IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
v.
ALEXIS ANNE PLUNKETT,
Respondent.

CASE NO: 74169

REPLY TO FAST TRACK RESPONSE

ARGUMENT

I. AIDING AND ABETTING LIABILITY APPLIES TO NRS 212.165(4)

Nothing in the legislative history or plain reading of the text suggests that the 2007 Legislature intended NRS 212.165(1) and (2) to create the exclusive and exhaustive source of vicarious liability for the statute: these subsections merely provide for a lesser penalty than that which a principal would receive under subsection (3). As detailed in the State's Fast Track Statement ("FTS"), Plunkett is liable under an aiding and abetting theory, as a principal, for the violation of NRS 212.165(4). FTS at 10-17. Indeed, where the statute does not explicitly provide for vicarious liability under subsection (4), general principles of vicarious liability, including aiding and abetting under NRS 195.020, apply. Id.

Likewise, nothing in the 2013 Legislature's discussions suggests that it intended to exempt furnishers of cell phones to jailees from criminal liability. Plunkett greatly overstates the one comment[1] in the Senate Committee on the Judiciary session on April 29, 2013, wherein, during public comment, John Wagner mentioned in passing the possibility of punishing those providing cell phones to jailees. Plunkett construes the fact that "no one followed up" on this comment to mean that "no one agreed that it was something that needed to be addressed." Fast Track Response ("FTR") at 7. This claim is absurd. As detailed in the State's FTS, Plunkett's bald suppositions and conjectures do not support her self-serving assertion that the Legislature specifically intended to carve out an exception to criminal liability for furnishers of cell phones to *jail* inmates.

NRS 195.020 holds that:

> *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

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[1] Despite Plunkett's assertion to the contrary, the topic of setting out vicarious liability for subsection (4) was not mentioned "twice." FTR at 7. Nothing in Assemblywoman Fiore's question about the history of the 2007 bill suggests that she proposed creating vicarious liability for a furnisher under subsection (4). Plunkett's claim that Assemblywoman Fiore's question shows that "everyone is aware" of the issue (FTR at 5) is unsupported by the record.

> or misdemeanor *is a principal, and shall be proceeded against and punished as such*. . . .

(Emphasis added). The fact that subsection (4) uses the term "prisoner" instead of "person" does not exempt Plunkett from liability: the purpose of the statute is to prohibit the unlawful possession of cell phones by *prisoners*. Plunkett is still liable as a *person* who aids and abets the possession of a cell phone by a prisoner, much as a *person* who aids and abets the possession of a firearm by a felon may be liable as a principal. See FTS at 13-15, 23-26.

The District Court arbitrarily and without reason granted Plunkett's Motion to Dismiss without properly considering the facts and the law, as detailed herein and in the State's FTS. As such, it abused its discretion and this Court should reverse the District Court's Order and reinstate the Indictment against Plunkett.

II. THE CANONS OF STATUTORY CONSTRUCTION SUPPORT PLUNKETT BEING CHARGED PURSUANT TO NRS 212.165(4) AS AN AIDER AND ABETTOR

Plunkett claims that the canons of statutory construction of *in pari materia*, *expressio unius est exclusio alterius*, and *ejusdem generis* support her argument that the 2013 Legislature intended to exclude persons such as Plunkett from any criminal liability under NRS 212.165.

This Court should only look at the legislative intent and canons of statutory construction if the language of the statute is ambiguous: here, NRS 212.165 is neither unclear nor ambiguous. See FTS at 18-20. Subsections (1), (2), and (3)

apply to state prisons. Subsection (4), added six years after subsections (1), (2), and (3), prohibits the possession of a telecommunications device by a jail inmate. Aiding and abetting liability applies to all of these subsections, including subsection (4). See FTS at 19. Yet Plunkett glosses over the fact that the statute is unambiguous and rests her entire argument on her interpretation of the statute's legislative history.

Plunkett's reliance on the above-mentioned canons of statutory construction to support her position that the Legislature affirmatively chose not to punish providers of cell phones to jailees is misplaced. As noted infra and in the State's FTS, the canons of statutory construction support Plunkett being charged as an aider and abettor under NRS 212.165(4).

First, the canon of *ejusdem generis* has no place in the instant case. *Ejusdem generis* is a canon that applies "when a drafter has tacked on a catchall phrase **at the end of an enumeration of specifics**, as in *dogs, cats, horses, cattle and other animals*." Bryan A. Garner & J. Antonin Scalia, Reading Law: The Interpretation of Legal Texts 199 (2012). It is "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Ejusdem generis*, Black's Law Dictionary (Abridged 6th Ed. 1991). There is no such enumeration or list of specifics in NRS 212.165, as such, this canon need not be considered when interpreting NRS 212.165.

Second, the canon of construction stating that statutes should be interpreted *in pari materia* does not support Plunkett's assertion that "it is clear that the Legislature intended that no liability extend to persons who provide phones to jailees in jail." FTR at 13. According to Black's Law Dictionary, "[i]t is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." *In Pari Materia*, Black's Law Dictionary. Statutes *in pari materia* are to be interpreted together, as though they were one law:

> Any word or phrase that comes before a court for interpretation is part of a whole statute, and its meaning is therefore affected by other provisions of the same statute. **It is also, however, part of an entire *corpus juris*. So, if possible, it should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law**. Hence laws dealing with the same subjects – being *in pari materia* translated as "in a like matter") – should if possible be interpreted harmoniously. . . . Though it is often presented as effectuating the legislative "intent," the related-statute canon is not, to tell the truth, based upon a realistic assessment of what the legislature actually meant. . . . **The canon is, however, based upon a realistic assessment of what the legislature ought to have meant. It rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so**.

Garner & Scalia, supra, at 252.

Here, the entire *corpus juris* includes Nevada statutes and precedent that recognize aiding and abetting liability as applying to all statutes – including NRS 212.165(4). FTS at 10-15. Moreover, the intent of the Legislature in enacting and amending NRS 212.165 in 2007 and 2013 was to prohibit any inmate – whether in prison or in jail – from possessing a telecommunications device. It would be absurd to assume that the Legislature intentionally provided a loophole for someone in Plunkett's situation to avoid criminal liability after she intentionally provided her cell phone to jail inmates.

Third, the canon of *expressio unius est exclusio alterius* holds that "to express or include one thing implies the exclusion of the other or of the alternative." *Expressio Unius Est Exclusio Alterius*, Black's Law Dictionary. This canon "makes sense only if all omissions in legislative drafting were deliberate." Id. (citing Richard A. Posner, The Federal Courts: Crisis and Reform 282 (1985)). Moreover, "the doctrine properly applies only when the *unius* . . . can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so." Garner & Scalia, supra, at 107. Here, common sense does *not* suggest that the 2013 Legislature, by its silence on the matter, and *in pari materia* with Nevada's general aiding and abetting liability and conspiracy statutes, intended to exempt the furnisher of a cell phone to a jailee from criminal liability. This would be absurd, since the entire purpose of subsection (4),

as explicitly stated by the Legislature, is to prohibit prisoners, within the confines of the jail, from possessing telecommunications devices. FTS at 21; AA 153.

Thus, even if the statute were unclear, the canons of statutory construction do not support Plunkett's assertion that she is exempt from criminal liability, and the District Court thus abused its discretion in granting her motion to dismiss.

III. PLUNKETT'S SEPARATION OF POWERS ARGUMENT IS WITHOUT MERIT

Plunkett alleges that by charging her under NRS 212.165(4), the State is "creat[ing] criminal liability where none currently exists," and is thus violating the doctrine of separation of powers. FTR at 10. This argument is utterly without merit. As detailed supra §§ I and II, aiding and abetting liability already exists as to subsection (4). The State is not creating vicarious criminal liability where none exists, as there is no explicit legislative intent to exclude from criminal liability someone like Plunkett who helped jail inmates Arevalo and Estrada possess her iPhone. In charging Plunkett under subsection (4), the State is merely enforcing the laws created by the Legislature – laws which include general liability principles of aiding and abetting as set out in NRS 195.020 – and there is therefore no separation of powers issue.

IV. THE STATE'S ARGUMENT THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THE SUBSTANTIVE CONSPIRACY COUNTS WITHOUT CONSIDERATION IS UNCONTESTED

Because Plunkett did not respond to the last issue raised in the State's brief, it appears that she admits the District Court abused its discretion in dismissing the two substantive counts of Conspiracy to Possess Unlawful Telecommunications Device By A Prisoner. *See* Polk v. State, 126 Nev. __, __, 233 P.3d 357, 360 (2010) (holding that a party confesses error by failing to address an issue "that compels a response"); *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating failure to respond to an appellant's argument as a confession of error). In her FTR, Plunkett does not address, let alone refute, the State's argument that Plunkett conspired with Arevalo and Estrada for the unlawful purpose of allowing them to possess a telecommunications device, in violation of NRS 212.165(4). FTS at 26-29. This concession is noteworthy in that, by conceding that the District Court abused its discretion in dismissing the two substantive Conspiracy counts, Plunkett also concedes that the court abused its discretion in dismissing the Indictment as a whole.

This Court should therefore treat Plunkett's failure to address the aforementioned issues as a confession of error. Polk, 126 Nev. at __, 233 P.3d at 360. Since it is thus uncontested that the District Court abused its discretion in

dismissing the substantive Conspiracy counts, the Court's Order should be reversed, and the Indictment as to the Conspiracy counts should be reinstated.

CONCLUSION

Based on the foregoing, and the arguments previously raised in the Fast Track Statement, the State respectfully submits that this Court should REVERSE the Order Granting Plunkett's Motion to Dismiss, and REINSTATE the Indictment.

Dated this 7th day of March, 2018.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

VERIFICATION

1. I hereby certify that this fast track reply 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 reply has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font and Times New Roman style.
2. I further certify that this fast track reply complies with the type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points and contains 1,931 words.

Dated this 7th day of March, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #04352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
P O Box 552212
Las Vegas, NV 89101
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 7, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

ADAM M. SOLINGER, ESQ.
Counsel for Respondent

STEVEN S. OWENS
Chief Deputy District Attorney

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

SSO/ Melanie Marland/ed