scope of the appeal is limited, however, to issues arising from the amendment. *Id.*; *see also Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (recognizing that an amendment to a judgment of conviction may provide good cause to present claims challenging the amendment in an untimely postconviction petition for a writ of habeas corpus). Here, Witter only raises issues arising from the 1995 trial. Because those issues are not properly before us in this appeal, we have not considered them and express no opinion as to their merit. And because Witter has not demonstrated any error with respect to the amendment to his judgment of conviction, we affirm the third amended judgment of conviction.

Gibbons, C.J., and Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

ARNOLD KEITH ANDERSON, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 74076

November 27, 2019 453 P.3d 380

Appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with use of a deadly weapon and battery with use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Affirmed.

[Rehearing denied February 18, 2020]

Law Office of Lisa Rasmussen and *Lisa A. Rasmussen*, Las Vegas; *Sandra L. Stewart*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Binu G. Palal*, Chief Deputy District Attorney, and *Charles W. Thoman*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal prosecution the right to confront the witnesses against him or her. A defendant, however, may forfeit that

right if he or she procures the witness's absence by wrongdoing. Appellant Arnold Anderson asserted his right to confrontation when the State sought to admit his daughter's out-of-court statements to an investigator employed by the Clark County District Attorney's Office. Relying on the forfeiture-by-wrongdoing exception to the Confrontation Clause, the trial court admitted the out-of-court statements after finding that the witness was unavailable and Anderson had intentionally deterred the witness from appearing at trial. We take this opportunity to weigh in on the State's burden of proof when invoking the forfeiture-by-wrongdoing exception to the Confrontation Clause, holding the preponderance-of-the-evidence standard is the appropriate burden of proof. Because the district court applied that standard and the record supports its conclusion that the State met its burden, we affirm.

FACTS AND PROCEDURAL HISTORY

Anderson shot Terry Bolden outside an apartment complex in Las Vegas, striking him in the head, chest, and leg. Bolden's girlfriend, Rhonda Robinson, and Anderson's daughter, Arndaejae Anderson (Arndaejae), witnessed the shooting. Bolden and Robinson identified Anderson as the shooter.

Anderson was charged with attempted murder with use of a deadly weapon, robbery with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm.[1] Anderson has maintained that he has physical evidence showing that he was in California at the time of the shooting—a photo with a time stamp and an automobile repair receipt. Sometime after Anderson was charged, Mark Rafalovich, an investigator with the Clark County District Attorney's Office, visited Arndaejae at a juvenile detention center to interview her about the incident.[2] The deputy district attorney assigned to the case, Arndaejae's defense counsel, and her defense investigator were also present. During the interview, Arndaejae made statements that incriminated Anderson in the shooting. The interview was not recorded or otherwise memorialized.

A five-day trial commenced wherein Anderson represented himself. On the morning of the second day of trial, the State represented to the court that earlier that morning Anderson was recorded on the jail telephone speaking with a female "and telling her to disappear

---

[1]Anderson was appointed counsel. Three times prior to trial, Anderson sought to have substitute counsel appointed. Anderson ultimately withdrew his first two requests, and when the court denied his third request, Anderson moved to proceed pro se. After a *Faretta* canvas, the trial court granted Anderson's motion. *Faretta v. California*, 422 U.S. 806 (1975). While Anderson challenges the court's failure to grant him substitute counsel in this appeal, he does not challenge the trial court's decision to allow him to proceed pro se.

[2]Arndaejae was in custody on an unrelated matter.

and to leave her phone" so that authorities could not track her.[3] The State alleged that the female was Arndaejae.[4] To support that allegation, the State indicated that it had evidence that Anderson called the same number on August 3 to wish the caller a happy birthday and Arndaejae's birthday is August 3. Arguing that the phone call showed Anderson had procured Arndaejae's absence, the State argued that it should be permitted to introduce Arndaejae's prior statements through Rafalovich. Anderson argued that because he never said his daughter's name during the call, the State could not prove that he was procuring *her* absence. He also represented that he was telling a "friend in a different matter" to disappear for a week.

The court then inquired about the State's efforts to locate Arndaejae. The State conveyed that a warrant was already out for her arrest because she absconded from juvenile probation "a few months ago," her probation officer was actively searching for her, and an investigator with the DA's office was also searching for her. However, a material witness warrant was not issued, and the State could not serve Arndaejae with a subpoena. Anderson objected and argued that he could not have procured her absence because she had already fled, as demonstrated by the existing warrant for absconding from her probation. The court noted Anderson's objection but deferred its ruling until the State was ready to call the witness.

At the end of the second day of trial, the State informed the court that it intended to call Rafalovich the following morning to testify to Arndaejae's out-of-court statements. At that time, the State provided its evidence to the court that Arndaejae was the female on the recorded jail call with Anderson. Relying on the doctrine of forfeiture by wrongdoing, the court allowed the State to call its investigator to testify as to Arndaejae's out-of-court statements. The court found that the State had shown by a preponderance of the evidence that Arndaejae was unavailable because Anderson intentionally deterred her from testifying against him.

On the fourth day of trial, Rafalovich testified as to Arndaejae's statements at the juvenile detention facility. According to Rafalovich, Arndaejae indicated that she witnessed the shooting, identified her father as the shooter, and indicated that he told her to lie about his whereabouts by saying that he was in California.

The jury found Anderson guilty of attempted murder with use of a deadly weapon and battery with use of a deadly weapon resulting in substantial bodily harm. The jury found Anderson not guilty of robbery with use of a deadly weapon. The district court sentenced Anderson to serve consecutive prison terms totaling 20-50 years in the aggregate for the attempted murder and battery convictions.

---

[3]The jail telephone recording was played in open court.

[4]The State had been having difficulty locating Arndaejae for trial.

DISCUSSION

Anderson argues that the introduction of Arndaejae's out-of-court statements violated his rights under the Sixth Amendment's Confrontation Clause. *See* U.S. Const. amend. VI. The State does not dispute, and we accept without deciding, that Arndaejae's out-of-court statements were testimonial. Rather, the State asserts that Anderson forfeited his right to confront Arndaejae by procuring her absence. Anderson in turn asserts that the State failed to prove by a preponderance of the evidence that Arndaejae was absent because of his actions so as to trigger the forfeiture-by-wrongdoing exception to the Confrontation Clause.[5] Whether a defendant's Confrontation Clause rights were violated is a question of law subject to de novo review. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009).

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. It bars admission of "testimonial evidence" unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The United States Supreme Court, however, has recognized that a defendant may forfeit the right to confrontation. In particular, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 547 U.S. 813, 833 (2006). To demonstrate such a forfeiture, the State must "show[ ] that the defendant intended to prevent a witness from testifying." *Giles v. California*, 554 U.S. 355, 361 (2008). Although the Supreme Court has acknowledged forfeiture by wrongdoing as an exception to the Sixth Amendment's confrontation guarantee and addressed the scope of that exception, it has not taken a position on the evidentiary standard that the State must meet to show forfeiture by wrongdoing. *See Davis*, 547 U.S. at 833 (taking "no position on the standards necessary to demonstrate such forfeiture"). This court also has not yet taken a position on that issue. We take this opportunity to do so.

Preponderance of the evidence is the appropriate standard of proof

Among the federal circuit and state courts that have grappled with the burden-of-proof issue, the focus has been on whether the appropriate burden is clear and convincing evidence or a more forgiving preponderance of the evidence. *See United States v. Johnson*, 767 F.3d 815, 820-23 (9th Cir. 2014) (discussing the issue and cases

[5]There are two independent hurdles to admitting out-of-court statements: the Sixth Amendment's Confrontation Clause and Nevada's evidentiary statutes. Anderson does not challenge the admissibility of Arndaejae's statements pursuant to the evidentiary statutes, so we do not address them.

addressing it). The overwhelming majority of those courts have held that the preponderance-of-the-evidence standard applies to the forfeiture exception to the Confrontation Clause. *Id.* at 821-23; *see State v. Thompson*, 45 A.3d 605, 615-16 (Conn. 2012) (compiling a list of all states applying the preponderance standard as of 2012).

On one end of the spectrum, the United States Court of Appeals for the Fifth Circuit held in *United States v. Thevis* that the prosecution must prove that a defendant procured the absence of a witness by clear and convincing evidence for the forfeiture exception to apply. 665 F.2d 616, 631 (5th Cir. 1982), *superseded by rule on other grounds as stated in United States v. Nelson*, 242 Fed. App'x 164 (5th Cir. 2007). In doing so, the court reasoned that confrontation rights are important "in testing the reliability of evidence" and the clear-and-convincing-evidence standard typically applies to evidentiary decisions "[w]here reliability of evidence is a primary concern." *Id.* (citing *United States v. Wade*, 388 U.S. 218, 240 (1967) (holding that where defense counsel was not present at a lineup identification, the prosecution must be given an opportunity to prove by clear and convincing evidence that the witness's in-court identification of the defendant was based on observations of the defendant other than the lineup identification)). On the other end of the spectrum, a number of federal circuits apply a preponderance-of-the-evidence standard. In *United States v. Mastrangelo*, for example, the United States Court of Appeals for the Second Circuit opined that the preponderance standard is more suitable because "waiver by misconduct is an issue distinct from the underlying right of confrontation" and a higher standard "might encourage behavior which strikes at the heart of the system of justice itself." 693 F.2d 269, 273 (2d Cir. 1982); *see also United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982) ("A standard that requires the proponent to show that it is more probable than not that the defendant procured the unavailability of the witness is constitutionally sufficient under the due process and confrontation clauses."); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *overruled on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984).

We agree with the majority of courts that have considered the issue—the preponderance standard provides the appropriate burden of proof for purposes of the forfeiture-by-wrongdoing exception to the Confrontation Clause. As the United States Supreme Court has observed, the forfeiture-by-wrongdoing exception is not about the reliability of the evidence at issue. *Crawford*, 541 U.S. at 62 (stating that the exception "make[s] no claim to be a surrogate means of assessing reliability"). The exception instead grows out of equitable concerns with allowing a defendant to benefit from his or her own wrongdoing. *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879) (stating that "[t]he Constitution does not guarantee an accused per-

son against the legitimate consequences of his own wrongful acts," harkening back to English common law for the equitable principle "that no one shall be permitted to take advantage of his own wrong"). If the purpose of the forfeiture-by-wrongdoing exception is, as the Supreme Court has said, to permit "courts to protect the integrity of their proceedings," *Davis*, 547 U.S. at 834, a lower standard of proof is fitting. The purpose of, and the equitable concerns underlying, the forfeiture-by-wrongdoing exception would not be served by a high burden of proof that could instead encourage conduct that undermines the integrity of the criminal justice system. And a higher standard is not required to protect the defendant's confrontation rights given the Supreme Court's narrow interpretation of the exception, particularly its intent requirement, as stated in *Giles*, 554 U.S. at 361. *See Johnson*, 767 F.3d at 822 ("The intent requirement thus ensures that the judge's inquiry is focused on whether the defendant intended to compromise the integrity of the proceedings, not on whether the defendant committed the underlying offense."). For these reasons, we hold that the burden of proof under the forfeiture-by-wrongdoing exception is the preponderance standard. The trial court applied the preponderance standard in this case, so we turn to whether the court erred in concluding that the State produced sufficient evidence to admit Arndaejae's out-of-court statements under the forfeiture-by-wrongdoing exception to the Confrontation Clause.

The trial court did not err in its application of the forfeiture-by-wrongdoing exception to admit Arndaejae's out-of-court statements

To apply the forfeiture-by-wrongdoing exception to the Confrontation Clause, the trial court must find by a preponderance of the evidence that the defendant intentionally procured the witness's absence. In making that determination, the district court must conduct a hearing outside of the jury's presence to consider the evidence relevant to the forfeiture-by-wrongdoing exception.

The State described its unsuccessful efforts to locate Arndaejae using an investigator, as well as efforts made by Arndaejae's probation officer. Asserting that Anderson procured her absence, the State produced a recording of a phone call that Anderson placed from the jail to Arndaejae's phone number.[6] During that call, Anderson told the person on the other end of the call "to disappear for a week" and "to leave [her] phone and go someplace else" so that authorities could not track her. But the court also heard that Arndaejae absconded from juvenile probation "a few months" earlier and that a warrant had been issued for her arrest.

[6]Although disputed below, Anderson conceded on appeal that the phone number belonged to Arndaejae.

Anderson suggests that the State presented insufficient evidence that he procured Arndaejae's absence, pointing to the outstanding warrant for her arrest as the more likely reason that she would not show up for trial. This argument implicates what it means to "procure" a witness's absence. In considering the meaning of "procure," the Court in *Giles* pointed to definitions including "to contrive and effect" and "to endeavour to cause or bring about." 554 U.S. at 360 (emphasis and internal quotation marks omitted). These definitions contemplate an affirmative action by the defendant that brings about the witness's absence. *See Carlson v. Att'y Gen. of Cal.*, 791 F.3d 1003, 1010 (9th Cir. 2015) ("The pertinent Supreme Court authority, then, clearly establishes that the forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result, non-appearance by a prospective witness against him in a criminal case."). Thus, we must draw a line between a defendant's mere passive acquiescence in a witness's decision to be absent and a defendant's affirmative effort or collusion with a witness to procure that witness's absence. *See id.* (opining that "[s]imple tolerance of, or failure to foil, a third party's previously expressed decision either to skip town himself rather than testifying or to prevent another witness from appearing does not 'cause' or 'effect' or 'bring about' or 'procure' a witness's absence"); *Commonwealth v. Edwards*, 830 N.E.2d 158, 171 (Mass. 2005) (applying the forfeiture doctrine where "a defendant actively facilitates the carrying out of the witness's independent intent not to testify"). Distinguishing between passive acquiescence and affirmative action ensures that courts apply the forfeiture-by-wrongdoing exception to the Confrontation Clause only where the defendant does more than merely approve of the witness's independent decision not to testify. *Edwards*, 830 N.E.2d at 171 ("[A] defendant's joint effort with a witness to secure the latter's unavailability, regardless of whether the witness already decided 'on his own' not to testify, may be sufficient to support a finding of forfeiture by wrongdoing."); *see also State v. Maestas*, 412 P.3d 79, 91 (N.M. 2018). Because it is the rare occasion that an absent witness will be present to explain the reason for his or her absence, the causal relationship between the defendant's actions and the witness's absence need not be proven by direct evidence. Rather, circumstantial evidence may be proffered to demonstrate that the witness's absence is "at the very least, . . . a logical outgrowth or foreseeable result of the [defendant's efforts]." *Edwards*, 830 N.E.2d at 171; *see also United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002).

We conclude that Anderson's actions indicate more than mere passive acquiescence to Arndaejae's decision to be absent. In his recorded phone call to Arndaejae's phone number, Anderson instructed her to leave her phone so she could not be tracked by law

enforcement. This demonstrates by a preponderance of the evidence that Anderson actively worked to keep Arndaejae from the prosecution with the intent that she not testify at his trial. Accordingly, we conclude the trial court did not err in its application of the forfeiture-by-wrongdoing exception to admit Arndaejae's out-of-court statements even though Anderson had no opportunity to confront her regarding the statements.

Anderson's Sixth Amendment right to counsel was not violated

Anderson contends that his Sixth Amendment right to counsel was violated when the trial court declined to substitute his appointed counsel. We review the district court decision for an abuse of discretion. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). In *Young*, we adopted a three-factor test to consider when reviewing a district court's denial of such a motion. *Id.* The three factors are "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." *Id.* (quoting *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

Throughout the course of the proceedings, Anderson filed three requests to substitute counsel. The requests were timely. And each time Anderson filed a motion for substitution of counsel, the trial court held a *Young* hearing to inquire into the extent of the conflict.[7] The record reflects that the trial court's inquiries into Anderson's conflicts with appointed counsel were thorough and adequate, and evidence supported the trial court's finding that there was not a complete breakdown in the relationship. Therefore, the trial court did not abuse its discretion in denying Anderson's requests.

CONCLUSION

In sum, we conclude that to apply the forfeiture-by-wrongdoing exception to the Confrontation Clause, a trial court must find by a preponderance of the evidence that a witness is unavailable, the defendant engaged in conduct that procured the witness's unavailability, and the defendant acted with intent to procure the witness's absence. We additionally conclude that the trial court must take evidence and argument from the prosecution and defense outside the presence of the jury to reach its finding. Because the district court did not err in its application of the exception, we affirm the judgment of conviction.[8]

Hardesty, J., concurs.

---

[7]Anderson withdrew his first request prior to the hearing. He withdrew his second request after the hearing.

[8]Anderson also claims that his convictions for both attempted murder and battery are redundant because they stem from the same conduct. In light of this court's holding in *Jackson v. State*, 128 Nev. 598, 291 P.3d 1274 (2012),

SILVER, J., concurring:

I join with the majority in adopting the doctrine of forfeiture-by-wrongdoing as an exception to the Confrontation Clause. I write separately only to emphasize that in the future, if this exception is to be utilized, the district courts should be mindful to make certain that the State provides details of what efforts were made to procure the witness's presence at trial, and to make detailed findings that the criminal defendant's actions *actually caused* the non-appearance of the witness.

Here, the district court did not, in my view, make adequate findings connecting the State's attempt to procure the witness with Anderson's misconduct of advising the witness to disappear. When utilizing this doctrine in future cases, I believe that there must be a nexus between the two. In this case, it appears that the district court put the cart before the horse. It is completely unclear from the record whether the witness's absence from trial occurred as a result of Anderson's jail call to the witness, or whether it was because she absconded from probation six months prior to trial and had an outstanding warrant for her arrest. This is further complicated by the fact that the State never served the witness with a subpoena advising the witness when to come to court, nor did the State ever apply to the district court for a material witness warrant prior to trial in order to actually procure the adverse witness's presence for trial.

Therefore, under these particular facts, I believe that the district court erred by allowing the district attorney's investigator to testify as to what the witness said during the State's case-in-chief. Nevertheless, because overwhelming evidence of guilt was adduced at trial, including the victim's and Anderson's girlfriend's testimony that Anderson was the shooter, the error was harmless.

Because I strongly believe that a criminal defendant who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confront that witness, I fully concur with the rationale driving the majority's opinion in this case. Adopting the doctrine of forfeiture-by-wrongdoing as an exception to the Confrontation Clause is sound jurisprudence in my view. Therefore, I respectfully concur.

Anderson's claim fails. In *Jackson*, this court considered whether a defendant's convictions for attempted murder and aggravated battery violated double jeopardy. *Id.* at 601, 291 P.3d at 1276. In concluding that the convictions did not violate the Double Jeopardy Clause, this court rejected the "same conduct" approach and reiterated its adherence to the "same element" test. *Id.* at 608-11, 291 P.3d at 1280-82 (favoring *Blockburger*'s "same element" test).

UPUTAUA DIANA POASA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 76676

November 27, 2019 453 P.3d 387

Appeal from a judgment of conviction, pursuant to a guilty plea, of grand larceny of an automobile, less than $3,500. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Remanded.

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

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Marilee Cate*, Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

Nevada law is well-settled that when a district court imposes a sentence in a criminal case, it must give a defendant credit for any time the defendant has actually spent in presentence confinement absent an express statutory provision making the defendant ineligible for that credit. In this case, the State asks us to reconsider that law and overrule established precedent. We decline to do so. Because appellant Uputaua Diana Poasa was eligible for presentence credit, the district court erred in forfeiting that credit as a condition of probation. Accordingly, we remand this case to the district court with instructions to amend the judgment of conviction to give Poasa the required credit for time served in presentence confinement.

I.

The State charged Poasa with grand larceny of an automobile, less than $3,500, a category C felony, and unlawful taking of a motor vehicle, a gross misdemeanor. Poasa pleaded guilty to both counts pursuant to plea negotiations. The plea agreement included the condition that if she paid $800 in restitution and completed substance abuse counseling prior to sentencing, the State would allow her to withdraw her guilty plea to felony grand larceny and she would be sentenced on the gross misdemeanor charge. Conversely, if Poasa

failed to pay restitution or complete counseling prior to sentencing, the State would allow her to withdraw her plea on the gross misdemeanor and she would be sentenced on the felony.

After the entry of Poasa's guilty plea, and pursuant to negotiations, the district court released Poasa on her own recognizance. Poasa thereafter failed to appear at sentencing and ultimately had to be extradited back to Washoe County and placed in custody prior to sentencing.

At Poasa's sentencing hearing, Poasa requested that the district court withdraw her plea to the gross misdemeanor charge and proceed with sentencing her on the felony, conceding she failed to fulfill the requirements of her plea agreement. But Poasa also requested that the district court order her into a diversion program pursuant to NRS 458.300, citing her family history, young age, lack of criminal history, and substance abuse issues in mitigation. The State countered that a diversion program was inappropriate because Poasa failed to appear twice before for court, including for her sentencing hearing in this case, and further argued that she was only present for sentencing because she was extradited back to Washoe County on new drug charges. As a result, the State recommended that the district court sentence Poasa to 12 to 30 months in prison. In the alternative, the State argued that if the court was inclined to give Poasa probation, the court should forfeit Poasa's 99 days' credit for time served and further order her to serve an additional 90 days in jail as conditions of probation.

The district court sentenced Poasa to a suspended prison term of 12 to 34 months and placed her on probation for an indeterminate period not to exceed five years. As a condition of her probation, the court ordered Poasa to complete drug court and serve an additional 29 days in jail until the next available drug court date. Finally, over defense counsel's objection, the court forfeited 99 days' credit for time Poasa already served in jail while awaiting sentencing. This appeal followed.

II.

Poasa argues the district court erred by failing to give her credit for time served in presentence confinement. She relies on Nevada law, notably NRS 176.055(1) and this court's interpretation of the statute in *Kuykendall v. State*, 112 Nev. 1285, 926 P.2d 781 (1996).

NRS 176.055(1) states in relevant part that "whenever a sentence of imprisonment in the county jail or state prison is imposed, the court *may* order that credit be allowed against the duration of the sentence . . . for the amount of time which the defendant has actually spent in confinement before conviction." (Emphasis added.) In *Kuykendall*, we acknowledged that the word "may" implies discre-

tion but nevertheless concluded that the statute mandated credit for time served before sentencing because "the purpose of the statute is to ensure that all time served is credited towards a defendant's ultimate sentence." 112 Nev. at 1287, 926 P.2d at 783.

Since *Kuykendall*, we have repeatedly followed its holding that, under NRS 176.055(1), sentencing courts must award credit for time served in presentence confinement. *See, e.g.*, *Haney v. State*, 124 Nev. 408, 413, 185 P.3d 350, 354 (2008) ("[C]redit for time served . . . remains mandatory."); *Johnson v. State*, 120 Nev. 296, 299, 89 P.3d 669, 671 (2004) (citing *Kuykendall* in holding "that credit for time served in presentence confinement may not be denied to a defendant by applying it to only one of multiple concurrent sentences"); *Nieto v. State*, 119 Nev. 229, 231, 70 P.3d 747, 748 (2003) ("NRS 176.055(1) states that a defendant is entitled to credit against a sentence for time 'actually spent in confinement before conviction . . . .'"). The State urges us to overrule *Kuykendall* on the ground that it conflicts with the statute's plain language.

III.

"[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing." *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (alterations in original) (quoting *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnote omitted)). Avoiding the "perpetuation of error" can be a compelling reason to overturn precedent, *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (internal quotation marks omitted), but "[m]ere disagreement" with a prior decision is not enough, *Miller*, 124 Nev. at 597, 188 P.3d at 1124.

When it comes to *Kuykendall*, we have no disagreement with it, let alone believe it to be clearly erroneous. In particular, the reasoning in *Kuykendall* is consistent with a general rule this court has long followed: "[I]n construing statutes, 'may' is construed as permissive . . . *unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature*." *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970) (emphasis added) (quoting *City of Wauwatosa v. Cty. of Milwaukee*, 125 N.W.2d 386, 389 (Wis. 1963)); *accord* NRS 0.025(1)(a) (providing that "[e]xcept as otherwise . . . required by the context," the word "'[m]ay' confers a right, privilege or power"). The *Kuykendall* court did not ignore the word "may" in the statute or that it generally conveys discretion; rather, the court determined that the statute's purpose demanded a different construction of "may"—that it imposed a mandate. 112 Nev. at 1287, 926 P.2d at 783.

The Legislature's silence in the 23 years since *Kuykendall* was decided suggests its agreement with the court's construction of the

statute, particularly as it has made other changes to the statute.[1] *See Runion v. State*, 116 Nev. 1041, 1047 n.2, 13 P.3d 52, 56 n.2 (2000) (noting that when the Legislature has amended a statute without changing language previously interpreted by this court, it is presumed the Legislature approved the court's interpretation). The mandatory construction also comports with notions of fundamental fairness, prevents arbitrary application of the statute, and avoids constitutional concerns with discrimination based on indigent status. *See, e.g.*, *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783 (addressing caselaw regarding whether mandatory credit for presentence incarceration is predicated upon indigency); *Merna v. State*, 95 Nev. 144, 145, 591 P.2d 252, 253 (1979) (addressing credit for time served as a condition of probation and concluding credit should be given as a matter of fundamental fairness); *Anglin v. State*, 90 Nev. 287, 292, 525 P.2d 34, 37 (1974) (concluding that under the Fourteenth Amendment, a sentencing court must provide credit for presentence confinement where bail has been set but the defendant is unable to pay).

In light of the foregoing, we conclude there is no compelling reason to overturn *Kuykendall* and its progeny.

IV.

Poasa spent 99 days in presentence confinement, but the sentencing court refused to credit that time toward her ultimate sentence. Based on *Kuykendall*, we conclude the district court erred. We therefore remand for the sentencing court to amend the judgment of conviction to give Poasa credit for the time she actually served in presentence confinement.

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

---

[1]In particular, the Legislature last amended NRS 176.055(1) in 2013. 2013 Nev. Stat., ch. 64, § 2, at 222.

SAM TOLL, Petitioner, *v.* THE HONORABLE JAMES E. WILSON, District Judge; and THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF STOREY, Respondents, and LANCE GILMAN, Real Party in Interest.

No. 78333

December 5, 2019 453 P.3d 1215

Original petition for a writ of prohibition or mandamus challenging a discovery ruling compelling petitioner to disclose the identity of his sources in a tort action.

Petition granted in part and denied in part.

John L. Marshall and *Luke A. Busby, Ltd.*, Reno, for Petitioner.

Flangas Dalacas Law Group and *Gus W. Flangas* and *Jessica K. Peterson*, Las Vegas, for Real Party in Interest.

McLetchie Law and *Margaret A. McLetchie*, Las Vegas, for Amici Curiae The Nevada Press Association, The Reporters Committee for Freedom of the Press, The News Media Alliance, The Online News Association, The Media Institute, The Society of Professional Journalists, and Reporters Without Borders.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, C.J.:

Almost fifty years ago, the Nevada Legislature passed the news shield statute, NRS 49.275. The current version of the statute protects journalists who are associated with newspapers, periodicals, press associations, and radio and television programs from mandatory disclosure of confidential sources. Since the passage of the statute, the news media has undergone immense changes. Previously, most news outlets disseminated news via physically printed newspapers and magazines or by radio and television broadcasts. Now, in addition to these sources, independent bloggers disseminate news through personal websites. In light of this modernization of the news media, we are asked to determine whether digital media falls within the protections of NRS 49.275. We hold that it does, but we do not address the specific question of whether or not petitioner Sam Toll qualifies for such protection as a blogger. Therefore, we grant the writ petition in part, so that the district court can conduct further proceedings in light of our holding and reconsider whether Toll's

blog falls within the protection of the news shield statute. Additionally, we deny the petition in part by holding that the district court did not act arbitrarily or capriciously when it granted the motion for limited discovery.

FACTS AND PROCEDURAL HISTORY

Toll runs an online blog that reports on current events in Virginia City, Nevada. Initially, this blog, thestoreyteller.online (*The Storey Teller*), focused on the then-pending recall election of Sheriff Gerald Antinoro. Toll expressed a counter-narrative to local news sources, which he felt were publishing stories that were critical of Antinoro. After the recall election, Toll continued publishing *The Storey Teller*. In addition to other current events, Toll took an interest in Storey County Commissioner Lance Gilman. Toll wrote several articles that were critical of Gilman and posted them on *The Storey Teller*. Specifically, Toll wrote and posted articles that alleged Gilman did not live in Storey County. In response to these articles, Gilman filed suit, alleging defamation per se against Toll.

After some litigation, Toll filed a special motion to dismiss Gilman's action under the anti-SLAPP statute, NRS 41.660, together with a sworn declaration, claiming that his statements constituted a good faith communication in furtherance of the right to free speech on an issue of public concern. Gilman filed an opposition to this motion together with an affidavit arguing that even if the statements were good faith communications, the action should not be dismissed because he, in turn, could demonstrate with prima facie evidence a probability of prevailing on his defamation claim. The district court held that there was a potentially viable claim under the anti-SLAPP statute. According to the court, Gilman made a prima facie case for a probability of success on the merits as to the falsity of the residency statements and their damaging nature, but he failed to make such a showing for actual malice, which is required to prevail on a defamation claim against a public figure. The district court granted Gilman's motion for limited discovery on whether Toll had actual malice when making these statements. The discovery was limited to information that would help discern whether Toll knew that the statements involving Gilman's residency were false or whether he acted with a high degree of awareness that they were likely false.

Once the limited discovery began, Gilman deposed Toll. During the course of the deposition, Gilman asked, among other things, why Toll believed that Gilman did not live in Storey County. Toll answered that he looked into the zoning of the Mustang Ranch, where Gilman claims to live, and determined that Gilman living there would violate zoning laws. Further, Toll stated that Gilman living in a trailer behind the Mustang Ranch was illogical, given Gilman's wealth. Toll said he asked people whether Gilman lived on

the Mustang Ranch property and they told him he did not. Toll stated his sources told him that Gilman would leave the Mustang Ranch and head to Reno every night at 8:00 p.m. Another source allegedly told Toll that Gilman kept his possessions at a different property, where he truly lives. When Gilman asked who these sources were, Toll invoked the news shield statute under NRS 49.275 and refused to provide the identity of his sources. The deposition abruptly ended shortly thereafter.

Gilman filed a motion to compel Toll to reveal his sources with the district court, arguing that the news shield statute does not apply to bloggers. The district court agreed and granted Gilman's motion to compel. The district court held while Toll is a reporter, he did not belong to a press association at the time of his comments. The court further held that Toll's blog did not qualify as a newspaper because it is not printed in physical form and therefore the news shield statute did not afford him any protection. Toll filed a petition for a writ of prohibition or mandamus, challenging that decision as well as the order allowing limited discovery.

DISCUSSION

"When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 118, 122, 319 P.3d 618, 621 (2014). Therefore, even though discovery issues are traditionally subject to the district court's discretion and unreviewable by a writ petition, this court will intervene when the district court issues an order requiring disclosure of privileged information.[1] Id. We exercise our discretion to review this writ petition because it involves an issue of first impression in need of clarification, and addressing it will promote judicial economy in the proceeding below. *See, e.g.*, *Corp. of the Presiding Bishop, LDS v. Seventh Judicial Dist. Court*, 132 Nev. 67, 70, 366 P.3d 1117, 1119 (2016) (providing that this court may consider writ petitions presenting narrow legal issues concerning issues of significant public policy and that will promote judicial economy).

---

[1]A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 867, 871, 335 P.3d 1234, 1238 (2014). A writ of prohibition, rather than a writ of mandamus, however, is the appropriate form of relief sought with regard to the order compelling disclosure in this case. *Las Vegas Sands*, 130 Nev. at 122, 319 P.3d at 621. A writ of prohibition is appropriate when the relief is to "arrest the proceedings" and prohibit some exercise of judicial function. NRS 34.320. The judicial function in this case is to compel Toll to reveal his sources, which Toll seeks to prohibit.

The district court erred by granting Gilman's motion to compel

The district court held that Toll was not protected by NRS 49.275 because he was not associated with a newspaper, periodical, press association, or radio or television station when he made the alleged defamatory statements on his blog. In particular, the district court relied on the notion that because Toll's blog is not physically printed, it cannot be considered a newspaper. We disagree with the district court's reasoning.

We review questions of statutory construction de novo. *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 799, 358 P.3d 234, 240 (2015). "When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable." *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 886 (1988). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (alteration in original) (internal quotation marks omitted). In *Desert Valley*, this court reinforced the notion that "[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." 104 Nev. at 720, 766 P.2d at 887. Applying each of these canons to NRS 49.275, we arrive at the same conclusion—the district court ruled incorrectly.

NRS 49.275 reads, in relevant part, as follows:

> No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation . . . .

In trying to ascertain the plain meaning of the statute, the district court attempted to define each word's literal meaning. The first relevant term in this statute is "reporter." The district court found that Toll was a reporter under this statute, and we agree. The district court defined reporter as "one that reports; one who reports news events; a commentator." Reporter, *Webster's Third New Int'l Dictionary* (2002). Toll reports various public events, opinions, and current news in Virginia City. This qualifies him as a reporter.

The statute also requires that, in order to be protected, the reporter must work for a "newspaper."[2] Because "newspaper" was not

[2]While a reporter may also be protected if the reporter works for a periodical or radio or television station, because Toll never argued that his blog was a

defined by NRS 49.275, the district court relied on the definition of newspaper in other statutes as well as in a dictionary. When examining statutory definitions, the district court found that in order to constitute a newspaper, the media source must be "printed."[3] This was consistent with the dictionary definition of newspaper the district court used, which also stated a newspaper is "printed."[4] Therefore, because Toll's blog was not printed in physical form, the court ruled it could not be a newspaper. However, if the district court had pursued the literal meaning of "print" further, it would have found that it could apply to digital media as well as physical form. In one dictionary, "print" is defined as "to make a copy of by impressing paper against an inked printing surface." Print, *Webster's Third New Int'l Dictionary* (2002). However, in another dictionary, "print" is defined as "to display on a surface (such as a computer screen) for viewing."[5] Print, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020). Because "print" possesses two definitions that are equally applicable to this statute, the district court erred in limiting itself to only one.

We are not required to make "a fortress out of the dictionary" in all instances. *Haw. Carpenters' Tr. Funds v. Aloe Dev. Corp.*, 633 P.2d 1106, 1111 (Haw. 1981) (quoting *Markham v. Cabell*, 326 U.S. 404, 409 (1945) (internal quotation marks omitted)). "Drafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances that they could not possibly envision . . . ." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 86 (2012). Take for instance the Fourth Amendment. When drafted, an unreasonable search was most readily associated with a "common-law trespass." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). But in *Kyllo*, the United States Supreme Court found that thermal imaging—a technological advance the framers could not have logically contemplated—is in fact an unreasonable search

---

periodical or radio or television station, we do not address those forms here. Nevertheless, the district court did hold that Toll was a member of a press association for the purposes of this statute. The district court held that Toll became a member of the Nevada Press Association in August 2017. However, the district court found Toll was not protected on this basis because he was not a member of the Nevada Press Association when he procured information from his sources. The parties did not brief and we do not decide whether the district court's interpretation of this part of the statute was correct.

[3]NRS 238.020 defines "daily," "triweekly," "semiweekly," "weekly," and "semimonthly" newspapers. It does not define what the contents of a newspaper must consist of, but rather states they must be printed and published.

[4]The dictionary the district court relied on defined newspaper as "a paper that is printed and distributed." Newspaper, *Webster's Third New Int'l Dictionary* (2002).

[5]"Print" has other definitions in the dictionary besides the two presented, but because they are not applicable here, they are not provided.

without a warrant. *Id*. at 40. Therefore, the Supreme Court recognized a new form of an unreasonable search that was not explicitly included in the common application of the Fourth Amendment. *Id.* (concluding that recognizing thermal imaging as an unreasonable search is taking "the long view [ ] from the original meaning of the Fourth Amendment forward").

The same principle applies here. NRS 49.275 has not been amended since 1975. While the drafters of NRS 49.275 knew what a newspaper was, they likely did not contemplate it taking digital form. But just because a newspaper can exist online, it does not mean it ceases to be a newspaper. To hold otherwise would be to create an absurd result in direct contradiction to the rules of statutory interpretation. In *Kyllo*, the court considered technological advancements and arrived at the conclusion that one can "search" in more than one way. *See* 533 U.S. at 31-33. We consider technological advancements as well and arrive at the conclusion that one can "print" in more than one way. While we decline to resolve whether or not a blog falls under the definition of a newspaper, we conclude that a blog should not be disqualified from the news shield statute under NRS 49.275 merely on the basis that the blog is digital, rather than appearing in an ink-printed, physical form. Therefore, we conclude that the district court erred by granting Gilman's motion to compel.

The district court did not act arbitrarily or capriciously when it granted the motion for limited discovery

Toll makes an alternative argument that the district court erred in granting Gilman's motion for limited discovery because Gilman failed to make a prima facie showing in his opposition to Toll's anti-SLAPP motion to dismiss. We disagree.

NRS 41.660(4) provides that "the court shall allow limited discovery" when a party needs access to information held by the opposing party to meet or oppose the plaintiff's burden under the second prong of the anti-SLAPP statute. We review the district court's determination whether such discovery is necessary for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) ("Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion."). Normally, we do "not exercise our discretion to review discovery orders through petitions for extraordinary relief, unless the challenged discovery order is one that is likely to cause irreparable harm." *Id*.

In this case, the district court did not arbitrarily and capriciously exercise its discretion by ordering limited discovery so that Gilman could ascertain whether Toll made his statements with actual malice. Without knowing what evidence Toll relied on when he asserted that Gilman did not live in Storey County, it could be difficult to

determine whether Toll acted with actual malice. Thus, limited discovery may be appropriate.

Given that the district court erred by holding that a blog could not be considered a newspaper on the grounds it exists in digital form, we grant this petition in part and instruct the district court to conduct further proceedings to determine whether Toll's blog qualifies for protection under the news shield statute. Furthermore, because the district court did not arbitrarily or capriciously exercise its discretion in ordering discovery in accordance with NRS 41.660(4), we deny that portion of the writ. We direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its order granting Gilman's motion to compel and to reconsider the motion in light of this opinion.

Pickering, Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

JACKY ROSEN, an Individual; and ROSEN FOR NEVADA, a 527 Organization, Appellants, *v.* DANNY TARKANIAN, Respondent.

No. 73274

December 12, 2019 453 P.3d 1220

Appeal from a district court order denying an anti-SLAPP special motion to dismiss in a tort action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Reversed and remanded with instructions.

Gibbons, C.J., with whom Pickering, J., agreed, dissented.

Perkins Coie LLP and *Marc E. Elias, Elisabeth C. Frost*, and *Amanda R. Callais*, Washington, D.C.; *Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP*, and *Bradley Schrager* and *Daniel Bravo*, Las Vegas, for Appellants.

Randazza Legal Group, PLLC, and *Marc J. Randazza* and *Alex J. Shepard*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.[1]

[1]The Honorable Elissa F. Cadish, Justice, and The Honorable Abbi Silver, Justice, did not participate in the decision of this matter. The Honorable Barry Breslow, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of The Honorable Elissa F. Cadish, Justice, and The Honorable Thomas L. Stockard, Judge of the Tenth Judicial District Court, was designated by the Governor to sit in place of The Honorable Abbi Silver, Justice. Nev. Const. art. 6, § 4.

OPINION

By the Court, Hardesty, J.:

In this appeal, we consider the appropriate test for determining if protected communications are made in "good faith" under Nevada's anti-SLAPP statutes. At issue in this case are allegedly defamatory statements made by appellant Jacky Rosen during her political campaign against respondent Danny Tarkanian. After being sued for defamation by Tarkanian, Rosen filed a special motion to dismiss the action under the anti-SLAPP statutes, which require her to demonstrate that the protected statements were made in good faith—that is, that they were true or made without knowledge of any falsehood. We hold that, in determining whether the communications were made in good faith, the court must consider the "gist or sting" of the communications as a whole, rather than parsing individual words in the communications. We further conclude that Rosen showed by a preponderance of the evidence that she made the statements in good faith under the first prong of the anti-SLAPP analysis, and Tarkanian cannot demonstrate with prima facie evidence a probability of prevailing on this claim under the second prong. Therefore, we conclude that the district court erred in denying Rosen's special motion to dismiss and remand to the district court to grant the motion.

FACTS

Danny Tarkanian ran against Jacky Rosen to represent Nevada in the United States House of Representatives in 2016. During the race, Rosen uploaded an ad entitled "Integrity" to YouTube and other social media platforms. This ad makes up the crux of the dispute before us. In the ad, Rosen and Rosen for Nevada (collectively, Rosen) make three statements. First, Rosen claims that "Danny Tarkanian set up 13 fake charities that preyed on vulnerable seniors." Second, Rosen states that "seniors lost millions from the scams Danny Tarkanian helped set up." Third, Rosen states that the charities Tarkanian set up were "fronts for telemarketing schemes." The first two statements cite to articles published in the *Las Vegas Review-Journal*, and the third directly quotes from a *Las Vegas Sun* article.

After Rosen began running this ad, Danny Tarkanian sent her a cease and desist letter, in which he explained that the statements in the ad were found to be defamatory in a prior court case. The case Tarkanian referenced arose out of Tarkanian's earlier race against State Senator Mike Schneider for a seat in the Nevada State Senate. During that race, Schneider said on a television show that Tarkanian "set up 19 fraudulent corporations for telemarketers." Later, Schneider sent out mailers that asked: (1) "Why [d]id Danny Tarkanian betray the most vulnerable among the elderly?" and (2) "Why did [Tarkanian] set up an organization to cheat us out [of] over $2

million of our hard-earned retirement money?" Tarkanian filed suit against Schneider, which culminated in a jury verdict finding that the statements constituted slander and libel per se. Schneider and Tarkanian settled after the jury verdict was entered.

Upon receiving the cease and desist letter, Rosen continued publishing the ad online. After the election was over, Tarkanian filed a complaint in district court against Rosen, alleging libel per se, slander per se, and intentional infliction of emotional distress. Shortly thereafter, Rosen filed an anti-SLAPP special motion to dismiss in accordance with NRS 41.660. In her anti-SLAPP motion, Rosen asserted that she believed that the statements were true based on multiple public accounts and Tarkanian's own admissions about his involvement with the corporations. The district court denied the motion, determining that Rosen did not meet her burden under the first prong of the anti-SLAPP analysis, as she did not show that the statements in the ad were made in good faith. The court noted that some of Rosen's statements were similar to those made by Schneider, which were adjudicated as defamatory, but also found that Rosen's statements relied upon statements made by Steven Horsford and Ross Miller in their campaigns subsequent to the Schneider defamation action, and that those statements by Horsford and Miller were never addressed in a court proceeding. Thus, the district court found that it could not ascertain whether the statements at issue were true at this preliminary stage. The district court also determined that, in any event, Tarkanian met his burden under the second prong by showing prima facie evidence of a probability of success on his defamation case and that it should be up to the jury to determine whether the challenged statements were truthful and whether they were made with actual malice. Rosen now appeals, claiming that the district court erred in its analysis.

DISCUSSION

The district court erred in finding that the communications were not made in good faith

We review the denial of an anti-SLAPP motion de novo. *Coker v. Sassone*, 135 Nev. 8, 10-11, 432 P.3d 746, 748-49 (2019). The anti-SLAPP statute immunizes from liability "[a] person who engages in a *good faith* communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.650 (emphasis added). Under the first prong of the anti-SLAPP statute, we evaluate "whether the moving party has established, by a preponderance of the evidence," that he or she made the protected communication in good faith. NRS 41.660(3)(a); *see also Coker*, 135 Nev. at 12, 432 P.3d at 749. Only after the movant has shown that he or she made the protected statement in good faith do we move to prong two and evaluate "whether

the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim." *See* NRS 41.660(3)(b).

Here, the parties agree that the statements were "aimed at procuring any . . . electoral action, result or outcome," which is political speech covered by the anti-SLAPP statute. NRS 41.637(1); *see also, e.g.*, *Collier v Harris*, 192 Cal. Rptr. 3d 31, 39-40 (Ct. App. 2015) ("The character and qualifications of a candidate for public office constitutes a public issue or public interest for purposes of" the anti-SLAPP statute; therefore, the statute "applies to suits involving statements made during political campaigns." (alteration in original) (internal quotation marks omitted)). Since the parties agree that the communications in the ad were protected speech, the dispute in this case centers on whether the communications were made in good faith. A communication is made in good faith when it "is truthful or is made without knowledge of its falsehood." NRS 41.637; *see also Delucchi v. Songer*, 133 Nev. 290, 300, 396 P.3d 826, 833 (2017).

Rosen asserted in her anti-SLAPP motion that she made the statements in good faith, but she did not attach a sworn affidavit to her motion asserting as such. Thus, we must look to the evidence that Rosen provided to determine whether the statements were made in good faith. *Cf. Coker*, 135 Nev. at 12-13, 432 P.3d at 750 (explaining that when an attached affidavit does not address the issue of contention in the statements, courts look to the evidence the movant provides to show that statements were made in good faith). A determination of good faith requires consideration of all of the evidence submitted by the defendant in support of his or her anti-SLAPP motion.

In support of her special motion to dismiss, Rosen submitted at least nine newspaper articles that reported that Tarkanian incorporated and/or was the registered agent for at least 13 entities that were found to be fraudulent telemarketing schemes that solicited millions of dollars from seniors. Four of these articles included direct admissions from Tarkanian of these facts. Rosen also provided a letter from a former Assistant U.S. Attorney confirming the facts in the articles and two sets of pleadings from court cases demonstrating that individuals in charge of the companies in question were indicted or convicted of fraud.

In addition, Tarkanian admitted in his opposition to the anti-SLAPP motion that substantially identical statements made by his political opponents in two of his earlier campaigns for public office were substantively true. In one, Ross Miller stated that Tarkanian "served as the resident agent and attorney for many fraudulent telemarketing organizations who bilked senior citizens out of millions of dollars." In another campaign, Steven Horsford's political ads included two statements—"Tarkanian worked for telemarketing scammers" and Tarkanian "has been involved, as a businessman and lawyer, with at least 13 fraudulent charities."

Rosen argues that while all the ads differ slightly, the gist of all the ads are true and therefore the statements were made in good faith. Tarkanian, on the other hand, contends that individual words in the statements made by Horsford and Miller are sufficiently different from words in Rosen's, such that she cannot rely on those statements as evidence that she believed her own statements to be true. Primarily, Tarkanian appears to take issue with the use of the words "set up" in Rosen's statements to describe Tarkanian's role in the telemarketing organizations, rather than the words "worked for," "served as the resident agent and attorney for," or "has been involved . . . with," as used by Horsford and Miller in their statements. Notably, Tarkanian admits that he served as a resident agent, filed incorporation paperwork, and "provided routine legal work for companies that ended up operating telemarketing scams." But he contends that "set[ting] up" a corporation is different from "work[ing] for" or "serv[ing] as the resident agent and attorney for" a corporation, as it suggests that Tarkanian's role in the companies was more intimately involved. This, however, is a distinction without a difference. It is equally arguable that "work[ing] for" fraudulent telemarketing companies implies a higher degree of involvement than simply incorporating, or "set[ting] up," companies which later became fraudulent.

The fundamental problem in Tarkanian's argument is that it ignores the gist of the statements and instead attempts to parse each individual word in the statements to assess it for its truthfulness. But in a defamation action, "it is not the literal truth of 'each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the "gist or sting" of the statement is true or false.'" *Oracle USA, Inc. v. Rimini St., Inc.*, 6 F. Supp. 3d 1108, 1131 (D. Nev. 2014) (quoting *Ringler Assocs. Inc. v. Md. Cas. Co.*, 96 Cal. Rptr. 2d 136, 150 (Ct. App. 2000)), *clarified*, No. 2:10-CV-00106-LRH-PAL, 2014 WL 5285963 (D. Nev. Oct. 14, 2014); *see also Desert Sun Publ'g Co. v. Superior Court*, 158 Cal. Rptr. 519, 521 (Ct. App. 1979) ("A political publication may not be dissected and judged word for word or phrase by phrase. The entire publication must be examined."). To meet her burden as the defendant in prong one, Rosen must establish only "by a preponderance of the evidence" that the statements were true or made without knowledge of their falsity. NRS 41.660(3)(a). This is a far lower burden of proof than the plaintiff must meet under prong two to prevail on his defamation claims, which require a showing of "actual malice"—i.e., that Rosen made the statements with the "knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). Consequently, the plaintiff's high burden of proof for actual malice indicates a low

burden of proof for the defendant to show he or she did not have knowledge of falsity of his or her statements and made them in good faith. And, because the standard for "actual malice" is essentially the same as the test for "good faith" in prong one, only differing in the party with whom the burden of proof lies, it is appropriate to use the inquiry in defamation cases for determining the truthfulness of a statement under prong one.

Thus, the relevant inquiry in prong one of the anti-SLAPP analysis is whether a preponderance of the evidence demonstrates that "the gist of the story, or the portion of the story that carries 'the sting' of the [statement], is true." *Pegasus*, 118 Nev. at 715 n.17, 57 P.3d at 88 n.17 (2002) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). Under this standard, it is clear from the evidence in the record that Rosen sufficiently demonstrated that the statements were made in "good faith" under the anti-SLAPP statute because the "gist or sting" of the statements was substantively true. NRS 41.660(3)(a); *Pegasus*, 118 Nev. at 715 n.17, 57 P.3d at 88 n.17; *see also Oracle USA*, 6 F. Supp. 3d at 1131. The gist of Rosen's statements, as well as the statements of Horsford and Miller, is that Tarkanian was involved or associated with companies later found to be telemarketing scams that targeted the elderly. And the evidence in the record, particularly Tarkanian's own admissions affirming Horsford's and Miller's statements, suggests that Rosen's statements were substantively true.

It is even clearer from the evidence that Rosen's statements were not made with knowledge of their falsity. *See* NRS 41.637. Tarkanian's involvement with companies found to be fraudulent telemarketing schemes is present throughout the public discourse, as shown by the expansive number of articles Rosen submitted as evidence. According to Tarkanian, however, because Rosen knew about the Schneider statements and knew that those statements were found to be defamatory by a jury based on two newspaper articles about the litigation, she therefore could not make the statements without knowledge of their falsity. However, neither newspaper article about the Schneider litigation contained the specific language of the statements that were the subject of the litigation, and it is not clear what part of the Schneider statements the jury found to be defamatory. For example, one of the articles mentioned that Schneider settled the case, rather than taking it to its final adjudication, and that Schneider believed the verdict would have been overturned on appeal. Additionally, these articles must be weighed against the numerous other articles connecting Tarkanian to telemarketing schemes.

Moreover, Horsford and Miller, who made attacks similar to the Schneider article's statements regarding Tarkanian's work for companies found to be fraudulent telemarketers, did not face lawsuits, as evidenced by further newspaper articles. While Tarkanian is not

required to pursue lawsuits against anyone who potentially defamed him, the absence of a suit against Horsford and Miller for defamation supports Rosen's argument that her statements were not made with knowledge of their falsity. In addition, the evidence does not clearly define Tarkanian's role in each of the companies, and thus it is reasonable that Rosen would not have known that stating Tarkanian "set up" rather than "worked for" these companies might be false. When considered in conjunction with the entirety of the public discourse on this topic, the evidence provides a compelling case that Rosen believed her statements to be true.

The district court erred in finding that Tarkanian met his burden in prong two of proving prima facie evidence of a probability of prevailing on his claims

Because Rosen satisfied prong one of the anti-SLAPP analysis, we must evaluate prong two to determine whether Tarkanian presented prima facie evidence of a probability of prevailing on the claims. He did not. To prevail on a defamation claim, the plaintiff must show: "(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Pegasus*, 118 Nev. at 718, 57 P.3d at 90 (alteration in original) (internal quotation marks omitted). Where, as here, the plaintiff is a public figure, the statements must be made with "actual malice." *Id*. at 718-19, 57 P.3d at 90-91.[2] The truth of the statements and actual malice are determinative here.

As discussed above, the gist of Rosen's statements is true, or at the very least her statements were made without actual malice. Tarkanian relies on the same newspaper articles about the Schneider litigation as Rosen did to show that Rosen knew her statements were false or at least acted with reckless disregard toward their truth. However, both articles fail to include the specific language that is the subject of the Schneider litigation. One of the articles refers to the statements as focusing on Tarkanian's "contact with companies involved in telemarketing fraud," while the other states that "he did work for telemarketing firms accused of scamming the elderly." Both of these statements were later admitted by Tarkanian to be

[2]This added hurdle is intended "[t]o promote free criticism of public officials, and avoid any chilling effect from the threat of a defamation action." *Id.* at 718, 57 P.3d at 90. Where political campaign speech is made without knowledge of falsity or actual malice, the First Amendment of the United States Constitution requires dismissal of a defamation suit. This is because the remedy for this type of factually incorrect criticism of a political opponent is not a lawsuit, but competing speech. *See Brown v. Hartlage*, 456 U.S. 45, 61 (1982) ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent.").

true after they were made by Horsford and Miller. The fact that two newspaper articles described the Schneider statements in this way shows that there is no material difference in the gist of Schneider's statement and those of Horsford and Miller. Because there is no material difference and Tarkanian later admitted to working for these companies, Rosen's statements are also true.

Even if there is a material difference between stating that Tarkanian "set up" the fraudulent telemarketing corporations and stating that he "worked for" those corporations, Tarkanian cannot prove that Rosen made her statements with reckless disregard for their truth. Neither of the newspaper articles Rosen referenced in the ad contain the specific "set up" language from the Schneider litigation, so the evidence does not support that Rosen knew that language formed the basis of the jury verdict in the Schneider litigation. For these reasons, Tarkanian cannot show a probability of proving actual malice in this case.

CONCLUSION

We conclude that the district court erred in its analysis of whether Rosen's statements were made in good faith. Because the evidence shows that the "gist or sting" of the statements was substantially true or made without knowledge of their falsehood, Rosen met her burden under the first prong of the anti-SLAPP analysis. We further conclude that the district court erred in finding that Tarkanian showed a probability of prevailing on his claims, as the evidence demonstrates a lack of actual malice by Rosen. Therefore, we reverse and remand with instructions for the district court to grant the special motion to dismiss.[3]

Parraguirre and Stiglich, JJ., and Breslow and Stockard, D.JJ., concur.

Gibbons, C.J., with whom Pickering, J., agrees, dissenting:

The anti-SLAPP statute affords a defendant who is sued for allegedly defamatory political speech the opportunity to challenge the complaint by a motion to dismiss at the outset of the case, despite there being some dispute as to the underlying facts. *See Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003) (internal quotation marks omitted), *superseded by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766 (9th Cir. 2017). In evaluating prong one of the anti-SLAPP analysis, this court con-

[3]Granting the special motion to dismiss will result in the dismissal of the entire complaint, including the claims of intentional infliction of emotional distress, as these were based on Rosen's good faith communications. *See* NRS 41.650.

siders whether the party made the assertedly protected communication in good faith.[1] NRS 41.660(1). A communication is made in good faith when it "is truthful or is made without knowledge of its falsehood." NRS 41.637; *see also Delucchi v. Songer*, 133 Nev. 290, 300, 396 P.3d 826, 833 (2017). To prevail on prong one at this early stage of the litigation, the moving party must establish by a preponderance of the evidence that he or she made the communication in good faith. NRS 41.660(3)(a); *see also Coker v. Sassone*, 135 Nev. at 8, 12, 432 P.3d 746, 749 (2019). Although the moving party is not required to file an affidavit in support of an anti-SLAPP motion to dismiss under the anti-SLAPP statute, it is necessary to do so when material facts are in dispute and to authenticate exhibits.

Rosen's motion to dismiss did not meet the burden of showing, by a preponderance of the evidence, that she made her statements in good faith. While the majority is correct that Rosen contends she relied on articles containing the Horsford and Miller statements, those statements differ markedly from the statements Rosen made that are in issue in this case. Further, Rosen provided no affidavit for the district court to evaluate her reliance or to authenticate the newspaper articles. Even if we were to conclude, as the majority does, that Rosen relied on these articles, such reliance does not prove that Rosen made the statements underlying the complaint in this case in good faith. Consequently, Rosen cannot demonstrate good faith on the back of Tarkanian's failure to sue Horsford or Miller. Tarkanian did sue Schneider for statements about Tarkanian that more closely resemble those Rosen made. Although the case settled before final judgment, a jury found the Schneider statements to be defamatory.

Tarkanian admitted that he did not sue Horsford or Miller because he believed that their statements had some truth to them, despite having a negative slant. The majority emphasizes this acknowledgment. Putting aside the fact that the acknowledgment concerned different statements and was conditional,[2] Tarkanian's acknowledgment only occurred after Rosen published her statements in the advertisement. Therefore, Rosen could not have relied on the acknowledgment when making her statements and cannot rely on this admission in establishing that she made the statements in good faith. Under the majority's reasoning, if a party does not sue for statements that are similar to a defamatory statement, then that party runs the risk of a court holding that the party admitted to a truthful gist of all similar

[1]In addition to this consideration, this court must also determine whether the speech is political speech covered by the anti-SLAPP statute. NRS 41.637(1). We do not address this here because both parties concede that the speech in question is covered by the anti-SLAPP statute.

[2]Tarkanian admits that the statements are true only insofar as he "served as a resident agent and did some minor legal work for some companies."

statements. Thereby, the party may be foreclosed from any defamation suit for any similar statements under the anti-SLAPP statute.

Contrary to the majority's assessment, Rosen's and Schneider's statements differ from the Miller and Horsford statements, on which Rosen relied. The majority attempts to bypass these differences by stating that the "gist" of these statements is the same. Specifically, the majority says that the gist of all these statements "is that Tarkanian was involved or associated with companies later found to be telemarketing scams that targeted the elderly." Majority, *supra*, at 441. This method of putting all related statements together and referring to their "gist" may misdirect a court to consider the truthfulness of similar statements instead of considering the statements actually made.

Rosen stated that "Tarkanian set up 13 fake charities that preyed on vulnerable seniors." This language most closely resembles the Schneider advertisements, which stated that "[Tarkanian] set up 19 fraudulent corporations for telemarketers." Horsford and Miller, on the other hand, said only that Tarkanian "worked for" and "served as the resident agent and an attorney for" these corporations. Providing legal work or working as a resident agent for a corporation that is engaged in illicit activity is different than setting up the illicit activity oneself. An attorney who does legal work or serves as the resident agent of a corporation is not necessarily implicated in the corporation's crimes. For example, an attorney may form a corporation for a client by filing the articles of incorporation. The hypothesis that an attorney who filed articles of incorporation for a corporation that later engages in illicit activity is guilty of such activity is incorrect and unfair. While the majority contends that this distinction is "arguable," I disagree.

Rosen was on notice that Schneider's statements, which are indisputably more similar to those at issue here than Horsford's or Miller's statements, were found to be defamatory by eight citizens serving on jury duty. Rosen also received a cease and desist letter from Tarkanian, explaining that similar statements were found to be defamatory. Given these facts, and with no affidavit from Rosen, the district court did not err in concluding that Rosen had not met her statutory burden of showing, by a preponderance of the evidence, that she made the statements in good faith.

Because Rosen did not meet her burden as to prong one, the analysis should end there. But, even assuming Rosen met her burden under prong one, Tarkanian met his burden under prong two of the anti-SLAPP analysis. Under prong two, the burden shifts to the plaintiff to demonstrate "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). To determine whether the prima facie evidence standard is met, we may look to California's

anti-SLAPP jurisprudence. NRS 41.665(2). In California, the prima facie evidence standard is a low burden. *See Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30, 51 (Cal. 2006). To meet this standard, the plaintiff must show that his claims meet "a minimum level of legal sufficiency and triability." *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 33 n.5 (Cal. 2000). In essence, the plaintiff "must demonstrate that his claim is legally sufficient." *Hecimovich v. Encinal Sch. Parent Teacher Org.*, 137 Cal. Rptr. 3d 455, 470 (Ct. App. 2012). California courts, therefore, treat this prong as they do a motion for summary judgment: the courts accept as true all evidence that is favorable to the nonmoving party and evaluate the moving party's evidence only to determine if it defeats the defamation claim "as a matter of law." *Id.* at 469-70; *cf. Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.").

Without considering this standard, the majority skips directly to its own defamation analysis and determines whether Tarkanian's claim is factually sufficient instead of legally sufficient. The majority holds that Tarkanian cannot show actual malice because the gist of Rosen's statements is true and Tarkanian acknowledged that the Horsford/Miller statements had some truth to them. Tarkanian maintained throughout the case in district court and before this court that the statements Rosen made in the advertisement, like the Schneider statements, were false, and he has provided support for his assertion.

"Actual malice (or more appropriately, constitutional malice) is defined as knowledge of the falsity of the statement or a reckless disregard for the truth." *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 414, 664 P.2d 337, 344 (1983) (emphasis omitted). A person shows "[r]eckless disregard for the truth" when the person has "a high degree of awareness of [the] probable falsity [of the statement]." *Id.* (second and third alteration in original) (internal quotation marks omitted) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). Looking to the evidence that Tarkanian presented to show actual malice, it is clear that he made the prima facie showing of a legally sufficient, triable claim. Tarkanian presented evidence that substantially similar Schneider statements were submitted by another district court to a jury of eight citizens and found to be defamatory. The cease and desist letter Tarkanian sent Rosen advised her of these facts. Thus, Rosen had actual notice of the likelihood that her statements were actionably false. Moreover, Tarkanian explained that Rosen inaccurately cited to articles to bolster her advertisement even though those articles did not state the propositions she included in her advertisement.

The majority contends that Tarkanian cannot show actual malice because of evidence Rosen presented: the evidence of his admission to the Horsford and Miller statements, and the articles that Rosen claimed she relied on. But consideration of this evidence in prong two of the anti-SLAPP analysis is inappropriate. Rather, we must consider the moving party's evidence only if it defeats the non-moving party's claims as a matter of law. Rosen's alleged reliance on other articles was not supported by an affidavit. The fact that Tarkanian did not sue Horsford and Miller for their similar statements may make actual malice less probable. However, it does not defeat Tarkanian's claim as a matter of law. NRS 41.660(4) states that "the court shall allow limited discovery" when a party needs to access information held by the opposing party for the purpose of either meeting or opposing the burden under the second prong of the anti-SLAPP statute. Neither Rosen nor Tarkanian requested such discovery in this case. Absent an affidavit from Rosen, the district court correctly determined that Tarkanian's evidence, when taken as true and viewed in a light most favorable to his case, resulted in Tarkanian meeting the burden of the prima facie evidence standard under prong two of the anti-SLAPP analysis.

We believe that the remedy for "factually incorrect criticism [during a campaign] is not a lawsuit, but competing speech." Majority, *supra*, at 442 n.2. As Justice Oliver Wendell Holmes, Jr., wrote, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Yet the anti-SLAPP statute fits a specific purpose—to bar frivolous litigation designed to thwart free speech at the courthouse doors. Without a supporting affidavit, Rosen failed to demonstrate by a preponderance of the evidence that she made the statements in good faith. Even if she had met her burden, considering Tarkanian's evidence in a light most favorable to him, he made a prima facie showing of his claims. The district court underwent the appropriate consideration of Rosen's anti-SLAPP motion and properly denied it based upon the disputed material issues of fact and the limited record.

KAYCEAN BUMA, AS THE SURVIVING SPOUSE, AND DELANEY BUMA, AS THE SURVIVING CHILD OF JASON BUMA (DECEASED), APPELLANTS, *v.* PROVIDENCE CORP. DEVELOPMENT, DBA MILLER HEIMAN, INC.; AND GALLAGHER BASSETT SERVICES, INC., RESPONDENTS.

No. 73632

December 12, 2019 453 P.3d 904

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Vacated and remanded with instructions.

Diaz & Galt, LLC, and *Charles C. Diaz*, Reno, for Appellants.

Lewis Brisbois Bisgaard & Smith LLP and *John P. Lavery* and *Lee E. Davis*, Las Vegas, for Respondents.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PICKERING, J.:

To receive workers' compensation under the Nevada Industrial Insurance Act (NIIA), an employee must show that an "injury arose out of and in the course of his or her employment." NRS 616C.150(1). This rule generally requires that the injury happened at work and was due to the work itself or a condition of the workplace. This court has not addressed how these basic requirements apply to "traveling" employees—those whose employment entails travel away from the workplace.

Under the NIIA, "Travel for which an employee receives wages shall, for the purposes of [the act], be deemed in the course of employment." NRS 616B.612(3). Consistent with this statute is the majority rule that traveling employees are in the course of employment continuously during their business trips, except during distinct departures on personal errands. Such an employee's injuries arising out of travel- or work-related risks—including those associated with meeting basic personal needs (like sleeping in hotels or eating in restaurants) and navigating hazards necessarily incidental to the travel or work—are usually compensable unless an exception applies. NRS 616B.612(3) codifies this majority rule.

This case concerns a traveling employee, Jason Buma. He died in an all-terrain-vehicle (ATV) accident while on a required business trip for his employer, respondent Miller Heiman. Appellants Kay-

cean and Delaney Buma, Jason's wife and daughter, were denied workers' compensation death benefits, and the district court denied their petition for judicial review. We vacate and remand. We vacate the district court's order because the appeals officer failed to apply NRS 616B.612(3), and we remand for the appeals officer to reevaluate the matter under the correct standards.

I.

Respondent Miller Heiman employed Jason Buma full-time as a vice president of sales. In that capacity, Jason split his time working from home in Reno, Nevada, and traveling out-of-state on business. He had no local clients or contacts, and he did not work out of Miller Heiman's Reno office. Jason enjoyed considerable discretion in carrying out his duties. He worked irregular hours, starting his day as early as 6 a.m. and sometimes working as late as 10 p.m. He was constantly on call, taking business calls at any hour on weekends, on vacations, and even "while hiking." He made his own travel arrangements.

Miller Heiman required Jason to travel on business, including annual trips to Houston, Texas, to attend an oil and gas conference. On these trips to Houston, Jason stayed with a local friend and independent affiliate of Miller Heiman, Michael O'Callaghan, who owned a ranch about a two-hour drive from Houston. Each year Jason and Michael attended the conference, Jason would stay at Michael's ranch, where he and Michael would prepare their joint presentations on Miller Heiman's behalf for the conference. The two would travel to and from Houston to attend the conference, meet with clients, and give presentations on Miller Heiman's services.

On his most recent trip, Jason flew from Reno to Houston on a Sunday and drove from the airport to Michael's ranch in the late afternoon. He and Michael had several joint presentations at the oil and gas conference to prepare for, with the first presentation scheduled for Monday morning at 8:30 a.m. Sometime after 5 p.m. on Sunday, Jason and Michael went on an ATV ride around the property, as they had on Jason's prior trips. While riding towards the end of a trail that led off the property, Jason rolled his ATV. He died at the scene.

Kaycean and Delaney Buma filed a workers' compensation claim for death benefits. Respondent Gallagher Bassett Services, Inc., the third-party administrator of Miller Heiman's workers' compensation plan, investigated the incident and denied the claim. The Bumas appealed the decision administratively. The hearing officer affirmed Gallagher Bassett's determination that Jason's death occurred during an activity that was not part of his work duties. The Bumas again appealed the decision, arguing that Jason traveled to the Houston area solely for the purpose of work. The appeals officer

affirmed the denial. The Bumas then petitioned for, and the district court denied, judicial review. They now appeal from that order.

II.

To receive workers' compensation under the NIIA, an injured employee (or his dependents) must show two things: "that the employee's injury arose *out of* and *in the course of* his or her employment." NRS 616C.150(1) (emphases added); *see MGM Mirage v. Cotton*, 121 Nev. 396, 400, 116 P.3d 56, 58 (2005) ("emphasiz[ing] that the inquiry is two-fold"). If "the injury occurs at work, during working hours, and while the employee is reasonably performing his or her duties," then the injury arises "in the course of employment" under NRS 616C.150(1). *Baiguen v. Harrah's Las Vegas, LLC*, 134 Nev. 597, 599, 426 P.3d 586, 590 (2018) (quoting *Wood v. Safeway, Inc.*, 121 Nev. 724, 733, 121 P.3d 1026, 1032 (2005)). "An injury arises out of the employment 'when there is a causal connection between the employee's injury and the nature of the work or workplace.'" *Id.* at 600, 426 P.3d at 590 (quoting *Wood*, 121 Nev. at 733, 121 P.3d at 1032).

The appeals officer concluded that Jason's injury did not arise out of or in the course of his employment. Because judicial review is limited to the appeals officer's final written decision, NRS 616C.370(2), "this court's role is identical to that of the district court." *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 282, 183 P.3d 126, 128 (2008) (internal quotation marks omitted). The reviewing court must affirm if the appeals officer applied the law correctly and the facts reasonably support the decision. *See* NRS 233B.135; *Bob Allyn*, 124 Nev. at 282, 183 P.3d at 128. We review the appeals officer's view of the facts deferentially, NRS 233B.135(3), but decide questions of law independently. *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006). Questions of law include questions of statutory interpretation. *Id.*

In analyzing whether Jason's death occurred in the course of employment, the appeals officer applied the "going and coming" rule, which "'preclud[es] compensation for most employee injuries that occur'" away from the workplace (for instance, when the employee is commuting to or from work). *See Bob Allyn*, 124 Nev. at 287, 183 P.3d at 131 (alteration in original) (quoting *Cotton*, 121 Nev. at 399, 116 P.3d at 58). "This rule frees employers from liability for the dangers employees encounter in daily life" when they are beyond the reach of their employers' control. *Cotton*, 121 Nev. at 399-400, 116 P.3d at 58. This general rule, however, does not apply to "traveling" employees—those "whose work *entails travel away from* the" workplace by definition. 2 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law* § 25.01, at 25-2 (2019) (emphasis added). Rather, "in the majority of jurisdictions,"

and under Larson's rule, traveling employees are "within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." *Id*.

This court has not addressed the traveling employee rule. The Bumas posit that the NIIA statutorily adopts the traveling employee rule, citing NRS 616B.612(3): "Travel for which an employee receives wages shall, for the purposes of [the NIIA], be deemed in the course of employment." *See Jourdan v. State Indus. Ins. Sys.*, 109 Nev. 497, 501, 853 P.2d 99, 102 (1993) (recognizing that NRS 616B.612(3), formerly numbered NRS 616.270(2), does not apply in the context of a non-traveling employee who receives a stipend to cover the cost of his daily commute). They argue that Jason's death was in the course of employment under this statute because he received a salary to travel to solicit business on Miller Heiman's behalf.[1] They argue that the appeals officer erred by failing to apply this statute to their claim. They also argue that, to the extent there are any exceptions implicit in the rule under NRS 616B.612(3), none of those exceptions applies here. In the Bumas' view, Jason's short ATV ride with his associate, with whom he was staying to prepare for their joint presentations early the next morning, was not an unreasonable departure from the course of his employment, but was instead akin to a walk around hotel grounds while traveling on business. Miller Heiman argues that, even if Jason was in the course of employment as a traveling employee, his injury did not arise out the employment.

A.

The Bumas are correct that NRS 616B.612(3) creates a traveling employee rule. Commonly understood, "travel" naturally encompasses a range of activities incidental to the physical act of moving from one place to another. This understanding underpins "[t]he rationale for . . . extended coverage" for traveling employees under workers' compensation law: "that when travel is an essential part of employment, the risks associated with the necessity of eating, sleeping, and ministering to personal needs away from home are an incident of the employment even though the employee is not actually working at the time of injury." *Ball-Foster Glass Container Co. v. Giovanelli*, 177 P.3d 692, 696 (Wash. 2008).

[1]The Bumas are correct that Jason received "wages [for]" his travel under NRS 616B.612(3). Under *Mensah v. CorVel Corp.*, "wages," as used throughout the NIIA and its accompanying administrative code, is not so inflexible as to exclude an employee's salary. *See* 131 Nev. 594, 596-97, 356 P.3d 497, 498-99 (2015) (holding that "wages" broadly "means the amount of money that an employee receives for the time the employee worked") (citing NRS 608.012 (defining wages)); *see also* NAC 616C.423(j) (2019) (including salary in the calculation of average monthly wages).

A "[traveling] employee may indeed have a choice" of where to stay, but "that is not the point." 2 Larson's, *supra*, § 25.02, at 25-2. "The point is that there is no choice but to live [*somewhere* while] away from home." *Id.* For that reason, a traveling employee is entitled to expanded coverage for travel-related injuries. There is no choice but for traveling employees to face hazards away from home in order to tend to their personal needs, "including sleeping, eating, and seeking fresh air and exercise," and reasonably entertaining themselves, on their work trips. *Ball-Foster*, 177 P.3d at 701; *see also* 2 Larson's, *supra*, § 25.02, at 25-4 n.12 ("A motel is the place of employment of a traveling employee.") (internal quotation marks omitted). That said, "the traveling employee doctrine does not require coverage for every injury." *Ball-Foster*, 177 P.3d at 697. "The problem is to define a principle which will tell us where the line is to be drawn." 2 Larson's, *supra*, § 20.01, at 20-2.

Traveling employees are deemed in their employers' control, as a practical matter, for the duration of their trips. Several courts have hence simplified the traveling-employee inquiry (i.e., whether a traveling employee's injury is ultimately compensable under workers' compensation) to a question of general reasonableness. *See, e.g.*, *Bagcraft Corp. v. Indus. Comm'n*, 705 N.E.2d 919, 921 (Ill. App. Ct. 1998) (applying rule covering employees under workers' compensation throughout their work trips for all reasonable and foreseeable activities). "A general reasonableness standard without a finding of a connection to the employee's work," however, "would go too far in covering the social and recreational activities of traveling employees." *Ball-Foster*, 177 P.3d at 698. This court has consistently held that an employee must "establish more than merely being at work and suffering an injury in order to recover" workers' compensation under the NIIA. *Mitchell v. Clark Cty. Sch. Dist.*, 121 Nev. 179, 182, 111 P.3d 1104, 1106 (2005) (quoting *Rio Suite Hotel & Casino v. Gorsky*, 113 Nev. 600, 605, 939 P.2d 1043, 1046 (1997)). We extend this reasoning to the rule for traveling employees under NRS 616B.612(3). While NIIA coverage is broader for a traveling employee because of the risks associated with travel away from home, *Ball-Foster*, 177 P.3d at 701, a traveling employee nonetheless may not recover for injuries sustained while on a personal errand amounting to a distinct departure from his or her employer's business. *See* Larson's, *supra*, § 25.01, at 25-2. The "distinct departure" exception to the traveling employee rule comports with Nevada's requirement that, to be covered by workers' compensation, the injury arise out of the employment.

1.

The exception in Larson's traveling employee rule for distinct departures on personal errands is implicit in the text of NRS

616B.612(3). This court has recognized that employees on special errands/missions may deviate from the course of their employment. *See, e.g.*, *Bob Allyn*, 124 Nev. at 289, 183 P.3d at 133; *Heidtman v. Nev. Indus. Comm'n*, 78 Nev. 25, 29, 368 P.2d 763, 765 (1962). And the "traveling employee may depart on a personal errand just like any other type of employee." *Ball-Foster*, 177 P.3d at 697. We accordingly align the inquiry under NRS 616B.612(3) with Larson's traveling employee rule. *Cf. Neighbors*, 122 Nev. at 779-80, 138 P.3d at 512 (relying on Larson's in interpreting NRS 616B.033(2)); *Heidtman*, 78 Nev. at 32, 368 P.2d at 767 (quoting Larson's).

Consistent with the statutory text and Larson's treatise, under NRS 616B.612(3), a traveling employee is in the course of employment continuously for the duration of the trip, excepting the employee's distinct departures on personal errands. To determine whether a traveling employee left the course of employment by distinctly departing on a personal errand, the inquiry focuses on whether the employee was (a) tending reasonably to the needs of personal comfort, or encountering hazards necessarily incidental to the travel or work; or, alternatively, (b) "pursuing . . . strictly personal amusement ventures." *Ball-Foster*, 177 P.3d at 697. "The focus is on the nature of the activity" and the activity's purpose, considered in the context of the work and the trip, "rather than the [travel] status of the employee." *LaTourette v. Workers' Comp. Appeals Bd.*, 951 P.2d 1184, 1188 (Cal. 1998). The cases of distinct departures on personal errands tend to involve a personally motivated activity that takes the traveling employee on a material deviation in time or space from carrying out the trip's employment-related objectives. *See, e.g.*, *Fleetwood Enters., Inc. v. Workers' Comp. Appeals Bd.*, 37 Cal. Rptr. 3d 587 (Ct. App. 2005) (concluding that injury was not compensable under traveling employee rule where claimant was injured in a car accident after extending his stay in Europe by three days for "additional sightseeing in Italy" following the completion of the business purpose of the trip); *E. Airlines v. Rigdon*, 543 So. 2d 822 (Fla. Dist. Ct. App. 1989) (denying benefits to flight attendant on a 24-hour layover who was injured skiing at a lodge 58 miles from hotel).

A personally motivated activity is therefore not necessarily dispositive by itself. For instance, under the personal comfort rule, an employee remains in the course of employment during personal comfort activities unless the departure from the employee's work-related duties "is so substantial that an intent to abandon the job temporarily may be inferred or the method chosen" to minister to one's personal comfort "is so unusual and unreasonable that the act cannot be considered incidental to the course of employment." *Ball-Foster*, 177 P.3d at 700. Generally, "[t]he personal comfort doctrine applies to such acts as eating, resting, drinking, going to

the bathroom, smoking, and seeking fresh air, coolness, or warmth." *Id.* The class "of activities covered by the personal comfort doctrine depends on the particular circumstances of employment" and, in general, "[a] traveling employee is entitled to broader coverage" under the personal comfort rule than would be a non-traveling employee. *Id.* at 701.

Accordingly, traveling employees may generally tend to their reasonable recreational needs during downtime without leaving the course of employment under this standard. *See, e.g.*, *id.* at 701-02 (affirming award of benefits where traveling employee was injured "taking a Sunday stroll to the park on his single day off"); *see also, e.g.*, *Gravette v. Visual Aids Elecs.*, 90 A.3d 483 (Md. Ct. Spec. App. 2014) (reversing denial of benefits where an off-duty traveling employee injured his pelvis when he slipped and fell while dancing in a nightclub at the hotel he was staying at for his employer's benefit, even though he was not at the nightclub at the employer's request or for the employer's benefit); *Proctor v. SAIF Corp.*, 860 P.2d 828, 830-31 (Or. Ct. App. 1993) (reversing denial of benefits where traveling employee drove 15 miles away from conference center to a gym and was injured there while playing basketball); *CBS, Inc. v. Labor & Indus. Review Comm'n*, 579 N.W.2d 668 (Wis. 1998) (affirming award where traveling employee, a CBS employee hired to assist CBS's television coverage of the 1994 Winter Olympic Games, injured his knee while skiing on his day off). However, recreational activity that is unreasonable in light of the total circumstances of the trip may constitute a distinct departure on a personal errand.

2.

As noted, to be compensable under the NIIA, a traveling employee's injury must have arisen out of the employment. *See Cotton*, 121 Nev. at 400, 116 P.3d at 58. This requirement is consistent with the applicable statutory text, caselaw from other jurisdictions, and Larson's rule for traveling employees. *See* NRS 616B.612(3) (specifying when travel is "in the course of" employment, but not addressing when travel-related injuries "arise out" of the employment); *Ball-Foster*, 177 P.3d at 698 (stating generally that, to be compensable, a traveling employee's "injury must have its origin in a travel related risk"); 2 Larson's, *supra*, § 25.01, at 25-2 (stating generally that, for traveling employees, their "injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable").

Our caselaw establishes three general categories of risk applicable to all employee injuries—employment risk, personal risk, and neutral risk. *See Baiguen*, 134 Nev. at 600, 426 P.3d at 590 (citing *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 351-53, 240

P.3d 2, 5-7 (2010)). In general, injuries from employment risks arise out of the employment, *id.*, as does an injury due to a neutral risk if the increased-risk test is satisfied, *see id.* at 601, 426 P.3d at 591. Injuries due to purely personal risks generally do not arise out of the employment. *See also id*. (adopting a mixed-risk test applicable to injuries caused by a personal risk and an employment risk).

We hold that this category-based approach applies to traveling employees, though we clarify that risks necessitated by travel—such as those associated with eating in an airport, sleeping in a hotel, and reasonably tending to personal comforts—are deemed employment risks for traveling employees. But purely personal risks—such as a cardiac arrest, the risk of which was not aggravated by the conditions of the travel or employment—remain non-compensable under the NIIA. *See, e.g.*, *LaTourette*, 951 P.2d at 1189 ("It follows that [traveling employees] are also subject to the general rules governing injury from a non-occupational disease."). Additionally, neutral risks that traveling employees may encounter are compensable only if the increased-risk test is met. *Cf. Baiguen*, 134 Nev. at 601, 426 P.3d at 591.

B.

Both the appeals officer and district court decided compensability based on three main facts: (1) "there were no company events scheduled for the day of the accident"; (2) "Buma was not meeting with clients until the following day"; and (3) "Buma was not required to ride the ATV for work purposes." However significant in the non-traveling-employee context, these facts are not outcome-determinative under NRS 616B.612(3), the statutory rule for traveling employees. The first and second factual findings do not speak to the reality that Jason was *required* to be in the Houston area *for work* and that, to get there in time to make the scheduled joint presentation with Michael, Jason needed to arrive a day ahead of time. As for the third factual finding, it begs the outcome-determinative question: whether Jason's ATV outing *with his business associate/co-presenter while on a business trip* amounted to a "distinct personal departure on a personal errand."

The appeals officer's decision does not cite NRS 616B.612(3), but it does make passing reference to Larson's traveling employee rule, albeit in confusing fashion. First, the decision deems the traveling employee rule not applicable; then the decision states conclusorily that "[t]he ATV ride was clearly a distinct departure on a personal errand." The former conclusion cannot be squared with NRS 616B.612(3) and is erroneous as a matter of law. The latter statement, while a permissible conclusion after a full and fair hearing, appears influenced by extraneous considerations: specifically, the hearing officer's explanation, three sentences later, that "[Jason]

was not under his employer's control while at his friend's ranch." Such analysis ignores reality—that Jason was on a business trip—and the law: A traveling employee is under his employer's control for the duration of his or her business trip, NRS 616B.612(3).

Review for substantial evidence presupposes a full and fair proceeding, which in turn presupposes correct application of law. *Revert v. Ray*, 95 Nev. 782, 786-87, 603 P.2d 262, 264-65 (1979). The correct legal principles should have guided the inquiry towards the facts made relevant by those principles. *Cf. Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491, 215 P.3d 709, 724 (2009) (noting that, in the summary judgment context, "[t]he substantive law determines which facts are material"), *modified on other grounds by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 293 P.3d 869 (2013). We therefore vacate the district court's order denying the Bumas' petition for judicial review, with instructions to remand the matter to the appeals officer to conduct a hearing for additional fact-finding, to be guided by the traveling employee rule and its exception for distinct personal errands as set out in this opinion.

Gibbons, C.J., and Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.