IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. ALEXIS ANNE PLUNKETT, Respondent.	CASE NO: 74169

FAST TRACK STATEMENT

ROUTING STATEMENT: This is an appeal from a pretrial order of dismissal of an indictment charging, inter alia, several counts of Possessing a Telecommunications Device, a Category D felony, for failure to state a crime because the judge determined that the State is not permitted to pursue vicarious liability as an aider and abettor for crimes committed under subsection 4 of NRS 212.165. None of the various categories in NRAP 17 appear to squarely fit this situation and the State has no objection to routing this appeal to either the Court of Appeals or the Supreme Court.

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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200 Lewis Avenue
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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District Court, Clark County, Nevada: C-17-324821-2

5. Name of judge issuing decision, judgment, or order appeal from:
Michael P. Villani

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last?

N/A

7. Conviction(s) appealed from: N/A

8. Sentence for each count: N/A

9. Date district court announced decision, sentence, or order appealed from:
September 21, 2017

10. Date of entry of written judgment or order appealed from:
October 31, 2017

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: N/A

11. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court: N/A

(a) Specify whether service was by delivery or by mail: N/A

12. If the time for filing the notice of appeal was tolled by a post-judgment motion,

(a) Specify the type of motion, and the date of filing of the motion: N/A

(b) Date of entry of written order resolving motion: N/A

13. Date notice of appeal filed: October 10, 2017.

14. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other:
NRAP 4(b)

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from: NRS 177.015(1)(b)

16. Specify the nature of disposition below, e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.:

Order granting Defendant's Motion to Dismiss.

17. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings):

None

18. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):

None

19. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues you intend to raise in this appeal:

None known

20. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

On July 6, 2017, the State charged Alexis Plunkett by way of Indictment with two counts of CONSPIRACY TO UNLAWFULLY POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Gross Misdemeanor – NRS 212.165, 199.480 – NOC 55248) and twelve counts of POSSESS PORTABLE TELECOMMUNICATION DEVICE BY A PRISONER (Category D Felony – NRS 212.165 – NOC 58368). Appellant's Appendix ("AA") 21-33. On July 13, 2017, a

Superseding Indictment was filed charging Plunkett with the same charges, but adding Rogelio Estrada as a co-defendant. AA 41-53.

On August 7, 2017, Plunkett filed a pre-trial Petition for Writ of Habeas Corpus. AA 54-85. The State filed its Return on August 11, 2017. AA 86-99. Plunkett filed an Answer to the Return on August 22, 2017. AA 100-104. The District Court heard the matter on August 31, 2017, and denied Plunkett's Petition for Writ of Habeas Corpus. AA 105-17.

On September 11, 2017, Plunkett filed a Motion to Dismiss ("Motion"). AA 118-26. The State filed an Opposition on September 16, 2017, and a Supplemental Opposition on September 20, 2017. AA 127-36, 137-83. Plunkett filed a "Supplemental Briefing on Legislative Intent" on September 20, 2017. AA 184-208. The Court heard arguments, and granted Plunkett's Motion on September 21, 2017. AA 209-18. The Order granting Plunkett's Motion to Dismiss was filed on November 1, 2017. AA 219-24.

The State filed a Notice of Appeal on September 29, 2017. AA 225-26. Its Fast Track Statement herein follows.

21. Statement of facts. Briefly set forth the facts material to the issue on appeal:

On or about March 23, 2017, Detective Aaron Stanton of the Las Vegas Metropolitan Department ("LVMPD") was informed by Corrections Officer Munoz of suspicious activity between Plunkett and an inmate, Andrew Arevalo ("Arevalo"),

whom she was representing. AA 4(16)-5(17). Detective Stanton investigated by employing a covert video camera disguised as a smoke detector on the ceiling of one of the Clark County Detention Center's ("CCDC") visiting rooms. AA 5(19). The camera only had video capabilities, and did not pick up sound. AA 6(21). Since there were several visiting rooms in CCDC, Detective Stanton was not able to record all of Plunkett's visits to Arevalo, since only one room was equipped with the video camera. Id. The video camera recorded multiple visits between Plunkett and Arevalo that took place between April 8, 2017, and May 10, 2017. AA 6(22). Detective Stanton testified that Plunkett seemed to visit Arevalo more frequently than most attorneys visited clients, and mainly outside of regular business hours. Id. The visits also seemed to be more social than professional. AA 6(22-23). Stanton testified to the videos that were introduced as Grand Jury Exhibits on July 5, 2017.

On April 8, 2017, at 7:38 p.m., Plunkett visited Arevalo. AA 6(24). The video shows Plunkett and Arevalo sitting across from each other, and Plunkett manipulating her iPhone to turn up the volume and activate the speakerphone. AA 7(26-27). Arevalo leaned in toward the phone that was placed in the middle of the table, and seems to be talking. AA 7(27).

On April 10, 2017, 7:45 p.m., Plunkett visited Arevalo, made a phone call on her white-colored iPhone, and then placed the phone in the middle of the table

between Arevalo and herself, with the speakerphone button activated. AA 7(28). Arevalo is shown talking while Plunkett is flipping through her binder. Id.

On April 16, 2017, at 1:16 p.m., Plunkett visited Arevalo, and made a phone call from her contacts list before placing the call on speaker. AA 8(30-31). Plunkett then placed the phone in the center of the table and seemingly manipulated the volume. AA 8(31). Arevalo seemed to be speaking toward the phone, and Plunkett moved the phone closer to Arevalo and again manipulated the volume button. Id. While Arevalo was leaning down toward the phone and talking, Plunkett was fidgeting with something in her hands. Id. Before retrieving her phone, Plunkett terminated the phone call. AA 8(32). A little later, at 1:43 p.m., Plunkett, who was holding her phone, handed her phone to Arevalo, who held it in his hands and talked to Plunkett while she sat back in her chair. AA 9(33).

On April 18, 2017, at 7:49 p.m., Plunkett again visited Arevalo. AA 9(34). Plunkett placed a phone call, put the phone in the center of the table, with the speaker positioned toward Arevalo, and fidgeted with some cards while Arevalo leaned toward the phone and seemed to be talking. AA 9(35)-10(37). At the end of the phone call, Plunkett seemed to be looking toward the window of the visiting room. AA 10(37).

On April 20, 2017, at 8:04 p.m., Plunkett, during her visit with Arevalo, turned her iPhone around and extended it so the screen faced Arevalo. AA 10(38). She

then placed the phone face-up in the center of the table, with the speakerphone button illuminated. AA 10(39). Arevalo again exhibited body language consistent with someone communicating over the phone. AA 10(39). Plunkett retrieved the phone, terminated the call, and made a subsequent call. AA 10(39). She then put it in the center of the table, before immediately retrieving it and placing it under her notebook. AA 10(40).

Plunkett again visited Arevalo on April 23, 2017, at 7:44 p.m., and again placed a call and put it on speakerphone before pushing it toward the center of the table, toward Arevalo. AA 10(40)-11(41). While Plunkett sat back in the corner, Arevalo seemed to be talking over the phone. AA 11(41).

On April 25, 2017, at 8:46 p.m., Plunkett placed a phone call, put her phone in the middle of the table and put the phone on speakerphone. AA 11(42). Later, at 10:08 p.m., Plunkett had her phone in her hands, then put it on speakerphone and placed it in the center of the table; Arevalo again exhibited behavior consistent with him being a participant on the phone call. AA 11(43).

On April 27, 2017, at 3:29 p.m., during her visit, Plunkett manipulated her cell phone and handed it to Arevalo, who used it before handing it back to Plunkett. AA 11(44).

During a visit on April 30, 2017, at 10:08 p.m., Plunkett placed a phone call on the iPhone in the middle of the table and put it on speakerphone. AA 12(45).

Arevalo's posture and behavior was consistent with being a participant on the phone call. AA 12(45-46). The call lasted until approximately 10:25 p.m., and Plunkett terminated the call and retrieved her phone. AA 12(46).

On May 2, 2017, at 10:06 p.m., Plunkett had her messages open, and turned the phone around and extended her arm out so the screen faced Arevalo, who leaned forward to look at the phone. AA 12(47). Both Plunkett and Arevalo laughed, and Plunkett continued to show Arevalo text conversations. AA 12(48).

On May 8, 2017, at 2:22 p.m., during her visit, Plunkett placed her phone in the center of the table, made a phone call, and put the phone on speakerphone. AA 12(48)-13(49). The phone call lasted nearly ten minutes, and Arevalo seemed to be a participant on the phone call. AA 13(49).

Detective Stanton testified that, as an inmate at the CCDC, Arevalo would not have the ability to make a phone call over a cell phone. AA 10(39). He would only have access to the phones provided by the jail. Id. LVMPD Sergeant Jere Ebneter, assigned to the gang special investigation unit at CCDC, confirmed that jail calls made by inmates are recorded, and inmates are advised of this fact. AA 16(62), 18(71-72).

Plunkett also visited another client at CCDC, Rogelio Estrada, on April 28, 2017. AA 13(49-50). At 2:20 p.m., Plunkett placed a phone call on her iPhone, put it on speakerphone, adjusted the volume, and put the phone in the center of the table.

AA 13(51). Estrada reached over and moved the phone right in front of him, and Plunkett did nothing to prevent him from doing so. AA 13(51-52). Estrada seemed to be communicating through the phone for several minutes while Plunkett looked out the window. AA 13(52). Estrada then pushed the phone back over to Plunkett, who terminated the phone call. Id.

When Detective Stanton and his partner interviewed Plunkett on May 8, 2017, in the CCDC outside courtyard, they asked her whether she had let inmates use her phone, and Plunkett stated she would make phone calls on behalf of inmates to bondsmen or for case-related activity, but never let inmates touch the phone or do the talking. AA 14(53-54). The form Plunkett signed to bring her phone into the jail expressly stated that cell phone use was prohibited with the exception of calling detention center staff or 911 in case of emergency. AA 14(55), 17(65-66), 17(68). Plunkett told the detectives that inmates did not do any talking over the phone, and did not touch her phone. AA 15(57-58).

22. Issues on appeal. State concisely the principal issue in this appeal:

I. Whether the Court Abused Its Discretion in Granting Plunkett's Motion to Dismiss

23. Legal argument, including authorities:

I. STANDARD OF REVIEW

This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 188 P.3d 51 (2008);

McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999). An abuse of discretion is "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law[.]" *Abuse of Discretion,* Black's Law Dictionary (Abridged 6th Ed. 1991).

To the extent this Court reviews issues of statutory construction, the review is de novo. Davis v. Beling, 128 Nev. 301, 314, 278 P.3d 501, 510 (2012) ("questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo"); Nelson v. Heer, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007).

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING PLUNKETT'S INDICTMENT BECAUSE SHE WAS PROPERLY CHARGED UNDER NRS 212.165(4)

A. An Aider and Abettor Is Criminally Liable as a Principal.

Both federal and Nevada law punish an aider and abettor as a principal, and subject her to the same punishment she would have received had she directly committed the crime. "Whoever commits 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); Rosemond v. United States, __ U.S. __, 134 S. Ct. 1240, 1245 (2014). This reflects the "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." Rosemond, 134 S. Ct. at 1245; see also J. HAWLEY & M. MCGREGOR, CRIMINAL LAW 81 (1899).

Nevada has adopted this theory of vicarious liability, wherein

> Nevada law does not distinguish between an aider and abettor to a crime and an actual perpetrator of a crime; both are equally culpable. Under NRS 195.020, every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission is guilty as a principal.

Sharma v. State, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002); see also Garner v. State, 116 Nev. 770, 782, 6 P.3d 1013, 1021 (2000) ("aiding and abetting the commission of an offense is treated and punished the same as directly committing the offense"). To aid and abet a specific intent crime, the defendant must aid and abet with the specific intent to commit the crime. Sharma, 118 Nev. at 652, 56 P.3d at 870. In Bolden v. State, the Nevada Supreme Court held that an instruction on aiding and abetting was correct, where it explained:

> All persons concerned in the commission of a crime who 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.

121 Nev. 908, 914, 124 P.3d 191, 195 (2005).

The Ninth Circuit, in United States v. Garcia, found that aiding and abetting liability is implied in every substantive offense in federal law:

> Aiding and abetting is simply one means of committing a single crime. Indeed, we have often referred to aiding and abetting as a theory of liability. See, e.g., Gaskins, 849 F.2d [454,] 459; United States v. Angwin, 271 F.3d 786, 800 (9th Cir. 2001). We have also held a number of times in different contexts that ***aiding and abetting is embedded in every federal indictment for a substantive crime***. See, e.g., Ramirez-Martinez, 273 F.3d [903,] 911; Gaskins, 849 F.2d at 459 (noting that "all indictments for substantive offenses must be read as if the alternative provided by 18 U.S.C. § 2 were embodied in the indictment") (internal quotation marks and citations omitted); United States v. Armstrong, 909 F.2d 1238, 1241, 1242 (9th Cir. 1990) ("Aiding and abetting is implied in every federal indictment for a substantive offense[,]" even though the elements necessary to convict as a principal and as an aider and abettor are different.); United States v. Vaandering, 50 F.3d 696, 702 (9th Cir. 1995) (holding that a general aiding and abetting instruction need not be tied to a specific count of an indictment). It follows that ***aiding and abetting is a different means of committing a single crime, not a separate offense itself***, for other-wise it could not be implicit in a substantive charge.

400 F.3d 816, 820 (9th Cir. 2005) (emphasis added).

A defendant may aid and abet a possessory crime. Roland v. State, 86 Nev. 300, 302-03, 608 P.2d 500, 501-02 (1980) (finding defendant was aider and abettor where defendant was present and helped negotiate offender's possession of short-barreled shotgun in violation of the law); Franklin v. State, 96 Nev. 417, 321, 610 P.2d 732, 735 (1980) (finding that since defendant's accomplice had short-barreled

shotgun during the robbery "a jury could reasonably conclude that Franklin aided or encouraged that possession"); see also Roy v. United States, 652 A.2d 1098 (D.C. 1995) (finding one can aid and abet possessory crime).

A defendant may aid and abet a possessory crime even though the offense depends on the status of the offender, such as the offense of being a felon in possession of a firearm. This requires that a defendant have actual knowledge of the offender's status as a felon. United States v. Graves, 143 F.3d 1185, 1186 (9th Cir. 1998) (reversing because failure to show defendant knew of the offender's prior felony). Similarly, in United States v. Ford, the defendant was convicted of aiding and abetting the possession of a firearm by a felon, her husband, when she provided the guns her husband used at a range and in her presence. 821 F.3d 63, 70-71, 75 (1st Cir. 2016). The Ford Court found that Darlene Ford could be held liable as a principal for the possession of a firearm by a felon, but vacated the conviction due to an erroneous jury instruction.[1] Id.

In the instant case, Plunkett intended to aid Arevalo and Estrada's possession of a telecommunications device, in violation of NRS 212.165(4), as detailed infra;

[1] The jury instruction stated that Darlene "knew or had reason to know" her husband had previously been convicted of a felony. In order to aid and abet, Darlene Ford needed to have actual knowledge of the fact that her husband was a felon, which was an essential element of the substantive offense. 823 F.3d at 75.

accordingly, Plunkett is liable as a principal. Plunkett, a criminal defense attorney, visited two of her clients, who were inmates at CCDC awaiting proceedings on various felony charges. AA 5(17-19). She thus had actual knowledge of Arevalo and Estrada's status as jail inmates. Moreover, the Electronic Telecommunications Device Acknowledgement Forms Plunkett signed upon entering CCDC with her cell phone exhibit her acknowledgment that the use of cell phones is prohibited for anything other than calling CCDC staff or 911.[2]

By bringing her iPhone into the visiting rooms and allowing Arevalo and Estrada to engage in unrecorded and unauthorized phone conversations, as well as their actual possession of her phone, Plunkett aided and abetted Arevalo and

[2] The Form asks the individual to check the portable device they are bringing into the facility, with the "Cell phone" box clearly explaining that, "the use of a cell phone is only authorized to contact CCDC staff (702-xxx-xxxx) or 911 in the event of an emergency. Unauthorized use will subject user to criminal prosecution." AA 69-85. The Form continues and clearly states that,

> [t]he 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.

AA 69-85. The purpose options provide for "casework," "evaluations," or "other/specify." Plunkett, on the dates she signed the Form, checked the boxes stating she was bringing in a cell phone, for purposes of "casework." However, the phone calls made while in the visiting room with Arevalo are primarily to other gang members who have criminal ID numbers. AA 113.

Estrada's control and possession of a telecommunication device, in violation of NRS 212.165(4). Plunkett, as detailed infra, may therefore be charged, convicted and punished as a principal for aiding and abetting the violation of NRS 212.165(4). Accordingly, this Court should reverse the District Court's Motion to Dismiss and allow the charges against Plunkett to be reinstated.

B. Plunkett Was Properly Charged Under a Theory of Aiding and Abetting Because the Liability Theories of NRS 212.165(1) and (2) Do Not Apply to Subsection (4).

NRS 212.165 reads:

> 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.

(Emphasis added). This statute, including current subsections (1), (2), and (3), was enacted in 2007, following the 2005 escape from prison of an inmate thanks to a cell phone given to him by a social worker. AA 152, 161-63. The escapee killed several people before he was apprehended. Id.; AA 153. During the meeting of the 2013 Legislature's Assembly Committee on the Judiciary, on March 26, 2013, Pershing County District Attorney Jim Shirley explained that the 2007 version of NRS 212.165 "has provisions for noninmates. That is the reason those provisions are in there, so no one can take a cell phone *into a prison*." AA 153 (emphasis added). Current subsection (4) was added in 2013, after legislators noticed the loophole exempting jail inmates from liability, such as when a jail inmate in Pershing County was found in possession of a cell phone. See id.; AA 155; see also Sheriff v. Andrews, 128 Nev. 544, 286 P.3d 262 (2012). The Committee did not, in 2013,

enact specific or enumerated provisions criminalizing persons who provide telecommunication devices to jail inmates.

In granting the Motion to Dismiss, the District Court accepted Plunkett's argument that NRS 212.165(1) and (2) provide the exclusive vicarious liability for the offense, finding that 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 [NRS] 212.165." AA 222. The Court further held that "in looking at the legislative history, it is clear that the Legislature was only concerned with making sure persons in jails were covered under [NRS] 212.165 . . . 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." AA 216-17. By so ruling, the District Court misinterpreted the statute and existing legal authority, and thus abused its discretion.

"When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." Nelson, 123 Nev. at 224, 163 P.3d at 425. Legislative intent only becomes the controlling factor for statutory construction if the statute is ambiguous. Id. Legislative history, reason, and public policy considerations, as well as the context and purpose of the law may be used to determine legislative intent. Id. "The entire subject matter and policy

may be involved as an interpretive aid." Leven v. Frey, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007); see also Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51, 107 S. Ct. 1549. 1555 (1987) ("in expounding a statute, we must not be guided by a single sentence . . . but look to the provisions of the whole law, and to its objects and policy"), overruled in part on other grounds, Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 123 S. Ct. 1471 (2003). No part of a statute should be construed in a way that produces absurd or unreasonable results. E.g., Leven, 123 Nev. at 405, 168 P.3d at 716; Harris Assocs, 119 Nev. at 641-42, 81 P.3d at 534. Absurd or unreasonable results are those that are at odds with the legislative intentions of the drafters and the purpose of the statute. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 5571, 102 S. Ct. 3245, 3250 (1982).

In analyzing this statute, this Court must therefore first consider the language and plain meaning of the statute. Only if the Court finds this statute ambiguous may it consider canons of statutory construction and the legislative intent of the drafters.

1. The language of the statute is clear.

The language of the statute is clear and unambiguous, and the District Court abused its discretion in looking beyond its plain meaning. See Nelson, 123 Nev. at 224, 163 P.3d at 425.

A plain reading of NRS 212.165 clearly establishes that subsections (1), (2) and (3) apply to prisoners in the state prison system, while subsection (4) applies to

prisoners in a jail system. While subsections (1) and (2) provide distinct penalties for accomplice liability, separate from that of subsection (3), they themselves do not exclude the possibility of someone aiding and abetting their commission. For example, a wife, parent, or friend could bribe a prison guard to furnish a cell phone to a state prison inmate. While the prison guard would be criminally liable under subsections (1) or (2), the wife, parent or friend would be equally liable for the same offense under an aiding and abetting theory. There is no stated prohibition in NRS 212.165 against aiding and abetting liability in any of the subsections, and it would be against public policy and safety to create such exemptions where they do not exist.

In the instant case, Arevalo and Estrada were jail inmates, and their offense therefore clearly fell under NRS 212.165(4). Subsections (1) and (2) only detail criminal liability for those persons who furnish or unlawfully carry a telecommunications device into a facility of the Department of Corrections – which does not include the Clark County Detention Center. Looking at the plain language of the statute, Plunkett did not commit either of the offenses set out in subsections (1) and (2), as she carried the cell phone in question into a jail to facilitate its use by Arevalo and Estrada. She did not carry the cell phone into a state prison, nor did she provide her cell phone to prisoners within the state prison system.

Since only subsection (4) criminalizes the possession of a cell phone in a jail, and since there is no alternative liability theory set out in the statute for persons such as Plunkett who provide cell phones to jail inmates, aiding and abetting liability applies to subsection (4), as it does for any other crime. See supra § I.A.

The District Court's reasoning was flawed when it held that Plunkett could be held liable under NRS 212.165(1) or (2) but not under subsection (4), and the court thus abused its discretion when it went beyond the language of the statute to interpret NRS 212.165(4), since the language is clear and unambiguous. AA 216-17, 222.

2. An examination of the Legislature's intent fails to show that it intended to exempt from criminal liability those persons providing jail inmates with telecommunication devices.

If this Court determines that the language of the statute is ambiguous, it may then look at legislative history, the reason for the statute, and the public policy considerations that led to the statute being drafted. Leven, 123 Nev. at 405, 168 P.3d at 716; Nelson, 123 Nev. at 224, 163 P.3d at 425; Harris Ass'n v. Clark Cty. Sch. Dist., 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003).

The purpose of subsection (4) of NRS 212.165, as explained by Pershing County District Attorney Jim Shirley to the 2013 Legislature's Assembly Committee on the Judiciary, is "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*." AA 153 (emphasis added).

Despite what Plunkett claims in her Motion to Dismiss, and despite the District Court's decision to grant Plunkett's Motion, NRS 212.165 is not a "comprehensive statutory scheme." AA 123. The only purpose of subsection (4) was to create liability for jail inmates who possess telecommunications devices. Nothing in the minutes suggests that the Legislature intended to exempt from liability those persons who aid and abet this offense. During the Senate Committee on Judiciary, John Wagner[3] mentioned that he thought "the person who smuggles in cell phones should also be guilty of a crime." AA 165. Plunkett argued, and the District Court seemingly agreed, that this one sentence, which the Committee did not elaborate on, leads to the "righteous conclusion . . . that the legislature considered and chose not to create such liability" – meaning that the Legislature chose not to penalize persons such as Plunkett who provided cell phones to jail inmates. AA 187; see also AA 222. Such a conclusion is not only absurd, it goes against the very purpose of the entire statute.

Under the omitted-text canon of statutory construction, a matter not covered is to be treated as not covered. "When a legislature prescribes in a fashion that courts

[3] John Wagner was present at the Senate Committee on the Judiciary meeting as a representative of the Independent American Party. He was neither a Committee Member, nor a Guest Legislator. AA 160.

regard as providing only 'in part' and not 'in full,' *what remains is to be governed by preexisting law, unamended, or rather by a new law, enacted by the courts*. Judicial amendment flatly contradicts democratic self-governance." BRYAN A. GARNER & J. ANTONIN SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 95-96 (2012).

It was therefore not for the District Court to determine that the inclusion of a vicarious liability component in NRS 212.165's subsections (1) and (2) acted to obviate aider-and-abettor liability for subsection (4). The Legislature did not amend those subsections to apply to jails as well as prisons. Since no separate theory of liability exists for subsection (4), this Court should look at pre-existing law, which applies aiding and abetting liability to all crimes, including possessory crimes, as detailed supra § I.A. As Plunkett aided and abetted the violation of NRS 212.165(4) by providing her cell phone to Arevalo and Estrada and helping them gain actual and constructive possession of her phone, she was properly charged with the violation of NRS 212.165(4) as a principal.

3. Plunkett may be sentenced as a principal for the violation of NRS 212.165(4) under the aiding and abetting theory of liability.

NRS 212.165(4) punishes "a prisoner" who possesses or controls a telecommunications device. The District Court held that since "Plunkett was not a prisoner, […] she cannot be held criminally culpable under section 4 of [NRS

212.165]." AA 222. This misstates the law: just as an individual may be liable for aiding and abetting a felon in possession of a weapon, as detailed supra § I.A, a person may also be criminally liable for aiding and abetting a prisoner to possess a telecommunications device. See Graves, 143 F.3d at 1186; Ford, 821 F.3d at 70-71, 75. As no alternative theories of liability exist for subsection (4), Plunkett may properly be charged and convicted of aiding and abetting a "prisoner" to possess a telecommunications device.

The District Court disregarded the law in finding that, "the language of the sections at issue . . . demonstrate a clear intent for separate punishment," between the "person[s]" of subsections (1) and (2) and the "prisoner[s]" of subsections (3) and (4). AA 222. With regards to sentencing, NRS 212.165(5)(b) provides that

> [a] sentence imposed upon a prisoner pursuant to subsection 3 or 4 . . . 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.

Moreover, NRS 212.165(7) details how a jail inmate may be sentenced if the charge for which he was in custody is dismissed. While the particularized sentencing structure set out in subsection (5) explains how the sentence should be applied in relation to an inmate's pre-existing sentence, this does not exclude Plunkett from being sentenced as a principal to the same sentence as the jail inmates she was aiding and abetting. Plunkett has no underlying sentence, as she was not a jail inmate.

However, as an aider and abettor, Plunkett would be punished as a principal and sentenced to a Category D felony pursuant to NRS 212.165(4)(a), since Arevalo and Estrada were in CCDC awaiting proceedings for various felony charges.

In arguing her Motion to Dismiss and her Petition for Writ of Habeas Corpus, Plunkett argued that the sentencing structures for subsections (1) and (2) set out a different penalty scheme than aiding and abetting, which punishes the aider and abettor as a principal. AA 210; see, e.g., Sharma, 118 Nev. at 652, 56 P.3d at 870. While this may be true, the liability theories set out in subsections (1) and (2) do not apply to subsection (4), as detailed supra. Instead, aiding and abetting liability applies to subsection (4), and Plunkett would thus receive the same sentence as Arevalo or Estrada – one consistent with a Category D felony, pursuant to NRS 212.165(4)(a). Had Plunkett furnished the cell phone to a state prison inmate, she would have been guilty of a Category E felony: the only difference between a Category E and a Category D felony is that the first provides for mandatory probation, whereas the second leaves probation to the discretion of the sentencing court. See NRS 193.130(2)(d), (e).

The simple fact that Plunkett could receive a slightly harsher sentence as an aider and abettor under NRS 212.165(4) than she would if charged under subsections (1) and (2) is not an "absurd result," as Plunkett alleged in her pre-trial Petition for Writ of Habeas corpus. AA 107.

An absurd result is one that is "plainly at variance with the policy of the legislation as a whole." City of N.Y. v. Beretta, 524 F.3d 384, 401 (2d Cir. 2008); see also *Absurdity*, Black's Law Dictionary (Abridged 6th Ed. 1991) ("an interpretation that would lead to an unconscionable result"); John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387, 2390 (2003) ("the absurdity doctrine . . . permits a court to adjust a clear statute in the rare case in which the court finds that the statutory text diverges from the legislature's true intent, as derived from sources such as the legislative history or the purpose of the statute as a whole"). The purpose of the statute is to bar prison and jail inmates from possessing cell phones. While Plunkett may be more severely punished for providing a cell phone to a jail inmate than a prison inmate, this does not run counter to the Legislature's intent when it enacted NRS 212.165 in 2007, or when it amended the statute to include subsection (4) in 2013.

In the instant case, while it may appear odd that Plunkett could be subject to a mildly higher sentence as an aider and abettor for the violation of NRS 212.165(4), this is not an absurd result. The absurd result would be in accepting that the Legislature intended to only punish those who furnished telecommunications devices to prisoners in the state prison system, and not those who furnished those devices to prisoners in jail awaiting convictions on felony charges, like Arevalo or Estrada.

Plunkett cannot, under the instant facts, be charged under subsections (1) and (2), which only apply to state prisons, although she can be charged and sentenced under NRS 212.165(4) as an aider and abettor to the possession of her cell phone by a jail inmate. Accordingly, the District Court abused its discretion in granting Plunkett's Motion to Dismiss, and this Court should reverse this decision and reinstate the State's Indictment against Plunkett.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THE CHARGE OF CONSPIRACY OUT OF HAND

In granting Plunkett's Motion to Dismiss, the District Court wholly disregarded the two Conspiracy counts with which Plunkett was charged, and dismissed the Indictment in its entirety, only ruling that Plunkett could not be charged with Possession of a Portable Telecommunications Device by a Prisoner under an aiding and abetting theory of liability. AA 222. By disregarding the law and the facts that support Plunkett being charged both (1) with Conspiracy to Possess Portable Telecommunications Device by a Prisoner, and (2) under a conspiracy theory of liability, the court manifestly abused its discretion.

First, the charge of Conspiracy to Possess Portable Telecommunications Device by a Prisoner, and that of Possess Portable Telecommunications Device by a Prisoner under a theory of aiding and abetting, are separate and distinct, as each requires proof that the other does not. A conspiracy is an agreement between two or

more persons for an unlawful purpose. Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979). "[C]onspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." Gaitor v. State, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990) (citation omitted). Additionally, the Nevada Supreme Court has concluded that, "the unlawful agreement is the essence of the crime of conspiracy" and that a "conspiracy is committed upon reaching the unlawful agreement." Nunnery v. Eighth Judicial Dist. Court, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008). Aiding, abetting, and counseling are not terms that presuppose the existence of an agreement, but instead have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. Pereira v. United States, 347 U.S. 1, 11-12, 74 S. Ct. 358, 364 (1954); Nye & Nissen v. United States, 336 U.S. 613, 619-20, 69 S. Ct. 766, 770 (1949).

The facts in the instant case supported Plunkett being charged with Conspiracy to Possess a Portable Telecommunications Device by a Prisoner: the videos suggest that Plunkett and her clients, Arevalo and Estrada, agreed that she would give them constructive and actual possession of her iPhone. Plunkett regularly placed her phone, on speakerphone, on the table between herself and Arevalo or Estrada. She also handed her phone to, and allowed her phone to be seized by, both inmates.

Second, the State specifically charged Plunkett with two substantive counts of Conspiracy. Moreover, the Indictment also included conspiracy as an alternative theory of liability to aiding and abetting for the Possess a Portable Telecommunications Device by a Prisoner counts,[4] explicitly putting Plunkett and the Court on notice of the State's intent to pursue conspiracy as an alternative theory of liability. See Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983); AA 21-33. Even if this Court were to find that aiding and abetting liability does not apply to the possession charges, Plunkett could still have been held liable under a conspiracy theory of liability for those same charges.

The Court's Order granting Plunkett's Motion to Dismiss is entirely devoid of any discussion as to the Conspiracy charges, whether in the discussion of the facts, or in the application of the law. Not only did the District Court fail to consider the substantive Conspiracy charges in dismissing the Indictment, but it also failed to address conspiracy as a theory of liability as to the possession charges. By disregarding the facts of the case that supported the counts of Conspiracy, and dismissing them out of hand when granting Plunkett's Motion to Dismiss, the

[4] The Indictment stated that Plunkett was liable,

> under one or more of the following principles of liability, to wit: . . . (2) by aiding or abetting . . . ; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed. . .

See AA 21-33.

District Court therefore abused its discretion, and this Court should accordingly reverse the District Court's decision and reinstate the State's Indictment against Plunkett.

IV. CONCLUSION

For all the foregoing, the State respectfully requests that the District Court's decision granting Plunkett's Motion to Dismiss be REVERSED**.**

24. Preservation of issues. State concisely how each enumerated issue on appeal was preserved during trial. If the issue was not preserved, explain why this court should review the issue:

N/A

25. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: If so, explain:

This is a legal issue of first impression, as the interpretation of NRS 212.165(4) has not yet been reviewed by an appellate court.

VERIFICATION

1. I hereby certify that this Fast Track Statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point and Times New Roman style.
2. I further certify that this fast track statement does comply with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 7,156 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

Dated this 22nd day of January, 2018.

Respectfully submitted,
STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Ryan J. MacDonald*

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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 22, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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