IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE,

Respondents.
_____/

No.

District Court Case No. CV19-01912

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

I. Introduction

In 2017, the Nevada Legislature made clear that Nevada favors the sealing of criminal convictions in order to provide convicted persons with a second chance, and established a rebuttable presumption in favor of sealing convictions. The Legislature also enacted a series of statutes giving prosecutors, and anyone with relevant evidence regarding a petition for sealing, the *option* to participate in any hearing on the petition.

This writ petition asks the Court to determine whether a district court exceeds its jurisdiction by 1) mandating that a prosecuting agency respond to a petition to seal records; and 2) requiring a prosecuting agency to serve

a fact-checking function by ordering a prosecuting agency to compare the verified criminal history submitted by a petitioner with the agency's records.

II. Routing Statement

Cases that raise as a principal issue a question of statewide public importance are retained by the Supreme Court. NRAP 17(a)(12). The district court's order raises an issue of statewide public importance and provides an opportunity to provide guidance to the district court and to prosecutors regarding the role of prosecutors in the sealing process. Thus, the Petitioner respectfully requests that the Nevada Supreme Court retain and decide this petition.

III. Procedural History

On October 1, 2019, Sean Thomas McKelvy McCall, hereafter "McCall," through counsel, filed a petition to seal criminal records. Petitioner's Appendix, hereafter "PA," 1-7. That same day, 2019, the Second Judicial District Court notified the Washoe County District Attorney's Office, hereafter "WCDA," as well as several other entities, that the Petition for Sealing had been filed. PA, 8-10. On October 15, 2019, McCall filed a request for submission. *Id*., 11.

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On October 22, 2019, the district court issued an Order to Respond. *Id*., 12-13. The Order noted that the WCDA had not responded to McCall's's petition to seal his criminal records. *Id*. It ordered the WCDA to file a response or opposition within ten days. *Id*. The district court further ordered that the WCDA's response or opposition, "shall include whether the representations of Petitioner's criminal history are consistent with the records of the Washoe County District Attorney's Office no later than ten (10) days from the date of this Order." *Id*. The WCDA moved to stay the proceedings in order to pursue the instant writ on October 30, 2019. *Id*., 38-41.

IV. Standard of Review

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see also* NRS 34.160; *Humphries v. Eighth Judicial Dist. Ct.*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); *see also*

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Smith v. Eighth Judicial Dist. Ct., 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991).

Where there is no "plain, speedy, and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; NRS 34.330; *see Oxbow Constr., LLC v. Eighth Judicial Dist. Ct.*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014). A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition is warranted. *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Ct.*, 405 P.3d 651, 653 (Nev. 2017); *see also Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

An appeal is generally an adequate remedy precluding writ relief. *Pan*, 120 Nev. at 224, 88 P.3d at 841; *see also Bradford v. Eighth Judicial Dist. Ct.*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). The Court may consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014).

In the context of writ petitions, this Court reviews district court orders for an arbitrary or capricious abuse of discretion. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. "An arbitrary or capricious exercise of

discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law...." *State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)(internal quotations and citations omitted). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Armstrong*, 127 Nev. at 932, 267 P.3d at 780 (internal quotations omitted). Questions of law are reviewed de novo, even in the context of writ petitions. *Moseley v. Eighth Judicial Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

V. Argument

A. NRS 179.245 Permits, But Does Not Require, Prosecutors to Participate in Sealing Proceedings.

Although NRS 179.245 permits the prosecuting attorney to participate in sealing proceedings, it does make prosecutors a party to those proceedings. NRS 179.245 provides, in relevant part:

> 3. Upon receiving a petition pursuant to this section, the court shall notify the law enforcement agency that arrested the petitioner for the crime and the prosecuting attorney, including, without limitation, the Attorney General, who prosecuted the petitioner for the crime. The prosecuting attorney and any person having relevant evidence *may* testify and present evidence at any hearing on the petition.
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> 4. If the prosecuting attorney who prosecuted the petitioner for the crime stipulates to the sealing of the records after receiving

> notification pursuant to subsection 3 and the court makes the findings set forth in subsection 5, the court may order the sealing of the records in accordance with subsection 5 without a hearing. If the prosecuting attorney does not stipulate to the sealing of the records, a hearing on the petition must be conducted.

NRS 179.245 (3)(*emphasis added*).

The language of NRS 179.245 (3) is clearly permissive. It makes clear that a prosecuting agency may participate in a proceeding regarding a petition for sealing, but it does not require the prosecutor to participate. This statutorily-created option of participation in the proceeding does not transform a prosecuting agency that secured a petitioner's conviction into a party to the proceedings. Instead, the Legislature has merely granted the prosecuting agency the ability to participate. This same option of participation is afforded to "any person having relevant evidence." NRS 179.245 (3). Such persons could include the victim, employers, and other members of the community.

The very fact that the Legislature believed a special provision was required to authorize the prosecutor to "testify" or offer evidence at a hearing on the petition highlights the WCDA's non-party status. If the prosecutor was a party to the action, these things would be matter of right, and standing to participate in the proceedings would not need to be specially and separately conferred.

Further support for the WCDA's position may be found in the lack of requirement that the petitioner serve the prosecuting agency with a copy of the petition. It is the district court that must notify the prosecuting attorney that has received the petition:

> 3. Upon receiving a petition pursuant to this section, the court shall notify the law enforcement agency that arrested the petitioner for the crime and the prosecuting attorney, including, without limitation, the Attorney General, who prosecuted the petitioner for the crime. *The prosecuting attorney and any person having relevant evidence may testify and present evidence at any hearing on the petition.*
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> NRS 179.245 (3)(*emphasis added*).

There is other precedent in Nevada for granting non-parties standing to participate in a court proceeding. For example, Article 1, Section 8A (2) of the Nevada Constitution provides standing for victims to optionally participate in criminal proceedings, but does not grant the victim the same status as a party to the sealing proceeding:

> 2. A victim has standing to assert the rights enumerated in this section in any court with jurisdiction over the case. The court shall promptly rule on a victim's request. A defendant does not have standing to assert the rights of his or her victim. This section does not alter the powers, duties or responsibilities of a prosecuting attorney. A victim does not have the status of a party in a criminal proceeding.

Despite the matter having been submitted for decision by McCall on October 15, 2019, the district court appears to assume that the WCDA is a

party that must participate in the sealing proceedings. The district court ordered the WCDA to respond to, or oppose, McCall's petition to seal his records, even after the matter was submitted for decision. PA, 12-13. The district court further ordered the WCDA to analyze the criminal history provided by McCall, and to inform the district court "whether the representations of Petitioner's criminal history are consistent with the records of the Washoe County District Attorney's Office no later than ten (10) days from the date of this Order." *Id*. The WCDA respectfully observes that neither of the district court's mandates are authorized by statute. NRS 179.245 allows prosecuting attorney, or *anyone* having relevant evidence, to testify and present evidence, but it does not require that the prosecutor, or anyone else, participate in the proceedings.

The Second Judicial District's captioning of orders and notifications related to petitions to seal is inconsistent. The petitions are assigned civil case numbers, separating them from any related criminal cases. PA, 8-10. 109. The petitions are sometimes captioned with the State of Nevada as the adverse party, and sometimes do not refer to any government actor at all. The Order to Respond simply captions the case with McCall's name and date of birth, with no reference to the State, and no reference to any adverse party. *Id*.

B. Requiring a Prosecuting Agency to Compare and Analyze the Verified Records Provided by Petitioners is Improper and Unnecessary.

The district court order requires the WCDA to compare the criminal history provided by McCall to records kept by the WCDA. *Id*. The order further requires the WCDA to take a position as to whether the criminal history provided by McCall is "consistent" with prosecution records. *Id*. These aspects of the order are not supported by the plain language of the statute.

NRS 179.245 (2)(a) requires that a petition to seal must be accompanied by records from the Central Repository, along with other information about the conviction:

> A petition filed pursuant to subsection 1 must:
>
> (a) Be accompanied by the petitioner's current, verified records received from the Central Repository for Nevada Records of Criminal History;
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> (b) If the petition references NRS 453.3365 or 458.330, include a certificate of acknowledgment or the disposition of the proceedings for the records to be sealed from all agencies of criminal justice which maintain such records;
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> (c) Include a list of any other public or private agency, company, official or other custodian of records that is reasonably known to the petitioner to have possession of records of the conviction and to whom the order to seal records, if issued, will be directed; and

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(d) Include information that, to the best knowledge and belief of the petitioner, accurately and completely identifies the records to be sealed, including, without limitation, the:

(1) Date of birth of the petitioner;

(2) Specific conviction to which the records to be sealed pertain; and

(3) Date of arrest relating to the specific conviction to which the records to be sealed pertain.

NRS 179.245 (s)

In addition to being unsupported by any language in the related statutes, the district court's order that the WCDA compare and analyze the criminal history provided by McCall with information possessed by the WCDA is unnecessary. The district court has already been provided with criminal records from the Central Repository. Additionally, the imposition of this fact-finding task requirement impedes resolution of a petition and frustrates the Legislature's clearly expressed intent to facilitate, favor, and simplify the sealing of criminal convictions, as discussed in the next section. Just as it would be improper for the district court to impose the task on a police agency it has notified, it is improper to order the WCDA to analyze criminal records.

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Furthermore, prior to the 2017 changes to Nevada's sealing laws, this Court has held that while a district attorney is "entitled to be notified of the petition[...]there is no authority for the district court to avoid its mandatory obligation to act on the petition by deferring its judicial role to a deputy district attorney." *Knox v. Eighth Judicial District Court*, 108 Nev. 354, 830 P.2d 1342 (1992). Although *Knox* is not directly on point, it reflects a general wariness of prosecutor over-participation in sealing proceedings. Since *Knox* was decided, the Legislature has made clear efforts to further simplify sealing for defendants. Requiring the WCDA to engage in fact-finding and analysis regarding McCall's verified criminal history is contrary to those efforts. It also violates the separation of powers doctrine because the judiciary branch encroaches on executive function by forcing the WCDA to participate in sealing proceedings.

C. Requiring Prosecutors to Respond to Petitions for Sealing Frustrates Clearly Expressed Legislative Intent.

In 2017, the Nevada Legislature passed Assembly 327, which amended Chapter 179 of the Nevada Revised Statutes to declare, as a matter of public policy, that Nevada favors sealing as a means of giving rehabilitated offenders a "second chance":

> The Legislature 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 179.2405 to 179.301, inclusive.
>
> NRS 179.2405.

The sealing of criminal records is integral to execution of that public policy concern, so much that the Legislature amended Nevada law to establish rebuttable presumption of sealing.

> 179.2445. Rebuttable presumption that records should be sealed; exception
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> 1. Except 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.
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> 2. The presumption set forth in subsection 1 does not apply to a defendant who is 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.
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> NRS 179.2445.

A district court discharges its statutory duty regarding a former prosecuting agency simply by notifying the agency of the petition. NRS 179.245 (3). Here, the Second Judicial District Court satisfied that requirement by issuing its Notice of Filing of Petition to Seal Records on October 1, 2019. PA, 8-10. The WCDA chose not to respond or otherwise participate, which is permissible under the clear language of NRS 179.245 (3). Ordering the WCDA to respond, even after McCall submitted the

matter for decision, unnecessarily dilates the sealing process, and is unsupported by the language of the statute. The language of NRS 179.245 Ordering the WCDA to compare the verified criminal history supplied by McCall with WCDA records is not authorized by any portion of NRS Chapter 179, and only complicates the sealing process. The district court should be prohibited from issuing such an order.

D. The District Court's Error is Capable of Repetition, and May Otherwise Evade Review.

The WCDA has requested that the district court stay the October 22, 2019 Order to Respond pending the resolution of this petition, but has not requested that the district court stay its decision on McCall's request to seal his records. Although the WCDA anticipates that McCall's petition to seal may be resolved prior to the resolution of the instant petition. Should that occur, the WCDA asks this Court to make an exception to the mootness doctrine, because the factual circumstances are capable of repetition, but may well otherwise evade review. *Personhood Nevada v. Bristol*, 126 nev. 599, 245 P.3d 572 (2010). Petitions for sealing are routinely filed in the Second Judicial District Court, and the WCDA is routinely receiving court orders to respond by stipulating to the petition, opposing the petition, and performing other actions such as contacting victims. The WCDA has also been ordered to attend sealing hearings, even where the WCDA has

expressed its desire not to take any position whatsoever with respect to a petition for sealing. Guidance from this Court is needed to resolve the questions presented in this petition, and will benefit the WCDA, the Second Judicial District Court, and persons petitioning for sealing.

IV. Conclusion

Based on the foregoing, the WCDA requests that this Court issue an order or opinion resolving the questions of whether a district court may 1) mandate that a prosecuting agency respond to a petition to seal records; and 2) require a prosecuting agency to serve a fact-checking function by ordering the agency to compare the verified criminal history submitted by a petitioner with the agency's records.

DATED: November 13, 2019.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

AFFIDAVIT OF JENNIFER P. NOBLE

STATE OF NEVADA

COUNTY OF WASHOE

I, JENNIFER P. NOBLE, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. That your affiant is a duly licensed attorney in the State of Nevada and is counsel of record for Petitioner.

2. That your affiant has read the foregoing Petition and she believes that it correctly describes the procedural history of this case.

3. That this Petition is brought in good faith and not for purposes of delay or any other improper reason.

Jennifer P. Noble

Subscribed and sworn to before me
on this 13th day of November, 2019
by Jennifer P. Noble.

WANDA JACKSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 17-2611-2 - Expires May 1, 2021

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 13, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kenneth A. Stover, Esq.

I further certify that on this date, a copy of this document was hand delivered to the Chambers of the Honorable Kathleen Drakulich of the Second Judicial District Court.

Margaret Ford
Washoe County District Attorney's Office