

Case No. 80009

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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THE STATE OF NEVADA,  
Petitioner,

Electronically Filed  
Nov 19 2019 10:39 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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.

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ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT  
CASE No. CV19-01912

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**AMICUS BRIEF OF THE STATE OF NEVADA  
IN SUPPORT OF PETITIONER**

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## **I. INTRODUCTION AND INTERESTS OF AMICUS CURIAE**

The State of Nevada submits this brief as amicus curiae in support of Petitioner’s Petition for Writ of Mandamus or Prohibition. The State asks this Court to correct the District Court’s misinterpretation of the plain language of NRS Chapter 179 relating to sealing records of criminal proceedings. Pursuant to NEV. R. APP. P. 29, the State may file a brief of amicus curiae without leave of court.

## **II. ARGUMENT**

### **A. Public policy favors sealing of criminal records**

“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. That language was explicitly added by the Legislature during the 2017 session to express the intent of Nevadans in the importance of the sealing of criminal records for those that meet the statutory requirements. There is a rebuttable presumption that records should be sealed so long as the applicant satisfies all statutory requirements for the sealing of his records. *See* NRS 179.2445.

The Nevada Supreme 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 v. Clark Cty.*, 102 Nev. 568, 570, 729 P.2d 1338, 1340 (1986); *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”).

The State here takes no position as to whether Mr. McCall’s application is sufficient or whether his criminal records should be sealed. Instead, the State is simply asking this Court to correct the order of the District Court in requiring the prosecuting agency to respond to every petition to seal records, attend and participate in every hearing, and to conduct its own independent research regarding every applicant’s criminal history beyond the records provided by Central Repository.

**B. The plain language of NRS Chapter 179 makes it permissive, but not mandatory, that prosecutors participate in sealing proceedings**

To determine legislative intent, this Court first looks at the plain language of a statute. *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 513–14 (2000). The Court should only look beyond the plain language if it is ambiguous or silent on the issue in question. *Id.* Statutes should be read within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result. *Torrealba v. Kesmetis*, 124 Nev. 95, 178 P.3d 716, 721 (2008).

Here, the plain language of NRS 179.245 is clear. The applicant bears the burden of proof in demonstrating that his criminal records should be sealed. It is within the court's discretion whether to order those records sealed. The prosecuting agency does not carry the burden of proof and is not obligated to participate in the hearing on the sealing of the records.

NRS 179.245(3)-(4) states:

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.

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.

The plain language of this statute is clear – a prosecuting agency may, not *must*, participate in a proceeding or hearing regarding a petition to seal criminal records.

**C. The underlying Legislative intent is clear – the burden does not shift to prosecutors to determine whether criminal records should be sealed**

Even looking beyond the plain language of the statute, the Legislative intent is clear that the prosecution does not bear the burden of proof in a petition to seal criminal records. In the 2017 amendment, the original proposed statutory language required the applicant to submit their application including records from Central Repository, and the burden then shifted to the prosecuting agency to make a determination on the records submitted by the petitioner. That subpart was removed from the bill text prior to passage to prevent just this sort of issue. See AB 327 (compare Section 4 “As Introduced” to “As Enrolled”

with Amendment 345 noting the changes). AC APP0003; AC APP0020; AC APP0033. The Legislature explicitly declined to shift the burden to the prosecuting agency to make a determination on the sufficiency of the application to seal criminal records. Instead, discretion lies entirely with the District Court judge on whether an applicant's criminal records should be sealed based on the statutory sufficiency of the application that is submitted.

### **III. CONCLUSION**

The State requests this Court issue an order providing clarity to the district courts on two issues. First, the response of the prosecutor or the presence of the prosecutor at a hearing on a petition to seal criminal records, where the prosecutor is not opposing the sealing of the records, is not mandatory, but is subject to prosecutorial discretion. And second, that the prosecutor is not required to conduct any independent research



into the applicant's criminal history because the applicant is required to provide a copy of his records as maintained by Central Repository.

Dated this 19th day of November, 2019.

AARON D. FORD  
Attorney General

By: /s/ Theresa M. Haar  
Theresa M. Haar (Bar No. 12158)  
*Special Assistant Attorney General*

## 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 Microsoft Word 2010 in 14 pt. font and Century Schoolbook; or

This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

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:

Proportionately spaced, has a typeface of 14 points or more and contains 980 words; or

Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_ words or \_\_\_ lines of text; or

Does not exceed \_\_\_ pages.

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

Dated this 19th day of November, 2019.

AARON D. FORD  
Attorney General

By: /s/ Theresa M. Haar  
Theresa M. Haar (Bar No. 12158)  
*Special Assistant Attorney General*

## CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 19, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Kenneth A. Stover, Esq.

Jennifer Noble, Esq.

I further certify that on this date, a copy of this document was mailed via U.S. Mail to the Chambers of the Honorable Kathleen Drakulich of the Second Judicial District Court.

*/s/ Traci Plotnick*  
\_\_\_\_\_  
Traci Plotnick, an employee of the  
Office of the Nevada Attorney General