Case No. 75852

In the Supreme Court of Nevada

ELAINE P. WYNN,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondents,

and

STEPHEN A. WYNN; WYNN RESORTS, LIMITED; and KIMMARIE SINATRA,

Real Parties in Interest.

District Court
No. A656710

PETITIONER'S REPLY BRIEF
(Redacted)

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STATEMENT OF THE CASE

This writ petition, following a final settlement of the parties' claims, is the appropriate vehicle to prevent irreparable harm that would result from publicizing confidential information. The district court sealed an ongoing hearing and then, at the conclusion of the hearing, *sua sponte* ordered the transcript of that hearing to be publicly filed. Because that transcript includes discussion of sensitive information related to [redacted] that to this day remain confidential—the decision to unseal the transcript was an abuse of discretion. This Court should issue the writ.

INTRODUCTION

Ms. Wynn's post-litigation petition is simple. This Court need only decide whether the district court exceeded its authority when it made public a closed proceeding during which the parties discussed confidential information. In their answer, however, the real parties in interest (the "Wynn parties")[1] attempt to obscure the issues with hyperbole. Even though this lawsuit has settled, the Wynn parties accuse Ms.

[1] Though designated as a real party in interest, Steve Wynn notified this Court that he takes no position on the petition.

Wynn of "trying to control the public narrative about her conduct," and insist that the only way to prevent such "public relations spin" is to make a hearing transcript public. (Answer 1.)

The Wynn parties' arguments lack merit. Although they focus on the confidentiality of Ms. Wynn's private notes taken in 2009, that issue is not before the Court. Under existing district court orders, those notes *are* confidential. Although the district court orally ruled it would unseal them, the court has never entered a written order doing so. Moreover, if and when the order is entered, the district court made clear it will issue a stay so Ms. Wynn can petition this Court for review. (R. App. 46–47.)[2] Because the notes remain confidential now, so, too, should the transcript discussing them. Review of the entire issue should be taken up all at once.

Accordingly, the question in this petition is whether the district

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[2] Although the question is yet not ripe for review, Ms. Wynn maintains that the information *is* confidential and should remain sealed. The district court abused its discretion by failing to analyze confidentiality under the appropriate standards. Among other things, the notes discussed at the hearing [redacted]. This highly sensitive information is not suitable for public consumption and its release would serve only to harass or cause trauma to the alleged victim, others close to the assault, and Ms. Wynn.

court abused its discretion by ordering publication of a hearing transcript that includes discussion of the currently sealed, confidential notes. In this context, the Wynn parties' accusations against Ms. Wynn are smoke and mirrors. They are using this concluded case to posture their defense case in *other* lawsuits against them related to Mr. Wynn's misconduct. They seek to shift blame to Ms. Wynn, who is *not* a defendant in those cases.

Consequently, this Court should grant the petition and rule that transcript must be kept sealed until the resolution of any subsequent petition on the confidentiality of the notes (and other documents that should be unsealed). This Court's rules concerning the sealing of court records and applicable jurisprudence demand this result.

BACKGROUND CLARIFICATION

The Wynn parties predominantly attack Ms. Wynn instead of presenting argument on the issues. According to them, Ms. Wynn's petition "is simply part of Ms. Wynn's public relations campaign to preclude information from coming to light [redacted]." (Answer 2.) The Wynn parties accuse Ms. Wynn of hypocritically seeking protection of her notes that detail [redacted]

[redacted], but then later making public statements that criticize Wynn Resorts and its directors over their handling of the same or similar allegations. (Answer 3.) The Wynn parties argue "the 2009 Notes [redacted] [sic] [redacted]" and "Ms. Wynn [redacted] . . ." (Answer 4.) They claim it was Ms. Wynn who purposefully [redacted].

The Wynn parties' arguments are far-fetched, resting on the lie that [redacted].

As the district court found by clear and convincing evidence, Ms. Wynn first became aware of [redacted] in 2009, and [redacted]. (1 App. 110–12.) [redacted]. (1 App. 110–12.) [redacted]. (1 App. 36, 118:25-121:21.) Even then, Ms. Sinatra and Wynn

Resorts took no action to investigate or address the 2005 incident until public reporting forced them to do so. (1 App. 36, 118:25-121:21.)[3] And then, Ms. Sinatra and Wynn Resorts replaced the independent outside counsel they initially retained to conduct the investigation with the company's long-time outside counsel (and Ms. Sinatra's former firm), and, ensured that the special committee charged with overseeing the investigation included Mr. Wynn's long-time personal friend, John Hagenbuch. (1 App. 36-37; 1 App. 17-18.)[4]

Given this context, the Wynn parties' defensiveness is understandable. It is more convenient to blame Ms. Wynn for their own failures. But, to blame Ms. Wynn is to mischaracterize the content and context of Ms. Wynn's 2009 notes, ignore voluminous deposition testi-

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[3] *See* Chris Kirkham, Kate O'Keeffe & Alexandra Berzon, *Wynn Resorts Board Cancels Outside Investigation of Steve Wynn's Conduct*, WALL ST. J., Feb. 12, 2018, *available at* https://www.wsj.com/articles/wynn-resorts-board-cancels-outside-investigation-of-steve-wynns-conduct-1518218666.

[4] *See* Kirkham et. al, *supra;* Wynn Resorts Press Release, *Special Committee of Wynn Resorts Board of Directors Retains Gibson, Dunn & Crutcher LLP, Expands Review Nominating and Corporate Governance Committee to Evaluate Board Enhancement*, Feb. 12, 2018, *available at* https://wynnresortslimited.gcs-web.com/news-releases/news-release-details/special-committee-wynn-resorts-board-directors-retains-gibson?field_nir_news_date_value[min]=; Richard N. Velotta, *Panel Members Who Will Investigate Charges Against Steve Wynn Identified*, LAS VEGAS REVIEW-JOURNAL, Jan. 29, 2018, *available at* https://www.reviewjournal.com/business/casinos-gaming/panel-members-who-will-investigate-charges-against-steve-wynn-identified/.

mony that contradicts their story, and disregard other documents that demonstrate that [redacted].

Make no mistake: the 2009 notes are highly sensitive and should be kept confidential, as they currently are. They detail [redacted]. Publicizing those notes would only [redacted]. *See, e.g.*, *NML Capital Ltd. v. Republic of Argentina*, 2015 WL 727924, at *4 (D. Nev. Feb. 19, 2015) ("In certain circumstances, information is harmful each and every time it is disclosed. A defamatory statement, for example, is equally harmful and actionable the twentieth time it is uttered as the first time it is uttered, *see Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002), because repeated publication may cause one's name, reputation, and integrity additional damage." (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

ARGUMENT

A. Writ Relief is Appropriate to Protect Confidential Information that Should be Shielded from the Public

The Wynn parties argue that Ms. Wynn is not entitled to writ relief because the district court alone has the jurisdiction and supervisory power to determine whether a transcript should be sealed. (Answer 8.) In other words, the Wynn parties imply that a district court's decision to open a previously closed proceeding is unreviewable. That argument is wrong.

A petition for writ relief is the appropriate mechanism to challenge a trial court's decision to seal or unseal court records. *See, e.g.*, *Mulford v. Davey*, 64 Nev. 506, 513, 186 P.2d 360, 363 (1947) (granting writ relief to compel the court clerk to unseal a proceeding); *Knox v. Eighth Judicial Dist. Court*, 108 Nev. 354, 358, 830 P.2d 1342, 1344 (1992) (issuing a writ of mandamus, directing the district court to schedule a hearing on a petition to seal records).

An order requiring disclosure of confidential information is also subject to writ review. *See* NRS 34.330. Put simply, documents or other confidential information, once unsealed, cannot effectively be re-sealed even if this Court rules that such information should remain pro-

tected. *See Club Vista Fin. Servs. v. Eighth Judicial District Court*, 128 Nev. 224, 229, 276 P.3d 246, 249 (2012) (en banc) ("A later appeal would not effectively remedy any improper disclosure of information."); *see also Wardleigh v. District Court*, 111 Nev. 345, 350–51, 891 P.2d 1180, 1183–84 (1995).

There is no remedy at law here. This case is settled and all claims have been dismissed. Writ relief is the only method available to Ms. Wynn to challenge the district court's decision to unseal the transcript at issue.

B. The District Court Sealed the Transcript and Closed the Proceedings, and then *Sua Sponte* Reversed its Decision Without an Opportunity for Ms. Wynn to be Heard

The Wynn parties argue that the "District Court never sealed the transcript" (Answer 2), and thus, "there is no issue as to whether the District Court had the 'authority—*sua sponte* and without a hearing on the question—to unseal the transcript . . . .'" (Answer 7 (citing Pet. 1).) The Wynn parties' argument is wrong and irrelevant.

1. A Hearing and Transcript May be Effectively Closed and Sealed without Precise Terminology

First, a record may be effectively sealed, and a hearing may be closed, even if the court uses imprecise language in doing so. (*See* SRCR 3 (providing that "the court may, *upon its own motion*, initiate proceedings to seal or redact a court record (emphasis added)).

Here, the district court judge specifically directed the court reporter to "[redacted]" and directed "[redacted]." (R. App. 14:10–13.) (Answer 2.) These directions closed the proceedings and sealed the transcript.[5] Based on this assurance, Ms. Wynn's counsel discussed the confidential contents of the notes and other confidential aspects of the incident, including [redacted], which has never been publicized. (*See* R. App. 19:4–5.) The formality the Wynn parties demand is not the legal standard.

[5] The Wynn parties' argument that the district court only closed the proceedings to "[redacted]" is both wrong and assumes that the district court is not capable of controlling its own court room.

2. *The Absence of Written Findings is Irrelevant to this Petition*

Second, the absence of written findings is a red herring. (Answer 10 (arguing that the district court's decision to "limit access to the transcript" was "insufficient to constitute the sealing of the transcript which, under SRCR 3(4), requires written findings specifically identifying how and why the record should be sealed.").

The court, on its own accord, both sealed and then unsealed the proceedings during the same hearing. (R. App. 14:10–13, 50:6.) There was no opportunity for written findings *during* the hearing, but until the court reversed itself at the conclusion of the hearing, Ms. Wynn reasonably anticipated that the court would enter an appropriate sealing order with written findings.[6] And Ms. Wynn's filed her petition the same day as the hearing, before any order had been prepared or reviewed by the court.[7] There has yet to be a written order entered.

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[6] Because the notes themselves remained confidential through the conclusion of the hearing—and would remain so until five days after the entry of a written order unsealing them—the written findings could have been straightforward: that the hearing includes discussion of information designated confidential under a protective order of the court. *See* SRCR 3(4)(b).

[7] The Wynn parties' argument that Ms. Wynn purposefully failed to file the transcript is absurd for the same reason. (*See* Answer 2 n.1.) The petition was filed in true emergency form—the same day the hearing occurred, when no such transcript existed. The transcript appears in

3. *The Decision to Seal and then Unseal the Transcript During the Hearing Left Ms. Wynn No Opportunity to be Heard*

Third, the court's decision to seal and unseal the transcript during the same hearing left Ms. Wynn no opportunity to be heard. (R. App. 50:6.)[8] The decision to unseal was also inconsistent with the court's issuance of a stay on the issue of confidentiality.

Indeed, the district court decided—at the eleventh hour—to make the proceedings public after erroneously declaring that the information discussed was not confidential. (R. App. 50:6.) But the decision to unseal the records followed the court's issuance of a stay to allow Ms. Wynn to challenge the court's order on confidentiality. (R. App. 46:10–11.) The effect of the stay was to temporarily maintain confidentiality pending a petition and review by this Court, and yet, the decision to publish the transcript would make the stay useless. That is *precisely* why this petition is necessary. A writ should issue so that the transcript may remain confidential while a stay is in place, so that Ms. Wynn can actually and effectively challenge the confidential nature of

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the supplemental appendix. (R. App. 1.)

[8] Immediately after the court announced that the transcript would be unsealed, Ms. Wynn's counsel expressed incredulity, but Wynn Resorts' counsel asked permission to leave, which concluded the hearing. (R. App. 50:8-10.)

the documents and information discussed at the hearing.

4. This Court Can Order the Transcript Sealed

The complaint that the district court's initial sealing was ineffective is also irrelevant. Even if the district court had not initially sealed the proceedings, this Court has authority to order their sealing to prevent the disclosure of highly confidential information.

C. The District Court's Authority to Control Record Sealing Must be Exercised with Discretion

Ms. Wynn agrees that the district court has supervisory power over its records and proceedings. (Answer 7 (citing *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598 (1978) and SRCR 3).) But that supervisory power is not absolute. The district court must exercise its supervisory and inherent powers with sound discretion. *See Howard v. State*, 128 Nev. 736, 743, 291 P.3d 137, 141 (2012). It was not an abuse of discretion for the district court to seal the proceedings initially, but it *was* an abuse to reopen them because the district court (1) failed to appropriately analyze confidentiality, and (2) failed to provide Ms. Wynn an opportunity to be heard before the proceedings were reopened.

1. The Court did not Abuse its Discretion When it Initially Sealed the Transcript

The court properly sealed the transcript without a formal motion from Ms. Wynn. Pursuant to SRCR 3, "the court may, upon its own motion, initiate proceedings to seal or redact a court record." *See also Howard*, 128 Nev. at 744, 291 P.3d at 142 (the trial court "possesses inherent authority to deny public access when justified.").

Sealing the transcript from the outset was appropriate because the parties began discussing information and documents marked highly confidential under the court's umbrella protective order. (*See* 2 App. 168.) Under that order, all highly confidential information is deemed protected at a hearing. (*Id.*)

2. The District Court Abused its Discretion When it Unsealed the Transcript Without a Hearing

It was, however, an abuse of discretion for the court to unseal the record without examining whether that record included discussion of confidential information. It also erred by disallowing Ms. Wynn an opportunity to be heard. This is especially true given the court's intent to stay its ruling on confidentiality of the underlying notes.

Indeed, pursuant to SRCR 4(3), a party opposing the unsealing of a record must have the opportunity to appear and demonstrate the ba-

ses for keeping the information sealed. *See also State v. Richardson*, 302 P.3d 156, 160–61 (Wash. 2013) (a trial court must "ensure that the named parties receive appropriate notice of the motion to unseal. The trial court may also consider whether any third party interests are implicated in the sealed information and whether or not these interests would be adequately protected by the parties. Interested third parties may be afforded reasonable notice and an opportunity to present argument where appropriate.").

3. The Transcript Needs to be Sealed in Furtherance of the Protective Order and to Respect Private Information

Had the court conducted a hearing on the issue of sealing, the impropriety of publication would have been clear. At least while a stay was in place, those notes remained confidential under the existing protective order, so sealing the transcript during that time would have been appropriate under SRCR 3(4)(b). Any other result would undermine the purpose of that stay: to give Ms. Wynn an opportunity (following an appropriate written order) to petition this Court for continued protection of the notes.

Importantly, it was because of the court's promise to close the hear-

ing that Ms. Wynn's counsel discussed [redacted]. (R. App. 19:4–5, 20:4–22:21.) Protecting [redacted] is compelling justification alone to seal the transcript. SRCR 3(4)(d), (h). In fact, the court was [redacted] (and thus in the transcript). (R. App. 40:24–41:4.) Perhaps unthinkingly, the district court would have exposed those very individuals to public scrutiny.

4. The District Court Abused its Discretion by Failing to Properly Analyze Confidentiality

The Wynn parties make much ado about the district court's declaration that it would unseal the notes discussed at the hearing. (Answer 6.) But, again, that issue and that ruling is not presently before this Court because an order on that separate issue has not been entered, and because the district court agreed to stay it so this court may consider the issue. *See* SRCR 7 (providing that "[c]ourt records sealed in the trial court shall be sealed from public access in the Nevada Supreme Court subject to further order of that court").[9]

[9] To be clear, through this petition Ms. Wynn asks only that the tran-

But, if confidentiality is at issue, the district court abused its discretion by failing to appropriately analyze confidentiality under applicable legal standards, including NRCP 26(c). As will be further discussed in a forthcoming, separate petition, the district court was required to "identify and discuss the [NRCP 26(c)(1)] factors it considered in its 'good cause' examination to allow appellate review of the exercise of its discretion." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). But the record demonstrates the court did not even consider NRCP 26(c)(1). Rather, the court seemingly bent to the passions of the Wynn parties instead of determining whether disclosure of the notes would cause "annoyance, embarrassment, oppression, or undue burden or expense" to Ms. Wynn (or others). NRCP 26(c)(1). Doing so was reversible legal error. *Id.* at 1212. The Wynn parties' attempt to sway this Court in the same way should be disregarded.

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script be kept sealed until this Court has the opportunity to analyze that separate topic.

CONCLUSION

For now, Ms. Wynn's notes remain sealed. Once the district court enters a written order removing their highly confidential designation, Ms. Wynn will seek this Court's review. The district court stayed the effect of any such order for that purpose. Ms. Wynn's ability to seek that future relief would be frustrated by the district court's publicly filing the transcript now. Without this Court's immediate action, the district court will allow the publication of a transcript that discusses Ms. Wynn's highly confidential information, including the [redacted]. Under these extraordinary circumstances, this Court should issue a writ of prohibition ordering the district court not to publicly file the transcript from this hearing.

Dated this 20th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 3413 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 20th day of July, 2018.

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