IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE APPLICATION OF EDWARD TARROBAGO FINLEY, FOR AN ORDER TO SEAL RECORDS	CASE NO: 76715 (Appeal from 8th Judicial District Court Case No. A-18-771[illegible])
EDWARD TARROBAGO FINLEY, Appellant, vs. CITY OF HENDERSON, and THE STATE OF NEVADA, Respondents.	**RESPONDENT CITY OF HENDERSON'S ANSWERING BRIEF**

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243 WATER STREET, MSC 711
HENDERSON NV 89015

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STATEMENT OF THE ISSUES

I. **WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST TO SEAL HIS BATTERY DOMESTIC VIOLENCE CASE, WHEN HE WAS SUBSEQUENTLY CONVICTED OF ADDITIONAL VIOLENT CRIME**

II. **WHETHER THE PLAIN MEANING OF NRS 179.245 SHOULD BE IGNORED AND APPELLANT MAY CHOOSE WHEN THE WAITING PERIODS PRESCRIBED IN NRS 179.245(1) BEGIN**

STATEMENT OF THE CASE AND FACTS

On August 20, 2003, Edward Tarrobago Finley (hereinafter "Appellant") pled nolo contendere to one (1) count of Battery Constituting Domestic Violence – 1st Offense in the Henderson Municipal Court – Case No. 03CR004960. Pursuant to negotiations, the adjudication was stayed pending a potential reduction to the charge of simple battery, provided that the Appellant (1) completed domestic violence counseling, (2) paid a fine, (3) and stayed out of trouble for the pendency of the case. The Municipal Court also ordered, but suspended, a twenty-eight (28) day jail sentence. *See Respondent City of Henderson's Appendix, pp. 001-002)* (hereinafter "*RA*").

On May 5, 2004, the Municipal Court received a report that Appellant was terminated from his domestic violence counseling program for non-compliance. *(RA, pp. 002).* In approximately nine (9) months of misdemeanor probation (August 2003—May 2004), Appellant only completed eight (8) out of the required

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twenty-six (26) domestic violence counseling sessions, and was thus terminated from the counseling program. *(RA, pp. 002).*

On July 7, 2004, the Municipal Court re-ordered Appellant to fully complete his domestic violence counseling and stay out of trouble. *(RA, pp. 002).* Instead of abiding by the Court's order, Appellant thereafter committed more violent crime. On July 25, 2004, Appellant was arrested for Battery Constituting Domestic Violence, and subsequently was convicted of the charge on September 17, 2004 in the Las Vegas Justice Court – Case No. 04M17355X. *(AA, pp. 017).*

Then, on August 29, 2004, Appellant terrorized his pregnant girlfriend by kidnapping her, holding a knife to her, and threatening to cut her throat and kill her. *(AA, pp. 025-027).* Appellant also physically struck his girlfriend several times and then threatened to stab their three-year old daughter. *(AA, pp. 025-027).* On August 30, 2004, Appellant was arrested for the kidnapping and attack on his girlfriend. *(AA, p. 027).* On September 8, 2004, Appellant was arraigned in the Las Vegas Justice Court on the following charges: First Degree Kidnapping with a Deadly Weapon, Assault with a Deadly Weapon and Battery Constituting Domestic Violence – Case No. 04F15288X. *(RA, pp. 006-007).*

Appellant ultimately waived his right to a preliminary hearing and subsequently pled guilty in District Court on September 30, 2004, to Second Degree Kidnapping (Category B Felony), Assault with a Deadly Weapon

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(Category B Felony) and Battery Constituting Domestic Violence (Misdemeanor) – District Court Case No. C204855. *(RA, pp. 008-014).*

On November 18, 2004, Appellant was sentenced in District Court on both felonies to a term of probation with a suspended prison sentence. On the misdemeanor domestic violence count, the Court ordered that the Appellant serve six (6) months in the Clark County Detention Center. *(AA, pp. 029-030).* The Judgment of Conviction was filed on December 14, 2004. *(AA, pp. 029-030).*

On September 27, 2004, the Henderson Municipal Court received a report that the Appellant was once again terminated from his domestic violence counseling program, and that he had failed to stay out of trouble. *(RA, pp. 003).* In turn, the Court issued a warrant for Appellant's arrest due to his failure to comply with his sentencing requirements. *(RA, pp. 003).* On November 24, 2004, the Municipal Court adjudicated the Appellant guilty of Battery Constituting Domestic Violence and imposed the suspended sentence. *(RA, pp. 004).* Thus, as of November 24, 2004, Appellant was convicted of Battery Constituting Domestic Violence, and was no longer under a suspended sentence in Municipal Court.

On March 21, 2018, Appellant's counsel filed a Petition to Seal Records in the Eighth Judicial District Court – Department No. 22. *(AA, pp. 001-009).* Specifically, Appellant requested that the District Court sign an order sealing the arrest, conviction and associated probation violation, arising from the 2004

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incident of kidnapping and threatening his girlfriend with a knife, which included Second Degree Kidnapping (Category B Felony), Assault with a Deadly Weapon (Category B Felony) and Battery Constituting Domestic Violence (Misdemeanor) – District Court Case No. C204855. In addition, Appellant requested to seal his 2004 conviction of Battery Constituting Domestic Violence (Misdemeanor) in the Henderson Municipal Court – Case No. 03CR004960, and his 2004 conviction of Battery Constituting Domestic Violence (Misdemeanor) in the Las Vegas Justice Court – Case No. 04M17355X. *(AA, pp. 001-009).*

Since the Appellant committed several violent offenses, while on probation with the Henderson Municipal Court for his Battery Domestic Violence case, the City of Henderson filed an opposition to the Petition to Seal Records on June 13, 2018. *(AA, pp. 019-023).* The Court scheduled the matter for hearing on July 19, 2018. After hearing oral arguments, the Court issued a written order denying the Petition to Seal Records. *(AA, pp. 064-072).* Appellant filed a Notice of Appeal on August 13, 2018. *(AA, pp. 073-074).* The City of Henderson responds as follows.

STANDARD OF REVIEW

Abuse of discretion is the standard of appellate review when reviewing a district court's decision to seal criminal records in accordance with NRS 179.245. State. v. Cavaricci, 108 Nev. 411, 412-13, 834 P.2d 406, 408 (1992). Questions of

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statutory interpretation are reviewed *de novo*. State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004); State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST TO SEAL HIS HENDERSON BATTERY DOMESTIC VIOLENCE CASE, WHEN HE WAS SUBSEQEUNTLY CONVICTED OF ADDITIONAL VIOLENT CRIME

A. Appellant cannot now claim that he fulfilled the waiting period, since he was convicted of his new offenses before being released from his suspended sentence in Henderson

Until the instant appeal, Appellant's sole argument had been that the waiting period (7 years) to seal his Henderson domestic violence case should commence after his District Court case was closed. Appellant did not allege that he actually stayed trouble free immediately following his Henderson domestic violence case, given his subsequent arrests and convictions.

In both his written opposition and oral argument before the District Court, the Appellant exclusively argued that the waiting period for all of his various convictions should begin after he was released from probation on his felony case in December 2007.

> "The **only** question before this Court is whether the plain language of NRS 179.245 means that a defendant must remain trouble free during the prescribed waiting period following each and every singular arrest, or if the language of NRS 179.245 means that a defendant must remain trouble free

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for the prescribed waiting period from the defendant's most recent arrest…Here, the required waiting period is 7 years. The waiting period is not being disputed. It is also undisputed that the requisite period of time is measured from the date the defendant is released from custody or from the date when the defendant is no longer under a suspended sentenced, whichever occurs later. The **only dispute here** is *which 7 years* do we look at. Specifically, are we looking from December 2004 (when case No. 03CR004930 was closed) to December 2011, or are we looking at the 7 years from December 2007 (when Appellant was released from his sentence of second degree kidnapping, assault with a deadly weapon, and battery constituting domestic violence) to December 2014? A careful reading of the plain language of NRS 179.245 shows that the controlling period of time is from December 2007 to December 2014.

Petitioner's Opposition to Motion to Oppose Petitioner's Request to Seal Records, AA, pp. 31-37 (emphasis added).[1]

However, for the first time on appeal, Appellant now claims that the seven (7) year waiting period was in fact satisfied because he was still under his suspended sentence until after his new felony case had been adjudicated. *See* Appellant's Opening Brief, pp. 14-15. This particular issue is not ripe for appeal, since Appellant wholly failed to raise it with the lower court. *See* Rodriguez v. Fiesta Palms, LLC, 134 Nev. Adv. Op. 78, 428 P.3d 255, 257 (2018); Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); Harper v. Lichtenberger, 59 Nev. 495, 92 P.2d 719 (1939) (**holding that "[a] point not urged in the trial court**, unless it goes to the jurisdiction of that court, **is deemed**

[1] *See* Recorder's Transcript of Hearing Re: City of Henderson's Motion to Oppose Petitioner's Request to Seal Records, AA, pp. 54-63, where Appellant never raised this issue before the District Court.

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to have been waived and will not be considered on appeal.") (emphasis added). Appellant's only argument below centered on when the clock started.

By not raising this particular issue with the District Court, the Appellant acquiesced to the proposition that he did not satisfy the initial seven (7) year waiting period immediately following his Henderson domestic violence case. Again, the "only dispute" in the lower court was whether the waiting period to seal the Henderson domestic violence case began in 2004 (end of the Henderson case) or 2007 (end of the District Court case). Appellant cannot, for the first time on appeal, argue that he somehow satisfied both time periods, when that was clearly not his position before the District Court.

Even if this Court would like to address this issue, for the first time on appeal, Appellant's Henderson domestic battery conviction should not be statutorily eligible to be sealed. On November 24, 2004, Appellant was adjudicated guilty of misdemeanor Battery Domestic Violence in Municipal Court. The felony and misdemeanor convictions arising from the new District Court case were entered when the Judgment of Conviction was filed on December 14, 2004. Therefore, Appellant was fully adjudicated of Battery Domestic Violence in Henderson by the time the District Court filed the Judgment of Conviction for Second Degree Kidnapping, Assault with a Deadly Weapon and Battery Domestic

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Violence.[2] Also, Appellant's new attack on his girlfriend clearly occurred after he pled nolo contendere to the charge in Municipal Court.

Moreover, Appellant's newly-raised argument would unduly reward him for failing to complete his misdemeanor probation in a timely manner, and therefore, elongating the time that the Municipal Court case remained open. Appellant should have completed all the court-ordered requirements on his Henderson case by May 10, 2004, which was the status check to complete his requirements in the Henderson Municipal Court. *(RA, pp. 002-003).*

However, Appellant failed to complete his probation in a timely manner because he was terminated from his counseling due to non-compliance. *(RA, pp. 002).* On July 7, 2004, the Henderson Municipal Court re-ordered Appellant to fully complete his domestic violence counseling. *(RA, pp. 003).* Once again, Appellant refused to comply. On September 27, 2004, the Henderson Municipal Court received a report stating that the Appellant was again terminated from his domestic violence counseling program for non-compliance, and that he had failed to stay out of trouble. In turn, the Court issued a warrant for Appellant's arrest due to his failure to comply with his sentencing requirements. *(RA, pp. 003).*

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[2] While Appellant did serve his 28 day suspended sentence and was released from custody on December 27, 2004, he was clearly adjudicated of the Henderson domestic violence case before the District Court's Judgment of Conviction was filed. The seven year waiting period should be interpreted at the minimum not the maximum waiting period, and this case should fall within the statutory waiting period.

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In short, the only reason that Appellant's Henderson domestic violence case was open when he attacked his girlfriend on August 29, 2004, was due to his own failure to comply with his misdemeanor probation conditions. Appellant cannot benefit from his own non-compliance with the Municipal Court's sentencing orders. If a similarly situated petitioner had fully complied with the court's orders and completed his/her misdemeanor probation in a timely manner, and then was arrested and convicted of a new crime, he/she would not be statutorily eligible to seal the record. However, according to Appellant, he should be allowed to seal this conviction because he was continually non-compliant with his conditions which necessitated a lengthier probationary period. This result would be truly perverse and reward the Appellant's non-compliance. Overall though, Appellant failed to raise this argument in District Court, and thus, has waived appellate review on this basis.

Since the Appellant did not allege in the lower court that he satisfied the waiting period immediately after his Henderson domestic violence case, Respondent did not request a full FBI criminal history. But since raising this issue on appeal, and arguing that he has neither been arrested nor convicted for any criminal offense whatsoever since February 2005[3], the Respondent requested a full criminal history when preparing the response to the instant appeal. Despite his

[3] *See* Appellant's Opening Brief, p. 5.

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assertions, Appellant was convicted on September 26, 2005, of Failure to Appear[4] on an underlying domestic assault case in the State of Tennessee, Bartlett Municipal Court. *(RA, pp. 021-024).* Thus, even if this Court agrees that the prior District Court case did not occur during the period prescribed by NRS 179.245(1), this misdemeanor Failure to Appear conviction from Tennessee certainly did.

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[4] Tennessee Code Annotated § 39-16-609 states:

(a) It is unlawful for any person to knowingly fail to appear as directed by a lawful authority if the person:
(1) Has been lawfully issued a criminal summons pursuant to § 40-6-215;
(2) Has been lawfully commanded to appear for booking and processing pursuant to a criminal summons issued in accordance with § 40-6-215;
(3) Has been lawfully issued a citation in lieu of arrest under § 40-7-118;
(4) Has been lawfully released from custody, with or without bail, on condition of subsequent appearance at an official proceeding or penal institution at a specified time or place; or
(5) Knowingly goes into hiding to avoid prosecution or court appearance.
(b) It is a defense to prosecution under this section that:
(1) The appearance is required by a probation and parole officer as an incident of probation or parole supervision; or
(2) The person had a reasonable excuse for failure to appear at the specified time and place.
(c) Nothing in this section shall apply to witnesses.
(d) If the occasion for which the defendant's appearance is required is a misdemeanor or is a violation of subdivision (a)(2), **failure to appear is a Class A misdemeanor**.
(e) If the occasion for which the defendant's appearance is required is a Class A misdemeanor or a felony, failure to appear is a Class E felony.
(f) Any sentence received for a violation of this section may be ordered to be served consecutively to any sentence received for the offense for which the defendant failed to appear.

Tenn. Code Ann. § 39-16-609 (West) (emphasis added).

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In addition, as the District Court noted, Appellant was arrested in February 2005 for violating the terms of his felony probation. *(AA, pp. 070, RA, pp.012).*

Overall, the Respondent would submit that Appellant failed to satisfy NRS 179.245(5)'s requirement that, during the period prescribed in NRS 179.245(1), he had "not been charged with any offense for which the charges are pending or convicted of any offense, except for minor moving or standing traffic violations." Appellant's attempt to avoid the plain meaning of this statutory provision lacks merit. *See* We the People Nevada v. Secretary of State, 124 Nev. 874, 881, 192 P.3d 1166, 1170–71 (2008) (explaining that if a statute's language is clear and the meaning plain, this court will enforce the statute as written).

B. Appellant failed to invoke the District Court's discretionary power under NRS 179.245(5) to seal his Henderson domestic violence case

Due to Appellant's violent attack on his girlfriend on August 29, 2004, and the resulting convictions for his behavior on December 14, 2004, he was not statutorily eligible to seal his Battery Domestic Violence case from the Henderson Municipal Court. Since the lower court accurately applied existing law when it declined to seal this particular criminal record, the City respectfully requests that the lower court's decision be affirmed.

NRS 179.245(5) states:

> If the court finds that, in the period prescribed in subsection 1, the petitioner has not been charged with any offense for which the charges are pending or

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convicted of any offense, except for minor moving or standing traffic violations, the court may order sealed all records of the conviction…

NRS 179.245(1)(e) states a person may petition for sealing of records relating to:

> A violation of NRS 422.540 to 422.570, inclusive, other than a felony, a violation of NRS 484C.110 or 484C.120 other than a felony, or **a battery which constitutes domestic violence pursuant to NRS 33.018 other than a felony, after 7 years** from the date of release from actual custody or from the date when the person is no longer under a suspended sentence, whichever occurs later. (Emphasis added).

In general, a petitioner must stay trouble free during the waiting period prescribed in NRS 179.245(1) to be statutorily eligible to petition to seal his/her criminal record. If a petitioner has been charged with any offense for which the charges are pending or convicted of any offense during the waiting period, the Court does not have discretion to seal that particular criminal record. On the other hand, if a petitioner has legally satisfied the waiting period by not being arrested or convicted of new criminal offense(s), he/she may petition to seal his/her record, although the decision to seal any criminal record remains discretionary. *See* NRS 179.245(5). Further, while there is a rebuttable presumption in favor of sealing criminal records, that presumption only takes effect when the applicant has fully

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satisfied the waiting period prescribed by NRS 179.245(1) by not being charged and convicted of new criminal offenses.[5]

In State v. Cavaricci, 108 Nev. 411, 412-13, 834 P.2d 406, 408 (1992), the State opposed Cavaricci's request to seal various convictions and arrests on his criminal record. Specifically, Cavaricci continued to commit several crimes without satisfying the requisite waiting period to stay trouble free, as delineated in NRS 179.245. The District Court sealed Cavaricci's criminal records over the State's objection. In turn, the State filed a Petition for Writ of Mandamus and the Nevada Supreme Court overturned the District Court's decision to seal the records. Id.

The Court held that:

> Pursuant to NRS 179.245(3), the district court has discretion to grant or deny a petition filed pursuant to NRS 179.245(1)(d) only if the petitioner has been arrested for nothing greater than minor traffic violations during the five years succeeding the petitioner's most recent misdemeanor conviction. In this case, a review of respondent's criminal record reveals at least seven incidents since 1984 resulting in numerous charges, including multiple DUI arrests, resisting arrest, resisting a police officer, battery with use of a deadly weapon and possession of a controlled substance. These do not qualify as "minor traffic violations" under the statute. Consequently, respondent failed to invoke the district court's discretionary power under NRS 179.245(3).

Id. at 412.

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[5] NRS 179.2445 states "there is a rebuttable presumption that the records should be sealed **if the applicant satisfies all statutory requirements** for the sealing of the records." (Emphasis added).

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The Court further noted, in reference to arrests that did not result in a conviction, that: "[a]s revealed by his record of arrests and convictions, respondent is simply not the type of person upon whom the judiciary will confer such a substantial benefit as the sealing of his criminal records." Id. at 413.

Here, Appellant pled nolo contendere to one (1) count of Battery Constituting Domestic Violence – 1st Offense in the Henderson Municipal Court on August 20, 2003. *(RA, p. 001-002).* After failing to adequately complete the conditions of his misdemeanor probation, the Henderson Municipal Court, on July 7, 2004, once again re-ordered Appellant to complete his domestic violence counseling and stay out of trouble. *(RA, p. 003).* However, within two months of that order, Appellant was arrested for two more separate violent attacks. On July 25, 2004, he was arrested for Battery Domestic Violence and later convicted of that offense on September 17, 2004 – Las Vegas Justice Court Case No. 04M17355X. *(AA, pp. 017).* Then, his behavior escalated. On August 29, 2004, Appellant kidnapped his pregnant girlfriend, held a knife to her, and threatened to cut her throat and kill her. *(AA, pp. 025-027).* Appellant also physically attacked the victim and threatened to stab their three-year old daughter. *(AA, pp. 025-027).*

Appellant subsequently pled guilty on September 30, 2004, in the Eighth Judicial District Court to Second Degree Kidnapping (Category B Felony), Assault

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with a Deadly Weapon (Category B Felony) and Battery Constituting Domestic Violence (Misdemeanor) – District Court Case No. C204855. *(RA, pp. 008-014).*

On November 18, 2004, Appellant was sentenced on both felonies to a term of probation with a suspended prison sentence. (*AA*, pp. 29-30). On the misdemeanor domestic violence count, the Court ordered that the Appellant serve six (6) months in the Clark County Detention Center. (*AA*, pp. 29-30). The Judgment of Conviction was filed on December 14, 2004. (*AA*, pp. 29-30).

On November 24, 2004, the Henderson Municipal Court adjudicated the Appellant guilty of Battery Domestic Violence and imposed the suspended sentence. *(RA, p. 004).* The Judgment of Conviction on Appellant's District Court case was filed on December 14, 2004, approximately three (3) weeks after the domestic violence conviction was entered by the Henderson Municipal Court. (*AA*, pp. 29-30).

Simply, Appellant committed more violent crime while on probation for his Henderson domestic battery case and his District Court Judgment of Conviction was filed (12/14/2004) after the adjudication of his Henderson Municipal Court case (11/24/2004). As such, the District Court did not abuse its discretion when it denied the petition to seal the Henderson Battery Domestic Violence arrest and conviction.

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C. Correcting Appellant's Statements on Appeal

In Appellant's opening brief, he unequivocally states, "Finley has remained arrest free for more than thirteen (13) years. Finley's last arrest was February 9, 2005." *See* Appellant's Opening Brief, p. 5. As stated above, since making some novel arguments surrounding the dates of his convictions and the waiting periods in the instant appeal, the Respondent requested a full criminal history, including any out-of-state arrests or convictions. To be clear, this information was not presented to the District Court by *either* party. However, the Respondent feels a duty to correct the Appellant's assertions in his opening brief.

In addition to his 2005 Failure to Appear conviction from Tennessee, Appellant was arrested several times in Texas in 2014, including Aggravated Assault with a Weapon and Driving while Intoxicated. *(RA, pp.017-018).* It does not appear that either arrest ultimately resulted in a conviction, but Appellant did pled nolo contendere to Driving while Intoxicated in 2015. The case was ultimately dismissed in 2016 as part of a deferred adjudication, after he completed various requirements. *(RA, pp.017-020).*

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II. THE WAITING PERIODS PRESCRIBED IN NRS 179.245(1) ARE CRIME SPECIFIC AND FLOW IMMEDIATELY FROM THE CRIME SOUGHT TO BE SEALED, NOT THE MOST RECENT TIME FRAME IN THE APPELLANT'S LIFE

A. Per NRS 179.245(1), the clock starts in 2004, not 2007

Appellant's central argument on appeal is that the waiting period to seal his Henderson domestic violence conviction should commence from his release from his most recent felony conviction in 2007, and not from the actual domestic violence case in 2004. There is absolutely no statutory basis for this interpretation. The District Court interpreted NRS 179.245 according to its plain language. As such, the District Court did not abuse its discretion when it denied Appellant's petition as to this record.

The waiting periods in NRS 179.245(1) are crime specific and begin immediately after the criminal case is closed. For each type or level of crime, NRS 179.245(1) unmistakably states, when referring the crime to be sealed, that the waiting period is "**from the date**" of release in reference to the particular crime

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sought to be sealed.[6] NRS 179.245(1) continually repeats that the waiting period for each classification of crime begins "from the date" that the particular case has been closed (e.g. end of probation, end of parole, release from custody, or no

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[6] **NRS 179.245 Sealing records after conviction: Persons eligible; petition; notice; hearing; order.**

1. Except as otherwise provided in subsection 6 and NRS 176A.265, 176A.295, 179.247, 179.259, 201.354, 453.3365 and 458.330, a person may petition the court in which the person was convicted for the sealing of all records relating to a conviction of:

(a) A category A felony, a crime of violence pursuant to NRS 200.408 or burglary pursuant to NRS 205.060 after 10 years **from the date** of release from actual custody or discharge from parole or probation, whichever occurs later;

(b) Except as otherwise provided in paragraphs (a) and (e), a category B, C or D felony after 5 years **from the date** of release from actual custody or discharge from parole or probation, whichever occurs later;

(c) A category E felony after 2 years **from the date** of release from actual custody or discharge from parole or probation, whichever occurs later;

(d) Except as otherwise provided in paragraph (e), any gross misdemeanor after 2 years **from the date** of release from actual custody or discharge from probation, whichever occurs later;

(e) A violation of NRS 422.540 to 422.570, inclusive, a violation of NRS 484C.110 or 484C.120 other than a felony, or a battery which constitutes domestic violence pursuant to NRS 33.018 other than a felony, after 7 years from the date of release from actual custody or **from the date** when the person is no longer under a suspended sentence, whichever occurs later;

(f) Except as otherwise provided in paragraph (e), if the offense is punished as a misdemeanor, a battery pursuant to NRS 200.481, harassment pursuant to NRS 200.571, stalking pursuant to NRS 200.575 or a violation of a temporary or extended order for protection, after 2 years **from the date** of release from actual custody or from the date when the person is no longer under a suspended sentence, whichever occurs later; or

(g) Any other misdemeanor after 1 year **from the date** of release from actual custody or from the date when the person is no longer under a suspended sentence, whichever occurs later.

Emphasis added.

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longer under a suspended sentence). The statute does not state, in any way, that the waiting period begins from the end of a petitioner's last case on his criminal record.

In addition, this Court has previously interpreted NRS 179.245 in accordance with its plain meaning, namely that a petitioner must stay out of trouble for the time frame immediately the closure of the case sought to be sealed. In State v. Hayes, 94 Nev. 366, 580 P. 2d 122 (1978), the Court overruled the District Court's grant of a petition to seal records because the waiting period prescribed in NRS 179.245 had not yet been met. The Court clearly referenced the waiting period as flowing from the crime sought to be sealed, and not some other benchmark for calculating time.

Clearly though, the repetitive phrase of "from the date" directly refers the particular crime sought to be sealed, since the "from the date" language is listed in each crime classification in NRS 179.245(1). Since the "from the date" language references the corresponding crime, the timeframe is undeniably case and crime specific. Per NRS 179.245(1), the clock starts "from the date" the case sought to be sealed is closed and does not begin arbitrarily from a petitioner's most recent and unrelated conviction in his life. Appellant requests that this Court read and interpret NRS 179.245 in a way in which it is not written nor previously interpreted by this Court.

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Appellant cites the rule of lenity for the proposition that his records should be sealed. The "rule of lenity [is a rule of construction that] demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor." Moore v. State, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006). Because ambiguity is the cornerstone of the rule of lenity, the rule only applies when other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity. State v. Lucero, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011).

Overall, since the plain language of NRS 179.245(1) states that the waiting period begins "*from the date*" of the closure of the particular crime to be sealed, the rule of lenity would not apply, as ambiguity does not exist.

B. The public policy behind criminal record sealing is furthered by the District Court's decision

The policy regarding the sealing of records is in no way frustrated by the District Court's denial of his petition. To the contrary, the District Court's ruling actually furthers the policy that only individuals who truly change their life by not engaging in further criminal conduct are statutorily eligible to seal their record. NRS 179.2405 states that, the "[l]egislature hereby declares that the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated and the sealing of the records of such persons in accordance with NRS 179.245 to 179.301, inclusive." Petitioners must stay out of trouble "from the

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date" that the particular criminal record is closed to avail them of this statutory benefit.

While the expressed purpose of the record sealing statutes is to potentially give someone who made a mistake in their life, a second chance – there is no public policy or guarantee that a court will grant third or fourth chances, as is the case, particularly on crimes of violence.

Appellant cites the recent enactment of NRS 179.2595 for the proposition that the District Court's interpretation of NRS 179.245 is flawed. Appellant misinterprets NRS 179.2595 and the overall procedures to petition to seal records. In the 2017 Legislative Session, NRS 179.2595 was enacted into law. NRS 179.2595 states in part:

> 1. If a person wishes to have more than one record sealed and would otherwise need to file a petition in more than one court for the sealing of the records, the person may, instead of filing a petition in each court, file a petition in district court for the sealing of all such records.
> 2. If a person files a petition for the sealing of records in district court pursuant to subsection 1 or NRS 179.245, 179.255 or 179.259, the district court may order the sealing of any other records in the justice or municipal courts in accordance with the provisions of NRS 179.2405 to 179.301, inclusive.

In general, NRS 179.2595 simply provides a more straightforward way to file a petition to seal multiple criminal records. To be clear, NRS 179.2595 does not remove or modify the mandatory waiting periods listed in NRS 179.245(1), which begin "from the date" the particular record is closed. Nor does NRS

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179.2595 remove the District Court's discretion to grant or deny a petition to seal records under NRS 179.245(5), even if the Appellant fully stayed out of trouble during the waiting period. *See* NRS 179.245(5) (stating "the court ***may*** order sealed all records of the conviction.") (Emphasis added).

Appellant assumes that if he were to be successful in petitioning to seal his 2004 felony case, a subsequent petition to seal his Henderson domestic violence case would automatically be granted. Appellant is misguided.

Even if Appellant chose to file a petition to seal his felony case first, and was successful in having those records sealed, there is no right or guarantee that the Henderson domestic violence case would also be sealed. When a criminal record is sealed, it is removed from the petitioner's criminal history, but the facts of the underlying case and the damage that a petitioner rendered unto a victim remains. The crime does not forever become erased from the memories of those who lived through it, nor should it be fully overlooked by a court or prosecutor who already knew of the crime's existence. Simply, abhorrent behavior, although removed from a criminal history, may still provide a basis to oppose sealing a separate criminal record. The arrest and conviction, although sealed, do not become factually secret.

In Baliotis v. Clark County et. al., 102 Nev. 568, 570–71, 729 P.2d 1338, 1340 (1986), the Nevada Supreme Court acknowledged the importance of the

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record sealing statutes, but also noted the obvious truth that even though a conviction is sealed, the underlying crime cannot be erased from people's memories.

The Court observed: "[t]here is no indication that the statute was intended to require prospective employers or licensing authorities to disregard information concerning an applicant that is known independently of the sealed records." Id. The Court then quoted a decision from the Oregon Court of Appeals, which interpreted a similar sealing statute:

> The statute was enacted to enhance employment and other opportunities for such formerly convicted persons. It was intended to remove the stigma associated with the conviction of a crime and to give those individuals another chance, so to speak, unencumbered by that stigma. The statute does not, however, impose any duty on members of the public who are aware of the conviction to pretend that it does not exist. In other words, the statute authorizes certain persons to misrepresent their own past. It does not make that representation true.

Id., *citing* Bahr v. Statesman Journal Co., 51 Or.App. 177, 624 P.2d 664, 666 (1981).

The Nevada Supreme Court then eloquently and practically stated:

> The net effect of Nevada's sealing statute, except as to gaming matters, is a legal dispensation that regards criminal events itemized in the sealed record as if they had never occurred. The statute thus confers a substantial benefit on convicted persons who may appropriately disavow involvement with the criminal justice system. **It is clear, however, that such authorized disavowals cannot erase history. Nor can they force persons who are aware of an individual's criminal record to disregard independent facts known to them.**

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Baliotis v. Clark County, 102 Nev. 568, 570–71, 729 P.2d 1338, 1340 (1986) (Emphasis added).

Moreover, the Court further explained, in State, Dept. of Motor Vehicles and Public Safety v. Frangul, 110 Nev. 46, 867 P.2d 397 (1994), that the clear purpose of record sealing statutes is to allow convicted persons to lawfully advise employers that they have not been arrested or convicted of a crime with respect to the sealed events. However, the underlying facts that constitute the conviction are not subject to the record sealing statutes and can independently be considered at a civil or administrative proceeding. The Court stated:

> **There is nothing in the text of the statute, the legislative history or our prior interpretations indicating that the legislature intended to provide that the underlying events of a situation that leads to an arrest are deemed never to have occurred**. Rather, the statute provides only that those events specifically "relating to" the arrest are deemed never to have occurred. As a result, the statute does not operate to expunge the outcome of a separate civil, administrative proceeding, even when a decision from that proceeding concerns a matter arising from the same events as the sealed arrest.

Id. at 50-51 (emphasis added).

In general, NRS 179.2595 simply provides for a more straight-forward filing mechanism that allows one District Court to consider sealing multiple criminal records. The District Court is still required to analyze each record individually and determine which records are (1) eligible to be sealed, and (2) whether to exercise discretion to seal those eligible records. Moreover, even if the most recent

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criminal record were to be sealed, the Court still has the discretion to decline to seal other records. Further, NRS 179.2495's filling mechanism actually safeguards the integrity of the criminal record sealing process by preventing a petitioner from misrepresenting his record to a subsequent court, if a record were previously sealed by a different judge.

Overall, Appellant's claim that the District Court's interpretation of NRS 179.245(1) somehow renders the sealing statutes meaningless is wrong. The lower court's interpretation promotes a fair process, which only confers this statutory benefit to those petitioners who actually change their life directly after their criminal case is closed.

Appellant has failed to satisfy NRS 179.245(5)'s requirement that, during the period prescribed in NRS 179.245(1), he had "not been charged with any offense for which the charges are pending or convicted of any offense, except for minor moving or standing traffic violations." As such, he failed to invoke the District Court's discretionary power under NRS 179.245(5) to seal his Henderson domestic violence case.

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CONCLUSION

Based on the above arguments of law and fact, the City of Henderson respectfully requests that the District Court's order denying the Petition to Seal Records be affirmed.

DATED this 20 day of December, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief excepted by NRAP 32(a)(7)(C) it is proportionately spaced, has a typeface of 14 points or more, and contains 6,114 words.

3. Finally, I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20 day of December, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of December, 2018, a true and correct copy of the foregoing RESPONDENT CITY OF HENDERSON'S ANSWERING BRIEF was served via electronic service through the Court's electronic filing system per NEFCR 9 to the following:

John Henry Wright, Esq.
Christopher B. Phillips, Esq.
Steven S. Owens, Esq.

and that the same was served via US mail, certified postage prepaid, and addressed as follows:

Steven B. Wolfson, District Attorney
Attn: Appeals Unit
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City of Henderson Employee

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