements in this case. Specifically, Rodriguez claims that the primary offense in this case was simple battery (a misdemeanor), and the district court impermissibly imposed both a substantial-bodily-harm enhancement and an older-person enhancement. We disagree.

Rodriguez's trial counsel failed to object and never argued that the older-person-sentencing enhancement should not apply because the battery statute has a built-in enhancement when a battery results in substantial bodily harm. Therefore, we review for plain error, *Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009), and will reverse only if Rodriguez demonstrates that "there was 'error,' . . . the error was 'plain' or clear, and . . . the error affected [his] substantial rights," *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

" 'Battery' [is] any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). The classification of the offense—whether it is a misdemeanor, a category C felony, or a category B felony—depends on additional facts identified in NRS 200.481(2). The facts that determine whether the battery is a felony and, if so, the category of felony, include how the battery was committed (with or without a deadly weapon, or by strangulation); whether the battery was committed upon a person in a protected class of employment (a law enforcement officer, for example); the extent of any physical injury to the victim; and the defendant's status as a probationer or prisoner. *See* NRS 200.481(2). If the battery does not involve any of those facts, the offense is a misdemeanor. NRS 200.481(2)(a). But, for example, if the battery results in substantial bodily harm to the victim, as happened here, the offense is a category C felony. NRS 200.481(2)(b). According to Rodriguez, by elevating battery from a misdemeanor to a category C felony based on substantial bodily harm, NRS 200.481(2)(b) is an enhancement statute, and the district court could not impose an additional enhancement under NRS 193.167 based on the victim's age.

We recognize that this court has held that a district court may not enhance a primary substantive offense under more than one enhancement statute. *See, e.g.*, *Barrett v. State*, 105 Nev. 361, 365, 775 P.2d 1276, 1278 (1989). For example, a primary substantive offense cannot be enhanced based on both the use of a deadly weapon under

NRS 193.165 and the victim's age under NRS 193.167.[1] *Carter v. State*, 98 Nev. 331, 335, 647 P.2d 374, 377 (1982). Similarly, a primary substantive offense cannot be enhanced based on both the use of a deadly weapon under NRS 193.165 and the defendant's status as a habitual criminal under NRS 207.010. *Odoms v. State*, 102 Nev. 27, 34, 714 P.2d 568, 572 (1986).

We disagree, however, with Rodriguez's characterization of NRS 200.481(2)(b) as an enhancement statute. The enhancement statutes addressed in *Barrett*, *Carter*, and *Odoms* increased or added to the penalty for the primary substantive offense based on facts that were not addressed in the primary offense statute. In contrast, the primary offense statute at issue here—NRS 200.481—provides that battery is a felony if certain facts have been shown in addition to a willful and unlawful use of force or violence upon the person of another. When the primary offense statute provides different classifications of the offense based on certain facts, nothing in our prior decisions prevents the district court from also applying a separate enhancement statute. This is true regardless of whether the additional facts addressed in the primary offense statute are characterized as an element of the primary offense or as a fact only relevant to sentencing. Whether characterized as an element of the offense or a sentencing factor, the additional facts are part of the primary offense statute, not a separate enhancement statute. *See People v. Anderson*, 211 P.3d 584, 599 (Cal. 2009) (explaining that a sentencing enhancement statute differs from a statute defining "greater and lesser degrees of the same offense" in that the enhancement addresses specified circumstances of the crime but "*does not set forth . . . a greater degree of the offense charged*" (emphasis added) (internal quotation omitted)). The district court therefore did not err—plainly or otherwise—by imposing the older-person enhancement.

CONCLUSION

We conclude that NRS 200.481(2)(b) is not an enhancement statute and, therefore, a battery causing substantial bodily harm can be enhanced under NRS 193.167 based on the victim's age without running afoul of Nevada cases prohibiting multiple sentencing en-

[1]This limitation has since been codified in NRS 193.169(1):

> A person who is sentenced to an additional term of imprisonment pursuant to the provisions of subsection 1 of NRS 193.161, NRS 193.162, 193.163, 193.165, 193.166, 193.167, 193.1675, 193.1677, 193.168, subsection 1 of NRS 193.1685, NRS 453.3335, 453.3345, 453.3351 or subsection 1 of NRS 453.3353 must not be sentenced to an additional term of imprisonment pursuant to any of the other listed sections even if the person's conduct satisfies the requirements for imposing an additional term of imprisonment pursuant to another one or more of those sections.

hancements for the same primary offense. Accordingly, we affirm the judgment of conviction.

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