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Elizabeth A. Brown
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

THE STATE OF NEVADA, No. 79792/80008/80009

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
AND THE HONORABLE KATHLEEN
DRAKULICH, DISTRICT JUDGE,

Respondents.

_______________________________________/

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

I. Introduction

The procedures surrounding petitions to seal criminal records are inconsistent throughout the departments of the Second Judicial District Court (hereafter "the District Court"). Some departments treat the Washoe County District Attorney's (hereafter "WCDA") participation as mandatory, while others recognize the WCDA's statutory right to waive participation in the proceedings. Despite the District Court's equal access to criminal justice databases and the clear permissive language of NRS 179.245, some



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District Court departments are ordering the WCDA to perform a research and analysis function.

The district court accuses the WCDA of abdicating its responsibility to represent the State in a criminal action. Answer, 6. But petitions to seal criminal records have been regarded by the Nevada Supreme Court as a civil matter. *See generally In the Matter of the Application of Duong*, 118 Nev. 920, 921-922, 59 P.3d 1210, 1211 (2002). These petitions are not criminal proceedings, and the Legislature has explicitly made WCDA participation permissive, not mandatory.

Some departments have made clear they will hold individual prosecutors in contempt of court if they fail to appear at a sealing proceeding, even after a waiver of participation and appearance is filed. This Court's intervention is needed to guide the District Court's practices, and to ensure consistency across departments.

II. Standard of Review

This Court reviews decisions on writ petitions that raise statutory interpretation questions de novo. *See Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010)

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## III. Argument

### A. The District Court's Practice of Ordering the State to Access Criminal Justice Databases Is Improper, Unnecessary, and Unauthorized by the Statute.

Compelling the prosecutor to access criminal justice databases violates Nevada's separation of powers doctrine outlined in Article 3, § 1 of the Nevada Constitution. The judiciary branch encroaches on executive function by ordering the WCDA to not only participate in sealing proceedings, but to serve a research and fact-finding function by also ordering the WCDA to access criminal history databases and cross-reference them with the verified criminal histories included with petitions for sealing. Such orders also ignore the District Court's own ability to access criminal justice databases, and the clear statutory intent that verified criminal records from the Central Repository for Nevada Records of Criminal History be accepted representative of a petitioner's criminal history.

#### 1. The District Court enjoys its own, independent access to the relevant criminal databases.

Many of the arguments in the Answer rest upon the flawed premise that prosecutors are essential to the sealing process because prosecutors have access to criminal history information that the District Court does not. The Answer argues the District Court must be permitted to compel

prosecutors to run and analyze criminal histories, because otherwise, the judges will be forced to make its decision about sealing in a vacuum of information, thereby compromising public safety:

> *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…*

Answer, 15 (Emphasis Added).

Essentially, the District Court argues with respect to a petitioner's criminal history, prosecutors must assume the role of research librarian and law clerk, because the District Court simply has no ability to access criminal justice databases. The glaring problem with this argument is that the District Court enjoys access to the same criminal databases as does the State: NCIC, CJIS, J-Link, U-Soft, and Tiburon. *See* Reply Appendix, 7-8. The District Court accesses these databases for a variety of different purposes. On April 13, 2018, the Clerk of the Second Judicial District Court testified before the Advisory Committee on the Administration of Justice's

Subcommittee on Criminal Justice Information Sharing regarding the many purposes for which the District Court regularly accesses state and federal criminal justice databases:

> Jackie Bryant (Clerk of Court, Second Judicial District Court):
>
> I am the Second Judicial District Court Administrator and Clerk of Court. With me is our Chief Information Officer, Craig Franden, and our Terminal Agency Coordinator (TAC), Shannon Kimberlin.
>
> Our presentation is very simple (Agenda Item VI-B). These are the various systems that we use. *Primarily, we access Tiburon, as you heard, the Washoe County Sheriff's Office's system*. We have two departments within the court that access that. One is our Pretrial Services Department. That entity exists both in the jail and in the court. In the jail, they operate 21 hours a day and they perform assessments of people who are arrested. As part of that assessment, there's a determination based upon the Nevada Pretrial Risk Assessment as to whether that individual will be held for review by a judge or whether they will be OR'd (own recognizance) immediately out of the jail. Those staff regularly access Tiburon directly as they are in the jail. The other staff from Pretrial Services that access Tiburon are those who do supervision of the defendants that have been released. Those supervision staff will also regularly need to access Tiburon. Ms. Kimberlin is our TAC. She makes sure that everyone is compliant with their knowledge skillset and that we are utilizing the system correctly. Additionally, we have specialty courts, and the specialty courts' officers access Tiburon to check in on the status of the people that they are supervising. Those individuals have been through the court system and are on the backend utilizing some type of diversion program. They are regularly reviewed through the Tiburon system just to make sure that they haven't been arrested or any other situation has come up. Additionally, we regularly access USoft for entering in temporary protective orders. Our staff in the courthouse does that on regular business hours. The

> Pretrial Services staff at the jail will perform that task on nonbusiness hours so that we are regularly updating the USoft system with that information.
>
> *We also use JLink (Justice Link) to access the National Crime Information Center (NCIC) and the Nevada Criminal Justice Information System (NCJIS)*, also through Pretrial Services. Finally, we access through these systems of the Washoe County Sheriff's Office their NCIC, NCJIS and Tiburon for employee and volunteer background checks. That's a service that they perform for us, but that is the access that they utilize, so I wanted to mention that as well since that's an important feature, as we are rather stringent, especially for those individuals who work at the jail and their backgrounds.

*See* Second Supplemental Appendix, 7-8 (emphasis added).

As the legislative record makes clear, the District Court's claim that it cannot access the same criminal justice databases as the WCDA is simply false. The District Court can indeed compare the verified criminal records submitted by petitioners with a variety of state and federal databases.

Additionally, the District Court also assumes that when a prosecutor stipulates to sealing, "a court may reasonably infer [...] 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." Answer, 7. This interpretation is simply not supported by any of statutory language.

2. The district court's insistence on the WCDA double-checking the already-verified criminal history from the repository frustrates clearly-expressed legislative intent.

NRS 179.245 (2) requires that petitions to seal criminal records "be accompanied by the petitioner's current, verified records received from the Central Repository for Nevada Records of Criminal History." In other words, the records must be accompanied by documentation from the Central Repository verifying that the records are accurate. When possible, this Court construes statutes "such that no part of the statute is rendered nugatory or turned to mere surplusage." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 132 P.3d 1022 (2006)(*quoting Paramount Ins. v. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970). The District Court's interpretation of NRS 179.245 violates this basic principle of statutory construction. Allowing courts to order prosecutors to "double-check" the criminal histories submitted by petitioners would render the statute's requirement that petitions be accompanied by verified criminal records from the Central Repository a meaningless waste of time and resources. [1]

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[1] In this appeal, the Second Judicial District Court is represented by a deputy attorney general. However, the Nevada Attorney General's Office has erected a screen, and filed an Amicus Brief in support of the WCDA's Petition in Case No. 80009. The Amicus Brief correctly notes that if this Court were to look beyond the plain meaning of the statutory language, the

With no supporting authority, the District Court also suggests that it is the WCDA's obligation to locate and notify victims of upcoming sealing hearings. This suggestion is at odds with the clear language of Article 1, Section 8A (2) of the Nevada Constitution, which does not rest notification obligations on prosecutors. Instead, that section explicitly states that "[t]his section does not alter the powers, duties or responsibilities of a prosecuting attorney." District Courts have access to transcripts, victim impact statements, witness lists, and Tiburon. District Courts have equal ability to notify a victim of an upcoming sealing hearing.

### B. The WCDA'S Practice of Formally Waiving Its Participation and Appearance Arose From the District Court's Repeated Threats of Contempt.

In its appendix, the District Court includes a memorandum from the WCDA to its Chief Judge. Though not part of the record in any of the sealing petitions that are the subject of the WCDA's consolidated writ, the memorandum demonstrates that the WCDA informed the Chief Judge of its

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history of the 2017 amendment disfavors the District Court's interpretation. The original proposed statutory language required the applicant to submit their application including records from the Central Repository, and the burden then shifted to the prosecuting agency to make a determination on the records submitted by the petitioner. But that language was removed from the bill text prior to enrollment. The Legislature avoided shifting the burden to the prosecuting agency to determine the sufficiency of the application to seal criminal records, leaving the discretion entirely with the District Court. *See* Appendix of Amicus Curiae in Docket No. 80009, at 21.

initial planned approach to sealing petitions: to appear only when the WCDA opposed the petitions. Respondent's Appendix, hereafter "RA," p. 1.

The District Court also includes examples of the State's Response and Notice of Waiver Pursuant to NRS 179.245, filed in various sealing matters in late 2019. RA, 2-18. The District Court then cites these waivers of appearance and requests not be compelled to appear as proof that the WCDA is, without question, a party to each and every sealing case. It declares that "[t]he 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 to both." Answer, 13-14.

Omitted from both Respondent's Appendix and the Answer's discussion of this issue is any acknowledgement that the WCDA began filing these waivers and responses only after the district court began orally threatening individual deputy district attorneys with contempt of court if they failed to appear at a sealing proceeding. Examples of this practice may be found in the transcripts of numerous sealing proceedings. *See* Transcript of Proceedings, January 9, 2020, in CV19-02261.[2] In at least

[2] Because these matters are now under seal, the WCDA cannot obtain the transcripts to include in a supplemental appendix. The WCDA

one instance, the prosecutor was compelled to appear, and then castigated for the WCDA's waiver of participation. When the prosecutor asked to make a record in response to the judge's accusations, the judge answered, "Nope." *See* Transcript of Proceedings, December 19, 2019, in CV19-01896.

This Court has long-recognized that the threat of contempt of court can have a coercive effect on attorneys. *See generally Phillips v. Welch*, 11 Nev. 187 (1876); *Hildahl v. Hildahl*, 95 Nev. 657, 601 P.2d 58 (1979). Here, this Court should infer nothing from the State's responses, waivers, and requests to not be required to appear other than an understandable desire to avoid being held in contempt. The District Court cannot candidly argue that its judges have not required prosecutors to appear in sealing matters under threat of contempt in multiple departments.

This practice of rejection of the WCDA's waiver and the ever-present spectre of contempt is not uniform across District Court departments, however. In Department 9, presided over by current Chief Judge Scott Freeman, the WCDA's waivers have been accepted, and the WCDA has not been compelled to appear when it notifies the District Court that it waives

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therefore filed motions to transmit the transcripts from the sealing hearings in CV19-02261, CV19-01896, CV18-02094, and CV19-01480.

its statutory right to participate. *See* Transcript of Proceedings, December 4, 2019 in CV18-02094, and CV19-01480.

The District Court observes that the WCDA, and every attorney, is an "officer of the court." This is true; however, using that logic, the District Court could order any attorney at any time to research any subject of its choosing, long after litigation has ended. This argument is a continues to ignore that the District Court has the tools and ability to research a petitioner's criminal history, and that it is the District Court, not the WCDA, that holds the power to grant or deny a petition to seal criminal records.

### C. The District Court's Proposed Interpretation Ignores the Plain Meaning Rule.

#### 1. The statutory language is not ambiguous, and exploration of legislative history is therefore unnecessary.

Although the District Court does not explicitly argue that the statutory provisions at issue are ambiguous, it appears to contend as much, with the Answer spending considerable effort cobbling together portions of legislative history in an effort to support its position that the prosecution is always a party to sealing proceedings, and its comment that the prosecutor's role "is easily understood with inquiry into the legislative

history, which is instructive here." Answer, 27-28. Predictably, the State's analysis differs.

When statutory language is plain and unambiguous, the language should be given its ordinary meaning, and courts should not go beyond it. When courts conduct a plain language reading, an interpretation that renders language meaningless or superfluous should be avoided. But if a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply. *Nevada Department of Corrections v. York Claims Services*, 121 Nev. 199, 348 P.3d 1010 (2015).

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

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> 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 word "may" in the statute is not ambiguous. It is clear permissive language. A prosecuting agency *may* participate in a proceeding regarding a petition for sealing, but is not *required* to participate. This same option of participation is afforded to "any person having relevant evidence." NRS 179.245 (3). It applies to law enforcement, victims, and the general public: literally, "any person." But this option to present evidence does not support the imposition of any affirmative duty on persons who may have relevant evidence. The same holds true for the WCDA.

The Legislature's inclusion of a special provision authorizing the prosecutor to appear in order to offer evidence at a hearing on the petition demonstrates that without that special language, the prosecutor would have no such automatic right. Standing to participate in the proceedings would not need to be specially and separately conferred via statute if the prosecutor was a party to the proceedings.

Although the District Court makes much of the prosecutor's ability to stipulate to sealing, this ability does not transform the WCDA into a party to sealing proceedings. Answer, 11. While it is true that in general, only

parties may stipulate in an action, it is equally true that parties must be generally served by an opposing party, and that parties enjoy automatic right to participate in proceedings. But NRS 179.245 does not treat prosecuting agencies that way. Petitioners must serve the district court, not the prosecutor—because the prosecutor is not a party. Prosecutors are given special permission to participate because they are not parties. The District Court then must notify the prosecuting attorney that it has received the petition. NRS 179.245(3). If the prosecutor were a party, the statutory lack of a requirement that the prosecutor be served would make no sense. Nor would the statutory provision granting optional prosecutorial participation serve any purpose.

Quite simply, the Legislature has crafted a special status for prosecutors that falls outside the typical party/non-party model courts are used to seeing. No service of process is required, stipulation is possible, and participation by the prosecuting agency is permissive, not mandatory. Prosecutors are not a party to sealing proceedings, but the Legislature conferred upon prosecutors the ability to participate in sealing proceedings, but the language does not require that participation.

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## IV. Conclusion

Based upon the foregoing, the WCDA requests that this Court issue an order or opinion providing that 1) in sealing proceedings, the WCDA's participation and attendance is not mandatory; and 2) directing the District Court to cease ordering the WCDA to perform research and verification tasks concerning the verified criminal records submitted by petitioners in sealing cases.

DATED: February 18, 2020

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

## 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 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 7,000 words.

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

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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: February 18, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 18, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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