IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

vs.

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

Respondents.

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Case No. 79792
(Consolidated with 80008 and 80009)

RESPONDENTS' ANSWER TO THE PETITIONS FOR WRIT OF MANDAMUS OR PROHIBITION

Respondents, the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; and the Honorable Kathleen M. Drakulich, District Judge (hereafter "Respondents"), by and through counsel, Nevada Attorney General Aaron D. Ford and Deputy Attorney General Peter P. Handy, hereby files this Answer to the Petitions for Writ of Mandamus or Prohibition.

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Docket 79792 Document 2020-03741

I. ISSUES PRESENTED

1. Whether the Second Judicial District Court may require the Washoe County District Attorney's Office to submit a response to a Petition for an Order Sealing Records.

2. Whether the Second Judicial District Court may require that the Washoe County District Attorney's Office verify the accuracy of the criminal history included in a Petition for an Order Sealing Records.

3. Whether the Second Judicial District Court may order a representative of the prosecuting agency to appear and participate at a sealing proceeding when the prosecuting agency exercises its discretion to not stipulate to the sealing.

II. ROUTING STATEMENT

The issues presented involve a dispute between branches of government and are to be retained by the Supreme Court pursuant to NRAP 17(a)(7).

III. RELEVANT FACTS AND PROCEDURAL HISTORY

Respondents do not dispute and adopt the procedural history as provided by Petitioner in each of the Petitions, and supplement such history with the following relevant information:

On January 17, 2019, the Washoe County District Attorney's Office (hereinafter "WCDA") submitted a memorandum to the Second Judicial District Court, Department 9, in which it informed the Second Judicial District Court that, "effective February 4 [2019] . . . [its] Criminal Division will not follow a practice of stipulating to records sealing, nor will the WCDA be routinely filing any pleadings in support of or against sealing." The memorandum further provided that "[t]he WCDA will appear at court-noticed hearings as a statutorily interested entity in matters only where it intends to offer evidence or testimony in opposition to the civil Petition to Seal." Respondents' Appendix (hereinafter "RA"), Vol. I, at 1.

In other criminal sealing matters, the WCDA has filed waivers of appearances in which it seeks to obtain an order from the "Court indicating that counsel for the State need not appear at [a] sealing proceeding." *E.g.*, RA Vol. I. at 2–5, 6–11, 12–15, 16–18.

At all relevant times, the District Attorney of Washoe County and his Deputies are attorneys duly licensed to practice law by the State Bar of Nevada. NRS 252.010.

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IV. STANDARD OF REVIEW

"Because both writs of prohibition and writs of mandamus are extraordinary remedies, [the Supreme Court has] complete discretion to determine whether to consider them." *Cote H. v. Eighth Jud. Dist. Ct. (Voy)*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *State v. Second Jud. Dist. Ct. (Steinheimer)*, 134 Nev. 783, 784, 432 P.3d 154, 157 (2018). A writ may be used "to compel the performance of an act which the law especially enjoins as a duty . . . ," NRS 34.160, to "arrest[] the proceedings of any tribunal . . . when such proceedings are without or in excess of the jurisdiction of such tribunal . . . ," NRS 34.320; *Cote H.*, 124 Nev. at 39, 175 P.3d at 907, "or to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011); *Cote H.*, 124 Nev. at 39, 175 P.3d at 908.

Generally, if a petitioner has a "plain, speedy and adequate remedy in the ordinary course of law," writ relief is not appropriate. NRS 34.170; NRS 34.330; *Cote H.*, 124 Nev. at 39, 175 P.3d at 908; *Steinheimer*, 134 Nev. at 784, 432 P.3d at 157. In most cases, an appeal is an adequate and speedy remedy precluding writ relief, *Cote H.*, 124 Nev. at 39,

175 P.3d at 908; *see also Cty. of Washoe v. City of Reno*, 77 Nev. 152, 360 P.2d 602 (1961); however, this Court may exercise discretion in granting writ relief "to clarify 'important legal issue[s] in need of clarification' or 'in the interest of judicial economy and to provide guidance to Nevada's lower courts.'" *Steinheimer*, 134 Nev. at 784, 432 P.3d at 157 (quoting *State v. Justice Ct. (Escalante)*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017)) (alteration in original). "This Court considers whether judicial economy and sound judicial administration militate for or against issuing the writ," *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), and whether "public policy is served by this [C]ourt's invocation of its original jurisdiction," *Bus. Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998).

V. DISCUSSION

The Nevada Legislature, through NRS 179.245–179.285, vested district courts with the jurisdiction, responsibility, and discretion to determine whether to seal the criminal records of a petitioner. *See In re Application of Finley*, 135 Nev. Adv. Op. 63, at 7 (Ct. App. 2019) ("[U]nder the statute, a court always possesses the discretion to refuse to seal any conviction even when it is eligible to be sealed."). The bounds of the

jurisdiction and discretion of the court, as well as the requirements for eligibility of petitions to seal, are found within NRS 179.245–179.285.

The WCDA is abdicating its responsibilities to represent the State of Nevada in a criminal action. Respondents have clear authority to require the participation of the WCDA at hearings on petitions to seal criminal records, and the statutory scheme clearly presumes their participation in these proceedings. Petitioner's attempt to transform a statute that authorizes prosecuting agencies to participate in a proceeding into a statute that places a limitation on the judiciary's authority to issue orders necessary to acquire relevant facts and information, is inconsistent with the law and public policy.

A. Record Sealing Process Followed By District Courts

The process of sealing criminal records begins when an offender submits a petition to have a record sealed. NRS 179.245(1); *Finley*, 135 Nev. Adv. Op. at 7. Upon receipt of the petition, the receiving court must first review the petition in order to perform its obligation to "notify the law enforcement agency that arrested the petitioner for the crime and the prosecuting attorney . . . who prosecuted the petitioner for the crime." NRS 179.245(3). This may require the notification of several law

enforcement agencies and prosecuting agencies if several records are sought to be sealed. NRS 179.2595. In the event that a prosecuting attorney stipulates to the sealing of the records, the Court may, at its discretion, elect to dispense with a hearing on the petition and seal the records without further proceedings. NRS 179.245(4). If a prosecuting agency stipulates to a petition, a court may reasonably infer that the prosecuting agency has reviewed the petition and believes that it satisfies the requisite statutory requirements, that the criminal records submitted by the petitioner are accurate and unobjectionable, and/or that there are no interceding arrests or charges filed against the petitioner.[1] However, if the prosecuting agency does not stipulate to the sealing of records, then a hearing on the petition must occur. *Id.* "At the hearing, the court analyzes the contents of the petition and examines the relevant convictions in order to determine whether . . . the petitioner was subsequently convicted of another offense within the prescribed waiting

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[1] If a prosecuting agency stipulates to a petition to seal criminal records, a court may still hold a hearing if it deems a hearing necessary to facilitate justice or to allow for correction or explanation of discrepancies in the petition. NRS 179.245(4) ("[T]he court *may* order the sealing of records . . . without a hearing.") (emphasis added).

period that would disqualify a conviction from being sealed. NRS 179.245(5)." *Finley*, 135 Nev. Adv. Op. at 9. The court has only the contents of the petition at its disposal, all of which is submitted by the petitioner. NRS 179.245(2); Petitioner's Supp. App. 2 ("Pursuant to NRS 179.245.2 (a) NRS 179.255.3 (a) [sic], the Petitioner has attached a current verified record of his criminal history received from the State of Nevada Criminal History Records Repository (See Exhibit "1" attached hereto) and the Federal Bureau of Investigation (See Exhibit "2" attached hereto)."). None of the information provided to the court comes directly from any other source or agency, including the Central Repository for Nevada Records of Criminal History. *Id.* If "no such subsequent conviction occurred during the waiting period, then the discretionary phase of the analysis kicks in and 'the court may order sealed all records of the [corresponding] conviction.' NRS 179.245(5). It is not, however, required to." *Finley*, 135 Nev. Adv. Op. at 9 (alteration in original). If a petition is denied, a petitioner must wait two years before they may petition for rehearing. NRS 179.265(1). Offenders who have their petitions denied three times (once on the original petition and twice for

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petitions for rehearing) become ineligible to have their records sealed at any time in the future. NRS 179.265(2).

B. Petitioner Is A Party To, And Subject To Respondents' Jurisdiction Over, Proceedings Commenced Pursuant To NRS 179.245 And 179.255

"Party" herein is not used in the sense that the entity or person is a named litigant in the case caption, but rather an entity or person over whom the court has jurisdiction and who has standing to seek to enforce a right or privilege through the court.

The Legislature can afford parties statutory rights which are broader in nature than constitutional standing would provide. *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630–31, 218 P.3d 847, 851 (2009) (explaining proper analysis is to examine statutory language and determine if it confers standing). State courts are not bound by federal constitutional standing limitations. *Fergason v. LVMPD*, 131 Nev. 939, 952, 364 P.3d 592, 600 (2015) (explaining statutory standing permits courts to "reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."). Nevada in particular, has "a long-standing history of recognizing statutory rights that are broader than those afforded to citizens by constitutional standing." *Citizens for*

Cold Springs, 125 Nev. at 633, 218 P.3d at 852. Even if prosecuting agencies were not parties by virtue of being record-holders or as advocates for victims and the public, NRS 179.245 and 179.255 confer the right to appear and object to the sealing of records upon prosecuting agencies. Simply because the State questions the position it should take on these petitions does not alter the legislative declaration that it has standing to appear and object and is a relevant and necessary party to these proceedings.

1. The WCDA must be a party to record sealing proceedings because only a party may exercise rights afforded to, and utilized by, the WCDA as a prosecuting agency

Since 1971, NRS 179.245 has provided that a court in receipt of a petition to seal records "shall notify the district attorney of the county in which the conviction was obtained, and the district attorney and any person having relevant evidence may testify and present evidence at the hearing on the petition." NRS 179.245(2) (1971) (current version at NRS 179.245(3)). In 2017, NRS 179.245(4) was added and provides that if a "prosecuting attorney . . . stipulates to the sealing of records after receiving notification pursuant to subsection 3 . . . the court may order the sealing of the records . . . without a hearing." However, at least as

early as 1997, criminal records were being sealed by stipulation between petitioning offenders and District Attorney's Offices. *Hearing on S.B. 258 before the Sen. Comm. on Judiciary*, 1997 Leg., 69th Sess. (Ben Graham, a lobbyist for the Nevada District Attorneys' Association stated that "in most cases record sealing requests could be stipulated to with no need for a hearing.").

Only parties to an action are able to stipulate. Stipulations are only relevant and effective if made between and among parties to an action. *See* DCR 16 ("No . . . stipulation between the parties in a cause . . . will be regarded unless the same shall, by consent [of the court] be entered in the minutes in the form of an order, or unless the same shall be in writing subscribed by the party against whom the same shall be alleged . . . .").

The WCDA's obligation to participate as a party is consistent with the statutory obligation of the District Attorney to "[a]ttend the district courts held in his or her county, for the transaction of criminal business," NRS 252.090, and the legislative intent as explained below. Recognition of the WCDA as a party to petitions to seal criminal records pursuant to NRS 179.245 has been recognized by this Court, having promulgated Washoe District Court Rule 12(3) since at least as early as 1998. *Id.* ("The

District Attorney's Office shall have 21 days to respond to any motions to seal criminal records pursuant to NRS 179.245.") (subsection 3 was not affected by the most recent amendments to WDCR 12 that went into effect on January 1, 2020).

The practice of stipulating to petitions to seal criminal records has been ongoing for over twenty years, and shows an acceptance by courts, petitioners, and prosecutors that prosecutors are a party. The recent codification by the legislature of prosecutors' ability to enter into such stipulations clearly demonstrates that the legislature intends that prosecutors were, and remain, parties to criminal record sealing cases. As such, the WCDA is a party to the proceedings in the Second Judicial District Court cases at issue and subject to the orders of Respondents.

Furthermore, only a party to an action may seek to appeal an order of the District Court. NRAP 3A(a) ("a party who is aggrieved . . . may appeal . . . ."); *Albert D. Massi, Ltd. v. Bellmyre*, 111 Nev. 1520, 1521, 908 P.2d 705, 706 (1995) ("Pursuant to NRAP 3A(a), we have consistently held that only an aggrieved party may appeal from an adverse decision."); *Gladys Baker Olsen Fam. Tr. v. Olsen*, 109 Nev. 838, 839–40, 858 P.2d 385, 385–86 (1993) (holding that a District Court may not permit a

nonparty to intervene for the purpose of appeal). In at least one published case, the State of Nevada has been the appellant in an appeal from an order sealing a petitioner's criminal record. *State v. Cavaricci*, 108 Nev. 411, 934 P.3d 406 (1992) (implicitly recognizing the State as a party to a record-sealing matter). No statute or rule permits such an appeal to a non-party. This Court's implicit finding of party status and the desire of at least one District Attorney to assert party status so that they might take an appeal further demonstrate that prosecutors were and remain parties to criminal record sealing cases. As such, the WCDA is a party to the proceedings in the Second Judicial District Court cases at issue and subject to orders issued by Respondents.

In addition to the above, the WCDA has recently submitted several documents entitled "State's Waiver of Appearance Pursuant to NRS 179.245" seeking to both "waive[] its statutory right to participate in any sealing proceeding" and requesting "an Order from th[e] Court indicating that counsel for the State need not appear at the sealing proceeding scheduled . . . ." RA Vol. I, at 16–18; *see also id.* at 2–15. The idea that the WCDA is not a party but can seek an order from the court in a matter is self-defeating. Either the WCDA may maintain that it is not a party,

or it can seek orders from the court, but it cannot do both. The WCDA does not become a party for some purposes and not for others at its sole discretion. Its historical actions, and those of other prosecuting agencies, have made clear that they are amenable to being a party in these actions only when it suits them.

2. The permissive nature of NRS 179.245(3) delineates a right for the WCDA to participate in a hearing but does not exempt it from being compelled to participate by the court conducting the hearing

In some cases where the prosecutor does not stipulate to the sealing of records, there may be sufficient information available to a court to grant or deny the petition without any further inquiry being necessary; however, a hearing must still be held. NRS 179.245(4). In such cases, NRS 179.245(3) provides the prosecutor, a victim, or *any* person, the affirmative right to appear at the hearing, and to provide evidence either for, or against, the court's granting or denial of the petition in an attempt to better inform the court, or to persuade the court to utilize its discretion in one way or the other. *See* NRS 0.025(1)(a) ("'May' confers a right, privilege or power."). However, NRS 179.245(3) does not, as suggested by Petitioner, *exempt* the prosecutor from obeying a lawful order of the court

to appear and provide information necessary to the just disposition of a case.

Without the ability to obtain information from the prosecuting agency, any other law enforcement agency, or other interested party, a court will likely not have received enough information to make a just determination. In the event that a prosecuting agency does not stipulate to a petition to seal and no further information is provided, a court must take one of two possible courses of action under the statute: hold a hearing, and grant the petition with no ability to obtain further relevant information (such as verification from the prosecuting agency that the criminal history the petitioner has provided is accurate and has not been altered, verification that the petitioner has not suffered an additional conviction or arrest in violation of the statutory requirements, and confirmation that outreach to the victim and an opportunity to participate at the hearing has been provided, all of which is beyond the reach of the court) or deny the petition after the hearing.[2] The mandatory

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[2] Petitioner seems to indicate that NRS 179.2445 somehow solves this problem by requiring the court to presume that the records should be sealed if the statutory requirements are met. This is erroneous as the

hearing required by the WCDA's failure to stipulate also results in a profound waste of petitioners' and judicial resources. The petitioners, who may be from out of town or out of state, and the court must participate at the hearing, but if the WCDA does not appear or appears and refuses to participate, the hearing is rendered superfluous. In this circumstance, the court may have no other option but to grant an otherwise statutorily compliant petition pursuant to the rebuttable presumption set forth in NRS 179.2445(1). Alternatively, the court must hold a hearing, where it can compel the parties to the proceedings to appear and respond to the court's inquiries regarding the propriety of sealing the records. This ensures that the rights of the petitioner, the victim, and the public safety concerns of the citizens of Washoe County can be carefully addressed and considered.

The Second Judicial District Court has the authority, and the obligation, within the scope of a record-sealing petition hearing, to

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documents provided may not of themselves satisfy the court's statutorily mandated inquiry, *see In re Application of Finley*, 135 Nev. Adv. Op. 63, at 9 (Ct. App. 2019) (observing that courts are required to "analyze[] the contents of the petition . . . to determine whether . . . the petitioner was subsequently convicted of another offense . . . .").

compel the attendance and participation of the WCDA, "to prevent injustice and to preserve the integrity of the judicial process." *Halverson v. Hardcastle*, 123 Nev. 245, 261–62, 163 P.3d 428, 440 (2007). NRS 34.160 specifically provides that a court may "compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station."

C. Courts Have The Authority To Compel Attendance And Participation As Necessary To Give Effect To Their Jurisdiction And To See That Justice Is Properly Administered

1. The ability to compel attendance and seek information of the WCDA is within the Second Judicial District Court's constitutional authority

Article 6, Section 6 of the Nevada Constitution provides that District Courts have "power to issue writs of Mandamus . . . and all other writs proper and necessary to the complete exercise of their jurisdiction." While the orders at issue are not denominated as writs, the authority, intent, and effect are the same. *See* WRIT, *Black's Law Dictionary* (11th ed. 2019) ("A court's written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act."). The same is true of other orders issued to attorneys, public officials, and other persons subject to the jurisdiction

of a court when required for "the complete exercise of [its] jurisdiction." Nev. Const. art. 6 § 6.

2. Courts have greater authority to compel attorneys as officers of the court to assist them as may be required in the administration of justice

The WCDA is not merely subject to an order compelling its participation because it is an interested record-holder, as an officer of the court, or because it has a statutory obligation to appear—"[t]he district attorney . . . has a special and awesome responsibility, . . . he represents a democratic government which must govern impartially and which must have as its predominant interest . . . that justice should be done." *Yates v. State*, 103 Nev. 200, 202, 734 P.2d 1252, 1243–44 (1987). It is the duty of a prosecuting agency to see that justice is done and failing to support a court in its endeavor to do justice on behalf of petitioners, record-holders, victims of crime, and the public is anathema to justice.

The WCDA, and every attorney, is an "officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470–71, 162 N.E. 487, 489 (1928). As officers of the court, "cooperation with the court [i]s due, whenever justice would be imperiled if cooperation was withheld." *Id.*;

Chapman v. Pac. Tel. & Tel. Co., 613 F.2d 193, 197 (9th Cir., 1979) ("Attorneys, as officers of the court, have a duty to cooperate with the court to preserve and promote the efficient operation of our system of justice."). Courts regularly require acts of attorneys, related to their official capacity as officers of the court, which they do not require of members of the public or litigants representing themselves. *See, e.g.*, *Burton v. Infinity Capital Management*, 862 F.3d 740, 64 Bankr. Ct. Dec. 93 (9th Cir., 2017) (court below ordered counsel to draft an order); *Chapman,* 613 F.2d at 197–98 (affirming lower court's order to counsel to submit a written narrative statement of direct testimony of each witness intended to be called at trial); *Quinn v. White*, 26 Nev. 42, 42, 62 P. 995, 996 (1900) (holding that a court may require counsel to inform the court how evidence to be presented is relevant, which may be required to be made in writing). Each order directing an attorney to take an action is a writ, though not so denominated, and are frequently used by courts to give effect to their jurisdiction and to effectively and efficiently administer their business. *Chapman*, 613 F.2d at 194–95. Therefore, when a court requires the participation of an attorney in order to give

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effect to its jurisdiction or to advance the ends of justice, it is clearly empowered to compel such participation to meet those ends.

3. The Second Judicial District Court has the inherent authority to require participation and information from Petitioner to ensure the needs of justice are met

In addition to a court's authority to compel attorneys to act in ways to further justice, courts have the inherent power to require participation and information from other relevant and necessary persons to ensure justice. This inherent power is recognized as existing "quite apart from any consideration of the particular statutory and constitutional demands." *Marshall v. District Court*, 80 Nev. 478, 478 (1964); s*ee also Hawkins v. Dist. Ct. (Wines)*, 67 Nev. 248, 255, 216 P.2d 601, 604 (1950) (holding that courts have the inherent authority to enjoin an attorney from appearing for a party to prevent injustice); *Harris v. Harris*, 65 Nev. 342, 196 P.2d 402 (1948) (holding the NRCP 41(e) requirement for dismissal of a case not brought to trial within three years does not restrict a court's inherent authority to dismiss earlier where justice requires); Nev. Const. art 6, § 6 ("The District Courts and the Judges thereof have power to issue . . . all other writs proper and necessary to complete exercise of their jurisdiction."). Thus, even if a court did not have the

express authority to compel a prosecutor to attend a hearing on a petition to seal criminal records, it would have the inherent authority because the court may not be able to achieve a just result without further information being provided from a source other than the petitioner. It is overwhelmingly the case that a prosecutor has the information required by a court, such as accurate records of a petitioner's criminal history, whether the petitioner has any charges currently pending in another court, or if the victim of an offense sought to be sealed has been notified of the proceeding. The ability to obtain reliably accurate information is vital to the Court's ability to dispense justice. Many petitions are filed without the assistance of an attorney and contain outdated, unverified, incomplete, or incorrect information attached in support thereof. Under the WCDA's position, the Court has no viable avenue to seek additional information.[3]

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[3] At first glance, it might appear that a court could simply reject all petitions with inadequate information, however, if WCDA's position is adopted, District Courts would be prevented from verifying that the information presented is complete and accurate from the prosecuting agency. It would be imprudent for a trial court to blindly accept the veracity of records submitted by a petitioner, who has a weighty incentive to obtain the sealing of those records, especially when those records are easily verified for accuracy and authenticity by a prosecuting agency.

Thus, Petitioner's assertion that NRS 179.245 does not compel the WCDA's participation patently ignores the Court's express and inherent ability to compel the WCDA to participate and to provide additional information or even verification of information when justice so requires.

D. The WCDA Has An Obligation To Attend And Participate In Record Sealing Petitions Even Absent A Court Order Compelling It To Do So

1. The WCDA has an obligation to attend all criminal business in the District Courts in Washoe County

In addition to their obligations as attorneys and officers of the court, district attorneys have a statutory obligation to "[a]ttend the district courts held in his or her county, for the transaction of criminal business." NRS 252.090. The statutory scheme authorizing petitions to seal criminal records is codified in Title 14 of the Nevada Revised Statutes, entitled "Procedure in Criminal Cases." *See* NRS 179.2405–179.301 (falling under Title 14–Procedure in Criminal Cases). Such petitions are thus clearly within the ambit of "criminal business" as contemplated by NRS 252.090. *See* NRS 169.055 (defining "criminal action" as proceedings

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in "which a party is charged with a public offense is accused and brought to trial and punishment," being only a subset of "criminal business").[4]

Petitioner's allegation is partially correct—the language of NRS 179.245(3) is permissive, in that a prosecuting agency (or a member of the public) has the affirmative privilege and standing to choose to appear and provide testimony or evidence—but that does not prohibit a court from requiring participation where the court requires further information regarding the records of a petitioner, or to order the WCDA to fulfill its obligation under NRS 252.090, especially when the prosecuting agency has not stipulated to a petition and the considering court cannot infer the veracity of the records contained in the petition at the mandated hearing.

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[4] While the proceedings for petitions to seal criminal records are "civil proceeding[s], not criminal prosecution[s]" *Finley*, 135 Nev. Adv. Op. at n.3, they are not civil in substance—they are inextricably linked to the petitioner having been a criminal defendant and have entirely to do with the status and records of a petitioner's criminal case(s).

2. The WCDA must either stipulate to the sealing of records or attend a hearing set on a petition to which it did not stipulate; it cannot ignore its statutory role in the process

It is not disputed that a court cannot compel a prosecuting agency to stipulate to a petition for sealing criminal records. That discretion is enjoyed, without limitation, by the prosecuting agency. NRS 179.245(4). However, if a prosecuting agency does not stipulate to a petition, a court may not reasonably infer that the prosecuting agency has reviewed the petition and believes that it satisfies the requisite statutory requirements, that the records submitted by the petitioner are accurate, or that there are no interceding arrests or charges filed against the petitioner. When a court may not infer this information from the record, it is both mandatory and prudent that a court hold a hearing to determine not only whether the statutory requirements are met, but also whether sealing a petitioner's criminal records is the just result. NRS 179.245(4). A court *must* have the participation of the prosecuting agency to come to any conclusions regarding the statutory requirements.

The legislative requirement that the court provide notice to the prosecuting and arresting agencies acknowledges that these entities were the original points of contact for interested parties and the

repositories for information related to the petitions to seal records. *See* NRS 179.245(3). Thus, the statutory conferral of the discretion to prosecuting agencies to stipulate to a petition *necessitates* participation in the event they decline to stipulate.

"This [C]ourt has [ ] held . . . the term 'may' in a statute is conditional rather than permissive if the purpose of the [law] requires that construction . . . . This construction of the word 'may' has been recognized . . . especially where used to define the duties of a public officer." *State of Nev. Employees Ass'n, Inc. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992). In these circumstances, and from the statutory scheme, it logically follows that a prosecutor may appear, testify, and provide evidence at a hearing on a petition to seal, or, alternatively, it may not, on the condition that it stipulates to the petition. *See* NRS 179.245(3) & 179.245(4) (conjunctively creating an alternative system for a prosecutor to either stipulate to a petition and not attend a hearing on the petition, or to not stipulate to a petition and attend the then-mandatory hearing on the petition). While generally, "[i]f the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer*

Homes Nev., Inc. v. Eighth Judicial Dist. Court, 120 Nev. 575, 579–80, 97 P.3d 1132, 1135 (2004) (internal quotation marks omitted) (alterations in original). In circumstances "[w]hen a statute is clear on its face, this court gives the statute's plain language its 'ordinary meaning.'" *Waste Mgmt. of Nev., Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 170, 443 P.3d 1115, 1117 (2019) (quoting *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union/SEIU Local 1107*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008)). "If a statute is ambiguous, meaning that it is susceptible to multiple 'natural or honest interpretation[s],' then this court will look beyond that statute to determine its meaning. *Tam*, 131 Nev. at 799, 358 P.3d at 240." *Id.* (alterations in original) (full citation is *Tam v. Eighth Jud. Dist. Ct. (Wiese)*, 131 Nev. 792, 358 P.3d 234 (2015)). When interpreting statutes, "[i]t is elementary that [they] . . . be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Charlie Brown Const. Co., Inc., v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 979 (1990) *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). The reading proffered by the WCDA would render the statutorily mandated hearing

nugatory. In this case, any question regarding a prosecutor's role at the record-sealing hearing is easily understood with inquiry into the legislative history, which is instructive here.

NRS 179.245(3) was codified as a result of passage of Assembly Bill 327 in 2017. AB 327 was discussed during several committee hearings throughout the legislative process, including in the Assembly Committee on Corrections, Parole, and Probation on April 4, 2017. At that hearing, an amendment offered by the Nevada District Attorneys Association was discussed, Assemb. Amendment No. 345 to A.B. 327, which deleted a proposed subsection 2 of section 4, which originally read:

> 2. If a hearing on the petition is conducted, the prosecuting attorney with jurisdiction or the Division of Parole and Probation of the Department of Public Safety, as applicable, must prove by clear and convincing evidence that the records should not be sealed.

A.B. 327 (2017) (as introduced).

Deputy Public Defender John J. Piro stated that "the district attorneys' amendment is going to remove that section, which removes their responsibility to prove that the record should not be sealed." *Hearing on A.B. 327 before the Assemb. Comm. On Corrs., Parole, and Prob.*, 2017 Leg., 79th Sess. The stated intent for the amendment was to

"delete the language that shifts the burden to the prosecutor." Nevada District Attorneys Association, *2017 Legislative Session PROPOSED AMENDMENT TO AB 327*, 1 (2017) (Exhibit I to *Hearing on A.B. 327 before the Assemb. Comm. On Corrs., Parole, and Prob.*, 2017 Leg., 79th Sess.). The proposal by the NDAA and adoption by the legislature of the deletion of the original subsection demonstrates that district attorneys and legislators alike expected that district attorney's offices were going to be participants in proceedings for petitions to seal but that the prosecutor's should not have to take on the burden of proving the record should not be sealed.

Thus, it follows that "may" is conditional—a prosecutor *may* stipulate to a petition and the records may be sealed without a hearing or a prosecutor may not stipulate to a petition, and the prosecutor would be required to participate at the mandatory hearing. This reading gives effect to the legislative intent that prosecutors participate in hearings when prosecutors do not stipulate to petitions to seal criminal records.

If the WCDA refuses to stipulate to a petition, it cannot then refuse to participate in the adjudication of that petition. In the cases at issue, the WCDA declined to stipulate and subsequently refused to comply with

the court's order that the WCDA respond and provide information. This tactic prevents the court from resolving the petitions in a just manner.

E. The Proposed Prohibition On A Court's Ability To Obtain Necessary Information Related To A Petition To Seal Records Has Negative Public Policy Implications

Petitioner's argument that it is not a party to proceedings to seal criminal records and that Respondents cannot require them to participate in those proceedings and provide information not only fails based upon the language of the relevant statutes, existing case law, and the historical assertion of party status, but it would impermissibly contort the role of Respondents from impartial fact-finder to inquisitor. A court does not have the option to do nothing with a petition to seal criminal records, it has "a mandatory duty to take official action on that petition . . . ." *Knox v. Eighth Jud. Dist. Ct. (Bonaventure)*, 108 Nev. 354, 357, 830 P.2d 1342, 1344 (1992). But "[i]f it be suggested that the judge act as inquisitor to carry the probe deeper, it should be remembered that the judges are required by law not to practice advocacy." *Shum v. Fogliani*, 82 Nev. 156, 165, 413 P.2d 495, 500 (1966) (Wines, Dist. J., dissenting) (internal quotations omitted), *abrogated by Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973); *see also* Revised Nevada

Code of Judicial Conduct: Canon 2 ("A judge shall perform the duties of judicial office impartially . . . ."). A court cannot engage as adversary to a petitioner. Without the needed information, the court will not be in a position to exercise its obligation to fairly balance the rights of the petitioner, issues of public safety, and the rights of the victim. Moreover, petitioners who have their records ordered sealed are entitled to finality and assurance that an order sealing records will be enforceable and not subject to later contest by a nonparty record-holder. Requiring prosecuting agencies to participate in proceedings brought by petitions to seal criminal records and to provide necessary information is essential to ensuring that the proceeding is fair and that a just result will be had.

The WCDA offers no reasonable explanation as to how it can abdicate its constitutional and legislative responsibility to represent the people of Washoe County in sealing proceedings. NRS 179.2405 states, "[t]he 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." The WCDA is at least disregarding, and at most intentionally thwarting, the will of the people as expressed

through their representatives and signed into law by the Governor. Prosecutors exercise discretion from the beginning of the process until the end. Rarely, if ever, do they get specific direction from the Legislature in favor of a specific policy objective. Here they have one in NRS 179.2405. The recent codification by the legislature of a prosecutor's ability to enter into such stipulations clearly demonstrates the legislature's acknowledgment that the prosecutor is uniquely situated to recommend whether criminal records should be sealed. It is completely contrary to this legislative display of confidence for the prosecutor to decline to participate when they are needed most, namely when they have identified relevant information that, for reasons unknown, causes them to refrain from stipulating.

The clear solution to the issues presented before this Court is simple: Both courts and prosecuting agencies need to collaborate to provide a just result for petitioners, victims, and the public. Without both courts and prosecuting agencies working to achieve the ends of the legislature's intent, the law and justice will become frustrated. If prosecuting agencies do not want to stipulate to petitions for sealing records, they should be amenable to assisting the courts in other ways to

help the courts to determine whether those criminal records should, or should not, be sealed. This would be the most efficient way to expedite justice for petitioners, victims, and the public, all of whom have valid stakes in the result of such proceedings. [5]

However, until such time as the WCDA is willing to cooperate with the Second Judicial District Court in its exercise to administer justice in sealing proceedings, the Second Judicial District Court must be permitted and authorized to compel the WCDA to participate in

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[5] It is worth noting that in the March 16, 2017 Assembly Committee on Judiciary Hearing on Assembly Bill 243 (ultimately resulting in NRS 179.247), Bart Pace, Chief Deputy District Attorney with the Clark County District Attorney's Office, astutely observed that, in regards to sealing records related to victims of human trafficking, "We at the district attorney's office want to see the process complete. That takes people . . . to not only get those records in each of those courts set aside but to also get the records sealed—not only with the arresting agency, not only with the prosecuting agency, not only with the justice court or municipal court, but with all the agencies in the state . . . none of the organizations talk to each other. We must have a formal process that brings all of those organizations together . . . so that at the end of the day, when a victim walks out of their attorney's office with the final report, the victim knows that it has . . . all been taken care of, and that they can go to any employer and lawfully state that they have never been arrested, charged, or convicted of a crime." While generally stated in the context of utilizing a single proceeding for sealing in a single court, it is certainly applicable to the cases at issue here—the courts and agencies need to talk to each other to afford both petitioners and the public justice in the sealing of criminal records.

proceedings and to provide information germane to the resolution of petitions to seal criminal records so that the legislature's intent isn't rendered moot and so that it can achieve justice for petitioners, victims, and the public.

VI. CONCLUSION

Under Nevada Law, trial courts, including the Second Judicial District Court, possess the express and inherent authority to issue orders necessary to compel prosecuting agencies, including the WCDA, to participate in NRS 179.245 and 179.255 proceedings by providing a response and additional information to give effect to their jurisdiction and for the efficient and effective administration of justice. Petitioner's contention that courts are prohibited from ever ordering a prosecuting agency to participate and respond or produce additional information would leave the courts to proceed on petitions to seal records blindly. Such a contention is inconsistent with Nevada Law, is bad public policy, and is contrary to the statutorily-mandated exercise of the court's discretion. In these cases, the Second Judicial District Court acted well within its authority and did not abuse its discretion by requiring the participation and information of the Petitioners.

Therefore, based on the foregoing, the Petitions for Writ of Mandamus or Prohibition should be denied.

RESPECTFULLY SUBMITTED this 27th day of January, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 27th day of January, 2020, I served a copy of the foregoing RESPONDENTS' ANSWER TO THE PETITIONS FOR WRIT OF MANDAMUS OR PROHIBITION, by the Nevada Supreme Court's EFlex Electronic Filing System to:

JENNNIFER P. NOBLE
Chief Appellate Deputy
Washoe County District Attorney's Office

/s/ Dorene A. Wright