THE STATE OF NEVADA LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, Appellant, *v.* EDUCATION SUPPORT EMPLOYEES ASSOCIATION; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14; and CLARK COUNTY SCHOOL DISTRICT, Respondents.

No. 70586

November 8, 2018 429 P.3d 658

Appeal from a district court order granting a petition for judicial review of an order of the Local Government Employee-Management Relations Board. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Affirmed.

Adam Paul Laxalt, Attorney General, *Gregory L. Zunino*, Bureau Chief, and *Donald J. Bordelove*, Deputy Attorney General, Carson City, for Appellant.

Clark County School District, Office of the General Counsel, and *S. Scott Greenberg*, Assistant General Counsel, Las Vegas, for Respondent Clark County School District.

Dyer Lawrence, LLP, and *Francis C. Flaherty* and *Sue S. Matuska*, Carson City, for Respondent Education Support Employees Association.

McCracken, Stemerman & Holsberry, LLP, and *Kristin L. Martin*, Las Vegas, for Respondent International Brotherhood of Teamsters, Local 14.

Before the Supreme Court, Cherry, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Stiglich, J.:

Two labor unions have disputed which entity has the right to represent Clark County School District employees as the exclusive bargaining representative. Three elections have occurred since this dispute first arose, and in each the challenging union secured a majority of the votes cast but failed to secure a majority of the members of the bargaining unit. Following the last election, the Local Government Employee-Management Relations Board deemed the challenging union the winner of the election because the union obtained

a majority of the votes cast. We take this opportunity to clarify that the vote-counting standard mandated by NRS 288.160 and Nevada Administrative Code (NAC) 288.110 is a majority of the members of the bargaining unit and not simply a majority of the votes cast. Accordingly, we affirm the district court's order granting the petition for judicial review.

FACTUAL AND PROCEDURAL HISTORY

Education Support Employees Association (ESEA) is the recognized bargaining agent for the Clark County School District (CCSD) bargaining unit. In 2001, the International Brotherhood of Teamsters, Local 14 (Local 14) challenged ESEA's support among CCSD employees, and the Local Government Employee-Management Relations Board (Board) found that there was a good-faith doubt as to which labor union enjoyed the support of the majority of the bargaining unit. Therefore, the Board decided an election would be held to determine which labor union would represent the majority of the CCSD bargaining unit.

Before the election was held, the Board issued an order stating: "[A]lthough the Legislature does not appear to have specifically addressed whether the majority is of 'votes cast' or 'of members of the bargaining unit' in NRS 288.160(4), NAC [288.110(10)(d)][1] does provide clear interpretation that a majority of the employees within the particular 'bargaining unit' is required." Accordingly, the Board stated its intent to require support from a majority of the employees in the bargaining unit for a labor union to be certified as the exclusive bargaining representative. ESEA and Local 14 petitioned for judicial review of the Board's pre-election order, and, on appeal, this court affirmed the Board's interpretation of the relevant statute and administrative code and the Board's use of the majority-of-the-unit standard in an unpublished order.

The election was held in 2006. The Board ultimately declared that the status quo endured, or that ESEA remained the bargaining agent, because neither union obtained the support of a majority of the members in the bargaining unit and because the government employer had not sought to withdraw its recognition of ESEA as the exclusive bargaining agent. On appeal from the district court's resolution of Local 14's petition for judicial review, this court concluded in an unpublished order that the Board was required to conduct a runoff election and that the majority-of-the-unit standard applied to the runoff election, unless the parties could agree to an alternative method.

[1]The order erroneously referenced NAC 288.160(9)(d), instead of NAC 288.110(9)(d); the NAC was amended in 2003, and the relevant subsection is now NAC 288.110(10)(d).

The runoff election was held in 2015. The Board determined that the results of the election did not demonstrate support for a particular union by a majority of the bargaining unit and, as such, did not justify removing ESEA as the recognized bargaining agent. The Board went on to find that another runoff election was not required but that it had the discretion to hold a second runoff election. The Board stated its intent, pursuant to its discretionary as well as its implied authority, to conduct a second runoff election utilizing the majority-of-the-votes-cast standard in order to infer support by the majority of the bargaining unit.[2]

The second runoff election took place in late 2015. Local 14 again failed to secure a majority of the bargaining unit. However, because Local 14 received a majority of the votes cast, the Board stated its intent to certify Local 14 as the exclusive collective bargaining representative for CCSD employees. ESEA petitioned for judicial review, arguing that the Board exceeded its statutory authority by ordering a second runoff election with a different vote-counting standard and that the Board engaged in unlawful rulemaking in violation of Nevada's Administrative Procedures Act (APA). The district court granted the petition for judicial review, and this appeal followed.

DISCUSSION

Standard of review

The Board argues that the district court erred when it granted ESEA's petition for judicial review and asks this court to defer to its interpretation of the statute and regulation. As a general rule, this court considers petitions for judicial review as the district court does—an administrative agency's factual findings are reviewed "for clear error or an arbitrary abuse of discretion and will only [be] overturn[ed] . . . if they are not supported by substantial evidence," *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) (internal quotation marks omitted), and "purely legal issues, including matters of statutory and regulatory interpretation" are reviewed de novo, *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union/SEIU Local 1107, AFL-CIO*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008). We give effect to a statute's or a regulation's plain, unambiguous language and only look beyond the plain language where there is ambiguity. *Id*. at 88-89, 178 P.3d at 712; *see also Silver State Elec. Supply Co. v. State, Dep't of Taxation*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007) ("Statutory construction rules also apply to administrative regulations."). And "[t]his court defers to an agency's interpretation of its governing statutes or regulations if the interpretation is within the

[2]ESEA petitioned the district court for judicial review of the Board's order, but the district court concluded that it did not have jurisdiction over the preelection challenge and dismissed the case without prejudice.

statute's or regulation's language." *Wynn Las Vegas, LLC v. Baldonado*, 129 Nev. 734, 738, 311 P.3d 1179, 1182 (2013) (alterations and internal quotation marks omitted). As the issue before us hinges on the Board's interpretation of its authority to act under statutes and regulations, we independently review the legal question presented, only giving deference to the Board's interpretation if it is consistent with the legal text.

NRS 288.160(4) and NAC 288.110

For the second runoff election, the Board determined a different vote-counting standard was warranted and necessary to lead to meaningful results, in furtherance of the Board's statutory duty to conduct elections and resolve good-faith doubts. *See* NRS 288.160(4) ("If the Board in good faith doubts whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit, it may conduct an election by secret ballot upon the question."). The Board examined NRS 288.160(4) and NAC 288.110 and concluded it had the discretionary and inherent authority to conduct a second runoff election and to utilize the majority-of-the-votes-cast standard. Specifically, the Board interpreted NAC 288.110(10)(d) to permit an inference of majority support from the bargaining unit based upon the majority of votes cast. The Board referenced federal caselaw in support of its interpretation.

We agree with the Board that, pursuant to the plain language of NRS 288.160(4), it had the authority to conduct a second runoff election. The statute provides that, if a good-faith doubt exists, the Board may conduct an election to resolve the question of which employee organization "is supported by a majority of the local government employees in a particular bargaining unit." *Id*. The language does not limit the Board's discretion to conduct multiple elections. And while NAC 288.110(7) provides that "[i]f the results [of the election] are inconclusive, the Board will conduct *a* runoff election" (emphasis added), we agree with the Board's interpretation that the administrative code appears to require only a single runoff election when the results are inconclusive. Thus, the second runoff election was not mandated but was properly conducted pursuant to the Board's discretion to resolve any good-faith doubt.

However, we are unable to subscribe to the Board's interpretation of the statute and regulation as allowing for a vote-counting standard that permits an inference of support by the majority of the unit based upon a majority of the votes cast. NRS 288.160 provides different means by which an employee organization may obtain recognition as the exclusive bargaining agent of government employees in a bargaining unit. *See, e.g.*, NRS 288.160(2) (providing that if an organization is recognized by the government employer and if the organization "presents a verified membership list showing that

it represents a majority of the employees in a bargaining unit," the organization is the exclusive, recognized bargaining agent); NRS 288.160(5) (providing for a representative election, pursuant to the parties' agreement, to determine whether an organization represents the majority of the employees in the bargaining unit). Each method requires support by, or representation of, the *majority of employees in the bargaining unit* before an organization is recognized as the exclusive bargaining agent. *See generally* NRS 288.160.[3] For recognition by election, NRS 288.160(4) states that the Board "may conduct an election" to discern "whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit." Per the statute's plain language, the standard is support by a *majority of employees in a bargaining unit*.

And should there be any doubt left as to the standard to be used at an election, the Board's own governing administrative code dispels all uncertainty. NAC 288.110(10)(d) plainly states that: "An employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election, if . . . [t]he election demonstrates that the employee organization is supported by *a majority of the employees within the particular bargaining unit*." (Emphasis added.) Thus, the regulation unambiguously provides that an employee organization will be the exclusive bargaining agent if it obtains the support of a majority of the bargaining unit at an election. Neither the statute nor the regulation reference the majority of votes cast in an election but both resoundingly reference the majority of employees within a bargaining unit.[4] Therefore, as the Board's interpretation to allow for a majority-of-the-votes-cast standard contradicts its own regulation, the Board's interpretation was in error.[5] *See United States v. State Engineer*, 117 Nev. 585, 589-90, 27 P.3d 51, 53 (2001) ("An administrative agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain lan-

[3]The statute and administrative code also provide methods by which an organization's recognition may be withdrawn. *See, e.g.*, NRS 288.160(3); NAC 288.146. At issue in this opinion is the Board's intent to recognize Local 14 as the exclusive bargaining agent after an election held pursuant to NRS 288.160(4).

[4]Because of the clear language of the statute and regulation, we reject the Board's argument that the use of the word "demonstrate" allows an inference of support by the majority of the bargaining unit based on the majority of votes cast.

[5]We reject any argument that the Board could change its mind and return to a majority-of-the-votes-cast standard based upon evidence of an unworkable standard. The Board may refer to its use of the higher standard as an experimental interpretation, but the plain language dictates that the majority-of-the-unit standard be used for elections conducted pursuant to NRS 288.160 and NAC 288.110(10)(d).

guage of the provision." (alterations and internal quotation marks omitted)).

The Board contends that it properly exercised its authority to fill in gaps in the statutes it administers.[6] But it is well settled "that where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction." *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 540, 958 P.2d 733, 736 (1998) (alteration and internal quotation marks omitted); *see also Randono v. CUNA Mut. Ins. Grp.*, 106 Nev. 371, 374, 793 P.2d 1324, 1326 (1990) ("[W]here there is no ambiguity . . . there is no opportunity for . . . construction and the law must be followed regardless of result."). This is true "even if the statute is impractical." *Id*. As the rules of statutory construction also apply to regulations, *see Silver State Elec.*, 123 Nev. at 85, 157 P.3d at 713, and as we have concluded that the language is plain and unambiguous, there were no gaps for the Board to fill. The Board must adhere to the clear language, irrespective of the outcome.[7]

CONCLUSION

The Board's interpretation of NRS 288.160(4) and NAC 288.110 as allowing for the use of a majority-of-the-votes-cast standard at a discretionary, runoff election cannot be found within the plain language of the statute or the regulation. Rather, the statute and regulation are clear that the majority-of-the-unit standard be utilized. Therefore, we affirm the district court order granting the petition for judicial review.[8]

Cherry and Parraguirre, JJ., concur.

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[6]The Board also argues that it had the authority to utilize the majority-of-the-votes-cast standard because the Legislature authorized it to make rules regarding "[t]he recognition of employee organizations." NRS 288.110(1)(c). Regardless of the Board's authority to make rules, the Board's ruling in this matter conflicts with its established regulation. *See State Engineer*, 117 Nev. at 589-90, 27 P.3d at 53.

[7]To the extent the Board relied upon Ninth Circuit Court of Appeals caselaw, this court is not bound by decisions of the federal circuit court of appeals. *See Blanton v. N. Las Vegas Mun. Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987). We are, however, bound by the rules of statutory construction.

[8]ESEA urges this court to apply the doctrine of law of the case. This is the first time in this litigation that we have been called upon to review the Board's decision to certify a bargaining representative after a discretionary runoff election where a majority-of-the-votes-cast standard was utilized. We note that we examined NRS 288.160 and NAC 288.110 previously and concluded, as we do today, that the plain language mandates the use of the majority-of-the-unit standard. However, we reach our conclusion today independent of any prior order.

INGRID PATIN, AN INDIVIDUAL; AND PATIN LAW GROUP, PLLC, A PROFESSIONAL LLC, APPELLANTS, *v.* TON VINH LEE, RESPONDENT.

No. 69928

November 15, 2018 429 P.3d 1248

Appeal from a district court order denying a special motion to dismiss in a defamation action. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Affirmed.

Marquis Aurbach Coffing and *Micah S. Echols*, Las Vegas; *Nettles Law Firm* and *Christian M. Morris* and *Brian D. Nettles*, Henderson, for Appellants.

Resnick & Louis, P.C., and *Prescott T. Jones*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

Under NRS 41.660(1), Nevada's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute, a defendant may file a special motion to dismiss a plaintiff's complaint if the complaint is based upon the defendant's "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 41.637 provides four alternative definitions for what can constitute 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," one of which includes a "statement made in direct connection with an issue under consideration by a . . . judicial body." NRS 41.637(3). In this appeal, we must determine whether an attorney's statement on a website summarizing a jury's verdict is a statement in direct connection with an issue under consideration by a judicial body. We adopt California's framework for evaluating such statements, which requires the statement to (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation. Because the statement in this case failed to satisfy either of these requirements, it does not fall within NRS 41.637(3)'s definition, and the district court correctly denied appellants' special motion to dismiss.

FACTS AND PROCEDURAL HISTORY

In a previous case, appellants Ingrid Patin and Patin Law Group represented a client in a dental malpractice lawsuit against Summerlin Smiles, Dr. Florida Traivai, and respondent Dr. Ton Vinh Lee. After trial, a jury rendered a $3.4 million verdict in favor of Patin's client. In so doing, the jury determined that Summerlin Smiles and Dr. Traivai had been negligent but that Dr. Lee had not been negligent. Thereafter, Summerlin Smiles and Dr. Traivai moved to vacate the jury's verdict, which the district court granted in 2014. Patin's client appealed that order, and in 2016, this court reversed and directed the district court to reinstate the jury's verdict. That reversal, however, did not affect Dr. Lee since Patin's client had not challenged the portion of the jury's verdict that found Dr. Lee was not negligent.

At some point between when the jury's verdict was entered and when this court directed the district court to reinstate the jury's verdict, Patin posted on her law firm's website the following statement:

> DENTAL MALPRACTICE/WRONGFUL DEATH - ***PLAINTIFF'S VERDICT $3.4M, 2014 Description: Singletary v. Ton Vinh Lee, DDS, et al.***
>
> A dental malpractice-based wrongful death action that arose out of the death of Decedent Reginald Singletary following the extraction of the No. 32 wisdom tooth by Defendants on or about April 16, 2011. Plaintiff sued the dental office, Summerlin Smiles, the owner, Ton Vinh Lee, DDS, and the treating dentists, Florida Traivai, DMD and Jai Park, DDS, on behalf of the Estate, herself and minor son.

(Emphasis added.) Thereafter, Dr. Lee filed the underlying action asserting a single claim of defamation per se, which was based on the premise that the emphasized portion of Patin's statement could be construed as stating that the jury found Dr. Lee to have been negligent, which, as indicated, was false. In response, Patin filed a special motion to dismiss pursuant to NRS 41.660(1). Among other things, Patin argued that the statement was a "statement made in direct connection with an issue under consideration by a . . . judicial body," NRS 41.637(3), such that the statement constituted 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" that per NRS 41.660(3)(a) could not form the basis for defamation liability. The district court denied Patin's motion, reasoning that because the statement did not reference the pending appeal in the dental malpractice case, the statement was not in direct connection with an issue under consideration by a judicial body.

The district court alternatively concluded that even if the statement had fallen within NRS 41.637(3)'s definition, dismissal was still not warranted as Dr. Lee had "demonstrated with prima facie evidence a probability of prevailing on [his] claim," NRS 41.660(3)(b), by providing an interpretation of Patin's statement that could be construed as false and defamatory.[1] This appeal followed.

DISCUSSION

Because resolution of this appeal involves a single matter of statutory interpretation, we review de novo the district court's denial of Patin's special motion to dismiss. *Pawlik v. Deng*, 134 Nev. 83, 85, 412 P.3d 68, 70 (2018).[2]

As indicated, resolution of this appeal implicates a single issue of statutory interpretation: whether Patin's statement regarding the jury verdict in the dental malpractice case is a "statement made in direct connection with an issue under consideration by a . . . judicial body" under NRS 41.637(3). Because no Nevada precedent is instructive on this issue, we look to California precedent for guidance. *See Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017) (observing that because "California's and Nevada's anti-SLAPP statutes are similar in purpose and language, we look to California law for guidance" (internal quotation marks and citations omitted)).

California's analogous anti-SLAPP statute protects "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body." Cal. Civ. Proc. Code § 425.16(e)(2) (West 2016). In this respect, we believe *Neville v. Chudacoff*, 73 Cal. Rptr. 3d 383, 391-92 (Ct. App. 2008), is particularly instructive. In *Neville*, a company fired one of its employees because the employee had stolen the company's customer lists and had been secretly soliciting its customers in order to start a competing business. *Id.* at 386. The company's attorney sent a letter to the company's customers warning them not to do business with the fired employee because he had breached the company's confidentiality

[1]The Legislature amended the anti-SLAPP statute in 2015. Among other things, the amendments require a plaintiff in the second step of the anti-SLAPP analysis to demonstrate with "prima facie evidence," instead of "clear and convincing evidence," a probability of prevailing on the claim. 2015 Nev. Stat., ch. 428, § 13, at 2455. To the extent Patin has not conceded that the district court correctly applied the 2015 anti-SLAPP statute, any such argument is moot because, as explained below, Patin failed to satisfy her burden under the first step.

[2]Because this appeal involves a single matter of statutory interpretation, we need not address what effect the above-mentioned 2015 amendments have on this court's standard of review for an anti-SLAPP motion. *See Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017) (observing that when the Legislature changed the plaintiff's burden from prima facie evidence to clear and convincing evidence in 2013, this court's standard of review for an anti-SLAPP motion changed from de novo to abuse of discretion).

agreement. *Id*. Thereafter, the company sued the fired employee, and the employee asserted a cross-claim for defamation against the company's attorney premised on the attorney having allegedly defamed the employee in the letters. *Id.* at 386-87. The attorney filed an anti-SLAPP motion, which the trial court granted, and the employee appealed. *Id.* at 387.

On appeal, the *Neville* court canvassed California precedent regarding the meaning of "in connection with" as used in section 425.16(e)(2). *Id*. at 389-91. First, it evaluated *Paul v. Friedman*, 117 Cal. Rptr. 2d 82 (Ct. App. 2002), *abrogated on other grounds by Jacob B. v. Cty. of Shasta*, 154 P.3d 1003, 1010-12 (Cal. 2007). *See Neville*, 73 Cal. Rptr. 3d at 389. In *Paul*, an attorney had investigated a securities broker's personal life in the course of an arbitration matter pertaining to the broker's alleged commission of securities fraud. 117 Cal. Rptr. 2d at 8485. The attorney disclosed the details of the broker's personal life to the broker's clients, and the broker subsequently sued the attorney for various torts, including defamation. *Id*. The attorney filed an anti-SLAPP motion, and on appeal, the *Paul* court determined that the attorney's communications to the broker's clients were not "in connection with" the arbitration proceeding for purposes of affording the attorney protection under section 425.16(e)(2). *Id.* at 92. Specifically, the *Paul* court held that section 425.16(e)(2) "does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding," and that statements "bearing no relationship" to "the claims under consideration in the arbitration" do not qualify for anti-SLAPP protection. *Id.*

Next, the *Neville* court evaluated *Healy v. Tuscany Hills Landscape & Recreation Corp.*, 39 Cal. Rptr. 3d 547 (Ct. App. 2006). *See Neville*, 73 Cal. Rptr. 3d at 390. In *Healy*, a resident in a homeowners' association (HOA) refused to allow the HOA to cross her property to cut down weeds on an adjacent piece of land. 39 Cal. Rptr. 3d at 548. The HOA filed a declaratory relief action against the resident and sent a letter to other residents in the HOA informing them of the litigation and explaining that the offending resident was increasing the overall cost of the weed abatement project by refusing to allow the HOA to cross her property. *Id.* The resident then asserted a defamation claim against the HOA, alleging that the letter had falsely stated that she was increasing the cost of the weed abatement project. *Id.* at 548-49. The HOA filed an anti-SLAPP motion, which the lower court denied, and on appeal, the court of appeal determined that the HOA's letter to the residents was "in connection with an issue under consideration or review by . . . a judicial body" because the letter was sent in connection with litigation. *Id.* at 549-50 (alteration in original) (quoting section 425.16(e)(2)).

The *Neville* court then evaluated *Contemporary Services Corp. v. Staff Pro Inc.*, 61 Cal. Rptr. 3d 434 (Ct. App. 2007) (*CSC*). *See*

Neville, 73 Cal. Rptr. 3d at 390-91. In *CSC*, two competing companies, Staff Pro and Contemporary Services, were in litigation against one another. 61 Cal. Rptr. 3d at 439-40. During the course of that litigation, Staff Pro's president sent an email to Staff Pro's customers stating that Contemporary Services had paid Staff Pro's ex-employees to make false statements about Staff Pro. *Id.* at 441. Staff Pro's president later explained that the purpose of the email was to keep the customers apprised of the status of the litigation, as the customers had previously been required to sit for depositions. *Id.* at 439, 441. As a result of the email, Contemporary Services filed a new action asserting, among other claims, a claim for defamation. *Id.* at 441. Staff Pro filed an anti-SLAPP motion, which the lower court granted, and on appeal, the court of appeal affirmed that the email was made "in connection with an issue under consideration or review by . . . a judicial body" because the email was a "litigation update" given to individuals "who had some involvement" in the litigation. *Id.* at 445.

After having reviewed *Paul*, *Healy*, and *CSC*, the *Neville* court synthesized the holdings in those cases and concluded that a statement is "made in connection with an issue under consideration or review by . . . a judicial body" for purposes of section 425.16(e)(2) if the statement "relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation." 73 Cal. Rptr. 3d at 391 (internal quotation marks omitted). The *Neville* court thereafter analyzed cases construing the scope of the litigation privilege because the litigation privilege and section 425.16(e)(2) "serve similar policy interests," in that both "protect the right of litigants to the utmost freedom of access to the courts without the fear of being harassed subsequently by derivative tort actions." 73 Cal. Rptr. 3d at 388-89 (internal quotation marks and alterations omitted). Ultimately, the *Neville* court determined that the attorney's letter to the company's customers was protected under both section 425.16(e)(2) and the litigation privilege because the letter related directly to the company's forthcoming claims against the fired employee and was directed to the company's customers, who the company reasonably believed would have an interest in the forthcoming litigation. *Id.* at 392-94.

We are persuaded by the *Neville* court's analysis and conclude that in order for a statement to be protected under NRS 41.637(3), which requires a statement to be "*in direct* connection with an issue under consideration by a . . . judicial body" (emphasis added), the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation. If we were to accept Patin's argument that simply referencing a jury verdict in a court case is sufficient to be in direct connection with an issue under consideration by a judicial body, we would essen-

tially be providing anti-SLAPP protection to "any act having any connection, however remote, with [a judicial] proceeding." *Paul*, 117 Cal. Rptr. 2d at 92. Doing so would not further the anti-SLAPP statute's purpose of "protect[ing] the right of litigants to the utmost freedom of access to the courts without the fear of being harassed subsequently by derivative tort actions."[3] *Neville*, 73 Cal. Rptr. 3d at 389 (internal quotation marks and alterations omitted).

Having adopted the *Neville* court's standard for what qualifies for protection under NRS 41.637(3), it is clear that Patin's statement fails to meet that standard. First, even if the statement had mentioned the pending appeal, it still did not relate to any substantive issues in the appeal or the district court proceedings. Second, the statement was not directed to any specific person or group, let alone to someone with an interest in the litigation.[4] Accordingly, we conclude that the district court correctly determined that Patin's statement was not "in direct connection with an issue under consideration by a . . . judicial body" for purposes of anti-SLAPP protection under NRS 41.637(3) and NRS 41.660(3)(a). We therefore need not address whether Dr. Lee satisfied the second step of the anti-SLAPP statute, NRS 41.660(3)(b), which, as indicated, would require Dr. Lee to "demonstrate with prima facie evidence a probability of prevailing on [his] claim."

We are not persuaded that Patin's other arguments on appeal warrant reversal. Although Patin argues that the statement is protected by the fair report privilege, she has not cited any authority for the proposition that an affirmative defense such as the fair report privilege can be asserted within the confines of an anti-SLAPP motion to dismiss, *see Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider arguments that are not cogently argued or supported by relevant authority), nor is that proposition self-evident. Patin's argument that this case is moot in light of the reversal in the dental malpractice case is meritless, as the jury's verdict in favor of Dr. Lee remains in place. Patin's remaining arguments were not raised in district court, and we decline to consider them for the first time on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

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[3]In this respect, Patin's reliance on case law discussing the filing of a lawsuit as being protected speech are inapposite. Dr. Lee is not challenging Patin's client's decision to file a lawsuit against him, but is instead challenging Patin's statement regarding the lawsuit's result.

[4]Patin's argument that the statement is protected by the absolute litigation privilege fails for the same reason. *See Shapiro*, 133 Nev. at 41, 389 P.3d at 269 ("For a statement to fall within the scope of the absolute litigation privilege it must be made to a recipient who has a significant interest in the outcome of the litigation or who has a role in the litigation.").

CONCLUSION

NRS 41.637(3) provides anti-SLAPP protection for a "statement made in direct connection with an issue under consideration by a . . . judicial body." For a statement to fall within this definition, the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation. Because Patin's statement regarding the jury verdict in the dental malpractice case against Dr. Lee did not satisfy either of these requirements, the statement was not protected under NRS 41.660, Nevada's anti-SLAPP statute. We therefore affirm the district court's order denying Patin's special motion to dismiss.

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

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

No. 74169

November 15, 2018 429 P.3d 936

Appeal from a district court order granting a motion to dismiss an indictment. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Reversed and remanded.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Christopher J. Lalli*, Assistant District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Appellant.

Las Vegas Defense Group, LLC, and *Adam M. Solinger* and *Michael L. Becker*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

At issue in this appeal is whether a person who is not a prisoner can be held vicariously liable under NRS 212.165(4), which pro-

hibits prisoners in jail from possessing a cellphone or other portable telecommunications device. We hold that the plain language of Nevada's aiding and abetting statute provides for broad applicability across the criminal code, including imposing criminal liability upon nonprisoners who assist prisoners in possessing cellphones in jail under NRS 212.165(4). Therefore, we reverse the district court's order granting respondent Alexis Plunkett's motion to dismiss the indictment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plunkett is an attorney who represents a number of clients housed at the Clark County Detention Center (CCDC), a jail. A corrections officer at the CCDC informed Detective Stanton of the Las Vegas Metropolitan Police Department of suspicious activity involving Plunkett and one of her clients. In response, Detective Stanton installed a hidden camera with its audio capabilities disabled in a visiting room at the CCDC. In reviewing the video footage, Detective Stanton allegedly observed that Plunkett allowed two clients to use her cellphone on 12 separate occasions. On some occasions, he alleges, Plunkett would dial a phone number on her cellphone, appear to activate speakerphone, and move the phone toward the client so the client could speak into the phone. On other occasions, he claims, Plunkett would allow the client to touch the phone or hold it in his hands while he spoke to the caller. The State argued that these videos additionally demonstrate that Plunkett entered into an agreement with the prisoners to give them actual or constructive possession of the cellphone.

Plunkett was indicted on 2 counts of conspiracy to unlawfully possess a portable communication device by a prisoner and 12 counts of possession of a portable telecommunication device by a prisoner. These 12 charges were brought pursuant to NRS 212.165(4) and include aiding and abetting and conspiracy theories of liability.

Plunkett petitioned for a writ of habeas corpus, arguing that she could not be charged with or convicted of violating NRS 212.165(4) because the statute only criminalizes conduct by jail prisoners. She argued that NRS 212.165's statutory scheme evinces the Legislature's intent to punish those who furnish a phone to prisoners within a prison but not those who aid and abet a prisoner's possession of a cellphone in jail. The district court denied that petition. Plunkett subsequently moved to dismiss the charges against her, raising essentially the same arguments from the writ petition. The district court granted that motion, finding that "only a prisoner can be sentenced under [NRS 212.165(4)]. . . . [H]owever, [Plunkett] could be held liable under sections 1 or 2 of Nev. Rev. Stat. 212.165." This appeal by the State followed.

DISCUSSION

The question before the court is whether Plunkett, a nonprisoner, can nonetheless be held liable for possession of a cellphone by a prisoner under an aider and abettor theory. In order to answer this question, we must address whether NRS 195.020 aider and abettor liability applies to NRS 212.165(4).

We review a district court's decision to grant a motion to dismiss an indictment for an abuse of discretion. *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). However, we review issues of statutory construction de novo. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009).

Aider and abettor liability applies broadly

We begin our analysis with Nevada's aider and abettor statute, NRS 195.020. It states:

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

NRS 195.020 (emphasis added). This court has interpreted NRS 195.020 to have expansive application across the criminal code. In *Randolph v. State*, we held that "pursuant to NRS 195.020, *anyone* who aids and abets in the commission of a crime is liable as a principal." 117 Nev. 970, 978, 36 P.3d 424, 429-30 (2001) (emphasis added); *cf. United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005) ("[A]iding and abetting is embedded in every federal indictment for a substantive crime."). Indeed, it is a well-recognized maxim that "Nevada law does not distinguish between an aider or abettor to a crime and an actual perpetrator of a crime." *Sharma v. State*, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002). "[*B*]*oth are equally culpable*." *Id.* (emphasis added).

Aider and abettor liability applies to NRS 212.165

Plunkett does not appear to dispute the broad applicability of NRS 195.020, but argues instead that it does not apply to NRS

212.165(4). NRS 212.165(4)[1] addresses the unlawful possession of portable telecommunication devices by prisoners in Nevada jails. It provides that "[a] prisoner confined in a jail . . . shall not, without lawful authorization, possess or have in his or her custody or control a portable telecommunications device." NRS 212.165(4). Subsection 4 does not mention aiding and abetting liability, nor does it expressly limit such liability in any way. Plunkett argues, however, that when read as a whole, NRS 212.165 indicates an intent by the Legislature to exempt NRS 212.165(4) from aider and abettor liability. To decipher legislative intent, we look to the statute's plain language. *See Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). If the language is clear and unambiguous, we do not look beyond it. *Id.*

The first three subsections of NRS 212.165 exclusively apply within an "institution or a facility of the Department of Corrections"—that is, a prison.[2] *See Sheriff v. Andrews*, 128 Nev. 544, 548, 286 P.3d 262, 264 (2012) (interpreting subsection 1 to apply to prisons and not jails).[3] Subsection 1 prohibits a person from *furnishing, attempting to furnish, or aiding or assisting in furnishing or attempting to furnish*, an unauthorized device to a prisoner confined in a prison. NRS 212.165(1). Subsection 2 prohibits a person from *carrying an unauthorized device into a prison*. NRS 212.165(2). Subsection 3, which criminalizes a *prisoner's* possession of a device in a *prison*, is the prison counterpart and mirror image of, subsection 4, which criminalizes the same behavior in *jail*. NRS 212.165(3), (4).

Plunkett argues that NRS 212.165 already contains an aiding and abetting provision that applies only in the prison context. *See* NRS 212.165(1). That is, subsection 1 of NRS 212.165 prohibits "[a] person" from furnishing a cellphone to a *prison* inmate, thus specifically providing for aiding and abetting liability, but there is no analogous subsection for those who furnish cellphones to *jail* inmates. Plunkett contends that this statutory construction evinces legislative intent to limit aider and abettor liability under the statute solely to the prison context.

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[1]NRS 212.165 was amended in 2017, effective January 1, 2018. *See* 2017 Nev. Stat., ch. 538, § 3, at 3660-62. Plunkett's alleged crimes occurred in 2017. As the amendment did not change the language at issue in this matter, we reference the current version of the statute.

[2]We recognize that NRS 212.165(1)-(3) also encompasses "institution[s]" or "facilit[ies]" of the Department of Corrections, "or any other place where prisoners are authorized to be or are assigned by the Director of the Department." While we generally refer only to prisons throughout this opinion, the statute also prohibits these activities in these other locations as well. *See* NRS 212.165(9)(a)-(b).

[3]We note that the district court erroneously observed that Plunkett could be charged under NRS 212.165(1) or (2). This court's holding in *Andrews* demonstrates that subsection 1 applies exclusively to the prison context, 128 Nev. at 548, 286 P.3d at 264, and this logic extends equally to subsections 2 and 3. The relevant acts here occurred in the CCDC, a jail.

We disagree with Plunkett's interpretation of NRS 212.165. Subsection 1 does not limit aider and abettor liability for the entirety of the statute. It simply captures and criminalizes different conduct. The prohibited acts of subsection 1—knowingly *furnishing*, assisting in furnishing, or attempting to furnish a portable communications device to a prisoner—are different than the prohibited acts outlined in subsections 3 and 4—a prisoner confined in a prison or a jail *possessing* a portable telecommunications device. *Compare* NRS 212.165(1), *with* NRS 212.165(3), *and* NRS 212.165(4). An example illuminates the difference: Imagine that a prisoner confined in a prison distracts a guard to aid another prisoner's possession of a cellphone. The prisoner providing the distraction is not furnishing or attempting to furnish the cellphone to the other prisoner and therefore has not committed an act prohibited by subsection 1. Although the prisoner providing the distraction does not have possession of the cellphone, he or she nevertheless could be punished for aiding the other prisoner's possession of the cellphone under subsection 3 based on Nevada's aiding and abetting statute.

Indeed, if Plunkett had furnished a cellphone to a prisoner confined in a prison, thereby also aiding in the prisoner's possession of the cellphone, charges may have been brought under either NRS 212.165(1)—a category E felony—or NRS 212.165(3) based on an aider and abettor theory of liability—a category D felony. Simply because a defendant's actions might subject them to liability under more than one statute does not evince legislative intent to limit the broad application of our aiding and abetting statute. *See Hernandez v. State*, 118 Nev. 513, 523, 50 P.3d 1100, 1107 (2002) (stating that "[t]he matter at issue here involves not conflicting statutes but prosecutorial discretion in charging" and that there is no constitutional problem with "the fact that the government prescribed different penalties in two separate statutes for the same conduct" (internal quotation omitted)).

Further, as to Plunkett's argument that she cannot be charged under NRS 212.165(4) because she is not a prisoner, aider and abettor liability applies even though NRS 212.165(4) establishes a status-based possessory crime. Courts have long held that a nonfelon can be criminally liable for aiding and abetting a felon in possessing a firearm, *see, e.g.*, *United States v. Ford*, 821 F.3d 63, 70 (1st Cir. 2016), and this court has held that an individual can aid and abet another individual in unlawfully possessing a short-barreled shotgun, *Roland v. State*, 96 Nev. 300, 302, 608 P.2d 500, 501 (1980); *see also Franklin v. State*, 96 Nev. 417, 421, 610 P.2d 732, 735 (1980) (applying holding of *Roland*). By extension, even though Plunkett is not a prisoner confined in a jail, she can be criminally liable as a principal for a prisoner's possession of a cellphone by virtue of NRS 195.020.

In sum, Plunkett's argument that subsection 1 limits vicarious liability for the rest of NRS 212.165 fails once we recognize that subsection 1 merely captures and criminalizes different conduct from subsection 4. Rather, NRS 195.020's aider and abettor liability applies across the criminal code, including to NRS 212.165(4). We therefore hold that a person can be criminally liable as an aider or abettor under NRS 212.165(4).[4]

Accordingly, we reverse the district court's order granting Plunkett's motion to dismiss the indictment and remand this matter to the district court for further proceedings consistent with this opinion.

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

JIM McGOWEN, TRUSTEE OF McGOWEN & FOWLER, PLLC, Petitioner, *v*. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE DAVID A. HARDY, District Judge, Respondents, and STEVEN B. CRYSTAL, Individually and as Trustee of the BARBARA L. CRYSTAL DECEDENT TRUST, Real Party in Interest.

No. 73312

November 21, 2018 432 P.3d 220

Original petition for a writ of mandamus challenging a district court order denying a motion to quash service of summons and complaint.

Petition denied.

Pickering, J., dissented.

Snell & Wilmer, LLP, and *William E. Peterson, Janine C. Prupas*, and *Carrie L. Parker*, Reno, for Petitioner.

Woodburn & Wedge and *W. Chris Wicker* and *Dane W. Anderson*, Reno, for Real Party in Interest.

Before the Supreme Court, En Banc.

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[4]Plunkett also raises an argument on constitutional grounds that she cannot be vicariously liable as a coconspirator under NRS 212.165(4). However, she does not develop this argument beyond a bare assertion. Moreover, this court has held that a coconspirator can be vicariously liable for general intent crimes. *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008). Plunkett has not presented us with argument to revisit this rule.

OPINION

By the Court, Hardesty, J.:

Petitioner Jim McGowen was served with a summons and complaint by the attorney or an employee of the plaintiff's counsel. In this writ proceeding, we must determine whether a plaintiff's attorney or the employee of a plaintiff's attorney may serve a summons and complaint on a defendant. Based on the plain language of NRCP 4(c) and federal decisions interpreting the federal analog to Nevada's rule, we conclude that a plaintiff's attorney or an employee of the attorney may serve a summons and complaint; thus, we deny McGowen's petition.

FACTS AND PROCEDURAL HISTORY

McGowen is a partner in the law firm of McGowen and Fowler, PLLC, and is licensed to practice law in Texas, where he lives and works. Ron Bush, a party to an unrelated artwork dispute in which McGowen's client has an interest, invited McGowen to attend a settlement conference in Nevada. When McGowen traveled to Nevada to attend the settlement conference on behalf of his client, Bush's attorneys told McGowen that there was a deposition taking place the same morning that would be of interest to McGowen. After the deposition concluded, McGowen was served with a summons and complaint. McGowen claims that he was served by W. Chris Wicker, the attorney for the plaintiff in the complaint. Wicker claims that Dianne Kelling, an assistant at Wicker's firm, served the summons and complaint upon McGowen. The complaint alleged that McGowen improperly purchased valuable artwork in which Wicker's client, real party in interest Steven B. Crystal, had a security interest.

McGowen moved to quash service and dismiss the case, and requested sanctions. McGowen argued that under NRCP 4(c), service cannot be made by plaintiff's counsel or an employee of plaintiff's counsel because they are not disinterested persons. As further support, McGowen cites *Sawyer v. Sugarless Shops, Inc.*, which stated that "[s]omething as fundamental and decisive as service is best taken away from the parties or their counsel or counsel's employees." 106 Nev. 265, 270, 792 P.2d 14, 17 (1990). McGowen also argued that service was improper because his physical presence in Nevada was procured by trickery and deceit.

The district court found that Kelling, the employee of the plaintiff's attorney, served McGowen. The district court denied McGowen's motion to quash, concluding that NRCP 4(c) does not prohibit service by an employee of the plaintiff's attorney as the language of

the rule allows service "by any person who is not a party and who is over 18 years of age." The district court also distinguished the holding in *Sawyer*, concluding that it was abrogated when NRCP 4 was subsequently amended to expressly require service by a non-party. The district court also found that McGowen voluntary entered the jurisdiction for business purposes on behalf of a client and was not induced to appear by trickery and deceit. McGowen petitions this court for a writ of mandamus directing the district court to vacate its order and to enter an order granting his motion to quash service of process.

DISCUSSION

We elect to consider the writ petition

As a preliminary issue, we must determine whether to entertain the petition for writ relief. "This court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); Nev. Const. art. 6, § 4. "A writ of mandamus is available to compel the performance of an act which the law . . . [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (alteration in original) (footnote and internal quotation marks omitted).

Because a writ petition seeks an extraordinary remedy, we have discretion whether to consider such a petition. *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). Extraordinary writ relief is generally only available where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). However, despite an available legal remedy, we may still entertain a petition for writ relief "where the circumstances reveal urgency and strong necessity." *Barngrover v. Fourth Judicial Dist. Court*, 115 Nev. 104, 111, 979 P.2d 216, 220 (1999). Additionally, we may entertain writ petitions "where considerations of sound judicial economy and administration militate[ ] in favor of granting such petitions." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997).

McGowen argues that he does not have a plain, speedy, or adequate remedy at law because although he may ultimately appeal the district court's decision at the end of the case, he will have wasted vast amounts of resources litigating a case the district court might not have jurisdiction over. McGowen contends that he does not have

sufficient minimum contacts to justify jurisdiction under Nevada's long arm statute, meaning that there would be no jurisdiction in Nevada if there was a defect in the service of process. McGowen further argues that there are no disputed factual issues, because the only disputed fact—whether the plaintiff's attorney or his employee served McGowen—is immaterial to answering the legal question raised in the petition. Finally, McGowen argues that his petition should be considered because Nevada caselaw and the Nevada rules of civil procedure appear to have a conflict which requires a clarification from this court. Crystal argues that this court should not entertain McGowen's writ petition because the language of NRCP 4(c) is unambiguous and no genuine legal issue exists.

We agree with McGowen that Nevada caselaw and NRCP 4(c) appear to conflict on the issue of whether an attorney or his or her employee may effect service of process, and we elect to consider McGowen's writ petition in order to answer this question. Additionally, judicial economy is benefitted by answering the question of whether the district court has jurisdiction over McGowen at the outset of the matter.

NRCP 4(c) does not prohibit service of process by a plaintiff's attorney or the attorney's employee

NRCP 4(c) states that "[p]rocess shall be served . . . by any person who is not a party and who is over 18 years of age." McGowen argues that *Sawyer* prohibits service by a plaintiff's attorney and the attorney's employees and notes that when NRCP 4(c) was amended in 2004, the committee notes cited *Sawyer*. McGowen argues that this means the committee intended to codify *Sawyer*, rather than abrogate it, and that the word "party" in NRCP 4(c) follows *Sawyer*'s definition, which includes the attorney for the plaintiff and his or her employees. McGowen cites to the drafter's note, which indicates that the amendment was intended to be consistent with Nevada's common law rule that a process server must be a "disinterested person." *See* NRCP 4 drafter's note (2004 amendment).

Crystal argues that the district court was correct in its conclusion that service by the employee of the plaintiff's attorney was valid, because it does not violate the plain language of NRCP 4(c). Crystal contends that when this court amended NRCP 4(c) to expressly require service by a non-party, it superseded previous common law. Crystal contends that although the drafter's note to the current rule cites *Sawyer*, *Sawyer* is factually distinguishable from the present matter and did not create a bright-line rule prohibiting service from an attorney or attorney's employee. Crystal argues that the *Sawyer* opinion merely said, in dicta, that "service is *best* taken away from the parties or their counsel or counsel's employees." 106 Nev. at

270, 792 P.2d at 17 (emphasis added). Crystal finally argues that the federal rule regarding service of process is nearly identical to the Nevada rule, but that federal courts have interpreted its phrase "[a]ny person who is . . . not a party" to allow service by an attorney or employee of an attorney. FRCP 4(c)(2).

Although the language of NRCP 4(c) plainly states that process may be effected "by any person who is not a party and who is over 18 years of age," the drafter's note to the 2004 amendment creates an ambiguity. The drafter's note regarding subsection (c) states

> The amendment to subdivision (c), adding the words "person who is not a party," clarifies that service may be made by any person who is over 18 years of age so long as he or she is also a disinterested person. The revised provision is consistent with the current federal rule and with the common law rule, followed in Nevada, requiring that service be made by a disinterested person, *see Sawyer v. Sugarless Shops*, 106 Nev. 265, 269-70, 792 P.2d 14, 17 (1990) ("Nevada has long had rules prohibiting service by a party. This was a common law requirement and has not been changed by [statute]." (citation omitted)).

NRCP 4 drafter's note (2004 amendment).

The drafter's note contains three internal inconsistencies which cause confusion. First, the note references the common law concept of a "disinterested person," which arose in *Nevada Cornell Silver Mines, Inc. v. Hankins*, 51 Nev. 420, 429-32, 279 P. 27, 29-30 (1929), and most recently in *Sawyer*, 106 Nev. at 269-70, 792 P.2d at 17 ("[Respondent] cannot establish that proper service took place by a disinterested party; the default judgment is therefore void."). Despite their reference to the common law concept of a disinterested person, the drafters did not carry it forward into the language of the new rule. Second, when citing to *Sawyer*, the parenthetical used in the drafter's note does not contain any language about the disinterested person concept; rather, it states that "Nevada has long had rules prohibiting service by a party," which echoes the plain language of the rule itself. NRCP 4 drafter's note (2004 amendment) (quoting *Sawyer*, 106 Nev. at 269, 792 P.2d at 17).

Finally, the drafter's note's stated purpose is to bring the rule in conformity with the federal rule. The federal rule on service of process has nearly identical language to the Nevada rule and states that "[a]ny person who is at least 18 years old and not a party may serve a summons and complaint." FRCP 4(c)(2). At the time Nevada amended its rules in 2004, federal courts were already interpreting its rule as allowing service of process by a plaintiff's attorney. *See, e.g.*, *Trs. of Local Union No. 727 Pension Fund v. Perfect Parking, Inc.*, 126 F.R.D. 48, 52 (N.D. Ill. 1989) ("While service by coun-

sel for plaintiff may not be the most preferable method, service by counsel is proper."); *Commodity Futures Trading Comm'n v. Am. Metal Exch. Corp.*, 693 F. Supp. 168, 186 (D.N.J. 1988) ("The term 'any person' has been broadly construed so as to permit service by an attorney for the party, but not by the party itself."); *Jugolinija v. Blue Heaven Mills, Inc.*, 115 F.R.D. 13, 15 (S.D. Ga. 1986) ("[T]his Court declines to read limitations onto the clear wording of Fed.R.Civ.P. 4(c)(2)(A), and finds that a party's attorney may serve a summons and complaint in accordance with the Federal Rules.").

Because the over-arching purpose of the 2004 amendment was to conform NRCP 4(c) with FRCP 4(c)(2), and federal courts interpreting the federal counterpart at the time excluded counsel from the word "party," we conclude that NRCP 4(c)'s plain language allows service by a party's attorney. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) ("Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." (internal quotation marks omitted)).

CONCLUSION

We conclude that NRCP 4(c), which allows service of process by "any person who is not a party and who is over 18 years of age," does not preclude the plaintiff's attorney or the attorney's employee from effecting service. Accordingly, we conclude that the district court properly denied McGowen's motion to quash service of summons and complaint, and we deny his petition for a writ of mandamus.

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

Pickering, J., dissenting:

NRCP 4(c) directs that, "Process shall be served by the sheriff of the county where the defendant is found, or by a deputy, *or by any person who is not a party* and who is over 18 years of age." (emphasis added). The question presented is what is meant by "party": Does Rule 4(c)'s prohibition against a "party" serving process only apply to the named party plaintiff, or does it extend to a party's representative, here, the lawyer who filed the complaint on the plaintiff's behalf?

Courts elsewhere have divided on this question. *See* 72 C.J.S. *Process* § 51 (2018); *compare, e.g.*, *In re Wills*, 126 B.R. 489, 498 n.8 (Bankr. E.D. Va. 1991) (citing *In re Evanishyn*, 1 F.R.D. 202, 203 (S.D.N.Y. 1939), for the proposition "an attorney stands in the same relationship as a party for purposes of [the prohibition against

a party] serving a subpoena"), *with Trs. of Local Union No. 727 Pension Fund v. Perfect Parking, Inc.*, 126 F.R.D. 48, 51-52 (N.D. Ill. 1989) (holding that "[w]hile service by counsel for plaintiff may not be the most preferable method," it is permissible) (citing *Jugolinija v. Blue Heaven Mills, Inc.*, 115 F.R.D. 13, 15 (S.D. Ga. 1986)). But the question is not open in Nevada. Long-standing Nevada precedent establishes that a party may not serve process in the party's own case and that, for purposes of this rule, "party" includes the lawyer representing the party in the case:

> Nevada has long had rules prohibiting service by a party. This was a common law requirement and has not been changed by statute. There are obvious and sound policy reasons for this prohibition. The primary justification, as illustrated by the facts of this case, is that service many times becomes a battle of credibility and testimony. Something as fundamental and decisive as service is best taken away from the parties or their counsel or counsel's employees.

Sawyer v. Sugarless Shops, Inc., 106 Nev. 265, 269-70, 792 P.2d 14, 17 (1990) (citing *Nev. Cornell Silver Mines v. Hankins*, 51 Nev. 420, 429-32, 279 P. 27, 29-30 (1929)).

When *Sawyer* was decided, NRCP 4(c) did not even mention service by parties. It read: "Process shall be served by the sheriff of the county where the defendant is found, or by his deputy, *or by any citizen of the United States over twenty-one years of age*. . . ." NRCP 4(c) (1953) (emphasis added); *see* Revised Laws of Nevada § 5022 (1919) (similar). NRCP 4(c) was amended to its current form in 2004. The 2004 amendment struck the phrase "any citizen of the United States who is over twenty-one years of age" and replaced it with "any person who is not a party and who is over 18 years of age." Setting aside the changes to the age and citizenship requirements to serve process, the 2004 amendment narrowed the prior rule by stating expressly that only a "person who is not a party" can serve process. The 2004 amendment thus made explicit what *Sawyer* and *Nevada Cornell Silver Mines* had earlier held was implicit in our law: For policy reasons, "Nevada [prohibits] service by . . . the parties or their counsel or counsel's employees." *Sawyer*, 106 Nev. at 269-70, 792 P.2d at 17. The advisory committee's note to the 2004 amendment to NRCP 4(c) confirms that the amendment codified the law stated in *Sawyer* and its predecessor, *Nevada Cornell Silver Mines*:

> The amendment . . . adding the words "person who is not a party," clarifies that service may be made by any person who is over 18 years of age so long as he or she is also a disinterested person. The revised provision is consistent with the current

> federal rule and with the common law rule, followed in Nevada, requiring that service be made by a disinterested person, *see Sawyer v. Sugarless Shops*, 106 Nev. 265, 269-70, 792 P.2d 14, 17 (1990) ("Nevada has long had rules prohibiting service by a party. This was a common law requirement and has not been changed by [statute] [or rule].").

NRCP 4(c) advisory committee's note to 2004 amendment.

Against this history, the majority holds that the 2004 amendment to NRCP 4(c) changed the law so that now, while a party cannot serve process, the party's lawyer can. The majority bases its holding on three federal district court cases that have interpreted FRCP 4(c)'s cognate provision to prohibit service by a party but not by the party's lawyer. Majority opinion *ante* at 737-38 (citing *Perfect Parking*, *Jugolinija*, and *Commodity Futures Trading Comm'n v. Am. Metal Exch. Corp.*, 693 F. Supp. 168, 186 (D.N.J. 1988)). If we were writing on a clean slate, I could agree. "Party" as used in NRCP 4(c) can be read to include, or not to include, a party's lawyer or other representative, and this court often consults federal cases interpreting federal rules when our analogous rules contain an ambiguity existing Nevada law does not dispel. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). But this court does not automatically defer to federal case law in interpreting the NRCP—for example, Nevada has not adopted the federal "plausibility" pleading standard, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), even though NRCP 8 and 12(b) mirror FRCP 8 and 12(b). *See Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014).

In this case, there are three reasons why deferring to federal case law in interpreting a textually ambiguous rule is unwarranted. First, the federal case law on FRCP 4(c) is scant and reflects a split among a few federal district courts—the United States Supreme Court has not weighed in. *Compare, e.g.*, *In re Wills*, 126 B.R. at 498 n.8 (citing *In re Evanishyn*, 1 F.R.D. at 203), *with Perfect Parking, Inc.*, 126 F.R.D. at 51-52 (citing *Jugolinija*, 115 F.R.D. at 15); *Am. Metal Exch. Corp.*, 693 F. Supp. at 186. Second, we are not writing on a clean slate: Long-standing Nevada law holds that a party cannot serve process and that, for purposes of this prohibition, the party and the lawyer representing the party are one and the same. *Sawyer*, 106 Nev. at 269-70, 792 P.2d at 17; *Nev. Cornell Silver Mines*, 51 Nev. at 429-32, 279 P.2d at 29-30. And last, but not least, this court relies on the advisory committee notes to the NRCP in interpreting the rules they address and here the advisory committee notes expressly endorse reading the 2004 amendments to NRCP 4(c) as retaining the law stated in *Sawyer* and *Nevada Cornell Silver Mines*. *See, e.g.*, *Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 313, 236

P.3d 613, 614 (2010); *accord Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (consulting advisory committee notes as persuasive authority). This court has the authority to overrule prior case law but to avoid destabilizing the law and surprising those who rely on it, we do not do so except for "compelling reasons," where, for example, the existing law has proven "badly reasoned" or "unworkable." *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013). That showing has not been made with respect to *Sawyer* and *Nevada Cornell Silver Mines*, and without it, these decisions constitute binding precedent the district court and, by extension, this court should follow.

For these reasons, I would grant the writ, not deny it, and therefore respectfully dissent.

BRANDON STARR, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 71401-COA

November 21, 2018 433 P.3d 301

Appeal from a judgment of conviction, pursuant to a jury verdict, of 12 counts of burglary while in possession of a deadly weapon, 13 counts of conspiracy to commit robbery, 39 counts of robbery with use of a deadly weapon, 3 counts of attempted robbery with use of a deadly weapon, 2 counts of second-degree kidnapping with use of a deadly weapon, and 5 counts of false imprisonment with use of a deadly weapon. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed.

Terrence M. Jackson, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Charles W. Thoman*, Deputy District Attorney, Clark County, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Tao, J.:

Nevada district courts routinely instruct juries that they may consider the defendant's flight from the scene of a crime in deciding his or her guilt. *See, e.g.*, *Weber v. State*, 121 Nev. 554, 581-82, 119 P.3d

107, 126 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). Appellant Brandon Starr contends that the district court should have given the exact inverse of that standard instruction. Tried on multiple charges stemming from a spree of armed robberies and burglaries throughout the Las Vegas Valley, Starr argued before the district court that it should instruct the jury that it may consider his *lack* of flight from the scene of the crime in considering whether he is guilty or not guilty. We conclude the district court did not abuse its discretion in declining to give the so-called "inverse flight" jury instruction, and because we conclude that Starr's other arguments for reversal lack merit, we affirm his conviction.

FACTS AND PROCEDURAL HISTORY

Starr and two accomplices, Tony Hobson and Donte Johns, were implicated in a series of 14 separate robberies or attempted robberies, primarily of fast-food restaurants, that the police dubbed the "windbreaker series," based on witness reports that one of the perpetrators wore a black windbreaker and a surgical mask during the crimes. The robberies were solved late one night when a police detective on routine patrol noticed a vehicle of the same color, make, and model that witnesses had described as the getaway car in the windbreaker series pull into the parking lot of a Taco Bell restaurant. The detective followed the car into the parking lot and watched it surreptitiously from a nearby parking space. After a few moments, he saw a man emerge from the car wearing a black windbreaker and a surgical mask. The detective immediately called for backup and officers arrested the three occupants of the car, who turned out to be Starr, Johns, and Hobson, without incident or resistance.

Starr and Hobson were jointly charged with 82 felony counts—including burglary while in possession of a deadly weapon, robbery with use of a deadly weapon, and various conspiracy and attempt offenses—stemming from the 14 incidents. Johns was also jointly charged with 45 of the counts for his role as the getaway driver. Starr moved to sever his trial from codefendants Hobson and Johns, arguing that Johns had made statements to police implicating Starr and Hobson and that use of those statements by the State would violate his Sixth Amendment confrontation right. The district court denied the motion. Johns pleaded guilty to a reduced set of charges in return for agreeing to testify against Starr and Hobson.

During the 13-day trial, the jury heard testimony from numerous victims as well as from Johns, who testified at length about his role as the getaway driver in several of the robberies. Police detectives testified that they believed all of the robberies were committed by the same perpetrators based upon numerous similarities between the crimes—including the time of day, the types of businesses targeted,

and the perpetrators' clothing and mannerisms during the crimes—and because surveillance camera images from different robberies showed men who appeared very similar to each other.

After the close of the evidence, Starr and Hobson submitted a joint list of proposed jury instructions to the district court, including a proposed "inverse flight" instruction, which read as follows:

> The fact that the defendants did not (flee, leave the scene, leave the area) does not in itself prove that the defendant is not guilty, but is a fact that may be considered by you in light of all other proved facts in deciding the question of whether the defendant is guilty or not guilty.

The district court deemed the instruction not appropriate and refused to give it. The jury ultimately found Starr guilty on 74 counts, and the court sentenced him to 37 to 152 years in prison, running counts stemming from the same incident concurrently with each other, but counts from each separate incident consecutively. Starr now appeals.

ANALYSIS

On appeal, Starr argues that the district court abused its discretion when it refused to give his proposed "inverse flight" jury instruction.[1] Below, he argued to the district court that the instruction was justified by his having remained at the scene of the crime when police officers first arrived. On appeal, he advances a slightly different argument, contending instead that the instruction arose from his having remained within the jurisdiction of Nevada throughout the crime spree and, after being arrested, during the course of the criminal proceedings. While we note that an appellant generally may not change his or her theory underlying an assignment of error on appeal, *see Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995), the precise nature of Starr's argument ultimately makes little difference because the same legal analysis applies to both.

District courts possess broad discretion to settle jury instructions, and on appeal this court reviews the district court's decision for an abuse of discretion or for judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A defendant is entitled "to have the jury instructed on [his or her] theory of the case as disclosed by the evidence." *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433

[1]Starr raises other arguments on appeal that can be summarily disposed of. He argues that (1) the district court erred by failing to sever his trial from his codefendants, (2) he was denied his constitutional right to a jury venire selected from a fair cross section of the community, (3) a police detective provided an improper in-court identification of Starr, (4) the evidence presented at trial was insufficient to support his conviction, (5) his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment, and (6) cumulative error warrants reversal. After careful consideration, we find no merit in these arguments.

(2007) (internal quotation marks omitted). However, the instruction cannot be worded such that it is misleading, states the law inaccurately, or duplicates other instructions. *See Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005); *Crawford*, 121 Nev. at 754, 121 P.3d at 589.

In criminal cases, district courts may instruct juries that they can consider the flight of a defendant after the commission of a crime as evidence of the defendant's guilty state of mind. *Weber*, 121 Nev. at 581-82, 119 P.3d at 126. Generally speaking, these so-called "flight instructions" are permitted (but not required) because they reflect our common-sense intuitions about how people usually behave: most innocent people are unlikely to flee from the police for no reason at all. Remaining in place in the face of police confrontation generally "constitute[s] mere compliance with a lawful police request," and "it is reasonable to expect that all persons, whether guilty or innocent, will cooperate with a lawful police request." *People v. Williams*, 64 Cal. Rptr. 2d 203, 205 (Ct. App. 1997) (affirming trial court's decision not to give inverse flight jury instruction). Indeed, in certain situations, fleeing the scene of a crime immediately after its commission can constitute the independent crimes of obstructing or evading police officers. *See* NRS 199.280 (prohibiting the obstruction of a public officer discharging a legal duty of his or her office); NRS 484B.550(1) (prohibiting the driver of a motor vehicle from fleeing a police officer when signaled to stop). Similarly, if a defendant remains at a crime scene but later flees the jurisdiction after being arrested and after criminal charges have been filed, he may also be subject to the court's contempt powers, forfeiture of bail (if any has been posted), and arrest pursuant to a fugitive warrant. *See* NRS 199.340(4); *see also* NRS 178.508(1)-(2); NRS 179.177-.235. In either situation, juries are permitted to rationally infer that people wholly innocent of any crime are unlikely to flee unless motivated by some measure of consciousness of guilt.

Starr argues that the inverse is also true. He contends that if the jury can be instructed that fleeing the scene is a fact that can imply guilt, then it should also be instructed that remaining at the scene (or within the jurisdiction) is a fact that can suggest innocence. But the two assertions are not logically symmetrical. *See State v. Walton*, 769 P.2d 1017, 1030 (Ariz. 1989) ("Although flight is relevant to guilt, it does not necessarily follow that lack of flight is relevant to innocence."), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). The assertions are not symmetrical because criminal trials themselves are not symmetrical, nor are they supposed to be. A criminal defendant is presumed to be innocent and bears no burden of proving it; the burden falls entirely upon the state to prove guilt, and it must do so unilaterally "beyond a reasonable doubt," the highest standard of proof that exists anywhere in the law. *See* NRS 175.191; NRS 175.201. Consequently, a defendant has no

need for any inference suggesting innocence when his innocence is presumed throughout the trial. *See Commonwealth v. Hanford*, 937 A.2d 1094, 1097-98 (Pa. Super. Ct. 2007) (noting that inferences of innocence are unnecessary when defendants are "presumed innocent until proven guilty"). For this reason, except when flight is an element of the offense charged or when an absence of flight otherwise tends to seriously undermine the state's case against the defendant, "[t]he failure to flee, like voluntary surrender, is not a theory of defense from which, as a matter of law, an inference of innocence may be drawn by the jury." *State v. Jennings*, 562 A.2d 545, 549 (Conn. App. Ct. 1989) (internal quotation marks omitted).

In this appeal, Starr does not identify any defense recognized by law that his proposed instruction could support. Here, Starr's lack of flight does not, for example, establish an alibi, nor does it prove mistaken identity. Moreover, it does not negate any essential element of any crime for which he was charged, and he does not argue that it tends to disprove any particular fact or piece of evidence that the State was required to establish in order to prove Starr guilty of those crimes. Furthermore, while fleeing from the scene of a crime is "an active, conscious activity which readily and logically tends to support the inference of consciousness of guilt," the absence of flight is "more inherently ambiguous and," consequently, "its probative value on the issue of innocence is slight."[2] *Williams*, 64 Cal. Rptr. 2d at 205-06 (internal quotations marks omitted). "[U]nlike an attempt to flee, the fact that a suspect did not try to avoid the police is open to multiple interpretations, many of which have little to do with consciousness of guilt, and which could actually reflect a strategic choice." *Hanford*, 937 A.2d at 1097; *see also State v. Sorensen*, 455 P.2d 981, 987 (Ariz. 1969). *See generally Albarran v. State*, 96 So. 3d 131, 192-93 (Ala. Crim. App. 2011) (rejecting inverse flight instruction); *Smith v. United States*, 837 A.2d 87, 99-100 (D.C. 2003) (same); *State v. Mayberry*, 411 N.W.2d 677, 684 (Iowa 1987) (same), *overruled on other grounds by State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006).

Accordingly, we conclude that Starr's lack of flight does not constitute a theory of defense for the offenses charged, and thus he was not entitled to an inverse flight instruction. Consequently, the district court did not abuse its discretion by declining to give Starr's proposed instruction.

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[2]This is equally true whether considering a defendant's presence at the scene immediately after the crime, or merely within the jurisdiction long after the crime: "a person not in custody may . . . plausibly fear that his sudden departure from the jurisdiction will call police attention to him in the first place," and "a person still at large may refrain from fleeing because he is . . . convinced that he will never be identified as the culprit." *People v. Green*, 609 P.2d 468, 490 (Cal. 1980), *abrogated on other grounds by People v. Martinez*, 973 P.2d 512 (Cal. 1999).

Nonetheless, Starr attempts to distinguish his proposed instruction from those rejected by courts of other states by noting that, in those cases, the challenged instruction explicitly stated that lack of flight creates an inference of innocence. *See, e.g.*, *Hanford*, 937 A.2d at 1097 (rejecting instruction that jury was "permitted to infer . . . innocence" because of lack of flight); *Jennings*, 562 A.2d at 548 n.2 (rejecting instruction stating that absence of flight "may be considered a basis for an inference of innocence"). In contrast, Starr's proposed instruction merely states that lack of flight is a "fact" that the jury may consider in deciding the question of guilt. It is certainly true that his proposed instruction does not contain the words "inference" or "innocence." Ultimately, however, this is a distinction without a difference, because the only logical way that the jury could plausibly utilize the "fact" of Starr's lack of flight in its deliberations would be to treat it as a kind of generalized proof of his overall innocence, untied to any particular element of any crime or to any particular defense mounted by Starr. In other words, it ends up being precisely the same kind of inference of innocence with which other courts have dealt. *See Albarran*, 96 So. 3d at 192-93 (evaluating an instruction very similar to Starr's and concluding that it need not be given because its inference of innocence is unnecessary).

Finally, even assuming the district court abused its discretion by declining to give Starr's proposed inverse flight instruction, we conclude that any error was harmless. Even without his proposed instruction, Starr remained free to argue to the jury during closing argument that lack of flight proved his innocence. He fails to demonstrate how he was prejudiced by the lack of a jury instruction echoing an argument he otherwise had complete freedom to make. Thus, his "closing argument would not have been materially different or more effective with the benefit of the [requested] instruction, and . . . he has therefore failed to show prejudice." *Dawes v. State*, 110 Nev. 1141, 1147, 881 P.2d 670, 674 (1994). Accordingly, we conclude no relief is warranted.

CONCLUSION

For these reasons, we conclude the district court did not abuse its discretion in refusing to give Starr's proposed "inverse flight" instruction and therefore affirm his judgment of conviction.

Silver, C.J., and Gibbons, J., concur.