IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA Appellant, v. ALEXIS ANNE PLUNKETT, Respondent.	)	Case No. 74169

APPELLANT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 19, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ E.Davis*
Employee, District Attorney's Office

RJM/Melanie Marland/ed

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BEFORE THE GRAND JURY IMPANELED BY THE AFORESAID DISTRICT COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

GJ Case No. 16BGJ180A-B
DC Case No. C324821

ANDREW AREVALO, aka Andrew Jay Arevalo,
ALEXIS PLUNKETT, aka Alexis Anne Plunkett,

Defendants.

Taken at Las Vegas, Nevada

Wednesday, July 5, 2017

10:36 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reported by: Donna J. McCord, C.C.R. No. 337

GRAND JURORS PRESENT ON JULY 5, 2017:

JOHN BLACKWELL, Foreperson
JANE REYLING, Deputy Foreperson
STACEY EARL, Secretary
MARGARET FREE, Assistant Secretary
ISABEL DARENSBOURG
BLANCA FISSELLA
PHILLIP HOLGUIN
GREGORY KRAMER
CAROLE LARKINS
KIMBERLY MADRID
CHARLOTTE MILLER
ADOLPH PEBELSKE
ELIZABETH ROMOFF
DERRICK SIMMONS
FRANCES STOLDAL

Also present at the request of the Grand Jury:
Jay P. Raman
Chief Deputy District Attorney
Tiffany Yang
District Attorney Intern

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LAS VEGAS, NEVADA, JULY 5, 2017

* * * * * * * *

DONNA J. McCORD,

having been first duly sworn to faithfully and accurately transcribe the following proceedings to the best of her ability.

MS. YANG: Good morning, ladies and gentlemen of the Grand Jury. My name is Tiffany Yang. I'm a student attorney practicing under Rule 49.5 under the supervision of Chief Deputy Jay P. Raman. I'm presenting to you Grand Jury case number 16BGJ180A-B, State of Nevada versus Andrew Arevalo, Alexis Plunkett and Rogelio Estrada.

The record will reflect that we have marked a copy of the proposed Indictment as Exhibit Number 1 and that all members of the Grand Jury will be presented with a copy of it.

The defendants in this case are charged with Count 1, conspiracy to unlawfully possess portable telecommunications device by a prisoner; Counts 2 through 12, possess portable telecommunications device by a prisoner; Count 13, conspiracy to unlawfully possess portable telecommunications device by a

prisoner; Count 14, possess portable telecommunications device by a prisoner.

I am required by law to advise you of the elements of these charges. Instructions containing the elements for the offenses set forth in the proposed Indictment will also be provided to you. I would ask that a copy of the standard jury instructions be marked as Exhibit Number 2.

As for the instructions for conspiracy, NRS 199.480, Penalties.

3. Whenever two or more persons conspire;

(a) To commit any crime other than those set forth in subsections 1 and 2, and no punishment is otherwise prescribed by law;

(b) Falsely and maliciously to procure another to be arrested or proceeded against for a crime;

(c) Falsely to institute or maintain any action or proceeding;

(d) To cheat or defraud another out of any property by unlawful or fraudulent means;

(e) To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another,

or with the use or employment thereof;

(f) To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law; or

(g) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means.

Let's see, NRS 199.490, Overact act not necessary. In any such proceeding for violation of NRS 199.480, it shall not be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination.

For Possession of a Telecommunications Device by a Prisoner, NRS 212.165, Prohibition on furnishing portable telecommunications device to prisoner and on possession of such devices in jail or institution or facility of Department of Corrections; penalties; petition for modification of sentence.

1. A person shall not, without lawful authorization, knowingly furnish, attempt to furnish, or aid or assist in furnishing or attempting to furnish to a prisoner confined in an institution or a facility of the Department of Corrections, or any other place where prisoners are authorized to be or assigned by the

Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a category E felony and shall be punished as provided by NRS 197.130.

2. A person shall not, without lawful authorization, carry into an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a misdemeanor.

3. A prisoner confined in an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

4. A prisoner confined in a jail or any other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police or other officer responsible for the operation of the jail, shall not, without lawful authorization, possess or have in

his or her custody or control a portable telecommunications device. A prisoner who violates this subsection and who is in lawful custody or confinement for a charge, conviction or sentence for:

(a) A felony is guilty of a category D felony and shall be punished as provided by NRS 193.130.

(b) A gross misdemeanor is guilty of a gross misdemeanor.

(c) A misdemeanor is guilty of a misdemeanor.

5. A sentence imposed upon a prisoner pursuant to subsection 3 or 4:

(a) Is not subject to suspension or the granting of probation; and

(b) Must run consecutively after the prisoner has served any sentences imposed upon the prisoner for the offense or offenses for which the prisoner was in lawful custody or confinement when the prisoner violated the provisions of subsections 3 or 4.

6. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been reduced to a charge for which the penalty is less than the penalty which was imposed upon the person pursuant to subsection

4, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her sentence imposed pursuant to subsection 4 be modified to a sentence equivalent to the penalty imposed for the underlying charge for which the person was convicted; and

(b) Resentence him or her in accordance with the penalties prescribed for the underlying charge for which the person was convicted.

7. A person who is convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been declined for prosecution or dismissed, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her original sentence pursuant to subsection 4 be reduced to a misdemeanor; and

(b) Resentence him or her in accordance with the penalties prescribed for a misdemeanor.

8. No person has a right to the modification of a sentence pursuant to subsection 6 or 7, and the granting or denial of a petition pursuant to subsection 6 or 7 does not establish a basis for any cause of action against this State, any political

subdivision of this State or any agency, board, commission, department, officer, employee or agent of this State or a political subdivision of this State.

9. As used in this section:

(a) "Facility" has the meaning ascribed to it in NRS 209.065.

(b) "Institution" has the meaning ascribed to it in NRS 209.271.

(c) "Jail" means a jail, branch, county jail or other local detention facility.

(d) "Telecommunications device" has the meaning ascribed to it in subsection 4 of NRS 209.417.

Accomplice/Aiding or Abetting Liability.

An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial.

To be an accomplice, the person must have aided, promoted, encouraged, or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person who committed the offense.

A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence that tends to connect such defendant with the commission of the

offense.

It is not necessary that the evidence of the corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies. The necessary corroboration of an accomplice's testimony need not be found in a single fact or circumstance; rather, several circumstances in combination may satisfy the law. If evidence from sources other than the testimony of the accomplice tends on the whole to connect the accused with the crime charged, the accomplice's testimony is lawfully corroborated.

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

For Actual or Constructive Possession.

The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession

as that term is used in these instructions is present if you find by probable cause that a defendant had actual or constructive possession, either alone or jointly with other.

"Knowingly" imports a knowledge that the facts exist which constitute the act or commission of a crime, and does not require knowledge of its unlawfulness. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person on notice. An act or a failure to act is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Are there any questions with regard to the elements of the charged offenses at this time?

A JUROR: I have a question. You just said there were three defendants in this case but we only have two listed on our Indictment. The third one is listed in Counts 13 and 14.

MR. RAMAN: We plan to supersede including that defendant next week. So we're presenting all evidence that you're going to hear in the case and simply ask for a vote next week.

MS. YANG: Sir, you had a question.

A JUROR: It was the same question.

MS. YANG: Okay.

A JUROR: Thank you.

MS. YANG: Thank you. Are there any other questions at this time? Okay.

MR. RAMAN: We'll call our first witness, Aaron Stanton.

THE FOREPERSON: Please raise your right hand.

You do solemnly swear that the testimony you're about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE FOREPERSON: Please be seated.

You're advised you're here today to give testimony in the investigation pertaining to the offenses of conspiracy to unlawfully possess portable telecommunications device by a prisoner, possess portable telecommunications device by a prisoner involving Andrew Arevalo and Alexis Plunkett.

Do you understand this advisement?

THE WITNESS: I do.

THE FOREPERSON: Please state your first and last name. Spell both for the record.

THE WITNESS: It's Aaron Stanton,

A-A-R-O-N, last name is S-T-A-N-T-O-N.

AARON STANTON,

having been first duly sworn by the Foreperson of the Grand Jury to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MR. RAMAN:

Q Detective, what do you do for a living?

A I'm employed by the Las Vegas Metropolitan Police Department as a detective in the criminal intelligence section.

Q How long have you been a law enforcement officer?

A I've been employed with the department approximately 23 years.

Q And are you assigned any particular section or capacity within the department?

A Yes, I work in the criminal intelligence section. Within that section I work on the public integrity squad.

Q And you mentioned that you are a detective?

A Correct.

Q I want to take you back to March 23rd of

2017. Were you tasked with an investigation that had a relationship with the Clark County Detention Center?
A Yes.
Q And is the Clark County Detention Center here in Clark County?
A It is.
Q Is it located on Casino Center Drive?
A Yes.
Q And in what capacity did you become involved in the investigation regarding the Clark County Detention Center?
A A corrections officer, Officer Munoz, M-U-N-O-Z, contacted our section and informed us that there was some suspicious activity involving an inmate and his attorney during visits and wanted to provide this information to us in order to see if it warranted further investigation.
Q What inmate in specific were you reached out to investigate?
A It was Andrew Arevalo.
Q If I were to show you a picture would you recognize this person?
A Yes.
Q Showing you Grand Jury Exhibit 7, is this Mr. Arevalo?

A It is.
Q And you said this also related to an attorney?
A Correct.
Q What attorney would that be?
A Alexis Plunkett.
Q And if I were to show you a picture of a Alexis Plunkett, would you be able to recognize that person?
A Yes.
Q Showing you Grand Jury Exhibit 8.
A That is Miss Plunkett.
Q You mentioned that you were doing this investigation regarding Mr. Arevalo being an inmate. Do you recall what he was in jail for at the time?
A He was originally in custody for prohibited person in possession of firearm in some narcotics-related offenses. There was a subsequent break in custody and then he was indicted for a prohibited person possession of firearm and trafficking in controlled substance which he was then taken back into custody which is when the investigation began involving me.
Q To your knowledge those offenses, possession of firearm by a prohibited person and

trafficking in controlled substance, are those felony offenses?
A They are.
Q Based on the information provided to you by, was it Detective or Sergeant Munoz?
A He's just a corrections officer.
Q Corrections Officer Munoz, did you use any tools to conduct any kind of an investigation at the jail?
A Yes.
Q What tool did you use?
A We actually employed a covert video camera inside one of the visiting rooms at the Clark County Detention Center.
Q Regarding that covert video camera, what was it disguised as?
A It was disguised as a smoke detector on the ceiling of the visiting room.
Q The room itself, does it not normally have surveillance?
A There's two different towers in the Clark County Detention Center, the north tower and the south tower. The north tower was recently retrofitted. It does have overt cameras which you can see. The south tower does not have any type of video cameras in the

visiting rooms.
Q Okay. And by installing this covert camera, was there a purpose or plan that you installed it for?
A Yes, to monitor the activities that were going on during the visits between Mr. Arevalo and Miss Plunkett.
Q Was there any kind of circumstance with vision to make sure that Inmate Arevalo and Attorney Plunkett were within eyeshot of that camera?
A It was. If I'm understanding you correctly, it was installed in one particular room and the best efforts were made to actually place them into that particular room during their visits.
Q So are there multiple rooms for visitation within the south tower?
A There is. There's approximately four rooms on each of the floors.
Q Okay. So there are numerous rooms that one could visit, attorney/client?
A Correct. Mr. Arevalo was actually housed on the second floor in the south tower, so generally he would be taken to the second floor visiting rooms and there's four different rooms that are in that visiting area for him to conduct visits.

Q Okay. Was the camera equipped with the ability to pick up audio?
A No.
Q Was there a reason why it was not?
A Yes. Attorneys and their clients obviously have what we call attorney/client privilege. Their communication is privileged and therefore we cannot surreptitiously listen into their conversations.
Q Was Miss Plunkett at the time Mr. Arevalo's retained attorney?
A She was.
Q Was every single visit during the time period you were investigating recorded?
A No.
Q Was there a reason?
A Yes. We had the equipment installed in one particular room. There was all the efforts that we could employ to get them into those rooms but sometimes there were circumstances outside of our control that happened. There were occasions where there would already be somebody in that particular room visiting when Miss Plunkett would show up for visits or for her visits, therefore they were placed in a different room. There was different reasons why but not all of them were recorded again for things that happened outside of our

control.
Q When was the basic time frame that you were able to start getting recorded surveillance video only of visitations between Mr. Arevalo and Miss Plunkett?
A It was approximately April 8th of 2017.
Q And what was the duration? Where did that terminate as far as your surveillance of these two?
A It lasted approximately a month and it terminated approximately May 10th of 2017.
Q Okay. You personally reviewed all of the surveillance video that you were able to acquire on those multiple visits?
A Yes.
Q And did the relationship there appear to be standard between attorney and client?
A Not from my experience. For one, the frequency was a lot, much more than a normal attorney/client frequency at this stage in a court proceeding. The times were off. A majority of the visits were late at night outside of business hours. In reviewing the actual content of the video, a lot of it seemed to be more of a social interaction rather than a business interaction. There was a lot of laughing and joking around going on. There was instances where it appeared that Mr. Arevalo was upset and wouldn't look at

Miss Plunkett, just stared away from her, and she appeared to be crying. It just, it did not seem like a normal attorney/client situation to me.
Q Okay. In preparation for this Grand Jury presentation, have you prepared excerpts of the videos?
A Yes.
Q And in preparing those excerpts, is it focused on any particular activity that occurred during those visitations?
A Yes, it's primarily focused around the use of Miss Plunkett's cellular telephone during the visits.
Q Okay. At this time I'm going to switch over to a video. And showing you Grand Jury Exhibit 6, is this a disk that was prepared with said excerpts of those videos?
A Yes.
Q Okay. The first folder in the disk is titled Plunkett Video Clips; is that correct?
A Yes.
Q And it appears that there is a numerical order to each individual folder within the disk. Can you explain the explanation of what those numbers mean?
A Sure. Each of the folders have the date and time attached to them. So the very first folder would be 04082017 so that's April 8th, 2017, and then

the time in military time next to it, 1938 hours, which would be 7:38 p.m. And it goes down for each of the folders. And then one of the folders actually has a hyphen that says Estrada which relates to a visit involving Miss Plunkett and Rogelio Estrada.
Q Okay. Let's go one by one and talk about what is on these video clips. The first folder we're going to go into and play from is titled 04082017 and there's a space 1938, correct?
A Yes.
Q Okay. Before I start this clip which now that we're in the clip, it says April 8th, 2017, 7:38 p.m., correct?
A Yes.
Q What are we looking at?
A So again this is a view from the covert camera from the ceiling into the visiting room. In the middle is a table. That's typical of the visiting rooms. They typically will have two or three chairs sitting in them as well. This particular one at this time appears to have two chairs. Mr. Arevalo is sitting at one side of the table and Miss Plunkett is sitting at the other. The rooms have a door which you would see the bottom of it in this clip towards the lower left-hand corner of the picture and then the lower

right-hand corner of the picture is a window that is in the room that goes out into a hallway.

Q Okay. And how long is this excerpt of that clip approximately?

A It's approximately a little bit longer than a minute.

Q Okay. I'm going to proceed to play the clip and I'll ask you certain questions about what is being viewed. First of all, who are the parties that we can see on this clip?

A Again, Mr. Arevalo is at the top left-hand corner of the video and Miss Plunkett is on the other side of the table which would be kind of the center to the right of the picture.

Q Okay. I'm going to start the clip. Okay. Do we see any telecommunications devices out?

A Yes, there's a white-colored Apple iPhone that Miss Plunkett is manipulating on the table.

Q Did that come from the property of Miss Plunkett or Mr. Arevalo?

A From Miss Plunkett.

Q And is she manipulating the device?

A Yes.

Q Are you familiar with what kind of device that is?

A Yes, that's an Apple iPhone.

Q Now, at this point in the clip she appears to be touching a side button on the phone. From your training and experience, what was she manipulating?

A Sure. So on the left-hand side of the Apple iPhones there's two buttons that when you're on a phone call control the volume.

Q Okay. And based upon what can be seen in the video, does it appear the phone is in any certain state?

A Sure. The Apple iPhone has a speakerphone function and this is, once you place a call it's in this screen and then the button, which the phone is actually upside down, but the top right-hand corner of the screen allows the phone to go into speakerphone mode.

Q Okay. Is there any visuals on the phone that you can see that would resemble that a phone call is actually being placed there?

A Yes. Again, once a phone call is being placed that particular screen pops up on one of the functions, and once that screen pops up in the top right-hand corner is the function to be able to put it onto speakerphone. So you can tell that a phone call is being placed by the screen that it's actually on and then you can tell that it is placed on speakerphone

because the button on the right-hand top corner of the screen is actually highlighted.

And then also you asked me earlier about the buttons on the left-hand side. They do control the volume, and you'll frequently see after Miss Plunkett touches those buttons you'll see a bell-shaped emblem that pops up on the screen of the phone and that shows that the volume is actually being manipulated.

Q Okay. Are there actions -- I'm going to probably back up and replay from the middle of this clip. Is there body language or gesturing or what appears to be talking going on that would be consistent with using the phone?

A Well, after Miss Plunkett places it on speakerphone you can see Mr. Arevalo leaning towards the phone which is placed in the middle of the table and you can see his movement appears that he's talking although he can't see his mouth.

Q Okay. If Miss Plunkett was solely using that telephone, would putting it in the middle of the table closer to Mr. Arevalo be the most efficient way to use that phone?

A Not in my opinion.

Q Okay. We'll move on to the next folder. The next folder is titled 04102017 space 1945, and I'm

going to play from that folder. Does this correspond with April 10, 2017?

A Yes.

Q And there's a time stamp on this. It says 7:45 p.m.; is that correct?

A Yes.

Q Approximately how long is this clip?

A It's approximately four minutes.

Q Okay. Who are the parties in the picture?

A Again, at the top of the screen you see Mr. Arevalo and towards the bottom of the screen you see Miss Plunkett.

Q Okay. And I'm going to play the clip. Okay. Do you see any telecommunications device in the clip at this point?

A Yes, Miss Plunkett removed a white-colored Apple iPhone from her purse. She has it in her hands at this point.

Q Okay. And is she doing anything with the phone?

A Yes, she is making a phone call right now and has extended her hand out to the middle of the table to place the phone in the middle of the table and it appears to be on speakerphone from the highlighted button on the screen.

Q Okay. Again, it's in the middle of the table between Mr. Arevalo and Miss Plunkett?
A Correct.
Q Does it appear to be in a phone call making screen setting?
A It does.
Q If you look at the phone closely there's a prominent red button that's visible when the screen is active. Do you know that to be significant?
A Sure. So at the bottom of the phone call screen when you're in a phone call there's the button that is in the center toward the bottom of the phone and that button terminates the phone call.
Q Is that red button usually present when there isn't a phone call being made?
A No.
Q During the time that this phone is on a speakerphone telephone phone call, does it appear consistent that Mr. Arevalo is talking to the party that's being made?
A Yes.
Q What is Miss Plunkett doing during this conversation?
A During this particular one it appears that she's doing something with her binder, flipping through

pages and looking at papers.
Q All right. And then the phone call ends, correct?
A Yes.
Q Moving to the next folder entitled 04162017 space 1316, is this a video clip from April 16, 2017, at 1:16 p.m.?
A Yes.
Q And approximately how long is this clip?
A Approximately two and a half minutes.
Q Okay. Who are the parties in the clip?
A Again, at the top left-hand corner of the screen is Mr. Arevalo and then towards the center to the bottom of the right-hand side is Miss Plunkett.
Q And where this video clip is starting, does the phone appear to be closer to any one of the parties?
A It's closer to Miss Plunkett right in front of her.
Q Okay. And I'll start the clip. Does the phone appear to be in a call state?
A Not at this time.
Q Okay. And what is Miss Plunkett doing with the telephone?
A It appears that she went to one of her contacts in her phone, just made a phone call from the

contacts and then placed it on speakerphone.
Q Okay.
A And now is placing it in the center of the table. Again, she appears to be manipulating the volume button on the left-hand side with her right thumb.
Q Is the facial movements and body gesturing of Mr. Arevalo consistent with him speaking to whoever the recipient is on that phone call?
A Yes.
Q Did the positioning of the phone just change in the video?
A Yes. Miss Plunkett actually moved it closer to Mr. Arevalo and again manipulated the volume button.
Q Okay. Now, while it appears Mr. Arevalo was speaking over the telephone, is Miss Plunkett doing anything?
A At this point she just appears to be fidgeting with something in her hands.
Q Regarding body language, as it's appearing Mr. Arevalo's talking, does it appear he's having conversation with Miss Plunkett or somebody else?
A Well, by the positioning of the phone and that he's leaning across the table and kind of talking, looking down at the phone, it would appear that he's

talking to the phone as opposed to Miss Plunkett.
Q Okay. So, for example, when he is speaking and finishes speaking, does it appear that Miss Plunkett says anything in response?
A No. Well, right now she's actually got her hand over her mouth.
Q Okay. Did it appear that Miss Plunkett did something with the phone before she retrieved it back?
A Yeah, she hit the button that would be used to terminate the phone call.
Q Okay. That ends the clip. Move on to the next folder entitled 04162017 dash or space 1343. Okay, before I start the clip, is this a clip from same visit, later time frame, April 16th, 2017, at 1:43 p.m.?
A Yes.
Q Okay. And who were the parties in the video?
A Again, Mr. Arevalo is at the top left-hand corner of the screen and Miss Plunkett is on the other side of the table from him towards the center to lower right-hand corner of the screen.
Q Before I start the clip playing, is the telecommunications device visible?
A Yes.
Q And who is it in the possession of at that

point?
A Right now Miss Plunkett has the phone in her hands and she's leaning back from the table.
Q Okay. Let me start the clip. And does she do anything with the phone?
A Yeah, she actually hands it to Mr. Arevalo and he begins holding it on his side of the table in his hands.
Q While Mr. Arevalo is using the phone, does it appear Miss Plunkett is doing anything?
A She's sitting back in her chair against the wall not really doing anything.
Q As far as the way that room is structured, is there any further position she could possibly be from Mr. Arevalo?
A No.
Q So she's at the very maximum of being away from him?
A Correct.
Q Does it appear there's some kind of dialogue going on?
A It appears that Mr. Arevalo is having some type of dialogue with Miss Plunkett at this point.
Q Given that this is a video clip that takes place about 20 minutes after the previous one, so this

conduct where Mr. Estrada actually has the phone in his hand, this is the same visit after he talked on the speakerphone?
A Mr. Arevalo?
Q Yes.
A Yes.
Q Did I say Estrada?
A Yes.
Q Oh, I apologize. Was it clear from any of this video clip whether it looked like he executed any kind of call or text or anything like that?
A It was hard to tell from the positioning of the phone. I couldn't say for sure what he was actually doing with the phone.
Q Okay. Is that based upon the angle of the camera, his use of the phone?
A Yes.
Q Next folder is titled 04182017 space 1949. Is this a video clip that was taken April 18th, 2017, 7:49 p.m.?
A Yes.
Q Before I start the clip, who are the parties that are depicted in the clip?
A Again, it's hard to tell at this juncture but it's Mr. Arevalo at the top of the screen and

Miss Plunkett towards the center to the bottom of the screen.
Q Okay. And is there any telecommunications devices present?
A There is a white-colored Apple iPhone on the table just in the right hand of Miss Plunkett.
Q Okay. I'm going to start the clip. Does she appear to be manipulating the phone? Is she doing anything in particular with it?
A She's going through some different text screens right now and now she's placing a phone call.
Q Okay. Again, she's manipulating the side of the phone. Is that indicative of the volume switch?
A Yes. And now it has been placed in the center of the table.
Q Does it appear to be on a call?
A Yes.
Q And then there's further manipulation of the side button. Is that consistent with the volume?
A Yes. And again, like I described earlier, there's a shadow of a bell symbol that popped up on the screen which comes on when the volume is turned up or down.
Q Is there conduct that Mr. Arevalo is exhibiting that is consistent with talking on that phone

call?
A Yes. Again, he's leaned forward towards the phone that's placed in the center of the table.
Q Is Miss Plunkett exhibiting any body language or behavior that would be consistent with not being on the telephone call?
A She had her left elbow up onto the seal of the window and now she's just fidgeting around with some cards which appears that she's not engaged in a phone conversation to me.
Q Okay. And this is while Mr. Arevalo appears to be speaking?
A Correct.
Q Phone being in the center of the table?
A Correct.
Q There appears to be an object in Miss Plunkett's hands. Are you familiar with what that might be?
A Earlier it appeared to be her Arizona driver's license. Now there's miscellaneous cards which I don't know what they are exactly.
Q How long was this particular phone call or this video clip?
A Approximately five minutes.
Q Okay. We've got about a minute left?

A Yes.
Q Throughout the majority of this video clip, does Mr. Arevalo appear to be talking over a speaker phone call?
A Yes. For all the reasons why I explained before and one that I haven't, but in the majority of these calls the phone is actually placed upside down to where there's a speaker for the person talking into the speakerphone is actually positioned on the bottom of the Apple iPhone and in these calls they're mostly, the phone is positioned with the bottom of the phone towards Mr. Arevalo.
Q Now, there was a body gesture 15 seconds ago, we're near the end of the clip, where Miss Plunkett appears to be looking out the window. Is there behavior throughout these clips that would be consistent with being paranoid of being discovered?
A Yes, there's frequent numerous occasions she actually turns around and looks out the window to see if there's anybody out there apparently.
Q Okay. Going to April, this is a folder titled 04202017 space 2004. Is this a video clip that was April 20th, 2017, 8:04 p.m.?
A Yes.
Q Approximately how long is this clip?

A It's approximately four minutes.
Q And who are the parties in the clip?
A Miss Plunkett's towards the center to the bottom of the screen and Mr. Arevalo is at the top of the screen.
Q Is there any telecommunications devices visible in the video clip?
A There is. There's a white-colored Apple iPhone in Miss Plunkett's right hand.
Q I'm starting the clip. Is she doing something with said telecommunications device?
A She turned the phone around and has the screen of the phone facing towards Mr. Arevalo and she's holding it in approximately the center of the table with her right arm extended out.
Q And did she take the device back?
A She did.
Q Does it appear to be in any kind of state at this point?
A Yes, it appears that she has placed the phone call then placed the phone back in the center of the table.
Q Okay. And are we able to see that red button again that would indicate when you hang up a call?

A You should, yes.
Q Okay. So it appears there's a call taking place here when it's in the center of the table?
A There's a call. The top right-hand button is illuminated showing that it's on speakerphone and the red button in the center to the bottom is illuminated showing it is again in a phone call status.
Q Is there body language consistent with Mr. Arevalo speaking on that phone call?
A Yes.
Q Mr. Arevalo, as an inmate at the Clark County Detention Center, would he normally have access to have the ability to make a phone call --
A No.
Q -- in this nature?
A No.
Q What about in any capacity?
A There are actual phones that the inmates are allowed to use in their housing modules but definitely not cellular telephones.
Q Okay. Those are provided by the jail?
A The phones in the housing modules are, yes.
Q Those are not cell phones, correct?
A No.
Q Okay. It appears she's taken back the

phone, correct?
A She has taken back the phone. The previous call was terminated and a subsequent phone call has just been placed. And she put it in the center of the table and then immediately took it and put it under her notebook.
Q Okay. Is that consistent maybe with the phone call being unsuccessful?
A It actually appears to me like she heard somebody or thought somebody was coming and she was hiding the phone.
Q Okay. The phone is present again. She pulled it back out from under the notebook?
A Yes.
Q Okay. And that's the end of the clip.
Going to folder titled 04232017 space 1944, and this is dated April 23rd, 2017, at 7:44 p.m., correct?
A Yes.
Q And who are the parties depicted in the video?
A Again, Mr. Arevalo is at the top of the screen and Miss Plunkett is also in this video clip.
Q Are there any telecommunications devices present?

A There is a whited-colored Apple iPhone sitting on the table in front of Miss Plunkett in her right hand.
Q Okay. And does she appear to do something with the phone?
A Yeah, she appears to be placing a phone call and putting it on speakerphone.
Q Is the phone still in the possession or closest to Miss Plunkett?
A She scooted it towards the center of the table and adjusted it a little bit closer to Mr. Arevalo.
Q Is there body language or facial gesturing on the part of Mr. Arevalo consistent with talking on that phone call?
A Yes.
Q Does Miss Plunkett appear to be actively involved in that phone call?
A No, she is sitting back in the corner in her chair again with her hand, it appears to be covering her mouth.
Q Okay. I'll move on to the next clip. Folder is 04252017 space 2046. This appears to be a video clip from April 25, 2017, 8:46 p.m., correct?
A Yes.

Q And who are the parties depicted in the video?
A Again, it's Mr. Arevalo in the top left-hand corner and Miss Plunkett is also in the screen.
Q Are any telecommunications devices present?
A Yes, there's a white-colored Apple iPhone that's sitting on the table closer to Miss Plunkett.
Q Okay. I'll play the video. Does Miss Plunkett do something with that phone?
A She scooted the phone towards the center of the table and she is manipulating it right now.
Q Does it appear to be in any state after she's manipulated it?
A Yes, it appears to be on speakerphone status right now.
Q And then after the phone call takes place she takes it back in her possession?
A Yes.
Q Playing for you a clip in a folder, folder 04252017 2207 ALT, correct?
A Yes.
Q Same visit?
A Yes.
Q Okay. And before I play the clip, same

parties, is that Miss Plunkett and Mr. Arevalo?
A Yes.
Q Is the telecommunications device present?
A Yes, a white-colored Apple iPhone is actually in Miss Plunkett's hands.
Q I'll play the clip. And this is again from April 25th, 2017, at 10:08 p.m.?
A Correct.
Q Does she appear to be doing something with the phone?
A Yes, it appears she just placed it on speakerphone and placed in the center of the table.
Q Is there any body language or head movement consistent with Mr. Arevalo being a participant on a phone call?
A Yes.
Q Okay. Did Miss Plunkett just terminate a call?
A Yes.
Q Okay. Next folder is 04272017 space 1530. This appears to be a video clip from April 27, 2017, at 3:29 p.m., correct?
A Yes.
Q Who were the parties depicted in this video clip?

A Okay. That's Mr. Arevalo and Miss Plunkett.
Q Are there any telecommunications devices present?
A Yes, there's a white-colored Apple iPhone in Miss Plunkett's hands.
Q Okay. I'll start the clip. Does she appear to be using the iPhone?
A She's manipulating it on some type of a screen.
Q Okay. Is it in the possession of somebody else at this point?
A Yeah, she hands it to Mr. Arevalo and he begins holding it on his side of the table in his hand.
Q Is he using the phone?
A Yes.
Q From the positioning of the phone and the camera is it readily apparent what he's doing with the phone?
A No, I can't identify exactly what it is that he's doing with the phone.
Q Okay. And then does it appear that Mr. Arevalo hands the phone back to Miss Plunkett?
A Yes.
Q Next folder is titled 04282017 -- actually

I'm going to skip that one for a minute.
Let's go to the next folder, 04302017, 2208. Okay. This appears to be a video clip from April 30th, 2017, 10:08 p.m.?
A Correct.
Q And who are the parties depicted?
A Mr. Arevalo and Miss Plunkett.
Q Is there a telecommunications device present?
A Yes, in the center of the table is a white-colored Apple iPhone.
Q Okay. Do either of these parties appear to be doing anything with that phone?
A Not at this point. Miss Plunkett's right arm is extended out but it doesn't appear that she's doing anything at this juncture.
Q All right. I'll start the video. Okay. Does something appear to have been done with the phone?
A Yes, she placed a phone call and it's on speakerphone mode.
Q Is the phone in the center of the table?
A Yes.
Q Is there any body movement or head gesturing consistent with Mr. Arevalo being a participant on a phone call?

A Yes.
Q All right. So that is currently at 10:09 p.m. I'm going to skip ahead because this is a lengthy clip and go to the middle. Does it appear that this phone call continues for a decently long time?
A Yes.
Q Well over ten minutes?
A Yes.
Q And then we get to about 10:25 p.m. and is that the end of the phone call?
A Yes. Miss Plunkett terminates the phone call and moves the phone back over towards her.
Q Next folder is 05022017 space 2206. This appears to be a video clip from May 2nd, 2017, 10:06 p.m., correct?
A Yes.
Q Who are the parties in the video?
A Mr. Arevalo and Miss Plunkett.
Q Is there a telecommunications device present?
A There is. There's a white-colored Apple iPhone in front of Miss Plunkett in her hands.
Q Okay. Starting the clip, is she manipulating the phone?
A Yes.

Q And what is she doing with the phone?
A It appears it's in a text message string and she's turned the phone around so that the screen is facing Mr. Arevalo. He's leaning forward towards the phone as if he's looking at it.
Q Okay. Now what's going on?
A She's now got her right arm extended out towards the center of the table. He's leaning forward looking at the screen of the phone.
Q Is there any behavior going on in the room consistent with any kind of activity?
A Well, they're both laughing.
Q Okay. Did something change with the phone?
A She put the phone down on the table.
Q And we're about midway through this clip?
A Correct.
Q Now what's happening?
A Miss Plunkett picked the phone back up still in a text message string and she's extended it out in her right hand towards the center of the table towards Mr. Arevalo who's leaning forward looking at the screen.
Q Did Mr. Arevalo just change his body position?
A Yes, he actually got up out of his seat a

little bit and leaned forward more towards the phone.
Q Okay. So it appears throughout this video clip the conduct consists of Miss Plunkett showing Mr. Arevalo text conversations?
A Correct.
Q Okay. And then this folder is titled 05082017 space 1422, correct?
A Yes.
Q All right. And we start the video. Who are the parties? This is a video from May 8, 2017, 2:22 p.m., correct?
A Yes.
Q And who are the parties depicted?
A Mr. Arevalo and Miss Plunkett.
Q Are there any telecommunications devices present?
A Yes, there's a white-colored Apple iPhone sitting on the table in front of Miss Plunkett.
Q I'll start the video. Is she doing anything with the iPhone?
A She just placed the phone in the center of the table.
Q Does the phone change to any different state?
A Yes, it appears now she's making a phone

call and just placed it on speaker mode and is manipulating the volume button.
Q Does it appear from the body language and head gesturing of Mr. Arevalo that he's a participant on the phone call?
A Yes.
Q Let's skip to the end. And does that phone call seem to last for nearly ten minutes?
A Yes.
Q Okay. And after that time period does it appear Miss Plunkett does something to the phone?
A Yes, it appears she terminated a phone call.
Q Okay. In furtherance of your surveillance, did you come across any other inmates that Miss Plunkett was providing telecommunications devices access to?
A Yes.
Q And who would that be?
A Rogelio Estrada.
Q Was Mr. Estrada in jail on any particular charges?
A Yes, he was in custody on possession of forged credit or debit card with intent to defraud.
Q Is that a felony charge?
A It is.

MR. RAMAN: And ladies and gentlemen of the jury, we mentioned through testimony that Mr. Arevalo was in on felony charges as are we now mentioning that Mr. Estrada was in on felony charges. Please do not construe either of these gentlemen having been charged with crimes other than what you're hearing as to their guilt or innocence as a part of this case, simply the fact that they were in custody on felony charges and an element of the crime that we're charging here today but their guilt or innocence on those charges should not bleed over into your decision on their probable cause culpability on these charges.
BY MR. RAMAN:
Q Regarding Mr. Estrada, was Miss Plunkett the attorney for Mr. Estrada?
A Yes.
Q And did you have video surveillance of this, her providing him a portable telecommunications device?
A Yes.
Q I'm playing from folder titled 04282017 space 1420 Estrada. Who are the parties depicted? The video is April 28th, 2017, 2:20 p.m., correct?
A Yes. In this video it's Mr. Estrada is at the top of the video and Miss Plunkett is in the center

towards the bottom.
Q Are there any telecommunications devices present?
A There's a white-colored Apple iPhone in Miss Plunkett's hands.
Q Okay. And does she do anything with that phone?
A She does. She places a phone call, puts it on speaker mode and adjusts the volume and has placed the phone in the center of the table.
Q Does it appear from what you see with the phone that there's an actual phone call taking place?
A There's a phone call that's taking place on the phone, yes.
Q And if I were to show you a picture of Mr. Estrada would you recognize him?
A Yes.
Q Showing you Grand Jury Exhibit 9, is this Mr. Estrada?
A It is.
Q What is the proximity in this video of the phone to Mr. Estrada?
A He actually reached to the center of the table and moved the phone over to the right in front of him sitting on the table and he appears to be leaning

down towards the phone that's sitting on the table in front of him.
Q When he grabbed the phone did Miss Plunkett do anything to try to prevent him from taking it?
A No.
Q Does it appear consistent that Mr. Estrada is in fact speaking on a phone call?
A Yes.
Q And that's based upon what's depicted in the video?
A Yes.
Q Is Miss Plunkett doing anything at this time?
A She's looking out the window.
Q Okay. And that phone call takes place for several minutes?
A Yes.
Q At which point what happens?
A Mr. Estrada pushes the phone back over to Miss Plunkett and she pushes the button to terminate a phone call.
Q Okay. Did you have an opportunity to interview Miss Plunkett?
A I did.
Q And when did that take place?

A That was May 8th, 2017.
Q Where did that take place?
A Myself and my partner Mark Gregory interviewed her in the courtyard in front of the Clark County Detention Center. She was exiting.
Q Was this a voluntary consensual interview or a custodial interview?
A No, it was consensual. We approached her and identified ourselves and asked if we could speak with her.
Q And this took place in an outdoor setting?
A Yes.
Q So in front of the jail there's an outdoor area with some benches?
A Yeah, there's a large courtyard with benches and such, trees, and it's all in front of the jail.
Q Did she agree to speak with you?
A Yes.
Q Did you ask her about letting inmates use her phone?
A Yes.
Q And what did she say?
A She stated that she would make phone calls on behalf of inmates specifically to like bondsmen for

case-related activity. She told me that she did not let the inmates touch the phone, that she wouldn't, or the clients I should say, and she also said that she wouldn't let the clients do the talking, that she would do all the talking on behalf of clients and that she would definitely not let them have the phone.
Q Did she state to you that she was under any impression under her ability to use the phone for attorney type of work?
A She had stated that she was aware that she signed the acknowledgment form when she did visits at the detention center that let her bring her phone in and that she again used them for her to speak if she had to make a call to like a bailbonds person or something.
Q Okay. In the course of your investigation did you receive forms that Miss Plunkett would have signed when she, upon admission of the jail, was to visit with her clients?
A Yes.
Q Did you receive those from a Sergeant Jere Ebneter?
A Yes.
Q And how do you spell his name?
A First name is J-E-R-E and his last name Ebneter, E-B-N-E-T-E-R.

Q Okay. From what you saw in the form was her usage of the phone consistent with the explicit terms of why one would have a phone in the jail?
A The form, when they fill out the form, allows them to bring the phone into the jail; however, the first line expressly states that cell phone use is prohibited with the exception of calling the detention center staff or 911 in the event of an emergency.
Q Okay. Did she admit that she had signed said forms?
A Yes.
Q Okay. Did she admit to showing her phone to any inmates?
A Yes.
Q Okay. What about allowing inmates to touch her phone?
A She said that she did not allow inmates to touch her phone.
Q Were you asking about any specific inmate in question?
A Yeah, we were speaking specifically about Mr. Arevalo.
Q Did she go into detail about why she would be making calls and what she was doing on those calls?
A Predominantly she stated if she had to call

a bondsman or she just roughly stated case-related calls.
Q Okay. Would those be permissible reasons under the law or the policy of CCDC to use a phone?
A No.
Q Did you confront her with it being illegal to do so?
A Yes. When she told me that she would allow Mr. Arevalo to look at her phone I basically said that, you know, he can't touch it, you know, that's a big no-no. She said correct. And I said, you know, basically if he has it at all it's, I said you know it's against the law and she said correct.
Q Regarding she's talking about using her phone supposedly to procure bail and did she say if either of the parties were speaking? Did you ask her questions that would tend to illustrate the possibility that she's allowing Mr. Arevalo or potentially Estrada to talk on her phone and her response to that?
A I'm sorry, can you rephrase that?
Q Sure. Did you ask her any kind of questions about any inmates, Arevalo or Estrada, talking on the phone?
A Yes.
Q Did she say who would be talking on the

phone?
A She said that they don't talk on the phone, that if there was any phone calls that she would be the one doing the talking, not either of the inmates.
Q Okay. Did she talk about any other attorneys and their usage of phone in the jail?
A She did mention that she had a case with another attorney and stated that that attorney would use the phone as well.
Q Okay. What was that attorney's name? Would seeing your report refresh your memory?
A It would. It was attorney Greg Coyer, C-O-Y-E-R.
Q Now, were you asking her any questions specifically related to Defendant Estrada or were they primarily on Arevalo?
A They were primarily regarding Mr. Arevalo.
Q Did you ask general questions that included the possibility that she was potentially doing this conduct with other inmates?
A Yes.
Q And did she deny allowing other inmates to touch or speak on her telephone?
A Yes, she said that she doesn't let them touch or speak, that again that she is the only one that

speaks on the phone if there's a phone call.
Q Okay.
A And that they absolutely don't touch her phone.
Q Was the angle that you entered the conversation with Miss Plunkett towards her potentially being coerced to do this?
A That's originally what we had asked her. We said that we had received information that she might be, that she might have been coerced or being manipulated. She denied it. And we specifically identified Mr. Arevalo. She stated that she's known him for several years and has represented him for several years and was absolutely not being coerced or manipulated by him.
Q Okay. And did you also ultimately prepare a declaration and recommend charges in this case?
A Yes.
Q Okay. One second.
Does the Grand Jury have any questions of this witness? We do have one more relatively brief witness from CCDC. I know we're close into the lunch hour. I just wanted to inform you of that. It should be all of ten minutes.
///

BY A JUROR:
Q I have a quick question. I hope this doesn't get misconstrued. Because of an attorney/client privilege are you allowed to inspect the attorney's phone for any information?
A That is a really, really fine line and it probably would be a very long discussion and there's a lot of difference in opinions. It is possible but there's a lot of problems with doing so.
BY A JUROR:
Q The window in the interview room, that's clear glass so it's not -- it's not like one-way glass where people outside can see in and not the other way around, it's clear both sides?
A It is clear both sides. The way the rooms are set up, there's four rooms within a very small confined hallway and there's what's called sallyport doors on either side which are controlled by the control room operators at the detention center. So there's not a lot of movement going on between those two sallyport doors in the hallway which is just outside that window. And the doors are very loud and take a minute to open. So I'm not sure if that's where you're going with it but there's not a lot of movement but you can see in and out of that window that's in that room.

Q So she had some expectation of privacy to do this?
A No, not necessarily an expectation of privacy. I mean, she's in a space that other attorneys, other inmates, correctional staff all have the ability to be in position to see what she's doing so I wouldn't say she -- plus she's in a correctional facility so there really isn't a whole lot of expectation of privacy for making a phone call per se.
Q Thank you.
THE FOREPERSON: By law these proceedings are secret and you are prohibited from disclosing to anyone anything that transpired before us including any evidence presented to the Grand Jury, any event occurring or a statement made in the presence of the Grand Jury or any information obtained by the Grand Jury.
Failure to comply with this admonition is a gross misdemeanor punishable up to 364 days in the Clark County Detention Center and a $2,000 fine. In addition you may be held in contempt of court punishable by an additional $500 fine and 25 days in the Clark County Detention Center.
Do you understand this admonition?
THE WITNESS: I do.

THE FOREPERSON: Thank you. You're excused.

THE WITNESS: Thank you.

MR. RAMAN: The next witness is Mr. Jere Ebneter.

THE FOREPERSON: Please raise your right hand.

You do solemnly swear that the testimony you're about to give upon the investigation now pending before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE FOREPERSON: Please be seated.

You're advised that you're here today to give testimony in the investigation pertaining to the offenses of conspiracy to unlawfully possess portable telecommunications device by a prisoner, possess telecommunications device by a prisoner involving Andrew Arevalo and Alexis Plunkett.

Do you understand this advisement?

THE WITNESS: Yes, sir.

THE FOREPERSON: Please state your first and last name and spell it for the record.

THE WITNESS: My name is Jere Ebneter. First name is J-E-R-E, last name is E-B, as in boy,

N-E-T-E-R.

JERE EBNETER,

having been first duly sworn by the Foreperson of the Grand Jury to testify to the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION

BY MS. YANG:

Q Thank you. Good morning.

A Good morning.

Q How are you employed?

A I am currently a sergeant with the Las Vegas Metropolitan Police Department. I'm assigned to the gang special investigations unit within our Clark County Detention Center.

Q And that's the Clark County Detention Center on Casino Center?

A Yes, ma'am.

Q Okay. How long have you been employed?

A I'm been employed approximately 19 years.

Q What is your official title one more time?

A Corrections sergeant.

Q Corrections sergeant. What are your general responsibilities at CCDC?

A Currently I run and operate a five-man unit which is the gang special investigations unit. Any kind of incidents that happen within the walls of the Clark County Detention Center, normally that comes to me and I help investigate and assist other agencies within the jail.

Q Okay. And what brought you onto this case?

A I was informed that there was a possible corruption case involving an attorney and one of our inmates that is currently assigned or housed within our facility.

Q And this is in regards to bringing a telecommunications device into a visitation room?

A Yes, ma'am.

Q Okay. I'm going to ask you some questions about the visitation room.

A Okay.

Q What are some ways a visitor can visit an inmate?

A There's different ways. As far as for an attorney or a general visitor that can come in?

Q For a general visitor.

A Okay. What they have to do is they have to sign up with the lobby with our DSTs which is our detention specialist clerks and they have to show up 30

minutes prior before a visit. And normally those visits happen approximately an hour throughout the day. And like I said, the visitor has to show up a half hour prior and they normally have their visits within booths that are located down in the lobby.

Q Okay. So these visits are not with contact with the inmates?

A For civilians, no, there's no contact with the inmates.

Q But you said there are visitation rooms available where contact visits are allowed?

A Yes, ma'am. On each of the floors within the towers there are visiting rooms, contact rooms for the attorneys and criminal investigators.

Q Okay. Do the general public ever get permission to have these contact visits?

A Civilians, no.

Q Okay. And what purpose are the visitation rooms usually used for?

A They're normally used for attorney/client privileges. Anytime the attorney wants to come in and they want to talk to their client in regards to their case law or if the attorney can't make it they'll send one of their investigators and they'll come up and do the interviews. Sometimes like Parole and Probation

will come up and do interviews as well but that's what the normal use is for the rooms.

Q Okay. Before any attorney or investigator is allowed inside the visitation room, are they required to fill out any kind of form?

A Yes, ma'am. Before they come into or when they come into the facility, at the front lobby there's a piece of paper that's just an advisement saying that they would abide by the rules of the facility and not bring in any telecommunications devices, laptops, media players, whatever, without authorization and then they have to sign off on it.

Q What if they don't want to sign the form?

A If they don't want to sign the form then we won't allow them up into the towers whatsoever to have a contact visit and if they don't want to, like I said, we do have the visiting booths set aside for the attorneys. There's a door behind the booths that we allow for a little bit more privacy.

Q Okay. In these enclosures with the attorneys and clients, do they have any kind of warning sign inside the enclosure?

A Inside the booths downstairs I don't believe there is a warning, but up on the towers as the, before you enter the slamlocks where the visiting rooms

are there is a notice that's posted on the wall for any kind of, bringing in any kind of contraband, cell phones, media players.

Q Okay. And directing your attention back to these forms, what are they called?

A I believe they are just a liability release form or acknowledgment saying that if you do wind up breaking these laws this is what you can be held accountable for.

Q If I show you some forms would you be able to recognize them?

A Yes, ma'am.

Q Okay. Can you tell me if these are the forms that we were speaking of earlier?

A Yes, ma'am. Actually, yes, they are.

Q Okay. And this is dated April 16th, April 18th, April 20th, April 23rd, April 25th, April 27th, April 30th, May 2nd and May 8th as well as April 28; is that correct?

A Yes, ma'am.

Q Okay. Let's see here, and these are the same forms or the dates of the same forms as was on the recording as well of the surveillance video?

A I believe so. I believe there's some dates that we're actually missing from the recordings because

we weren't able to get all the recordings.

Q And that's from the 8th and the 10th; is that correct?

A Yes, ma'am.

Q What was the reason for that?

A Normally what happens is that if the rooms are all full and we are unable to use that room we will just go ahead and allow them to have a visit in another room instead of doing, you know, moving people around just to accommodate that one specific visit.

Q Okay. And for the record this was Grand Jury Exhibit Number 5. Let's see, on these forms here who are the inmates that she mentioned that she was going to be contacting?

A This date on April 16th it was Andrew Arevalo. On the 18th Andrew Arevalo. On the 20th Mr. Arevalo. 23rd Arevalo. 25th is Arevalo. The 27th is Arevalo. The 30th again is Arevalo. May 2nd is Arevalo. May 8th is Arevalo. And then on the 28th she also has down three different ones which is Mr. Williams, Mr. Leon and Mr. Estrada.

Q Okay. Thank you.

A You're welcome.

Q So based on CCDC rules and protocol, anyone who's going into a visitation room with a cell phone

must fill out the form; is that correct?

A That is correct.

Q So we would assume -- let me rephrase that, sorry.

Brief indulgence, please.

On these forms here what did she list as the item that she was going to bring into the visitation room?

A She listed that she was going to be bringing a cell phone in.

Q Okay. And the form does state that the use of a cell phone is only authorized to contact CCDC staff or 911 in the event of an emergency. Unauthorized use will subject the user to criminal prosecution; is that correct?

A Yes, ma'am.

Q Okay. To your knowledge was a cell phone ever used to make a call to CCDC staff or 911?

A No, ma'am.

Q Okay. Based on statements that she made, she did say that she was going to call bondsmen for the purpose of her case work with the inmates, with the defendants. At booking though do they have, do inmates have a list of bondsmen provided to them?

A Yes, ma'am. Throughout the facility, even

in the booking when they are initially brought in, there's a list of bail bondsmen that are available for them to call as well as when they're housed up inside the modules in the towers there are lists of bondsmen that they can call whenever they're on free time at any given time.

Q So they have multiple opportunities to call bondsmen?

A Yes, ma'am, they do.

Q They can call their families to call bondsmen?

A Yes.

Q And having an attorney inside a visitation room does not give them a special opportunity to call a bondsman?

A No, ma'am.

Q Would you consider calling a bondsman an emergency call?

A No, ma'am.

Q So based upon the video and surveillance and her statements, did Alexis Plunkett circumvent telecommunications by using the cell phone during these dates?

A Yes, ma'am.

Q Let's see here, in addition to the

visitation forms you've also provided visitation logs; is that correct?

A Yes, ma'am.

Q And these are all logs that list the person who visits them as well as the time and the date?

A Yes, ma'am.

Q If I show these to you will you recognize them?

A Yes, ma'am.

Q Showing you Grand Jury Exhibit Number 3, do you recognize this?

A Yes, ma'am.

Q Can you tell me what that is?

A This is a list of Mr. Andrew Arevalo's current visits that he has had since he's been in our custody starting on May 8th, or excuse me, April 8th.

Q Okay. And directing your attention to the dates here -- let me put it up here for the Grand Jury to see -- and this is the visitation log for the defendant Andrew Arevalo?

A Yes, ma'am.

Q Okay. And do the dates also correspond to the April 8th, April 10th, April 12th, 16th, 18th and 20th that are also seen here on the visitation forms for acknowledging the device?

A Yes, ma'am.

Q Let's go to the next page here. And are these dates here also corroborating the forms that she signed for the device?

A Yes, ma'am.

Q Okay. And showing you Exhibit Number 4, do you recognize this, sir?

A Yes, ma'am, this is for Inmate Estrada and his visit with Attorney Alexis Plunkett.

Q And this is dated April 28th. Does this also corroborate the date of the form that she signed, April 28th, for Defendant Estrada?

A Yes, ma'am.

Q Okay. To your knowledge are jail calls made by inmates usually recorded?

A Yes, ma'am, they are.

Q Why are they recorded?

A For safety and security at the facility. If anything was to come out that there was a threat or, like I said, a security issue they can be recorded at any given time.

Q So safety and concern are the biggest issues here?

A Yes, ma'am.

Q At any time during booking or during their

detention stay, are inmates ever advised by rules of contraband or bringing items into the detention center?

A Yes, ma'am, they are. As soon as they are booked into the facility we have a what's called an orientation film that's played several times throughout the day and it's shown up on, there's T.V. monitors within all the cells, even up in the towers, like I said that's played several times throughout the day and it advises them of the rules in regards to phone calls as well any kind of contraband and several hours out of the day. So, yes, they are notified plus we have rule books given to the inmates once they are booked in as well.

Q So inmates are fully aware of the contraband rules?

A Yes, ma'am, they are.

MS. YANG: We have nothing further. Thank you.

BY A JUROR:

Q Is there any limit on what time of day an attorney can visit with the client?

A Attorneys pretty much have, they're allowed to have a visit any time of the day up until around 2300 hours at nighttime and that's so the inmates can be back into their cells or their rooms, their living area by 11:00 o'clock because we wind up doing a head count

around that time.
Q Thank you.
A You're welcome, ma'am.
BY A JUROR:
Q What is the normal form of communication between an attorney and an inmate as far as arranging these meetings?
A Well, we've seen it several different ways. The attorney can call over. There's a phone within the module where the inmates are housed where the attorney can call and talk to the inmate that way, or the other way would be for them to come in and do a video visit with them as well as the contact rooms of the module. So there's three different ways.
Q Thank you.
A You're welcome, sir.
BY MS. YANG:
Q I apologize, I have one additional question here.
A Yes, ma'am.
Q So we went over Grand Jury Exhibit Number 5 and we said that we were missing the dates of the 8th and the 10th which have been recorded here in the visitation logs.
Let me just show it for the Grand Jury

here.
We have the date of the visit 8th and the 10th, but unfortunately we don't have the forms here. To your knowledge though she would have to sign these forms in order to receive visitation rights to the inmate; is that correct?
A That is correct.
Q Okay. Do you have any standard protocol regarding the forms for destroying them?
A Currently right now we hold onto those forms. The DSTs or the detention services clerks do. They hold onto those forms for approximately a week, a week and a half, and then they are discarded. So right now, no, there isn't a standard operation of how long we keep them because it's a form that's normally filled out every single day; however, that's being changed right now where we can keep them longer.
MS. YANG: Are there any questions for this witness from the Grand Jury at this time?
THE FOREPERSON: By law these proceedings are secret and you are prohibited from disclosing to anyone anything that transpired before us including any evidence presented to the Grand Jury, any event occurring or a statement made in the presence of the Grand Jury or any information obtained by the Grand

Jury.
Failure to comply with this admonition is a gross misdemeanor punishable up to 364 days in the Clark County Detention Center and a $2,000 fine. In addition you may be held in contempt of court punishable by an additional $500 fine and 25 days in the Clark County Detention Center.
Do you understand this admonition?
THE WITNESS: Yes, sir, I do.
THE FOREPERSON: Thank you. You're excused.
THE WITNESS: All right. Thank you.
MR. RAMAN: And that's all our witnesses for now. We'll retire while you deliberate.
(At this time, all persons, except the members of the Grand Jury, exited the room at 12:18 and returned at 12:23.)
THE FOREPERSON: Mr. and Madam District Attorney, by a vote of 12 or more Grand Jurors a true bill has been returned against defendants Andrew Arevalo and Alexis Plunkett charging the crimes of conspiracy to unlawfully possess portable telecommunications device by a prisoner, possess portable telecommunications device by a prisoner in Grand Jury case number 16BGJ180A and B.
We instruct you to prepare an Indictment in

conformance with the proposed Indictment previously submitted to us.
MR. RAMAN: All right. Thank you. See you next week.
(Proceedings concluded.)
--oo0oo--

REPORTER'S CERTIFICATE

STATE OF NEVADA)
: Ss
COUNTY OF CLARK)

I, Donna J. McCord, C.C.R. 337, do hereby certify that I took down in Shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated and thereafter said shorthand notes were transcribed at and under my direction and supervision and that the foregoing transcript constitutes a full, true, and accurate record of the proceedings had.

Dated at Las Vegas, Nevada, July 10, 2017.

/S/DONNA J.MCCORD
Donna J. McCord, C.C.R. 337

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding TRANSCRIPT filed in GRAND JURY CASE NUMBER 16BGJ180A-B:

X Does not contain the social security number of any person,

-OR-

___ Contains the social security number of a person as required by:

A. A specific state or federal law, to-wit: NRS 656.250.

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

/S/DONNA J. MCCORD
Signature

July 10, 2017
Date

Donna J. McCord
Print Name

Official Court Reporter
Title

ORIGINAL

IND
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUL 0 6 2017

BY
DULCE MARIE ROMEA, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANDREW AREVALO, aka,
Andrew Jay Arevalo #2691301
ALEXIS PLUNKETT, aka,
Alexis Anne Plunkett

Defendant(s).

CASE NO: C-17-324821-2

DEPT NO: XVII

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, accused by the Clark County Grand Jury of the crime(s) of CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER (Gross Misdemeanor - NRS 212.165, 199.480 - NOC 55248) and POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony - NRS 212.165 - NOC 58368), committed at and within the County of Clark, State of Nevada, on or between April 8, 2017 and May 8, 2017, as follows:

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C-17-324821-2
IND
Indictment
4663750

COUNT 1 - CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or between April 8, 2017 and May 8, 2017 willfully and unlawfully conspire with each other to commit possession of a portable telecommunications device by a prisoner, by Defendants committing the acts as set forth in Counts 2 through 12, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 8, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact

visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 3 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 10, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 4 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 16, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable

telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 5 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 18, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with

the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 6 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did April 20, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of

Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 7 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 23, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 8 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 25, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 9 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 27, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be

or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 10 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 30, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding,

inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 11 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about May 2, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of

Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 12 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about May 8, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact

visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket, Defendants acting in concert throughout.

COUNT 13 - CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER

Defendants ALEXIS PLUNKETT, aka, Alexis Anne Plunket did on or about April 28, 2017 willfully and unlawfully conspire with ROGELIO ESTRADA, aka, Rogelio Estradasalcedo to commit possession of a portable telecommunications device by a prisoner, by Defendant and/or ROGELIO ESTRADA, aka, Rogelio Estradasalcedo committing the acts as set forth in Count 14, said acts being incorporated by this reference as though fully set forth herein.

COUNT 14 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket did on or about April 28, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, defendant being charged, convicted, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail, to wit: the Clark County Detention Center, the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendant(s) aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby ROGELIO ESTRADA, aka, Rogelio Estradasalcedo, being a prisoner of the Clark County Detention Center, being charged with the felony crime of Forgery of Credit or Debit Card, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunket allowed ROGELIO ESTRADA, aka, Rogelio Estradasalcedo to

possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between ROGELIO ESTRADA, aka, Rogelio Estradasalcedo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendant and ROGELIO ESTRADA, aka, Rogelio Estradasalcedo acting in concert throughout.

DATED this 5 day of July, 2017.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193

ENDORSEMENT: A True Bill

_____
Foreperson, Clark County Grand Jury

Names of Witnesses and testifying before the Grand Jury:

EBNETER, JERE, LVMPD #6298

STANTON, AARON, LVMDP #4717

Additional Witnesses known to the District Attorney at time of filing the Indictment:

BUFFOLINO, TOM, LVMPD #3927

CUSTODIAN OF RECORDS, CCDC

CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS, LVMPD RECORDS

GREGORY, MARK, LVMPD #4112

NGUYEN, CHUONG, LVMPD# 9919

16BGJ180A-B/17F08821A-B/mc-GJ
LVMPD EV# 1704061379
(TK7)

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ANDREW AREVALO, aka Andrew Jay Arevalo, ALEXIS PLUNKETT, aka Alexis Anne Plunkett, ROGELIO ESTRADA, aka Rogelio Estradasalcedo, Defendants.	GJ No. 16BGJ180A-C DC No. C324821

Taken at Las Vegas, Nevada

Wednesday, July 12, 2017

1:02 p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SUPERSEDING INDICTMENT

Reported by: Danette L. Antonacci, C.C.R. No. 222

GRAND JURORS PRESENT ON JULY 12, 2017

JOHN BLACKWELL, Foreperson
JANE REYLING, Deputy Foreperson
STACEY EARL, Secretary
MARGARET FREE, Assistant Secretary
LILA CAMPOS
ISABEL DARENSBOURG
PHILLIP HOLGUIN
GREGORY KRAMER
REGLA MEGRET
CHARLOTTE MILLER
ADOLPH PEBELSKE, JR.
ELIZABETH ROMOFF
FRANCES STOLDAD

Also present at the request of the Grand Jury:

Jay P. Raman, Chief Deputy District Attorney

LAS VEGAS, NEVADA, JULY 12, 2017

* * * * * * *

DANETTE L. ANTONACCI,

having been first duly sworn to faithfully and accurately transcribe the following proceedings to the best of her ability.

MR. RAMAN: Ladies and gentlemen of the Grand Jury, again my name is Jay P. Raman. I'm with the Clark County District Attorney's Office. I'm here to supercede on case number 16BGJ180A through now C. Previously indicted Mr. Andrew Arevalo and Alexis Plunkett. Our superseding Indictment simply adds defendant liability to Rogelio Estrada as the C defendant in your superseding Indictment is mentioned in Counts 12 and 13.

A JUROR: Ten, 11, 12, 13, 14.

MR. RAMAN: I'll check. I'm sorry.

No, there's a typo here. Count 10 is correct but it should say committing the acts set forth in Counts 11 and 12, not 11 and 14. So please make that change. Count 11 is correct. So 10 and 11 are correct. Count 12 should be Alexis Plunkett and Andrew Arevalo. So anywhere it says Rogelio Estrada, it should be Andrew

Arevelo. Count 13 should be the same, Andrew Arevalo with Alexis Plunkett. And Count 14 should be Andrew Arevalo with Alexis Plunkett, not Rogelio Estrada. Likewise that makes Count 1, Counts 2 through 9 and then 12 through 14. Does everybody understand those changes?

A JUROR: Would you go through it again just to make sure?

MR. RAMAN: Sure. So looking at Count 1, it should say conspiracy between Andrew Arevalo and Alexis Plunkett involves acts in Counts 2 through 9 and 12 through 14. And then if you skip to 10, 10 is talking about the co-defendant that we're adding today, Rogelio Estrada. 11 is correctly pled, Rogelio Estrada, April 28th. 12 should be changed to Andrew Arevalo and Alexis Plunkett. Anywhere it says Rogelio Estrada it should say Andrew Arevalo. Thirteen, same thing, should have been Andrew Arevalo. And 14 should be Andrew Arevalo. And if the Grand Jury's recollection of the events differ from that please let me know. But I believe we only presented one video on Mr. Estrada, that was April 28th. Everything else was Mr. Arevalo with Plunkett.

All right. I will let everybody retire to deliberate.

///

01:07 (At this time, all persons, other than members of the Grand Jury, exit the room at 1:06 p.m. and return at 1:10 p.m.)

THE FOREPERSON: Mr. District Attorney, by
01:10 a vote of 12 or more Grand Jurors a true bill has been returned against defendants Andrew Arevalo, Alexis Plunkett and Rogelio Estrada charging the crimes of conspiracy to unlawfully possess portable telecommunications device by a prisoner, possess
01:11 portable telecommunication device by a prisoner, in Grand Jury case number 16BGJ180ABC. We instruct you to prepare an Indictment in conformance with the proposed Indictment previously submitted to us with amendments.

MR. RAMAN: Okay. Thank you.

01:11 (Proceedings concluded.)

--oo0oo--

01:11

REPORTER'S CERTIFICATE

STATE OF NEVADA)
: ss
COUNTY OF CLARK)

I, Danette L. Antonacci, C.C.R. 222, do hereby certify that I took down in Shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated and thereafter said shorthand notes were transcribed at and under my direction and supervision and that the foregoing transcript constitutes a full, true, and accurate record of the proceedings had.

Dated at Las Vegas, Nevada,
July 19, 2017.

/s/ Danette L. Antonacci

Danette L. Antonacci, C.C.R. 222

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding TRANSCRIPT filed in GRAND JURY CASE NUMBER 16BGJ180A-C:

_X_ Does not contain the social security number of any person,

-OR-

___ Contains the social security number of a person as required by:

A. A specific state or federal law, to-wit: NRS 656.250.

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

/s/ Danette L. Antonacci
Signature

7-19-17
Date

Danette L. Antonacci
Print Name

Official Court Reporter
Title

ORIGINAL

IND
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUL 13 2017

BY
DULCE MARIE ROMEA, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANDREW AREVALO, aka,
Andrew Jay Arevalo #2691301
ALEXIS PLUNKETT, aka,
Alexis Anne Plunkett #7042408
ROGELIO ESTRADA, aka,
Rogelio Estradasalcedo #1970627

Defendant(s).

CASE NO: C-17-324821-2

DEPT NO: XVII

SUPERSEDING

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, ANDREW AREVALO, aka, Andrew Jay Arevalo, ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, and ROGELIO ESTRADA, aka, Rogelio Estradasalcedo, accused by the Clark County Grand Jury of the crime(s) of CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER (Gross Misdemeanor - NRS 212.165, 199.480 - NOC 55248) and POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony - NRS 212.165 - NOC 58368), committed at and within the County of Clark, State of Nevada, on or between April 8, 2017 and May 8, 2017, as follows:

///

///

C-17-324821-2
SIND
Superseding Indictment
4665611

COUNT 1 - CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or between April 8, 2017 and May 8, 2017 willfully and unlawfully conspire with each other to commit possession of a portable telecommunications device by a prisoner, by Defendants committing the acts as set forth in Counts 2 through 9 and 12 through 14, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 8, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact

visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 3 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 10, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 4 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 16, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable

telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 5 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 18, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with

the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 6 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did April 20, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of

Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 7 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 25, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 8 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 8, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 9 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 27, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, Defendant being charged, or sentenced for a felony crime, and Defendant being a prisoner of a jail or other place where such prisoners are authorized to be

or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crimes of Possession of Firearm by a Prohibited Person, Trafficking in a Controlled Substance, and Sale of a Controlled Substance, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 10 - CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER

Defendants ALEXIS PLUNKETT, aka, Alexis Anne Plunkett and ROGELIO ESTRADA, aka, Rogelio Estradasalcedo did on or about April 28, 2017 willfully and unlawfully conspire with each other to commit possession of a portable telecommunications device by a prisoner, by Defendants committing the acts as set forth in Count 11, said acts being incorporated by this reference as though fully set forth herein.

COUNT 11 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ALEXIS PLUNKETT, aka, Alexis Anne Plunkett and ROGELIO ESTRADA, aka, Rogelio Estradasalcedo did on or about April 28, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable

telecommunications device, defendant being charged, convicted, or sentenced for a felony crime, and defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail, to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ROGELIO ESTRADA, aka, Rogelio Estradasalcedo, being a prisoner of the Clark County Detention Center, being charged with the felony crime of Forgery of Credit or Debit Card, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ROGELIO ESTRADA, aka, Rogelio Estradasalcedo to possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ROGELIO ESTRADA, aka, Rogelio Estradasalcedo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 12 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about April 30, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, defendant being charged, convicted, or sentenced for a felony crime, and defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail, to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1)

by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crime of Forgery of Credit or Debit Card, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo to possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 13 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about May 2, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, defendant being charged, convicted, or sentenced for a felony crime, and defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail, to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering

into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crime of Forgery of Credit or Debit Card, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo to possess or control a cellular telephone or smart phone within the Clark County Detention Center during a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

COUNT 14 - POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER

Defendants ANDREW AREVALO, aka, Andrew Jay Arevalo and ALEXIS PLUNKETT, aka, Alexis Anne Plunkett did on or about May 8, 2017 willfully, unlawfully, and feloniously, without authorization, possess, or have in his custody or control, a portable telecommunications device, defendant being charged, convicted, or sentenced for a felony crime, and defendant being a prisoner of a jail or other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police, or other officer responsible for the operation of the jail, to wit: the Clark County Detention Center, the Defendants being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring in the following manner, to wit: by entering into a course of conduct whereby Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo, being a prisoner of the Clark County Detention Center, being charged with the felony crime of Forgery of Credit or Debit Card, Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett allowed Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo to possess or control a cellular telephone or smart phone within the Clark County Detention Center during

a contact visit between Defendant ANDREW AREVALO, aka, Andrew Jay Arevalo and Defendant ALEXIS PLUNKETT, aka, Alexis Anne Plunkett, Defendants acting in concert throughout.

DATED this 12 day of July, 2017.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____ 10193
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193

ENDORSEMENT: A True Bill

_____
Foreperson, Clark County Grand Jury

Names of Witnesses and testifying before the Grand Jury:

EBNETER, JERE, LVMPD #6298

STANTON, AARON, LVMDP #4717

Additional Witnesses known to the District Attorney at time of filing the Indictment:

BUFFOLINO, TOM, LVMPD #3927

CUSTODIAN OF RECORDS, CCDC

CUSTODIAN OF RECORDS, LVMPD COMMUNICATIONS

CUSTODIAN OF RECORDS, LVMPD RECORDS

GREGORY, MARK, LVMPD #4112

NGUYEN, CHUONG, LVMPD# 9919

16BGJ180A-C/17F08821A-C/mc-GJ
LVMPD EV# 1704061379
(TK7)

MICHAEL L. BECKER, ESQ.
NEVADA BAR NO. 8765
ADAM M. SOLINGER, ESQ.
NEVADA BAR NO. 13963
LAS VEGAS DEFENSE GROUP, LLC
2300 W. Sahara Avenue, Suite 450
Las Vegas, Nevada 89102
(702) 331-2725 – Telephone
(702) 974-0524 - Fax
Attorney for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Application of,	
	CASE NO. C-17-324821-2
	DEPT. NO. XVII
Alexis Plunkett,	
For a Writ of Habeas Corpus.	DATE:
	TIME:

PETITION FOR WRIT OF HABEAS CORPUS

To: The Honorable District Court of the State of Nevada, in and for the County of Clark.

The Petition of ADAM M. SOLINGER, ESQ. for the above captioned individual, respectfully shows:

1. Counsel for Petitioner is a duly qualified, practicing and licensed attorney for Defendant ALEXIS PLUNKETT.

2. That Counsel for Petitioner makes application herein on behalf of Petitioner for a Writ of Habeas Corpus; that the place where Applicant is constructively restrained of her liberty is the Clark County Detention Center; that the officer by whom she is restrained is the Clark County Sheriff, Joseph Lombardo.

3. That the imprisonment and restraint of said above-captioned Petitioner is unlawful in that

insufficient evidence was presented during said Petitioner's Grand Jury hearing of July 5, 2017, to establish probable cause for the charges of CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER (Gross Misdemeanor – NRS 212.165, 199.480 – NOC 55248) and POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony – NRS 212.165 – NOC 58368).

4. That Counsel for Petitioner waives the 60-day limitation for bringing said Petitioner to trial.

5. That Counsel for Petitioner consents that if the Petition is not decided within 15 days before the date set for trail, the Court may, without notice or hearing, continue the trial indefinitely to a date designated by the Court.

6. That Counsel for Petitioner consents that if any party appeals the Court's ruling and the appeal is not determined before the date set for trial; the trial date is automatically vacated and the trial postponed unless the Court otherwise orders;

7. That no other Petition for Writ of Habeas Corpus has heretofore been filed on behalf of Petitioner on this particular issue.

WHEREFORE, Petitioner prays that this Honorable Court issue an order directing the Clark County Clerk to issue a Writ of Habeas Corpus to the said Joseph Lombardo, Sheriff commanding him to release Petitioner from her constructive imprisonment.

Respectfully submitted,

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Petitioner

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff;

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the above and foregoing Motion will be heard before the above entitled Court on the 22nd day of August, 2017, at 8:30 AM a.m., or as soon thereafter as counsel may be heard.

DATED this 7th day of August, 2017

By: _____

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
Attorney for Petitioner

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I. STATEMENT OF THE CASE

Petitioner ALEXIS PLUNKETT ("Petitioner") was charged by way of superseding grand jury indictment, along with two (2) co-defendants, Andrew Arevalo and Rogelio Estrada, with fourteen (14) counts including: CONSPIRACY TO UNLAWFULLY POESSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER (Gross Misdemeanor – NRS 212.165, 199.480 – NOC 55248); and POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony – NRS 212.165 – NOC 58368).

Said indictment is the subject of this Petition for Writ of Habeas Corpus. The Petitioner has been released on her own recognizance but is being constructively restrained by the indictment in this case.

II. STATEMENT OF THE FACTS

As relevant to this petition, Ms. Plunkett is alleged to have brought a cell phone into the Clark County Detention Center without lawful authorization and that once she was visiting with her clients, she is alleged to have provided the phone to her clients to allow them to make or participate in calls and/or send messages and/or read text messages. However, every time a phone was brought into the jail, an authorization form was signed and completed by Ms. Plunkett. That form disclosed that she was bringing the phone in for the purpose of conducting case work. *See* Exhibit "A."

III. ARGUMENT

A. Applicable Law

The Writ of Habeas Corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless action. Its preeminent role is recognized by the admonition

that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended." Harris v. Nelson, 394 U.S. 286, 290-91; 89 s.Ct 1082 (1969). Further, "the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom..." Johnson v. Avery, 394 U.S. 483, 485; 89 S.Ct. 747 (1969). Since 1912, the Nevada Supreme Court has recognized that the writ of habeas corpus is the plain, speedy and adequate remedy by which to determine the legal sufficiency of the evidence supporting a grand jury indictment. *See e.g.* Eureka County Bank Habeas Corpus Cases, 35 Nev. 80; 126 P. 655 (1912); Ex parte Stearns, 68 Nev. 155; 227 P.2d 971 (1951); Ex parte Colton, 72 Nev. 83; 295 P.2d 383 (1956).

Petitioner has been unlawfully and constructively held to answer to these charges due to the failure of the state to adduce sufficient legal evidence to demonstrate probable cause. This position is supported by the arguments that follow.

B. Discussion

AS A MATTER OF LAW, THE LEGISLATURE NEVER INTENDED NRS 212.165(4) TO EXTEND LIABILITY AS CHARGED TO PERSONS BRINGING PHONES INTO JAILS AND THEREFORE THE STATE CANNOT CREATE LIABILITY.

i. Probable Cause Standard

During grand jury proceedings, the State must elicit sufficient evidence demonstrating probable cause that a crime was committed and that the accused was likely the perpetrator. Sheriff v. Miley, 99 Nev. 377, 379; 663 P.2d 343, 344 (1983). The Nevada Supreme Court has stated that "It is fundamentally unfair to require one to stand trial unless he is committed upon a criminal charge with reasonable or probable cause. No one would suggest that an accused person should be tried for a public offense if there exists no reasonable or probable cause for trial." Shelby v. Sixth Judicial Dist. Court In and For Pershing County, 82 Nev. 204, 207-208; 414 P.2d 942, 943 - 944 (1966). The writ has been most commonly used to test probable cause following a preliminary

examination resulting in an order that the accused be held to answer in the district court. *See* State v. Plas, 80 Nev. 251, 391 P.2d 867 (1964); Beasley v. Lamb, 79 Nev. 78, 378 P.2d 524 (1963). The remedy is equally available for use following a grand indictment, (*See* Ex parte Hutchinson, 76 Nev. 478; 357 P.2d 589 (1960), writ granted.), and to test the legal sufficiency of the evidence supporting a grand jury indictment. Ex parte Colton, 72 Nev. 83, 205 P.2d 383 (1956).

All of the above cases cited compel the conclusion that whether the prosecution elects to proceed by preliminary examination or by grand jury indictment, it must assume the burden of showing the existence of reasonable or probable cause to hold the accused for trial, if challenged on that ground. *See* Shelby, 82 Nev. at 208; 414 P.2d at 944 (1966).

ii. Duty of the Grand Jury

NRS 172.155(1) requires that the grand jury, prior to indicting the accused, find probable cause to believe that an offense has been committed and that the person charged committed the crime. The grand jury has a duty to "weigh all evidence submitted to them." NRS 172.145(1). The grand jury does not determine guilt or innocence, but needs only to have before them legally sufficient evidence to establish probable cause. Kinsey v. Sheriff, 87 Nev. 361; 487 P.2d 340 (1971).

iii. Standard of Review

It is appropriate for a district court to grant a petition for a writ of habeas corpus when the prosecution acts in "a willful or consciously indifferent manner with regard to a defendant's procedural rights, or where the grand jury indicts the defendant on criminal charges without probable cause." Dettloff v. State, 120 Nev. 588, 595; 97 P. 3d 586, 590 (2004) (quoting Sheriff v. Roylance, 110 Nev. 334, 337, 871 P.2d 359, 361 (1994)) For the indictment to withstand a challenge by habeas corpus the sufficient legal evidence presented to the grand jury must show (1)

probable cause to believe that a crime has been committed, and (2) probable cause to believe that the person charged committed the crime. Tertrou v. Sheriff, Clark County, 89 Nev. 166, 169; 509 P.2d 970, 972 (1973). "A grand jury indictment will be sustained where the State submits sufficient legal evidence to establish probable cause, even though inadmissible evidence may have been offered." Id. "The finding of probable cause may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." Id. at 595; 97 P.3d at 590-91 (quoting Sheriff v. Simpson, 109 Nev. 430, 435, 851 P.2d 428, 432 (1993) (quoting Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980)).

In habeas corpus proceedings brought by one indicted in a crime, the court can only inquire into whether there exists any substantial evidence which, if true, would support a verdict of conviction. Ex Parte Stearns, 68 Nev. 155, 159, 227 P.2d 971, 973 (1951), *overruled in part on other grounds by* Shelby v. District Court, 82 Nev. 213, 418 P.2d 132 (1966). The court may not resolve a substantial conflict in the evidence because that is the exclusive function of the jury. Id.

iv. Analysis

In the present case, the State has created criminal liability in this case where the legislator has clearly intended that no liability exist.

a. THE LEGISLATIVE INTENT CLEARLY DEMONSTRATES THAT NO CRIMINAL LIABILITY EXISTS FOR PERSONS BRINGING PHONES INTO JAILS.

The Nevada Constitution explicitly provides for the separation of powers between the three branches of government. NV. Const. Art. 3, § 1. No one charged with the execution of the powers assigned to one branch shall then exercise the powers belonging to another branch. *Id.* The Legislator is entrusted with the power to frame and enact laws and to amend or repeal them. *See Nevada Yellow Cab Corporation v. Eighth Judicial District Court in and for the County of Clark,*

383 P.3d 246 (Nev. 2016). Executive power is to carry out and enforce the law enacted by the legislature. NV Const. Art. 3, § 1.

Nevada law prohibits certain conduct with regards to telecommunication devices and jails and/or prisons. *See* Nev. Rev. Stat. 212.165. Specifically, a person who brings a phone into a facility that houses prisoners and does so without lawful authority in an attempt to provide the device to a prisoner is guilty of a category E Felony. Nev. Rev. Stat. 212.165(1). A person who just carries the device into a prison without lawful authority but only possesses the device is guilty of a misdemeanor. Nev. Rev. Stat. 212.165(2). A prisoner in prison who has possession of a device without lawful authority is guilty of a category D felony. Nev. Rev. Stat. 212.165(3). Finally, a prisoner confined in jail who has possession of a device without lawful authority shall be punished proportionally depending on the alleged crime the prisoner is currently in custody on. Nev. Rev. Stat. 212.165(4)(a)-(c).

Clearly, the Nevada Legislature intended to prohibit prisoners in prison and jail from possessing telecommunication devices with unfettered access. Also, the Legislature intended to punish those that bring phones into a prison without permission and either give the device or give access to the same to a person in the prison.

In this case, Ms. Plunkett is charged with a violation of Nev. Rev. Stat. 212.165(4)(a) under a theory of conspiracy liability, a theory of aiding and abetting, or a theory that she was a prisoner herself. More specifically, at the times relevant to this case, she was not a prisoner being detained pretrial in the county jail; she was an attorney. Therefore, she could not have directly committed this crime. Furthermore, the theory of conspiracy or aiding and abetting liability cannot Constitutionally stand in this case because the Nevada Legislature had the opportunity to extend

liability to those that bring phones into a jail, but choose not to extend criminal liability. This is clearly evidenced by the statutory scheme. The legislature specifically punishes people who bring phones into a prison without authorization. The only line of demarcation for punishment in those instances is whether the phone is merely possessed or whether it is actively furnished to an inmate in the prison. However, the statutory scheme does not provide to criminal liability when a person brings a phone into a jail. Instead, the only punishment is on the person in jail that possesses or exercises control over the phone. This purposeful asymmetry clearly demonstrates an intent not to criminally punish persons that bring phones into a jail. The Legislature knew how to create a crime and did so with prisons.

As a result, to allow the State of Nevada, by and through the Clark County District Attorney's Office, to create criminal liability where none currently exists would violate the Nevada Constitution that provides for separation of powers. Essentially, our system provides that the office in charge of enforcing the law cannot then create the law that it chooses to enforce. To allow Ms. Plunkett to face trial on a charge never intended to exist by the legislature would be a gross miscarriage of justice. Furthermore, Ms. Plunkett would actually face a lesser charge and be given mandatory probation if she would have provided a phone to a prisoner in prison because she would then only be punished for a category E felony and be given mandatory probation rather than a non-probationable category D felony. This absurd result of punishing those who provide phones to prisoners in prison, rather than jailees in jail cannot stand as a matter of law.

b. THE STATE VIOLATED NEVADA LAW BY FAILING TO PRESENT THE INHERENT AMBIGUITY IN THE CELL PHONE PERMISSION FORM REQUIRED BY THE CLARK COUNTY DETENTION CENTER.

There is a duty of good faith on the part of the prosecutor when dealing with the court, the grand jury and the defendant. U.S. v. Basurto, 497 F. 2d 781, 786 (9th Cir. 1974). Misconduct may

even be found when a prosecutor acts in good faith. *See, e.g.* People v. Osband, 919 P.2d 640, 55 Cal. Rptr.2d 26, 13 C.4th 38a (1996). In presenting a case to a grand jury a prosecutor and his assistants are required to submit any evidence that would explain away the charges. Nev. Rev. Stat. 172.145(2). Additionally, a district court may grant a pretrial petition for a writ of habeas corpus where the prosecution acted in "a willful or consciously indifferent manner with regard to a defendant's procedural rights," or where the grand jury indicted the defendant on criminal charges without probable cause. Sheriff v. Roylance, 110 Nev. 334, 337; 871 P.2d 359, 361 (1994).

In Nevada, "the dismissal of an indictment serves equally well to eliminate prejudice to a defendant and to curb the prosecutorial excesses of a District Attorney or his staff." *See* State v. Babayan, 106 Nev. 155, 173; 787 P. 2d 805, 818 (1990). Additionally, "dismissal with prejudice is warranted when the evidence against a defendant is irrevocably tainted or the defendant's case on the merits is prejudiced to the extent 'that notions of due process and fundamental fairness would preclude reindictment.'" Id.

In the present case, the Clark County Detention Center requires a form to be signed and completed by anyone bringing an electronic device into the jail. The permissible items include cell phones and laptops, among other things. The next section of the form provides a space for the attorney or professional to denote the purpose for which the device is brought into the jail. Now, the form is inherently ambiguous because under the item section the cell phone box has an explanatory line that states the phone is to be used for emergencies only. However, under the purpose section, there is no language stating that a purpose is to be checked only for items that are not a cell phone.

In other words, the form is ambiguous because it provides the opportunity for an attorney to bring a phone if they mark that the purpose "casework," which is exactly what Ms. Plunkett did

here. Ms. Plunkett clearly disclosed her intentions with the phone with no objection from jail personnel. Rather, jail personnel presumably reviewed the forms and expressly or at a minimum tacitly authorized Ms. Plunkett to bring the phone in to use for her intended purpose.

While the State did present the forms to the Grand Jury, the State failed to explain the forms or their purpose and in fact adduced witness testimony that claims the form expressly states that a phone can be used only for calling detention center staff or for calling 911, when the form necessarily suggests otherwise. *See* GJT at 55. *See also* Exhibit A. While this is but one interpretation of the form, another would be that professionals may modify the scope of permissible use by checking casework on the form and that absent a protest or admonishment from jail staff, that there is authorization to use the device for the selected purpose. This goes to both the State's duty to present evidence that would explain away the charge and the lawful authorization prong of the criminal charging statute.

IV. CONCLUSION

The totality of the circumstances demonstrate that sufficient legal evidence has not been presented by the State substantiating probable cause by which a grand jury could return an indictment.

Specifically, the District Attorney has violated the doctrine of separation of powers by creating criminal liability where the legislator specifically intended that none exist and that the State failed in its duty to present exculpatory evidence that goes to the legal sufficiency of the charge by allowing its witness to mischaracterize the forms signed in this case that grant permission to bring the phone into the jail.

WHEREFORE, Petitioner ALEXIS PLUNKETT respectfully requests that this Honorable Court grant her Petition for Writ of Habeas Corpus and dismiss the Indictment with prejudice as

Petitioner has established that there is no theory of liability under which Ms. Plunkett may permissible be charged as a matter of law.

DATED this 7th day of August, 2017.

By:

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Petitioner

DECLARATION OF ADAM M. SOLINGER, ESQ. PURSUANT TO NRS 53.045

ADAM M. SOLINGER, ESQ. deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Nevada. I am co-counsel with Michael L. Becker, Esq. for Ms. Alexis Plunkett;

2. That Ms. Plunkett has directed that I file the foregoing Writ of Habeas Corpus;

3. That I have read the foregoing Writ of Habeas Corpus and knows the contents therein and as to those matters they are true and correct and as to those matters based on information and belief he is informed and believes them to be true;

4. That MS. PLUNKETT has no adequate remedy at law available to her as to the current matter and that the only means to address this problem is through this writ;

5. That I sign this Verification on behalf of MS. PLUNKETT under her direction and authorization.

Pursuant to NRS 53.045, I ADAM M. SOLINGER, ESQ., declare under perjury that the foregoing is true and correct.

Executed this 28 day of August, 2017.

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963

CERTIFICATE OF MAILING

I hereby certify that service of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** was made this 7th day of August, 2017 upon the appropriate parties hereto by depositing a true copy thereof in the United States mail, postage prepaid and addressed to:

SHERIFF JOSEPH LOMBARDO
Clark County Detention Center
330 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 671-3900
Respondent

JAY P. RAHMAN, ESQ.
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155
(702) 671-2590
Attorneys for Respondent

An employee of
LAS VEGAS DEFENSE GROUP,
LLC.

EXHIBIT A

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

You are being authorized to bring in portable electronic device(s). Please check the portable device(s) you are bringing into the facility:

- ☒ Cell phone - The use of a cell phone is only authorized to contact CCDC staff (*702*-671-3800) or 911 in the event of an emergency. Unauthorized use will subject the user to criminal prosecution.
- ☒ Notebook
- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

The authorization to bring in this equipment is for specific and limited purposes, as defined below. Please check the purpose that requires the use of the aforementioned portable electronic devices. If you use this equipment for any other purpose other than what has been authorized, you are subject to the terms of NRS 212.165 (on back), up to and including prosecution. Any violations of this acknowledgment will likely lead to your visiting rights at the Clark County Detention Center being terminated.

- ☒ Casework
- ☒ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: Alexis Plunkett

Signature: [signature]

Date: 4/14/21

Inmate(s) to be contacted:

Name: A. Arwald Name:_____ Name:_____

ID # 2409301 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
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- ☐ Notebook
- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

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- ☐ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: Peggy Plunkett

Signature: _____

Date: 5/2/17

Inmate(s) to be contacted:

Name: J. Nevada Name:_____ Name:_____

ID # 2611301 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: [illegible]

Signature: [illegible]

Date: 4/18/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # 2004130 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

You are being authorized to bring in portable electronic device(s). Please check the portable device(s) you are bringing into the facility:

- ☑ Cell phone - The use of a cell phone is only authorized to contact CCDC staff (702-671-3800) or 911 in the event of an emergency. Unauthorized use will subject the user to criminal prosecution.
- ☐ Notebook
- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: [illegible]

Signature: [illegible]

Date: 4/30/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # 2099130 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

You are being authorized to bring in portable electronic device(s). Please check the portable device(s) you are bringing into the facility:

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- ☐ Notebook
- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

The authorization to bring in this equipment is for specific and limited purposes, as defined below. Please check the purpose that requires the use of the aforementioned portable electronic devices. If you use this equipment for any other purpose other than what has been authorized, you are subject to the terms of NRS 212.165 (on back), up to and including prosecution. Any violations of this acknowledgment will likely lead to your visiting rights at the Clark County Detention Center being terminated.

- ☐ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: A. Burnett

Signature: _____

Date: 4/21/17

Inmate(s) to be contacted:

Name: A. Arnold Name:_____ Name:_____

ID # 2491301 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☐ Notebook
- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

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- ☒ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: A. Blankett

Signature: [signature]

Date: 4/23/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # 2091301 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☐ Notebook
- ☐ Tablet
- ☐ Laptop
- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

_____

_____

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: [illegible]

Signature: [illegible]

Date: 4/25/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # 2049301 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: J. Hunter

Signature: _____

Date: 4/24/17

Inmate(s) to be contacted:

Name: D. Arvelo Name:_____ Name:_____

ID # 2694130 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: A. Plunkett

Signature: [signature]

Date: 1/27/17

Inmate(s) to be contacted:

Name: N. Arevalo Name:_____ Name:_____

ID # 2609130 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
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- ☐ DVD Players
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- ☒ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: A. Blunkett

Signature: [signature]

Date: 4/28/17

Inmate(s) to be contacted:

Name: Williams ID # 834284S

Name: Leon ID # 7841506

Name: Estrada ID # 1976627

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
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- ☐ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: [illegible] Plunkett

Signature: [illegible]

Date: 1/26/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # 2491301 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☐ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: D. Hunkin

Signature: _____

Date: 4/24/17

Inmate(s) to be contacted:

Name: J. Urrutia Name:_____ Name:_____

ID # 2149136 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT FORM

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: J. Flanked

Signature: _____

Date: 4/30/17

Inmate(s) to be contacted:

Name: Arvelo Name:_____ Name:_____

ID # 2404130 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
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- ☐ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: [illegible] Clark ST

Signature: [illegible]

Date: 5/2/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # 2667126 ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
ACKNOWLEDGMENT

NRS 212.165 Prohibition on furnishing portable telecommunications device to prisoner and on possession of such devices in jail or institution or facility of Department of Corrections; penalties; petition for modification of sentence.

1. A person shall not, without lawful authorization, knowingly furnish, attempt to furnish, or aid or assist in furnishing or attempting to furnish to a prisoner confined in an institution or a facility of the Department of Corrections, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a category E felony and shall be punished as provided in NRS 193.130.

2. A person shall not, without lawful authorization, carry into an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a misdemeanor.

3. A prisoner confined in an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

4. A prisoner confined in a jail or any other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police or other officer responsible for the operation of the jail, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection and who is in lawful custody or confinement for a charge, conviction or sentence for:

(a) A felony is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(b) A gross misdemeanor is guilty of a gross misdemeanor.

(c) A misdemeanor is guilty of a misdemeanor.

5. A sentence imposed upon a prisoner pursuant to subsection 3 or 4:

(a) Is not subject to suspension or the granting of probation; and

(b) Must run consecutively after the prisoner has served any sentences imposed upon the prisoner for the offense or offenses for which the prisoner was in lawful custody or confinement when the prisoner violated the provisions of subsection 3 or 4.

6. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been reduced to a charge for which the penalty is less than the penalty which was imposed upon the person pursuant to subsection 4, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her sentence imposed pursuant to subsection 4 be modified to a sentence equivalent to the penalty imposed for the underlying charge for which the person was convicted; and

(b) Resentence him or her in accordance with the penalties prescribed for the underlying charge for which the person was convicted.

7. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been declined for prosecution or dismissed, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her original sentence pursuant to subsection 4 be reduced to a misdemeanor; and

(b) Resentence him or her in accordance with the penalties prescribed for a misdemeanor.

8. No person has a right to the modification of a sentence pursuant to subsection 6 or 7, and the granting or denial of a petition pursuant to subsection 6 or 7 does not establish a basis for any cause of action against this State, any political subdivision of this State or any agency, board, commission, department, officer, employee or agent of this State or a political subdivision of this State.

9. As used in this section:

(a) "Facility" has the meaning ascribed to it in NRS 209.065.

(b) "Institution" has the meaning ascribed to it in NRS 209.071.

(c) "Jail" means a jail, branch county jail or other local detention facility.

(d) "Telecommunications device" has the meaning ascribed to it in subsection 3 of NRS 209.417.

(Added to NRS by 2007, 72; A 2013, 2095).

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
ELECTRONIC TELECOMMUNICATIONS DEVICE
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- ☐ DVD Players
- ☐ Other /specify (provide justification for use):

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- ☐ Casework
- ☐ Evaluations
- ☐ Other/specify_____

Printed Name/Agency: [illegible]

Signature: [illegible]

Date: 5/7/17

Inmate(s) to be contacted:

Name: [illegible] Name:_____ Name:_____

ID # [illegible] ID #_____ ID #_____

CLARK COUNTY DETENTION CENTER / NORTH VALLEY COMPLEX
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- ☐ Other /specify (provide justification for use):

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- ☑ Casework
- ☐ Evaluations
- ☐ Other/specify _____

Printed Name/Agency: Hunt

Signature: _____

Date: 5/8/17

Inmate(s) to be contacted:

Name: Rivera Name: _____ Name: _____

ID # 2629301 ID # _____ ID # _____

RWHC
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of Application,
of

ALEXIS PLUNKETT,
For a Writ of Habeas Corpus.

Case No. C-17-324821-2
Dept No. XVII

RETURN TO WRIT OF HABEAS CORPUS

DATE OF HEARING: AUGUST 22, 2017
TIME OF HEARING: 8:30 A.M.

COMES NOW, JOSEPH LOMBARDO, Sheriff of Clark County, Nevada, Respondent, through his counsel, STEVEN B. WOLFSON, District Attorney, through JAY P. RAMAN, Chief Deputy District Attorney, in obedience to a writ of habeas corpus issued out of and under the seal of the above-entitled Court on the 11th day of August, 2017, and made returnable on the 22nd day of August, 2017, at the hour of 8:30 o'clock A.M., before the above-entitled Court, and states as follows:

1. Respondent admits the allegations of Paragraph(s) 1, 2, 4, 5, 6 and 7 of the Petitioner's Petition for Writ of Habeas Corpus.

///

2. Respondent denies the allegations of Paragraph 3 of the Petitioner's Petition for Writ of Habeas Corpus.

3. The Petitioner is in the constructive custody of JOSEPH LOMBARDO, Clark County Sheriff, Respondent herein, pursuant to a criminal Information, a copy of which is attached hereto as Exhibit 1 and incorporated by reference herein.

Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the Petition be dismissed.

DATED this 11th day of August, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY _____
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193

POINTS AND AUTHORITIES

FACTS AND CIRCUMSTANCES

This case was presented for indictment on July 5, 2017 and subsequently superseded on July 13, 2017. There are three Defendants in this case, Andrew Arevalo, Alexis Plunkett, and Rogelio Estrada. The common course and scheme shown by the evidence in this case is that Alexis Plunkett, acting as an attorney for Arevalo and Estrada, had a series of contact visits in the Clark County Detention Center with Arevalo and Estrada. During those visits, she provided them access and use of her cell phone, to make unrestricted and unrecorded calls, violating jail policy and the Nevada Revised Statutes.

///

///

ARGUMENT

I. PETITIONER CANNOT CHALLENGE HER INDICTMENT IN A PRETRIAL WRIT OF HABEAS CORPUS ON THE GROUNDS OF 'LEGISLATIVE INTENT'

The Petitioner has chosen an impermissible ground for challenging the indictment. Even if legislative intent were a challengeable ground in a writ, the Petitioner has failed to show facts or circumstances to support her argument. Thus, the writ must be denied on this basis.

A. The Petitioner lacks statutory authority to challenge the indictment on the grounds of Legislative Intent

NRS 34.700 - Time for filing; waiver and consent of accused respecting date of trial.

> 1. Except as provided in subsection 3, a pretrial petition for a writ of habeas corpus based on alleged **lack of probable cause** or otherwise challenging the court's right or **jurisdiction** to proceed to the trial of a criminal charge may not be considered unless:
>
> (a) The petition and all supporting documents are filed within 21 days after the first appearance of the accused in the district court; and
>
> (b) The petition contains a statement that the accused:
>
> (1) Waives the 60-day limitation for bringing an accused to trial; or
>
> (2) If the petition is not decided within 15 days before the date set for trial, consents that the court may, without notice or hearing, continue the trial indefinitely or to a date designated by the court.
>
> 2. The arraignment and entry of a plea by the accused must not be continued to avoid the requirement that a pretrial petition be filed within the period specified in subsection 1.
>
> 3. The court may extend, for good cause, the time to file a petition. Good cause shall be deemed to exist if the transcript of the preliminary hearing or of the proceedings before the grand jury is not available within 14 days after the accused's initial appearance and the court shall grant an ex parte application to extend the time for filing a petition. All other applications may be made only after appropriate

notice has been given to the prosecuting attorney. (Emphasis added)

NRS 34.710 - Limitations on submission and consideration of pretrial petition.

1. A district court **shall not consider any pretrial petition** for habeas corpus:

   (a) Based on alleged **lack of probable cause** or otherwise challenging the court's right or **jurisdiction** to proceed to the trial of a criminal charge unless a petition is filed in **accordance with NRS 34.700.**

   (b) Based on a ground which the petitioner could have included as a ground for relief in any prior petition for habeas corpus or other petition for extraordinary relief.

2. If an application is made to a justice of the Supreme Court for a writ of habeas corpus and the application is entertained by the justice or the Supreme Court, and thereafter denied, the person making the application may not submit thereafter an application to the district judge of the district in which the applicant is held in custody, nor to any other district judge in any other judicial district of the State, premised upon the illegality of the same charge upon which the applicant is held in custody. (Emphasis added)

NRS 34.700 states that Writs of Habeas Corpus only apply to two (2) challenges, 1) sufficiency of probable cause to hold the Defendant for trial, and 2) jurisdiction. NRS 34.710 repeats the grounds under which a Writ may be filed, and specifically says the Court shall not consider it if it doesn't conform to the Statute. The Petitioner's grounds for her Writ are that the facts of this case do not meet the legislative intent of NRS 212.165. This type of claim is not entitled relief under the Statute, is it is neither sufficiency nor jurisdiction. Therefore, Defendant's Petition must be denied on this ground.

B. Petitioner Provides No Factual or Legal Support for Her Legislative Intent Challenge

Besides the lack of authority to challenge a criminal case on the grounds of legislative intent through a pretrial writ of habeas corpus, the claim is otherwise lacking support and should not be granted.

///

The Petitioner sets out the claim on the following basis: NV Const. Art. 3 Sec 1 provides for the separation of powers, and the legislator is entrusted with the power to frame and enact laws, or amend or repeal them, citing to *Nevada Yellow Cab Corporation v. Eighth Judicial District Court* (citation missing). Neither of these citations are instructive on the matter of legislative intent of NRS 212.165, or the subject of legislative intent generally.

The Petitioner's claim is that the statutory scheme of NRS 212.165 "punishes people who bring phones into a prison without authorization" and "the only line of demarcation for punishment in those instances is whether the phone is merely possessed or whether it is actively furnished to an inmate in the prison." The Petitioner further claims that "the statutory scheme does not provide to criminal liability when a person brings a phone into a jail. Instead, the only punishment is on the person in jail that possess or exercises control over the phone."

Looking at the applicable statutes, it is clear that the Defendant can be properly charged as she is currently.

> NRS 212.165 Prohibition on furnishing portable telecommunications device to prisoner and on possession of such devices in jail or institution or facility of Department of Corrections; penalties; petition for modification of sentence.
>
> 1. A person shall not, without lawful authorization, knowingly furnish, attempt to furnish, or aid or assist in furnishing or attempting to furnish to a prisoner confined in an institution or a facility of the Department of Corrections, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a category E felony and shall be punished as provided in NRS 193.130.
>
> 2. A person shall not, without lawful authorization, carry into an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a misdemeanor.
>
> 3. A prisoner confined in an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, shall not, without lawful authorization, possess or

have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

4. A prisoner confined in a jail or any other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police or other officer responsible for the operation of the jail, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection and who is in lawful custody or confinement for a charge, conviction or sentence for:

(a) A felony is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(b) A gross misdemeanor is guilty of a gross misdemeanor.

(c) A misdemeanor is guilty of a misdemeanor.

5. A sentence imposed upon a prisoner pursuant to subsection 3 or 4:

(a) Is not subject to suspension or the granting of probation; and

(b) Must run consecutively after the prisoner has served any sentences imposed upon the prisoner for the offense or offenses for which the prisoner was in lawful custody or confinement when the prisoner violated the provisions of subsection 3 or 4.

6. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been reduced to a charge for which the penalty is less than the penalty which was imposed upon the person pursuant to subsection 4, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her sentence imposed pursuant to subsection 4 be modified to a sentence equivalent to the penalty imposed for the underlying charge for which the person was convicted; and

(b) Resentence him or her in accordance with the penalties prescribed for the underlying charge for which the person was convicted.

7. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been declined for prosecution or dismissed, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her original sentence pursuant to subsection 4 be reduced to a misdemeanor; and

(b) Resentence him or her in accordance with the penalties prescribed for a misdemeanor.

8. No person has a right to the modification of a sentence pursuant to subsection 6 or 7, and the granting or denial of a petition pursuant to subsection 6 or 7 does not establish a basis for any cause of action against this State, any political subdivision of this State or any agency, board, commission, department, officer, employee or agent of this State or a political subdivision of this State.

9. As used in this section:

(a) "Facility" has the meaning ascribed to it in NRS 209.065.

(b) "Institution" has the meaning ascribed to it in NRS 209.071.

(c) "Jail" means a jail, branch county jail or other local detention facility.

(d) "Telecommunications device" has the meaning ascribed to it in subsection 4 of NRS 209.417.

(Added to NRS by 2007, 72; A 2013, 2095; 2015, 3081)

Additionally, the aiding and abetting liability applies to all crimes, including the one Petitioner was charged with:

> NRS 195.020 Principals. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him or her.
>
> [1911 C&P § 9; RL § 6274; NCL § 9958]

///

///

The Nevada Supreme Court has said, "Of course, we recognize that the intent of the legislature is the controlling factor and that, if the statutes under consideration are clear on their face, we cannot go beyond them in determining legislative intent." *Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979); *State v. Beemer*, 51 Nev. 192, 199, 272 P. 656, 658 (1928). These statutes could be more clear. Hence, going beyond the plainly worded law, especially with no evidence or authority provided by the Petitioner to show that legislative intent was violated, would be irresponsible and impermissible.

Further, there is Nevada Supreme Court precedent for criminal liability for an aider or abettor involving possession crimes. "In our view, however, it is clear that an individual can aid and abet a possessory crime." See, e.g., *People v. Storr*, 527 P.2d 878, 881-82 (Colo. 1974); *People v. Francis*, 450 P.2d 591, 595 (Cal. 1969); *Roland v. State*, 96 Nev. 300, 302, 608 P.2d 500, 501 (1980). The fact that there isn't a specific crime assigning liability to furnishing a prisoner in a jail a telecommunications device is inconsequential. Basic logic and reasoning demonstrates that just as in *Roland*, there need not be a specific crime to charge and convict someone with providing someone the short barreled shotgun which a Co-Defendant later possesses. There needn't be a specific crime for proving someone a stolen vehicle, which the Co-Defendant then is in possession. In light of Nevada Supreme Court case law, as well as NRS 212.165(4) and NRS 195.020, there is no authority or reasoning to alter or dismiss this case as a matter of Writ, or any other legal motion.

Finally, the Petitioner asserts "Furthermore, Ms. Plunkett would actually face a lesser charge and be given mandatory probation of she would have provided a phone to a prisoner in prison because she would then only be punishment for a category E felony" arguing the scenario is an "absurd result.". First, it is not constructive to argue about penalties and disparities assigned to various criminal acts by the legislature. Currently, the penalty for certain sexual crimes far exceeds (in some cases) the penalties allowed for 2nd Degree Murder. Does that as a matter of some authority give the court a right to do anything regarding the propriety of a Murder or Sexual Assault conviction – obviously not. Under the same reasoning, that does not give the court the right to do anything regarding what the Petition is charged

with. Petitioner began her briefing citing to the Nevada Constitution, specifically the separation of powers, and as there exists a separation of powers, the penalties assigned to crimes are solely within the prevue of the legislative branch. Therefore, this meritless argument pointing out that *if* she were charged in a different title, it would be an E felony versus a D felony is inconsequential. Second, there is very little difference between D felonies and E felonies, so claiming a disparity which raises to the level of being 'absurd' is a bit overstated.

Based upon the lack of authority, this claim must be denied.

II. ALL LAWS WERE COMPLIED WITH IN THE PRESENTAITON OF THE CLARK COUNTY DETENTION CENTER FORMS

The State complied with the statutory requirements of NRS The Petitioner makes the claim that the State "Violated Nevada Law by failing to present the inherent ambiguity in the cell phone permission form". There are several deficiencies in this argument.

The Petitioner readily admits that the State did in fact present the evidence, the actual forms signed by Plunkett to the grand jurors. The forms, which are attached to the Petitioner's Writ, are easy enough to read, and needn't be explained by the State. If the forms are as ambiguous as claimed by the Petitioner, the grand jurors could surely see that for themselves, and *if they agreed it was a factor* they could have decided to not true bill the charges. This obviously did not occur.

Second, significant testimony was taken regarding the forms:

> Q. Okay. Before any attorney or investigator is allowed inside the visitation room, are they required to fill out any kind of form?
> A. Yes, ma'am. Before they come into or when they come into the facility, at the front lobby there's a piece of paper that's just an advisement saying that they would abide by the rules of the facility and not bring in any telecommunications devices, laptops, media players, whatever without authorization and then they have to sign off on it.
> Q. What if they don't want to sign the form?
> A. If they don't want to sign the form then we won't allow them up into the towers whatsoever to have a contact visit and they don't want to, like I said,

we do have the visiting booths set aside for the attorneys. There's a door being the booths that we allow for a little bit more privacy.

...

Q. Okay. And directing your attention back to these forms, what are they called?

A. I believe they are just a liability release form or acknowledgement saying that if you do wind up breaking these laws this is what you can be held accountable for.

Q. If I show you some forms would you be able to recognize them?

A. Yes, ma'am.

Q. Okay. Can you tell me if these are the forms we were speaking of earlier?

A. Yes, ma'am. Actually, yes they are.

Q. Okay. And this is dated April 16th, April 18th, April 20th, April 23rd, April 25th, April 27th, April 30th, May 2nd, and May 8th, as well as April 28; is that correct?

A. Yes ma'am.

Q. Okay. Let's see here, and these are the same forms or the dates of the same forms as was on the recording as well of the surveillance video?

A. I believe so. I believe there's some dates that we're actually missing from the recordings because we weren't able to get all the recordings.

Q. And that's from the 8th and the 10th; is that correct?

A. Yes, ma'am.

....

Q. So based on CCDC rules and protocol, anyone who's going into a visitation room with a cell phone must fill out the form; is that correct?

A. That is correct.

Q... on these forms here, what did she list as the item she was going to bring into the visitation room?

A. She listed that she was going to be bringing a cell phone in.

Q. Okay. And the form does state that the use of a cell phone is only authorized to contact CCDC staff or 911 in the event of an emergency. Unauthorized use will subject the user to criminal prosecution; is that correct?

A. Yes, ma'am.

Q. Okay. To your knowledge was a cell phone ever used to make a call to CCDC staff or 911?

A. No, ma'am.

(Grand Jury Transcript, pp. 65-68)

As can be seen by the testimony, the forms were viewed and testified about in the Grand Jury. Petitioner's contention in her Writ that the form is ambiguous and what was actually written on the form, or written by Ms. Plunkett was presented by simply presenting the forms. The

Petitioner claims that the State "failed to explain the forms or their purpose and in fact adduced witness testimony that claims the form expressly states a phone can be used only for calling detention center staff or for calling 911, when the form necessarily suggests otherwise." It is clear that the grand jurors, having the forms in front of them, could come to whatever reasonable conclusion they believed about the form, and the testimony from Sgt. Jare Ebneter was not misleading, it was from the jail forms.

A further problem with the Petitioner's Writ argument, is that when a Defendant is served with Notice to Seek Indictment, they are specifically advised "If you are aware of any evidence which tends to explain away the above crimes, and it is your desire that this evidence be presented to the Grand Jury, then you or your attorney must furnish such evidence to the office of the District Attorney immediately." 1) The forms in question were presented, so there would have nothing been done differently, as there was not additional evidence that could have been presented. 2) The Petitioner was served with notice that we were seeking indictment on June 5, 2017. If the Petitioner felt strongly that this point needed to be emphasized, they could have provided the State knowledge of that fact sometime between the notice and the case was actually being indicted. The Petitioner did not provide a response, nor would it have made a difference, as the complained about evidence was presented, in full, to the grand jurors. 3) The Petitioner is not citing to any new evidence that they would have had us present – they are simply calling the forms 'ambiguous' which if so, the grand jurors could decide for themselves. 4) The State presented evidence from the interview of Alexis Plunkett where she gave explanations that mirror what the Petitioner is arguing in the writ:

> Q. Okay. From what you say in the form was her usage of the phone consistent with the explicit terms of why one would have a phone in the jail?
> A. The form, when they fill out the form, allows them to bring the phone into the jail; however the first line expressly states that cell phone use is prohibited with the exception of calling the detention center staff or 911 in the event of an emergency.
> Q. Okay. Did she admit that she had signed said forms?
> A. Yes.
> Q. Okay. Did she admit to showing her phone to any inmates?
> A. Yes.
> Q. Okay what about allowing inmates to touch her phone?

A. She said that she did not allow inmates to touch her phone.
Q. Were you asking about any specific inmate in question?
A. Yeah, we were speaking about Mr. Arevalo.
Q. Did she go into detail about why she would be making calls and what she was doing on those calls?
A. Predominately she stated if she had to call a bondsman or she roughly stated case-related calls.
Q. Okay. Would those be permissible reasons under the law or the police of CCDC to use a phone?
A. No.
Q. Did you confront her with it being illegal to do so?
A. Yes. When she told me that she would allow Mr. Arevalo to look at her phone I basically said that, you know, he can't touch it, you know, that's a big no-no. She said correct. And I said, you know, basically if he has it at all it's, I said you know it's against the law and she said correct.
Q. Regarding she's talking about using her phone supposedly to procure bail and did she say if either of the parties were speaking Did you ask her questions that would tend to illustrate the possibility that she's allowing Mr. Arevalo or potentially Estrada to talk on her phone and her response to that?
A. I'm sorry, can you rephrase that?
Q. Sure. Did you ask her any kind of questions about any inmates, Arevalo or Estrada, talking on the phone?
A. Yes.
Q. Did she say who would be talking on the phone?
A. She said that they don't talk on the phone, that if there was any phone calls that she would be the one doing the talking, not either of the inmates.
Q. Okay. Did she talk about any other attorneys and their usage of phone in the jail?
A. She did mention that she had a case with another attorney and stated that that attorney would use the phone as well.
(Grand Jury Transcript, pp. 55-57)

Thus, there really is nothing that can be argued on this point regarding presenting evidence of what Plunkett's intentions may have been regarding phone usage. The problem for Plunkett is that her statements are belied by the video evidence.

What is simply being lost in the Writ is that the crime was not Alexis Plunkett bringing a cell phone into a jail, it was providing it to inmates so that they could make phone calls – which is the crime which she aided and abetted. Providing a cell phone to an incarcerated person is not casework, it's a crime – and ignorance of the law is never a defense, especially

for a criminal defense attorney. Plunkett has not been charged with using the phone herself, it has been for instances where she put the phone on speaker mode, pushed it towards the inmate, and allowed the inmate to talk over the phone. It is for instances where the inmate was given the telephone by Ms. Plunkett and was speaking over the telephone to a third party. The video evidence is extremely clear that these acts were occurring, and the testimony provided by Det. Aaron Stanton described the conduct occurring in those videos in great detail. Simply put, there was sufficient evidence presented to substantiate by at least probable cause that the crimes charged were committed, and the Defendants are the ones who committed those crimes.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Honorable Court to DENY the Defendant's Petition for Writ of Habeas Corpus.

DATED this 11th day of August, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY _____
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 11th day of August, 2017, by electronic transmission to:

ADAM SOLINGER, ESQ.
(702)974-0524

BY _____
M. CRAWFORD
Secretary for the District Attorney's Office

17F08821B/JPR/mc/FDD

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DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Application of, Alexis Plunkett, For a Writ of Habeas Corpus.	CASE NO. C-17-324821-2 DEPT. NO. XVII

ANSWER TO RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Petitioner, ALEXIS PLUNKETT, by and through her attorneys of record, MICHAEL L. BECKER, ESQ. and ADAM M. SOLINGER, ESQ. and pursuant to NRS 34.470 files this answer to the State's Return on her Petition for Writ of Habeas Corpus.

This answer is made and based upon all the papers and pleadings on file herein, the attached Points and Authorities, and any argument given at the time of oral argument.

DATED this 22nd day of August, 2017.

By:

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Petitioner

POINTS AND AUTHORITIES

I. THE STATE MISUNDERSTANDS THE DEFENSE ARGUMENT WHICH IS THAT THERE IS NO VIOLATION OF LAW AND THEREFORE THIS COURT IS WITHOUT JURISDICTION.

As mentioned in the State's Return, the Court may only hear a pretrial writ that attacks the jurisdiction of the Court or the sufficiency of the evidence presented. However, the State fundamentally misunderstands the argument contained in the writ. Specifically, Petitioner is asserting that there is no criminal law that punishes providing a phone to an inmate in a jail as evidenced by the statute and therefore this Court is without jurisdiction. Simply put, the Petitioner is arguing the criminal equivalent of a civil NRCP 12(b)(5) motion.

More fundamentally, the mental gymnastics required to create criminal liability where none currently exists demonstrate the absurd results that would occur if the State is permitted to essentially create a new crime where one was not contemplated before.

The Nevada Supreme Court has cited to many of the common canons of statutory interpretation. When similar statutes or provisions are interpreted in harmony with each other, the statutes are interpreted *in pari materia*. *See State v. Daugherty*, 47 Nev. 415 (1924). *See also Kondas v. Washoe County Bank*, 50 Nev. 181 (1927). When a statute includes specific terms and then general terms, the specific should help define the general following the principles of *ejusdem generis*. *See Didier v. Webster Mines Corporation*, 49 Nev. 5 (1925). Finally, "[t]he maxim 'expressio Unius Est Exclusio Alterius', the expression of one thing is the exlusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26 (1967).

What this leads to is a statute that cannot be read in the manner sought by the State without leading to an absurd result. *See General Motors v. Jackson*, 111 Nev. 1026, 1029 (1995) (holding and citing to other omitted authority that statutes should be construed to avoid absurd results).

As laid out in the initial writ, NRS 212.165 is a comprehensive statutory scheme to govern the possession of cell phones in the jails and prisons in the State of Nevada. Section 1 makes it a crime to give and/or furnish a phone to a prisoner in jail. Section 2 makes it a crime to even possess a phone in a prison without authorization. Section 3 Punishes a prisoner in prison for possessing a phone. Section 4 punishes a prisoner for possessing a phone in the county jail. The State does not contest that Ms. Plunkett was not a prisoner and therefore cannot be directly charged with a violation of section 4. Instead, the State contends that Ms. Plunkett is criminally liable under a theory of aiding and abetting and/or conspiracy liability.

However, as argued previously, this would be an absurd result. What the State glosses over in its return is that there is a huge difference between a Category E and Category D felony in this case because the Category D that Ms. Plunkett faces, if she were convicted, is non-probationable. *See* NRS 212.165(5). This sentencing disparity is huge considering the Category E felony for a violation of section 1 is mandatory probation. If the State's interpretation were correct, then without ever mentioning it, the Legislature decided to send anyone that provides a phone to a *jailee* to prison while anyone that provides a phone to a *prisoner* must be given probation. That makes no sense.

If that were not enough, the above-mentioned canons of statutory interpretation applied to this case shows that no criminal liability can exist and therefore this Court is without jurisdiction. First, the State cites to the general vicarious liability doctrine of aiding and abetting. However, NRS 212.165 already accounts for aiding and abetting liability in some contexts.

Specifically, section 1 already extends liability for those that bring phones to give to *prisoners* and punishes as a Category E felony. Whereas, section 3 punishes prisoners that possess phones in prison as a non-probationable Category D felony. This clearly shows an intended sentencing

disparity between persons who bring phones into prisons and the prisoners who possess them. This demonstrates *ejusdem generis* and *expression unius*. In other words, because this section of the statute already accounts for people bringing phones in and sets a different punishment level, one could not be convicted of section 3 liability through a theory of aiding and abetting. That is simply section 1 liability.

Similarly, the language used in each section is important. Sections 1 and 2 discuss liability for *persons* and sections 3 and 4 discuss liability for *prisoners*. *Expressio unius* would dictate that these were specific language choices and meant to create exclusive categories of liability for *persons* and *prisoners*.

Finally, taking all of the above and looking at the statute *in pari materia*, it's clear that the Legislature intended that no liability extend to persons who provide phones to *jailees* in jail. This is abundantly clear from the plain text of the statute. While the State may not like it, the proper recourse is to push for a change during the next legislative session, not to create law where none currently exists.

IV. CONCLUSION

This Court is without jurisdiction in this case because there has been no crime recognized in the State of Nevada that has been committed. The statute in question extends no criminal liability to persons bringing phones into jails and providing them to *jailees*. The State would argue that this is a hole in the statute; however, the proper recourse is to lobby the Legislature to plug the hole, not to allow the State to create new law were none currently exists.

WHEREFORE, Petitioner ALEXIS PLUNKETT respectfully requests that this Honorable Court grant her Petition for Writ of Habeas Corpus and dismiss the Indictment with prejudice as

Petitioner has established that there is no theory of liability under which Ms. Plunkett may permissibly be charged as a matter of law.

DATED this 22nd day of August, 2017.

By:

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify that service of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** was made this 22nd day of August, 2017 upon the appropriate parties hereto by depositing a true copy thereof in the United States mail, postage prepaid and addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ALEXIS PLUNKETT, Defendant.	CASE NO.: C-17-324821-2 DEPT. XVII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

THURSDAY, AUGUST 31, 2017

PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: JAY P. RAMAN, ESQ.
Chief Deputy District Attorney

For Defendant Plunkett: ADAM M. SOLINGER, ESQ.
MICHAEL V. CASTILLO, ESQ.

RECORDED BY: CYNTHIA GEORGILAS, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, AUGUST 31, 2017

[Proceedings commenced at 8:35 a.m.]

THE MARSHAL: Page 17, Your Honor; Plunkett.

THE COURT: All right, let's do Plunkett. This is a petition for writ of -- pretrial petition for writ of habeas corpus.

Go ahead, Counsel.

MR. SOLINGER: Judge, this is our writ. You have explicit jurisdiction because we're challenging essentially the Court's jurisdiction. We're saying that the State's interpretation of the relevant charging statute is not contemplated by Nevada law. And essentially, if there's no violation of a criminal statute then this Court has no jurisdiction. So, that addresses one of the State's points.

But when we turn to the actual statute itself, we took great pains to break down that statutory language, which I won't belabor here, but if we look at Section 1, that explicitly punishes somebody who brings a phone and provides it to a prisoner in a prison as a category E felony which is mandatory probation. Section 2 punishes somebody who brings a phone into a prison without lawful authorization as a misdemeanor. Section 3 punishes the person who's in a prison that possess a phone as a prisoner as a non-probationable category D felony. And SFection 4, which is what the State is charging here, punishes a prisoner in a jail, so jailee by way of distinction between a prisoner in prison and a jailee in jail as a non-probationable D if they're in for a felony, gross misdemeanor if it's a gross, or a misdemeanor if they're in jail for a misdemeanor.

So, the State -- I don't think there's any real serious argument here that Ms. Plunkett was a prisoner and therefore § 4 directly applies to her. Instead, the State's trying to impose a type of vicarious liability by arguing that she's bound by

the same strictures as you know an accomplice in aiding and abetting, just the generic statute. However, as our initial petition and then our answer to their return lays out that doesn't make sense from a statutory interpretation standpoint. It's kind of similar to if somebody's charged with battery with a deadly weapon, then you use the battery with the deadly weapon sentencing statute rather than the generic deadly weapon sentencing statute, right, the enhancement.

And so, when we look at the statute it appears that the Legislature has with great pains attempted to lay out who's liable for what, when, and where. And so by explicitly saying that a person in -- a person who provides a phone to a prisoner in prison is guilty of a category E mandatory probation felony, if the State's theory of liability is correct then we're punishing somebody more severely for providing a phone to a jailee in a jail by making it mandatory prison.

And so, our state Supreme Court has made clear that statutes are to be construed to avoid absurd results so that the classic conundrum of the sign 'no vehicles in the park'; does that mean I can't bring my 2 year old down to the park with his tricycle? No, because that's not what the Legislature was trying to combat. Similarly, an ambulance trying to respond to a heart attack victim, they wouldn't be punished under the statute not only because of a justification defense but because that's not the evil the statute is designed to protect. So here, when we look at the statute, explicitly it appears as though the Legislature explicitly left a hole in this statute for punishment of persons who provide phones to jailees in jail.

Now, we kind of laid out that separation of powers argument because I don't think the State would contend that they are permitted to make laws that go along just as Your Honor can't make law, you can only interpret the law. If the State has a problem with this statute and thinks that Ms. Plunkett should be punished for

her conduct, then the appropriate forum of recourse is to lobby the Legislature. It's not to impose just a generic vicarious liability to accomplice liability -- so I'm a little sleep deprived because I just brought my newborn home who was born on Monday -- but there's all the fancy Latin that I have in my answer which essentially says you've got to look at the statute in the entire context of the statute, in context with other statutes around it, and you have to interpret it accordingly.

And so, the Defense position would be that if you take this statute apart and you look at it, that's how it makes sense because it wouldn't make sense that we have an explicit prohibition on providing a phone to a prisoner in a prison and that the Legislature's deemed that mandatory probation as an E felony but by not talking about providing a phone to a jailee in a jail we're making it a mandatory prison sentence. Its non-probationable per the terms of the statute, specifically § 5(a) because it's a sentence of imprisonment imposed upon a prisoner pursuant to § 4. And so, even the language in the statutes you've got to look at the specific language, § 1 and 2 which deals with the providee, so to speak, or the provider of the phone. It says a person, where § 3 and 4 talk about a prison -- and so, I think our briefing is fairly consistent. It makes sense on these points that she can't lawfully be charged with the crime that she's being charged with, whether that's to accomplice liability or whether that's through conspiracy liability and that makes sense because this statute specifically lays out what happens to somebody who is an accomplice or a conspirator in the prison context. It makes no mention of somebody who is an alleged accomplice or a conspirator in the jail context. And so, when you look at those prohibitions that's the only logical way that this statute makes sense and the State may not like it but that's the statute that we have. And that's kind of grounds one of our petition.

Grounds two we can argue that if you'd like but I think grounds one is dispositive, but grounds 2 essentially is that the State failed to provide mitigating and/or exculpatory evidence during presentation of the Grand Jury. Now, we do concede that they did provide the forms and that there was testimony about those forms. However, those forms have to have some context. The State's response is, well, the forms were submitted as evidence. They could read those forms if they wanted to but the question is why. Why would they read them when the State had a witness get on the stand and testify as to what the forms said without any mention as to that purpose box on the forms? We attached those forms as an exhibit to our petition. And if you look at them, the State does reference that there's the check box where it says cell phones only to be used in case of an emergency to call 9-1-1 or the Post 10 number that's listed on the form. But below that there's check boxes for why you're bringing that item in. You know if anything it's an ambiguous consent form where the person signing the consent is entitled to authorize the scope of what they're bringing it in for with that second box by checking "Casework" which essentially is what Ms. Plunkett believed she was doing with that phone in CCDC is providing it for purposes of casework in arranging for bail for her client. And so, those forms are just routinely accepted at CCDC. There's never a mark on them saying, hey, I see you're bringing a cell phone in and you checked casework. I just want to let you know you can't do anything but call 9-1-1 or call Post 10 from this phone. By accepting it, there's kind of this implicit acceptance and authorization, and so, that kind of goes to the lawful authorization scope. So, the Defense position on grounds two would be that because that form allows for modification in that way, and if you look at the purpose box it doesn't say, please check the purpose for everything but cell phones. It just says please check the purpose for why you're

bringing an electronic item; right? And as a result of that, it's reasonable to conclude that that allows for a change in the scope of authorization for the electronic items, specifically with regards to cell phones. And so, that's kind of grounds two.

I'm happy to answer any questions Your Honor has or allow the State to respond, at this point reserving some rebuttal.

THE COURT: All right, let me hear from the State. And, State, was it clear to the Grand Jury which provision you sought the indictment on? Maybe I missed it.

MR. RAYMAN: Yes, actually the charging document itself specified the theory of liability. We actually, in an abundance of caution, read that entire statute and introduced that entire statute, everything that Mr. Solinger cited to the Court about this liability, this liability, this liability. So, the fact that he's making his argument based upon that statute, the Grand Jury had the entire statute, was made aware through reading to them and having it as a physical evidence of what liabilities were prescribed in what situations, as well as the aiding and abetting liability, which under 195.020, applies to pretty much everything except specified crimes where there is actual direct principle liability for crimes such as conspiracy, robbery that is in itself its own crime.

But basically to counter Mr. Solinger's argument, NRS 34.700 and 34.710 are extremely explicit. They're not broadly styled. I know a lot of defense attorneys come into Your Honor's court and others and say we should attack this, we should attack the statute of limitations, we should attack legislative construction of statutes, we'll use writ of habeas corpus to do that. It is completely improper. There is no precedent for such an attack to be allowed under this vehicle. Even if it wasn't under this type of vehicle, they have provided none of the tools and ammunition this Court would need to find facts and circumstances that would allow

the Court to say, yes, the facts and circumstances that were presented to the Grand Jury or that exist in this case if Your Honor had an evidentiary hearing do not meet legislative intent. They have not provided legislative history. They have not provided other circumstances where a court has found these circumstances do not add up to criminal charging. They've provided none of the things Your Honor would expect and has seen in legislative intent challenges. Further, I have provided precedent under *Roland v. State* that shows the Nevada Supreme Court has explicitly recognized that one can aid and abet a possessory crime, such as possession of a telecommunications device by an inmate.

The other argument they are making to bolster, well, this isn't legislative intent 'cause that's an absurd result that Plunkett providing this phone to an inmate, if it was a prison, would receive a less harsh sentence. Number one, that part of the statute that Mr. Solinger just quoted about prisoner going to prison, well, Ms. Plunkett isn't a prisoner so that is not applicable to her punishment. She's simply liable under a D felony stepping into the shoes of the principle under aiding and abetting liability. It says specifically prisoners would receive mandatory prison. She is not a prisoner so she would not receive mandatory prison, therefore that provision would not be applicable as far as mandatory punishment.

Therefore, all we're left with is the difference between a D felony and an E felony. And on the first hand, we don't judge our statutes by their comparative penalties. We never have done that and I presume we never will do that because it's completely inappropriate. That invades the purview of the Legislature. They decide what crimes are to be penalized and how much.

Secondly, there's hardly any difference between a D felony and an E felony. The only difference is mandatory versus discretionary probation, but

penalties otherwise are very much the same. So, there's certainly not an absurd result that she would be penalized in a D felony to be providing an inmate a phone in a jail versus a prison.

Secondly, their major argument is that we didn't present exculpatory evidence on the forms. We presented all the forms. The forms are a one page document. They're clear on their face. They say you can only bring in a phone for certain reasons. They even tell the NRS about the penalties for certain crimes, specifically the crime we've charged here, not that we would have to instruct anybody who has visitation privileges, face to face privileges, with an inmate about what the law is. Any of those persons, being criminal defense attorneys, investigators, or other necessary persons that a defense attorney would employ would know these statutes. But further, they've instructed them on it. If there was ambiguity, the Grand Jury could have found ambiguity and decided not to true bill any one of these defendants on these provisions but they did not. Further, we took testimony on the forms and we introduced Ms. Plunkett's own interview to Detective Stanton where she detailed what her intents were and the Grand Jury had that and they were able to consider that.

And additionally, there was a delay between *Marcum* notice and presentment about 30 days. In that time period, I received no such indication that the Defense would really like me to present X, Y, and Z. So how am I to know that I need to hammer home some point on evidence I'm already presenting which is clear on its face, which we did present her testimony on, which we did present detective testimony on on the provision of the forms and how they're kept and when they're issued and how they're signed?

So, we have certainly met our obligations under probable cause and the

duty to present evidence that tends to explain away a crime in presenting the forms and the testimony that we did. So, there's absolutely no basis in fact or in law for granting of a writ on this matter.

THE COURT: All right, thank you.

I'm just curious, has there been any -- and this question doesn't relate to my decision on the writ but just for discovery purposes, has there been any analysis of the phone calls being made to whom they were made, text messages? I'm assuming both sides have those because I'm wondering whether or not they were to her investigator or if they were to friends of the Defendant, and that's just up for the two of you to decide that, but I mean --

MR. RAYMAN: Sure.

THE COURT: -- that's an important discovery issue for both you to investigate.

MR. RAYMAN: That analysis has been done. It wasn't necessary to present that to the Grand Jury because that's not the crime. It's simply possession on the inmate's part and aiding and abetting on Ms. Plunkett's part. But they have been analyzed and they're largely other gang members, people with criminal ID numbers. It's not bail bonds. It's not casework. And there is no fathomable circumstance where casework involves giving an inmate who does have access to a phone and has used his jail phone, a private cell phone to make unrecorded calls. That's not casework.

THE COURT: All right.

Anything further, Counsel?

MR. SOLINGER: Judge, just briefly.

We're explicitly challenging this Court's jurisdiction. If you don't think

that the proper vehicle is a petition of habeas corpus then I'll file a motion to dismiss for lack of jurisdiction. The reason I don't cite legislative history, which I can relate to Your Honor now if you're interested in it, is that in our opinion the statute is clear. You know the State does concede somewhat that accessory liability and conspiracy liability apply unless the statute has specific provisions dealing with those and this statute does; that's explicitly § 1 and § 2.

As far as legislative history is concerned, what I can represent to the Court is that the statute was passed in 2007 in response to a social worker falling in love with her prisoner at High Desert; him using that phone as a means of escape to coordinate with the outside and then killing 2 or 3 people when he was released. And so the Attorney General lobbied for this statute. The provisions for jail were not amended in there till approximately 2013 in response to, I believe, in Pershing County the jail there -- apparently their facility is somewhat open to the public or shares a street in common and somebody tossed a cell phone over the street to a jailee in there and he was using it to threaten people in the community unchecked. They didn't have a provision on the books to charge him with that so they charged him with possession of a means -- of escape device or something like that. The Nevada Supreme Court overturned that conviction. So in a kind of what I think should happen here, the DA in Pershing County went before the Legislature in 2013 and said, come on, guys, we really need to add jailee liability -- 'cause they couldn't charge him with anything else and he's doing that. No one mentions anything about punishing the person who provides it or anything like that except for there's one person from I think the American Independent Party that says, as in neutral support for the [indiscernible], we're in support of this statute but what about people who give them the phones. And then there's no follow up, no comments, no critiques on

it but they're put on notice of it. But the reason we don't bring any of that legislative history up is in our opinion it's irrelevant.

This statute is clear on its face as to whom it applies and what kind of liability it extends. When this statute already accounts for conspiracy and accomplice liability in § 1 and 2 in the prison context, then it stands to reason that they've made a direct choice as to how those people should be punished and what the appropriate punishment is. Because of that, we should interpret this statute as it sits with them purposely meaning to only apply those vicarious liability mechanisms to § 1 and 2 in the prison context but not in the jail context. This is the appropriate recourse is to dismiss because there's no statute that Ms. Plunkett could have violated.

As for the possessory crimes and being an accomplice to those and that they've made clear, sure, in the general context of possession with intent to sell, regular possession of drugs, those statutes don't have provisions that account for conspiracy and accomplice liability. This statute does and that's what sets it apart. And I think -- I can't for the life of me remember those Latin terms in there except for the in *pari materia*, but there's -- the inclusion of one is necessarily the exclusion of others. You've got to interpret them holistically. And when we look at this statute on the whole that's what it encompasses. It says people who provide phones for prisons should be punished as in 1 and 2. A prisoner who has a phone in a prison should be punished as in 3. A person -- or a prisoner who has a phone in the jail context should be punished as 4. They've made their choice. They've made it clear in the statute and that's what Your Honor should follow.

THE COURT: All right, thank you.

Anything further from the State?

MR. RAYMAN: No, Your Honor.

THE COURT: Under the mechanism and before the Court is a pretrial writ of habeas corpus and the standard for -- under this pursuit is slight or marginal evidence and I do find that slight or marginal evidence has been presented to the Grand Jury under these proceedings. On a separate issue, I think you had mentioned that perhaps a motion to dismiss under a separate legal theory may be the appropriate vehicle; okay. So, I'm denying the writ and I'll wait for any other motions that you may file.

We do have a trial date October 16th. Are we still on track for that date? I mean whether the case is dismissed or not, I'm just -- is everyone still working towards it and is there any issue with trial readiness?

MR. RAYMAN: Yes, Your Honor. I don't anticipate any readiness issue.

MR. SOLINGER: And, Judge, we've just confirmed last week with a District Attorney in Reno that I think we're going to trial October 9th on a child sex assault case for -- our client's in custody up there. It is a first setting but it's notoriously difficult to continue things in Reno.

So, at this point, in addition to our motion to dismiss, we'll probably be filing a motion to sever from the co-defendant because my understanding I think is that he's invoked or has a trial date and that we'd be filing a motion to continue. So, I'm just putting everyone on notice that that's our intent at this point. I will note for the record that I'm technically on paternity leave as of Monday night so I'll be back I think not next week but the week after so there may be a slight delay in filing those.

THE COURT: If you could just file as soon as possible so we can address that issue. We do have 3 defendants here. I don't know how many defendants do you have up in Reno?

MR. SOLINGER: Just one.

THE COURT: All right, we'll see who goes first and see if there's any other motions that you'll be filing in this matter.

MR. SOLINGER: Of course.

Thank you, Your Honor.

THE COURT: All right, thank you.

MR. CASTILLO: Thank you, Your Honor.

MR. RAYMAN: Thank you.

THE DEFENDANT: Thank you, Judge.

[Proceedings concluded 8:55 at a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Cynthia Georgilas

CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ALEXIS PLUNKETT, Defendant.	CASE NO. C-17-324821-2 DEPT. NO. XVII

MOTION TO DISMISS

COMES NOW, the Defendant, ALEXIS PLUNKETT, by and through her attorneys of record, MICHAEL L. BECKER, ESQ. and ADAM M. SOLINGER, ESQ., and hereby files this motion to dismiss based upon the attached memorandum of points and authorities.

Ms. Plunkett seeks to dismiss the charges against her upon the basis that Nevada law does not prohibit and/or punish the crime she is alleged to have committed.

DATED this 11th day of September 2017.

Respectfully submitted,

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Petitioner

NOTICE OF MOTION

TO: THE STATE OF NEVADA, Plaintiff;

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the above and foregoing Motion will be heard before the above entitled Court on the 21 day of Sept., 2017, at 8:30 a.m., or as soon thereafter as counsel may be heard.

DATED this 11th day of September, 2017

By: _____

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
Attorney for Petitioner

POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. STATEMENT OF THE CASE

Petitioner ALEXIS PLUNKETT ("Petitioner") was charged by way of superseding grand jury indictment, along with two (2) co-defendants, Andrew Arevalo and Rogelio Estrada, with fourteen (14) counts including: CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER (Gross Misdemeanor – NRS 212.165, 199.480 – NOC 55248); and POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony – NRS 212.165 – NOC 58368).

Said indictment was the subject of a Petition for Writ of Habeas Corpus. The Court denied her petition holding that there was slight or marginal evidence that a crime was committed and that Ms. Plunkett's argument regarding jurisdiction was improper as part of a pretrial writ.

II. STATEMENT OF THE FACTS

As relevant to this petition, Ms. Plunkett is alleged to have brought a cell phone into the Clark County Detention Center without lawful authorization and that once she was visiting with her clients, she is alleged to have provided the phone to her clients to allow them to make or participate in calls and/or send messages and/or read text messages. However, every time a phone was brought into the jail, an authorization form was signed and completed by Ms. Plunkett. That form disclosed that she was bringing the phone in for the purpose of conducting case work.

III. ARGUMENT

A. Applicable Law

Under Nev. Rev. Stat. 174.095, "any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

Additionally, a defendant may object that the indictment fails to allege a crime at any time before trial. *See* Nev. Rev. Stat. 174.105(3).

B. Discussion

AS A MATTER OF LAW, THE LEGISLATURE NEVER INTENDED NEV REV STAT 212.165(4) TO EXTEND LIABILITY AS CHARGED TO PERSONS BRINGING PHONES INTO JAILS AND THEREFORE THE STATE CANNOT CREATE LIABILITY.

The Nevada Constitution explicitly provides for the separation of powers between the three branches of government. NV. Const. Art. 3, § 1. No one charged with the execution of the powers assigned to one branch shall then exercise the powers belonging to another branch. *Id.* The Legislator is entrusted with the power to frame and enact laws and to amend or repeal them. *See Nevada Yellow Cab Corporation v. Eighth Judicial District Court in and for the County of Clark*, 383 P.3d 246 (Nev. 2016). Executive power is to carry out and enforce the law enacted by the legislature. NV Const. Art. 3, § 1.

Nevada law prohibits certain conduct with regards to telecommunication devices and jails and/or prisons. *See* Nev. Rev. Stat. 212.165. Specifically, a person who brings a phone into a facility that houses prisoners and does so without lawful authority in an attempt to provide the device to a prisoner is guilty of a Category E Felony. Nev. Rev. Stat. 212.165(1). A person who just carries the device into a prison without lawful authority but only possesses the device is guilty of a misdemeanor. Nev. Rev. Stat. 212.165(2). A prisoner in prison who has possession of a device without lawful authority is guilty of a Category D Felony. Nev. Rev. Stat. 212.165(3). Finally, a prisoner confined in jail who has possession of a device without lawful authority shall be punished proportionally depending on the alleged crime the prisoner is currently in custody on. Nev. Rev. Stat. 212.165(4)(a)-(c).

Clearly, the Nevada Legislature intended to prohibit prisoners in prison and jail from possessing telecommunication devices with unfettered access. Also, the Legislature intended to punish those who bring phones into a prison without permission and either give the device or give access to the same to a person in the prison.

In this case, Ms. Plunkett is charged with a violation of Nev. Rev. Stat. 212.165(4)(a) under a theory of conspiracy liability, a theory of aiding and abetting, or a theory that she was a prisoner herself. More specifically, at the times relevant to this case, she was not a prisoner being detained pretrial in the county jail; she was an attorney. Therefore, she could not have directly committed this crime. Furthermore, the theory of conspiracy or aiding and abetting liability cannot Constitutionally stand in this case because the Nevada Legislature had the opportunity to extend liability to those who bring phones into a jail but chose not to extend criminal liability. This is clearly evidenced by the statutory scheme. The legislature specifically punishes people who bring phones into a prison without authorization. The only line of demarcation for punishment in those instances is whether the phone is merely possessed or whether it is actively furnished to an inmate in the prison. However, the statutory scheme does not provide to criminal liability when a person brings a phone into a jail. Instead, the only punishment is on the person in jail that possesses or exercises control over the phone. This purposeful asymmetry clearly demonstrates an intent not to criminally punish persons who bring phones into a jail. The Legislature knew how to create a crime and did so with prisons.

As a result, to allow the State of Nevada, by and through the Clark County District Attorney's Office, to create criminal liability where none currently exists would violate the Nevada Constitution that provides for separation of powers. Essentially, our system provides that the office in charge of enforcing the law cannot then create the law that it chooses to enforce. To allow Ms.

Plunkett to face trial on a charge never intended to exist by the legislature would be a gross miscarriage of justice.

The Nevada Supreme Court has cited to many of the common canons of statutory interpretation. When similar statutes or provisions are interpreted in harmony with each other, the statutes are interpreted *in pari materia*. *See State v. Daugherty*, 47 Nev. 415 (1924). *See also Kondas v. Washoe County Bank*, 50 Nev. 181 (1927). When a statute includes specific terms and then general terms, the specific should help define the general following the principles of *ejusdem generis*. *See Didier v. Webster Mines Corporation*, 49 Nev. 5 (1925). Finally, "[t]he maxim 'expressio Unius Est Exclusio Alterius', the expression of one thing is the exlusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26 (1967).

What this leads to is a statute that cannot be read in the manner sought by the State without leading to an absurd result. *See General Motors v. Jackson*, 111 Nev. 1026, 1029 (1995) (holding and citing to other omitted authority that statutes should be construed to avoid absurd results).

As laid out in the initial writ, NRS 212.165 is a comprehensive statutory scheme to govern the possession of cell phones in the jails and prisons in the State of Nevada. Section 1 makes it a crime to give and/or furnish a phone to a prisoner in jail. Section 2 makes it a crime to even possess a phone in a prison without authorization. Section 3 punishes a prisoner in prison for possessing a phone. Section 4 punishes a prisoner for possessing a phone in the county jail. The State does not contest that Ms. Plunkett was not a prisoner and therefore cannot be directly charged with a violation of section 4. Instead, the State contends that Ms. Plunkett is criminally liable under a theory of aiding and abetting and/or conspiracy liability.

If that were not enough, the above-mentioned canons of statutory interpretation applied to this case shows that no criminal liability can exist and therefore this Court is without jurisdiction. First, the State cites to the general vicarious liability doctrine of aiding and abetting. However, Nev. Rev. Stat. 212.165 already accounts for aiding and abetting liability in some contexts.

Specifically, section 1 already extends liability for those who bring phones to give to prisoners and punishes as a Category E Felony. Whereas, section 3 punishes prisoners that possess phones in prison as a non-probationable Category D felony. This clearly shows an intended sentencing disparity between persons who bring phones into prisons and the prisoners who possess them. This demonstrates *ejusdem generis* and *expression unius*. In other words, because this section of the statute already accounts for people bringing phones in and sets a different punishment level, one could not be convicted of section 3 liability through a theory of aiding and abetting. That is simply section 1 liability.

Similarly, the language used in each section is important. Sections 1 and 2 discuss liability for persons and sections 3 and 4 discuss liability for prisoners. *Expressio unius* would dictate that these were specific language choices and meant to create exclusive categories of liability for persons and prisoners.

Finally, taking all of the above and looking at the statute *in pari materia*, it's clear that the Legislature intended that no liability extend to persons who provide phones to jailees in jail. This is abundantly clear from the plain text of the statute. While the State may not like it, the proper recourse is to push for a change during the next legislative session, not to create law where none currently exists.

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IV. CONCLUSION

The District Attorney has violated the doctrine of separation of powers by creating criminal liability where the legislator specifically intended that none exist.

WHEREFORE, ALEXIS PLUNKETT respectfully requests that this Honorable Court grant her Motion to Dismiss and dismiss the Indictment with prejudice as there is no crime recognized under Nevada law with which she may be charged.

DATED this 11th day of September, 2017.

By:

ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that service of the foregoing **MOTION TO DISMISS** was made this _____day of September, 2017 upon the appropriate parties hereto by depositing a true copy thereof in the United States mail, postage prepaid and addressed to:

JAY P. RAHMAN, ESQ.
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155
(702) 671-2590

An employee of
LAS VEGAS DEFENSE GROUP, LLC.

OPPS
STEVEN B. WOLFSON
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Nevada Bar #001565
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALEXIS PLUNKETT, aka,
Alexis Anne Plunkett,

Defendant.

CASE NO: C-17-324821-2

DEPT NO: XVII

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

DATE OF HEARING: SEPTEMBER 21, 2017
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAY P. RAMAN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Dismiss.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

FACTS AND CIRCUMSTANCES

This case was presented for indictment on July 5, 2017 and subsequently superseded on July 13, 2017. There are three Defendants in this case, Andrew Arevalo, Alexis Plunkett, and Rogelio Estrada. The common course and scheme shown by the evidence in this case is that Alexis Plunkett, acting as an attorney for Arevalo and Estrada, had a series of contact visits in the Clark County Detention Center with Arevalo and Estrada. During those visits, she provided them access and use of her cell phone, to make unrestricted and unrecorded calls, violating jail policy and the Nevada Revised Statutes.

ARGUMENT

I. THE STATE AGREES THAT AS A MATTER OF LAW, THE COURT IS THE PROPER PARTY TO MAKE A LEGAL CONCLUSION ON THE DEFENDANT'S RAISED ISSUE

Alexis Plunkett ("Defendant") is correct in citing to statue regarding the concept that the Court must determine questions of law by way of motion:

> NRS 174.105 Defenses and objections which must be raised by motion.
>
> 1. Defenses and objections based on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment, or in the indictment, information or complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant.
>
> 2. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.
>
> 3. Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.
>
> (Added to NRS by 1967, 1416)

The concept is clear and universal – the Court is the trier of law, the jury is the trier of fact. As such, it is procedurally correct for the court to determine this issue by way of motion. The converse is also true. Once the issue has been decided, it would be impermissible to make the same argument regarding the law to the jury – as that would be impermissible jury

nullification. The United States Supreme Court has held, "it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Sparf v. United States*, 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 (1895); *United States v. Trujillo*, 714 F.2d 102, 105–06 (11th Cir.1983) ("While a jury does have the power to bring a verdict ... its duty is to apply the law as interpreted and instructed by the court.") (internal citations omitted). Thus, once this motion has been put to rest, the State moves that the Defendant be precluded from making such arguments about the law to the jury.

II. DEFENDANT PROVIDES NO FACTUAL OR LEGAL SUPPORT THAT 'THE LEGISLATURE NEVER INTENDED TO EXTEND LIABILITY AS CHARGED TO PERSONS BEINGING PHONES INTO JAILS'

The Defendant makes a makes a very powerful and conclusory claim, with no support to back it up. Claims that lack support cannot be granted by the court, as seen in *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

The Defendant sets out the claim on the following basis: NV Const. Art. 3 Sec 1 provides for the separation of powers, and the legislator is entrusted with the power to frame and enact laws, or amend or repeal them, citing to *Nevada Yellow Cab Corporation v. Eighth Judicial District Court* 383 P.3d 246 (2016). Neither of these citations are instructive on the matter of legislative intent of NRS 212.165, or the subject of legislative intent generally.

The Defendant's claim is that the statutory scheme of NRS 212.165 is such that it is a specifically enumerated crime to provide a telecommunications device to a prisoner, whereas it is not a specifically enumerated crime to provide a telecommunications device to a jail inmate. Based upon that alone, the Defendant draws the conclusion that it is 'clear' legislative intent that providing a jail inmate with a telecommunications device would not be a crime. There are several problems with this argument.

A. The Defendant's Argument That a Statute That Criminalizes an Act, Does Not Specifically Make Legal Another Similar Act by Omission is Flawed

The Defendant hangs her hat on four cases which stand for principles that don't apply in this case. The reasoning cited in *Daugherty, Kondas, Didier and Galloway* is that they stand

for propositions where statutes are unclear, and further delving is required. Our situation and statute requires no further delving.

The Nevada Supreme Court has said, "Of course, we recognize that the intent of the legislature is the controlling factor and that, if the statutes under consideration are clear on their face, we cannot go beyond them in determining legislative intent." *Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979); *State v. Beemer*, 51 Nev. 192, 199, 272 P. 656, 658 (1928). The statutes in their totality are as follows:

> NRS 212.165 Prohibition on furnishing portable telecommunications device to prisoner and on possession of such devices in jail or institution or facility of Department of Corrections; penalties; petition for modification of sentence.
>
> 1. A person shall not, without lawful authorization, knowingly furnish, attempt to furnish, or aid or assist in furnishing or attempting to furnish to a prisoner confined in an institution or a facility of the Department of Corrections, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a category E felony and shall be punished as provided in NRS 193.130.
>
> 2. A person shall not, without lawful authorization, carry into an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a misdemeanor.
>
> 3. A prisoner confined in an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.
>
> **4. A prisoner confined in a jail or any other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police or other officer responsible for the operation of the jail, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection and who is in lawful custody or confinement for a charge, conviction or sentence for:**

(a) A felony is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(b) A gross misdemeanor is guilty of a gross misdemeanor.

(c) A misdemeanor is guilty of a misdemeanor.

5. A sentence imposed upon a prisoner pursuant to subsection 3 or 4:

(a) Is not subject to suspension or the granting of probation; and

(b) Must run consecutively after the prisoner has served any sentences imposed upon the prisoner for the offense or offenses for which the prisoner was in lawful custody or confinement when the prisoner violated the provisions of subsection 3 or 4.

6. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been reduced to a charge for which the penalty is less than the penalty which was imposed upon the person pursuant to subsection 4, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her sentence imposed pursuant to subsection 4 be modified to a sentence equivalent to the penalty imposed for the underlying charge for which the person was convicted; and

(b) Resentence him or her in accordance with the penalties prescribed for the underlying charge for which the person was convicted.

7. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been declined for prosecution or dismissed, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her original sentence pursuant to subsection 4 be reduced to a misdemeanor; and

(b) Resentence him or her in accordance with the penalties prescribed for a misdemeanor.

8. No person has a right to the modification of a sentence pursuant to subsection 6 or 7, and the granting or denial of a petition pursuant to subsection 6 or 7 does not establish a basis for any cause of action against this State, any political subdivision of this State or any agency, board, commission, department, officer, employee or agent of this State or a political subdivision of this State.

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9. As used in this section:

(a) "Facility" has the meaning ascribed to it in NRS 209.065.

(b) "Institution" has the meaning ascribed to it in NRS 209.071.

(c) "Jail" means a jail, branch county jail or other local detention facility.

(d) "Telecommunications device" has the meaning ascribed to it in subsection 4 of NRS 209.417.

(Added to NRS by 2007, 72; A 2013, 2095; 2015, 3081)

Additionally, the aiding and abetting liability applies to all crimes, including the one Petitioner was charged with:

> NRS 195.020 Principals. Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him or her.
>
> [1911 C&P § 9; RL § 6274; NCL § 9958]

These statutes are clear, and there are no prohibitions on aiding and abetting or conspiracy liability from applying to these statutes. Hence, going beyond the plainly worded law, especially with no evidence or authority provided by the Petitioner to show that legislative intent was violated, would be irresponsible and impermissible.

B. All Criminal Acts Can Have Aiding and Abetting Liability Attach

The United States Supreme Court, specifically Justice Elana Kagen recently authored the *Rosemond v. United States* decision, where in much of the universal concepts of aiding and abetting liability were repeated and analyzed.

> The Court said, "The federal aiding and abetting statute, 18 U.S.C. §2, states that a person who furthers — more specifically, who "aids, abets, counsels, commands, induces or procures"— the commission of a federal offense "is punishable as a principal." That provision derives from (though simplifies) common-law

standards for accomplice liability. See, e.g., *Standefer v. United States*, 447 U.S. 10, 14-19, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980); *United States v. Peoni*, 100 F. 2d 401, 402 (CA2 1938) (L. Hand, J.) ("The substance of [§2's] formula goes back a long way"). And in so doing, §2 reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission. See J. Hawley & M. McGregor, Criminal Law 81 (1899).

We have previously held that under §2 "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Central Bank of Denver, N. A. v. First Interstate Bank of Denver*, N. A., 511 U.S. 164, 181, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994). Both parties here embrace that formulation, and agree as well that it has two components. See Brief for Petitioner 28; Brief for United States 14. As at common law, a person is liable under §2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. See 2 W. LaFave, Substantive Criminal Law §13.2, p. 337 (2003) (hereinafter LaFave) (an accomplice is liable as a principal when he gives "assistance or encouragement . . . with the intent thereby to promote or facilitate commission of the crime"); *Hicks v. United States*, 150 U.S. 442, 449, 14 S. Ct. 144, 37 L. Ed. 1137 (1893) (an accomplice is liable when his acts of assistance are done "with the intention of encouraging and abetting" the crime).

Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014)

Further in the opinion, the Court said "As almost every court of appeals has held, "[a] defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *United States v. Sigalow*, 812 F. 2d 783, 785 (CA2 1987), *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). The main issue of the *Rosemond* decision was making sure that federally, the type of intent element was presented to the jury –

the type Nevada's Supreme Court ruled on in *Sharma* and *Bolden.* Nonetheless, it is clear that no matter the type of crime, it is well established precedent nationwide that aiding and abetting liability applies.

Further bolstering the legal argument for the Defendant's criminal liability in this crime, there is Nevada Supreme Court precedent for criminal liability for an aider or abettor involving possession crimes. "In our view, however, it is clear that an individual can aid and abet a possessory crime." See, e.g., *People v. Storr*, 527 P.2d 878, 881-82 (Colo. 1974); *People v. Francis*, 450 P.2d 591, 595 (Cal. 1969); *Roland v. State*, 96 Nev. 300, 302, 608 P.2d 500, 501 (1980). The fact that there isn't a specific crime assigning liability to furnishing a prisoner in a jail a telecommunications device is inconsequential. Basic logic and reasoning demonstrates that just as in *Roland*, there need not be a specific crime to charge and convict someone with providing someone the short barreled shotgun which a Co-Defendant later possesses. There needn't be a specific crime for proving someone a stolen vehicle, which the Co-Defendant then is in possession. In light of Nevada Supreme Court case law, as well as NRS 212.165(4) and NRS 195.020, there is no authority or reasoning to alter or dismiss this case as a matter of legal motion.

C. The Defendant Provides No Other Support for the Contention That This Case Must be Dismissed as a Matter of Law

The remedy of dismissing a case as a matter of law is the strongest possible remedy that can be levied on behalf of a Defendant in the criminal justice system. As such, support is required to justify such a remedy. Normally, a successful challenge on legislative intent would include the following support, which are notably lacking:

1) Precedent which shows that this specific statute has been ruled as not applying to this type of liability;

2) Precedent which shows in similar crimes rulings that this type of liability does not apply;

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3) Legislative history that shows specifically that the legislators who created NRS 212.165 did not mean for aiding and abetting liability to apply for the crime;

4) Persuasive authority from other jurisdictions that stand for the same proposition as options 1 and 2.

What the Court does have before it, is clear evidence that the Defendant provided a telecommunications device multiple times to multiple inmates at the jail, and therefore aided and abetted their illegal possession and use of it. The Court has no precedent which shows that aiding and abetting liability does not apply to this crimes. In fact, the Court is fully aware aiding and abetting liability applies to all crimes, even misdemeanor crimes. Additionally, the State has citied to Nevada precedent for aiding and abetting liability for possessory crimes. Therefore, there is no basis in law to dismiss this criminal case.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Honorable Court DENY Defendant's Motion to Dismiss

DATED this 15th day of September, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Opposition to Defendant's Motion to Dismiss, was made this 15th day of September, 2017, by Electronic Filing to:

MICHAEL L. BECKER, ESQ.
Michael@702defense.com

C. Jimenez
Secretary for the District Attorney's Office

JPR/cmj/FDD

SUPPL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
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Nevada Bar #010193
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALEXIS PLUNKETT, aka,
Alexis Anne Plunkett,

Defendant.

CASE NO: C-17-324821-2

DEPT NO: XVII

STATE'S SUPPLEMENTAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

DATE OF HEARING: SEPTEMBER 21, 2017
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAY P. RAMAN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Dismiss.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

FACTS AND CIRCUMSTANCES

This case was presented for indictment on July 5, 2017 and subsequently superseded on July 13, 2017. There are three Defendants in this case, Andrew Arevalo, Alexis Plunkett, and Rogelio Estrada. The common course and scheme shown by the evidence in this case is that Alexis Plunkett, acting as an attorney for Arevalo and Estrada, had a series of contact visits in the Clark County Detention Center with Arevalo and Estrada. During those visits, she provided them access and use of her cell phone, to make unrestricted and unrecorded calls, violating jail policy and the Nevada Revised Statutes.

ARGUMENT

I. LESGISLATIVE HISTORY DOES NOT SHOW PRECLUSION OF AIDING AND ABETTING LIABILITY

There is nothing within the legislative history of the statute which shows specific preclusion for charging someone with aiding and abetting liability.

Statutes should be given their plain meaning and 'must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.'" (quoting *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990), overruled on other grounds by *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000)). As mentioned in the State's previous Opposition, we recognize that the intent of the legislature is the controlling factor and that, if the statutes under consideration are clear on their face, we cannot go beyond them in determining legislative intent." *Cirac v. Lander County*, 95 Nev. 723, 729, 602 P.2d 1012, 1015 (1979); *State v. Beemer*, 51 Nev. 192, 199, 272 P. 656, 658 (1928).

The specific crime that Defendant Plunkett is charged with aiding and abetting, was added to the statute in the 2013 Legislative Session (See Index of History). There were two substantive discussions held on the passage of this bill. The amendments and attachments are not instructive as they deal with commensurate penalties, not liability (i.e. if someone is in jail for a misdemeanor, the crime of possession can be no higher than a misdemeanor, etc., as well

as a downgrade on the possession offense if the requisite crime which landed the person in jail in the first place is pled down.)

From the first reading and discussion of AB 212 on March 23, 2013 in the Assembly, the statute was amended because there was a loophole regarding these crimes and the jail. Previous to AB 212, this statute only concerned State prisons. (See Initial Draft and Minutes from Initial Discussion in Assembly, March 23, 2013.) As can be seen by the discussion held between Jim Shirley, of the Pershing County District Attorney and Assemblywoman Michelle Fiore, the amendment of this statute adding jail liability was due to a 2010 case in Pershing County where an inmate had a cell phone hidden in a bible. That inmate was charged with possessing escape tools, and the Nevada Supreme Court found that cell phones did not qualify as devices for escape. The purpose of the bill was "so the inmates can no longer bypass the regular phone system – where they are recorded – to communicate with others about jail security and such, or make threats, or perform other criminal acts which in the confines of the jail" Jim Shirley, p. 4 id. There is no specific talk about restricting any kind of liability under aiding and abetting in the discussion of this statute.

From the minutes from the initial discussion in the Senate on April 29, 2013, there is some mention of an aiding and abetting situation, albeit not from an elected official. "We support A.B. 212. I assume cell phones are confiscated when prisoners are incarcerated. That means someone is smuggling cell phones in to prisoners. I would think the person who smuggles in cell phones should also be guilty of a crime. John Wagner, p. 6, Initial Discussion in the Senate on April 29, 2013. Likewise, Assemblyman Hansen reiterates some speakers later that "This bill closes a peculiar loophole in the law. I am willing to work with legal staff to resolve any potential issues on the penalties. The bottom line is that people in jail should not be allowed to have cell phones." Assemblyman Ira Hansen, p. 8 id.

These are the only minutes of any substance from discussions held on this bill. There is nothing that was said that specifically decrees that aiding and abetting or conspiracy liability would not apply to this crime.

II. FURTHER CASE LAW SHOWS THE ABILITY TO AID AND ABET A STATUS POSSESSION CRIME

In the State's original Opposition to the Defendant's Motion, we pointed out the recent United States Supreme Court opinion of *Rosemond v. United States*, 134 S. Ct. 1240 (2014) which gives a lengthy recitation on the usefulness and validity of aiding and abetting liability. In response to the Court's request for further briefing on the matter, the State has searched for precedent within our State court system for aiding and abetting liability, and presented the court with a prime example of aiding and abetting a possessory crime, as shown in *Roland v. State*, 96 Nev. 300, 302, 608 P.2d 500, 501 (1980). The State further wanted to show the court precedence for not only aiding and abetting for a possession crime, but also for a possession crime of status – akin to our circumstances here.

The State was able to find the case of *United States v. Ford*, 821 F.3d 63 (1st Cir. App. 2016). In this case, Ford was charged with aiding and abetting possession of a firearm having been convicted of a crime punishable by imprisonment for a term exceeding one year. USC SS 922(g)(1), 924(a)(2). Ford was not the person convicted, it was her husband and she was charged with aiding and abetting his possession. This clearly is not only a possession crime, but a status crime – it is only criminal by virtue of the possessor's status. Ford was convicted of aiding and abetting her husband's possession of firearms, having given him the guns to shoot at a range. Similar to our case, Ford "purchased two assault rifles found by agents at her Monroe home, and that James used one of the rifles at least once in her presence. In short, it is plan that she aided his possession of a firearm" Id. This case stands for the proposition that it is valid to convict someone for aiding and abetting a person, where a crime on the principle offender is a crime due to his status, not the aider and abettor's. The problem in this case was in the instruction given to the jury, where it was simply adequate that Ford 'knew or had reason to know' he was previously convicted, which is simply too lax under the beyond a reasonable doubt standard. The court distinguishes that ignorance of the law would not have been an available defense, and but for the jury instruction lowering the standard of proof tantamount to negligence – this would have been a solid conviction. The decision also cites to several

other cases which stand for the same proposition, that provided that the intent and knowledge element is intact, such a conviction for aiding and abetting a possessory status crime is legally proper.

The problem that occurred in Ford would not be capable of occurrence factually in the instant case. Defendant Plunkett is visiting Defendant Arevalo and Defendant Estrada in the jail. It is plainly obvious and without defense that they both are inmates in a jail – the requisite status. In fact, the form with Defendant Plunkett signed points her directly to the statute prohibiting such possession by inmates, not that 1) ignorance of the law is a defense, or 2) she wouldn't already have a greater basis to know such things as a criminal defense attorney. She aids and abets the possession of the telecommunications device to Defendants' Arevalo and Estrada by providing them with a cell phone, which they use.

Notwithstanding that there is no legislative history to preclude Defendant Plunkett's criminal liability, and no direct precedent in Nevada State Law, there still are clear boundaries that have been drawn for aiding and abetting liability in Nevada. The boundaries are *Sharma* and *Bolden*. *Sharma v. State*, 118 Nev. 648 (2002), and *Bolden v. State*, 121 Nev. 908 (2005). Essentially, *Sharma* stands for the idea that in order to be liable as an aider or abettor, you must share the intent of the principal actor. *Bolden* says Conspiracy is a knowing agreement to act in furtherance of an unlawful act. *Bolden v. State*, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005). When a defendant does not know that he or she is acting in furtherance of an unlawful act, there can be no conspiracy. *Gonzalez v. State*, 366 P.3d 680, 684 (2015). The findings of Sharma and Bolden have been widely adopted as 'limits' to aiding and abetting, or conspiracy liability. Thus, to declare that Defendant Plunkett's charges must be dismissed would be irresponsible, as it would not be based on legal precedent, Nevada's established bounds on aiding and abetting or conspiracy liability, and not based on legislative intent or history.

Therefore, the charges must stand and the issues of fact must be decided by a jury.

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CONCLUSION

Based on the foregoing, the State respectfully requests that this Honorable Court DENY Defendant's Motion to Dismiss

DATED this 26 day of September, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
JAY P. RAMAN
Chief Deputy District Attorney
Nevada Bar #010193

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of STATE'S SUPPLEMENTAL OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, was made this Enter Day day of 20th, September 2017, by Electronic Filing to:

MICHAEL L. BECKER, ESQ.
Michael@702defense.com

_____
C. Jimenez
Secretary for the District Attorney's Office

JPR/cmj/FDD

Index of History

AB212

Introduced in the Assembly on Mar 07, 2013.

By: (**Bolded** name indicates primary sponsorship)
Hansen, Hambrick, Paul Anderson, Ellison, Grady, Kirner, Livermore, Stewart, Wheeler, Gustavson

Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Fiscal Notes View Fiscal Notes
Effect on Local Government: Increases or Newly Provides for Term of Imprisonment in County or City Jail or Detention Facility.
Effect on State: Yes.

Most Recent History Action: Approved by the Governor. Chapter 385.
(See full list below)

Upcoming Hearings

Past Hearings

Assembly Judiciary	Mar 26, 2013 08:00 AM	**Agenda**	**Minutes**	No action
Assembly Judiciary	Apr 02, 2013 08:00 AM	**Agenda**	**Minutes**	Amend, and do pass as amended
Assembly Government Affairs	Apr 25, 2013 08:00 AM	**Agenda**	**Minutes**	Mentioned no jurisdiction
Senate Judiciary	Apr 29, 2013 09:00 AM	**Agenda**	**Minutes**	No Action
Senate Judiciary	May 16, 2013 09:00 AM	**Agenda**	**Minutes**	Amend, and do pass as amended

Final Passage Votes

Assembly Final Passage	**(1st Reprint)**	Apr 15, 2013	Yea 40,	Nay 0,	Excused 1,	Not Voting 0,	Absent 0,	Vacant 1
Senate Final Passage	**(2nd Reprint)**	May 23, 2013	Yea 21,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0	

Bill Text **As Introduced** **1st Reprint** **2nd Reprint** **As Enrolled**

Adopted Amendments **Amend. No. 123** **Amend. No. 674**

Bill History
Mar 07, 2013

- Read first time. Referred to Committee on Judiciary. To printer.

Mar 08, 2013

- From printer. To committee.

Apr 09, 2013

- From committee: Amend, and do pass as amended.

Apr 10, 2013

- Taken from Second Reading File.
- Placed on Second Reading File for next legislative day.

Apr 12, 2013

- Read second time. Amended. (Amend. No. **123.**) To printer.

Apr 15, 2013

- From printer. To engrossment. Engrossed. **First reprint .**
- Read third time. Passed, as amended. Title approved. **(Yeas: 40, Nays: None, Excused: 1, Vacant: 1.)** To Senate.

Apr 16, 2013

- In Senate.
- Read first time. Referred to Committee on Judiciary. To committee.

May 22, 2013

- From committee: Amend, and do pass as amended.
- Placed on Second Reading File.
- Read second time. Amended. (Amend. No. **674.**) To printer.

May 23, 2013

- From printer. To re-engrossment. Re-engrossed. **Second reprint .**
- Read third time. Passed, as amended. Title approved, as amended. **(Yeas: 21, Nays: None.)** To Assembly.

May 24, 2013

- In Assembly.

May 31, 2013

- Senate Amendment No. **674** concurred in.

Jun 01, 2013

- To enrollment.

Jun 03, 2013

- Enrolled and delivered to Governor.
- Approved by the Governor. Chapter 385.
- **Effective October 1, 2013.**

Initial Draft and Minutes from Initial Discussion in Assembly March 23, 2013

ASSEMBLY BILL NO. 212–ASSEMBLYMEN HANSEN, HAMBRICK; PAUL ANDERSON, ELLISON, GRADY, KIRNER, LIVERMORE, STEWART AND WHEELER

MARCH 7, 2013

JOINT SPONSOR: SENATOR GUSTAVSON

Referred to Committee on Judiciary

SUMMARY—Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

FISCAL NOTE: Effect on Local Government: Increases or Newly Provides for Term of Imprisonment in County or City Jail or Detention Facility.
Effect on the State: Yes.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to correctional institutions; prohibiting the possession of portable telecommunications devices by certain prisoners; providing penalties; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law prohibits the possession of portable telecommunications devices by prisoners in state institutions and facilities. (NRS 212.165) This bill extends that prohibition to include any prisoner in a jail, branch county jail or other local detention facility and provides that a prisoner who violates the prohibition is guilty of: (1) a category D felony if he or she was confined as a result of a gross misdemeanor or a felony; or (2) a misdemeanor if he or she was confined as a result of a misdemeanor.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 212.165 is hereby amended to read as follows:

212.165 1. A person shall not, without lawful authorization, knowingly furnish, attempt to furnish, or aid or assist in furnishing or attempting to furnish to a prisoner confined in an institution or a facility of the Department of Corrections, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a category E felony and shall be punished as provided in NRS 193.130.

2. A person shall not, without lawful authorization, carry into an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a misdemeanor.

3. A prisoner confined in an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

4. ***A prisoner confined in a jail or any other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police or other officer responsible for the operation of the jail, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection and who is in lawful custody or confinement for a charge, conviction or sentence for:***

(a) A gross misdemeanor or felony is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(b) A misdemeanor is guilty of a misdemeanor.

5. A sentence imposed upon a prisoner pursuant to subsection 3 ~~[.]~~ ***or 4:***

(a) Is not subject to suspension or the granting of probation; and

(b) Must run consecutively after the prisoner has served any sentences imposed upon the prisoner for the offense or offenses for which the prisoner was in lawful custody or confinement when the prisoner violated the provisions of subsection 3 ~~[.~~

~~5.]~~ ***or 4.***

6. As used in this section:

(a) "Facility" has the meaning ascribed to it in NRS 209.065.

(b) "Institution" has the meaning ascribed to it in NRS 209.071.

(c) ***"Jail" means a jail, branch county jail or other local detention facility.***

(d) "Telecommunications device" has the meaning ascribed to it in subsection 3 of NRS 209.417.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 26, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:11 a.m. on Tuesday, March 26, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Peggy Pierce, Clark County Assembly District No. 3

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Karyn Werner, Committee Secretary
Brittany Shipp, Policy Assistant
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Jim Shirley, Pershing County District Attorney
Eric Spratley, representing the Washoe County Sheriff's Office
A.J. Delap, representing the Las Vegas Metropolitan Police Department
Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association
Steve Yeager, representing the Clark County Office of the Public Defender
Chris Frey, Deputy Public Defender, Washoe County Public Defender
Bob Bayer, Private Citizen, Reno, Nevada
Keith Uriarte, representing American Federation of State, County and Municipal Employees Local 4041
Vanessa Spinazola, representing the American Civil Liberties Union of Nevada
Clifton C. Maclin Jr., Private Citizen, Carson City, Nevada
James "Greg" Cox, Director, Nevada Department of Corrections
Gawain Guedry, representing the Las Vegas Metropolitan Police Department
Bill Ames, representing the Washoe County Sheriff's Office
Paul Villa, representing the Peace Officers Research Association of Nevada, Inc.; and the Reno Police Protective Association
Robert Lawson, representing the Las Vegas Metropolitan Police Department
Kristin Erickson, representing the Nevada District Attorneys' Association

Chairman Frierson:
[Roll was taken. Committee protocol and rules were explained.]

We have four items on the agenda today, so we will have to be swift. We will go in order. The first bill is Assembly Bill 212 and I will invite Mr. Hansen to introduce his bill.

Assembly Bill 212: Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Assemblyman Ira Hansen, Assembly District No. 32:
I am here today to present Assembly Bill 212 which prohibits the possession of portable telecommunication devices by prisoners in a county jail or other local detention facility. [Read from written testimony (Exhibit C).]

It was a surprise to me when I was contacted by the Pershing County District Attorney, Jim Shirley, and found out that there was a case on this issue that went all the way to the Supreme Court of Nevada. I would like to have Mr. Shirley give us some background on why this law is necessary.

Jim Shirley, Pershing County District Attorney:
A little bit of history so you will get a grasp of where we are. In 2003 the Office of the Attorney General, on behalf of the prison system, came before the Legislature with Senate Bill 299 of the 72nd Session and asked for the law that became *Nevada Revised Statutes* (NRS) 212.093, which does not allow prisoners to have items that can be used for escape. During the testimony for that statute, Mr. Gerald Gardner testified that the trick with an escape is to catch it before it happens, because once the escape has started, serious consequences can happen, such as harm to the correctional officers, the inmate, or the public at large.

In 2005 there was an escape from the state prison system when a social worker brought a cell phone to an inmate with whom she had fallen in love. He then used that phone to coordinate his escape with people on the outside. He escaped, which resulted in the deaths of two or three other people before he was caught.

In 2007, as Assemblyman Hansen told you, a bill was presented to the Legislature by the Nevada Department of Corrections (NDOC) prohibiting portable telecommunication devices in the prison system. Unfortunately, it was so narrowly defined that it only applied to the prisons.

Around 2010 we had a case in Pershing County in which an inmate possessed a cell phone, which he hid in his Bible in his cell. We discovered it because he threatened other people by using that cell phone. When we prosecuted him, the District Court ruled the statute unconstitutionally vague. We appealed that decision to the Supreme Court of Nevada and they overturned the vagueness ruling, but then found that cell phones did not qualify as devices for escape.

Assemblywoman Fiore:
Was the social worker who gave the inmate the cell phone charged and arrested?

Jim Shirley:
I do not know what happened to her. If you look at the current version of NRS 212.165, it has provisions for noninmates. That is the reason those provisions are in there, so no one can take a cell phone into a prison.

Assemblywoman Fiore:
Mr. Cox is behind you nodding his head yes, so they have apprehended her.

Jim Shirley:
I do not know what happened to her. I only know what happened with the escapee.

We went to the Supreme Court and they said that the escape device would not apply, so our alternative was to correct this small oversight from when NRS 212.165 was originally enacted. When I was growing up, it was the file in the cake; cell phones are the new files. What they have discovered worldwide is that we are having an epidemic of cell phones getting into correctional facilities. For example, in Brazil they have carrier pigeons carry the cell phones into the inmates. The inmates are then able to use those phones for escape, for continuing their criminal enterprises, threatening people in the public, and those types of things. In Italy, they downloaded blueprints for the prison. In the case at hand, the cell phone was used for threatening people in the community. Of course, escapes are the real problem.

We are asking that you pass this bill so the inmates can no longer bypass the regular phone system—where they are recorded—to communicate with others about jail security and such, or make threats, or perform other criminal acts while in the confines of the jail.

I have also been notified that the Nevada District Attorney's Association is in full support of this bill.

Chairman Frierson:
I understand what you are trying to accomplish; I have spoken with Mr. Hansen about this issue. We were both surprised that this was not already a prohibition. I understand the Supreme Court's rationale in that an escape tool is usually only an escape tool. Cell phones can be used for this purpose, but can also be used for threatening witnesses, contacting girlfriends, and other less nefarious things.

The felony characterization jumps out at me because we have inmates under local government jurisdiction that are now going to be subject to felony treatment for things that the local government jurisdiction could have prevented.

I relate this to a situation ten years ago. I was prosecuting someone for escape because a handcuff key was found in his shoe. A screening found the handcuff key, so if we have an ineffective screening process, we are allowing something to happen that we could have prevented. My concern is local government not doing an adequate screening resulting in a cost to the state. That is a longwinded way of asking if you are open to a penalty that is not a felony if they are in for a misdemeanor or gross misdemeanor.

Jim Shirley:
The proposal is that a misdemeanor would be guilty of a misdemeanor. I would not have a problem with throwing the gross misdemeanor in there as well. I think the felony issue is, if it is that serious of a crime and they actually have a cell phone in the jail, the crime should be the same as it would be in prison. I understand what you are saying about the screening process and I agree. The problem in the rural jurisdictions is that the jails do not have the money to put in some of the things that we should have, like updated camera systems. We are looking at that now, but it is over $50,000 and that is a lot of money for a local jurisdiction. What happened in the case I was talking about is a confederate threw the cell phone over the fence while no one was there, and the inmate came and retrieved it later.

Chairman Frierson:
Are there any questions for Mr. Shirley or Assemblyman Hansen? I see none. You are right. This is a straightforward bill. I think jails should be able to prohibit inmates from having anything that is not approved by the jail.

Assemblyman Ohrenschall:
According to the bill, someone would be guilty at the same level as their custody. My concern is if someone is arrested and in custody on a charge of felony burglary and he has a cell phone offense, but later the burglary is pled down to a misdemeanor petty larceny, would he still be facing a felony because of the cell phone? It worries me that a cell phone could be missed by a detention facility when someone is brought in and no one realizes he has it and it does not get taken away and inventoried.

Jim Shirley:
Most of the booking processes require them to change clothing, so they would not have the same clothing on. They would have surrendered their personal effects. As to the burglary scenario that you addressed, most people in the jails are felons who are awaiting trial and are generally not given a plea deal. They stay in jail because it is going to stay a felony. The people like you are talking about usually bail out. The bail is not set very high, especially in the rural jurisdictions. We "O-R" a lot of people to get them out of our jails and keep

only the really serious offenders. I am sure it is even more so in the larger jurisdictions because of budgetary constraints in housing so many people.

Chairman Frierson:
Are there any questions? I realize there is a great deal of discretion involved here as well. We understand that the state charging officers do some screening. The questions directed to you are designed to find that balance and ensure we retain that opportunity. We do not want to expose people unnecessarily to felonies. It sounds like your goal is to prohibit cell phones on inmates, and we have room for discussion on how to accomplish that.

Jim Shirley:
Yes, that is the main issue. I understand that plea bargains can change the nature of the underlying charge. Ultimately, you go back to the old saying about what a prosecutor's duty is, and that is to do justice, not harm. By and large that is what we try to do.

Assemblyman Wheeler:
In your experience, if a person is in for a class A felony and is being held over for trial, do you think convicting him of a misdemeanor for having a cell phone would be a deterrent?

Jim Shirley:
It would not be a deterrent because the nature of a misdemeanor is jail; it is not a severe punishment. We also looked at administrative remedies, but once again, since he is staying in jail, it would not affect what is going on in the prison at all if they are convicted of a felony and they go on to prison. It needs to be something that wakes them up to the fact that they cannot have a cell phone while incarcerated.

Chairman Frierson:
I will now open the hearing for those testifying in support of A.B. 212 both here and in Las Vegas.

Eric Spratley, representing the Washoe County Sheriff's Office:
I am here to express our support of A.B. 212. As you have heard, loopholes in existing statute can be addressed by this legislation which further enhances the safety of our jails and our communities throughout the state. The penalty, as has been pointed out by Mr. Wheeler, does need to have enough teeth to prohibit that conduct if possible. We are asking for your consideration not to limit it to just a misdemeanor penalty, but it should fit the current level of charge so there is something that would make them think twice about trying to get a cell phone into the jail. We have a thorough screening process, especially

at the Washoe County Jail, and our sister agencies across the state. The idea that inmates could accidentally end up with a cell phone in their possession is a very low possibility. It would be cause for concern if someone does get a cell phone into a jail system. He would be using it for a nefarious purpose, not just to contact his girlfriend.

We thank Assemblyman Hansen for bringing this important legislation forward. Please consider this bill the way it is intended.

Chairman Frierson:
You mentioned that you were in support of the penalty matching the underlying charge. Would you be in support of someone in on a gross misdemeanor being charged with a gross misdemeanor for possession of a cell phone?

Eric Spratley:
Yes, Mr. Chairman.

Chairman Frierson:
Please address the circumstances that Mr. Ohrenschall brought up about a person who is arrested on an offense that is negotiated down to a misdemeanor. Technically, if he is arrested for an offense and is then ultimately acquitted, or the offense is dismissed, under the existing bill he would still have a felony charge. How do you imagine that circumstance being dealt with?

Eric Spratley:
Going back to my other comments, an inmate cannot accidentally end up with a cell phone in the jail. He is going to have it for a specific purpose. He is going to obtain it through some means for a purpose more than communicating with his girlfriend. Even if the original charge of felony was pled down to a misdemeanor or a gross misdemeanor, the fact is he is still charged with a felony and is in possession of a cell phone. We have rules that are laid out in the very beginning of their time with us. If he ends up with a cell phone in a cell that he is in, or any other contraband, he knows he should bring it right to the deputy and turn it in. If we find it during shakedown, he should be appropriately charged and he knows he has that hanging over his head whether or not the original charge gets pled down, dismissed, or adjudicated otherwise.

A.J. Delap, representing the Las Vegas Metropolitan Police Department:
We are in support of this measure. We are in support of the suggested changes to the classification based on the conviction. In summation, it is a quick "me too." We are on board with it.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We would like to add a "me too" to A.B. 212.

Chairman Frierson:
Is there anyone else in support in Las Vegas? [There was no one.] We are back to Carson City and invite those in opposition to the bill to come forward. [There was no one.] Is there anyone in Las Vegas? Seeing no one we will come back to Carson City for anyone wishing to testify in the neutral position on the bill, including in Las Vegas.

Steve Yeager, representing the Clark County Office of the Public Defender:
I am neutral on the bill, but as has been raised by some members of the Committee, it would be appropriate where someone is pending a gross misdemeanor charge that they would face another gross misdemeanor for having a telecommunication device. In that way, the statute would be in line with the charge and custody. I would recommend that change. It sounds like everyone is amenable to that. Other than that, we remain neutral.

Chairman Frierson:
I am hesitant to bring this up, but in the context of escape, the sentence is required to be consecutive. What are your thoughts on that? It is complicated because this is only arrests, not necessarily convictions. Would this be appropriate in cases where there is already a conviction? When someone is just in custody? Would that be unnecessary?

Steve Yeager:
In a case like this, when this charge is leveled against someone, we do not know if there is going to be a conviction. The best way to do it is to leave it for the sentencing judge to decide whether this charge should run consecutively or concurrently. That would be best since it allows both the district attorney and the defense attorney to argue their positions, and the judge to look at the underlying facts to decide which sentence is appropriate. I would not be in favor of making it mandatory consecutive.

Chris Frey, Deputy Public Defender, Washoe County Public Defender:
I want to express my support for the recommendation that there be parity between the penalty and the underlying offense. It sounds like that is a noncontroversial recommendation. We would support that.

I signed in as neutral and nonspeaking, but I want to make a comment with respect to Assemblyman Wheeler's hypothetical scenario about someone who is facing a category A felony. Under the language of the bill, and even with the

parity recommendation, the penalty would not be a misdemeanor; they would be facing a felony.

Chairman Frierson:
Is there anyone else who is neutral? I see no one, so I will invite Mr. Hansen back up for closing remarks.

Assemblyman Hansen:
We are open to any suggestions on the parity issue. We will be happy to work with anyone so we will all be on the same page.

Chairman Frierson:
I will close the hearing on Assembly Bill 212. We will now move on to Assembly Bill 299, open the hearing, and invite Ms. Fiore to introduce her bill.

Assembly Bill 299: Makes various changes relating to the provision of medical and dental services within the Department of Corrections. (BDR 16-749)

Assemblywoman Michele Fiore, Clark County Assembly District No. 4:
When I was elected last year, as a new legislator I looked at what I could do to help the state. Although this is a policy committee and not a financial committee, sometimes the policies we enact affect finances. As I started touring our prisons, schools, and hospitals, I found issues that could help our directors implement better statutes and to help policy matters make our state budget more efficient. I also became aware of certain issues that we have with our medical staff.

We will go through the bill very quickly. I will state each section in simple layman's terms. [Read from written testimony (Exhibit D).]

Since this is my first time presenting, there were two words that we changed that did not get into the Nevada Electronic Legislative Information System (NELIS) in time. In section 1 where it says, "The director shall . . . ," it was changed to "may." Section 1 also says, "facility must . . . ," which was also changed to "may."

This basic bill has very simplistic language that gives the director the ability to hire doctors on a private contractual basis because, as it stands now, our doctors are exempt from working the ten-hour shifts. [Read from written testimony.]

Minutes from Initial Discussion in Senate April 29, 2013

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
April 29, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:04 a.m. on Monday, April 29, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Assemblywoman Lesley E. Cohen, Assembly District No. 29
Assemblywoman Lucy Flores, Assembly District No. 28
Assemblyman Ira Hansen, Assembly District No. 32
Assemblyman James Ohrenschall, Assembly District No. 12

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Jim C. Shirley, District Attorney, Pershing County
John Wagner, Independent American Party
Robert Roshak, Nevada Sheriffs' and Chiefs' Association

Kristin Erickson, Nevada District Attorneys Association
Steve Yeager, Public Defender's Office, Clark County
Beverlee McGrath, Best Friends Animal Society; American Society for the Prevention of Cruelty to Animals; Nevada Humane Society; Northern Nevada Society for the Prevention of Cruelty to Animals; Nevada Political Action for Animals; PawPac; Lake Tahoe Humane Society and Society for the Prevention of Cruelty to Animals; Compassion Charity for Animals; Pet Network of Lake Tahoe; Wylie Animal Rescue Foundation; Lake Tahoe Wolf Rescue
Margaret Flint, Nevada Humane Society; Canine Rehabilitation Center and Sanctuary
Richard Hunter
Fred Voltz
Jesica Clemens, Incred-A-Bull
Keith M. Lyons, Jr., Nevada Justice Association
Vanessa Spinazola, American Civil Liberties Union of Nevada
Sean B. Sullivan, Public Defender's Office, Washoe County
Michelle Ravell

Chair Segerblom:
I will open the hearing on Assembly Bill (A.B.) 212.

ASSEMBLY BILL 212 (1st Reprint): Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Assemblyman Ira Hansen (Assembly District No. 32):
This simple bill takes the prohibition against the possession of cell phones and other portable telecommunications devices by prisoners in the Department of Corrections (DOC) and applies it to inmates of our county jails or similar local detention facilities. The new language in section 1, subsection 4 of A.B. 212 mirrors the language used to prohibit cell phones in prisons. The differences are necessary to clarify that an inmate who is not yet convicted of another crime could still be guilty of possessing a cell phone or similar device without authorization. It also specifies that for jail inmates being charged or already serving a sentence for a misdemeanor, violation of this statute would carry a misdemeanor charge. For those charged with a gross misdemeanor, it would be a gross misdemeanor; for those charged with a felony, it would be a felony. Inmates would not face a stiffer penalty for possessing a cell phone than for the original charge.

The DOC originally proposed a law banning possession of portable telecommunication devices by its inmates in A.B. No. 106 of the 74th Session. The law has worked well for the DOC as a major deterrent against inmates trying to keep cell phones, and the law has not needed amendment since its passage 6 years ago. It is reasonable to have a similar restriction for our jail inmates.

This bill was brought in response to a lawsuit out of Pershing County regarding whether a county jail inmate could have a cell phone in his or her possession. That case eventually went to the Nevada Supreme Court.

Chair Segerblom:
What is the theory behind having the penalty escalate based on why the offender is in jail?

Jim C. Shirley (District Attorney, Pershing County):
We graduated the consequences because if you were in jail waiting to go to prison on a felony charge, it would not worry you to face a misdemeanor charge for carrying a cell phone. We were trying to keep the consequences on the level of the crime for which the person was in jail.

Chair Segerblom:
Did the original bill make it a felony for everyone, and the Assembly Committee on Judiciary reduced it?

Mr. Shirley:
No. The original bill had felonies and gross misdemeanors lumped together and misdemeanors with misdemeanors. When we discussed it before the Committee, the members broke it down so each level had the same corresponding crime. That seemed a lot more fair. Someone in jail on a misdemeanor will not face a felony charge and vice versa.

The lawsuit referred to eventually resulted in the Nevada Supreme Court decision *Sheriff v. Andrews*, 128 Nev. ____, 286 P.3d 262 (2012). We had a prisoner who had somebody throw a cell phone to him over the fence. He then hid the cell phone among some Bibles in his cell. By the time we found it, he had made a number of phone calls, threatening people on the outside and calling family members. We prosecuted him for violation of *Nevada Revised Statutes* (NRS) 212.093, which is the prohibition against having an escape device. The

Nevada Supreme Court said that the prohibition in NRS 212.093 applied only to items that physically manipulated the jail.

In almost every case in which an inmate used a cell phone to escape, murders have been committed either during or immediately following the escape. In fact, a situation like this in Nevada caused the statute to be amended in 2007. In that case, a social worker brought the cell phone in to the prisoner; he used it to communicate with confederates and escaped. After his escape, he killed two or three people. A similar thing happened after a recent escape in Arizona. An inmate used another inmate's cell phone to communicate with confederates, escaped, killed a family in the Arizona desert and fled up into Colorado. In Brazil, there have been cases of carrier pigeons bringing cell phones into jails.

Chair Segerblom:
Have officials considered jamming the cell phone signals in prisons?

Mr. Shirley:
They cannot. A federal law prohibits a local government from having jamming technology within the prisons. In any event, we would never be able to afford something like that in Pershing County. I think it was just an oversight that A.B. No. 106 of the 74th Session did not include language adding jails. The biggest concern is not the use of cell phones to escape; it is their use to threaten witnesses, contact confederates and conduct criminal enterprises while inside the jail. Cell phones bypass the jail phone systems, so the monitoring you normally do of inmates' interactions cannot be done.

Chair Segerblom:
Many of the inmates of county jails are there because they have not yet been convicted. If you are awaiting trial on a felony and you get a felony for having a cell phone, and then you end up pleading to a gross misdemeanor on your original charge, does the cell phone charge become a gross misdemeanor?

Mr. Shirley:
Yes.

Senator Ford:
I am not certain I understand the progression of the penalties. Is the point that a person in jail on a felony is not concerned about a gross misdemeanor, so we need to charge the prisoner with a felony for having a cell phone?

Mr. Shirley:
That is exactly the point. If someone is in jail awaiting trial on a Category A felony, it is not going to mean anything to convict him or her of a misdemeanor because it does not add anything to his or her sentence.

Senator Ford:
Did I understand you to say that if an inmate charge changes from a felony to a gross misdemeanor, the cell phone charge also goes down to a gross misdemeanor?

Mr. Shirley:
That would be the just thing to do. I do not think you should impose a penalty that is heavier than the original charge.

Senator Ford:
Is that in the bill? As I read section 1, subsection 4, I am not certain it says that if the penalty is pled down, the cell phone penalty will follow suit.

Nick Anthony (Counsel):
I believe your reading of the bill is correct. If you would like language that specifically says the inmate could only be convicted of the lesser charge to which he or she pled, then we can certainly add that.

Mr. Shirley:
I would have no objection to that. The intent is for the cell phone possession penalty to mirror the penalty of the crime the inmate was originally charged with.

Assemblyman Hansen:
I concur. That would make perfect sense.

Senator Ford:
I will offer it as a friendly amendment if this bill advances.

Senator Hutchison:
Section 1, subsection 4 says a prisoner shall not possess a telecommunications device "without lawful authorization." How is that phrase interpreted?

Mr. Shirley:
Within a jail, a sheriff has the authority to authorize certain things. For example, an inmate on the work crew might have a shovel, which might constitute an escape device. But because the sheriff authorized the inmate to have a shovel at that time, the inmate is not subject to a criminal penalty.

Senator Hutchison:
So what is authorized is decided on a case-by-case basis by the sheriff and correctional facility. What constitutes a lawfully authorized cell phone is not defined anywhere.

Mr. Shirley:
Correct.

John Wagner (Independent American Party):
We support A.B. 212. I assume cell phones are confiscated when prisoners are incarcerated. That means someone is smuggling cell phones in to prisoners. I would think the person who smuggles in cell phones should also be guilty of a crime.

Robert Roshak (Nevada Sheriffs' and Chiefs' Association):
I am also speaking for the Las Vegas Metropolitan Police Department and Washoe County Sheriff's Office. We support A.B. 212.

Kristin Erickson (Nevada District Attorneys Association):
We are in support of A.B. 212. Having a cell phone in jail is always a serious security threat.

Steve Yeager (Public Defender's Office, Clark County):
We are neutral on this bill. I want to bring one potential area of concern to the Committee's attention. Some concern was expressed in my office about tying the penalty to the custody status of the offender. It was conveyed to me that there could be a constitutional problem with that, in that the penalty for the crime would depend on something unrelated to the crime itself. I did some research on this and found that there is not a lot of caselaw dealing with the Eighth Amendment to the U.S. Constitution, which includes the "cruel and unusual punishment" or proportionality doctrines. Most of the caselaw seems to deal with death penalty work. I was not able to find anything that would directly relate to this, but it was suggested that one way to avoid this issue is to have a

stepped-up penalty, where the first offense would be a misdemeanor, the second offense a gross misdemeanor and the third a felony. I am neutral on the bill because I was not able to confirm if that is a legitimate constitutional concern, but I wanted to make you aware of it.

Chair Segerblom:
What is your opinion about the argument that if you are in jail for a felony, getting a misdemeanor is irrelevant?

Mr. Yeager:
I certainly understand the rationale behind that, but there are some practical considerations for how the charge would actually work. Typically, when you are found with a cell phone, you are charged right away. In theory, that charge would be related to what you are in custody for. Some practical difficulties would arise; for example, the cell phone charge would have to wait until the resolution of the underlying charge. But I agree with the position that if you are in custody on a serious felony, you are probably not going to be deterred by the specter of a misdemeanor hanging over your head.

Chair Segerblom:
Mr. Anthony, do you feel it is constitutional to have a varying penalty?

Mr. Anthony:
I am not aware of anything that would say it is clearly unconstitutional.

Senator Hammond:
I am not a lawyer. You say you have constitutional concerns, and yet this was heard in the Assembly, giving you ample time to track down those concerns, and you have not found any yet. Your concerns are clearly not that serious or you would not be neutral on the bill. You are just throwing out the idea. Is that correct?

Mr. Yeager:
Yes. When we looked at this in the Assembly, this concern was not raised; it was brought to my attention recently. In the limited research I did, I was not able to find anything saying this is unconstitutional. I just want to make the Committee aware that this is a concern. I will continue to look at it, but at this time I do not have any reason to believe it would be a problem.

Assemblyman Hansen:
This bill closes a peculiar loophole in the law. I am willing to work with legal staff to resolve any potential issues on the penalties. The bottom line is that people in jail should not be allowed to have cell phones.

Chair Segerblom:
We will close the hearing on A.B. 212 and open the hearing on A.B. 110.

ASSEMBLY BILL 110 (1st Reprint): Revises provisions concerning canines and breed discrimination. (BDR 15-567)

Assemblyman James Ohrenschall (Assembly District No. 12):
Many municipalities in the U.S. have enacted ordinances declaring one specific breed of dog dangerous or vicious. Assembly Bill 110 seeks to preempt the enactment of such ordinances in Nevada. I am not aware of any existing ordinances like that in Nevada, but many cities around the U.S. have enacted breed-specific ordinances. From everything I have learned since I was asked to introduce this bill, the problem is with the owners of these dogs, not the dogs. It is how the dog is raised.

Chair Segerblom:
Did we have a bill like this last Session?

Assemblyman Ohrenschall:
Assemblyman John Hambrick did introduce A.B. No. 324 of the 76th Session regarding dangerous and vicious dogs. However, it did not specifically prohibit local breed-specific ordinances.

Chair Segerblom:
Are there currently any such ordinances in Nevada?

Assemblyman Ohrenschall:
Not that I am aware of, no. There are quite a few in municipalities across the U.S., including Denver, Colorado. This bill seeks to make sure that does not happen in Nevada. Legislation banning breed-specific legislation is supported by the American Kennel Club (AKC), the American Veterinary Medical Association, the National Animal Control Association, the American Society for the Prevention of Cruelty to Animals (ASPCA) and the National Animal Interest Alliance. This is important preventive legislation.

Statute as Enrolled

Assembly Bill No. 212–Assemblymen Hansen, Hambrick; Paul Anderson, Ellison, Grady, Kirner, Livermore, Stewart and Wheeler

Joint Sponsor: Senator Gustavson

CHAPTER.....

AN ACT relating to correctional institutions; prohibiting the possession of portable telecommunications devices by certain prisoners; authorizing persons convicted of possessing portable telecommunications devices to request a modification of sentence under certain circumstances; providing penalties; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law prohibits the possession of portable telecommunications devices by prisoners in state institutions and facilities. (NRS 212.165) This bill extends that prohibition to include any prisoner in a jail, branch county jail or other local detention facility and provides that a prisoner who violates the prohibition is guilty of: (1) a category D felony if he or she was confined as a result of a felony; (2) a gross misdemeanor if he or she was confined as a result of a gross misdemeanor; or (3) a misdemeanor if he or she was confined as a result of a misdemeanor. This bill also authorizes a person who was convicted of possessing a portable telecommunications device in a jail, branch county jail or other local detention facility to request a modification of his or her sentence if the underlying charge for which the person was in lawful custody or confinement has been reduced, declined for prosecution or dismissed.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 212.165 is hereby amended to read as follows:

212.165 1. A person shall not, without lawful authorization, knowingly furnish, attempt to furnish, or aid or assist in furnishing or attempting to furnish to a prisoner confined in an institution or a facility of the Department of Corrections, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a category E felony and shall be punished as provided in NRS 193.130.

2. A person shall not, without lawful authorization, carry into an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director

of the Department, a portable telecommunications device. A person who violates this subsection is guilty of a misdemeanor.

3. A prisoner confined in an institution or a facility of the Department, or any other place where prisoners are authorized to be or are assigned by the Director of the Department, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection is guilty of a category D felony and shall be punished as provided in NRS 193.130.

4. ***A prisoner confined in a jail or any other place where such prisoners are authorized to be or are assigned by the sheriff, chief of police or other officer responsible for the operation of the jail, shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device. A prisoner who violates this subsection and who is in lawful custody or confinement for a charge, conviction or sentence for:***

(a) A felony is guilty of a category D felony and shall be punished as provided in NRS 193.130.

(b) A gross misdemeanor is guilty of a gross misdemeanor.

(c) A misdemeanor is guilty of a misdemeanor.

5. A sentence imposed upon a prisoner pursuant to subsection 3 ~~[.]~~ ***or 4:***

(a) Is not subject to suspension or the granting of probation; and

(b) Must run consecutively after the prisoner has served any sentences imposed upon the prisoner for the offense or offenses for which the prisoner was in lawful custody or confinement when the prisoner violated the provisions of subsection 3 ~~[.~~ ~~5.]~~ ***or 4.***

6. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been reduced to a charge for which the penalty is less than the penalty which was imposed upon the person pursuant to subsection 4, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her sentence imposed pursuant to subsection 4 be modified to a sentence equivalent to the penalty imposed for the underlying charge for which the person was convicted; and

(b) Resentence him or her in accordance with the penalties prescribed for the underlying charge for which the person was convicted.

7. A person who was convicted and sentenced pursuant to subsection 4 may file a petition, if the underlying charge for which the person was in lawful custody or confinement has been declined for prosecution or dismissed, with the court of original jurisdiction requesting that the court, for good cause shown:

(a) Order that his or her original sentence pursuant to subsection 4 be reduced to a misdemeanor; and

(b) Resentence him or her in accordance with the penalties prescribed for a misdemeanor.

8. No person has a right to the modification of a sentence pursuant to subsection 6 or 7, and the granting or denial of a petition pursuant to subsection 6 or 7 does not establish a basis for any cause of action against this State, any political subdivision of this State or any agency, board, commission, department, officer, employee or agent of this State or a political subdivision of this State.

9. As used in this section:

(a) "Facility" has the meaning ascribed to it in NRS 209.065.

(b) "Institution" has the meaning ascribed to it in NRS 209.071.

(c) ***"Jail" means a jail, branch county jail or other local detention facility.***

(d) "Telecommunications device" has the meaning ascribed to it in subsection 3 of NRS 209.417.

United States v. Ford

United States Court of Appeals for the First Circuit

April 13, 2016, Decided

No. 15-1303

Reporter
821 F.3d 63 *; 2016 U.S. App. LEXIS 6712 **

UNITED STATES OF AMERICA, Appellee, v. DARLENE FORD, Defendant, Appellant.

Subsequent History: Decision reached on appeal by United States v. James F. Ford, 2016 U.S. App. LEXIS 18537 (1st Cir. Me., Oct. 14, 2016)

Prior History: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE. [Hon. John A. Woodcock, Jr., U.S. District Judge].

United States v. Ford, 2014 U.S. Dist. LEXIS 13589 (D. Me., Feb. 4, 2014)

Counsel: Steven Alan Feldman, with whom Feldman and Feldman was on brief, for appellant.

Margaret D. McGaughey, Assistant United States Attorney, with whom Thomas E. Delahanty II, United States Attorney, was on brief, for appellee.

Judges: Before Thompson and Kayatta, Circuit Judges, and Mastroianni,* District Judge.

Opinion by: KAYATTA

Opinion

[*65] **KAYATTA, Circuit Judge.** The four members of the Ford family ran an illicit, indoor marijuana farm, for which they have all been sentenced to prison. This appeal by Darlene Ford primarily concerns not the marijuana, but rather Darlene's semi automatic rifle, which she allowed her husband, James F. Ford, to use for target practice. James's ***possession of a firearm*** was a crime because he had previously been convicted of a criminal offense "punishable by imprisonment for a term exceeding one year." 18 U.S.C. §§ 922(g)(1), 924(a)(2). Relying on the criminal code's general ***aiding and abetting*** provision, 18 U.S.C. § 2 ("section 2"), the government indicted Darlene for, among other crimes, letting James possess the rifle. Over Darlene's objection, the trial court instructed [**2] the jury that it could convict Darlene if she "knew or had reason to know" that James had previously been convicted of a crime punishable by more than one year in prison. After the jury convicted her of the ***aiding and abetting*** charge, and also of conspiring in the family's illicit marijuana growing operation and of maintaining a drug-involved residence, Darlene appealed. In a case of first impression, we find that the jury should not have been allowed to convict Darlene of ***aiding and abetting*** James's unlawful ***possession of a firearm*** merely

* Of the District of Massachusetts, sitting by designation.

because she "had reason to know" that James had previously been convicted of a crime punishable by more than a year in prison. We otherwise reject Darlene's challenges to her conviction and sentence.

I. Background

Maine drug enforcement officers executed a warrant to search the Fords' home in Monroe, Maine, on November 15, 2011. In the home at the time were Darlene, her husband James, and their adult sons Jim and Paul.[1] The search uncovered evidence of a substantial indoor marijuana growing operation, including 211 marijuana plants and financial records consistent with a significant marijuana distribution business. The agents also found two dismantled [**3] semi-automatic rifles, various ***firearm*** parts, and a video of James holding and firing one of the rifles at a firing range as Darlene narrates.

The United States subsequently indicted the four family members on various drug and ***firearms*** charges. Sons Paul and Jim pled guilty of, among other crimes, conspiring with their parents to manufacture 100 or more marijuana plants. They are serving prison sentences of 46 and 60 months, respectively. United States v. Ford, No. 14-1669, 625 Fed. Appx. 4, slip op. at 2 (1st Cir. Aug. 19, 2015) (unpublished) (Paul); United States v. [*66] Ford, No. 1:12-cr-00163-JAW-2 (D. Me. June 03, 2013), ECF No. 143 (Jim). After a jury trial, husband James was convicted of conspiring with his sons and wife to manufacture 100 or more marijuana plants; of manufacturing 100 or more marijuana plants; of maintaining drug-involved residences; and of being a ***felon*** in ***possession of a firearm***. United States v. Ford, No. 1:12-cr-00163-JAW-1 (D. Me. Nov. 24, 2014), ECF No. 400. That conviction is the subject [**4] of a separate pending appeal before this court, United States v. Ford, No. 14-2245 (1st Cir.).

Darlene was tried separately from her husband. Her first trial ended when the jury deadlocked. A second trial resulted in a jury verdict convicting Darlene of conspiring to manufacture 100 or more marijuana plants, in violation of 21 U.S.C. §§ 841(a)(1) and 846; of maintaining a drug-involved residence, in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2; and of ***aiding and abetting*** a ***felon***'s ***possession of a firearm***, in violation of 18 U.S.C. §§ 2, 922(g)(1), and 924(a)(2). Darlene now appeals her conviction on the ***aiding and abetting*** count, plus her sentence: seventy-eight months in prison on each count, to run concurrently, followed by three years of supervised release on each count, also to run concurrently.

Darlene concedes that she purchased two assault rifles found by agents at her Monroe home, and that James used one of the rifles at least once in her presence. In short, it is plain that she ***aided*** his ***possession of a firearm***. Also not disputed is the government's proof that five to seven years before Darlene ***aided*** him in possessing the ***firearm***,[2] James had been convicted in Massachusetts of three felonies punishable by more than one year in prison: possessing marijuana with [**5] intent to cultivate and distribute; ***possessing a firearm*** without proper identification; and possessing ammunition without proper identification. What was contested at trial on the ***aiding and abetting*** count was Darlene's knowledge of those convictions.

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[1] In order to avoid confusion in referring to four people with the same last name, we refer to the members of the Ford family by their given names, see, e.g., United States v. Serunjogi, 767 F.3d 132, 135 n.1 (1st Cir. 2014), and we refer to Darlene's husband as "James" and to her son as "Jim."

[2] The Superseding Indictment alleged that Darlene had ***aided and abetted*** James's ***possession of a firearm*** "[o]n [or] about October 16, 2009 and November 15, 2011."

The evidence to which the government points us on the details of James's 2004 convictions is skimpy. It does not reveal how many times James appeared at the courthouse, whether he ever served a day in custody, or what, if any, conditions or probationary restrictions were imposed on him as a result of the conviction. Nor does that evidence reflect any involvement by Darlene in any appearance, meeting, or communication concerning the 2004 prosecution.

The government's evidence trained, instead, on the circumstances that gave rise to the 2004 charges. Massachusetts State Trooper James Bruce ("Bruce") testified that on October 11, 2002, he conducted searches at what were then the Fords' two residences in Wakefield, Massachusetts: 2 and 5 Fellsmere Avenue ("No. 2" and "No. 5," respectively). [**6] No. 2 was the voter registration address for Paul and Jim, and No. 5 was the voter registration address for Darlene and James. Bruce recalled substantial marijuana growing operations in both No. 2 and No. 5. He mentioned the "overpowering" smell of marijuana in both homes, the presence of marijuana plants in various stages of growth, and the discovery of other marijuana-related paraphernalia.

While police were searching No. 2 in 2002, a car pulled up to No. 5, and Bruce saw "[a] man, a woman, and a younger man" emerge from the vehicle. The woman and the younger man walked into No. 5, while the older man, James, walked over [*67] to the officers at No. 2. Bruce testified that he "believed the woman to be" Darlene because he had seen her driver's license photograph prior to conducting the search. Darlene's counsel questioned Bruce's knowledge and whether he was certain in 2011 that the woman at the scene he observed in 2002 was Darlene.

Darlene took the stand in her own defense. She testified that on October 11, 2002, she was at work from 12:00 to 9:00 PM and that she had never seen Trooper Bruce before the trial in this case. At the beginning of her direct examination, she said that she first [**7] heard about the search of her residence (No. 5) on the evening of the search. She then recanted, claiming that she did not learn about the search until nine years later, when the Maine prosecution began. She further claimed that she did not know that her husband had been arrested in 2002 in connection with the search, that she did not learn about his Massachusetts conviction until "this [Maine] case started unfolding," and that she therefore did not know at the time the video was taken that her husband had a prior conviction or was prohibited from ***possessing a firearm***. Although she knew that she and her husband had transferred No. 2 to the Commonwealth of Massachusetts pursuant to a civil forfeiture, she claimed to have believed that the reason was to keep her son Paul out of jail, not because of any conviction or charges related to her husband.

Closing arguments at Darlene's trial highlighted the parties' competing views of the state of mind the government needed to prove to convict Darlene of ***aiding and abetting*** James's crime. Defense counsel stressed that Darlene did not actually know about her husband's prior felony conviction, while the government emphasized the ample circumstantial [**8] evidence suggesting that Darlene "knew or had reason to know" about James's prior conviction.

A good portion of the charge conference focused on the state of mind instruction for the ***aiding and abetting*** count. In relevant part, the government argued that it need only prove that Darlene "knew or had reason to know" that James had been convicted of a crime classified as a felony under federal law. Darlene's counsel objected to inclusion of the phrase "or had reason to know" in the jury instructions. After a recess for research, the trial court determined that there was no direct precedent on point in this circuit. It fairly noted, though, that decisions in other circuits seemed to support the government.

Acknowledging that "we're sort of flying without guidance," the trial court accepted the government's position over objection, telling the jury that it needed to find that Darlene:

> knew or had reason to know that James F. Ford had been convicted in any court of at least one crime classified as a felony under federal law; and, . . . , that Darlene Ford consciously shared James F. Ford's knowledge that he possessed one or more -- one or both of the ***firearms***, intended to help him possess **[**9]** it, and took part in the endeavor, seeking to make it succeed. The government does not have to prove that James F. Ford or Darlene Ford knew their conduct was illegal.

II. Analysis

A. Jury Instructions for *Aiding and Abetting* a *Felon*'s *Possession of a Firearm*

1. Standard of Review

We review de novo Darlene's preserved argument that the instructions omitted or materially altered the elements of an offense. United States v. Godin, 534 F.3d 51, 56 **[*68]** (1st Cir. 2008).[3] If we conclude that the district court instructed the jury in error, we must then determine whether the error was harmless. Id. at 61. If not, "we vacate the conviction and remand for a new trial." Id. A jury instruction error is not harmless if "the record contains evidence that could rationally lead to a contrary finding" in the absence of the error. Id. (quoting United States v. Baldyga, 233 F.3d 674, 682 (1st. Cir. 2000)).

2. Scienter

We begin with Congress's words: "[w]hoever commits **[**10]** an offense against the United States or ***aids, abets***, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). Nothing in this language expressly addresses the state of mind that a person need possess in order to be guilty of ***aiding and abetting*** the commission of a crime. In the presence of such silence, we turn to a line of Supreme Court "cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). Beginning with Morissette v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952), these cases establish a "background presumption," X-Citement Video, Inc., 513 U.S. at 70, "in favor of a scienter requirement [that applies] to each of the statutory elements that criminalize otherwise innocent conduct," id. at 72. That scienter requirement, absent some indication to the contrary, requires that the government prove the existence of some mens rea. United States v. U.S. Gypsum Co., 438 U.S. 422, 436, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) (recognizing that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence") (alteration in original) (quoting Dennis v. United States, 341 U.S. 494, 500, 71 S. Ct. 857, 95 L. Ed. 1137 (1951) (opinion of Vinson, C.J.)). Proof of a mens rea, as conventionally understood, requires proof "that the defendant know the facts that make his conduct illegal." **[**11]** Staples v. United States, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). This requirement that "the defendant know the facts that make his conduct fit the definition of the offense . . . is reflected in the maxim ignorantia facti excusat." Id. at 608 n.3. In this respect, the law seeks

[3] By contrast, we review properly preserved objections to "the form and wording" of a district court instruction for abuse of discretion. United States v. Gonzalez, 570 F.3d 16, 21 (1st Cir. 2009) (quoting United States v. McFarlane, 491 F.3d 53, 59 (1st Cir. 2007)). And we similarly review for abuse of discretion (under a three-part test) a district court's determination that an ancillary instruction requested by a defendant should have been added to the otherwise generally required instructions. United States v. González-Pérez, 778 F.3d 3, 15 (1st Cir. 2015).

to align its punitive force with the "ability and duty of the normal individual to choose between good and evil." Morissette, 342 U.S. at 250.

This long-standing rule of statutory interpretation may be overborne by "some indication of congressional intent, express or implied, . . . to dispense with mens rea as an element of a crime." Staples, 511 U.S. at 606 (italics omitted). So, properly framed, the question here is whether we find in the general ***aiding and abetting*** statute any such indication, express or implied, that Congress intended that we imprison a person even if that person did not know all the facts that [*69] are necessary to classify the principal's behavior as criminal.

As we have already observed, nothing in section 2 provides any such express indication. And when we look for implied indications in Congress's words, we find that they point in favor of the background presumption. The words "***aids, abets***, counsels, commands, induces or procures" all suggest that a person violates section 2 only if the person has "chosen, with full knowledge, to participate [**12] in the illegal scheme." Rosemond v. United States, 134 S. Ct. 1240, 1250, 188 L. Ed. 2d 248 (2014). This choice, which the Rosemond Court described as a "moral" choice, id. at 1249, can hardly be presented as such if one does not know the very facts that distinguish the behavior in question from that which is perfectly innocent.

Our own circuit precedent in construing section 2 points firmly in the same direction. In United States v. Tarr, 589 F.2d 55 (1st Cir. 1978), we held that a person could not be held criminally liable under section 2 for ***aiding and abetting*** persons engaged in the business of dealing in ***firearms*** even though the defendant sold the principals a gun illegally and even though the principals were in fact engaged in the business of dealing ***firearms***, id. at 58-60. Rather, the defendant could only be convicted if he "knew that [the principals] were engaged in the business of dealing in ***firearms***, which is one of the elements of the [underlying] crime charged." Id. at 60.

More recently (and after the trial of this case), in United States v. Encarnación-Ruiz, 787 F.3d 581 (1st Cir. 2015), we considered whether a defendant could be liable under section 2 for ***aiding and abetting*** the production of child pornography if he did not know the key fact that turned the otherwise legal production of pornography into a crime, i.e., that the person depicted was a minor, id. at 583-84. Applying Rosemond, we reasoned that "to establish the [**13] mens rea required to ***aid and abet*** a crime, the government must prove that the defendant participated with advance knowledge of the elements that constitute the charged offense." Id. at 588. Therefore, because "[p]roducing child pornography is illegal precisely because the person in the visual depiction [is] a minor[,] [i]f an individual charged as an aider and abettor is unaware that the victim was underage, he cannot 'wish[] to bring about' such criminal conduct and 'seek . . . to make it succeed.'" Id. at 588 (quoting Rosemond, 134 S. Ct. at 1248). We emphasized that ***aiding and abetting*** is premised on a finding of "fault," and that under general principles of accomplice liability, there can be no liability without fault. Id. at 589. To be at "fault" in ***aiding and abetting*** a violation of the child pornography statute, one must know the victim was a minor, even if the principal does not also have to know.

Similarly, but for James's criminal history, there would have been no gun ***possession*** crime under section 922(g)(1). Hence, if Darlene was not aware of that history, she could not have acted with the requisite criminal purpose. To rule otherwise would be to say that we can put a person in prison for a crime, without congressional direction, merely because the person was [**14] negligent in failing to be aware of the fact that transformed innocent behavior into criminal behavior.

The breadth of section 2 reinforces our conclusion. While certain crimes that the Supreme Court has termed "public welfare" or "regulatory" offenses can be construed as implicitly eschewing a mens rea as an element, see generally Staples, 511 U.S. at 606-07 (discussing examples of such), section 2 applies uniformly to the ***aiding and abetting*** of all federal crimes, very many of which indisputably [*70] are not public welfare or regulatory offenses. Section 2 also expressly tracks the penalties available for the underlying crimes, in this instance a prison sentence of up to 10 years. 18 U.S.C. § 924(a)(2). The exposure to such a sentence buttresses the case for reading into section 2 the traditional background presumption of scienter as a necessary element of the offense. See Staples, 511 U.S. at 618 (eschewing a mens rea requirement "hardly seems apt . . . for a crime that is a felony . . . . After all, 'felony' is . . . 'as bad a word as you can give to man or thing.'" (quoting Morissette, 342 U.S. at 260)).

A simple way to illustrate the common sense in finding section 2 to contain as an element the ordinary form of a mens rea is to consider the ***firearm*** element of the underlying crime here at issue. Suppose "Joe," a convicted ***felon***, [**15] asks his neighbor "Sally" whether he may borrow her suitcase for a trip, and Sally agrees, forgetting that she left in the suitcase a handgun that Joe then finds and uses. Few would think that Sally would be guilty of ***aiding and abetting*** the ***possession of a firearm*** by a ***felon*** merely because she "had reason to know" that the handgun was in the suitcase. Instead, we would expect Sally--as an aider and abettor--actually to know the essential circumstance that makes Joe's conduct criminal. See Rosemond, 134 S. Ct. at 1248-49 (noting that the intent requirement of section 2 is "satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense"). And if she need know that there was a gun in her suitcase in order to be convicted of ***aiding and abetting***, one would think that she would also need to know the other fact essential to labeling Joe's conduct criminal; i.e., that he had been convicted of a crime punishable by more than a year in prison.

This is not to say that a conviction under section 2 requires that the aider and abettor know that the principal's conduct is unlawful. Customarily, the mens rea element is satisfied if the defendant "know[s] the facts that make [**16] his conduct fit the definition of the offense." Staples, 511 U.S. at 607 n.3 (citing the maxim ignorantia facti excusat). Conversely, ignorance that the known facts constitute a crime provides no defense, except perhaps in extremely rare cases in which the defendant has "such insufficient notice [of the law] that it [falls] outside the bounds of due process," United States v. Denis, 297 F.3d 25, 29 (1st Cir. 2002) (citing Lambert v. California, 355 U.S. 225, 229-30, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957)), or when Congress has dictated otherwise, Ratzlaf v. United States, 510 U.S. 135, 149, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (noting an exception to the "venerable principle that ignorance of the law generally is no defense" when Congress has "decree[d] otherwise"); Cheek v. United States, 498 U.S. 192, 201-02, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) (holding that, for the purposes of complex criminal tax laws requiring specific intent and willfulness, the government must prove that the defendant knew of his legal duty). Thus, if Darlene knew that James had previously been convicted of a crime punishable by more than a year, she would be liable for knowingly giving him a ***firearm*** even if she did not know that the law declared his ***possession*** to be criminal.

We are aware that the Ninth Circuit ruled in 1993 that a person may be liable for ***aiding and abetting*** the ***possession of a firearm*** in violation of section 922(g)(1) without any knowledge at all that the principal was previously convicted of a crime punishable by more than a year. United States v. Canon, 993 F.2d 1439, 1442 (9th Cir. 1993). Canon [**17] opined that the government [*71] need not show that the principal knew he had been convicted of such a crime, hence there should be no need to show that the

aider and abettor was aware of the conviction. Id. The Ninth Circuit itself has since expressed "serious reservations regarding the soundness" of that reasoning. United States v. Graves, 143 F.3d 1185, 1188 n.3 (9th Cir. 1998).

We share such reservations regarding the first part of Canon's reasoning, and disagree with the second part. First, while those circuits to have addressed the question of the required state of mind for the principal have affirmed Canon's assumption that the government need not show that the principal knew that he had been convicted of a crime punishable by more than a year,[4] a good argument can be made that the government actually does need to prove, in a case against the principal under section 922(g)(1), the principal's knowledge of his prior conviction. See 18 U.S.C. § 924(a)(2) (providing penalties for "knowingly" violating section 922(g)). See generally United States v. Langley, 62 F.3d 602, 608-19 (4th Cir. 1995)(en banc)(Phillips, J., concurring and dissenting) (disagreeing with the majority and concluding that the "knowingly" requirement of 18 U.S.C. § 924(a)(2), applicable to § 922(g)(1), requires "proof that the accused knew at the critical time charged that he 'ha[d] been convicted in any court of a crime punishable **[**18]** by imprisonment for a term exceeding one year.'" (alteration in original) (quoting 18 U.S.C. § 922(g)(1)).

Second--and this is the point on which we rely--as in Encarnación, we reject the notion that the state of mind requirement of section 2 is a chameleon, simply taking on the state of mind requirements of whatever underlying crime is ***aided and abetted***. See Encarnación, 787 F.3d at 589. We read the words "punishable as a principal" to refer to the penalties available to one who is guilty of ***aiding and*** [**19] ***abetting*** a crime, not to define by incorporation a reduced scienter requirement for determining guilt in the first instance. In too many instances, the principal will be in a superior position both to know the facts and to know whether his or her conduct is regulated for the protection of the public welfare. With the principal's crime here, for example, the ***felon*** presumably knows that he was convicted of some crime, and that the conviction has continuing ramifications. Indeed, given modern rules of criminal procedure, such as guilty plea and sentencing procedures, James was presumably told that he was convicted of a crime punishable by a year or more in prison. See, e.g., Fed. R. Crim. P. 11(b)(1)(H) (requiring federal courts, before accepting a guilty plea, to inform the defendant and determine that he understands "any maximum possible penalty" of the offense); Mass. R. Crim. P. 12(c)(3)(A)(ii) [*72] (same). Conversely, if another person has no idea that the principal has been convicted of a serious crime, there is no reason that other person can be presumed to know that ***possession of a firearm*** may be problematic. Staples, in turn, tells us that this country's "long tradition of widespread lawful gun ownership by **[**20]** private individuals" precludes any rejection of the background scienter presumption merely because the defendant knows that a ***firearm*** is involved. 511 U.S. at 610.

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[4] United States v. Games-Perez, 667 F.3d 1136, 1140 (10th Cir. 2012); United States v. Olender, 338 F.3d 629, 637 (6th Cir. 2003); United States v. Kind, 194 F.3d 900, 907 (8th Cir. 1999); United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam); United States v. Langley, 62 F.3d 602, 605-06 (4th Cir. 1995)(per curiam); United States v. Burke, 888 F.2d 862, 867 n.7, 281 U.S. App. D.C. 165 (D.C. Cir. 1989); United States v. Dancy, 861 F.2d 77, 81-82 (5th Cir. 1988)(per curiam). Although this circuit's decision in United States v. Smith, 940 F.2d 710 (1st Cir. 1991), has been cited as standing for the proposition that the government need not prove the principal knew he was a ***felon***, Smith's holding actually held it was unnecessary for the government to prove the defendant's knowledge of the law itself, i.e., ignorance of the law is no excuse. Id. at 714 ("The government need only prove that [the defendant] knew he possessed the ***firearms***, not that he understood that such ***possession*** was illegal."). The principal's knowledge of his felony status was not at issue. Id. at 713 ("Smith argues . . . that a jury might find that he had mistakenly believed he could legally ***possess firearms***, notwithstanding the fact that he was a convicted ***felon***.").

In any event, the government in this case does not need to rely on Canon's strict liability interpretation. Rather, the government need only defend the district court's "know or had reason to know" formulation. To do so, the government turns to another 1993 opinion, United States v. Xavier, 2 F.3d 1281, 29 V.I. 279 (3d Cir. 1993), stating that the government need prove that the aider and abettor "knew or had cause to believe" that the principal had been convicted of a crime punishable by more than a year in prison, id. at 1287. Two other circuits have arrived at the same conclusion as Xavier without adding to its analysis. United States v. Samuels, 521 F.3d 804, 812 (7th Cir. 2008) ("[T]o ***aid and abet*** a ***felon*** in ***possession of a firearm***, the defendant must know or have reason to know that the individual is a ***felon*** at the time of the ***aiding and abetting*** . . . ."); United States v. Gardner, 488 F.3d 700, 715 (6th Cir. 2007) (agreeing with the Third Circuit's "well-reasoned" decision in Xavier). We reject Xavier's formulation of the scienter requirement for three reasons.

First, Xavier and its progeny were not presented with the precise question now before us: whether the government must prove knowledge or whether proof of "reason to [**21] know" is sufficient. In Xavier and Gardner,[5] for example, the courts grappled with the choice between a combined "know or reason to know" standard and strict liability. Gardner, 488 F.3d at 714 (noting that the Sixth Circuit had "yet to decide" whether there must be proof that the aider and abettor knew or should have known that the principal was a convicted ***felon*** or whether strict liability was proper); Xavier, 2 F.3d at 1286 (rejecting the notion that a conviction for ***aiding and abetting*** a violation of § 922(g)(1) can stand without requiring proof of the aider and abettor's knowledge or reason to know of the principal's status). It appears that no court has squarely decided the question we now answer,[6] and the "circuit split" referenced by [*73] the district court and the parties refers only to a disagreement between whether the government "ha[s] to prove knew or had reason to know or nothing at all in terms of knowledge."

Second, having "reason to know" suggests a negligence standard. Cf. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 cmt. g (2010) (negligence concerns "what the actor 'should have known'"). That formulation therefore materially deviates from the traditional mens rea formulation "that the defendant know the facts that make his conduct illegal." Staples, 511 U.S. at 605. Or, as we said in Tarr, for a "defendant to be an aider and abettor [she] must know that the activity condemned by the law is actually occurring." 589 F.2d at 59 (quoting United States v. McDaniel, 545 F.2d 642, 644 (9th Cir.

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[5] In Samuels, the defendant did not contest his knowledge of the principal's prior conviction, but rather he claimed there was insufficient evidence proving that he was actually the individual who transferred the ***firearm*** to the principal. In its discussion, however, the Seventh Circuit simply stated, without further analysis, that the [**22] aider and abettor "must know or have reason to know that the individual is a ***felon*** at the time of the ***aiding and abetting***." Samuels, 521 F.3d at 812 (noting that the defendant did "not challenge the sufficiency of the evidence as it relates to [the principal] being a prior convicted ***felon*** who ***possessed a firearm*** that traveled in interstate commerce," but rather only challenged a witness's "testimony about whether [the witness] saw [the defendant] hand [the principal] the gun").

[6] There are two unpublished cases, one from the Fourth Circuit and one from the Eleventh Circuit, finding no plain error in a court's refusal to require that the jury find that the aider and abettor had actual knowledge of the prior conviction. While these cases are informative, they are not directly on point given the deferential standard of review applied by these two courts. United States v. Cox, 591 F. App'x 181, 185-86 (4th Cir. 2014)(unpublished); United States v. Lesure, 262 F. App'x 135, 141-43 (11th Cir. 2008)(unpublished per curiam). Both courts concluded that given the lack of controlling precedent on this issue, it was not plain error for the court to deny the defendant's request for a jury instruction requiring the aider and abettor's actual knowledge of the principal's past conviction. Cox, 591 F. App'x at 186 ("In the absence of controlling precedent and in view of the [**23] inconsistent holdings of other circuits, we cannot conclude that any error in failing to grant Cox's requested instruction was plain."); Lesure, 262 F. App'x at 142 ("Given the applicable standard of review, it is notable to observe at the outset that '[w]hen neither the Supreme Court nor [we have] resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue.'" (alterations in original) (quoting United States v. Evans, 478 F.3d 1332, 1338 (11th Cir.), cert. denied, 552 U.S. 910, 128 S. Ct. 257, 169 L. Ed. 2d 188 (2007)).

1976)). Under the "have reason to know" alternative, a jury might well convict one who was merely negligent in failing to know.

Third, we reject Xavier's formulation because it rests on the faulty and unstated assumption that the absence of any express [**24] scienter requirement in section 2 or in section 922(g)(1) suggests that scienter is not generally an element of a section 2 offense. Perhaps because Xavier was decided before X-Citement Video and Staples, the Xavier court entirely overlooked the background scienter presumption that must inform our reading of section 2. That oversight then led the Xavier court to perceive an anomaly, which we summarize as follows: (1) 18 U.S.C. § 922(d)(1) directly addresses the sale or disposing of a ***firearm*** to a ***felon***, imposing criminal liability on the purveyor if he or she "know[s] or ha[s] reasonable cause to believe" that the recipient "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"; (2) every sale or disposing of a ***firearm*** to a ***felon*** can be described as ***aiding and abetting*** a ***felon***'s ***possession of the firearm***; therefore, (3) "[a]llowing aider and abettor liability under § 922(g)(1), without requiring proof of knowledge or reason to know of the possessor's status, would effectively circumvent the knowledge element in § 922(d)(1)." Xavier, 2 F.3d at 1286. In order to prevent such a circumvention, the court read into section 2 a knowledge requirement paralleling the requirement of section 922(d)(1).

In sum, by overlooking the background presumption of scienter that should inform any reading of section 2, the [**25] Xavier court perceived a problem that did not exist, and then adopted for aiders and abettors a watered-down scienter requirement applicable when the government chooses to allege that the person violated section 922(d)(1) by selling or "otherwise dispos[ing] of any ***firearm***" to a ***felon***, which the Xavier court did not appear to realize actually reduced the requirement that was already in the statute implicitly.[7]

Notwithstanding Xavier and its progeny, we therefore adhere to our view [*74] that, in order to establish criminal liability under 18 U.S.C. § 2 for ***aiding and abetting*** criminal behavior, and subject to several caveats we will next address, the government need prove beyond a reasonable doubt that the putative aider and abettor knew the facts that make the principal's conduct criminal. In this case, that means that the government must prove that Darlene knew that James had previously been convicted of a crime punishable by more than a year in prison. Having so concluded, and before turning to consider the effect of this holding on this appeal, we add several important caveats.

First, the element of the principal's [**26] crime at issue in this case--his prior conviction--is an element that is essential to labeling as criminal, even wrongful, the principal's behavior. Were we confronted, instead, with an element of the crime that was required, for example, only to establish federal jurisdiction to punish behavior that was in any event unlawful, we might well reach a different answer. Cf. United States v. Feola, 420 U.S. 671, 694-96, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975) (one who conspires to assault a person who turns out to be a federal officer may, in the case of an actual assault, be convicted without proof that he knew the federal status of the victim); see also United States v. Gendron, 18 F.3d 955, 958 (1st Cir. 1994) (noting that "courts normally hold that the prosecutor need not prove the defendant's state of mind in respect to 'jurisdictional facts'").

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[7] Here, the government did not charge Darlene with violating section 922(d)(1). It instead pursued ***aiding and abetting*** liability via section 2 and section 922(g)(1).

Second, when the government is required to prove that a defendant knew a fact, the court may give a "willful blindness" instruction, which is warranted if "(1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge [is] mandatory." United States v. Gabriele, 63 F.3d 61, 66 (1st Cir. 1995).[8] Evidence sufficient to meet requirement [**27] (2) can include evidence that the defendant was confronted with "red flags" but nevertheless said, "I don't want to know what they mean." Id.

Third, if the government does prove what it need not prove--that Darlene knew that the law barred James from possessing a gun--then it need not also prove that she was aware that he had been previously convicted of a crime punishable by more than a year in prison. When a person actually knows that the conduct she proceeds to ***aid and abet*** is unlawful, she acts with specific intent [**28] to ***aid*** or ***abet*** a crime. Cf. Cheek, 498 U.S. at 199-200 (discussing the requirement, under certain tax laws, that the government prove the defendant's specific intent to violate the law, which requires showing the defendant's knowledge of the legal duty). "[I]f the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component" and has shown that [*75] the defendant acted willfully. Id. at 202. Thus, if the government proves the defendant's knowledge of the legal duty itself, it need not also prove the lesser degree of culpability that would otherwise need to be shown in the absence of such knowledge. See Model Penal Code § 2.02(5) and explanatory note (stating that § 2.02(5) "makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was more culpable than the definition of the offense requires"). This conclusion is logical, because when a defendant knows her conduct is unlawful, "[t]here is . . . no risk of unfairness [or criminalizing the innocent] because the defendant 'knows from the very outset that his planned course of conduct is wrongful.'" United States v. Burwell, 690 F.3d 500, 507, 402 U.S. App. D.C. 193 (D.C. Cir. 2012) (en banc) (quoting Feola, 420 U.S. at 685).

Fourth, direct proof of knowledge is not required. [**29] "[T]he government's proof may lay entirely in circumstantial evidence." United States v. Valerio, 48 F.3d 58, 63 (1st Cir. 1995)(emphasis in original). Here, for example, viewed in a light favorable to the government, the cumulative force of the circumstantial evidence would have been more than enough to allow a properly instructed jury to find beyond a reasonable doubt that Darlene had the required mens rea. That evidence would have allowed a jury to find that: James and Darlene lived together for decades, during which time James shared with Darlene the details of the family's drug operations both in Massachusetts and Maine (indeed, she was actively involved in the Maine operation at least); James was arrested and thereafter accused and convicted of a serious crime while they lived together in Massachusetts; Darlene lost her house in Massachusetts without any good reason to think that the forfeiture was a product of her son's but not her husband's criminal activity; James was interested in guns, kept and adapted gun parts, and used the guns, yet Darlene alone bought the gun that James used in the video; she was familiar with the background check requirements, which included inquiry concerning prior convictions; and her denials of various

[8] In fact, the court gave a "willful blindness" instruction on the knowledge required for Count 3 of Darlene's conviction, which involved 21 U.S.C. § 856(a)(1), which prohibits a person from "knowingly" maintaining a place "for the purpose of manufacturing, distributing, or using any controlled substance." Because the statute itself includes the term "knowingly," the court instructed the jury that "[f]or the purposes of Count 3 only, the law allows the government to prove knowledge by proving that Darlene Ford was willfully blind to a fact." It explicitly stated, however, that "[t]his means of proving Ms. Ford's knowledge is applicable only to Count 3 and must not be applied to either Count 1 or Count 6."

of [**30] these facts impeached her own credibility. All of this is more than enough to support a finding that Darlene had the requisite mens rea to be guilty of ***aiding and abetting*** the ***firearms*** offense.[9]

3. Harmless Error

Having concluded both that the trial court erred in instructing the jury on the state of mind element of the ***aiding and abetting*** offense, and that the evidence, when viewed favorably to the government, would have been sufficient to support a conviction had a proper instruction been given, we turn now to consider the government's argument that the instructional error was harmless. Whether this argument is correct turns on our answer to the following question: Was the evidence so overwhelming that any rational jury would have been compelled to find beyond a reasonable doubt that Darlene knew (or willfully disregarded) either that James could not legally possess a gun or, at least, that he had been convicted of an offense punishable by more than a year in prison? See Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); Baldyga, 233 F.3d at 682 (reviewing for plain error but analyzing harmlessness in the [**31] same way as Neder).

[*76] We think that the answer is plainly "no." Darlene testified, point blank, that she did not even know that James had been convicted of anything. Issues of credibility are customarily for the jury. United States v. Cruz-Kuilan, 75 F.3d 59, 62 (1st Cir. 1996). Furthermore, the absence of evidence about the prior criminal proceeding cuts against the government, as such evidence presumably would have shown much about James's activities in connection with the prior conviction and sentence that would have shed light on the likelihood that his wife was unaware of the conviction. Did he spend any time in jail? How often did he go to court? What exactly was the sentence? What were the terms of any probation? All of these unanswered questions, cumulatively, might well have caused a rational jury to have some reasonable doubt about the government's case on this element. Indeed, the government itself concedes that the evidence on Darlene's knowledge presented a "credibility choice [that] was the jury's to make." We agree. The error, therefore, was not harmless.

B. Substantive Reasonableness of Darlene's Sentence

We now turn to Darlene's challenge to the substantive reasonableness of her sentence.

At sentencing, the district court found a [**32] base offense level of 22 and that three 2-level enhancements applied, for a total offense level of 28: (1) a 2-level enhancement under U.S.S.G. § 2D1.1(b)(1) (***possession*** of a dangerous weapon); (2) a 2-level enhancement because Darlene was found to have maintained a residence for the purposes of manufacturing a controlled substance; and (3) a 2-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice. The district court found that a Guidelines range of 78 to 97 months applied and sentenced Darlene to concurrent prison terms of 78 months for each of the three counts on which she was convicted. Our decision to vacate the conviction on one of those counts leaves untouched the district court's sentence of 78 months on each of the other two counts, to run concurrently. Darlene challenges that remaining part of her sentence as substantively unreasonable because the district court said, at the sentencing hearing, that

[9] For this reason, we reject out-of-hand Darlene's contention that the evidence was insufficient to support a conviction on the ***aiding and abetting*** charge.

> [I]f you had been smarter about this, in my view, and you had either not testified falsely or alternatively looked at yourself hard in the mirror and said, I am going to follow my sons and not my husband, I won't go to trial on this, you would have been looking at a much lower guideline range.

"We employ the [**33] abuse of discretion standard" in considering challenges to the substantive reasonableness of a sentence. United States v. Ayala-Vazquez, 751 F.3d 1, 29 (1st Cir. 2014).

Darlene argues that the district court's remarks constituted an improper and indefensible rationale for selecting the bottom of the Guidelines range sentence, rather than an even lower sentence like those her sons received when they pled guilty. As support for this argument, Darlene says that she could not have avoided a trial because the government never offered her a plea deal. Therefore, reasons Darlene, she was "punish[ed] . . . for going to trial, when, in fact, she had no other option."

Darlene plainly had another option: she could have entered a straight plea of guilty under Federal Rule of Criminal Procedure 11(a). See also United States v. Pulido, 566 F.3d 52, 55 (1st Cir. 2009) (referring to a "straight up plea" as one in which the defendant pleads guilty on his own initiative rather than "pleading with a plea agreement with the government"). Had [*77] she done so, she might have had a shot at a reduction in her Guidelines sentencing range for acceptance of responsibility, U.S.S.G. § 3E1.1, and she would have had no occasion to appall the trial judge with testimony that he found to contain repeated lying, which resulted in an enhancement for obstruction of justice under U.S.S.G. § 3C1.1. Given that she did not [**34] pursue that available option, she has no basis to complain that she did not benefit from the court's discretion to incarcerate for shorter periods those who do accept responsibility and demonstrate truthfulness. See, e.g., United States v. García-Pagán, 804 F.3d 121, 125 (1st Cir. 2015), petition for cert. filed, 15-8711 (U.S. filed Mar. 18, 2016); United States v. Alejandro-Montañez, 778 F.3d 352, 360-61 (1st Cir. 2015); United States v. Castro-Caicedo, 775 F.3d 93, 103 (1st Cir. 2014); United States v. Brum, 948 F.2d 817, 819-20 (1st Cir. 1991). Accordingly, the district court's observation that Darlene was unwise to have foregone any possibility of such dispensation was a fair comment, and certainly did not fall within haling distance of an abuse of discretion that would sustain Darlene's substantive challenge to her sentence. See Ayala-Vazquez, 751 F.3d at 29.

III. Conclusion

For the reasons set forth above, we vacate Darlene's conviction on the ***aiding and abetting*** count (Count 6), and we affirm her sentence for the remaining counts of conviction (Counts 1 and 3). The case is remanded to the district court for further proceedings in light of this opinion.

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ALEXIS PLUNKETT, Defendant.	CASE NO. C-17-324821-2 DEPT. NO. XVII

SUPPLEMENTAL BRIEFING ON LEGISLATIVE INTENT

COMES NOW, the Defendant, ALEXIS PLUNKETT, by and through her attorneys of record, MICHAEL L. BECKER, ESQ. and ADAM M. SOLINGER, ESQ., and hereby files this supplemental briefing per the Court's request.

Ms. Plunkett seeks to dismiss the charges against her upon the basis that Nevada law does not prohibit and/or punish the crime she is alleged to have committed.

DATED this 20th day of September 2017.

Respectfully submitted,

/s/ Adam M. Solinger
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POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. STATEMENT OF THE CASE

On September 18, 2017, the Court requested this supplemental briefing on the legislative history of Nev. Rev. Stat. 212.165 in furtherance of Defendant's pending Motion to Dismiss.

II. LEGISLATIVE HISTORY OF NEV. REV. STAT. 212.165

A. Initial Passage in 2007

In 2007, Chapter 212 of the Nevada Revised Statutes was amended to prohibit possession of a cell phone by a prisoner in prison and to punish the person that furnishes the phone to the prisoner or possesses the device in the prison. *See* Nev. Rev. Stat. 212.165 (2007); *see also* Exhibit A. The bill was first mentioned as a bill draft request during the Assembly Select Committee on Corrections, Parole, and Probation on February 13, 2007. It was first discussed on March 1, 2007. *See Assembly Select Committee on Corrections, Parole, and Probation* Seventy-Fourth Session, March 1, 2007, Page 15-20; *see also* Exhibit B. It appears that the Nevada Department of Corrections requested that this law be passed because of the Jody Thompson case where a prison staff member supplied a phone to him and he used it to escape. *See id.* There is questioning during the session about prosecuting the staff member for supplying the phone and the NDOC representative states that she was prosecuted for aiding and abetting an escape. *See id.* Of note during the hearing, the representative of the NDOC states that the charges are meant to punish someone with criminal intent. *See id.* at page 17.

At the next session on April 10, 2007, the discussion was largely based upon a proposed amendment that added language regarding the intent of the person bringing the device into the prison. *See Assembly Select Committee on Corrections, Parole, and Probation* Seventy-Fourth Session, April 10, 2007, Page 7-10.

The bill was discussed one final time on April 26, 2007 in the Senate Committee on Judiciary. Seventy-Fourth Session, Page 9-12. The discussion largely focuses around introducing the bill to the Senate and no new developments are really discussed.

B. 2013 Amendment Adding Jails to the Statute.

In 2013, the cell phone law was amended to add a prohibition on cellphones being possessed by jailees while in jail without lawful authorization. *See* Nev. Rev. Stat. 212.165(4) (2013). The proposed amendment was first discussed during an Assembly Committee on Judiciary session that took place on March 26, 2013. *See Assembly Committee on Judiciary*, Seventy-Seventh Session, March 26, 2013, Page 1-9. This meeting was the initial introduction of the bill by Jim Shirley, Pershing County District Attorney. He begins by recapping the history of the cell phone bill as it relates to prisons and why he wants jails added to the list. *Id.* His complaint was that a jailee had a phone in 2010 and was using it to threaten people in the community. *Id.* at 3. He prosecuted the jailee for possession of a device that can be used for escape but it was ultimately overturned by the Nevada Supreme Court who ruled that a cell phone was not a device used for escape. *Id.*

Assemblywoman Fiore asked what happened to the social worker that gave the prisoner the cell phone that led to the initial passage of the law in 2007. *Id.* District Attorney Shirley continues and asks that the bill be passed so that inmates cannot bypass the regular phone system that is recorded. *Id.* at 4. The rest of the discussion is largely focused on the appropriate penalty. *See id.* at 4-9. However, this discussion is still enlightening because in advocating for a felony, the supporters of the bill claim that no one could accidently end up with a cell phone in jail and that the screening procedures during the jail intake process should catch the phone. *See id.* This suggests that everyone is aware that the phone would have to be provided by someone with

access that can bring the phone into the facility. This, coupled with the question earlier regarding the charges against the social worker that provided the phone to the prisoner that escaped and motivated the initial 2007 law, shows that the Committee was aware of adding liability to those that provide phones.

The next meeting on the bill occurred in the same committee on April 2, 2013 and the bill was amended, voted on, and passed. *See Assembly Committee on Judiciary*, Seventy-Seventh Session, April 2, 2013, Page 49. The next time the bill was mentioned was on April 25, 2013 in the Assembly Committee on Government Affairs where it was mentioned as a bill that "prohibits the possession of portable telecommunications devices by prisoners in local detention facilities." *Assembly Committee on Government Affairs*, Seventy-Seventh Session, April 25, 2013, Page 4.

On April 29, 2013, the bill was introduced to the Senate Committee on Judiciary. *See Senate Committee on Judiciary*, Seventy-Seventh Session, April 29, 2013, Page 2-8. The discussion largely focuses on the introduction of the bill and the proportional penalty scheme for prisoners. *See id.* However, John Wagner from the Independent American Party voices his support for the bill and adds: "I would think the person who smuggles in cell phones should also be guilty of a crime." *See id.* at 6. After that comment, the remainder is largely about the constitutionality of tying the offense level to the crime the jailee is in custody for with the jail. *See id.* at 6-8. Once again, this makes clear that there was specific mention of needing to punish those that provide the phones, but no action was taken to amend the bill to provide for punishment in those cases. Hence, the righteous conclusion is that the legislature considered and chose not to create such liability.

The final session on the bill was in front of the same Senate Judiciary Committee where the bill was amended to its current version and that motion to amend passed. *See Senate Judiciary Committee*, Seventy-Seventh Session, May 16, 2013, Page 13.

C. The Legislative History Makes Clear That the Legislature Only Intended to Punish Prisoners that a Phone.

The legislative history of the two sessions demonstrates that the Legislature never intended to punish those that provide cell phones to persons in jail. During the 2007 session, the Legislature specifically discussed and talked about punishment for the providers of phones in the prison context and what the appropriate punishment should be. During the 2013 session, the topic was brought up twice and no one followed up. This makes clear that the intent was never formed to criminalize the provider of phones in the jail context.

The Court must presume that the Legislature is a competent law making body that knows what it is doing. The history of Nev. Rev. Stat. 212.165 demonstrates that the Legislature specifically intended to punish the provider of phones in the prison context because there was amble discussion about doing so. However, during the follow up session in 2013 to add jails to the statute, the Legislature chose not to add a similar punishment to the person that provides phones in the jail context. This issue is brought up during the session with no one mentioning that the Legislature needs to account for that eventuality. As a result, this demonstrates an affirmative choice not to extend punishment.

IV. CONCLUSION

The Defense respectfully submits this report concerning the legislative history of Nev. Rev. Stat. 212.165 and requests that the Court grant the Defense Motion to Dismiss.

WHEREFORE, ALEXIS PLUNKETT respectfully requests that this Honorable Court grant her Motion to Dismiss and dismiss the Indictment with prejudice as there is no crime recognized under Nevada law with which she may be charged.

DATED this 20th day of September, 2017.

By:

/s/ Adam M. Solinger
ADAM M. SOLINGER, ESQ.
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Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that service of the foregoing **MOTION TO DISMISS** was made this 20th day of September, 2017 upon the appropriate parties hereto by depositing a true copy thereof in the United States mail, postage prepaid and addressed to:

JAY P. RAHMAN, ESQ.
Clark County District Attorney
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An employee of
LAS VEGAS DEFENSE GROUP,
LLC.

EXHIBIT A

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 26, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:11 a.m. on Tuesday, March 26, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Peggy Pierce, Clark County Assembly District No. 3

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Karyn Werner, Committee Secretary
Brittany Shipp, Policy Assistant
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Jim Shirley, Pershing County District Attorney
Eric Spratley, representing the Washoe County Sheriff's Office
A.J. Delap, representing the Las Vegas Metropolitan Police Department
Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association
Steve Yeager, representing the Clark County Office of the Public Defender
Chris Frey, Deputy Public Defender, Washoe County Public Defender
Bob Bayer, Private Citizen, Reno, Nevada
Keith Uriarte, representing American Federation of State, County and Municipal Employees Local 4041
Vanessa Spinazola, representing the American Civil Liberties Union of Nevada
Clifton C. Maclin Jr., Private Citizen, Carson City, Nevada
James "Greg" Cox, Director, Nevada Department of Corrections
Gawain Guedry, representing the Las Vegas Metropolitan Police Department
Bill Ames, representing the Washoe County Sheriff's Office
Paul Villa, representing the Peace Officers Research Association of Nevada, Inc.; and the Reno Police Protective Association
Robert Lawson, representing the Las Vegas Metropolitan Police Department
Kristin Erickson, representing the Nevada District Attorneys' Association

Chairman Frierson:
[Roll was taken. Committee protocol and rules were explained.]

We have four items on the agenda today, so we will have to be swift. We will go in order. The first bill is Assembly Bill 212 and I will invite Mr. Hansen to introduce his bill.

Assembly Bill 212: Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Assemblyman Ira Hansen, Assembly District No. 32:
I am here today to present Assembly Bill 212 which prohibits the possession of portable telecommunication devices by prisoners in a county jail or other local detention facility. [Read from written testimony (Exhibit C).]

It was a surprise to me when I was contacted by the Pershing County District Attorney, Jim Shirley, and found out that there was a case on this issue that went all the way to the Supreme Court of Nevada. I would like to have Mr. Shirley give us some background on why this law is necessary.

Jim Shirley, Pershing County District Attorney:
A little bit of history so you will get a grasp of where we are. In 2003 the Office of the Attorney General, on behalf of the prison system, came before the Legislature with Senate Bill 299 of the 72nd Session and asked for the law that became *Nevada Revised Statutes* (NRS) 212.093, which does not allow prisoners to have items that can be used for escape. During the testimony for that statute, Mr. Gerald Gardner testified that the trick with an escape is to catch it before it happens, because once the escape has started, serious consequences can happen, such as harm to the correctional officers, the inmate, or the public at large.

In 2005 there was an escape from the state prison system when a social worker brought a cell phone to an inmate with whom she had fallen in love. He then used that phone to coordinate his escape with people on the outside. He escaped, which resulted in the deaths of two or three other people before he was caught.

In 2007, as Assemblyman Hansen told you, a bill was presented to the Legislature by the Nevada Department of Corrections (NDOC) prohibiting portable telecommunication devices in the prison system. Unfortunately, it was so narrowly defined that it only applied to the prisons.

Around 2010 we had a case in Pershing County in which an inmate possessed a cell phone, which he hid in his Bible in his cell. We discovered it because he threatened other people by using that cell phone. When we prosecuted him, the District Court ruled the statute unconstitutionally vague. We appealed that decision to the Supreme Court of Nevada and they overturned the vagueness ruling, but then found that cell phones did not qualify as devices for escape.

Assemblywoman Fiore:
Was the social worker who gave the inmate the cell phone charged and arrested?

Jim Shirley:
I do not know what happened to her. If you look at the current version of NRS 212.165, it has provisions for noninmates. That is the reason those provisions are in there, so no one can take a cell phone into a prison.

Assemblywoman Fiore:
Mr. Cox is behind you nodding his head yes, so they have apprehended her.

Jim Shirley:
I do not know what happened to her. I only know what happened with the escapee.

We went to the Supreme Court and they said that the escape device would not apply, so our alternative was to correct this small oversight from when NRS 212.165 was originally enacted. When I was growing up, it was the file in the cake; cell phones are the new files. What they have discovered worldwide is that we are having an epidemic of cell phones getting into correctional facilities. For example, in Brazil they have carrier pigeons carry the cell phones into the inmates. The inmates are then able to use those phones for escape, for continuing their criminal enterprises, threatening people in the public, and those types of things. In Italy, they downloaded blueprints for the prison. In the case at hand, the cell phone was used for threatening people in the community. Of course, escapes are the real problem.

We are asking that you pass this bill so the inmates can no longer bypass the regular phone system—where they are recorded—to communicate with others about jail security and such, or make threats, or perform other criminal acts while in the confines of the jail.

I have also been notified that the Nevada District Attorney's Association is in full support of this bill.

Chairman Frierson:
I understand what you are trying to accomplish; I have spoken with Mr. Hansen about this issue. We were both surprised that this was not already a prohibition. I understand the Supreme Court's rationale in that an escape tool is usually only an escape tool. Cell phones can be used for this purpose, but can also be used for threatening witnesses, contacting girlfriends, and other less nefarious things.

The felony characterization jumps out at me because we have inmates under local government jurisdiction that are now going to be subject to felony treatment for things that the local government jurisdiction could have prevented.

I relate this to a situation ten years ago. I was prosecuting someone for escape because a handcuff key was found in his shoe. A screening found the handcuff key, so if we have an ineffective screening process, we are allowing something to happen that we could have prevented. My concern is local government not doing an adequate screening resulting in a cost to the state. That is a longwinded way of asking if you are open to a penalty that is not a felony if they are in for a misdemeanor or gross misdemeanor.

Jim Shirley:
The proposal is that a misdemeanor would be guilty of a misdemeanor. I would not have a problem with throwing the gross misdemeanor in there as well. I think the felony issue is, if it is that serious of a crime and they actually have a cell phone in the jail, the crime should be the same as it would be in prison. I understand what you are saying about the screening process and I agree. The problem in the rural jurisdictions is that the jails do not have the money to put in some of the things that we should have, like updated camera systems. We are looking at that now, but it is over $50,000 and that is a lot of money for a local jurisdiction. What happened in the case I was talking about is a confederate threw the cell phone over the fence while no one was there, and the inmate came and retrieved it later.

Chairman Frierson:
Are there any questions for Mr. Shirley or Assemblyman Hansen? I see none. You are right. This is a straightforward bill. I think jails should be able to prohibit inmates from having anything that is not approved by the jail.

Assemblyman Ohrenschall:
According to the bill, someone would be guilty at the same level as their custody. My concern is if someone is arrested and in custody on a charge of felony burglary and he has a cell phone offense, but later the burglary is pled down to a misdemeanor petty larceny, would he still be facing a felony because of the cell phone? It worries me that a cell phone could be missed by a detention facility when someone is brought in and no one realizes he has it and it does not get taken away and inventoried.

Jim Shirley:
Most of the booking processes require them to change clothing, so they would not have the same clothing on. They would have surrendered their personal effects. As to the burglary scenario that you addressed, most people in the jails are felons who are awaiting trial and are generally not given a plea deal. They stay in jail because it is going to stay a felony. The people like you are talking about usually bail out. The bail is not set very high, especially in the rural jurisdictions. We "O-R" a lot of people to get them out of our jails and keep

only the really serious offenders. I am sure it is even more so in the larger jurisdictions because of budgetary constraints in housing so many people.

Chairman Frierson:
Are there any questions? I realize there is a great deal of discretion involved here as well. We understand that the state charging officers do some screening. The questions directed to you are designed to find that balance and ensure we retain that opportunity. We do not want to expose people unnecessarily to felonies. It sounds like your goal is to prohibit cell phones on inmates, and we have room for discussion on how to accomplish that.

Jim Shirley:
Yes, that is the main issue. I understand that plea bargains can change the nature of the underlying charge. Ultimately, you go back to the old saying about what a prosecutor's duty is, and that is to do justice, not harm. By and large that is what we try to do.

Assemblyman Wheeler:
In your experience, if a person is in for a class A felony and is being held over for trial, do you think convicting him of a misdemeanor for having a cell phone would be a deterrent?

Jim Shirley:
It would not be a deterrent because the nature of a misdemeanor is jail; it is not a severe punishment. We also looked at administrative remedies, but once again, since he is staying in jail, it would not affect what is going on in the prison at all if they are convicted of a felony and they go on to prison. It needs to be something that wakes them up to the fact that they cannot have a cell phone while incarcerated.

Chairman Frierson:
I will now open the hearing for those testifying in support of A.B. 212 both here and in Las Vegas.

Eric Spratley, representing the Washoe County Sheriff's Office:
I am here to express our support of A.B. 212. As you have heard, loopholes in existing statute can be addressed by this legislation which further enhances the safety of our jails and our communities throughout the state. The penalty, as has been pointed out by Mr. Wheeler, does need to have enough teeth to prohibit that conduct if possible. We are asking for your consideration not to limit it to just a misdemeanor penalty, but it should fit the current level of charge so there is something that would make them think twice about trying to get a cell phone into the jail. We have a thorough screening process, especially

at the Washoe County Jail, and our sister agencies across the state. The idea that inmates could accidentally end up with a cell phone in their possession is a very low possibility. It would be cause for concern if someone does get a cell phone into a jail system. He would be using it for a nefarious purpose, not just to contact his girlfriend.

We thank Assemblyman Hansen for bringing this important legislation forward. Please consider this bill the way it is intended.

Chairman Frierson:
You mentioned that you were in support of the penalty matching the underlying charge. Would you be in support of someone in on a gross misdemeanor being charged with a gross misdemeanor for possession of a cell phone?

Eric Spratley:
Yes, Mr. Chairman.

Chairman Frierson:
Please address the circumstances that Mr. Ohrenschall brought up about a person who is arrested on an offense that is negotiated down to a misdemeanor. Technically, if he is arrested for an offense and is then ultimately acquitted, or the offense is dismissed, under the existing bill he would still have a felony charge. How do you imagine that circumstance being dealt with?

Eric Spratley:
Going back to my other comments, an inmate cannot accidentally end up with a cell phone in the jail. He is going to have it for a specific purpose. He is going to obtain it through some means for a purpose more than communicating with his girlfriend. Even if the original charge of felony was pled down to a misdemeanor or a gross misdemeanor, the fact is he is still charged with a felony and is in possession of a cell phone. We have rules that are laid out in the very beginning of their time with us. If he ends up with a cell phone in a cell that he is in, or any other contraband, he knows he should bring it right to the deputy and turn it in. If we find it during shakedown, he should be appropriately charged and he knows he has that hanging over his head whether or not the original charge gets pled down, dismissed, or adjudicated otherwise.

A.J. Delap, representing the Las Vegas Metropolitan Police Department:
We are in support of this measure. We are in support of the suggested changes to the classification based on the conviction. In summation, it is a quick "me too." We are on board with it.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We would like to add a "me too" to A.B. 212.

Chairman Frierson:
Is there anyone else in support in Las Vegas? [There was no one.] We are back to Carson City and invite those in opposition to the bill to come forward. [There was no one.] Is there anyone in Las Vegas? Seeing no one we will come back to Carson City for anyone wishing to testify in the neutral position on the bill, including in Las Vegas.

Steve Yeager, representing the Clark County Office of the Public Defender:
I am neutral on the bill, but as has been raised by some members of the Committee, it would be appropriate where someone is pending a gross misdemeanor charge that they would face another gross misdemeanor for having a telecommunication device. In that way, the statute would be in line with the charge and custody. I would recommend that change. It sounds like everyone is amenable to that. Other than that, we remain neutral.

Chairman Frierson:
I am hesitant to bring this up, but in the context of escape, the sentence is required to be consecutive. What are your thoughts on that? It is complicated because this is only arrests, not necessarily convictions. Would this be appropriate in cases where there is already a conviction? When someone is just in custody? Would that be unnecessary?

Steve Yeager:
In a case like this, when this charge is leveled against someone, we do not know if there is going to be a conviction. The best way to do it is to leave it for the sentencing judge to decide whether this charge should run consecutively or concurrently. That would be best since it allows both the district attorney and the defense attorney to argue their positions, and the judge to look at the underlying facts to decide which sentence is appropriate. I would not be in favor of making it mandatory consecutive.

Chris Frey, Deputy Public Defender, Washoe County Public Defender:
I want to express my support for the recommendation that there be parity between the penalty and the underlying offense. It sounds like that is a noncontroversial recommendation. We would support that.

I signed in as neutral and nonspeaking, but I want to make a comment with respect to Assemblyman Wheeler's hypothetical scenario about someone who is facing a category A felony. Under the language of the bill, and even with the

parity recommendation, the penalty would not be a misdemeanor; they would be facing a felony.

Chairman Frierson:
Is there anyone else who is neutral? I see no one, so I will invite Mr. Hansen back up for closing remarks.

Assemblyman Hansen:
We are open to any suggestions on the parity issue. We will be happy to work with anyone so we will all be on the same page.

Chairman Frierson:
I will close the hearing on Assembly Bill 212. We will now move on to Assembly Bill 299, open the hearing, and invite Ms. Fiore to introduce her bill.

Assembly Bill 299: Makes various changes relating to the provision of medical and dental services within the Department of Corrections. (BDR 16-749)

Assemblywoman Michele Fiore, Clark County Assembly District No. 4:
When I was elected last year, as a new legislator I looked at what I could do to help the state. Although this is a policy committee and not a financial committee, sometimes the policies we enact affect finances. As I started touring our prisons, schools, and hospitals, I found issues that could help our directors implement better statutes and to help policy matters make our state budget more efficient. I also became aware of certain issues that we have with our medical staff.

We will go through the bill very quickly. I will state each section in simple layman's terms. [Read from written testimony (Exhibit D).]

Since this is my first time presenting, there were two words that we changed that did not get into the Nevada Electronic Legislative Information System (NELIS) in time. In section 1 where it says, "The director shall . . . ," it was changed to "may." Section 1 also says, "facility must . . . ," which was also changed to "may."

This basic bill has very simplistic language that gives the director the ability to hire doctors on a private contractual basis because, as it stands now, our doctors are exempt from working the ten-hour shifts. [Read from written testimony.]

EXHIBIT B

Kristin Erickson, Nevada District Attorneys Association
Steve Yeager, Public Defender's Office, Clark County
Beverlee McGrath, Best Friends Animal Society; American Society for the Prevention of Cruelty to Animals; Nevada Humane Society; Northern Nevada Society for the Prevention of Cruelty to Animals; Nevada Political Action for Animals; PawPac; Lake Tahoe Humane Society and Society for the Prevention of Cruelty to Animals; Compassion Charity for Animals; Pet Network of Lake Tahoe; Wylie Animal Rescue Foundation; Lake Tahoe Wolf Rescue
Margaret Flint, Nevada Humane Society; Canine Rehabilitation Center and Sanctuary
Richard Hunter
Fred Voltz
Jesica Clemens, Incred-A-Bull
Keith M. Lyons, Jr., Nevada Justice Association
Vanessa Spinazola, American Civil Liberties Union of Nevada
Sean B. Sullivan, Public Defender's Office, Washoe County
Michelle Ravell

Chair Segerblom:
I will open the hearing on Assembly Bill (A.B.) 212.

ASSEMBLY BILL 212 (1st Reprint): Prohibits the possession of portable telecommunications devices by certain prisoners. (BDR 16-639)

Assemblyman Ira Hansen (Assembly District No. 32):
This simple bill takes the prohibition against the possession of cell phones and other portable telecommunications devices by prisoners in the Department of Corrections (DOC) and applies it to inmates of our county jails or similar local detention facilities. The new language in section 1, subsection 4 of A.B. 212 mirrors the language used to prohibit cell phones in prisons. The differences are necessary to clarify that an inmate who is not yet convicted of another crime could still be guilty of possessing a cell phone or similar device without authorization. It also specifies that for jail inmates being charged or already serving a sentence for a misdemeanor, violation of this statute would carry a misdemeanor charge. For those charged with a gross misdemeanor, it would be a gross misdemeanor; for those charged with a felony, it would be a felony. Inmates would not face a stiffer penalty for possessing a cell phone than for the original charge.

The DOC originally proposed a law banning possession of portable telecommunication devices by its inmates in A.B. No. 106 of the 74th Session. The law has worked well for the DOC as a major deterrent against inmates trying to keep cell phones, and the law has not needed amendment since its passage 6 years ago. It is reasonable to have a similar restriction for our jail inmates.

This bill was brought in response to a lawsuit out of Pershing County regarding whether a county jail inmate could have a cell phone in his or her possession. That case eventually went to the Nevada Supreme Court.

Chair Segerblom:
What is the theory behind having the penalty escalate based on why the offender is in jail?

Jim C. Shirley (District Attorney, Pershing County):
We graduated the consequences because if you were in jail waiting to go to prison on a felony charge, it would not worry you to face a misdemeanor charge for carrying a cell phone. We were trying to keep the consequences on the level of the crime for which the person was in jail.

Chair Segerblom:
Did the original bill make it a felony for everyone, and the Assembly Committee on Judiciary reduced it?

Mr. Shirley:
No. The original bill had felonies and gross misdemeanors lumped together and misdemeanors with misdemeanors. When we discussed it before the Committee, the members broke it down so each level had the same corresponding crime. That seemed a lot more fair. Someone in jail on a misdemeanor will not face a felony charge and vice versa.

The lawsuit referred to eventually resulted in the Nevada Supreme Court decision *Sheriff v. Andrews*, 128 Nev. ____, 286 P.3d 262 (2012). We had a prisoner who had somebody throw a cell phone to him over the fence. He then hid the cell phone among some Bibles in his cell. By the time we found it, he had made a number of phone calls, threatening people on the outside and calling family members. We prosecuted him for violation of *Nevada Revised Statutes* (NRS) 212.093, which is the prohibition against having an escape device. The

Nevada Supreme Court said that the prohibition in NRS 212.093 applied only to items that physically manipulated the jail.

In almost every case in which an inmate used a cell phone to escape, murders have been committed either during or immediately following the escape. In fact, a situation like this in Nevada caused the statute to be amended in 2007. In that case, a social worker brought the cell phone in to the prisoner; he used it to communicate with confederates and escaped. After his escape, he killed two or three people. A similar thing happened after a recent escape in Arizona. An inmate used another inmate's cell phone to communicate with confederates, escaped, killed a family in the Arizona desert and fled up into Colorado. In Brazil, there have been cases of carrier pigeons bringing cell phones into jails.

Chair Segerblom:
Have officials considered jamming the cell phone signals in prisons?

Mr. Shirley:
They cannot. A federal law prohibits a local government from having jamming technology within the prisons. In any event, we would never be able to afford something like that in Pershing County. I think it was just an oversight that A.B. No. 106 of the 74th Session did not include language adding jails. The biggest concern is not the use of cell phones to escape; it is their use to threaten witnesses, contact confederates and conduct criminal enterprises while inside the jail. Cell phones bypass the jail phone systems, so the monitoring you normally do of inmates' interactions cannot be done.

Chair Segerblom:
Many of the inmates of county jails are there because they have not yet been convicted. If you are awaiting trial on a felony and you get a felony for having a cell phone, and then you end up pleading to a gross misdemeanor on your original charge, does the cell phone charge become a gross misdemeanor?

Mr. Shirley:
Yes.

Senator Ford:
I am not certain I understand the progression of the penalties. Is the point that a person in jail on a felony is not concerned about a gross misdemeanor, so we need to charge the prisoner with a felony for having a cell phone?

Mr. Shirley:
That is exactly the point. If someone is in jail awaiting trial on a Category A felony, it is not going to mean anything to convict him or her of a misdemeanor because it does not add anything to his or her sentence.

Senator Ford:
Did I understand you to say that if an inmate charge changes from a felony to a gross misdemeanor, the cell phone charge also goes down to a gross misdemeanor?

Mr. Shirley:
That would be the just thing to do. I do not think you should impose a penalty that is heavier than the original charge.

Senator Ford:
Is that in the bill? As I read section 1, subsection 4, I am not certain it says that if the penalty is pled down, the cell phone penalty will follow suit.

Nick Anthony (Counsel):
I believe your reading of the bill is correct. If you would like language that specifically says the inmate could only be convicted of the lesser charge to which he or she pled, then we can certainly add that.

Mr. Shirley:
I would have no objection to that. The intent is for the cell phone possession penalty to mirror the penalty of the crime the inmate was originally charged with.

Assemblyman Hansen:
I concur. That would make perfect sense.

Senator Ford:
I will offer it as a friendly amendment if this bill advances.

Senator Hutchison:
Section 1, subsection 4 says a prisoner shall not possess a telecommunications device "without lawful authorization." How is that phrase interpreted?

Mr. Shirley:
Within a jail, a sheriff has the authority to authorize certain things. For example, an inmate on the work crew might have a shovel, which might constitute an escape device. But because the sheriff authorized the inmate to have a shovel at that time, the inmate is not subject to a criminal penalty.

Senator Hutchison:
So what is authorized is decided on a case-by-case basis by the sheriff and correctional facility. What constitutes a lawfully authorized cell phone is not defined anywhere.

Mr. Shirley:
Correct.

John Wagner (Independent American Party):
We support A.B. 212. I assume cell phones are confiscated when prisoners are incarcerated. That means someone is smuggling cell phones in to prisoners. I would think the person who smuggles in cell phones should also be guilty of a crime.

Robert Roshak (Nevada Sheriffs' and Chiefs' Association):
I am also speaking for the Las Vegas Metropolitan Police Department and Washoe County Sheriff's Office. We support A.B. 212.

Kristin Erickson (Nevada District Attorneys Association):
We are in support of A.B. 212. Having a cell phone in jail is always a serious security threat.

Steve Yeager (Public Defender's Office, Clark County):
We are neutral on this bill. I want to bring one potential area of concern to the Committee's attention. Some concern was expressed in my office about tying the penalty to the custody status of the offender. It was conveyed to me that there could be a constitutional problem with that, in that the penalty for the crime would depend on something unrelated to the crime itself. I did some research on this and found that there is not a lot of caselaw dealing with the Eighth Amendment to the U.S. Constitution, which includes the "cruel and unusual punishment" or proportionality doctrines. Most of the caselaw seems to deal with death penalty work. I was not able to find anything that would directly relate to this, but it was suggested that one way to avoid this issue is to have a

stepped-up penalty, where the first offense would be a misdemeanor, the second offense a gross misdemeanor and the third a felony. I am neutral on the bill because I was not able to confirm if that is a legitimate constitutional concern, but I wanted to make you aware of it.

Chair Segerblom:
What is your opinion about the argument that if you are in jail for a felony, getting a misdemeanor is irrelevant?

Mr. Yeager:
I certainly understand the rationale behind that, but there are some practical considerations for how the charge would actually work. Typically, when you are found with a cell phone, you are charged right away. In theory, that charge would be related to what you are in custody for. Some practical difficulties would arise; for example, the cell phone charge would have to wait until the resolution of the underlying charge. But I agree with the position that if you are in custody on a serious felony, you are probably not going to be deterred by the specter of a misdemeanor hanging over your head.

Chair Segerblom:
Mr. Anthony, do you feel it is constitutional to have a varying penalty?

Mr. Anthony:
I am not aware of anything that would say it is clearly unconstitutional.

Senator Hammond:
I am not a lawyer. You say you have constitutional concerns, and yet this was heard in the Assembly, giving you ample time to track down those concerns, and you have not found any yet. Your concerns are clearly not that serious or you would not be neutral on the bill. You are just throwing out the idea. Is that correct?

Mr. Yeager:
Yes. When we looked at this in the Assembly, this concern was not raised; it was brought to my attention recently. In the limited research I did, I was not able to find anything saying this is unconstitutional. I just want to make the Committee aware that this is a concern. I will continue to look at it, but at this time I do not have any reason to believe it would be a problem.

Assemblyman Hansen:
This bill closes a peculiar loophole in the law. I am willing to work with legal staff to resolve any potential issues on the penalties. The bottom line is that people in jail should not be allowed to have cell phones.

Chair Segerblom:
We will close the hearing on A.B. 212 and open the hearing on A.B. 110.

ASSEMBLY BILL 110 (1st Reprint): Revises provisions concerning canines and breed discrimination. (BDR 15-567)

Assemblyman James Ohrenschall (Assembly District No. 12):
Many municipalities in the U.S. have enacted ordinances declaring one specific breed of dog dangerous or vicious. Assembly Bill 110 seeks to preempt the enactment of such ordinances in Nevada. I am not aware of any existing ordinances like that in Nevada, but many cities around the U.S. have enacted breed-specific ordinances. From everything I have learned since I was asked to introduce this bill, the problem is with the owners of these dogs, not the dogs. It is how the dog is raised.

Chair Segerblom:
Did we have a bill like this last Session?

Assemblyman Ohrenschall:
Assemblyman John Hambrick did introduce A.B. No. 324 of the 76th Session regarding dangerous and vicious dogs. However, it did not specifically prohibit local breed-specific ordinances.

Chair Segerblom:
Are there currently any such ordinances in Nevada?

Assemblyman Ohrenschall:
Not that I am aware of, no. There are quite a few in municipalities across the U.S., including Denver, Colorado. This bill seeks to make sure that does not happen in Nevada. Legislation banning breed-specific legislation is supported by the American Kennel Club (AKC), the American Veterinary Medical Association, the National Animal Control Association, the American Society for the Prevention of Cruelty to Animals (ASPCA) and the National Animal Interest Alliance. This is important preventive legislation.

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. ALEXIS PLUNKETT, Defendant.	CASE NO.: C-17-324821-2 DEPT. XVII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE
THURSDAY, SEPTEMBER 21, 2017

DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

For the State: JAY P. RAMAN, ESQ.
Chief Deputy District Attorney

For Defendant Plunkett: ADAM M. SOLINGER, ESQ.
MICHAEL V. CASTILLO, ESQ.

RECORDED BY: CYNTHIA GEORGILAS, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 21, 2017

[Proceedings commenced at 9:29 a.m.]

THE MARSHAL: Your Honor, page 5; Plunkett.

THE COURT: All right, I did receive supplemental briefing from the parties and also reviewed the legislative minutes regarding 216.165.

Counsel, it's your motion.

MR. SOLINGER: Judge, I don't want to rehash a great deal of this just because we've already discussed it once during the writ and decided that this was the more appropriate vehicle to approach this, so to speak, and so, really what I'd just like to reemphasize is that the legislative history I think enlightens us on all of this, and I truthfully think the State didn't do a deep enough dive on the initial grounds for why this statute was passed 'cause in looking at the State's briefing they talk about this amendment to add cell phones to jail but I think when you look at the initial passage that's what's most enlightening when they talk about how people -- this social worker provided a cell phone to somebody in the prison and that resulted in his escape attempt and hundreds of thousands of dollars of expenses, people were injured, and things like that. And so, they explicitly discussed the penalties for somebody that provides a phone to somebody in prison, right, during that initial passage. And because of that, they set this penalty scheme that would be different from ordinary aiding and abetting. They want somebody to be punished with a misdemeanor for even possessing the phone because there's no way to accidentally possess a phone in the prison. And then if you provide it, they wanted that category E felony and they thought a higher level felony, a D, was more appropriate.

Now, the State has argued many times that there's not any meaningful difference between a category D felony and category E felony other than one is

mandatory probation but they both carry the same sentencing range, but nonetheless, that step by the Legislature to differentiate amongst the prisoner and the provider of the phone in the prison context I think is very enlightening. And then when you get to the updated legislative history from when they added it to the jail, you've got the District Attorney up in Pershing County talking about how somebody managed to get a phone while in the jail and I believe it's because their fence is right along a public street and somebody tossed the phone over. So, they talk about their screening procedures and how no one could accidentally sneak a phone past the screening because their screening is so thorough. So, they're on notice, the Legislature, that people still provide phones. They're presumed to know what act they're amending and yet they chose to take no action on that.

Now, the Defense would argue that that is an affirmative act that they're choosing not to punish people who provide phones in jails to people and that that's something that needs to be rectified by the Legislature, not by the State and not by this Court. And so, to extend liability in this type of a case we think would be a violation of separation of powers. Just like the reason they had to add jails to that list was because they tried to charge that prisoner in Pershing County with possession of an escape device and that went up to the Nevada Supreme Court and they said, no, that's not an escape device. So, they weren't able to prosecute him and I believe there's reference to -- at the time the person provided the phone in the prison prosecuting them for possession of an escape device but I don't know how that played out because it's not in the history and a name's not really provided for that social worker. But I understand the State's position that you can be an accomplice to a possessory crime and I don't dispute that in the normal case like possession, possession with intent to sell, anything like that. But where we have a specific

statute that denotes who is liable for what in a vicarious capacity, and it does not mention jails, that it's inappropriate to turn to the general statute.

The analogy that is most apt would be something like battery resulting in substantial bodily harm or I guess battery with use of a deadly weapon; right? The deadly weapon statute's mandatory consecutive, 1 to 20, but because the battery with a deadly weapon statute has the specific liability built into it no one can turn to the general statute and ask for a bigger enhancement.

So, similarly in this case, it's our position that it would be inappropriate to extend liability to the jail context because the Legislature had a chance. They were on notice. Even the public member from the American Independent Party, his quote says, you know, we're in support of this and we think people who provide the phones should be punished as well. So, they're more concerned during this legislative session about setting the appropriate penalty for the prisoner, which, bear in mind, I -- Your Honor read the minutes. Never once does anyone, when talking about this Bill and punishment, talk about the person who provides the phone; that the noun is always a prisoner that does this, a prisoner does that. Well, what about a prisoner that's in on a felony but the case is reduced to a gross misdemeanor? Well, there's a mechanism to reduce it afterwards. They weren't thinking about adding it to the jail and that's the Legislature's fault, not my client's, and it would be inappropriate to extend liability in this case.

THE COURT: Thank you.

Mr. Raman.

MR. RAYMAN: Judge, the Defendant's argument is essentially part 1, 2 and 3 of 212.165, deals with prisoners and certain conduct is criminalized specifically. Part 4, which is charged here, applies to jail inmates, and because it isn't as nuanced or

detailed as 1, 2 and 3, and because specific language was not used to criminalize providing a phone to the inmate in a jail, it is not a criminal offense and that argument fails. It fails because this is not how laws are interpreted.

First, subsection 4 does not have language that says you cannot charge somebody with aiding and abetting this crime. We do have statutes which specifically say things of this nature. Take, for example, accessory after the fact. The language in that statute says every person, not standing in relation of husband or wife, brother or sister, parent or grandparent, child or grandchild to the offender can be charged with accessory after the fact. That is a situation where you can be an accessory to almost every crime on the books but if you're one of these particular people we can't charge you.

That doesn't exist in this case. In the aiding and abetting language it certainly doesn't exist. It doesn't exist in this statute where they're saying provisions of a cell phone to an inmate you cannot aid and abet. All statutes can have aiding and abetting or conspiracy of liability apply. There's no prohibition. The only limits we have on such theories of liability here in Nevada are *Sharma* and *Bolden*, and that relates to a specific intent that you're aiding and abetting somebody and you must share the intent of the principal actor. That follows the national trend of requiring knowledge for aiding and abetting to apply.

What the Defendant is asking is that you dismiss this case under the same logic that would exist if, let's say, this was a case where we have somebody aiding and abetting a grand larceny auto or possession of stolen vehicle. Obviously, NRS 205 makes stealing a car criminal, makes possessing a car criminal. But aiding and abetting is so many things. It can be providing things. It can be being a look out. It can be encouraging and assisting. And because NRS 205 doesn't say these

are also theories of criminal liability, under that same argument they would say you must dismiss anybody who aids and abets a grand larceny auto or possession of stolen vehicle and that doesn't make any sense. The aiding and abetting liability in the statute is universal. It applies to all crimes unless they specifically say it does not.

In this case, we also provided legislative history and it's helpful because there is no discussion about prohibitions on aiding and abetting liability on any part of this statute. Sections 1, 2 and 3, which apply to prison inmates, anybody could aid and abet those crimes. It doesn't specifically say aiding, encouraging, providing resources to. Obviously, with *Sharma* and *Bolden* intent that those are criminal acts, but we know from aiding and abetting liability that they certainly are. The same goes for subsection 4. Statutes 212.165 are clear; 195.020, aiding and abetting is clear. Therefore, legislative intent, even though we've gone into it, discussed it, is irrelevant because when statutes are clear there's nothing for the court to delve on. If anything, it helps because in the legislative history nobody said we really should consider what's going on with people who provide phones and restricting aiding and abetting liability, we need to create statutes that address that separately. Everybody knows that all crimes that are on the books can have aiding and abetting liability apply, conspiracy theory liability apply.

I also cited *Rosemond v U.S*. where the United States Supreme Court has basically universally adopted and applied a very broad view of aiding and abetting liability, obviously with similar limits that *Sharma* and *Bolden* put in place here in Nevada. These things are basically universal to the United States.

I also provided the Court a very similar case of *United States versus Ford*, a U.S. circuit case from the First Circuit, where we have not only a possessory

crime that was aided and abetted, but a status crime. The status being a felon crime of possession of firearm by a felon and the person charged not a felon whatsoever. So, we have in the case of Ms. Plunkett another status crime, another possession crime; possession of a telecommunications device by a person incarcerated. She's not the person incarcerated. *Ford* had its own problems because they used bad jury instructions on that, but the case is sound. The First Circuit said this is completely valid and fine. They even cited to other examples where they had status possession crimes that were upheld.

So, the statute is clear. There's no specific mention of excluding aiding and abetting liability. The legislative history is clear. There's no specific mention of excluding aiding and abetting liability. There's federal precedence for this type of liability on possessory status crimes. And it would be wildly irresponsible to basically undermine the aiding and abetting statute. The Legislature knows when they enact criminal statutes that there are clean up titles such as aiding and abetting liability, conspiracy theory under 199 which apply for all kinds of other theories of liability of one committing a crime. They named specifically and enumerate language for every foreseeable circumstance as to how one could perpetrate a crime.

But a crime was perpetrated and Alexis Plunkett aided and abetted those crimes on multiple occasions with multiple other Defendants, so these charges must stand. And furthermore, any arguments on this point of law should be excluded from the jury because as Your Honor's deciding this issue today it's a question of law and not fact, so I'd ask for that remedy as well.

THE COURT: You're charging her under Section 4 and specifically as an aider and abettor; correct?

MR. RAYMAN: Correct. She cannot --

THE COURT: Okay, under --

MR. RAYMAN: -- qualify for direct liability. She's an aider and abettor or a conspirator.

THE COURT: And in Section 4 it says a prisoner who violates this subsection has the following penalties; so how can I sentence her under Section 4 when she's not a prisoner? Look at the last line of Section 4 before we get to the sub parts a, b and c. It says a prisoner who violates this subsection -- so she's an aid and -- you're alleging she's an aid and abettor to that --

MR. RAYMAN: Correct.

THE COURT: -- shall be sentenced accordingly. She's not a prisoner. How can I sentence her under Section 4?

MR. RAYMAN: Well, again, Your Honor, based upon the principles of aiding and abetting liability, the actions and penalties that relate to the direct offender also relate to one who would aid and abet. I've shown you through case law and through principles of precedence that it doesn't matter based upon the status. One can similarly be convicted of said crime. So, there are mandatory provisions in this statute which, in our earlier argument of the writ argument, clearly we wouldn't ask for mandatory punishment but the Legislature has classified such actions by directors and aider and abettors and conspirators as being a D felony. We would simply strip away any kind of mandatory prison sentence making it probationable.

THE COURT: I look at this case differently than the other possessory crimes because this statute has a specific section, Section 1 and 2, that has a separate penalty and provision for the furnisher of the firearm. The argument is furnisher of a stolen vehicle or stolen weapon; those statutes don't have a specific section for furnishing the stolen weapon to the ex-felon. And so, the legislative minutes here

only addressed clarifying certain items, make sure its covering the jails as well as the prison setting, make sure that cell phone is identified as a means to escape. Sections 1 and 2 -- and also if you look at that it starts off “a person.” Sections 3 and 4 says “a prisoner.” And so, I find that the statute’s clear that only a prisoner can be sentenced under 4, Section 4, that you could still pursue a claim against the Defendant under Section 1 as a furnisher of the cell phone. But under Section 4 you can’t prosecute her as an aider and abettor because the specific language in Section 1, which tells me our legislators decided we’re going to have a separate cut-out for someone who furnishes this item and we will punish them accordingly under Section 1 and 2.

And so, for those reasons I am dismissing the indictment. And then like I said, the parties are free to -- State, you’re free to go to prelim or re-indict on this different subsection.

MR. SOLINGER: Judge, our position is that since the allegation is based on a jail we’d be asking that you to dismiss with prejudice at this time because there’s never been an allegation she’s provided a phone to somebody in a prison under subsection 1 or 2.

THE COURT: I’m just dismissing the indictment as it relates to subsection 4 --

MR. SOLINGER: Of course.

THE COURT: -- today.

MR. SOLINGER: Thank you, Your Honor.

THE COURT: All right.

And, Counsel, --

THE DEFENDANT: Thank you, Judge.

THE COURT: -- can you please prepare the order for today. Give them the reasons that I -- setting forth the reasons I just gave.

MR. SOLINGER: Yes, Judge; I will.

THE COURT: All right; thank you.

MR. SOLINGER: Thank you.

MR. RAYMAN: All right, thank you, Your Honor.

THE COURT: Any bond is exonerated in this case.

MR. SOLINGER: Much appreciated.

MR. CASTILLO: Thank you.

THE DEFENDANT: Thank you, Judge.

[Proceedings concluded at 9:44 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

Cynthia Georgilas

CYNTHIA GEORGILAS
Court Recorder/Transcriber
District Court Dept. XVII

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ALEXIS PLUNKETT, Defendant.	CASE NO. C-17-324821-2 DEPT. NO. XVII

DEFENDANT'S PROPOSED ORDER

Defendant, ALEXIS PLUNKETT, by and through her attorneys of record, MICHAEL L. BECKER, Esq. and ADAM M. SOLINGER, Esq., respectfully submit the following proposed order per the Court's minute order dated September 21,2017 attached as Exhibit A. Per EJDCR 7.21, counsel has circulated this proposed order to the Plaintiff and the Plaintiff agrees with the content and form.

DATED this 31 day of ~~September~~ October 2017.

Respectfully submitted,

/s/ Adam M. Solinger
ADAM M. SOLINGER, ESQ.
Nevada Bar No. 13963
2300 W. Sahara Ave, Suite 450
Las Vegas, NV 89102
Attorney for Petitioner

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MICHAEL L. BECKER, ESQ.
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ADAM M. SOLINGER, ESQ.
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ALEXIS PLUNKETT, Defendant.	CASE NO. C-17-324821-2 DEPT. NO. XVII **ORDER**

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I. STATEMENT OF THE CASE

Petitioner ALEXIS PLUNKETT ("Petitioner") was charged by way of superseding grand jury indictment, along with two (2) co-defendants, Andrew Arevalo and Rogelio Estrada, with fourteen (14) counts including: CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATIONS DEVICE BY A PRISONER (Gross Misdemeanor – NRS 212.165, 199.480 – NOC 55248); and POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony – NRS 212.165 – NOC 58368).

Said indictment was the subject of a Petition for Writ of Habeas Corpus. The Court denied her petition holding that there was slight or marginal evidence that a crime was

committed and that Ms. Plunkett's argument regarding jurisdiction was improper as part of a pretrial writ.

During the hearing on September 21, 2017, the State conceded it was charging Ms. Plunkett under section 4 of the statute. Further, at the close of the hearing, the Court instructed defense counsel to prepare the Order and submit to the State to approve as to form and content. A Notice of Appeal was filed by the State prior to the Order being entered in this matter. Further, both counsel for Ms. Plunkett and the State were out of the jurisdiction subsequent to the hearing and advised the Court of the inability to submit the Order within 10 days after the hearing pursuant to E.D.C.R 7.21.

II. STATEMENT OF THE FACTS

As relevant to this petition, Ms. Plunkett is alleged to have brought a cell phone into the Clark County Detention Center and that once she was visiting with her clients, she is alleged to have provided the phone to her clients to allow them to make or participate in calls and/or send messages and/or read text messages, which the State contends is unlawful under an aiding and abetting theory. However, every time a phone was brought into the jail, an authorization form was signed and completed by Ms. Plunkett. That form disclosed that she was bringing the phone in for the purpose of conducting case work.

III. ARGUMENT

A. Applicable Law

Under Nev. Rev. Stat. 174.095, "any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

Additionally, a defendant may object that the indictment fails to allege a crime at any time before trial. *See* Nev. Rev. Stat. 174.105(3).

B. Discussion

Ms. Plunkett is not a prisoner and therefore cannot be directly charged with violating Nev. Rev. Stat. 212.165(4). Instead, any criminal culpability must be based upon some type of vicarious liability. The State argues that she is criminally culpable based on a theory of aiding and abetting the crime by helping her in-custody clients violate Section 4. However, this argument is unpersuasive.

The statute in question in here is distinguishable from those cited by the State because Sections 1 and 2 of 212.165 build in vicarious liability in the context of prisons. The State argues that one can be criminally culpable for aiding and abetting an ex-felon who possesses a firearm. While this is true, the ex-felon in possession statute does not include a separate vicarious liability section like the statute at issue in this case.

In looking at the legislative history, it is clear that the Legislature was only concerned with making sure persons in jails were covered under Nev. Rev. Stat. 212.165. During the hearings on the proposed amendment to existing law, at least one person brought up punishing the person that provides the phone to a jailee, but that was never acted upon by the Legislature.

Finally, the language of the sections at issue here demonstrate a clear intent for separate punishment. Specifically, Sections 1 and 2 discuss the vicarious liability of a "person" that provides and/or possesses a phone in a prison. In contrast, Sections 3 and 4 discuss the culpability of a "prisoner" that possess a phone in a prison or jail, respectively.

In sum, Nev. Rev. Stat. 212.165(4) is clear and only a prisoner can be sentenced under the statute. Ms. Plunkett was not a prisoner and therefore she cannot be held criminally culpable under section 4 of this statute; however, she could be held liable under sections 1 or 2 of Nev. Rev. Stat. 212.165.

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IV. CONCLUSION

Section 4 clearly demonstrates an intent to punish a prisoner for possession of a cellphone without lawful authorization. Ms. Plunkett cannot be charged vicariously under Section 4 because Sections 1 and 2 show a clear legislative intent to carve out liability for vicarious liability in the provision of cell phone context. As a result, Ms. Plunkett cannot lawfully be charged with liability under Section 4.

IT IS HEREBY ORDERED AS FOLLOWS:

Defendant's Motion to Dismiss is Granted. The indictment against Ms. Plunkett is hereby dismissed. The State is free to pursue other charges as the State deems appropriate.

DATED this 30th day of October, 2017.

By:

DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that service of the foregoing **DEFENDANT'S PROPOSED ORDER** was made this 31 day of October, 2017 upon the appropriate parties hereto by depositing a true copy thereof in the United States mail, postage prepaid and addressed to:

JAY P. RAHMAN, ESQ.
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155
(702) 671-2590

An employee of
LAS VEGAS DEFENSE GROUP, LLC.

NOASC
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
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200 Lewis Avenue
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALEXIS PLUNKETT,

Defendant.

CASE NO: C-17-324821-2

DEPT NO: XVII

STATE'S NOTICE OF APPEAL

TO: ALEXIS PLUNKETT, Defendant; and

TO: ADAM SOLINGER, ESQ., Attorney for Defendant; and

TO: MICHAEL VILLANI, District Judge, Eighth Judicial District, Dept. No. XVII

NOTICE IS HEREBY GIVEN THAT THE STATE OF NEVADA, Plaintiff in the above entitled matter, appeals to the Supreme Court of Nevada from the granting of Defendant's motion to dismiss, pursuant to NRS 177.015(1)(b).[1]

Dated this 29th day of September, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Office of The Clark County District Attorney

[1]As of the date of this filing, no written order has been issued.

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing State's Notice of Appeal was made this 29th day of September, 2017 by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ADAM SOLINGER, ESQ.
Las Vegas Defense Group, LLC.
2300 W. Saraha Avenue, Suite 450
Las Vegas, Nevada 89102

MICHAEL VILLANI
Eighth Judicial District Court, Dept. XVII
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

BY _____
Employee,
Clark County District Attorney's Office

RJM//ed