IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE PETITION OF MICHAEL LORENZO ARAGON, MICHAEL LORENZO ARAGON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 79638 Dist. Ct. No. A-19-792350-S

APPELLANT'S OPENING BRIEF

(Appeal from Order Denying Petition to Seal Records)

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 23rd day of January, 2020.

DRASKOVICH LAW GROUP
Respectfully submitted,

/s/ Robert M. Draskovich
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STATEMENT OF JURISDICTION

This is a direct appeal from an order of the District Court denying the Appellan's Petition to Seal Records relating to a final judgment of conviction in a criminal case that was entered via guilty plea in the Eighth Judicial District Court of Nevada. This Court has jurisdiction over this appeal pursuant to NRS 177.075 and the Nevada Constitution Article 6, Section 4. *See* Nev. Rev. Stat. § 177.075; *see also* Nev. Const. Art. 6, § 4.

ROUTING STATEMENT

This case is subject to routing to the Nevada Court of Appeals pursuant to NRAP 17(b). However, the Nevada Supreme Court may wish to retain jurisdiction over this matter pursuant to NRAP 17(a)(12) as it is a matter "raising as a principal issue a question of statewide public importance." *See* Nev. R. App. P. 17(a)(12).

ISSUES PRESENTED FOR REVIEW

DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT FAILED TO CONSIDER AND APPLY CONTROLLING DEFINITIONS OF "SEXUAL OFFENSE" AND "CRIME AGAINST A CHILD" WHEN DENYING THE APPELLANT'S PETITION TO SEAL RECORDS.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN FAILING CONSIDER AND APPLY THE PRESUMPTION THAT THE

APPELLANT'S RECORDS SHOULD BE SEALED WHEN DENYING THE APPELLANT'S PETITION TO SEAL RECORDS.

STATEMENT OF THE CASE

The District Court abused its discretion when it denied the Appellant's Petition to Seal Records because it failed to consider and apply the record sealing statute's express definitions of "crime against a child" and "sexual offense," instead applying its own definition of "crime against a child" and "sexual offense" when concluding that the Appellant's records were not subject to sealing pursuant to NRS 179.245. The District Court also abused its discretion when it failed to consider and apply the applicable presumption that the Appellant's records should be sealed pursuant to NRS 179.2445.

STATEMENT OF RELEVANT FACTS

The facts pertinent to this appeal are relatively straight forward. The Appellant, Michael Aragon, was arrested in 2008 in Clark County, State of Nevada, and charged via information with felony sexually motivated coercion of a minor. *See* Appendix, at 001-2. The Information alleged that Michael committed the crime of "COERCION (Sexually Motivated) (Category B Felony- NRS 207.193, 175.547) in the manner following, to-wit: That the said Defendant, on or about the 24th day of

August, 2008, at and within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did, then and there, willfully, unlawfully, and feloniously use physical force, or the immediate threat of such force, against JASMINE J. RODRIGUEZ, with intent to compel her to do, or abstain from doing, an act which she had a right to do, or abstain from doing, by said Defendant using his hand(s) and/or finger(s) to touch and/or rub and/or fondle the leg(s) and/or genital area of the said JASMINE J. RODRIGUEZ over her clothing." *Id.*

In lieu of risking going to trial on the charges, Michael entered into a guilty plea agreement ("GPA") with the State of Nevada to plead guilty to charges as alleged in the Information on April 12, 2010. *See* Appendix, at 003-008. The terms of the GPA were clear, that "If Defendant successfully completes probation, he may withdraw the instant plea and enter a plea of guilty to Open or Gross Lewdness (Gross Misdemeanor) with credit for time served. If Defendant does not successfully complete probation, the felony plea will stand and he will face revocation." *See* Appendix, at 003.

On May 5, 2016, after an evidentiary hearing before Judge Richard F. Scotti, the District Court found and ruled that Michael was "HONORABLY DISCHARGED from probation and entitled to the drop down" (*see* Appendix, at 016) his charge by withdrawing his guilty plea from felony "COERCION (Sexually Motivated)," a category B Felony pursuant to NRS 207.193, 175.547, to "Open or Gross Lewdness," a gross misdemeanor pursuant to NRS 201.210. *See* Appendix, at 003. On July 7, 2016, the State of Nevada filed a new Information charging Michael with "OPEN OR GROSS LEWDNESS (Gross Misdemeanor- NRS 201.210- NOC 50971)." *See* Appendix, at 017-18. That same day, Michael entered a plea of guilty to open or gross lewdness pursuant to NRS 201.210, and was sentenced to credit for time served pursuant to the GPA. *See* Appendix, at 041.

On March 7, 2019, Michael, through counsel, filed a Petition to Seal Records with the Eighth Judicial District Court, Clark County, State of Nevada. *See* Appendix, at 019-23. The petition was docketed before the Honorable Judge Jacqueline Bluth, Department VI, of the Eighth Judicial District Court, Clark County, Nevada. *See* Appendix, at 035. The Court refused to grant the petition and returned it with a

Department VI Memorandum indicating that it was returned because "Petitioner has requested the court seal records relating to a conviction of: …a sexual offense." *See* Appendix, at 024. The Appellant filed a Motion to Address Petition to Seal Records on June 17, 2019. *See* Appendix, at 033-34.

On August 13, 2019, the matter of the Petition to Seal Michael Aragon's criminal records came up for hearing before The District Court, Department VI. *See* Appendix, at 035. According to the Court, the reason it did not grant the petition, and scheduled the hearing to address the petition was because:

> [W]hen I was reading the statute, my law clerks and I were going over this.
>
> So when I look at 179.245, under 6(a) and (b), it says a person may not petition the Court to seal records relating to a conviction of A, a crime against a child, or B, a sexual offense.
>
> And the key word that I'm getting caught up on here is the word relating, because I read the – you know, if you go into Odyssey, I read the bindover packet, which – because I saw the original charges, but I didn't under – I didn't know the factors, because I think **he originally pleads guilty to a sexually motivated coercion**.

See Appendix, at 36:8:19 (emphasis added).

According to the Court, because of the underlying charges, which Michael was not convicted of pursuant to the GPA, it needed to

"understand the underlying facts." *See* Appendix, at 036:20-25. According to the Court, it appeared to it "**that originally, it's a crime against a child**, I think her name was Jasmine…She was under 14 and **it was a sexual offense. So how do you get around that 6(a) and (b)**. That's the thing." *Id.* The Court noted that the crime that Michael was ultimately convicted of did not have language in it relating to a crime against a child. *See* Appendix, at 037:5-17. The Court asserted that "I guess you could say open and gross is still a sexual offense, but if you go further down, it says open and gross as a felony." *Id.* Undersigned counsel agreed with the Court's recognition that the conviction was for a gross misdemeanor open and gross lewdness, not a felony open and gross lewdness, and noted that the District Attorney was aware of the petition to seal, agreed that the record was subject to sealing, and did not oppose the petition. *Id.*

The Court denied Michael's petition to seal his records because it found "that under 6(a) and (b), a person may not petition the Court to seal records relating to a conviction of A, a crime against a child, B, a sexual offense. Finding that here, it is a crime related to a child and a

crime related to a sexual offense, because the original was lewdness." *See* Appendix, at 037:22-038:5.

When the District Court issued its Order denying the petition on October 2, 2019, however, the Court cited only NRS 179.245(6)(a), concluding that "a person may not petition the court to seal records relating to a conviction of a crime against a child." *See* Appendix, at 040:15-22.

SUMMARY OF THE ARGUMENT

Michael appeals the District Court's ruling denying his petition to seal his records because he was never convicted of a crime against a child, nor a sexual offense pursuant to the express definitions of "crime against a child" and "sexual offense" in the records sealing statute, NRS 179.245. The District Court abused its discretion when it applied its own definition of "crime against a child" and "sexual offense" when ruling that Michael's records were not subject to sealing, failing to consider and apply the controlling definitions of "crime against a child" and "sexual offense" delineated in the records sealing statute.

Further, Michael's petition to seal his records was subject to a rebuttable presumption that the records should be sealed, which went

unrebutted at the hearing to address the petition because the District Attorney approved of sealing the records, and did not file an opposition nor show up to the hearing to oppose the sealing of Michael's records. The District Court abused its discretion when it failed to consider and apply controlling authority, the presumption, pursuant to NRS 179.2445.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER AND APPLY CONTROLLING DEFINITIONS OF "SEXUAL OFFENSE" AND "CRIME AGAINST A CHILD" IN THE RECORDS SEALING STATUTE WHEN DENYING THE APPELLANT'S PETITION TO SEAL RECORDS.

In Nevada, a citizen convicted of a crime may petition the courts to seal his criminal records. "[T]he legislative history surrounding NRS 179.245-.301 indicates that the sealing statute was enacted to remove ex-convicts' criminal records from public scrutiny and to allow convicted persons to lawfully advise prospective employers that they have had no criminal arrests and convictions with respect to the sealed events." *Baliotis v. Clark Cty.*, 102 Nev. 568, 570, 729 P.2d 1338, 1340 (1986) *citing* Hearing on A.B. 491 before the Assembly Judiciary Comm., 56th Sess. (1971) p. 254; Hearing on A.B. 491 before the Senate Judiciary

Comm., 56th Sess. (1971) vol. 2, p. 221. "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." *Id.*

When a district court's ruling involves a district court's interpretion of a statute, this Court reviews the decision de novo. *See State, Dep't of Motor Vehicles* & *Pub. Safety v. Frangul*, 110 Nev. 46, 48-51, 867 P.2d 397, 398-400 (1994) (interpreting criminal record sealing statutes). "[T]his court will not go beyond the statute's plain language" if it is "clear on its face." *Pawlik v. Deng*, 134 Nev. ___, 412 P.3d 68, 71 (2018) (quotation marks omitted). This Court has consistently held that, when possible, it must interpret a statute in harmony with other statutes "to avoid unreasonable or absurd results." *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). Only "[i]f a statute is ambiguous, meaning that it is susceptible to differing reasonable interpretations," is a court permitted to interpret the statute "consistently with what reason and public policy would

indicate the Legislature intended." *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006). By statute, the Legislature has expressly "declare[d] 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 179.2405 to 179.301, inclusive." Nev. Rev. Stat. § 179.2405.

Generally, "a person may petition the court in which the person was convicted for the sealing of all records relating to a conviction of [specific enumerated crimes]" after a certain number of years has passed from the date of his or her release from actual custody, the date of his or her discharge from parole or probation, or the date when he or she is no longer under a suspended sentence, whichever occurs latest. *See* Nev. Rev. Stat. § 179.245(1)(a)-(g). The statute specifies different waiting periods of time depending upon the class or severity of the crime, with category A felonies and certain violent crimes being assigned the longest period, and certain non-violent misdemeanors being assigned the shortest period. *Id.*

NRS 179.245(6) also identifies certain types of crimes which are never eligible for sealing no matter how much time has passed,

including such crimes as sexual assault, DUI involving death, and crimes against children. The Nevada Supreme Court has recognized that NRS 179.245 presents a two-tiered analysis whereby a petitioner must first satisfy the relevant statutory waiting periods before he or she may invoke a court's discretionary power to order a record sealed. *See State v. Cavaricci*, 108 Nev. 411, 412, 834 P.2d 406, 407 (1992) (concluding that a petitioner had "failed to invoke the district court's discretionary power [to order a record sealed]" where he failed to satisfy the relevant waiting period in a prior version of NRS 179.245).

An individual's statutory eligibility to file a petition to seal is determined by NRS 179.245(1), which states that a person may file a petition only if the requisite time has elapsed since the person's release from custody or expiration of his or her sentence for a particular crime. *See* Nev. Rev. Stat. § 179.245(1)(a)-(g). Thus, a district court first evaluates the question of whether enough time has elapsed since the relevant date of release, depending upon the class or type of crime involved. If the petitioner satisfies the statutory waiting period, then NRS 179.245(2) sets forth the contents that a petitioner must include in the petition.

The petitioner must include his or her "current, verified records received from the Central Repository for Nevada Records of Criminal History." *See* Nev. Rev. Stat. § 179.245(2)(a). The petitioner must also include a list of entities or other custodians of records that he or she reasonably knows to possess records of the conviction he or she is seeking to have sealed, as well as information that "accurately and completely identifies the records to be sealed." *See* Nev. Rev. Stat. § 179.245(2)(c)-(d).

NRS 179.245(3) and (4) then require that the court notify the law enforcement agency that arrested the petitioner for the relevant crime, as well as the attorneys that prosecuted the petitioner (including the Attorney General), and provide them an opportunity to stipulate to the petition. If the prosecuting entity does not stipulate to the petition, then the court "must" conduct a hearing on the matter. *See* Nev. Rev. Stat. § 179.245(4).

At the hearing, the court analyzes the contents of the petition and examines the relevant convictions in order to determine whether or not the petitioner was subsequently convicted of another offense within the waiting period that would disqualify the conviction from being sealed.

NRS 179.245(5). If the person was convicted of other crimes within the waiting period, the conviction cannot be sealed. *Id.* But if no such subsequent convictions occurred during the waiting period, then "the court may order sealed all records of the [corresponding] conviction," but is not required to do so. *See* Nev. Rev. Stat. § 179.245(5). If the court exercises its discretion to order a record sealed, "[a]ll proceedings recounted in the record are *deemed never to have occurred*, and the person to whom the order pertains may properly answer accordingly to any inquiry, including, without limitation, an inquiry relating to an application for employment, concerning the arrest, conviction, dismissal or acquittal and the events and proceedings relating to the arrest, conviction, dismissal or acquittal." *See* Nev. Rev. Stat. § 179.285(1)(a) (emphasis added).

"The Nevada Supreme Court has held that, once a record is sealed, 'all proceedings in the record and all events and proceedings relating to the [conviction] are deemed never to have occurred,' but also that this principle applies only to events related to criminal proceedings, not the underlying conduct giving rise to the proceedings or separate civil proceedings stemming from that conduct." *Finley v.*

City of Henderson (In re Finley), 2019 Nev. App. Unpub. LEXIS 660, *4-9, 2019 WL 3378930. Moreover, this Court has held that the purpose of Nevada's record-sealing statutes is "to remove ex-convicts' criminal records from public scrutiny and to allow convicted persons to lawfully advise prospective employers that they have had no criminal arrests and convictions with respect to the sealed events." *Baliotis*, 729 P.2d at 1340; *see also Zana v. State*, 125 Nev. 541, 545, 216 P.3d 244, 247 (2009) ("[S]ealing orders are intended to permit individuals previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions.").

This Court has very recently held that when a district court fails to consider and apply controlling authority when denying a petition to seal records it commits an abuse of discretion. *Geck v. Clark Cty. Dist. Atty. (In re Geck)*, 443 P.3d 1126 (Nev. 2019) (reversing and remanding a petition to seal records ruling by the distrcit court because it failed to consider the presumption in NRS 179.2445, holding that "The failure to consider controlling authority is an abuse of discretion."); *see also Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) ("Although this court reviews a district court's discretionary determinations

deferentially, deference is not owed to legal error, or to findings so conclusory they may mask legal error.").

In the present case, the District Court abused its discretion in denying the Appellant's petition to seal his records because: (A) the Appellant satisfied all statutory requirements for sealing his records; (B) the Appellant was never charged with or convicted of a crime against a child; and (C) the Appellant was never charged with or convicted of a sexual offense.

A. It Is Undisputed That The Appellant Has Satisfied All Statutory Preconditions For Petitioning To Seal His Criminal Records.

NRS 179.245 Sections 1 and 2 outline the statutory preconditions for sealing a Nevada citizen's criminal records. Upon completion and honorable discharge from probation, the Appellant was permitted to withdraw his plea of guilty to the felony Coercion charge, and entered a plea of guilty to the a gross misdemeanor, open or gross lewdness. *See* Appendix, at 016-22. The statutory time period prescribed by NRS 179.245 for sealing records of conviction of a gross misdemeanor is "2 years from the date of release from actual custody or discharge from parole or probation, whichever occurs later." *See* Nev. Rev. Stat. Ann. § 179.2445(1).

The Appellant entered his amended plea of guilty to the gross misdemeanor of open or gross lewdness pursuant to NRS 201.210 on July 7, 2016. *See* Appendix, at 016-21. The Appellant filed his petition to seal he records on March 7, 2019, more than two years after he entered his amended plea and sentenced to time served. *Id. see also* Appendix, at 020. Neither the District Attorney, nor the District Court disputed that the Appellant met the statutory time period for bringing the petition to seal his records pursuant to NRS 179.245.

Appellant's petition to seal his records was "accompanied by the petitioner's current, verified records received from the Central Repository for Nevada Records of Criminal History." *See* Appendix, at 022-23. The petition included a certificate of the disposition of the proceedings for the records to be sealed from all agencies of criminal justice which maintain such records, and included a list of the public agencies that had possession of the reocrds of the conviction. *Id.* Niether the District Attorney, nor the District Court disputed that the Appellant's Petition to Seal Records contained all the requisite information necessary for reviewing and granting the peitition. The

Appellant, therefore, met all preconditions for sealing of his criminal records.

B. The Appellant Was Never Charged With Or Convicted Of A Crime Against A Child.

While Nevada permits citizens convicted of criminal offenses to seal their records, not all criminal records can be sealed. Nev. Rev. Stat. § 179.245(6). NRS 179.245(6) includes a list of eight (8) offenses that do not qualify for sealing. *Id.* As relevant here:

> A person may not petition the court to seal records relating to a conviction of:
>
> (a) A crime against a child;
> (b) A sexual offense;
> …

Nev. Rev. Stat. § 179.245(6); *see also* Appendix, at 037:22-38:3.

According to the Court, it belived that "the laws are the way they are for a reason," and denied the Appellant's petition to seal his records because because they "relate to a conviction of A, a crime against a child." *See* Appendix, at 037:22-38:3. However, the Court apparently failed to consider and apply the definition of "crime against a child" pursuant to the records sealing statute. Nevada's record sealing statute includes express definitions for the term "crime against a child." *See*

Nev. Rev. Stat. § 179.245(8). The term "'[c]rime against a child' has the meaning ascribed to it in NRS 179D.0357." *Id.* NRS 179D.0357 provides that "crime against a child" means any of the following offenses if the victim of the offense was a child less than 18 years of age when the offense was committed:

> 1. Kidnapping pursuant to NRS 200.310 to 200.340, inclusive, unless the offender is the parent or guardian of the victim.
> 2. False imprisonment pursuant to NRS 200.460, unless the offender is the parent or guardian of the victim.
> 3. Involuntary servitude of a child pursuant to NRS 200.4631, unless the offender is the parent or guardian of the victim.
> 4. An offense involving sex trafficking pursuant to subsection 2 of NRS 201.300 or prostitution pursuant to NRS 201.320 or section 1 of this act.
> 5. An attempt to commit an offense listed in this section.
> 6. An offense committed in another jurisdiction that, if committed in this State, would be an offense listed in this section. This subsection includes, without limitation, an offense prosecuted in:
>
> (a) A tribal court.
>
> (b) A court of the United States or the Armed Forces of the United States.
>
> 7. An offense against a child committed in another jurisdiction, whether or not the offense would be an offense listed in this section, if the person who committed the offense resides or has resided or is or has been a student or worker in any jurisdiction in which the person is or has been required by the laws of that jurisdiction to register as an offender who has committed a crime against a child because of the offense. This subsection includes, without limitation, an offense prosecuted in:

(a) A tribal court.
(b) A court of the United States or the Armed Forces of the United States.
(c) A court having jurisdiction over juveniles.

See Nev. Rev. Stat. § 179D.0357.

The Appellant was originally charged via Information and plead guilty to "the crime of **COERCION (Sexually Motivated) (Category B Felony- NRS 207.193, 175.547)**." *See* Appendix, at 009-15. Neither NRS 207.193, nor NRS 175.547 are listed in NRS § 179D.0357, which defines what a "crime against a child" is pursuant to the records sealing statute. *See* Nev. Rev. Stat. § 179D.0357; *see also* Nev. Rev. Stat. § 179.245(8). After the Appellant completed his probation and was honorably discharged, he withdrew his plea of guilty to category B felony coercion pursuant to NRS 207.193, and entered a plea of guilty to the gross misdemeanor of open or gross lewdness pursuant to NRS 201.210. *See* Appendix, at 016-023.

The offense of open or gross lewdness, whether felony or gross misdemanor, is not one of the crimes listed in the "crime against a child" definition statute. *See* Nev. Rev. Stat. § 179D.0357; *see also* Nev. Rev. Stat. § 179.245(8). At no time was the Appellant charged with, or convicted of any offense listed in NRS § 179D.0357 as a crime against a

child. As such, the Appellant never was, nor has he ever been charged with or convicted of a crime against a child pursuant to NRS 179.245.

C. The Appellant Was Never Charged With Nor Convicted Of A Sexual Offense.

The term "sexual offense" as defined by the records sealing statute includes sixteen (16) enumerated statutory sexual offenses and any attempt to commit those offenses. *See* Nev. Rev. Stat. § 179.245(8)(b). The offenses include:

> (1) Murder of the first degree committed in the perpetration or attempted perpetration of sexual assault or of sexual abuse or sexual molestation of a child less than 14 years of age pursuant to paragraph (b) of subsection 1 of NRS 200.030.
> (2) Sexual assault pursuant to NRS 200.366.
> (3) Statutory sexual seduction pursuant to NRS 200.368, if punishable as a felony.
> (4) Battery with intent to commit sexual assault pursuant to NRS 200.400.
> (5) An offense involving the administration of a drug to another person with the intent to enable or assist the commission of a felony pursuant to NRS 200.405, if the felony is an offense listed in this paragraph.
> (6) An offense involving the administration of a controlled substance to another person with the intent to enable or assist the commission of a crime of violence pursuant to NRS 200.408, if the crime of violence is an offense listed in this paragraph.
> (7) Abuse of a child pursuant to NRS 200.508, if the abuse involved sexual abuse or sexual exploitation.
> (8) An offense involving pornography and a minor pursuant to NRS 200.710 to 200.730, inclusive.

(9) Incest pursuant to NRS 201.180.
(10) Open or gross lewdness pursuant to NRS 201.210, if punishable as a felony.
(11) Indecent or obscene exposure pursuant to NRS 201.220, if punishable as a felony.
(12) Lewdness with a child pursuant to NRS 201.230.
(13) Sexual penetration of a dead human body pursuant to NRS 201.450.
(14) Sexual conduct between certain employees of a school or volunteers at a school and a pupil pursuant to NRS 201.540.
(15) Sexual conduct between certain employees of a college or university and a student pursuant to NRS 201.550.
(16) Luring a child or a person with mental illness pursuant to NRS 201.560, if punishable as a felony.
(17) An attempt to commit an offense listed in this paragraph.

See Nev. Rev. Stat. Ann. § 179.245(8)(b).

The Appellant was originally charged with and plead guilty to "the crime of **COERCION (Sexually Motivated) (Category B Felony- NRS 207.193, 175.547)**." *See* Appendix, at 001-008. Neither NRS 207.193, nor NRS 175.547 are listed in NRS § 179.245(8)(b), which defines what a "sexual offense" is pursuant to the records sealing statute. *See* Nev. Rev. Stat. § 179.245(8). After the Appellant was honorably discharged from probation he was allowed to withdrew his plea of guilty to category B felony sexually motivated coercion pursuant to NRS 207.193, and entered a plea of guilty to the gross misdemeanor of open or gross

lewdness pursuant to NRS 201.210. *See* Appendix, at 016-23. The offense of open or gross lewdness is only considered a "sexual offense" under the records sealing statute when it is a felony open and gross lewdness conviction. *See* Nev. Rev. Stat. § 179.245(8)(b)(10); *see also* Appendix, at 037:5-17.

The Appellant's open and gross lewdness charge could not be punishable as a felony because it was not the offense he was originally charged with and plead guilty to in the District Court, and his subsequent plea of guilty to the gross misdemeanor of open and gross lewdness was pursuant to the GPA with the State of Nevada. At no time was the Appellant charged with, or convicted of any offense listed in NRS § 179.245(8)(b), which defines what a "sexual offense" is pursuant to the records sealing statute. *See* Nev. Rev. Stat. § 179.245(8)(b). As such, the Appellant was never, and has never been charged with or convicted of a "sexual offense" pursuant to NRS 179.245.

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D. The District Court Abused Its Discretion In Denying The Appellant's Petition To Seal Records By Failing To Consider And Apply The Controlling Statutory Definitions Of "Crime Against A Child" And "Sexual Offense."

The underlying issue addressed by this appeal relates to the lower court's discretion in regards to statutory interpretation. "The Nevada Constitution does not expressly address the expunction of criminal records." *Sang Man Shin v. State (In re Sang Man Shin)*, 125 Nev. 100, 102-03, 206 P.3d 91, 92-93 (2009). When there is no constitutional limitation to the contrary, "the power to enact laws is vested in the Legislature." *Id. citing* Nev. Const. art. 4, § 1; *see Cramer v. Peavy,* 116 Nev. 575, 582, 3 P.3d 665, 670 (2000). The Nevada Legislature has enacted laws regarding the expunction of criminal records in NRS 179.245. *Id.* "Although NRS 179.245 generally grants the district court discretion to seal records of criminal conviction, it expressly prohibits the sealing of records pertaining to a sexual offense: 'A person may not petition the court to seal records relating to a conviction of a crime against a child or a sexual offense.'" *Id quoting* NRS 179.245(5).

"The ultimate goal of interpreting statutes is to effectuate the Legislature's intent." *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 673, 310 P.3d 574, 578 (2013). "When interpreting a statute,

our starting point is the statute's plain meaning." *Rodriguez v. State*, 407 P.3d 771, 773 (Nev. 2017) *citing Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). Judges are permitted discretion to interpret a statute based on legislative intent only when the "statute's plain language is ambiguous." *Id.* If a statutes plain language is ambiguous, the courts are directed to "'turn to other legitimate tools of statutory interpretation.'" *Id. quoting Castaneda v. State*, 132 Nev. Adv. Rep. 44, 373 P.3d 108, 111 (2016). There is a "presumption that, '[w]hen a legislature adopts language that has a particular meaning or history...the legislature intended the language to have meaning consistent with previous interpretations of the language.'" *Id. quoting Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004). It is an abuse of discretion for a court to apply an erroneous interpretation of a statute when the statute's plain language is substantially clear on the issue. *Clay v. Eighth Judicial Dist. Court of State*, 129 Nev. 445, 458, 305 P.3d 898, 906 (2013).

The Nevada Legislature has declared that it is the "the public policy of this State…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 179.2405 to 179.301." *See* Nev. Rev. Stat. Ann. § 179.2405. So long as the petitioner meets all the prerequisites for sealing records, and is not barred by the records sealing statute from doing so, the petitioner is entitled to seal his records, and there is a rebuttable presumption that the records should be sealed. *See* Nev. Rev. Stat. Ann. § 179.245; *see also* Nev. Rev. Stat. Ann. § 179.2445.

In this case, the District Court denied the Appellant's Petition to Seal Records "pursuant to NRS 179.245(6)(a), a person may not petition the court to seal records relating to a conviction of a crime against a child, B, a sexual offense." *See* Appendix, at 37:22-38:3, 40:20-22. Unfortunately, it appears that the District Court has substituted the record sealing statute's express definitions of the terms "crime against a child" and "sexual offense" for its own definitions. NRS 179.245 includes a clear and express definition of "sexual offense," listing sixteen (16) criminal offenses and any attempt to commit those offenses in the statute itself. *See* Nev. Rev. Stat. Ann. § 179.245(8)(e)(1-17).[1] Similarly,

[1] The records sealing statute was recently amended, and the statute in effect when the petition was filed, and when this brief is being filed, was

NRS § 179.245(8)(a) provides that the meaning of "crime against a child" "has the meaning ascribed to it in NRS 179D.0357." *Id.* NRS 179D.0357 defines "crime against a child" specifically as any of four enumerated offenses listed in the statute, any attempt to commit those offenses, and any offense committed in another jurisdiction that, had it been comitted in the state of Nevada, it would be charged as an offense listed in the statute. *See* Nev. Rev. Stat. Ann. § 179D.0357.

A category B felony coercion pursuant to NRS 207.193 with sexual motivation pursuant to NRS 175.547, is, quite simply, not one of the offenses defined as a "sexual offense" or a "crime against a child" listed in the records sealing statute or related definition statutes. *Id.* Similarly, a gross misdemeanor for open or gross lewdness is also not one of the offenses defined as a "sexual offense" or a "crime against a child" listed in the records sealing statute or related definition statutes.

As the Court recognized at the hearing on the petition to seal the Appellant's records, "the laws are the way they are for a reason." *See*

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the statute effective up until July 1, 2020. The changes do not affect the analysis of this appeal, as the definitions of "crime against a child" and "sexual offense" were not changed. The definition of "sexual offense" under the statute moved from NRS § 179.245(8)(e)(1-17) to NRS § 179.245(8)(b)(1-17).

Appendix, at 37:22-23. If the Nevada Legislature intended the term "crime against a child" in the records sealing statute to be subject to loose judicial interpretation, or to mean any crime that involves a child under eighteen (18) years old, the Nevada Legislature would not have included a clear and express definition section with a specific enumerated list of offenses involving children that were not subject to records sealing. Similarly, if the Nevada Legislature intended the term "sexual offense" in the records sealing statute to be subject to loose judicial interpretation, or to mean any crime that is charged as being sexually motivated, the Nevada Legislature would not have included a clear and express definitions section with a specific enumerated list of what a "sexual offense" is pursuant to the statute.

It appears that the Court recognized the error in its reasoning as it pertained to the definition of "sexual offense" prior to issuing the formal written order denying the Appellant's petition to seal his records. When the petition was initially filed with the District Court, the Court refused to rule on the petition, returning it with a notation that the request was seeking to seal records relating to a sexual offense. *See* Appendix, at 024. The petition otherwise complied with the

requirements of NRS 179.245, and the District Attorney, Steve Wolfson, signed off of the petition asserting that:

> The District Attorney has reviewed the applicable Criminal History and agrees that the record is statutorily eligible for sealing. The decision to order the sealing of a record remains solely within the discretion ofthe court. The District Attorney has no objection to the granting of the Petition to seal the criminal record(s) of the petitioner and stipulates to this Order pursuant to NRS 179.245.5.

See Appendix, at 032.

Because the Court rejected the petition, apparently based on the notation that it sought sealing of records regarding a conviction for a sexual offense, the Appellant filed a Motion to Address Petition to Seal Records. *See* Appendix, at 033-34. That motion came up for hearing on August 13, 2019. *See* Appendix, at 035. During the hearing on the Appellant's Petition to Seal Records, however, the Court noted that it guessed "you could say open and gross is still a sexual offense, but if you go further down, it says open and gross as a felony." *See* Appendix, at 037:10-12. The Court cited both the "crime against a child" and "sexual offense" provisions of the record sealing statute, NRS § 179.245(6)(a) and (b), when making its ruling denying the petition at the hearing. *See* Appendix, at 037:22—38:3.

When the Court issued its Order on October 2, 2019, however, it ruled that the petition was being rejected because "a person may not petition the court to seal records relating to a conviction of a crime against a child." *See* Appendix, at 040. The discrepency between the Order and the transcript of the hearing demonstrates the Court was aware that it could not reject the petition to seal records based on the definition of "sexual offense" in the records sealing statute because the gross misdemeanor of open or gross lewdness is not defined as a "sexual offense" under the statute, nor was sexually motivated coercion. *See* Nev. Rev. Stat. § 179.245(6)(b). For this reason, the District Court appears to have relied on the "crime against a child" section, which has a definition that links to a different statute. *See* Nev. Rev. Stat. § 179.245(6)(a); *see also* Nev. Rev. Stat. § 179D.0357. However, instead of looking at NRS 179D.0357, which is the controlling legal definition of "crime against a child" pursuant to the records sealing statute, the Court instead concluded that the Appellant had been convicted of a crime against a child because she "read the bindover packet, which-- because I saw the original charges, but I didn't under-- I didn't know the factors, because I think he originally pleads guilty to a sexually

motivated coercion.... And it does appear to me that originally, it's a crime against a child, I think her name was Jasmine [phonetic]. She was under 14 and it was a sexual offense." *See* Appendix, at 036:16-24.

The fact that the definition of "crime against a child" is found in another statute did not give the Court the authority to substitute its own definition of "crime against a child" for that of the Nevada Legislature's express definition of "crime against a child" pursuant to the records sealing statute. A "crime against a child," for records sealing purposes, includes any of four (4) enumerated offenses and any attempt to commit those offenses pursuant to NRS § 179D.0357, including: (1) "Kidnapping pursuant to NRS 200.310 to 200.340, inclusive, unless the offender is the parent or guardian of the victim"; (2) "False imprisonment pursuant to NRS 200.460, unless the offender is the parent or guardian of the victim"; (3) " Involuntary servitude of a child pursuant to NRS 200.4631, unless the offender is the parent or guardian of the victim"; (4) "An offense involving sex trafficking pursuant to subsection 2 of NRS 201.300 or prostitution pursuant to NRS 201.320 or section 1 of this act"; or (5) an attempt to commit any one of the aforementioned offenses. *See* Nev. Rev. Stat. § 179D.0357.

It cannot be disputed that the Appellant was not convicted nor charged with kidnapping, false imprisonment, involuntary servatude, sex trafficing or an attempt to do any of the above involving a child. The Court recognized that the Appellant's conviction "doesn't have child language in it." *See* Appendix, at 037:5-12. The Court recognized that the Appellant's conviction for open and gross lewdness was not a "sexual offense" defined by the records sealing statute. *Id.* The Court's ruling appears to be based on its belief that any crime that is sexually motivated, and any crime that involves a child is not subject to sealing. *See* Appendix, at 036:8-19. The Court's failure to consider and apply the express definitions of "crime against a child" and "sexual offense" in the records sealing statute is a clear abuse of discretion, which requires reversal. *See* Nev. Rev. Stat. § 179.245(6)(a); *see also* Nev. Rev. Stat. § 179D.0357. "Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error, or to findings so conclusory they may mask legal error." *Davis*, 352 P.3d at 1142.

It is also customary for a district court, when denying on a petition to seal records, to issue "findings of fact or conclusions of law." *See*

Duong v. State (In re Duong), 118 Nev. 920, 922, 59 P.3d 1210, 1211 (2002). In *Duong*, like in the present case, the District Court failed to issue any findings of fact or conclusions of law, instead issuing a short summary order denying the petition because the Appellant was convicted of a crime against a child. *Id. see also* Appendix, at 040. This was considered an error. *Id.* An appropriate Order denying a petition to seal records was issued in *In Re Feltus*, Case No. A-16-748532-S, Order Denying Petition to Seal Records, March 15, 2017, at 1-5.

Judge Adriana Escobar first addressed the sufficiency of the petition, and whether the petitioner had met the preconditions. *Id.* at 2. Judge Escobar then noted that "Petioner is not seeking to seal records relating to a conviction of a crime against a child or a sexual offense." *Id.* at 3:4-5. Judge Escobar noted that:

> a person may not petition the Court to seal records relating to a conviction of a crime against a child or of a sexual offense. NRS 179.245(5)(a)-(b). **A "crime against a child" is any offense listed in NRS 179D.0357, including sex trafficking** (or attempt sex trafficking) under NRS 201.300(2), when the victim was less than 18 years of age when the offense was committed. NRS 179.245(7)(a). A "sexual offense" **includes seventeen separate possible offenses, however none of these were implicated in this case**. NRS 179.245(7)(b).

Id. at 3:13-4:7 (emphasis added).

In *Feltus*, the prosecution argued that "because the statute addresses not just records of crimes against a child, but records "relating to" such crimes, the legislature intended the language to be applied broadly. Thus, because Petitioner was convicted of attempt to pander a victim who was a child, the State argued that the Court lacks jurisdiction to seal records (a), (b), (c), and (d)." *Id.* Judge Escobar correctly rejected the prosecution's argument, noting that:

> Under this Court's view, Petitioner's conviction for attempt pandering is neither a "crime against a child," nor a "sexual offense," as these terms are defined under the statute, such that it would not be subject to sealing. **The statutory definition of each of these categories includes specific crimes with specific statutes.** The only crime from these categories which is similar to Petitioner's conviction is sex trafficking under NRS 201.300(2), which is part of the "crime against a child" category. *See* NRS 179D.0357(4). However, **it is clear from Petitioner's records that he was not convicted of this crime; rather, he was convicted of attempt pandering, under NRS 201.300(1). This is a separate charge from sex trafficking, under a different statutory section, with a different felony classification and different associated punishment. Thus, NRS 170.245(5) does not bar Petitioner from seeking to have records of his conviction sealed**.

Id. (emphasis added).

The *Feltus* Court then addressed the prosecution's next argument, that the petition should be denied because the Court had the discretion

not to seal the records, and the petitioner was "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 4:23-5:7 *quoting State v. Vavaricci,* 108 Nev. 411,413, 834 P.2d 406,408 (1992). The *Feltus* Court agreed with the State, and declined to seal the records pursuant to its discretion. *Id.* Judge Escobar's Order in *Feltus* is an example of how the lower court's are supposed to address the denial of a petition to seal records, and the reasonable and proper analysis of the definitions of "crime against a child" and "sexual offense."

An abuse of discretion occurs "when no reasonable judge could reach a similar conclusion under the same circumstances." *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). "If any reasonable judge could have reached that conclusion, even if others might disagree, then by definition no 'abuse of discretion' occurred and we must affirm." *See Meaders v. State*, 2018 Nev. App. Unpub. LEXIS 307, *7-8. Even giving the Court the benefit of the extremely liberal abuse of discretion standard, its ruling constitutes an abuse of discretion because no reasonable judge, after considering the definitions of "sexual offense" and "crime against a child" in the records sealing statute, could come to

the conclusion that the Appellant committed a "crime against a child" or "sexual offense" as they are defined by the records sealing statute. "The statutory definition of each of these categories includes specific crimes with specific statutes," and the Appellant was not charged with or convicted of any of the offenses listed in those definitions. *In Re Feltus*, Case No. A-16-748532-S, Order Denying Petition to Seal Records, March 15, 2017, at 3:24-27.

At most, the Appellant was charged with and plead guilty to sexually motivated felony coercion pursuant to NRS 207.193, 175.547. *See* Appendix, at 001. Appellant's crime, did, indeed, involve a child under the age of eighteen (18) years old. *See* Appendix, at 020. However, these facts do not establish that the Appellant was petitioning the District Court to seal records relating to a conviction of "a crime against a child" or a "sexual offense" under NRS 179.245(6 and 8), because neither Appellant's conviction of open and gross lewdnes (gross misdemeanor), or the underlying offense he was charged with, sexually motivated coercion with a child (category B felony), are defined as a "sexual offense" or "a crime against a child" under the records sealing

statute. *See* Nev. Rev. Stat. § 179.245(6)(a-b); *see also* Nev. Rev. Stat. § 179.245(8); *see also* Nev. Rev. Stat. § 179D.0357.

The plain meaning of the records sealing statute is clear in regards to the definition of "sexual offense" and "crime against a child," and is, therefore, not subject to interpretation by the District Court. If the Nevada Legislature had wanted to include open and gross lewdnes (gross misdemeanor), or sexually motivated coercion with a child (category B felony), within the definitions of "sexual offense" or "a crime against a child" under the records sealing statute, it was within their power and duty to amend the records sealing statute to include those offenses within these defintions. Until then, the District Courts are constrained by the controlling legal definitions of "crime against a child" and "sexual offense" included within the records sealing statute. The District Court's conclusion that the Appellant was convicted of a "crime against a child" when neither his conviction, nor underlying charge are defined as a "crime against a child" in the records sealing statute is a clear abuse of discretion. Therefore, this Court should overrule the District Court's order denying the petition to seal records and order the Appellant's records sealed.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER AND ADDRESS THE REBUTTABLE PRESUMPTION THAT THE APPELLANT'S RECORDS SHOULD BE SEALED.

Instead of adding offenses to the records sealing statute that would bar criminal defendants from sealing their records, in 2017, the Nevada Legislature amended the records sealing statutes to make it easier for criminal defendants to seal their records. Specifically, in 2017, the Nevada Legislature added "a rebuttable presumption that the records should be sealed if the applicant satisfies all statutory requirements for the sealing of the records. **Section 4** also provides that such a presumption does not apply to a defendant who is given a dishonorable discharge from probation and applies to the court for the sealing of records relating to the conviction." *See* Legislative Counsel's Digest, AB No. 241, March 20, 2017, at 1-2.

The rebuttable presumption for sealing records was codified into NRS 179.2445, and provides that "[e]xcept as otherwise provided in subsection 2, upon the filing of a petition for the sealing of records pursuant to NRS 179.245, 179.255, 179.259 or 179.2595, there is a rebuttable presumption that the records should be sealed if the applicant satisfies all statutory requirements for the sealing of the

records." *See* Nev. Rev. Stat. Ann. § 179.2445(1). The presumption does not apply to defendants that are "given a dishonorable discharge from probation pursuant to NRS 176A.850 and applies to the court for the sealing of records relating to the conviction." *See* Nev. Rev. Stat. Ann. § 179.2445(2).

The Nevada Supreme Court just recently addressed whether a district court abuses its discretion when ruling on a petition to seal records by failing to address the rebuttable presumption. *Geck*, 443 P.3d at 1126. In *Geck*, the petitioner argued that "the district court erred by failing to apply NRS 179.2445's rebuttable presumption in favor of sealing records and that the district court should be required to seal the records where no evidence rebutted the presumption." *Id.* The State argued that "the district court must have considered the rebuttable presumption," however, the *Geck* Court noted that "the record is not so clear." *Id.*

> Geck's petition and proposed order did not mention it. The district court's written order also does not mention the rebuttable presumption. And there apparently was no hearing on the petition, likely because it was uncontested. On this record, **we are constrained to agree with Geck that the district court did not consider whether the rebuttable presumption applied. The failure to consider controlling authority is an abuse of discretion**. *See Davis v. Ewalefo*, 131

> Nev. 445, 450, 352 P.3d 1139, 1142 (2015) ("Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error, or to findings so conclusory they may mask legal error." (internal citations omitted)). **We must therefore reverse and remand so that the district court can consider whether the presumption in NRS 179.2445(1) applies and, if so, whether it has been rebutted**.

Id.

This case is remarkably similar to *Geck.* Like *Geck*, the Appellant's petition and proposed order did not mention the presumption. The District Court's written order also failed to address the presumption. The hearing on the petition was limited to the issue of whether the Appellant was convicted of a "crime against a child" or a "sexual offense." *See* Appendix, at 035-39. The District Court failed to address the presumption because it erroneously believed that the Appellant's petition was barred by NRS § 179.245(6), when it was not. *Id. see also* Appendix, at 040.

"The failure to consider controlling authority is an abuse of discretion." *See Geck*, 443 P.3d at 1126 *citing Davis*, 352 P.3d at 1142. On May 5, 2016, Judge Scotti, Department XXIX of the Eighth Judicial District Court, Clark County, Nevada, entered an order concluding that the Appellant "is HONORABLY DISCHARGED from probation and

entitled to the drop down" from the category B felony for coercion, to the gross misdemeanor for open and gross lewdness. *See* Appendix, at 016. Because the Appellant was not dishonorably discharged from probation, had met all the statutory preconditions for sealing his records, and the Appellant was not barred from sealing his records pursuant to NRS § 179.245(6), he was entitled to the rebuttable presumption that his records should be sealed pursuant to NRS § 179.2445.

The Clark County District Attorney did not seek to rebut that presumption, did not file a written opposition to the petition, and did not appear at the hearing on the petition. *See* Appendix, at 040. Further, the District Attorney also affirmed in writing that it had "no objection to the granting of the Petition to seal the criminal record(s) of the petitioner and stipulates to this Order pursuant to NRS 179.245.5." *See* Appendix, at 032. The presumption was, therefore, not rebutted, and the Appellant was entitled to a presumption that he records should be sealed. The District Court's failure to address the presumption in its written Order denying the petition is an abuse of discretion for failure to consider controlling authority. As such, as in *Geck*, this Court must

reverse the District Court's ruling denying the petition and remand with a directive that the District Court address the presumption.

CONCLUSION

For the reasons set forth above, Appellant Michael Aragon respectfully requests that this Honorable Court reverse the District Court's Order denying his petition to seal records and direct the District Court to address the presumption, and if the presumption is not rebutted, to seal the Appellant's records.

Dated this 23rd day of January 2020.

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CERTIFICATE PURSUANT TO NRAP 28.2

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook; or

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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 exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate 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.

Dated this 23rd day of January 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Nevada by using the efiling system located at efile.nevadasupremecourt.us.

I further certify that all participants in this case are registered users of Nevada Supreme Court's efiling system, and that service will be accomplished in accordance with 9(c) of the Nevada Electronic Filing Rules.

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