MAZEN ALOTAIBI, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 67380

November 9, 2017 404 P.3d 761

Appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, first-degree kidnapping, two counts of sexual assault with a minor under 14 years of age, two counts of lewdness with a child under 14 years of age, and coercion. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

Gentile Cristalli Miller Armeni Savarese and *Dominic P. Gentile* and *Vincent Savarese, III*, Las Vegas, for Appellant.

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

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

In this appeal, we are asked to determine whether, under the statutory definitions existing in 2012, the offense of statutory sexual seduction is a lesser-included offense of sexual assault when that offense is committed against a minor under 14 years of age.[1] Under the elements test, for an uncharged offense to be a lesser-included offense of the charged offense so that the defendant is entitled to a jury instruction on the lesser offense, all of the elements of the lesser offense must be included in the greater, charged offense. In applying the elements test in this case, we must resolve two issues related to the elements that make up the charged and uncharged offenses. First, we consider whether a statutory element that serves only to determine the appropriate sentence for the offense but has no bearing as to guilt for the offense is an element of the offense for purposes of

[1]The statutes defining statutory sexual seduction and sexual assault were amended in 2015. Under the 2015 amendments, any sexual penetration of a minor under the age of 14 is sexual assault, and it is no longer possible for statutory sexual seduction to be committed against a minor under the age of 14. Therefore, the analysis of the statutory elements in this opinion pertains only to the version of the statutes in place at the time the offenses were committed in 2012. *See* 2007 Nev. Stat., ch. 528, § 7, at 3255 (sexual assault, NRS 200.366(1)); 2009 Nev. Stat., ch. 300, § 1.1, at 1296 (statutory sexual seduction, NRS 200.364(5)).

the lesser-included-offense analysis. We hold that it is not. Second, we consider how to apply the elements test when a lesser offense may be committed by alternative means. We hold that the elements of only one of the alternative means need be included in the greater, charged offense to warrant an instruction on the lesser offense.

Applying these principles to the statutes at issue, we conclude that statutory sexual seduction, as defined in NRS 200.364(5)(a) (2009), is not a lesser-included offense of sexual assault even where the victim is a minor, NRS 200.366(1) (2007), because statutory sexual seduction contains an element not included in the greater offense. Thus, the district court did not err in refusing to give a lesser-included-offense instruction on statutory sexual seduction.[2]

FACTS

On the morning of December 31, 2012, appellant Mazen Alotaibi arrived at the Circus Circus hotel where his friends had a room. In the hallway outside the hotel room, Alotaibi encountered A.D., a 13-year-old boy who was staying at the hotel with his grandmother. A.D. asked Alotaibi for marijuana, and they went outside the hotel to smoke it. Alotaibi made sexual advances toward A.D. in the elevator and outside the hotel, despite A.D.'s resistance. Alotaibi then offered A.D. money and marijuana in exchange for sex. A.D. testified that he agreed but intended to trick Alotaibi into giving him marijuana without engaging in any sexual acts.

They went back to the hotel room where Alotaibi's friends were staying, and Alotaibi took A.D. into the bathroom and closed the door. Alotaibi told A.D. that he wanted to have sex and began kissing and touching him. A.D. testified that he told Alotaibi "no" and wanted to leave the bathroom but Alotaibi was standing between him and the door. A.D. testified that Alotaibi forced him to engage in oral and anal intercourse. After leaving the hotel room, A.D. reported to hotel security that he had been raped.

During his interview with the police, Alotaibi admitted meeting A.D. in the hallway of the hotel and stated that A.D. had asked him for money and weed. Alotaibi initially denied touching A.D. or

[2]The two other arguments raised on appeal do not merit relief. First, as to the argument that trial counsel was ineffective, claims of ineffective assistance of counsel generally should be raised in postconviction proceedings in the district court, and we therefore decline to consider the argument in the first instance. *See Pellegrini v. State*, 117 Nev. 860, 883-84, 34 P.3d 519, 534-35 (2001). Second, as to the claim regarding the district court's denial of a motion for a new trial based on newly discovered evidence, we have considered the arguments on appeal and conclude that the district court did not abuse its discretion in denying the motion. *See State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993) (reviewing a district court's decision to grant a motion for a new trial for an abuse of discretion); *Callier v. Warden, Nev. Women's Corr. Ctr.*, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995) (explaining the four required components for granting a motion for a new trial based upon a recantation).

bringing him into the bathroom, but then admitted engaging in the sexual acts in the bathroom of the hotel room. According to Alotaibi, it was A.D.'s idea to have sex in exchange for money and weed, A.D. went willingly with him into the bathroom and initiated the sexual acts, and Alotaibi did not force him.

Based upon this incident, Alotaibi was charged with numerous offenses, including two counts of sexual assault. In settling jury instructions, Alotaibi requested an instruction on statutory sexual seduction as a lesser-included offense of sexual assault, arguing that evidence indicated the victim consented to the sexual activity. The district court determined that statutory sexual seduction was not a lesser-included offense because it contained an additional element (the consenting person being under the age of 16) not required by sexual assault. Noting that there was evidence of consent to support the lesser offense, the district court instead offered to instruct the jury on statutory sexual seduction as a lesser-related offense of sexual assault, but Alotaibi declined such an instruction.[3]

The jury found Alotaibi guilty of two counts of sexual assault with a minor under 14 and other offenses. Alotaibi now appeals from the judgment of conviction.

DISCUSSION

Alotaibi contends that the district court erred in refusing to instruct the jury on statutory sexual seduction as a lesser-included offense of the charged offense of sexual assault with a minor because he presented evidence that the sexual conduct was consensual. We review the district court's settling of jury instructions for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

NRS 175.501 provides that a "defendant may be found guilty . . . of an offense necessarily included in the offense charged." We have held that this rule entitles a defendant to an instruction on a "necessarily included" offense, i.e., a lesser-included offense, as long as there is some evidence to support a conviction on that offense. *Rosas v. State*, 122 Nev. 1258, 1267-69, 147 P.3d 1101, 1108-09 (2006).

In determining whether an uncharged offense is a lesser-included offense of a charged offense so as to warrant an instruction pursuant to NRS 175.501, we apply the "elements test" from *Blockburger v. United States*, 284 U.S. 299 (1932). *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas*, 122 Nev. 1258, 147 P.3d 1101. Under the elements test,

[3]The district court was not required to give an instruction on a lesser-related offense, as the defendant is not entitled to such an instruction. *See Peck v. State*, 116 Nev. 840, 844-45, 7 P.3d 470, 472-73 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

an offense is "necessarily included" in the charged offense if "all of the elements of the lesser offense are included in the elements of the greater offense," *id.* at 690, 30 P.3d at 1106, such that "the offense charged cannot be committed without committing the lesser offense," *id.* (quoting *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)). Thus, if the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted.

Alotaibi suggests that this court has already resolved the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault with a minor in *Robinson v. State*, 110 Nev. 1137, 1138, 881 P.2d 667, 668 (1994). We disagree. Though *Robinson* contains statements to the effect that statutory sexual seduction is a lesser-included offense of sexual assault, the focus in that case was on whether a juvenile who had been certified to be tried as an adult also was an adult for purposes of statutory sexual seduction, which includes the defendant's age (18 years of age or older) as an element. *Robinson*, which was decided before this court clarified the test for determining whether an offense is a lesser-included offense in *Barton*, provides no analysis as to whether statutory sexual seduction is a lesser-included offense of sexual assault, and thus any statement on this issue is dictum.[4] Accordingly, *Robinson* is not controlling on the issue of whether statutory sexual seduction is a lesser-included offense of sexual assault so as to entitle a defendant to an instruction on the lesser, uncharged offense. The issue thus has not been clearly resolved by this court.[5]

The statutes at issue raise several questions about how to apply the elements test. Specifically, the parties disagree about which elements are included in the lesser and greater offenses. Thus, before comparing the statutory elements of the two offenses, we must ascertain what elements actually comprise those offenses.

Elements of the greater offense

In 2012, NRS 200.366(1) proscribed sexual assault as follows:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim

[4]Before *Barton*, there was a lack of clarity and consistency in Nevada caselaw as to how courts determine what constitutes a lesser-included offense. As explained in *Barton*, this court initially adopted the elements test in 1966 but then occasionally applied other tests that considered the particular facts of the case as well as the elements of the crimes. 117 Nev. at 689-92, 30 P.3d at 1105-07. *Barton* specifically disavowed the use of this "same conduct" approach and explicitly reaffirmed the *Blockburger* elements test. *Id.* at 694-95, 30 P.3d at 1108-09.

[5]We disavow any language in *Robinson* and our previous decisions suggesting that statutory sexual seduction is a lesser-included offense of sexual assault.

> or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

2007 Nev. Stat., ch. 528, § 7, at 3255. A separate subsection of that statute, NRS 200.366(3)(c), provided for a sentence of life with parole eligibility after 35 years if the offense was committed "against a child under the age of 14 years" and did not result in substantial bodily harm. *Id.* at 3255-56.

The State contends that the age of the victim is not an element of sexual assault for purposes of the lesser-included-offense analysis because the victim's age only goes to the sentence for the offense. Thus, the State argues, because statutory sexual seduction requires proof of the victim's age as an element while the offense of sexual assault does not, statutory sexual seduction is not a lesser-included offense.[6] Alotaibi argues that the State's decision to charge him with the offense of "Sexual Assault with a Minor Under 14 Years of Age" necessarily inserted the age of the alleged victim as an element of that offense and triggered the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

We agree with the State that the age of the victim in the sexual assault statute is not an element of the offense for purposes of the lesser-included-offense analysis. We acknowledge that our prior decisions have been somewhat inconsistent in distinguishing elements required for a conviction from those that only affect sentencing in applying the elements test. For example, in *Rosas*, we included as elements of the lesser offense several factors that served only to elevate the offense from a misdemeanor to a gross misdemeanor. 122 Nev. at 1263, 147 P.3d at 1105. We take this opportunity to clarify

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[6]The State contends that this court has already concluded as much in *Slobodian v. State*, 98 Nev. 52, 639 P.2d 561 (1982), *rejected by Barton*, 117 Nev. at 689 & n.9, 30 P.3d at 1105 & n.9. We disagree. In *Slobodian*, which concerned an earlier version of the sexual assault statute, this court held that statutory sexual seduction was not a lesser-included offense of sexual assault because "the crime of statutory sexual seduction requires a victim under the age of sixteen, while the age of the victim is irrelevant to the crime of sexual assault." 98 Nev. at 53, 639 P.2d at 562 (internal footnote omitted). The earlier version of the sexual assault statute in *Slobodian* defined sexual assault in the same way as the statute in Alotaibi's case, but differed in that it provided for a specific sentence only where the victim was under the age of 14 but contained no specific sentencing provision for a victim under the age of 16. *See id.*; 1977 Nev. Stat., ch. 598, § 3, at 1626-27. Under this earlier statute, if the victim was between the ages of 14 and 16, the victim's age was not relevant to either guilt or punishment. The *Slobodian* decision did not indicate whether the victim was under the age of 14. Thus, the *Slobodian* decision did not indicate whether the age of the victim is an element of sexual assault when the offense is *committed against a minor*.

that when an element goes *only* to punishment and is not essential to a finding of guilt, it is not an element of the offense for purposes of determining whether a lesser-included-offense instruction is warranted. *Cf. LaChance v. State*, 130 Nev. 263, 273-74, 321 P.3d 919, 927 (2014) (holding that an element that does not affect guilt but rather only determines the sentence is not an element of the offense for the purposes of *Blockburger*). To the extent that *Rosas* included elements only relevant to sentencing in its analysis under the elements test, we disavow any such application of the elements test.

Alotaibi's arguments regarding *Apprendi* do not alter our conclusion. In *Apprendi*, the United States Supreme Court considered whether the Sixth Amendment's guarantee of a jury trial requires that a jury, rather than a judge, determine any factor other than a prior conviction that increases the statutorily authorized sentence for an offense. 530 U.S. at 476. The Supreme Court held that, regardless of how a fact is designated by a legislature, any fact (other than a prior conviction) that authorizes the imposition of a more severe sentence than permitted by statute for the offense alone must be found by a jury beyond a reasonable doubt. *Id. Apprendi* did not address whether a sentencing factor is an element of an offense when determining whether the offense is included within a greater offense, and Alotaibi cites no controlling authority applying *Apprendi* to double jeopardy or lesser-included-offense analysis.[7]

Here, the elements necessary to convict a defendant of sexual assault are contained solely in subsection 1 of NRS 200.366, whereas the age of the victim set forth in subsection 3 is a factor for determining the appropriate sentence for the offense. As clearly indicated by the statute's structure and language, the age of the victim is not essential to a conviction for sexual assault; it serves only to increase the minimum sentence that may be imposed. Thus, it is a sentencing factor and not an element of the offense for purposes of the elements test. As such, for purposes of the elements test, the offense of sexual assault, regardless of whether it was committed against a minor, has two statutory elements:

> (1) "subject[ing] another person to sexual penetration, or . . . forc[ing] another person to make a sexual penetration on himself or another, or on a beast,"

[7]Notably, other courts have rejected the application of *Apprendi* to double jeopardy or lesser-included-offense analysis. *See, e.g.*, *Smith v. Hedgpeth*, 706 F.3d 1099, 1106 (9th Cir. 2013) (holding that *Apprendi* did not clearly establish that a state court must "consider sentencing enhancements as an element of an offense for purposes of the Double Jeopardy Clause"); *People v. Alarcon*, 148 Cal. Rptr. 3d 345, 348 (Ct. App. 2012) (rejecting contention that *Apprendi* requires enhancements to be considered in determining whether an uncharged offense is necessarily included in a charged offense).

> (2) "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct."

2007 Nev. Stat., ch. 528, § 7, at 3255 (NRS 200.366(1)).

Elements of the lesser offense

Having identified the elements of the greater offense, we turn to the elements of the lesser offense. In 2012, statutory sexual seduction was defined in NRS 200.364(5) as:

> (a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or
>
> (b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

2009 Nev. Stat., ch. 300, § 1.1, at 1296. The statute therefore sets forth two alternative means of committing statutory sexual seduction: (a) engaging in sexual intercourse, anal intercourse, cunnilingus, or fellatio; or (b) engaging in *other sexual penetration* with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either person. The parties disagree on how to apply the elements test where, as here, the statute provides different ways for a person to commit the offense. The State asserts that all of the elements of both alternative means of committing the lesser offense must be included in the greater offense, while Alotaibi focuses only on the elements of one of the alternatives, NRS 200.364(5)(a), that is most consistent with the sexual acts alleged in this case.

We conclude that where a statute provides alternative ways of committing an uncharged offense, the elements of only one of those alternatives need to be included in the charged offense for the uncharged offense to be lesser included. *See* 6 Wayne R. LaFave, et al., *Criminal Procedure* § 24.8(e) (3d ed. 2007) ("When the lesser offense is one defined by statute as committed in several different ways, it is a lesser-included offense if the higher offense invariably includes at least one of these alternatives."). This approach comports with that taken by other jurisdictions that have considered this issue. *See, e.g.*, *United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2003) (holding that "alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense"); *United States v. Alfisi*, 308 F.3d 144, 152 n.6 (2d Cir. 2002) (finding an offense to be a lesser-included of-

fense "notwithstanding the existence of possible or alternative, and non-mandatory, elements in the lesser offense not contained in the greater offense"); *State v. Waller*, 450 N.W.2d 864, 865 (Iowa 1990) ("When the statute defines [a lesser] offense alternatively, . . . the relevant definition is the one for the offense involved in the particular prosecution."). In particular, we agree with the Second Circuit's reasoning in *Alfisi*, whereby the court rejected an "unnecessary and formalistic requirement on how [the legislature] drafts criminal statutes," opting instead to view no differently a statute drafted as a "singular but disjunctive whole" from a statute dividing the alternative elements "into several discreet and independent sections." 308 F.3d at 152 n.6. Likewise, here, the fact that the Legislature included the alternative means of committing statutory sexual seduction in disjunctive subsections of the statute does not preclude each alternative means from being a lesser-included offense.

Here, neither of the alternatives in NRS 200.364(5) is necessarily included in the offense of sexual assault. Both alternatives include the age of the victim (under 16 years of age) as an element of the offense that is required for conviction. 2009 Nev. Stat., ch. 300, § 1.1, at 1296. As explained above, the age of the victim is not an element required for a conviction of the greater offense (sexual assault). The alternative set forth in NRS 200.364(5)(b) also includes an intent element that is not included in the greater offense—that the sexual act was committed "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of [the defendant or the victim]." *Id.* Therefore, under the elements test, statutory sexual seduction is not a lesser-included offense of sexual assault, and Alotaibi was not entitled to an instruction on statutory sexual seduction. As such, the district court properly refused to instruct the jury on statutory sexual seduction. We therefore affirm the judgment of conviction.

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

CITY OF LAS VEGAS, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ROB BARE, District Judge, Respondents, and STEVEN KAMIDE, Real Party in Interest.

No. 71637

November 16, 2017 405 P.3d 110

Original petition for a writ of mandamus challenging a district court order vacating misdemeanor convictions and remanding for a new trial.

Petition granted.

Bradford R. Jerbic, City Attorney, and *Kelly K. Giordani*, Deputy City Attorney, Las Vegas, for Petitioner.

Weiner Law Group, LLC, and *Jason G. Weiner* and *Gregory G. Cortese*, Las Vegas, for Real Party in Interest.

Before Hardesty, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Stiglich, J.:

In this opinion, we consider an appellate court's review of unpreserved trial error. As we have emphasized, it is incumbent upon the parties to make a contemporaneous objection to trial error. This not only ensures that the trial court has an opportunity to rule upon the objection and take remedial action if appropriate, but it also preserves the alleged error for appellate review. Conversely, unpreserved error need not be considered on appeal. While we have allowed discretionary review of unpreserved error, we have limited such review to errors that are unmistakably apparent from a casual inspection of the record. Here, the district court, acting in its appellate capacity, considered an unpreserved claim but ignored the clear record and speculated as to facts that could demonstrate error. As the district court's review was not in accord with our established plain error rule, we grant the petition and issue the requested writ.

FACTS AND PROCEDURAL HISTORY

In February 2015, Brock Rice, Trey Rosser, and Jeremy Hughes were leaving a restaurant and bar when they saw Kimberly Kamide lying on the ground, clearly intoxicated. The three men offered to give Kimberly a ride to her nearby home. When they arrived at Kim-

berly's residence, her husband, Steven Kamide, ran out of the house toward the vehicle. He pushed and shoved Kimberly to the ground and got into a physical altercation with Rice, Rosser, and Hughes.

The City of Las Vegas (the City) charged Kamide with one count of domestic battery and two counts of simple battery in the Las Vegas Municipal Court. During the bench trial, the City invoked the witness exclusion rule and Rice, Ross, and Hughes sat together in the hallway. While cross-examining Hughes after Rice and Rosser had testified, Kamide's counsel indicated that she had seen the three men talking together during a recess. Hughes answered that they had been reading Twitter together and had not been "talking about anything." Kamide's counsel did not ask any other questions regarding the witnesses' interaction or pursue the matter further.

After the municipal court found Kamide guilty of all counts charged, he appealed to the district court, alleging for the first time a violation of NRS 50.155(1), the witness exclusion rule. The district court found that the rule had been violated. The district court concluded that prejudice had to be presumed because the record did not clearly show the absence of prejudice and reversed Kamide's convictions. The City filed this original writ petition challenging the district court's decision.

DISCUSSION

The decision to consider a petition for a writ of mandamus lies within this court's complete discretion. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). The writ will generally not issue if the petitioner has a plain, speedy, and adequate remedy at law, *see* NRS 34.170, but there is no such remedy for the City in this matter as "district courts are granted exclusive final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals."[1] *Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) (internal quotation marks omitted). "[A]s a general rule, we have declined to entertain [writ petitions] that request review of a decision of the district court acting in its appellate capacity," noting that we are mindful of "undermin[ing] the finality of the district court's appellate jurisdiction." *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696 (2000). But we have entertained such petitions in circumstances where the district court "has exercised its discretion in an arbitrary or capricious manner." *Id.* A decision is arbitrary or capricious when it is "founded on prejudice or preference rather than on reason, or" is "contrary to the evidence or established rules

[1]We are unpersuaded by Kamide's argument that the City's ability to retry him serves as a speedy or adequate remedy when the City seeks to challenge the district court's appellate decision.

of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation and internal quotation marks omitted).

We elect to exercise our discretion and consider whether the district court's appellate decision in this case was contrary to the evidence and established rules of law.[2]

"It is well established that failure to object to asserted errors at trial will bar review of an issue on appeal." *Brown v. State*, 114 Nev. 1118, 1125, 967 P.2d 1126, 1131 (1998) (internal quotation marks omitted). Nonetheless, an appellate "court has the discretion to address an error if it was plain and affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted); *see also* NRS 178.602. The plain error rule affords an appellate court discretion to consider an issue raised for the first time on appeal only if it makes three determinations: (1) there was error, (2) the error was plain or clear from the record, and (3) "the error affected the defendant's substantial rights." *Green*, 119 Nev. at 545, 80 P.3d at 95. In exercising that discretion, the district court ignored the evidence and settled law relevant to the second inquiry under the plain error rule—whether the error was "plain."

Kamide argued for the first time on appeal that the witnesses violated the witness exclusion rule set forth in NRS 50.155(1) and that prejudice should be presumed based on *Givens v. State*, 99 Nev. 50, 657 P.2d 97 (1983), *disapproved of on other grounds by Talancon v. State*, 102 Nev. 294, 301 & n.3, 721 P.2d 764, 768-69 & n.3 (1986). Pursuant to the witness exclusion rule, "at the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses." NRS 50.155(1). "The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony in light of other witnesses' testimony, and to detect falsehood by exposing inconsistencies." *Givens*, 99 Nev. at 55, 657 P.2d at 100. In *Givens*, we examined a situation in which the district court denied defense counsel's request to invoke the witness exclusion rule and held that, based on a conceded violation of the rule, we would "presume prejudice from a violation of NRS 50.155 unless the record shows that prejudice did not occur." *Id.* at 52-55, 657 P.2d at 98-100.

Consistent with the statute, the trial court excluded witnesses from the courtroom upon the City's request. Kamide has never suggested that any of the witnesses were in the courtroom when other witnesses testified, and the record does not reflect any such violation

[2]We have considered Kamide's argument related to the doctrine of laches and conclude that laches does not preclude consideration of the City's petition in this instance. *See Hedland*, 116 Nev. at 135, 994 P.2d at 697.

of the witness exclusion rule. Instead, Kamide focused on the admitted interaction between several witnesses outside of the courtroom. That interaction implicates an admonition that the trial court gave the witnesses when it excluded them from the courtroom—that they were not to discuss their testimony with anyone. Whether a violation of the trial court's admonishment about out-of-court communications also violates NRS 50.155(1) is an open question in Nevada. This court has not addressed whether NRS 50.155(1) imposes a duty to limit out-of-court communications between witnesses about their testimony when the witness exclusion rule has been invoked; the statute expressly refers only to excluding witnesses from the courtroom. Cases decided by other courts interpreting similar witness exclusion rules are in conflict on this issue. *See generally* 29 Charles Alan Wright & Victor Gold, *Federal Practice and Procedure* § 6243, at 63-64 (2d ed. 2016). We need not resolve the matter in this case because even if the statute does not require an admonishment regarding out-of-court communications between witnesses about their testimony, the trial court likely had discretion to admonish the witnesses to refrain from such communications. *See id*.; *see also Perry v. Leeke*, 488 U.S. 272, 281 (1989) (recognizing that "[i]t is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed" and "[s]uch nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered"). Because the trial court admonished the witnesses in this case, it would be an error for the witnesses to violate this admonishment.

To show that the witnesses violated the trial court's admonishment, Kamide directed the district court to defense counsel's cross-examination of Hughes. During that examination, defense counsel indicated that she saw Hughes and two other witnesses talking outside the courtroom, and Hughes explained that they were reading Twitter but not talking about anything:

> [Counsel for Kamide]: I noticed when I walked to the bathroom during the break—
>
> A: Um-hmm (in the affirmative).
>
> Q: —that you guys were all taking [sic], the three of you.
>
> A: Um-hmm (in the affirmative).
>
> Q: You know you weren't supposed to be talking, the three of you, the three witness [sic]?
>
> A: We—we were just talking about just—we were actually reading Twitter.
>
> Q: Okay.
>
> A: We weren't talking about anything.

Q: Okay. But you know you're not supposed to be talking?

A: Um-hmm (in the affirmative).

Q: Okay.

Based on this exchange, the district court found a "plain" error.

The district court's determination ignores the evidence and controlling law. First, the district court necessarily ignored Hughes' testimony when it indicated that the record was not clear whether the witnesses discussed their testimony with each other. Hughes testified that the witnesses "weren't talking about anything." Based on Hughes' testimony, the record is clear that the witnesses did not discuss their testimony with each other. Even if the district court accurately characterized the record as being unclear, the district court still could not find plain error under established law. Under established law, an error is "plain" when it "is so unmistakable that it reveals itself by a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks omitted). According to the district court, "the conversation could be nothing related to the court proceeding, it could be that it was related, this [c]ourt does not know." If the record is such that the district court "does not know" what happened, then the error cannot be "so unmistakable that it reveals itself by a casual inspection of the record," *id*., as required to find that an error is "plain" under established law.[3]

At best, and ignoring Hughes' testimony that the witnesses "weren't talking about anything" (as the district court apparently did), a casual inspection of the record reveals that the witnesses talked to each other. The mere fact that the witnesses talked to each other is not sufficient to establish an unmistakable violation of the trial court's admonition that the witnesses not talk to each other *about their testimony*. *Cf. State v. Lucas*, 896 So. 2d 331, 339 (La. Ct. App. 2005) (remarking that "[t]he mere fact that a witness speaks to other witnesses does not establish a violation of the order of sequestration" issued pursuant to a state statute analogous to NRS 50.155(1)). The only way to find an error on this record is to speculate, something that the established plain error rule does not allow. Kamide had the opportunity to pursue this matter in the trial court and create

[3]Additionally, the district court stated multiple times that it felt compelled to presume a violation of NRS 50.155(1) based on *Givens*. Even assuming that caselaw is relevant to Kamide's claim that the witnesses were talking outside the courtroom, it does not allow a court to presume a violation based on a silent record. In *Givens*, the State conceded a violation of the statutory witness exclusion rule, and we held that *prejudice* would be presumed unless the record showed otherwise; we made no comment regarding the presumption of a *violation* of NRS 50.155(1). 99 Nev. at 54-55, 657 P.2d at 100.

a clear record of the alleged error. His failure to do so precluded the district court from affording him relief on appeal under the plain error rule.[4] *See Maestas v. State*, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012) (explaining that because defendant did not raise the issue in trial court, the record was not sufficiently developed to allow appellate court to determine that any error was "plain" and therefore the issue was not amenable to review under the plain error rule).

Because the district court arbitrarily and capriciously exercised its discretion under the plain error rule to consider an issue that was not preserved for appeal, we grant the petition. The clerk of this court shall issue a writ of mandamus directing the district court to vacate its order reversing Kamide's convictions and to enter an appropriate disposition of Kamide's appeal consistent with this opinion.

Hardesty and Parraguirre, JJ., concur.

SIERRA PACKAGING & CONVERTING, LLC, Appellant, *v.* THE CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY, STATE OF NEVADA; and THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD, Respondents.

No. 71130-COA

November 16, 2017 406 P.3d 522

Appeal from a district court order denying a petition for judicial review in an occupational safety and health matter. First Judicial District Court, Carson City; James Todd Russell, Judge.

Reversed and remanded.

McDonald Carano LLP and *Timothy E. Rowe*, Reno, for Appellant.

State of Nevada Department of Business and Industry, Division of Industrial Relations, and *Salli Ortiz*, Carson City, for Respondent.

Before Silver, C.J., Tao and Gibbons, JJ.

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[4]To the extent the district court imposed a duty on the trial court to conduct an evidentiary hearing *sua sponte* to determine whether the witnesses communicated with each other about their testimony, we disagree. *See generally Estelle v. Williams*, 425 U.S. 501, 512 (1976) (explaining the court's role in the adversarial process).

OPINION

By the Court, Silver, C.J.:

29 C.F.R. § 1910.132(f) (2011) requires employers to provide training regarding the use of personal protective equipment to employees exposed to hazards necessitating the use of such equipment. Appellant Sierra Packaging and Converting, LLC, argues the Nevada Occupational Safety and Health Administration improperly cited it for violating 29 C.F.R. § 1910.132(f), as no facts establish that the subject employees were actually exposed to such a hazard in the course of their work or were required by that regulation to have fall protection training. In this appeal, we clarify that exposure to a hazard can be demonstrated by facts establishing that exposure to the hazard is reasonably predictable. Because we conclude the Nevada Occupational Safety and Health Review Board relied on an incorrect standard to reach its decision and the evidence must be reevaluated under the standard set forth in this opinion, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Respondent Nevada Occupational Safety and Health Administration (NOSHA)[1] received an anonymous complaint alleging, in relevant part, that appellant Sierra Packaging and Converting, LLC (Sierra Packaging), violated NOSHA's health and safety regulations by allowing employees to climb on warehouse racks without personal protection equipment (PPE). Pictures of three employees on the racking without PPE accompanied the complaint.

Jennifer Cox, an enforcement officer for NOSHA, investigated the complaint. The men in the pictures were three temporary maintenance personnel hired through a subcontractor and working under maintenance manager Steve Tintinger. At the time, Sierra Packaging had just moved to a new location and hired the temporary help for the move. Sierra Packaging also hired another company to install the warehouse racking at its new location, but that company failed to install metal stabilization plates on the racking.

The three employees, assisted by a company interpreter, spoke to Cox regarding the photograph depicting them on the racking without PPE. The employees stated that they had been instructed to install the metal plates that were missing in the racking. Two employees admitted that they were not supposed to climb on the racking; one stated that he had actually been standing on a ladder next to the racking and the other did not say whether he had been standing on

[1]When referring to the Occupational Safety and Health Administration of other states or the federal government, we use the more general term "OSHA."

the racking. The third employee, however, admitted to Cox that he was in fact standing on the racking without PPE. All three were visibly nervous. One of the employees asserted Tintinger ordered them onto the racks to complete the task and told them to use ladders and PPE. But another stated that the subcontractor who hired the three men ordered them to install the metal plates. The third employee's statement is silent on this point.

When Cox inquired about the PPE, the men stated that "the employer" provided them with PPE, and one of them retrieved a harness system and shop pack. At least one employee indicated he had undergone safety training provided in Spanish. Although the three men knew how to don and inspect the PPE, Cox discovered that none of them understood how to utilize the equipment.

Cox also interviewed management, including Tintinger, and learned that management did not know the PPE's limitations. At the conclusion of the investigation, Cox recommended NOSHA cite Sierra Packaging for a "serious"[2] violation of 29 C.F.R. § 1910.132(f) (2011) for failing to provide adequate training regarding PPE. Thereafter, NOSHA issued a citation with notification of penalty for $3,825.

Sierra Packaging contested the citation and the Nevada Occupational Safety and Health Review Board (the Board) held an evidentiary hearing. NOSHA presented evidence, including the anonymous complaint accompanied with pictures of the three men standing on the racking, along with Cox's testimony and report. NOSHA argued that "[t]he only thing that matters is that these employees . . . had the fall protection equipment but they didn't know how to properly use it." Conversely, Sierra Packaging generally denied NOSHA's allegations, arguing the citation was improper because the employees did not actually need PPE to perform their job duties. But Sierra Packaging acknowledged that maintenance workers sometimes needed PPE, and Tintinger at one point admitted that he may have directed the three employees to install the metal plates on the racking. In its written decision concluding Sierra Packaging failed to adequately train the employees, the Board focused on the employees' access to the PPE. The Board found that Sierra Packaging's evidence was not credible, and upheld NOSHA's citation. In resolving Sierra Packaging's subsequent petition for judicial review, the district court agreed with the Board's conclusion and held that the "Board has taken the reasonable stance that when an employer provides fall protection equipment, it must also provide the training on the safe use of such equipment." This appeal followed.

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[2]There are several categories of OSHA violations, and the penalties vary for the type of violation. *See generally* NRS Chapter 618; 51 C.J.S. *Labor Relations* § 42 (2017).

ANALYSIS

Sierra Packaging argues that the Board disregarded the plain language of 29 C.F.R. § 1910.132(f)(1), a regulation mandating training for employees required to use PPE. On appeal, Sierra Packaging does not dispute that the three employees were inadequately trained; rather, Sierra Packaging argues that no facts established that the employees were required to be trained under 29 C.F.R. § 1910.132(f). NOSHA counters that, because the evidence established that Tintinger instructed the workers to use PPE, and the employees had access to PPE, 29 C.F.R. § 1910.132(f) requires that the employees must also be trained in using PPE.

When reviewing an agency's decision, we, like the district court, consider whether the decision was affected by an error of law or was "an arbitrary and capricious abuse of discretion." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383 (2008); *see also* NRS 233B.135(3)(d), (f); *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385-86, 254 P.3d 601, 603 (2011). If the agency's decision rests on an error of law and the petitioner's substantial rights have been prejudiced, this court may set aside the decision. *State, Private Investigator's Licensing Bd. v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013). Our review is limited to the record before the agency, *Gandy v. State ex rel. Div. of Investigation & Narcotics*, 96 Nev. 281, 282, 607 P.2d 581, 582-83 (1980), and we will overturn the agency's factual findings only if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4); *Nev. Pub. Emps.' Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013).

We review questions of statutory construction de novo. *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013). We first look to the statute's plain language, and we "construe the statute according to its fair meaning and so as not to produce unreasonable results." *Id.* Ordinarily we will defer to the agency's interpretation of its governing regulations, so long as the agency's interpretation is within the language of the statute. *Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013).

29 C.F.R. § 1910.132 (2011), in relevant part, states:

> (a) Application. Protective equipment, including personal protective equipment . . . , shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment[.]
>
> . . . .

> (d) Hazard assessment and equipment selection.
>
> (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).
>
> . . . .
>
> (f) Training.
>
> (1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following: . . .
>
> (iv) The limitations of the PPE.

The plain language of this regulation mandates training when the employee is "required by this section" to use PPE. Under subsections (a) and (d), PPE is required as "necessary" to protect against hazards. Accordingly, the citation was proper if the employees' work exposed them to a hazard that required the use of PPE—here, if the employees were exposed to heights that necessitated the use of fall protection equipment.

29 C.F.R. § 1910.132 does not, however, clarify what evidence NOSHA must present to show exposure to the hazard. Although Nevada's appellate courts have not yet addressed this question, other jurisdictions have held that, where a regulation requires exposure to a hazard, evidence of actual exposure is not required so long as the record demonstrates exposure was reasonably predictable. *See Or. Occupational Safety & Health Div. v. Moore Excavation, Inc.*, 307 P.3d 510 (Or. Ct. App. 2013).

In *Moore Excavation*, for example, the Oregon Occupational Safety and Health Division cited a company under 29 C.F.R. § 1926.1053(b)(16) for failing to tag as defective a damaged ladder and remove it from service. *Id.* at 511. In reviewing the administrative law judge's decision to vacate the citation, the Oregon Court of Appeals addressed the burden of proof for that state's OSHA to show exposure to the hazard. *Id.* at 514-16. The appeals court relied on the "rule of access" promulgated by the federal Occupational Safety and Health Review Committee, which the appeals court held "ultimately requires, simply, that the agency prove that it was *reasonably predictable* that one or more employees had been, were, or would be exposed to the hazard presented by the violative condition at issue." *Id.* at 516; *see also Secretary of Labor v. Gilles & Cotting, Inc.*, 1976 CCH OSHD ¶ 20,448, ¶ 24,425, 1976 WL 5933 (No. 504, 1976) ("On balance we conclude that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure."). The appeals court noted that this standard requires more than a mere showing of access to the hazard, but less than proof of actual exposure. *Moore Excavation*, 307 P.3d at 517.

Similarly, the United States Court of Appeals for the Fourth Circuit, while not using the term "rule of access," explained that, in establishing an exposure to a hazard under 29 C.F.R. § 1926.501(b)(1), OSHA must show a reasonable predictability that the employees either were, or would be, in the "zone of danger." *N&N Contractors, Inc. v. Occupational Safety & Health Review Comm'n*, 255 F.3d 122, 127 (4th Cir. 2001). The United States Court of Appeals for the Ninth Circuit likewise addressed employee exposure to the "zone of danger," concluding that proof of actual exposure to the danger was unnecessary to establish a violation of 29 C.F.R. § 1926.651(c)(2) where the evidence showed it was reasonably predictable that the employees would be exposed to the danger. *R. Williams Constr. Co. v. Occupational Safety & Health Review Comm'n*, 464 F.3d 1060, 1064 (9th Cir. 2006).

Although these cases do not address 29 C.F.R. § 1910.132, the cases suggest a common theme that may be applied to that regulation: where a rule requires OSHA to demonstrate employee exposure to a hazard, OSHA meets its burden of proof by showing that it is reasonably predictable that the employee was or would be exposed to the hazard in the course of the employee's work. Importantly, this rule comports with the language of 29 C.F.R. § 1910.132, a regulation focusing on the potential for and probability of employee exposure to hazards, rather than actual exposure. We therefore agree with the analysis set forth in *Moore Excavation* and hold that where NOSHA is required to show exposure to the hazard, NOSHA meets its burden of proof by demonstrating that it is reasonably predictable that the employees were or would be exposed to the hazard.[3]

In the present case, the Board employed an incorrect standard in rendering the underlying decision. Under 29 C.F.R. § 1910.132, the citation was proper if the employees' work exposed them to a hazard that required the use of PPE. Pursuant to the "rule of access," NOSHA could meet its burden of proof here by showing it was reasonably predictable that the employees were or would be exposed to hazardous heights necessitating the use of PPE. Yet instead of focusing on exposure to heights necessitating the use of PPE, the Board predicated its decision on the employees' access to the PPE and concluded this access triggered 29 C.F.R. § 1910.132(f)'s training requirement. Under the "rule of access," however, this training requirement only comes into play if it was reasonably predictable that the employees were or would be exposed to hazardous heights requiring the use of PPE. As a result, we reject the Board's interpretation of 29 C.F.R. § 1910.132 and conclude that its resulting decision was grounded in an error of law that, in this case, infect-

[3]We note the district court addressed *Moore Excavation* and the "rule of access," although the district court, like the Board, focused on the employees' access to the PPE.

ed the proceedings and consequently prejudiced Sierra Packaging's substantial rights. *See Tatalovich*, 129 Nev. at 590, 309 P.3d at 44.

Pursuant to the "rule of access" we adopt today, the propriety of the citation against Sierra Packaging needs to be reexamined under the reasonable predictability standard, but this analysis must be carried out by the Board in the first instance, as it is well established that courts may not reweigh the evidence in reviewing an administrative decision. *See Nellis Motors v. State, Dep't of Motor Vehicles*, 124 Nev. 1263, 1269-70, 197 P.3d 1061, 1066 (2008) (providing that an appellate court reviewing an administrative decision will not reweigh the evidence or reassess witness credibility). Accordingly, we reverse and remand this case to the district court with instructions to remand this matter to the Board to reevaluate the evidence and reconsider its decision under the standard set forth in this opinion.

CONCLUSION

We adopt the "rule of access" standard as articulated in *Moore Excavation*. Under this standard, when a statute or regulation requires NOSHA to establish employee exposure to a hazard, the Board's decision regarding a NOSHA citation may be upheld if NOSHA presents substantial evidence demonstrating that exposure to the hazard was or would be reasonably predictable. Here, because the Board applied an incorrect standard in evaluating the citation, we reverse and remand this case to the district court for it to remand this matter back to the Board for further proceedings in accordance with this opinion.

Gibbons, J., concurs.

Tao, J., concurring:

I agree with my colleagues that Nevada OSHA (NOSHA) erred by applying a circular legal standard under which an employer's duty to train kicks in whenever employees have access to safety equipment regardless of whether any hazard is present or not, rather than the better "rule of access" under which the duty to train arises only when it's reasonably predictable that employees will actually be exposed to some hazard that could hurt them. I therefore fully join the very thorough and well-reasoned majority opinion that explains NOSHA's error quite well.

But I would go a step further and find that there's a second, larger problem here that ought to be thought through on remand before this case goes any further. Although not quite pressed by the parties on appeal (and, hence, why it's not the subject of the principal opinion), it appears to me that NOSHA overstepped its regulatory authority by levying a fine pursuant to an excessively broad and non-textual interpretation of 29 C.F.R. § 1910.132, a regulation that, fairly read, doesn't apply to the conduct at issue. This case might therefore be

ripe for dismissal because Sierra's conduct didn't violate the terms of § 1910.132 as actually written.

There's an ongoing and active debate over how much quasi-legislative power Congress can constitutionally delegate to executive branch agencies, and how much deference courts owe to those agencies when they engage in the quasi-judicial task of interpreting the law. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the constitutionality of *Chevron* deference as violating the principle of separation of powers); *Waterkeeper All. v. Envtl. Prot. Agency* 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name. If a court could purport fealty to *Chevron* while subjugating statutory clarity to agency 'reasonableness,' textualism will be trivialized."). *Cf. Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 178, 368 P.3d 1219, 1230 (Ct. App. 2016) (Tao, J., concurring) (noting practical problems with treating executive-branch advisory opinions as if they were judicial decisions). This appeal goes to the very heart of that debate, as I would conclude that NOSHA's case against Sierra requires § 1910.132 to be interpreted in a way that exceeds any authority actually delegated by Congress.

I.

NOSHA filed its complaint against Sierra in September 2013, and issued its decision imposing a fine in April 2014. These dates matter because the regulation was significantly changed in November 2016 to add 29 C.F.R. § 1910.140, a new section that specifically addressed "personal fall protection systems." But this section didn't exist before 2016, so Sierra couldn't have violated it in 2013.

Prior to 2016, 29 C.F.R. § 1910.132 was limited to addressing chemical and environmental hazards that injure when breathed in or when in contact with skin, ears, face, or eyes. When these hazards are present, employers must provide personal protective equipment (PPEs), along with training in how to use them, to all exposed employees.

But NOSHA didn't charge Sierra with failing to provide PPEs to employees facing potential injury from toxic environmental hazards. It charged Sierra with failing to provide PPEs to employees working on an elevated platform from which they could have fallen. But § 1910.132 has nothing to do with this kind of danger, and the PPEs that § 1910.132 describes wouldn't have prevented anyone from either falling or being hurt if they did.

II.

The place to start is with the plain text of § 1910.132. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation*

of Legal Texts 56 (2012) ("[t]he words of a governing text are of paramount concern"). The scope of both the current and pre-2016 versions of § 1910.132 is defined in paragraph (a), the "application" paragraph of the regulation. Paragraph (a) states:

> *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

NOSHA contends that the phrase "hazards of processes or environment" is broad enough to encompass placing employees in situations where a dangerous fall is reasonably predictable. Is NOSHA correct?

The answer seems to me to be: NOSHA is correct only if the lengthy phrase that closes the paragraph—"encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact"—is read to qualify merely the term "mechanical irritants" that immediately precedes it, and nothing else.

But I don't read it that way. To me, the most natural meaning of the closing phrase is that it's intended to qualify the entire list of hazards set forth in paragraph (a), and not just the very last item on the list. In other words, a violation of § 1910.132(f) can occur only if a hazard capable of causing injury "through absorption, inhalation or physical contact" is present. Read that way, § 1910.132 was designed to address possible harm resulting from environmental hazards such as chemicals and irritants or small objects flying about in the workplace that might injure someone through skin contact or inhalation. The regulation has nothing to do with preventing employees from falling from high places.

III.

Why do I read the pre-2016 regulation that way?

First, reading it the way NOSHA wants us to would mean that the first item in the list of hazards, "hazards of processes or environment," just dangles there with no additional definition or qualifier. But that reading makes the phrase so broad and imprecise that it can cover any kind of workplace "hazard" at all: noxious chemicals, slips and falls, slicing injuries, malfunctioning machines, surly junkyard dogs running about, and even attacks by deranged assas-

sins or terrorists within the "environment" of the workplace. And if the initial item on the list were intended to have been so broad, then the entire rest of the list would be totally unnecessary. Yet "no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." *Indep. Am. Party v. Lau*, 110 Nev. 1151, 1154, 880 P.2d 1391, 1392 (1994) (quoting *Paramount Ins., Inc. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)).

Second, the types of PPEs specifically set forth throughout the pre-2016 version of 29 C.F.R. § 1910.132 consist of things like "eyewear" (paragraph (h)(2)), "metatarsal guards" (paragraph (h)(3)), "protective clothing" (paragraph (a)), "respiratory devices" (paragraph (a)) and "protective shields" (paragraph (a)). These are things that have nothing to do with preventing employees from falling from heights, but quite a lot to do with chemical or respiratory hazards that injure via absorption, inhalation, and skin contact.

Third, the overall structure of the pre-2016 version of Title 29 assigns the risk of employee falls to Subparts "D" and "F." For example, 29 C.F.R. § 1910.28(a)(1) of Subpart "D" describes the subpart as "requir[ing] employers to provide protection for each employee exposed to fall and falling object hazards." 29 C.F.R. § 1910.28(b)(1)(i) further clarifies a "fall hazard" as arising when employees are on a "walking-working surface with an unprotected side or edge that is 4 feet (1.2 m) or more above a lower level . . . ." But the provision that Sierra was charged with violating isn't located anywhere within this subpart. Instead, § 1910.132 is located several subparts away, in Subpart "I" (and, notably, immediately preceded by Subpart "H" addressing "Hazardous Materials"). NOSHA's argument moves a provision from one subpart to the other. But we aren't supposed to read regulations that way. Quite to the contrary, "[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Scalia & Garner, *supra*, at 174 (footnote omitted).

Furthermore, NOSHA's interpretation of § 1910.132(a) would give it breathtaking scope and reach. Subpart "D" defines a "fall hazard" as occurring only at four feet or higher. But according to NOSHA, the "hazard" of § 1910.132(a) of Subpart "I" includes no height limitation, so apparently it kicks in at any height. Thus, PPEs and PPE training are required whenever an employee steps on anything even mere inches above floor level—footstools, benches, even the single step of a staircase; every employee now needs a PPE to walk up or down a stairway. Would it apply to an employee who stands on his tippy-toes to reach something without a PPE? If § 1910.132(a) means what NOSHA says it does, there's nothing to

prevent NOSHA from prosecuting that as a violation, as utterly absurd as that seems.

In short, the most plain and natural reading of the entirety of the pre-2016 version of 29 C.F.R. § 1910.132 is that it's limited to hazards that cause injury through "absorption, inhalation or physical contact," and doesn't cover the risk of falling created by having employees work in high places. NOSHA cited and relied upon the wrong regulation in imposing its fine, and it's no longer clear what the outcome might have been had it cited one that did apply (perhaps, but not certainly, subpart "D") and allowed Sierra to mount a defense against it.

IV.

Nonetheless, NOSHA argues that its legal interpretation of the regulations at issue ought to be given deference. That's true, to a point. But only to a point. Courts give deference only to agency interpretations of law that are "reasonable" and within the language of the governing regulation and statutes. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *see also Taylor v. Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (under the Nevada Administrative Procedures Act, courts defer to agency interpretations of their governing statutes or regulations if the interpretation is within the language of the statute).

NOSHA's interpretation strikes me as neither; it's an interpretation that re-writes a clear regulation of relatively limited scope into an ill-defined one of almost boundless and unlimited scope, with scant regard for the actual text. If we're required to give deference to an interpretation as far-reaching and atextual as this one with precious little judicial review over the end result, I wonder if Judge (now Justice) Gorsuch wasn't right to question whether it makes constitutional sense to give so much power to interpret the meaning of a regulation to the very agency charged with prosecuting alleged violations of it. *See Gutierrez-Brizuela*, 834 F.3d at 1149.

The very purpose of requiring that federal regulations be published for all the world to see is to give fair notice to potential violators of the precise conduct prohibited under pain of administrative sanction. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) (written law serves to notify when the state will bring its force to bear, and "a bad man has as much reason as a good one" to want to know when "the axe will fall"). Congress delegated some rule-making power in this arena to federal OSHA to define what conduct ought to be punished. But once OSHA exercised that delegated power and promulgated something into the Code of Federal Regulations, I doubt that Congress intended that its state counterparts could subsequently re-cast the meaning of those words on the fly, totally ad hoc, under the rubric of "agency inter-

pretation," in order to penalize some unrelated conduct that OSHA's own published words don't reasonably cover. That strikes me as the very definition of "arbitrary," not to mention a serious due process problem to boot.

Once written, words are supposed to have a fixed meaning that ought to be more or less understandable to any reasonable person endeavoring to read them with an eye toward avoiding penalty. *See* Scalia & Garner, *supra*, at 78 ("Words must be given the meaning they had when the text was adopted."). It's true that litigants and lawyers may, and constantly do, argue over shades of meaning when the written words are unclear. But when words are clear, what shouldn't be the subject of argument is whether they have any definite meaning at all. Government agencies aren't supposed to be able to prosecute anyone they want whether or not the targeted conduct bears any relation to words published anywhere in any regulation or statute. Law isn't a looking-glass world where words mean whatever happens to be most convenient in one moment and something very different in the next. *See* Lewis Carroll, *Through the Looking-Glass* 188 (Signet Classic 2000) ("'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'").

OSHA drafted a regulation and made it law through the regular procedures of the Administrative Procedures Act. Having done so, it (and its state counterpart agencies) ought to stand by the original meaning of its own regulation and not try to make it now mean something else. *Cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) ("*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.").

V.

Consequently, while I fully agree that a remand is necessary, on remand I would suggest that the parties and the Board seriously reconsider whether the words of the regulation relied upon by NOSHA bear any reasonable relationship to Sierra's conduct or whether instead this entire case shouldn't just be dismissed outright.

THOMAS KNICKMEYER, Appellant, *v.* THE STATE OF NEVADA, ex rel. EIGHTH JUDICIAL DISTRICT COURT, Respondent.

No. 71372-COA

November 16, 2017 408 P.3d 161

Appeal from a district court order denying a petition to set aside an arbitration order. Eighth Judicial District Court, Clark County; Nancy Becker, Senior Judge.

Affirmed.

[Rehearing denied December 18, 2017]

Kirk T. Kennedy, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, *Clark G. Leslie*, Chief Deputy Attorney General, and *D. Randall Gilmer*, Senior Deputy Attorney General, Carson City, for Respondent.

Before Tao and Gibbons, JJ.[1]

OPINION

By the Court, Tao, J.:

The principal legal question addressed in this appeal is whether certain provisions of NRS Chapter 289 (namely, NRS 289.040, 289.057, and 289.060), intended to provide job-related protections to peace officers employed by law enforcement agencies, apply to bailiffs and marshals employed by the Eighth Judicial District Court. We conclude that judicial marshals are "peace officers" within the meaning of those statutes, but the Eighth Judicial District Court is not a "law enforcement agency" as statutorily defined. Accordingly, the provisions at issue do not apply to Knickmeyer, and we affirm the district court's denial of his petition to set aside the arbitration award in this case.

FACTUAL AND PROCEDURAL HISTORY

The Eighth Judicial District Court (EJDC) employed Thomas Knickmeyer first as a bailiff, and then later as an administrative marshal. Knickmeyer's employment was governed by the terms of a written Memorandum of Understanding (MOU) between the Clark County Marshal's Union and the EJDC, which stipulated that adverse employment actions, including possible termination, were to

[1]The Honorable Abbi Silver, Chief Judge, voluntarily recused herself from participation in the decision of this matter.

be resolved through a series of administrative proceedings, eventually culminating in a binding arbitration hearing if necessary.

The EJDC sought to terminate Knickmeyer's employment after co-workers reported several incidents of insubordination, vulgar language, and unprofessional behavior. The allegations included reports that Knickmeyer used foul language in the presence of a co-worker, publicly referred to an attorney who had complained about him as a "bitch," and retaliated against her by ordering that her purse be searched and re-scanned even after being told it contained no suspicious items. He also openly used an obscenity to refer to a superior officer. In seeking termination, the EJDC noted that Knickmeyer had previously been subject to lesser disciplinary actions in 1997, 2003, and 2013.

During the various administrative proceedings below, every hearing officer agreed that termination was appropriate and warranted. Knickmeyer appealed each step as outlined in the MOU, ultimately seeking arbitration. The arbitrator upheld the EJDC's decision to terminate Knickmeyer, finding that a preponderance of the evidence demonstrated that Knickmeyer committed the infractions in question and that termination was an appropriate response. The arbitrator's decision specifically noted that his conclusion was based only upon the immediate incidents at stake and not upon the previous complaints from 1997, 2003, or 2013.

Knickmeyer petitioned the district court to set aside the arbitrator's decision, arguing that the EJDC violated his statutory rights under NRS Chapter 289 by improperly disclosing and relying upon his prior disciplinary history as justification for termination in this case. The district court denied the petition, and Knickmeyer appeals, repeating the same arguments made to the district court.

ANALYSIS

This court reviews a district court decision to confirm an arbitration award de novo. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 97, 127 P.3d 1057, 1067 (2006). But the scope of the district court's review of an arbitration award (and, consequently, our own de novo review of the district court's decision) is extremely limited, and is "nothing like the scope of an appellate court's review of a trial court's decision." *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "A reviewing court should not concern itself with the 'correctness' of an arbitration award and thus does not review the merits of the dispute." *Bohlmann v. Printz*, 120 Nev. 543, 547, 96 P.3d 1155, 1158 (2004) (quoting *Thompson v. Tega-Rand Int'l*, 740 F.2d 762, 763 (9th Cir. 1984)), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006).

Rather, when a contractual agreement mandates that disputes be resolved through binding arbitration, courts give considerable

deference to the arbitrator's decision. Judicial review is limited to inquiring only whether a petitioner has proven, clearly and convincingly, that one of the following is true: the arbitrator's actions were arbitrary, capricious, or unsupported by the agreement; the arbitrator manifestly disregarded the law; or one of the specific statutory grounds set forth in NRS 38.241(1) was met. *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006); *Health Plan of Nev.*, 120 Nev. at 695, 100 P.3d at 176.

In this appeal, Knickmeyer asserts that the EJDC violated his due process rights by failing to comply with certain provisions of NRS Chapter 289 relating to discovery. He also contends that the arbitrator manifestly disregarded relevant law and exceeded his authority by determining that Knickmeyer's conduct violated standards not articulated within the MOU and by failing to make required findings of reasonableness.[2]

NRS Chapter 289

Knickmeyer first argues that his statutory rights under NRS Chapter 289 were violated because he was not provided with discovery relating to three prior disciplinary incidents (from 1997, 2003, and 2013) that were used against him during the arbitration, in violation of the requirements of NRS 289.040, NRS 289.057, and NRS 289.060.

As an initial observation, however, Knickmeyer waived this objection by failing to ever request any such discovery below or object to any failure to receive it to the arbitrator. *See Carrigan v. Comm'n*

[2]Knickmeyer's brief also includes two other arguments that we need not separately address. He contends that the MOU itself imposed contractual discovery obligations above and beyond those set forth in NRS Chapter 289, but this argument is presented only cursorily and is less than cogent. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued or supported by relevant authority). Moreover, Knickmeyer did not raise this argument before the arbitrator, belatedly raising it for the first time only before the district court. *See State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("Because judicial review is limited to the administrative record, arguments made for the first time on judicial review are generally waived by the party raising them."). Consequently, the arbitrator did not make any factual findings relating to whether the EJDC breached the MOU. Without these factual findings, we are unable to address this issue—unlike his argument relating to the applicability of NRS Chapter 289, which presents a pure question of law that does not depend on facts outside of the appellate record. *See Nev. Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877-78 n.9 (1999) (explaining that the court would resolve an issue of statutory interpretation not litigated below "in the interests of judicial economy"). Finally, Knickmeyer's brief also references an alleged constitutional due process violation, but he merely re-frames his arguments about the scope and application of NRS Chapter 289 and the MOU as due process problems without identifying or discussing any other independent procedural or substantive due process violation.

on Ethics, 129 Nev. 894, 905 n.6, 313 P.3d 880, 887 n.6 (2013) ("Arguments not raised before the appropriate administrative tribunal and in the district court normally cannot be raised for the first time on appeal."). Moreover, the arbitrator expressly stated that he was not relying upon the prior incidents in reaching his decision and that the instant incident alone provided sufficient grounds for termination. Consequently, any discovery relating to those incidents is entirely irrelevant to the case at hand. *See* NRCP 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); *see also Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) ("[W]hat is clear from our caselaw is that prejudice must be established in order to reverse a district court judgment; it is not presumed and is established by providing record evidence showing that, but for the error, a different result might have been reached.").

To overcome these defects, Knickmeyer argues on appeal that, under NRS Chapter 289, all discovery relating to prior disciplinary actions must automatically be provided whether any party individually requests it or not, and whether or not the arbitrator ultimately ended up relying upon it in his final decision. Knickmeyer's argument hinges on two contentions: first, that the statutes in question apply to him as a judicial marshal employed by the EJDC and, second, if they do apply, that they were violated by the EJDC in this case despite his never having requested discovery or objected to its absence. Both contentions must be true for Knickmeyer to win this appeal; if either fails, then we must decide the issue against him.

NRS Chapter 289 grants certain procedural protections to "peace officers" whenever adverse employment actions are initiated against them by their employers. *See* NRS 289.010(3). *See generally Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 336-37, 302 P.3d 1108, 1114 (2013). Judicial marshals are specifically identified as peace officers in NRS 289.150(4). Knickmeyer thus argues that all of the protections of NRS Chapter 289 must apply to him. Knickmeyer is partially correct in that judicial marshals are "peace officers" covered by the statute and therefore certain sections of NRS Chapter 289 indisputably apply to judicial marshals such as him.

This, however, doesn't quite resolve the question at hand. Peace officer or not, portions of Chapter 289 apply only to petitioners who are employed by a "law enforcement agency." *See, e.g.*, NRS 289.020(1) ("A law enforcement agency shall not use punitive action . . . ."); NRS 289.025 ("the home address of a peace officer and any photograph in the possession of a law enforcement agency are not public information"). Other portions of this chapter do not contain this limitation. *See, e.g.*, NRS 289.810(1) ("A peace officer shall not use a choke hold on any other person."); NRS 289.820(1) ("A peace officer shall not engage in racial profiling."). We must pre-

sume that the inclusion or omission of these words from different parts of the statute was purposeful. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."). Consequently, the plainest and most obvious meaning of Chapter 289 is that many portions of it apply broadly to any peace officer employed by any entity, but other portions apply in a more limited way only to peace officers employed by a "law enforcement agency."

The statutes that Knickmeyer alleges that the EJDC violated in this case are NRS 289.040, NRS 289.057, and NRS 289.060,[3] which set forth procedures that must be employed before a peace officer can be subjected to adverse employment action. NRS 289.040 prohibits law enforcement agencies from inserting unfavorable comments into the peace officer's administrative file unless certain requirements are met. NRS 289.057 governs how a law enforcement agency may investigate allegations of misconduct and initiate discipline, including discovery procedures. NRS 289.057(3)(a) permits the peace officer to review any recordings, notes, and interview transcripts pertaining to the investigation after the investigation has concluded. NRS 289.060 describes how law enforcement agencies may conduct disciplinary hearings.

But all of these statutes expressly apply only when a "law enforcement agency" seeks to impose discipline against one of its peace officers. Thus, these provisions can apply to Knickmeyer only if his employer, the EJDC, can be considered a "law enforcement agency" within the meaning of NRS Chapter 289. This presents a question of statutory interpretation.

We review questions of statutory meaning de novo. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). In interpreting a statute, we begin with its plain meaning and consider the statute as a whole, awarding meaning to each word, phrase, and provision, while striving to avoid interpretations that render any words superfluous or meaningless. *Haney v. State*, 124 Nev. 408, 411-12, 185 P.3d 350, 353 (2008). If the Legislature has independently defined any word or phrase contained within a statute, we must apply that definition wherever the Legislature intended it to apply because "[a] statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." *Williams v. Clark Cty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002); 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 20:8 (7th ed. 2009). The words of a statute must be given their plainest and most ordinary meaning unless the Legislature clearly used them differently, or the words are used in an

[3]Knickmeyer also mentions NRS 289.080 in his brief as a statute that applies to him, but doesn't allege that 289.080 was violated.

ambiguous way. *See State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous." (citing *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004)); *see also* Scalia & Garner, *supra*, at 56 ("The words of a governing text are of paramount concern . . . .").

NRS Chapter 289 does not contain its own definition of "law enforcement agency." However, NRS 179D.050 and NRS 62A.200 both define the phrase "local law enforcement agency" as referring to a sheriff's office or police department. Furthermore, the word "agency" is typically used by the Nevada Supreme Court and in administrative regulations to refer to subdivisions of the executive branch, not divisions of the judiciary. *Cf.* NAC 239.690; *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 87 n.4, 343 P.3d 608, 613 n.4 (2015). "We presume that the Legislature enact[s a] statute with full knowledge of existing statutes relating to the same subject." *Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) (internal quotation marks omitted). Thus, the plain text of the relevant statutes makes clear that the term "law enforcement agency" does not encompass a judicial court such as the EJDC. We ought to conclude that the Legislature said what it meant and meant what it said, and we could end our inquiry there.

But there's more. Knickmeyer's argument betrays a fundamental misunderstanding of the respective roles of the three branches of Nevada government. To conclude that the EJDC is a "law enforcement agency" is to conflate the roles of the judicial and executive branches and to presume that the Legislature used words in a most unnatural way. *See* Nev. Const. art. III, § 1 ("The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.").

Under our state constitution, the Legislature writes the laws. *See* Nev. Const. art. 4, § 1; *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). The Judiciary hears justiciable controversies and issues judgments and decrees in individual cases. *See* Nev. Const. art. 6, § 6; *Galloway*, 83 Nev. at 20, 422 P.2d at 242. And the Executive "enforces" the laws. *Galloway*, 83 Nev. at 20, 422 P.2d at 242 ("The executive power extends to the carrying out and enforcing the laws enacted by the Legislature."); *see* Nev. Const. art. 5, § 7 (the Governor "shall see that the laws are faithfully executed"); *see also Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) (prosecuting crimes is a "quintessentially executive function"). The separation of these powers between three indepen-

dent branches of government with the power to check-and-balance each other is a central tenet of our constitutional structure and a fundamental bulwark of democratic freedom. *See Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) (citing The Federalist No. 47 (James Madison) (Random House 1941)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 640 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty"; "The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand."); *cf. Comm'n on Ethics v. Hardy*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-04 (2009) (discussing differences between Nevada Constitution and U.S. Constitution). The powers of the EJDC are enumerated in Article 6, Section 6 of the Nevada Constitution, and Knickmeyer does not contend that the EJDC engages in investigating and prosecuting crimes as part of its constitutionally assigned judicial functions.

Thus, the judiciary is not empowered to engage in "law enforcement" functions any more than the executive or legislative branches are empowered to engage in judicial functions. *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches."). The phrase "law enforcement agency" as used in NRS Chapter 289 therefore cannot be naturally read to encompass the EJDC, and the statutes cited by Knickmeyer—NRS 289.040, NRS 289.057, and NRS 289.060, all of which apply only to "law enforcement agencies"—do not apply to the EJDC.[4] *See Mangarella v. State*, 117 Nev. 130, 134-35, 17 P.3d 989, 992 (2001) (holding that Nevada courts must interpret statutes so that they do not conflict with the state or federal constitutions). The EJDC could not have violated statutes that do not apply to it, and consequently the EJDC committed no discovery violations that would entitle Knickmeyer to relief.

Whether the arbitrator exceeded his authority

Knickmeyer also argues that the arbitrator exceeded his authority by relying upon the Clark County Marshal's Division Policy and Procedure Manual, and upon certain law review articles, as guidelines for acceptable conduct when the MOU makes no explicit reference to either.

[4]A potentially interesting question exists relating to whether, by signing the MOU, the EJDC contractually agreed to assume some of the responsibilities outlined in those statutes even if they otherwise would not have applied. But as noted above in footnote 2, Knickmeyer did not argue this issue before the arbitrator, the arbitrator made no factual findings relating to it, and therefore we need not address it.

When reviewing whether an arbitrator exceeded his powers, this court begins by presuming that arbitrators act within the scope of their authority. *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 697, 100 P.3d 172, 178 (2004). Arbitrators can exceed their authority when they act outside the scope of the governing contract, but this court will not vacate an arbitrator's award—even if erroneous—if the arbitrator's interpretation is rationally grounded in the agreement or there is "colorable justification" for construing and applying the contract the way the arbitrator did. *Id.* at 698, 100 P.3d at 178. Thus, the central question is "whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided." *Id.*

The parties agree that the governing agreement here is the MOU. Knickmeyer argues that the MOU did not allow the arbitrator to consider the Clark County Marshal's Division Policy and Procedure Manual, or any other sources such as law review articles, because the MOU did not explicitly reference them. But the arbitrator could have rationally interpreted those sources to represent accurate summaries of the "established rules, regulations or policies of the Courts" that the MOU permits to be considered. *See id*. ("Arbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement."). Consequently, "[t]he arbitrator's total findings demonstrate that he was construing the contract, and the record supports more than a colorable justification for the outcome." *Id.* at 698-99, 100 P.3d at 179. Accordingly, Knickmeyer has not met his burden of demonstrating, by clear and convincing evidence, that the arbitrator exceeded his authority.

Whether the arbitrator disregarded the law

Knickmeyer's final argument is that the arbitrator consciously disregarded relevant law by failing to determine whether the termination was reasonable in light of less severe forms of discipline. A court may vacate an arbitration decision if the arbitrator manifestly disregarded relevant law. *Bohlmann v. Printz*, 120 Nev. 543, 545-47, 96 P.3d 1155, 1156-58 (2004), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 452 n.32, 134 P.3d 103, 109 n.32 (2006). Relief is "extremely limited" and manifest disregard occurs only when an arbitrator "recognizes that the law absolutely requires a given result and nonetheless refuses to apply the law correctly." *Id*.

Here, Knickmeyer's argument is belied by the record. The arbitrator's decision contains numerous references to the available options of progressive discipline and explains quite clearly why Knickmeyer's conduct was "sufficiently egregious" to justify termination without first imposing less severe forms of discipline. Thus, Knickmeyer has not met his heavy burden of showing, by clear and convincing evidence, that the arbitrator consciously ignored applicable law in deciding that termination was appropriate.

CONCLUSION

For the foregoing reasons, Knickmeyer has failed to demonstrate that the arbitrator either exceeded his authority or manifestly disregarded the law, and we affirm the district court's denial of his petition to set aside the arbitration order.

Gibbons, J., concurs.

LAMAR ANTWAN HARRIS, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 70679-COA

November 16, 2017 407 P.3d 348

Appeal from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Reversed and remanded.

Carling Law Office, PC, and *Matthew D. Carling*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. Van Boskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

Before Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Gibbons, J.:

This case arises from an untimely postconviction petition for a writ of habeas corpus stemming from a conviction, entered pursuant to a jury verdict, of battery with the use of a deadly weapon resulting in substantial bodily harm. In his petition and supplement, appellant Lamar Antwan Harris alleged he had good cause for the delay in filing the petition because he believed counsel had filed a petition on his behalf, his belief was reasonable, and he filed the petition within a reasonable time of discovering his petition had not been filed. The district court dismissed the petition as procedurally time-barred.

In this appeal, we consider whether counsel's affirmative misrepresentation regarding filing a postconviction petition and subsequent abandonment of the petitioner can be an impediment external to the defense to satisfy cause for the delay under NRS 34.726(1)(a)

for filing an untimely petition. We conclude it can. We hold that to demonstrate cause for the delay under NRS 34.726(1)(a) in such a circumstance, a petitioner must show: (1) the petitioner believed counsel filed a petition on petitioner's behalf, (2) this belief was objectively reasonable, (3) counsel abandoned the petitioner without notice and failed to timely file the petition, and (4) the petitioner filed the petition within a reasonable time after the petitioner should have known counsel did not file a petition. Because we conclude Harris demonstrated cause for the delay under the approach set forth above, we reverse the district court's order and we remand for further proceedings.

PROCEDURAL AND FACTUAL HISTORY

Harris was convicted of battery with the use of a deadly weapon resulting in substantial bodily harm and was sentenced to 70 to 175 months in prison. After sentencing, Harris opted to have his previous counsel withdraw and he hired new counsel, Leslie Park, to represent him in his post-trial proceedings. Through Park, Harris filed a direct appeal from his judgment of conviction. Harris' conviction was affirmed on direct appeal. *Harris v. State*, Docket No. 59817 (Order of Affirmance, Dec. 13, 2012).

More than two years after the remittitur on direct appeal issued, Harris filed an untimely pro se postconviction petition for a writ of habeas corpus. As good cause to excuse the untimely filing, Harris claimed he reasonably believed Park had filed a petition on his behalf, and when he discovered she had not, he filed his petition within a reasonable time after that discovery.

The district court concluded Harris might be able to establish good cause to overcome the procedural bar and appointed counsel to supplement Harris' petition. In the supplement, counsel argued for an extension of the *Hathaway*[1] reasoning regarding good cause when counsel fails to file a direct appeal from a judgment of conviction. Specifically, counsel argued cause to excuse the procedural time-bar should exist in situations where a defendant reasonably believes counsel filed a postconviction petition on his behalf, and the petitioner files a petition within a reasonable time of realizing counsel did not file a petition.

The district court scheduled an evidentiary hearing on Harris' good cause claim. However, on the scheduled hearing date, a senior judge presided over the proceedings, declined to hold an evidentiary hearing, and denied the petition. The district court subsequently granted Harris' motion for reconsideration and held an evidentiary hearing.

At the hearing, Harris testified he hired Park to represent him for both his appeal and his postconviction petition and claimed they

[1]*Hathaway v. State*, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003).

agreed to a fee arrangement of $8,000 for handling both cases. After initially denying she agreed to represent Harris for his postconviction petition, Park agreed she was retained for both the direct appeal and the petition. She also agreed the fee was $8,000, but stated Harris had only paid her about half of that.

Harris testified he received a copy of a document drafted by Park entitled "Petition for Writ of Habeas Corpus" approximately five months after the remittitur issued in his direct appeal. The petition was signed by Park and included information causing it to appear as though it had been served on the Clerk of the Supreme Court, the Clark County District Attorney, and the Nevada Attorney General. The caption also indicated it was being filed in the Nevada Supreme Court.

Harris testified that sometime later he was informed by a fellow inmate his petition was filed in the wrong court. In December of 2013, before the expiration of the one-year time limit for filing a postconviction petition, Harris contacted counsel to point this error out and she told him she would immediately correct it and file it in the district court. Throughout 2014, Harris attempted to contact Park to no avail.

Because he understood postconviction proceedings could take some time, Harris waited until December of 2014 to contact the district court and the Nevada Supreme Court to inquire into the status of his petition. Between the end of December 2014 and the beginning of January 2015, Harris learned his petition had not been filed in either the district court or the Nevada Supreme Court. Harris then filed his petition on March 11, 2015.

Park confirmed at the evidentiary hearing she never filed the petition. Park claimed she was waiting for Harris to pay her the remainder of her fee before filing the petition. She stated she signed the petition and filled out the certificate of service in case Harris paid her right before the deadline to file.

After hearing this testimony, the district court concluded Harris' testimony was more credible than Park's because Park's responses were equivocal in nature, Park stated she lacked knowledge in response to many questions, and she conceded to many of the factual allegations put forth by Harris. Although troubled by Park's performance, the district court also concluded Harris did not demonstrate good cause to overcome the procedural time-bar. Specifically, the district court concluded *Hathaway* could not be extended because "*Hathaway*'s holding was clearly couched in the fact that the petitioner there had a Sixth Amendment right to the effective assistance of counsel on direct appeal, a claim that could excuse his late petition filing." The district court further concluded, because Harris was not entitled to the effective assistance of postconviction counsel, he was "precluded from relying upon a claim of ineffective assistance of counsel to show good cause to excuse the procedural default."

Therefore, the district court granted the State's motion and dismissed the petition as procedurally time-barred. This appeal follows.

DISCUSSION

Harris claims the district court erred by denying his petition as procedurally barred. He asserts he demonstrated cause and prejudice to excuse the procedural time-bar because his counsel's actions prevented him from timely filing a postconviction petition and deprived him of his statutory right to seek postconviction relief.

Pursuant to NRS 34.726(1), a postconviction petition for a writ of habeas corpus "must be filed within one year after entry of the judgment of conviction or, if a timely appeal is taken from the judgment, within one year after [the Nevada Supreme Court] issues its remittitur, absent a showing of good cause for the delay." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 94 (2012). Harris filed a direct appeal from his judgment of conviction and the remittitur issued on January 9, 2013. However, Harris did not file his petition until March 11, 2015, more than two years after the remittitur issued. Thus, Harris' petition was procedurally barred absent a demonstration of good cause for the delay.

"[G]ood cause for delay exists if the petitioner demonstrates to the satisfaction of the court: (a) [t]hat the delay is not the fault of the petitioner; and (b) [t]hat dismissal of the petition as untimely will unduly prejudice the petitioner." NRS 34.726(1). "Generally, good cause means a substantial reason; one that affords a legal excuse." *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (internal quotation marks omitted), *abrogated by statute on other grounds as recognized by Huebler*, 128 Nev. at 197 n.2, 275 P.3d at 95 n.2.

Harris was not entitled to the effective assistance of postconviction counsel and he could not establish good cause to excuse the delay in filing his petition based on a claim of ineffective assistance of counsel. *See Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (recognizing a claim of ineffective assistance of counsel does not constitute good cause to excuse the procedural bar where a petitioner does not have a Sixth Amendment or statutory right to the appointment of counsel). Harris, however, argues there is a distinction between a claim of ineffective assistance of counsel for purposes of habeas relief and a good cause claim that counsel's actions interfered with or created an impediment that prevented a petitioner from filing a postconviction petition within the procedural time limits. He argues there are some circumstances where counsel's actions can be an impediment external to the defense and establish undue prejudice to satisfy good cause under NRS 34.726(1) for filing an untimely petition. He asserts the Nevada Supreme Court identified such a circumstance in *Hathaway*. Harris argues his counsel's actions in this case represent another such circumstance, and

he urges this court to adopt a test, similar to the one in *Hathaway*, for evaluating a claim of good cause based on a petitioner's reliance on counsel's affirmative misrepresentation that counsel had, or was going to, timely file a petition on the petitioner's behalf.

Cause for the delay under NRS 34.726(1)(a)

In order to show the delay was not the fault of the petitioner, "a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. "In terms of a procedural time-bar, an adequate allegation of good cause would sufficiently explain why a petition was filed beyond the statutory time period." *Id*. at 252-53, 71 P.3d at 506.

Generally, "mere attorney error, not rising to the level of ineffective assistance of counsel, such as attorney ignorance or inadvertence," will not constitute cause to overcome a procedural bar "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" *Crump v. Warden*, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). But there is an "essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client." *Maples v. Thomas*, 565 U.S. 266, 282 (2012). Where counsel severs the principal-agent relationship and abandons his client without notice, the actions or omissions of counsel "'cannot fairly be attributed to [the client].'" *Id*. at 281 (quoting *Coleman*, 501 U.S. at 753). In such a situation, counsel's actions or omissions then become an impediment external to the defense and may constitute good cause to overcome the procedural bars. *Id*. at 283.

As noted by Harris, in *Hathaway*, the Nevada Supreme Court identified one circumstance where counsel's omission can constitute an impediment external to the defense and a petitioner can establish good cause for the delay under NRS 34.726(1). 119 Nev. at 252-55, 71 P.3d at 506-08. Hathaway asserted he had good cause to file an untimely petition because he asked counsel to file a direct appeal on his behalf, counsel affirmatively indicated he would file an appeal, Hathaway believed his counsel had filed an appeal, and Hathaway filed his petition within a reasonable time after learning his counsel did not file an appeal. *Id*. at 254, 71 P.3d at 507. The *Hathaway* court held a claim that counsel deprived the petitioner of a direct appeal could provide good cause to excuse the procedural time-bar. *Id*. at 253-55, 71 P.3d at 507-08. The *Hathaway* court then set forth a "test for evaluating an allegation of good cause based upon a petitioner's mistaken belief that counsel had filed a direct appeal." *Id*. at 254-55, 71 P.3d at 507-08.

Consistent with *Hathaway*, we hold counsel's affirmative representation that a timely postconviction petition will be filed, combined with counsel's subsequent abandonment without timely filing the petition, presents a circumstance where counsel's actions or omissions can constitute an impediment external to the defense to establish cause for the delay under NRS 34.726(1)(a). Using the framework in *Hathaway*, we establish the following test for evaluating an allegation of cause for the delay based on such a circumstance.

First, a petitioner must show the petitioner believed counsel filed a timely petition on petitioner's behalf. Second, the petitioner must show this belief was objectively reasonable, i.e., there was an attorney-client relationship and counsel affirmatively told or represented to the petitioner counsel had, or was going to, timely file a petition on the petitioner's behalf. Third, the petitioner must show counsel then abandoned petitioner without notice and failed to timely file the petition. We emphasize that the petitioner must demonstrate abandonment by counsel to satisfy this prong of the test; mere attorney negligence, such as miscalculating a filing deadline, will not suffice. Fourth, the petitioner must show the petition was filed within a reasonable time after the petitioner *should have known* counsel did not timely file a petition. This prong requires the petitioner to be reasonably diligent in determining whether the petition was actually filed.

If a petitioner can meet all prongs of this test, the petitioner will have established cause for the delay under NRS 34.726(1)(a). This is so because, in such a circumstance, counsel's abandonment of the petitioner will constitute an impediment external to the defense that prevented the petitioner from timely pursuing postconviction relief.

Undue prejudice under NRS 34.726(1)(b)

Under NRS 34.726(1)(b), a petitioner must also demonstrate there will be undue prejudice by dismissal of the petition as untimely. In *Huebler*, the Nevada Supreme Court stated that to show undue prejudice under NRS 34.726(1)(b), "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." 128 Nev. at 197, 275 P.3d at 95. We are required to follow this test. However, for the reasons discussed below, we disagree that this is the proper test for determining undue prejudice under NRS 34.726(1)(b).

"Nevada's post-conviction statutes contemplate the filing of one post-conviction petition to challenge a conviction or sentence." *Brown*, 130 Nev. at 572, 331 P.3d at 872. NRS Chapter 34 contains several different procedural bars that are designed to prevent different abuses of the postconviction remedy. "The purpose of the single post-conviction remedy and the statutory procedural bars is

'to ensure that petitioners would be limited to one time through the post-conviction system.'" *Id*. (quoting *Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519, 530 (2001)).

The purpose of the procedural bar in NRS 34.810 is to prevent a petitioner from raising claims that could have previously been raised, NRS 34.810(1)(b), and to prevent the filing of multiple petitions, NRS 34.810(2). In contrast, NRS 34.726 and NRS 34.800 are procedural time bars and the purpose of each is to "ensure that claims are raised before evidence is lost or memories fade." *Lozada v. State*, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). Each of the procedural bars operate independently of each other. For example, a petition may be procedurally barred under NRS 34.726(1), but not under NRS 34.810, and vice versa. Further, as the *Pellegrini* court noted, it is conceivable that a petitioner could demonstrate good cause under NRS 34.726, but laches under NRS 34.800 could nevertheless bar the petition. 117 Nev. at 875, 34 P.3d at 529.

Given the different purposes behind the procedural bars in NRS 34.726 and NRS 34.810, and taking into account the procedural bars operate independently of each other, it is unsurprising different terms are used to describe the prejudice necessary to overcome each procedural bar. NRS 34.726(1)(b) requires a showing of "undue" prejudice, while NRS 34.810 requires a showing of "actual" prejudice. We must presume that because the statutes are located within the same chapter but use different modifiers to describe the type of prejudice that must be shown, the type of prejudice required under each statute is different. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."). The material difference in terms is further evidenced by the statutory structure for what is necessary to overcome each procedural bar. NRS 34.726(1) requires only a showing of good cause, which it defines as cause and undue prejudice. NRS 34.726(1)(a), (b). In contrast, NRS 34.810(3) requires a showing of both good cause *and* actual prejudice. This, however, may not have been considered in the *Huebler* decision. Instead, the *Huebler* decision appears to conflate the undue prejudice requirement under NRS 34.726(1)(b) with the actual prejudice requirement under NRS 34.810.

The *Huebler* decision cites to *Hogan v. Warden*, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993), for the proposition that under NRS 34.726(1)(b), "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." *Huebler*, 128 Nev. at 197, 275 P.3d at 95. Yet the procedural bar at issue in *Hogan* was NRS 34.810(3), which requires a showing of actual prejudice, not NRS 34.726(1), which only requires a showing of undue prejudice. Because the

Huebler decision adopted the prejudice test set forth in *Hogan*, a petitioner is now required to show actual prejudice in order to satisfy the undue prejudice prong under NRS 34.726(1)(b). This requirement, however, is inconsistent with other Nevada Supreme Court precedent, specifically *Hathaway*, which *Huebler* does not purport to overrule.

In *Hathaway*, the court held prejudice is presumed for the purposes of NRS 34.726(1)(b) if the petitioner can show a reasonable belief counsel filed an appeal and the petitioner filed a petition within a reasonable time of learning a direct appeal had not been filed. 119 Nev. at 255, 71 P.3d at 508. Yet under *Huebler*'s undue prejudice test, undue prejudice could never have been demonstrated, much less presumed, under the facts in *Hathaway*. This is because counsel's failure to file a direct appeal does not "show that *errors in the proceedings underlying the judgment* worked to the petitioner's actual and substantial disadvantage." *Huebler*, 128 Nev. at 197, 275 P.3d at 95 (emphasis added). Given the finding of presumed prejudice in *Hathaway*, it appears undue prejudice under NRS 34.726(1)(b) may be established by demonstrating something other than actual prejudice.

It also appears the prejudice required to overcome the procedural time-bar and the prejudice required to establish ineffective assistance of counsel may have been conflated in the *Huebler* decision. *Huebler* found the undue prejudice test under NRS 34.726(1)(b) parallels the materiality prong for establishing a violation under *Brady v. Maryland*, 373 U.S. 83 (1963). *Huebler*, 128 Nev. at 198, 275 P.3d at 95. *Huebler* held, where a *Brady* violation is alleged in the guilty-plea context after a specific request has been made, in order to establish undue prejudice under NRS 34.726(1)(b), a petitioner must show "a reasonable *possibility* that but for the failure to disclose the evidence the defendant would have refused to plead and would have insisted on going to trial." *Id*. at 203, 275 P.3d at 99; *see also Hill v. Lockhart*, 474 U.S. 52, 57-60 (1985) (setting forth the test for the prejudice prong for establishing ineffective assistance of counsel in the context of a guilty plea). This is inconsistent with *Lozada*.

In *Lozada*, the Nevada Supreme Court stated, "[t]he required showing of prejudice to establish a claim of ineffective assistance of counsel is separate and distinct from the showing of prejudice required to overcome a procedural default." 110 Nev. at 358, 871 P.2d at 949-50. Despite this, *Huebler* set forth a prejudice test for the procedural time-bar that "is similar to the prejudice test that is used to evaluate ineffective-assistance claims by a defendant who has pleaded guilty." 128 Nev. at 203, 275 P.3d at 98-99. Even in light of this clear inconsistency, *Huebler* does not purport to overrule *Lozada*.

In effect, the *Huebler* decision ultimately combined the prejudice prongs of the two procedural bars with each other and with the prejudice required to demonstrate ineffective assistance of counsel, resulting in a single standard for prejudice. As noted above, this is inconsistent with both *Lozada* and *Hathaway.* Although we agree a petitioner who can show actual prejudice under NRS 34.810 can also show undue prejudice under NRS 34.726(1)(b), we do not believe that showing actual prejudice is required to establish undue prejudice under NRS 34.726(1)(b). We further do not think that prejudice under the procedural time-bar should be equivalent to the prejudice required to establish a claim of ineffective assistance of counsel. Rather, we believe the test for undue prejudice under NRS 34.726(1)(b) should be separate and distinct from the test for prejudice to overcome other procedural bars and from the prejudice required to demonstrate ineffective assistance of counsel.

Therefore, absent any explanation in *Huebler* for departing from earlier precedent, we believe *Hathaway* and *Lozada* are the better precedent to follow. Were we free to do so, we would hold, where a petitioner has demonstrated cause for the delay under the test identified above, a petitioner will also have demonstrated undue prejudice under NRS 34.726(1)(b), because the petitioner could show dismissal of the petition as untimely would contravene the Legislature's intent to allow convicted persons a single opportunity to seek postconviction relief.[2]

We recognize, however, *Huebler* was decided after *Lozada* and *Hathaway*, and we must presume *Huebler* intended to implicitly overrule those cases to the extent they are inconsistent with the test for undue prejudice announced in *Huebler*. Under the doctrine of vertical stare decisis, we have no choice but to follow the precedent established in *Huebler*. *See, e.g.*, *State v. Nichols*, 600 N.W.2d 484, 487 (Neb. Ct. App. 1999) ("Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system."). Therefore, as stated in *Huebler*, in order to show undue prejudice under NRS 34.726(1)(b), "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." *Huebler*, 128 Nev. at 197, 275 P.3d at 95. As a practical matter, we note that, because this test focuses on errors underlying the judgment, to evaluate whether a petitioner can demonstrate undue prejudice under this test, a district court will likely have to review the merits of the claims raised in the petition.

[2]We note a petition may be subject to multiple procedural bars. If a petition were subject to any other procedural bars, including laches, the petitioner would also have to overcome those procedural bars in order to have the petition reviewed on its merits.

Application to Harris

Based on the district court's factual findings, we conclude Harris demonstrated cause for the delay under NRS 34.726(1)(a).[3] First, Harris believed his counsel filed a postconviction petition on his behalf. Second, based on Park's conduct, it was objectively reasonable for Harris to believe counsel had filed the petition on his behalf. Park provided Harris with a copy of a signed postconviction petition with a completed certificate of service, Park affirmatively represented to Harris she had filed the petition, and Park again affirmatively represented a petition had been or was going to be filed when Harris informed her the petition she provided to him had been filed in the wrong court. Third, Park then abandoned Harris without notice and failed to file the petition. Fourth, Harris was reasonably diligent in attempting to determine whether Park filed a petition on his behalf and he filed his petition within a reasonable time after he should have known Park did not file a petition on his behalf. Harris continually attempted to contact Park, he reasonably believed the postconviction proceedings could take some time, and within a reasonable time of not hearing from Park, he inquired into his petition with both the district court and the Nevada Supreme Court. Harris filed his petition approximately two months after learning Park did not file a petition on his behalf.

While we can conclude Harris demonstrated cause for the delay based on the district court's findings, we note the district court did not make any findings regarding whether Harris could establish undue prejudice, and we make no determination in this regard. As stated previously, in order to overcome the procedural bar, both prongs of good cause must be met—cause for the delay and undue prejudice. NRS 34.726(1)(a), (b). Because we conclude Harris demonstrated cause for the delay under NRS 34.726(1)(a), we reverse the district court's order dismissing Harris' petition and we remand to the district court to determine whether Harris demonstrated undue prejudice under NRS 34.726(1)(b). Specifically, the district court must determine whether Harris showed "that errors in the proceedings underlying the judgment worked to [his] actual and substantial disadvantage." *Huebler*, 128 Nev. at 197, 275 P.3d at 95.

CONCLUSION

We hold counsel's affirmative representation that counsel has, or will, timely file a postconviction petition, combined with counsel's subsequent abandonment of the petitioner without timely filing the

[3]"We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo." *Huebler*, 128 Nev. at 197, 275 P.3d at 95.

petition, presents a circumstance where counsel's actions or omissions can constitute cause for the delay under NRS 34.726(1)(a) for filing an untimely postconviction petition. To demonstrate cause for the delay based on such a circumstance, a petitioner must show: (1) a reasonable belief counsel filed a petition on petitioner's behalf; (2) this belief was objectively reasonable; (3) counsel abandoned the petitioner without notice and failed to file the petition; and (4) the petitioner filed a petition within a reasonable time after the petitioner should have known counsel did not file a petition. We conclude Harris demonstrated cause for the delay under this test. Therefore, we reverse the district court's order dismissing Harris' petition. Because the district court did not make any findings regarding whether Harris established undue prejudice, we remand to the district court to determine whether Harris demonstrated undue prejudice under NRS 34.726(1)(b).

Silver, C.J., and Tao, J., concur.